No.

IN THE SUPREME COURT OF THE UNITED STATES

PARENTS FOR PRIVACY; JON GOLLY; KRIS GOLLY; NICOLE LILLIE; AND PARENTS RIGHTS IN EDUCATION;

Petitioners,

v.

WILLIAM P. BARR, ATTORNEY GENERAL; BETSY DEVOS; U.S. DEPARTMENT OF EDUCATION; U.S. DEPARTMENT OF JUSTICE; DALLAS SCHOOL DISTRICT NO. 2,

Respondents,

BASIC RIGHTS OREGON, Respondent-Intervenor

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Petition for a Writ of Certiorari

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QUESTIONS PRESENTED

1. Whether parents surrender their fundamental right to direct the upbringing of their children by enrolling them in public school so that a school district can compel children to disregard biological reality by requiring that they expose their bodies to classmates of the opposite sex and affirm that a child is the sex with which he or she self-identifies.

2. Whether schoolchildren's rights to bodily privacy are violated when they are compelled to undress and engage in intimate bodily functions in the presence of members of the opposite sex who self-identify as something other than their sex while using privacy facilities.

3. Whether a school district can compel children to violate sincerely held religious beliefs that sex is based on biological reality by being forced to affirm that members of one biological sex are members of the opposite sex if they self-identify as that sex.

4. Whether a school district violates Title IX when it compels children to accept into sex-separate privacy facilities members of the opposite sex who self-identify as something other than their sex and to affirm that students are members of whatever sex with which they self-identify.

PARTIES TO THE PROCEEDING

Petitioner Parents for Privacy is an unincorporated association in the State of Oregon. Petitioners Jon Golly, Kris Golly, and Nicole Lillie are individuals and parents of students and former students in Dallas School District No. 2. Petitioner Parents Rights in Education is a nonprofit corporation located in Oregon.

Respondent William P. Barr is the Attorney General of the United States. Respondent Betsy DeVos is the Secretary of Education of the United States. The U.S Departments of Justice and Education are government agencies in the Executive Branch of the United States (collectively "Federal Respondents").[1] Respondent Dallas School District No. 2 ("District") is a public school district located in Dallas, Polk County, Oregon organized under the laws of the State of Oregon. Intervenor-Respondent Basic Rights Oregon is a nonprofit organization in the state of Oregon.

CORPORATE DISCLOSURE STATEMENT

Petitioner Parents Rights in Education is a nonprofit corporation in the State of Oregon. It does not have any parent companies, and no entity or other person has any ownership interest in it.

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[1] The Federal Defendants were dismissed for lack of standing by the District Court. Petitioners did not challenge that ruling at the Ninth Circuit and are not challenging it in this Petition.

STATEMENT OF RELATED CASES

Petitioners state that the following are cases related to this case: *Parents for Privacy, et. al v. William Barr, et. al.* Ninth Circuit Court of Appeals Case No. 18-35708, decided February 12, 2020, and *Parents for Privacy, et. al. v. Dallas School District et. al.,* Oregon District Court Case No. 3:17-cv-01813-HZ, decided July 24, 2018.

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INTRODUCTION

This Court has the opportunity to untie a Gordian knot of conflicting constitutional and statutory rights and provide critically needed guidance to lower courts grappling with public school policies that seek to accommodate privacy facilities[2] use requests by children who self-identify as something other than their biological sex. When, as occurred here, a school district responds to such requests by directing that access to sex-separate privacy facilities shall be based on children's self-identity instead of biological sex, it affects constitutional and statutory rights of all district parents and students. In this case, the constitutional impacts are exacerbated because the district: 1) prohibits students from objecting to the presence of opposite sex classmates in privacy facilities under threat of disciplinary action and 2) sends the message to students and parents that those who object are intolerant and bigoted.

The District's directive interferes with parents' rights to direct the upbringing of their children, schoolchildren's rights to bodily privacy, parents' and children's rights to free exercise of religion, and children's rights to be free from hostile educational environments under Title IX.

Because of the wide-ranging effect of the District's policy, this case presents an ideal vehicle

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[2] Petitioners are using the term "privacy facilities" to refer to sex-separated facilities used for intimate bodily functions and changing clothes, including bathrooms, locker rooms, and showers.

for this Court to provide clarity on multiple interrelated constitutional issues at one time. Also, this case presents this Court with the opportunity to immediately provide guidance regarding some of the questions left unanswered by its decision in *Bostock v. Clayton County,* No. 17-1618, __ S.Ct. __, 2020 WL 3146686 (June 15, 2020). Specifically, this case presents the opportunity to clarify whether Title IX is violated when public schools re-label sex-separate privacy facilities as based on how a child identifies instead of biological sex, thus requiring children to expose themselves and be exposed in secluded spaces to members of the opposite sex in states of full and partial undress.

The stakes in this case are significant for public school parents and children throughout the country. This case asks whether public schools can require that parents surrender all rights to direct the education and upbringing of their children as the price for a public education, for which all parents are compelled to pay. It also asks whether public schools can compel students to surrender their right to privacy and to affirm biological reality. It also asks whether public schools can require that children and parents surrender their right to exercise religious beliefs about the nature of the human body. Finally, it asks whether public schools can compel children to accept an educational environment that is hostile to their concept of biological sex.

As schools continue to wrestle with how to accommodate privacy facilities use requests from children who self-identify as something other than their biological sex, this Court's guidance is critically

needed in order to strike the proper balance between the rights of the requesting students and the rest of the school community.

DECISIONS BELOW

The decision of the Ninth Circuit Court of Appeals is published at 949 F.3d 1210 and reproduced in the Appendix at 1a-77a.

The decision of the U.S. District Court for the District of Oregon is reported at 326 F.Supp.3d 1075 and is reproduced in the Appendix at 78a-172a.

STATEMENT OF JURISDICTION

The Ninth Circuit Court of Appeals entered its decision on February 12, 2020. Pursuant to this Court's Order dated March 19, 2020, "the deadline to file any petition for a writ of certiorari due on or after the date of this order is extended to 150 days from the date of the lower court judgment, order denying discretionary review, or order denying a timely petition for rehearing." Petitioners timely filed this Petition on July 10, 2020.

This Court has jurisdiction under 28 U.S.C. § 1254(1).

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

The text of the First and Fourteenth Amendments to the United States Constitution is found at Appx. 173a-175a. The relevant portion of

the text of Title IX of the Education Amendments of 1972 is reprinted at Appx. 175a.

STATEMENT OF THE CASE

A. Factual Background

Respondent Dallas School District (the "District") enacted a Transgender Student Access to Locker Room Student Safety Plan (the "Plan") that fundamentally changed the educational environment throughout the district. Appx. 259a. Under the Plan and policy statements made by administrators, privacy facilities that had been designated for use by girls and boys were opened for use by anyone who self-identified as the subject sex regardless of their biological sex. Complaint,[3] Appx. 205a-208a. The District enacted the Plan in response to a request from Student A, a biological girl who in her[4] senior year publicly stated that she identified as a boy and wanted to use the boys' locker room. Appx. 205a-206a. Student A's parent and legal guardian rejected the request. Appx. 206a. The District disregarded the parent's decision and instituted the Plan. *Id.*

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[3] Because the appeal was taken from the dismissal of Petitioners' Complaint, the Ninth Circuit was to "draw the facts from the complaint's well-pleaded factual allegations and from the exhibits attached to the complaint. *See Outdoor Media Grp., Inc. v. City of Beaumont,* 506 F.3d 895, 899–900 (9th Cir. 2007)." Appx. 10a n.2. Since the lower courts omitted and misstated some of the Complaint's factual allegations, Petitioners are including and citing to the full text of the Complaint and Exhibit A in the Appendix. Appx. 176a-262a.

[4] Petitioners will refer to Student A with pronouns that correspond to her biological sex.

Under the Plan Student A could use any privacy facility that she believed matched her identity. Appx. 205a-206a. Throughout the school year she used the boys' locker room, shower, and bathrooms. She undressed in the presence of male classmates. *Id.* Some male classmates reported embarrassment, humiliation, anxiety, intimidation, fear, apprehension, and stress produced by having to use these privacy facilities with a classmate of the opposite sex. Appx. 207a. Petitioners alleged that the stress and anxiety some students experienced over having to use privacy facilities with biologically opposite-sex students was an ever-present distraction throughout the school day, including during classroom instruction time. Appx. 208a.

The high school principal expanded the Plan to provide that all restroom facilities may be utilized by any student regardless of their biological sex. Appx. 208a. The high school principal further told students that they could not object to students of the opposite sex utilizing the same facilities that they used. *Id.* When students attempted to object by circulating petitions, the principal confiscated the petitions and told students that any further efforts to object to the Plan would be met with disciplinary action. Appx. 209a. District officials also conveyed the message to Petitioners and others that any objection to the Plan would be viewed by the District as intolerance and bigotry. Appx. 215a.

Students are forced to interact with opposite sex students in locker rooms because physical education ("PE") is mandatory. Appx. 212a. Moreover, it is mandatory that all students in PE

class change into clothing appropriate for PE class, and all must change their clothes at the beginning and end of each PE class. *Id.* This means that students are compelled to disrobe in the presence of opposite sex classmates who claim a different gender identity and observe those classmates disrobe without objection or risk disciplinary action. *Id.*

The District's governing board ratified the Plan as implemented by District officials. Appx. 210a.

B. Procedural Background

1. District Court Decision

Petitioners filed a lawsuit in the District Court for the District of Oregon alleging violation of their Fourteenth Amendment rights of privacy and to direct the upbringing of their children, their First Amendment right to freedom of religion, Title IX and several state law provisions. Appx. 176a-262a. The district court dismissed the entire complaint without leave to amend, stating that there was no legal theory under which Petitioners could seek relief so that granting leave to amend would be futile. Appx. 78a-172a. In dismissing the case, the district court recast the nature of the rights underlying Petitioners' claims and then found that there were no such rights protected under the Constitution. Appx 78a-172a.

Petitioners alleged that the Plan violates students' fundamental right to privacy in their unclothed bodies, as well as their fundamental right to be free from government-compelled risk of

intimate exposure to the opposite sex, without any compelling justification. Appx. 237a. The district court did not like the Petitioner's description of the relevant right and recast it as "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?" Appx. 116a. The court then concluded that there is no such cognizable right of privacy. Appx. 136a-140a.

Petitioners alleged that the Plan infringes and undermines the right of parents to direct the upbringing and education of their children, including the right to determine whether and when their minor children endure the risk of being exposed to members of the opposite sex in intimate, unsupervised, vulnerable settings like restrooms, locker rooms, and showers. Appx. 239a-241a. The district court decided that Petitioners were really trying to interfere with the District's decision-making authority in contravention of the Ninth Circuit's decision in *Fields v. Palmdale Sch. Dist.*, 427 F.3d 1197, 1207 (9th Cir. 2005). "As the Ninth Circuit explained in *Fields*, Parent Plaintiffs' Fourteenth Amendment liberty interest in the education and upbringing of their children 'does not extend beyond the threshold of the school door.' *Id.* At 1207. Accordingly, the Court dismisses this claim." Appx. 165a.

For the Title IX claim, Petitioners alleged that the Plan created unwelcome sexual harassment and a hostile environment on the basis of sex by exposing students to risks that their partially or fully

unclothed bodies will be exposed to students of the opposite sex and that they will be exposed to opposite-sex nudity. Appx. 242a-243a. The district court concluded that use of a restroom designated for use by biological males by a biological female who identifies as a "transgender male" did not state a claim for a hostile educational environment. Appx. 148a-150a.

Petitioners alleged that the Plan violated their rights to free exercise of religion. Appx. 250a-251a. In particular, they alleged that the Plan as implemented by the District compelled them to violate their sincere religious beliefs that they must not undress in the presence of a member of the opposite biological sex and must not be in the presence of the opposite biological sex while the opposite biological sex is undressing. *Id.* The district court dismissed the claim, saying "[t]here are no allegations that District forced any Plaintiff to embrace a religious belief, nor does the Plan punish anyone for expressing their religious beliefs." Appx. 169a.

2. Ninth Circuit Decision

The Ninth Circuit affirmed the district court's dismissal of Petitioners Complaint without leave to amend. Appx. 10a-77a. The Ninth Circuit adopted the District Court's redefinition of the relevant rights asserted by Petitioners so as to affirm the District Court's conclusion that Petitioners could not state any cognizable legal claims against the District. Appx. 10a-77a.

The Ninth Circuit adopted the District Court's recasting of the underlying right of bodily privacy as a "fundamental privacy right to avoid all risk of intimate exposure to or by a transgender person who was assigned the opposite biological sex at birth." Appx. 9a. Not surprisingly, the panel affirmed that Petitioners could not state a claim for that novel right. Appx. 35a.

In affirming the dismissal of the Title IX claim, the Ninth Circuit said that Petitioners were complaining about "the normal use of privacy facilities." Appx. 43a. "The use of facilities for their intended purpose, without more, does not constitute an act of harassment simply because a person is transgender." *Id.* The panel also claimed that "just because the … Plan implicitly addresses the topics of sex and gender by seeking to accommodate a transgender student's gender identity, or because it segregates facilities by gender identity, does not mean that the Plan harasses other students on the basis of their sex." Appx. 41a. Instead, the Ninth Circuit said, "the Student Safety Plan treats all students—male and female—the same." *Id.*

The Ninth Circuit also affirmed dismissal of the parental rights claim, saying that "the Fourteenth Amendment does not provide a fundamental parental right to determine the bathroom policies of the public schools to which parents may send their children, either independent of the parental right to direct the upbringing and education of their children or encompassed by it." Appx. 9a. The court acknowledged that Petitioners were not asserting a right to control information, as

was the case in *Fields,* but that *Fields* nonetheless controlled because the parents' complaint "similarly involves students being exposed to things of which their parents disapprove." Appx. 51a.

The Ninth Circuit also affirmed dismissal of Petitioners' Free Exercise claims on the grounds that "the school district's policy is rationally related to a legitimate state purpose, and does not infringe Plaintiffs' First Amendment free exercise rights because it does not target religious conduct." Appx. 10a.

REASONS TO GRANT THE PETITION

This Court should grant the Petition for four reasons. First, this Court should grant review to resolve the conflict between this Court's precedents and the Ninth Circuit's determination that parents surrender their fundamental right to direct the education and upbringing of their children at the threshold of the public school. Second, this Court should grant review to resolve the conflict between the Ninth Circuit's determination that children forfeit their right to bodily privacy when they attend public school and precedents from this Court and other circuits. Third, this Court should grant review to resolve the conflict between the Ninth Circuit's dismissal of Petitioners' Free Exercise claim and this Court's precedents. Finally, this Court should grant review to answer an important question left unanswered in *Bostock, i.e.,* whether re-labeling sex-separate privacy facilities in public schools as based on a student's self-identity instead of biological sex violates Title IX.

I. This Court Should Grant The Petition To Resolve The Conflict Between The Ninth Circuit's Ruling That Parents Surrender All Right To Direct The Education And Upbringing Of Their Children When They Enroll Them In Public School And This Court's Precedents Invalidating Public Schools' Infringement of The Rightful Authority Of Parents.

According to the Ninth Circuit, children **are** "mere creature[s] of the state," and "those who nurture [them] and direct [their] destiny have [ceded] the right, coupled with the high duty, to recognize and prepare [them] for additional obligations" to public schools. *Contra, Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925). The Ninth Circuit did not explicitly add that language to *Pierce*, but it might as well have. That is the effect of its derogation of decades of this Court's precedents establishing parents' fundamental right to direct the upbringing and education of their children. *Id. See also, Meyer v. Nebraska*, 262 U.S. 390 (1923).

Instead of recognizing, as this Court has established, that the state's broad authority to prescribe and enforce standards of conduct in its schools "must be exercised consistently with constitutional safeguards," *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 507 (1969), the Ninth Circuit continues to assert that parents' "Fourteenth Amendment liberty interest in the education and upbringing of their children 'does not extend beyond the threshold of the school door.'"

Appx 47a-48a, (citing *Fields*, 427 F.3d at 1207).[5] The court's conclusion conflicts with decades of this Court's precedents that have balanced the state's right to establish educational policies with parents' fundamental right to direct the education and upbringing of their children, a right that "has endured as one of the liberty rights protected by the Due Process Clause." *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997).

In dismissing Petitioners' Complaint based on its effective erasure of parental rights in *Fields,* the Ninth Circuit panel is flouting this Court's directive that:

> The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures—Boards of Education not excepted. These have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights.

West Virginia State Board of Education v. Barnette, 319 U.S. 624, 637 (1943). In *Barnette* and *Tinker*, this Court found that the school boards had exceeded their constitutional authority and invaded the "sphere of intellect and spirit which it is the purpose

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[5] The Ninth Circuit noted that it deleted the phrase "do[ ] not extend beyond the threshold of the school door" from the *Fields* opinion upon denial of rehearing. *See Fields v. Palmdale Sch. Dist.*, 447 F.3d 1187 (9th Cir. 2006), but that the deletion did not affect the Ninth Circuit's application of *Fields* to this case or the merits of Plaintiffs' substantive argument.

of the First Amendment to our Constitution to reserve from all official control." *Id.* at 642; *Tinker*, 393 U.S. at 507.

As was true of the compulsory flag salute policy in *Barnette*, the Policy in this case collides head-on with fundamental constitutional rights. In *Barnette*, the policy collided with freedom of speech, while in this case the Policy collides with parents' fundamental right to direct the education and upbringing of their children. In both cases, the challenged policy is compelling children to affirm a belief and engage in conduct that conflicts with their parents' core beliefs about the essential nature of human beings. In *Barnette,* compelling students to recite the Pledge of Allegiance and salute the flag conflicted with the tenets of the faith of Jehovah's Witnesses. 319 U.S. at 633. "The State asserts power to condition access to public education on making a prescribed sign and profession and at the same time to coerce attendance by punishing both parent and child." *Id.* at 630-31.

The same is true here. The District asserts power to condition access to public education on parents and students surrendering their rights to object to a student who is a biological female using privacy facilities designated for males (and vice versa). Students here are compelled to disregard the physiological differences between the sexes and affirm the belief that biological males can be females and biological females can be males. The compelled affirmation of these beliefs and worldview conflicts with the parents' right to direct the upbringing of their children by imparting values and standards of

conduct based on the physiological differences between the sexes. As this Court said in *Barnette,* such an intrusion in the private sphere of the family exceeds the state's legitimate authority to regulate public education. 319 U.S. at 642. The Ninth Circuit's contrary conclusion based on its decision that parents have surrendered their right to impart those standards to their children by enrolling them in public school is irreconcilable with *Barnette* and should be reviewed by this Court.

The Ninth Circuit's conclusion also conflicts with this Court's decision in *Wisconsin v. Yoder*, 406 U.S. 205 (1972). In *Yoder*, this Court affirmed that:

> There is no doubt as to the power of a State, having a high responsibility for education of its citizens, to impose reasonable regulations for the control and duration of basic education. *See, e.g., Pierce v. Society of Sisters*, 268 U.S. 510, 534, 45 S.Ct. 571, 573, 69 L.Ed. 1070 (1925). Providing public schools ranks at the very apex of the function of a State.

Id. at 213. At the same time, "[t]he values of parental direction of the religious upbringing and education of their children in their early and formative years have a high place in our society." *Id.*

> Thus, a State's interest in universal education, however highly we rank it, is not totally free from a balancing process when it impinges on fundamental rights and interests, such

> as those specifically protected by the Free Exercise Clause of the First Amendment, and the traditional interest of parents with respect to the religious upbringing of their children....

Id. at 214. As it did in *Barnette*, this Court applied the balancing process and found that the state's interest in requiring that children attend school until age 16 had to yield to the Amish parents' fundamental right to educate their children at home after eighth grade in keeping with the tenets of their faith. *Id.* at 218. As was true in *Barnette*, in *Yoder*, this Court found that the state could not compel parents to forfeit their fundamental rights when they enroll their children in public school. *Id.* However, as the Ninth Circuit concedes, that is exactly what it is requiring parents here, and all parents of students in the Ninth Circuit, to do. That irreconcilable conflict with decades of this Court's precedents should be reviewed and resolved by this Court.

The Ninth Circuit's dismissal of Petitioners' parental rights claims based on *Fields'* conclusion that parents abandon their constitutional rights when they enroll their children in public school also conflicts with this Court's precedents that fit parents retain the right to make decisions regarding their children's mental and physical health and well-being. *Parham v. J.R.*, 442 U.S. 584, 604 (1979); *Troxel v. Granville*, 530 U.S. 57, 66 (2000). The District adopted its Policy in response to Student A's declaration that she identified as a boy. Appx. 205a-206a. That declaration was not related to Student

A's academic or athletic status but was a statement regarding her state of mind. As such, it is related to Student A's mental health and within the purview of her parent, not the school.

Student A's parent exercised her right to make decisions related to Student A's mental health when she rejected her daughter's request that she use the boys' privacy facilities. Appx. 206a. That was in keeping with the centuries-old "canon of the common law that parents speak for their minor children." *Parham,* 442 U.S. at 621 (Stewart, J. concurring). "Most children, even in adolescence, simply are not able to make sound judgments concerning many decisions, including their need for medical care or treatment. Parents can and must make those judgments." *Id.* at 603. "We conclude that our precedents permit the parents to retain a substantial, if not the dominant, role in the decision, absent a finding of neglect or abuse, and that the traditional presumption that the parents act in the best interests of their child should apply." *Id.* at 604.

Similarly, in *Troxel* this Court restated, "In light of this extensive precedent, it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental rights of parents to make decisions concerning the care, custody, and control of their children." 530 U.S. at 65. "Accordingly, so long as a parent adequately cares for his or her children (*i.e.*, is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best

decisions concerning the rearing of that parent's children." *Id.* at 68-69.

Student A's parent was denied that presumption and her corresponding parental right when the District adopted the Plan in contravention of her decision concerning her own child's mental health and well-being. Appx. 205a-206a. Contrary to this Court's determination regarding parent's rights in *Parham* and *Troxel*, the Ninth Circuit concluded that Student A's parent (and the other Petitioner parents) no longer had such rights because she had enrolled her child in public school. That contravention of this Court's precedents should be reviewed.

The Ninth Circuit's decision irreconcilably conflicts with decades of precedent affirming that parents retain the right to direct the education and upbringing of their children in the public school setting, especially when schools overstep their legitimate authority. It similarly conflicts with this Court's precedent authorizing parents to direct decisions pertaining to their children's mental health and well-being. This Court should grant review to resolve the conflicts and restore the proper balance between state and parental authority.

II. This Court Should Grant The Petition To Resolve The Question Of Whether Children Can Be Compelled To Forfeit Their Right To Bodily Privacy In Order To Attend Public School.

As this Court has recognized, students have a lower expectation of privacy in school than they do

elsewhere because of the unique aspects of the school environment and the need to maintain order and discipline. *Bd. of Educ. of Indep. School Dist. No. 92 v. Earls*, 536 U.S. 822, 830-31 (2002). That means that students can be restricted to a greater degree than can adults. *Id.* While students' expectations of privacy might be diminished, they are not extinguished. *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 374-75 (2009). Even in the public school setting, this Court and courts of appeal recognize students' need for protection from compelled exposure of their unclothed bodies. *Id.; Brannum v. Overton County School Bd.*, 516 F.3d 489, 494 (6th Cir. 2008); *Cornfield by Lewis v. Consol. High Sch. Dist. No. 230*, 991 F.2d 1316 (7th Cir. 1993).

The Ninth Circuit's dismissal of Petitioners' bodily privacy claims conflicts with those precedents and with other circuit decisions affirming that even prisoners retain a right of privacy from exposure of their unclothed bodies to members of the opposite physical sex. *See e.g., Fortner v. Thomas*, 983 F.2d 1024 (11th Cir. 1993).

A. The Ninth Circuit Decision Conflicts with This Court's Decisions Recognizing That Bodily Privacy Is A Protected Constitutional Right Even In Institutional Settings.

The Ninth Circuit's decision conflicts with this Court's precedents that affirm the continuing

importance of recognizing the physical differences between males and females and the associated privacy required in communal living arrangements and privacy facilities. Physical differences between males and females are enduring: "[T]he two sexes are not fungible; a community made up exclusively of one [sex] is different from a community composed of both." *United States v. Virginia*, 518 U.S. 515, 533 (1996) (citing *Ballard v. United States*, 329 U.S. 187, 193 (1946)).

In *Virginia*, this Court specifically noted that admitting women to the Virginia Military Institute would "undoubtedly require alterations necessary to **afford members of each sex privacy from the other sex** in living arrangements." 518 U.S. at 550 n.19 (emphasis added). The Court recognized that mandating separate facilities based on generalizations about females' capabilities vis-a-vis males in training, discipline, and academics was incompatible with the Constitution. *Id.* However, the enduring physical differences between the sexes meant that separate privacy facilities were not only compatible with the Constitution, but necessary to protect bodily privacy. *Id.* That remains true regardless of how an individual psychologically identifies.

In *Vernonia School District v. Acton*, 515 U.S. 646 (1995), this Court upheld a minimally intrusive athlete drug testing policy while upholding students' rights to privacy in their unclothed or partially clothed bodies. Notably, in *Vernonia*, students were voluntarily participating in athletics which involved using communal facilities designated for athletes of

the same sex. *Id.* at 657. This Court noted that these locker rooms used by members of the same sex "were not for the bashful" since they required dressing, undressing, and showering together. *Id.* The drug testing policy involved staff members of the same sex accompanying the student athletes into the bathroom designated for that sex. *Id.* at 658. The students remained fully clothed with their backs to the staff members or in a stall with the door closed while providing urine samples. *Id.* Since the protocol was no more intrusive than what the students would encounter in any public sex-separate restroom, it was not an unreasonable invasion of privacy. *Id.* That was particularly true in light of the district's need to address known drug use by student athletes. *Id.* In addition, except for two plaintiff parents, "the primary guardians of Vernonia's schoolchildren," *i.e.,* their parents, did not object to the drug testing program. *Id.* at 665. Therefore "[w]e find insufficient basis to contradict the judgment of Vernonia's parents, its school board, and the District Court, as to what was reasonably in the interest of these children under the circumstances." *Id.*

In *Earls* this Court found that a similar drug testing policy for students in non-athletic extracurricular activities did not violate the students' right to bodily privacy. 536 U.S. at 834. As was true in *Vernonia*, in *Earls* the students remained fully clothed and were monitored by a same-sex staff member who stood outside a closed bathroom stall while the students provided a urine sample. *Id.* This Court found that the policy was even less problematic with regard to students'

privacy interests than was the policy in *Vernonia*. *Id.*

By contrast, in this case, students are compelled to fully undress and perform bodily functions in the presence of a student of the opposite sex without objection. Student A said that she identified as a male, but she remained physiologically and anatomically a female. Appx. 205a-206a. Unlike the students in *Vernonia* and *Earls* who voluntarily participated in athletics or extracurricular activities involving changing in the presence of students of the same sex, students here are compelled to take PE classes and to change clothes for those classes in the presence of students of the opposite sex. Appx. 212a. Unlike the circumstances in *Vernonia* and *Earls*, there is no allegation of misconduct that justifies subjecting students to even a minimal intrusion on their privacy such as the fully clothed drug tests, let alone the greater intrusion of disrobing in front of a member of the opposite sex. Furthermore, unlike the circumstances in *Vernonia* and *Earls,* the primary guardians of the students, including of the student for whom the Policy was developed, object to the policy. Appx. 206a.

Nevertheless, the Ninth Circuit not only decided that there was no violation of bodily privacy, but also that there could never be a cognizable claim for invasion of bodily privacy. That conclusion contradicts not only *Vernonia* and *Earls,* but also *Safford*.

In *Safford,* this Court found that a school violated a student's right to bodily privacy when it compelled her to expose her private parts to two female staff members as part of a search for contraband prescription drugs. *Safford,* 557 U.S. at 374-75. The Court emphasized the difference between procedures such as the urine testing in *Vernonia* and *Earls* and the intrusive search in *Safford*. Female staff members directed the female student to remove her clothes down to her underwear, and then "pull out" her bra and the elastic band on her underpants while standing in front of them in the nurse's office. *Id.* at 374.

> The very fact of Savana's pulling her underwear away from her body in the presence of the two officials who were able to see her necessarily exposed her breasts and pelvic area to some degree, and both subjective and reasonable societal expectations of personal privacy support the treatment of such a search as categorically distinct, requiring distinct elements of justification on the part of school authorities for going beyond a search of outer clothing and belongings. Savana's subjective expectation of privacy against such a search is inherent in her account of it as embarrassing, frightening, and humiliating.

Id. This Court went on the note that the student's reaction was consistent with experience by other children subject to similar exposure. *Id.* The Court noted that "adolescent vulnerability intensifies the patent intrusiveness of the exposure." *Id.* If that is true of a search by same-sex staff members, it is much more true of daily viewing by opposite sex peers such as is the case here.

Under *Safford* a single incident of an adolescent girl being compelled to briefly expose her private parts to female teachers in the privacy of the nurse's office violates the child's right to bodily privacy. *Id*. at 376-77. In this case, the children in Dallas School District are compelled to expose their bodies to **opposite sex students in a public locker room regularly throughout their tenure at school**. Such ongoing exposure is even more intrusive than the one-time exposure in *Safford.* Therefore, under this Court's precedents, compelling children to disrobe and engage in intimate bodily functions on a daily basis in the presence of opposite sex peers violates the students' rights to bodily privacy. The Ninth Circuit's conclusion that no such violation is legally cognizable cannot be reconciled with *Safford, Vernonia,* and *Earls*, and should be reviewed by this Court.

B. The Ninth Circuit Decision Conflicts With Decisions From Other Circuits Affirming A Constitutional Right of Bodily Privacy Even When The Expectation of Privacy Is Diminished.

1. The Ninth Circuit's Dismissal of Plaintiffs' Privacy Claims Conflicts with Decisions in the Fourth, Sixth, and Seventh Circuits Upholding Students' Right of Privacy Even in the Context of Suspected Misconduct.

Echoing this Court's ruling in *U.S. v. Virginia,* the Fourth Circuit emphasized that the need for privacy justifies separation of the sexes in privacy facilities as it upheld a woman's request to enroll at The Citadel. *Faulkner v. Jones*, 10 F.3d 226, 232 (4th Cir. 1993). The Court contrasted classifications based on race, which do not justify "separate but equal" facilities, with classifications based on sex. *Id.*

> When, however, a gender classification is justified by acknowledged differences, identical facilities are not necessarily mandated. Rather, the nature of the difference dictates the type of facility permissible for each gender. The point is illustrated by

> society's undisputed approval of separate public rest rooms for men and women based on privacy concerns. The need for privacy justifies separation and the differences between the genders demand a facility for each gender that is different.

Id. In the end, distinctions in any separate facilities provided for males and females may be based on real differences between the sexes, both in quality and quantity, so long as the distinctions are not based on stereotyped or generalized perceptions of differences. *Id.* at 232.

The Sixth Circuit confirmed that the constitutional right to privacy includes students' rights to shield their bodies from exposure to viewing by the opposite sex. *Brannum*, 516 F.3d at 494. The court found that right was violated when school officials filmed students changing clothes in locker rooms via surveillance cameras. *Id.*

> Perhaps it is merely an abundance of common experience that leads inexorably to the conclusion that there must be a fundamental constitutional right to be free from forced exposure of one's person to strangers of the opposite sex when not reasonably necessary for some legitimate, overriding reason, for the obverse would be repugnant to notions of human decency and personal integrity.

Id. at 495. "We recognize, of course, that this is not a case of 'naked bodies' being viewed by the

surveillance cameras, but rather underwear clad teen and pre-teen boys and girls. However, the difference is one of degree, rather than of kind." *Id.*

> Given the universal understanding among middle school age children in this country that a school locker room is a place of heightened privacy, we believe placing cameras in such a way so as to view the children dressing and undressing in a locker room is incongruent to any demonstrated necessity, and wholly disproportionate to the claimed policy goal of assuring increased school security, especially when there is no history of any threat to security in the locker rooms.

Id. at 498.

In *Beard v. Whitmore Lake School Dist.,* 402 F.3d 598, 605 (6th Cir. 2005), the Sixth Circuit affirmed that "[s]tudents of course have a significant privacy interest in their unclothed bodies." Consequently, the school's strip searches of students for alleged stolen money violated even the more limited privacy expectation of a locker room *Id.* at 604-05. "The students here were attending gym class as part of a general school curriculum." *Id.* at 605. "They accordingly did not voluntarily consent to be regulated more closely than the general student population, as do student athletes who choose to go out for school sports teams." *Id.* Therefore, according to the Sixth Circuit, students' rights of bodily privacy are violated when they are compelled to

expose their bodies to members of the same sex as part of an investigation into alleged misconduct. *Id.*

The Seventh Circuit has similarly held that students have a constitutionally protected right to not have their unclothed bodies exposed to same-sex third parties, even when misconduct is alleged. *Cornfield by Lewis v. Consol. High Sch. Dist. No. 230*, 991 F.2d 1316 (7th Cir. 1993). "Subjecting a student to a nude search is more than just the mild inconvenience of a pocket search, rather it is an intrusion into an individual's basic justifiable expectation of privacy." *Id.* at 1320. "It does not require a constitutional scholar to conclude that a nude search of a thirteen-year-old child is an invasion of constitutional rights of some magnitude. More than that: it is a violation of any known principle of human decency." *Id.* at 1320-21. The Court noted that the effect of a nude search will vary with the age of a student. "As children go through puberty, they become more conscious of their bodies and self-conscious about them. Consequently, the potential for a search to cause embarrassment and humiliation increases as children grow older." *Id.* at 1321 n.1. That is true regardless of the reasons for the search. In other words, from the child's perspective, exposing their bodies to others is embarrassing and humiliating regardless of whether it is for an investigation or preparing for gym class.

In this case, there are no allegations of misconduct, meaning there is even less justification for district interference with student privacy than was present in *Beard* or *Cornfield*—or in *Safford.*

Furthermore, here, students are compelled to expose their bodies to members of the opposite sex, not the same sex. *Brannum* specifically involved exposure of children's partially clothed bodies to the opposite sex, which the Court found "repugnant to notions of human decency and personal integrity." 516 F.3d at 495. The Ninth Circuit's conclusion that compelling elementary and secondary students to undress in front of peers of the opposite physical sex cannot state a claim for invasion of bodily privacy is irreconcilable with this precedent.

It is critical for this Court to resolve this conflict between the circuits. Public schools are continuing to address how to accommodate requests from children who, like Student A, psychologically identify as a gender other than their biological sex. Lower courts need clear guidance from this Court regarding student privacy rights in the context of such requests and in light of this Court's affirmation that enduring physical differences between the sexes justify separate privacy facilities. *U.S. v. Virginia,* 518 U.S. at 550, n.19. *See also, Faulkner v. Jones*, 10 F.3d at 232.

2. The Ninth Circuit's Dismissal of Plaintiffs' Privacy Claim Conflicts with Other Circuits' Decisions Finding that Even Prisoners Retain Privacy Interests in their Unclothed Bodies.

The critical need for this Court's review of the Ninth Circuit's decision is even more apparent in light of the fact that the Ninth Circuit's decision affords school children a lower expectation of privacy than that afforded to prisoners. *Fortner v. Thomas*, 983 F.2d 1024 (11th Cir. 1993), *Canedy v. Boardman*, 16 F.3d 183 (7th Cir. 1994).

In *Fortner,* the Eleventh Circuit recognized that prisoners have a right to bodily privacy against being viewed by correctional officers of the opposite sex. 983 F.2d at 1030. "We are persuaded to join other circuits in recognizing a prisoner's constitutional right to bodily privacy because most 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.'" *Id.*

In *Canedy,* the Seventh Circuit held that a male inmate was entitled to a reasonable accommodation to prevent unnecessary observations of his naked body by female guards. 16 F.3d at 188. "The right to privacy is now firmly ensconced among the individual liberties protected by our Constitution." *Id.* at 185 (citing *Planned*

Parenthood v. Casey, 505 U.S. 833, 845-853 (1992)). "Moreover, '[o]ne of the clearest forms of degradation in Western Society is to strip a person of his clothes. The right to be free from strip searches and degrading body inspections is thus basic to the concept of privacy.'" *Id.* (citing 3 George B. Trubow, ed., *Privacy Law and Practice*, ¶ 25.02[1] (1991)). The Court acknowledged that "Inmates surely do not enjoy the full sweep of constitutional rights afforded other members of society," but "do not surrender all of their constitutional rights." *Id.* "There is no iron curtain drawn between the Constitution and the prisons of this country." *Id.* at 185-86.

According to the Ninth Circuit, there is such an iron curtain drawn between the Constitution and public schools. The Constitution requires that prisons accommodate the bodily privacy needs of prisoners to not be viewed by correctional officers of the opposite sex. However, according to the Ninth Circuit, the Constitution does not require that public schools accommodate the bodily privacy needs of children to not be viewed by classmates of the opposite sex. That disparity between rights afforded to prisoners and rights afforded to schoolchildren should be reviewed and resolved by this Court.

III. This Court Should Grant The Petition To Resolve The Conflict Between The Ninth Circuit's Decision And This Court's Free Exercise Precedents, Which Provide That Schools Cannot Compel Parents and Students To Embrace Beliefs or Engage in Conduct That Is Undeniably At Odds With Fundamental Tenets Of Their Religious Beliefs.

The lower courts' conclusion that Petitioners cannot state a cognizable claim under the Free Exercise clause of the First Amendment is irreconcilable with this Court's precedents. The Plan as implemented by the District compels students, under threat of disciplinary sanction, to perform acts and accept beliefs undeniably at odds with fundamental tenets of their religious beliefs. Appx 208a-215a. That being the case, the Plan has the same constitutional infirmity as did the compulsory attendance law struck down in in *Yoder*, 406 U.S. at 218-220, and the compulsory flag salute invalidated in *Barnette.* 319 U.S. at 642. The Plan also represents the kind of "subtle departure from neutrality" and "masked hostility" toward religion that this Court invalidated in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993). *See also, Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719, 1731 (2018).

In *Yoder,* this Court found that Wisconsin's interest in universal education to age 16 did not supersede Amish parents' Free Exercise rights. 406 U.S. at 218. This Court found that compelling Amish

children to attend public school beyond eighth grade and be exposed to worldly influences instead of being integrated into the Amish community "contravenes the basic religious tenets and practice of the Amish faith, both as to the parent and the child." *Id.* at 218. Those compelled acts that were antithetical to the plaintiffs' beliefs violated their Free Exercise rights. *Id.* at 219-20. This Court rejected the state's assertion that actions, even though religiously grounded, are outside the protection of the First Amendment. *Id.* at 219.

Similarly, in *Barnette*, this Court found that the state's authority to regulate education did not extend to compelling Jehovah's Witnesses to act contrary to their faith. 319 U.S. at 642. "We think the action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power...." *Id.*

The Ninth Circuit's dismissal of Petitioners' Free Exercise claim contravenes these authorities in at least two significant respects. First, because it continues to assert that parents have ceded their parental rights to public schools, the Ninth Circuit did not engage in the balancing process prescribed in *Yoder*, 406 U.S. at 214.

Second, the Ninth Circuit refused to recognize that the District Plan compels actions and beliefs antithetical to Petitioners' sincerely held religious beliefs. Petitioners alleged that District officials directed students that they could not object to the presence of an opposite sex person in their privacy facilities, something which is antithetical to their

religious beliefs. Appx. 215a-217a. Nor could they object to being compelled to accept, in effect, that a female who self-identifies as a male is "created" male, and vice-versa, thus disqualifying all objections to undressing or attending to bodily needs with opposite-sexed classmates. The students were informed that any objection to the Plan would result in disciplinary action. Appx. 208a-209a. In addition, students are required to take PE and to change clothes before and after. Appx 212a-213a. Therefore, students are compelled to expose their bodies and be exposed to bodies of opposite sex classmates, acts which are contrary to their religious beliefs, and to accept such acts as normative. Under *Yoder* and *Barnette,* those compelled acts and acceptance of beliefs violate Free Exercise and exceed the state's legitimate authority to regulate education. The Ninth Circuit's conclusion that there is no possible cognizable Free Exercise claim conflicts with those precedents and should be reviewed.

The Ninth Circuit's decision also conflicts with this Court's precedents that proscribe state action that subtly departs from neutrality and covertly suppresses particular religious beliefs. *Church of the Lukumi Babalu Aye,* 508 U.S. at 534. In a case substantially similar to this case, the Plaintiffs alleged, as Petitioners do here (Appx. 215a), that school officials said that any objection to the presence of opposite sex students in privacy facilities would be viewed by the district as intolerance and bigotry. *Students and Parents for Privacy v. School Directors of Township High School District 211*, 377 F.Supp.3d 891, 907 (N.D. Ill. 2019). The district court denied a motion to dismiss

plaintiffs' Free Exercise claim because the allegations "sound[] like the sort of 'subtle departure' from neutrality that might support a claim under the Free Exercise Clause." By contrast, because of the Ninth Circuit's presumption that all rights are ceded to public schools, the lower courts here determined that there is no cognizable claim under the Free Exercise Clause.

That conclusion is in conflict with this Court's recent explication of the Free Exercise Clause in *Masterpiece Cakeshop*.

> In *Church of the Lukumi Babalu Aye, supra,* this Court made clear that the government, if it is to respect the Constitution's guarantee of free exercise, cannot impose regulations that are hostile to the religious beliefs of affected citizens and cannot act in a manner that passes judgment upon or presupposes the illegitimacy of religious beliefs and practices.
>
> The Free Exercise Clause bars even "subtle departures from neutrality" on matters of religion. *Id.,* at 534. Here, that means the Commission was obliged under the Free Exercise Clause to proceed in a manner neutral toward and tolerant of Phillips' religious beliefs. The Constitution "commits government itself to religious tolerance, and upon even slight suspicion that proposals for state

> intervention stem from animosity to religion or distrust of its practices, all officials must pause to remember their own high duty to the Constitution and to the rights it secures. *Id.* at 547.

138 S. Ct. at 1731.

In this case, the District was obliged under the Free Exercise Clause to proceed in a manner neutral toward and tolerant of Petitioners' religious beliefs. The Constitution requires that the District be committed to religious tolerance and its officials must remember their own high duty to the rights secured by the Constitution. The District's actions belied that obligation, yet the Ninth Circuit found that there was not and could not be a cognizable claim under the Free Exercise Clause. That conclusion and the court's continued assertion that parents cede their rights to public school officials contravene this Court's precedent. Because the court's conclusion impinges on fundamental First Amendment rights, it is critical that this Court grant the Petition.

IV. This Court Should Grant The Petition To Resolve The Critical Question Of Whether Schools Violate Title IX When They Require That Students Accept That Sex-Separate Privacy Facilities Will Be Used By Any Student Who Self-Identifies As A Particular Sex.

This case presents a question of profound importance left unanswered by the decision in

Bostock that will be the subject of speculation and judicial confusion if not answered by this Court. Justice Alito referenced the question and the uncertainty raised by the majority's decision in *Bostock*:

> "[B]athrooms, locker rooms, [and other things] of [that] kind." The Court may wish to avoid this subject, but it is a matter of concern to many people who are reticent about disrobing or using toilet facilities in the presence of individuals whom they regard as members of the opposite sex. For some, this may simply be a question of modesty, but for others, there is more at stake. For women who have been victimized by sexual assault or abuse, the experience of seeing an unclothed person with the anatomy of a male in a confined and sensitive location such as a bathroom or locker room can cause serious psychological harm....
>
> [A] person who has not undertaken any physical transitioning may claim the right to use the bathroom or locker room assigned to the sex with which the individual identifies at that particular time. **The Court provides no clue why a transgender person's claim to such bathroom or locker room access might not succeed. A similar issue has arisen under Title IX, which prohibits sex discrimination by**

> **any elementary or secondary school and any college or university that receives federal financial assistance.**

Bostock v. Clayton County, 2020 WL 3146686 at *40 (Alito, J., dissenting) (emphasis added).

The Ninth Circuit's decision here involves the precise issue identified by Justice Alito. This case involves a female, Student A, who had not undergone any physical transition but was granted access to bathrooms and locker rooms assigned to males. Appx. 205a-206a. Petitioners raised the very concerns raised by Justice Alito regarding being in the presence of the opposite sex and psychological harm. Appx. 216a-217a. The Ninth Circuit ruled that such concerns can not possibly state a viable claim under Title IX. Appx. 44a.

Furthermore, the Ninth Circuit said the District's policy that biological girls identifying as boys using privacy facilities designated for boys represented "the normal use of privacy facilities." Appx. 43a. That decision conflicts with this Court's long-standing recognition that the sexes are not fungible but have enduring physical differences. *United States v. Virginia*, 518 U.S. at 533 (citing *Ballard* 329 U.S. at 193). Those enduring physical differences mean that providing separate privacy facilities designated by biological sex does not constitute sex discrimination. *See id.* at 550, n.19. Recognizing the physiological differences between the sexes in the context of privacy facilities created for the sole purpose of accommodating those physical

differences is not sex "stereotyping." While the dress, appearance, preferences, and identification of each sex may be subject to stereotypes, the physiological differences between them are not–they are biological reality.

The District's Plan erases the enduring physical differences between the sexes by basing access on students' self-identity not biological sex. Appx. 259a-261a. Student A, a biological female, is permitted to use the male privacy facilities if she self-identifies as a male. Appx. 205a-206a. That means that members of each sex are not accorded privacy from the other sex, which is the essential purpose of sex-separate privacy facilities. *U.S. v. Virginia*, 518 U.S. at 550 n.19. Under this Court's precedents that is not, as the Ninth Circuit concluded, the "normal use" of privacy facilities. Appx. 43a.

The District's forced interaction between biological males and biological females in privacy facilities contravenes the privacy-protective intent that has justified sex-separate facilities under Title IX prior to *Bostock*. As Justice Alito indicated, it is not clear whether designating privacy facilities for use by biological sex in public schools remains permissible after *Bostock*. That issue is foundational for analyzing requests for accommodations by students who identify as something other than their biological sex and should be resolved quickly by this Court to avert an epidemic of legal confusion. This case offers the Court the opportunity to do that.

The Ninth Circuit's decision also conflicts with this Court's affirmation in *Bostock* that the determination of whether a policy discriminates on the basis of sex is based on individuals, not groups. 2020 WL 3146686 at *11. According to the Ninth Circuit, the District's Plan does not discriminate on the basis of sex because it "treats all students—male and female—the same." Appx. 41a. Even if that were true, it would not follow that the Plan does not discriminate against individuals on the basis of sex. In fact, by definition, the Plan does discriminate against individuals on the basis of sex. A female who self-identifies as a girl can only access privacy facilities designated for females. A female, like Student A, who self-identifies as a male can use either the female's or male's privacy facilities. The first student's privacy facilities choices are limited while Student A's are not based purely on her sex.

The Ninth Circuit's conclusion that Petitioners cannot state a cognizable claim for sex discrimination under Title IX conflicts with this Court's precedents, including *U.S. v. Virginia.* It also raises critical questions raised but unanswered in *Bostock*. The Court should accept review to resolve the conflict and provide guidance on the questions that are critical for lower courts' adjudication of school district privacy facilities policies across the country.

CONCLUSION

This case is an ideal vehicle for resolving multiple constitutional and statutory rights related to schools' efforts to accommodate requests from students who self-identity as another sex. This case involves pure questions of law. The case presents questions related to parental rights under the Fourteenth Amendment, privacy rights under various constitutional provisions, First Amendment rights and Title IX protections. Resolution of this case will provide clarity on four critical issues lower courts are addressing when analyzing public schools' policies regarding privacy facilities use requests by students who self-identify as something other than their biological sex, vis-a-vis the rights of others.

This is critically needed guidance for parents and students across the nation. For these reasons, the Petition for a Writ of Certiorari to the Ninth Circuit Court of Appeals should be granted.

Dated July 10, 2020

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APPENDIX

United States Court of Appeals, Ninth Circuit.

PARENTS FOR PRIVACY; Jon Golly; Kris Golly, individually and as guardians ad litem for A.G.; Nicole Lillie; Melissa Gregory, individually and as guardian ad litem for T.F.; Parents Rights in Education, an Oregon nonprofit corporation; Lindsay Golly, Plaintiffs-Appellants,

v.

William P. BARR, Attorney General; Betsy DeVos; U.S. Department of Education; United States Department of Justice; Dallas School District No. 2, Defendants-Appellees,

Basic Rights Oregon, Intervenor-Defendant-Appellee.

No. 18-35708

Argued and Submitted July 11, 2019 Portland, Oregon

Filed February 12, 2020

Synopsis

Background: Current and former high school students, their parents, and organizations brought action for injunctive relief against school district, Oregon Department of

Education, Oregon's Governor, U.S. Department of Education (DOE), U.S. Secretary of Education, U.S. Department of Justice (DOJ), and U.S. Attorney General, alleging that high school's policy of allowing transgender students to use restrooms, locker rooms, and showers that matched their gender identity, rather than their biological sex assigned at birth, violated the Due Process Clause, Title IX, the First Amendment's Free Exercise Clause, and Oregon law. The United States District Court for the District of Oregon, Marco A. Hernandez, J., 326 F.Supp.3d 1075, granted defendants' motion to dismiss for failure to state a claim. Plaintiffs appealed.

Holdings: The Court of Appeals, Tashima, Senior Circuit Judge, held that:

[1] Fourteenth Amendment right to privacy did not extend to avoiding all risk of intimate exposure to or by a transgender person;

[2] district's student safety plan for transgender student did not discriminate on basis of sex;

[3] Due Process Clause does not provide fundamental parental right to determine bathroom policies of public schools;

[4] plaintiffs failed to sufficiently allege that district's plan was not neutral toward religion; and

[5] district's plan was rationally related to legitimate government interests, for purposes of free exercise of religion.

Affirmed.

Procedural Posture(s): On Appeal; Motion to Dismiss for Failure to State a Claim.

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South Asian Americans Leading Together; Union for Reform Judaism; and Central Conference of American Rabbis.

Appeal from the United States District Court for the District of Oregon, Marco A. Hernández, District Judge, Presiding D.C. No. CV 17-1813 HZ

Before: A. Wallace Tashima, Susan P. Graber, and John B. Owens, Circuit Judges.

OPINION

TASHIMA, Circuit Judge:

This case concerns whether an Oregon public school district may allow transgender students to use school bathrooms, locker rooms, and showers that match their gender identity rather than the biological sex they were assigned at birth. Plaintiffs oppose the school district's policy, asserting that it violates Title IX, as well as the constitutional rights—including the right to privacy, the parental right to direct the education and upbringing of one's children, and the right to freely exercise one's religion—of students and of parents of students in the school district. Defendants and many amici highlight the importance of the policy for creating a safe, non-discriminatory school environment for transgender students that avoids the

detrimental physical and mental health effects that have been shown to result from transgender students' exclusion from privacy facilities that match their gender identities.

It is clear that this case touches on deeply personal issues about which many have strong feelings and beliefs. Moreover, adolescence and the bodily and mental changes it brings can be difficult for students, making bodily exposure to other students in locker rooms a potential source of anxiety—and this is particularly true for transgender students who experience gender dysphoria. School districts face the difficult task of navigating varying student (and parent) beliefs and interests in order to foster a safe and productive learning environment, free from discrimination, that accommodates the needs of all students. At the outset, we note that it is not our role to pass judgment on the school district's policy or on how the school district can best fulfill its duty as a public educational institution. We are asked only to resolve whether the school district's policy violates Title IX or Plaintiffs' constitutional rights.

In a thorough and well-reasoned opinion, the district court dismissed the federal causes of action against the school district for failure to

state a claim upon which relief can be granted.[1] *Parents for Privacy v. Dallas Sch. Dist. No. 2*, 326 F. Supp. 3d 1075 (D. Or. 2018). We agree with the district court and hold that there is no Fourteenth Amendment fundamental privacy right to avoid all risk of intimate exposure to or by a transgender person who was assigned the opposite biological sex at birth. We also hold that a policy that treats all students equally does not discriminate based on sex in violation of Title IX, and that the normal use of privacy facilities does not constitute actionable sexual harassment under Title IX just because a person is transgender. We hold further that the Fourteenth Amendment does not provide a fundamental parental right to determine the bathroom policies of the public schools to which parents may send their children, either independent of the parental right to direct the upbringing and education of their children or encompassed by it. Finally, we hold that the school district's policy is rationally related to a legitimate state purpose, and does not infringe Plaintiffs' First Amendment free exercise rights

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[1] The district court also dismissed Plaintiffs' claims under Oregon state law, but Plaintiffs do not challenge that portion of the district court's order on appeal.

because it does not target religious conduct. Accordingly, we affirm the district court's dismissal with prejudice of the action.

I.

In September 2015, a student at Dallas High School who had been born and who remained biologically female publicly identified as a boy, and he asked school officials to allow him to use the boys' bathroom and locker room.[2] Defendant-Appellee Dallas School District No. 2 (the "District") responded by creating and implementing a "Student Safety Plan" for the transgender boy ("Student A") and any other transgender student who might make a similar

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[2] For the purposes of this appeal, which is taken from the dismissal of Plaintiffs' complaint, we draw the facts from the complaint's well-pleaded factual allegations and from the exhibits attached to the complaint. *See Outdoor Media Grp., Inc. v. City of Beaumont*, 506 F.3d 895, 899–900 (9th Cir. 2007) ("When ruling on a motion to dismiss, we may 'generally consider only allegations contained in the pleadings, exhibits attached to the complaint, and matters properly subject to judicial notice.' " (quoting *Swartz v. KPMG LLP*, 476 F.3d 756, 763 (9th Cir. 2007) (per curiam)).

request in the future, in order to ensure that transgender persons like Student A could safely participate in school activities.

The Plan acknowledged Student A as a "transgender male" and permitted him to use the boys' locker room and bathroom facilities with his peers at Dallas High School.[3] The Plan also provided that, while Student A had not indicated "which bathroom he feels comfortable using," Student A could "use any of the bathrooms in the building to which he identifies sexually." In addition, to ensure Student A's safety, the Student Safety Plan provided that all staff would receive training and instruction regarding Title IX, that teachers would teach about anti-bullying and harassment, that the Physical Education ("PE") teacher would be first to enter and last to leave the locker room, and that Student A's locker would be in direct line of sight of the PE teacher in the coach's office. The Student Safety Plan also listed several "Safe Adults" with whom Student A could share any concerns.

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[3] The District also planned to spend between $200,000 and $500,000 upgrading the high school's bathrooms and locker rooms to better accommodate their use by transgender students.

Student A began using the boys' locker room and changing clothes "while male students were present." This caused several cisgender boys "embarrassment, humiliation, anxiety, intimidation, fear, apprehension, and stress," because they had to change clothes for their PE class and attend to their needs while someone who had been assigned the opposite sex at birth was present.[4] Although privacy stalls were available in the bathrooms, these were insufficient to alleviate the cisgender boys' fear of exposing themselves to Student A, because the stalls had gaps through which "partially unclothed bodies" could "inadvertently" be seen. And an available single-user bathroom was often inconvenient or was considered inferior because it lacked a shower. As a consequence of

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[4] In the District, PE is a mandatory course for two or more years of school, and students must change into and out of clothing appropriate for PE class at the beginning and end of each PE class. Some of the cisgender boys who had PE during the same class period as Student A changed into their PE clothes as quickly as possible as a result of their anxiety that Student A might see them in a partial state of undress.

their fear of exposure to Student A, some cisgender boys began using the restroom as little as possible while at school, and others risked tardiness by using distant restrooms during passing periods in order to try to find a restroom in which Student A was unlikely to be present.

When parents and other students in the Dallas community became aware of the Student Safety Plan, many opposed it publicly at successive school board meetings, in an effort to dissuade the District from implementing the policy. Some parents in the District are concerned and anxious about the prospect of their children using locker rooms or bathrooms together with a student who was assigned the opposite biological sex at birth. The Student Safety Plan also interferes with some parents' preferred moral and/or religious teaching of their children concerning modesty and nudity. In addition, several cisgender girls suffered from stress and anxiety as a result of their fear that a transgender girl student who remains biologically male would be allowed to use the girls' locker room and bathroom. Girls had the option of changing in the nurse's office, but it was on the other side of the school.

Students 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. Despite the objections raised by several parents and students, the District continued to allow Student A to use the bathroom and locker room that matched the gender with which he identified.

II.

In November 2017, Plaintiffs-Appellants Parents for Privacy, Parents' Rights in Education, and several individuals (collectively, "Plaintiffs")[5] sued the District, the Oregon

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[5] The individual plaintiffs are or were students ("Student Plaintiffs") or parents of students ("Parent Plaintiffs") in the District. Specifically, Plaintiff Lindsay Golly formerly attended Dallas High School during the 2015–2016 school year while the Plan was in place. Plaintiffs Kris Golly and Jon Golly are her parents, as well as the parents of their son A.G., who at the time of filing was an eighth-grade student who would soon attend Dallas High School. Plaintiff Melissa Gregory is a parent of T.F., who at the time of filing was a student at Dallas High School.

Plaintiff Parents for Privacy is an unincorporated association whose members

Department of Education, the Governor of Oregon, and various federal officials and agencies (collectively, the "Federal Defendants"),[6] arguing that the Student Safety

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included, at the time of filing, current and former students and parents of current and former students in the District, as well as "other concerned members of the District community." Plaintiff Parents' Rights in Education is a nonprofit "whose mission is to protect and advocate for parents' rights to guide the education of their children."

[6] The Federal Defendants are the U.S. Department of Justice, U.S. Department of Education, Attorney General, and Secretary of Education. These defendants were involved at various times in the issuance and enforcement of a number of guidance documents that initially promoted accommodation of transgender students in public schools, including on Title IX grounds. Subsequently, some of those guidance documents were withdrawn, and others were later superseded by contrary guidance documents. Plaintiffs asserted that, notwithstanding the withdrawal of the relevant guidance documents, the Federal Defendants, in part, caused the District to adopt the Student Safety Plan, because the guidance "has not been formally repealed, and it has continuing legal

Plan violates the Constitution and numerous other laws. The complaint alleges eight claims:

(1) violation by the Federal Defendants of the Administrative Procedure Act, 5 U.S.C. §§ 551–559;

(2) violation by the District and the Federal Defendants of the Fundamental Right to Privacy under the Fourteenth Amendment to the Constitution;

(3) violation by the District and the Federal Defendants of Parents' Fundamental Right to Direct the Education and Upbringing of Their Children under the Fourteenth Amendment;

(4) violation by the District of Title IX, 20 U.S.C. §§ 1681–1688;

(5) violation by the Federal Defendants of the Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb– 2000bb–4;

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force and effect [that is] binding" upon the Dallas School District. Thus, the complaint seeks to enjoin the Federal Defendants from "taking any action" based on their previous guidance.

(6) violation by the District and the Federal Defendants of the First Amendment's Guarantee of Free Exercise of Religion;

(7) violation by the District, the Governor of Oregon, and the Oregon Department of Education of Oregon's Public Accommodation Discrimination law, Or. Rev. Stat. § 659A.885; and

(8) violation by the District of Oregon's Discrimination in Education law, Or. Rev. Stat. § 659.850.

Plaintiffs sought to enjoin Defendants from enforcing the Student Safety Plan, and they sought a court order requiring the District to mandate that students use only the bathrooms, locker rooms, and showers that match their biological sex assigned at birth.

Upon the parties' stipulation, Plaintiffs' claims against Oregon Governor Kate Brown and the Oregon Department of Education were

voluntarily dismissed on Eleventh Amendment grounds.[7,8]

Thereafter the District, Basic Rights Oregon, and the Federal Defendants each moved to dismiss Plaintiffs' complaint. In a lengthy, detailed, and careful opinion, the district court granted all three motions and dismissed the case with prejudice. *Parents for Privacy*, 326 F. Supp. 3d at 1111. The court dismissed the claims against the District and Basic Rights Oregon on the merits under Federal Rule of Civil Procedure 12(b)(6), concluding that Plaintiffs had failed to state claims upon which relief could be granted because the legal theories on which Plaintiffs' claims were premised failed, and that amendment of the claims would therefore be futile. *Id.* at 1092–1110.

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[7] Those two dismissed defendants later requested and were granted leave to appear as amici.

[8] Also, Basic Rights Oregon, a non-profit LGBTQ advocacy organization that had been involved in the development and implementation of the Student Safety Plan, moved to intervene as a defendant, which the district court granted.

Separately, the court addressed the Federal Defendants' motion to dismiss Plaintiffs' claims against the Federal Defendants for lack of standing, and concluded that Plaintiffs indeed lacked Article III standing to bring their claims against the Federal Defendants. The court explained that Plaintiffs had not established causation or redressability with respect to the Federal Defendants, because the District had adopted the Student Safety Plan "in response to Student A's accommodation requests, not [the] Federal Defendants' actions," and the District would "retain[ ] the discretion to continue enforcing the Plan" notwithstanding any relief against the Federal Defendants. *Id.* at 1087–92.

Plaintiffs appealed the district court's dismissal order, arguing that the district court erred by dismissing, for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6), their Title IX and constitutional claims against the District. Plaintiffs further contend that the district court committed reversible error in failing to provide Plaintiffs an opportunity to amend their complaint and instead dismissing the case with prejudice.

III.

We have jurisdiction under 28 U.S.C. § 1291, and we review de novo the grant of a Rule

12(b)(6) motion to dismiss for failure to state a claim upon which relief may be granted. *Fields v. Palmdale Sch. Dist.*, 427 F.3d 1197, 1203 (9th Cir. 2005), *amended on denial of reh'g* by 447 F.3d 1187 (9th Cir. 2006) (per curiam). Under Rule 12(b)(6), a complaint must be dismissed when a plaintiff's allegations fail to set forth a set of facts that, if true, would entitle the complainant to relief. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007*); see also Ashcroft v. Iqbal,* 556 U.S. 662, 679, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (holding that a claim must be facially plausible in order to survive a motion to dismiss). In assessing whether a plaintiff has stated a claim, we accept as true all well-pleaded factual allegations, and construe all factual inferences in the light most favorable to the plaintiff. *See Manzarek v. St. Paul Fire & Marine Ins. Co.,* 519 F.3d 1025, 1031 (9th Cir. 2008). However, we are not required to accept as true legal conclusions couched as factual allegations. *Iqbal*, 556 U.S. at 678, 129 S.Ct. 1937; *Fayer v. Vaughn*, 649 F.3d 1061, 1064 (9th Cir. 2011) (per curiam).

Dismissal of a complaint without leave to amend is improper unless it is clear, on de novo review, that the complaint could not be saved by any amendment. *See Eminence Capital, LLC v.*

Aspeon, Inc., 316 F.3d 1048, 1052 (9th Cir. 2003) (per curiam*); Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000) (en banc). "A district court acts within its discretion to deny leave to amend when amendment would be futile ...." *V.V.V. & Sons Edible Oils Ltd. v. Meenakshi Overseas, LLC*, 946 F.3d 542, 547 (9th Cir. 2019) (ellipsis in original) (*quoting Chappel v. Lab. Corp. of Am.*, 232 F.3d 719, 725 (9th Cir. 2000)).

IV.

On appeal, Plaintiffs challenge the district court's dismissal of their claims that the District violated: (1) the Fourteenth Amendment right to privacy; (2) Title IX; (3) the Fourteenth Amendment right to direct the education and upbringing of one's children; and (4) the First Amendment's Free Exercise Clause.[9] We address each claim seriatim.

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[9] In their opening brief, Plaintiffs do not challenge or discuss the district court's ruling that Plaintiffs lacked Article III standing to sue Federal Defendants as a result of Plaintiffs' failure to establish causation and redressability. We therefore do not review the district court's dismissal of Plaintiffs' claims against Federal Defendants. *See Mandelbrot v. J.T. Thorpe Settlement Trust* (*In re J.T. Thorpe, Inc.*), 870

A.

First, Plaintiffs challenge the district court's dismissal of their claim for violation of a fundamental right to privacy under the Fourteenth Amendment.

The Fourteenth Amendment provides that no state shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. The Fourteenth Amendment's 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." *Washington v. Glucksberg*, 521 U.S. 702, 720–21, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997) (internal quotation marks and citations omitted). The Supreme Court has recognized that "one aspect of the 'liberty' protected by the

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F.3d 1121, 1124 (9th Cir. 2017) ("[W]e will not ordinarily consider matters on appeal that are not specifically and distinctly raised and argued in appellant's opening brief." (quoting *Int'l Union of Bricklayers & Allied Craftsman Local Union No. 20 v. Martin Jaska, Inc.*, 752 F.2d 1401, 1404 (9th Cir. 1985))).

Due Process Clause of the Fourteenth Amendment is 'a right of personal privacy, or a guarantee of certain areas or zones of privacy.' " *Carey v. Population Servs. Int'l*, 431 U.S. 678, 684, 97 S.Ct. 2010, 52 L.Ed.2d 675 (1977) (*quoting Roe v. Wade*, 410 U.S. 113, 152, 93 S.Ct. 705, 35 L.Ed.2d 147, (1973)). This right includes "at least two constitutionally protected privacy interests: the right to control the disclosure of sensitive information and the right to 'independence [in] making certain kinds of important decisions.'" *Fields*, 427 F.3d at 1207 (*quoting Whalen v. Roe*, 429 U.S. 589, 599–600, 97 S.Ct. 869, 51 L.Ed.2d 64 (1977); *see also Marsh v. County of San Diego*, 680 F.3d 1148, 1153 (9th Cir. 2012).)

Plaintiffs contend that the privacy protections afforded by the Fourteenth Amendment's Due Process Clause also encompass a "fundamental right to bodily privacy" that includes "a right to privacy of one's fully or partially unclothed body and the right to be free from State-compelled risk of intimate exposure of oneself to the opposite sex." Further, they assert that "[f]reedom from the risk of compelled intimate exposure to the opposite sex, especially for minors, is a fundamental right deeply rooted in this nation's history and tradition and is also implicit in the concept of ordered liberty."

Because the District's Student Safety Plan allegedly infringes these rights by "requir[ing] Student Plaintiffs to risk being intimately exposed to those of the opposite biological sex ... without any compelling justification," Plaintiffs contend that the District violated their fundamental Fourteenth Amendment rights.

The district court dismissed this claim on the ground that the complaint did not allege infringement of any constitutionally protected right. It concluded that the Fourteenth Amendment does not provide high school students with a constitutional privacy right not to share restrooms or locker rooms with transgender students whose sex assigned at birth is different than theirs. *Parents for Privacy*, 326 F. Supp. 3d at 1099.

In reaching this conclusion, the district court examined the authorities on which Plaintiffs relied, but rejected those cases as inapposite because, unlike the scenario presented in this case, those cases "involve[d] egregious state-compelled intrusions into one's personal privacy," such as "government officials"—often law enforcement or correctional officers—"viewing or touching the naked bodies of persons of the opposite sex against their will." *Id.* For example, the district court noted that *York v. Story*, 324 F.2d 450, 452 (9th Cir. 1963), the

Ninth Circuit case that Plaintiffs claim provides the basis for their asserted right to bodily privacy, "involved a male police officer taking unnecessary nude photographs of a female victim in provocative positions and circulating them to other officers." *Parents for Privacy*, 326 F. Supp. 3d at 1097. Similarly, the Ninth Circuit in *Sepulveda v. Ramirez*, 967 F.2d 1413, 1415 (9th Cir. 1992), determined that a male parole officer violated a female parolee's right to bodily privacy by entering her bathroom stall over her objections and remaining in the stall while she "finished urinating, cleaned herself, and dressed." *Parents for Privacy*, 326 F. Supp. 3d at 1097. And, the district court noted, *Byrd v. Maricopa County Sheriff's Department*, 629 F.3d 1135, 1137 (9th Cir. 2011), concerned a strip search by a female cadet of a male detainee in the presence of approximately three dozen cadets and detention officers as well as other male detainees, which the Ninth Circuit determined violated the Fourth Amendment's prohibition on unreasonable searches. *Parents for Privacy*, 326 F. Supp. 3d at 1097.

Because "none of these cases support[ed] the proposition that high school students have a fundamental right not to share restrooms and locker rooms with transgender students who have a different assigned sex than theirs," the

district court concluded that "Plaintiffs have failed to sufficiently allege a fundamental right to privacy cognizable under the Fourteenth Amendment."[10] *Id.* at 1096–99. It explained that

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[10] For further support for the obvious distinction between Plaintiffs' cited cases and the circumstances presented in this case, the district court pointed to several out-of-circuit cases similar to this one in which courts also rejected Plaintiffs' purported privacy interest, in favor of transgender students' access to school facilities. *Parents for Privacy*, 326 F. Supp. 3d at 1093–96; *see, e.g., Doe ex rel. Doe v. Boyertown Area Sch. Dist.,* 897 F.3d 518, 531 (3d Cir. 2018) ("[W]e decline to recognize such an expansive constitutional right to privacy—a right that would be violated by the presence of students [in restrooms or locker rooms] who do not share the same birth sex."), cert. denied, —— U.S. ——, 139 S. Ct. 2636, 204 L.Ed.2d 300 (2019); *Whitaker ex rel. Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1052 (7th Cir. 2017) ("A transgender student's presence in the restroom provides no more of a risk to other students' privacy rights than the presence of ... any other student who used the bathroom at the same time."), cert. dismissed, –

"[t]o hold otherwise would sweepingly expand the right to privacy beyond what any court has recognized," in contravention of the Supreme Court's reluctance to expand the "short list" of liberty rights protected by the Due Process Clause, including "the rights to marry, to have children, to direct the education and upbringing of one's children, to marital privacy, to use contraception, to bodily integrity, and to abortion." *Id.* at 1099 (*quoting Glucksberg*, 521 U.S. at 720, 117 S.Ct. 2258). Thus, because "[t]he potential threat that a high school student might see or be seen by someone of the opposite biological sex while either are undressing or performing bodily functions in a restroom, shower, or locker room does not give rise to a constitutional violation," the district court concluded that Plaintiffs failed to state a claim for violation of the Fourteenth Amendment. *See id.*

On appeal, Plaintiffs make several ultimately unavailing arguments about why the district court erred in dismissing their privacy rights claim under the Fourteenth Amendment. First, they argue that the Ninth Circuit in *York*, 324 F.2d at 455, recognized the right to bodily

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— U.S. ——, 138 S. Ct. 1260, 200 L.Ed.2d 415 (2018).

privacy when it commented that "[t]he 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." The problem with this argument is that *York* addressed an egregious privacy violation by police and recognized a much more specific and limited Due Process privacy right than Plaintiffs claim here. As noted, *York* involved a male police officer who coerced a female assault victim to allow him to take unnecessary nude photographs of her, which he later distributed to other officers. *See id.* at 452. In discussing the plaintiff's claim for violation of her fundamental right to privacy under the Fourteenth Amendment, we explained:

> We are not called upon to decide as an original proposition whether 'privacy,' as such, is comprehended within the 'liberty' of which one may not be deprived without due process of law, as used in the Due Process Clause of the Fourteenth Amendment. For it has already been declared by the Supreme Court that the security of one's privacy against arbitrary intrusion by the police is basic to a free society and is

> therefore 'implicit in the concept of ordered liberty,' embraced within the Due Process Clause of the Fourteenth Amendment.

Id. at 454–55 (emphasis added) (footnote omitted).

Thus, *York* recognized an established right to be free from arbitrary police intrusions upon one's privacy under the Fourth Amendment. *See id.* at 455 ("A search of one's home has been established to be an invasion of one's privacy against intrusion by the police, which, if 'unreasonable,' is arbitrary and therefore banned under the Fourth Amendment. We do not see how it can be argued that the searching of one's home deprives him of privacy, but the photographing of one's nude body, and the distribution of such photographs to strangers does not." (footnote omitted)). Thus, *York* did not recognize a more general right to be free from alleged privacy intrusions by other non-government persons, or a privacy right to avoid any risk of being exposed briefly to opposite-sex nudity by sharing locker facilities with transgender students in public schools.

Moreover, the actions that the Ninth Circuit concluded made the police's intrusion in *York* so arbitrary as to rise to the level of a violation of

the plaintiff's privacy right under the Due Process Clause were far more invasive than the transgender student's actions alleged in this case. In *York*, we explained:

> [W]e [cannot] imagine a more arbitrary police intrusion upon the security of [a person's] privacy than for a male police officer to unnecessarily photograph the nude body of a female citizen who has made complaint of an assault upon her, over her protest that the photographs would show no injuries, and at a time when a female police officer could have been, but was not, called in for this purpose, and to distribute those photographs to other personnel of the police department despite the fact that such distribution of the photographs could not have aided in apprehending the person who perpetrated the assault.

Id. Here, Plaintiffs do not allege that transgender students are taking nude photographs of them or purposefully taking overt steps to invade their privacy for no legitimate reason. Thus, beyond failing to support the broad privacy right claimed by

Plaintiffs, *York* is also readily distinguishable on its facts.

Next, Plaintiffs point to out-of-circuit cases to argue that the Fourteenth Amendment protects a "privacy interest in [a person's] partially clothed body." *See, e.g., Doe v. Luzerne County*, 660 F.3d 169, 175–76 & 176 n.5 (3d Cir. 2011). But beyond the fact that those cases are not binding, none of them directly supports Plaintiffs' argument that the Constitution affords a broad privacy right protecting against being exposed in even a partial state of undress to any person of the opposite sex, whether or not they are a government actor. For example, *Luzerne County* involved the unconsented and surreptitious filming of a female deputy sheriff by male superior officers while she was completely undressed, and the subsequent sharing of the video footage and still photos. *See id.* at 171–73, 175–78. The Third Circuit analyzed whether the public disclosure of those files violated constitutional "protect[ions] against public disclosure [of] ... highly personal matters representing the most intimate aspects of human affairs," *id.* at 176 (second alteration in original) (quoting *Nunez v. Pachman*, 578, F.3d 228, 232 (3d Cir. 2009)), noting that "a person's right to avoid disclosure of personal matters is not absolute," *id.* at 178, because

"[d]isclosure may be required if the government interest in disclosure outweighs the individual's privacy interest," *id.* (quoting *Fraternal Order of Police, Lodge No. 5 v. City of Philadelphia*, 812 F.2d 105, 110 (3d Cir. 1987)). Thus, both the facts and the legal issue in *Luzerne* are distinguishable from the case at bench, because this case does not involve a privacy intrusion by government officers or the public disclosure of photos or video footage.[11]

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[11] Other cases cited by Plaintiffs are similarly inapposite. *Poe v. Leonard*, 282 F.3d 123 (2d Cir. 2002), also involved the surreptitious and unconsented filming of a female officer by a male law enforcement officer. *See id.* at 138. The court concluded that the plaintiff had stated a claim for a violation of her Fourteenth Amendment privacy rights because the officer's behavior constituted "arbitrary government action" that "shock[ed] the conscience" and was "without any reasonable justification in the service of a legitimate governmental objective." *Id.* at 139 (quoting *County of Sacramento v. Lewis*, 523 U.S. 833, 845–46, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998)). Again, the instant case does not involve an arbitrary privacy intrusion by a law enforcement officer in the form of unconsented filming.

Finally, Plaintiffs attempt to support their Fourteenth Amendment argument by pointing to cases suggesting that providing separate restrooms for males and females is not illegal, cases discussing Fourth Amendment violations, and cases addressing whether Title VII protects against discrimination on the basis of sexual orientation or gender identity. Those cases, however, are inapposite; none establishes a Fourteenth Amendment right to privacy that protects against any risk of bodily exposure to a transgender student in school facilities.

In sum, Plaintiffs fail to show that the contours of the privacy right protected by the Fourteenth Amendment are so broad as to protect against the District's implementation of the Student

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Similarly, *Canedy v. Boardman*, 16 F.3d 183 (7th Cir. 1994), is distinguishable because it involved a non-emergency strip search of a male inmate by two female deputies, even though other male officers were nearby and could have conducted the search. *See id.* at 184–85.

Safety Plan.[12] This conclusion is supported by the fact that the Student Safety Plan provides alternative options and privacy protections to those who do not want to share facilities with a transgender student, even though those alternative options admittedly appear inferior and less convenient. *See Caribbean Marine Servs. Co. v. Baldrige*, 844 F.2d 668, 678 (9th Cir. 1988) (suggesting that in cases in which privacy interests must be weighed against governmental interests, inconvenience and slight discomfort that results from attempting to

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[12] As a result, Plaintiffs' argument that the District placed an unconstitutional condition on their privacy rights by implementing the Student Safety Plan also fails. If the asserted right is not protected by the Constitution, then any conditions that the District allegedly placed on the asserted right cannot be constitutionally impermissible. *See Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 604, 133 S.Ct. 2586, 186 L.Ed.2d 697 (2013) ("[T]he unconstitutional conditions doctrine ... vindicates the Constitution's enumerated rights by preventing the government from coercing people into giving them up.").

accommodate both interests are not enough to establish a privacy violation).

Accordingly, we affirm the district court's dismissal with prejudice of Plaintiffs' claim for violation of privacy under the Fourteenth Amendment's Due Process Clause. *See Albright v. Oliver*, 510 U.S. 266, 271, 114 S.Ct. 807, 127 L.Ed.2d 114 (1994) (holding that the plaintiff's § 1983 claim failed where the plaintiff failed to establish that he was deprived of a substantive due process right secured by the Constitution). Because this claim is premised on the violation of an asserted right that, as a matter of law, is not protected by the Fourteenth Amendment's Due Process Clause, amendment of this claim would be futile.[13]

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[13] Because we agree with the district court that the right to privacy on which Plaintiffs' claim is premised is not protected by the Constitution, we do not reach the district court's further conclusions that: (1) even if the right asserted by Plaintiffs were protected by the Constitution, the presence of a transgender student in school facilities does not infringe that right, *see Parents for Privacy*, 326 F. Supp. 3d at 1100–01; and (2) policies permitting transgender access further a compelling state interest in protecting transgender students from discrimination and

B.

Next, Plaintiffs contend that 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 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). Plaintiffs allege that the Student Safety Plan violates Title IX because it "produces unwelcome sexual harassment and create[s] a hostile environment on the basis of sex." They allege that the Plan "needlessly subjects Student Plaintiffs to the risk that their partially or fully unclothed bodies will be exposed to students of the opposite sex and that they will be exposed to opposite-sex nudity, causing the Student Plaintiffs to experience embarrassment, humiliation, anxiety, intimidation, fear,

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are narrowly tailored to satisfy strict scrutiny. *Id.*

apprehension, stress, degradation, and loss of dignity." According to Plaintiffs, "[a]llowing people to use restrooms, locker rooms or showers designated for the opposite biological sex violates privacy and creates a sexually harassing environment," in part because "[e]xposure to opposite-sex nudity creates a sexually harassing hostile environment." As a result of this allegedly harassing environment, "all Student Plaintiffs find that school has become intimidating and stressful," and some of them "are avoiding the restroom" and "are not able to concentrate as well in school."

Stating a Title IX hostile environment claim requires alleging 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 ex rel. LaShonda D. v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 650, 119 S.Ct. 1661, 143 L.Ed.2d 839 (1999); *see also Reese v. Jefferson Sch. Dist. No. 14J*, 208 F.3d 736, 738–39 (9th Cir. 2000). The district court ruled that Plaintiffs had failed to establish the third and fourth elements and, on that basis, dismissed

Plaintiffs' Title IX hostile environment claim. *Parents for Privacy*, 326 F. Supp. 3d at 1104.

The district court concluded that the alleged harassment was not discrimination on the basis of sex within the meaning of Title IX, because the "District's plan does not target any Student Plaintiff because of their sex." *Id.* at 1102. Rather, the Student Safety Plan applies to all students regardless of their sex, and therefore "Student Plaintiffs have not demonstrated that they are being treated any differently from other students at Dallas High School."

In addition, the district court held that Plaintiffs failed to show "that the District's Plan discriminates because of sex, or that it creates a severe, pervasive, and objectively offensive environment." *Id.* at 1104. The court explained that, in contrast to cases involving "egregious and persistent acts of sexual violence and verbal harassment," "[c]ourts have recognized that the presence of transgender people in an intimate setting does not, by itself, create a sexually harassing environment that is severe or pervasive." *Id.* at 1102; *see also id.* at 1102–04 (discussing cases). Noting Plaintiffs' failure to cite supporting authority, the district court rejected Plaintiffs' arguments that harassment was pervasive because the District's Plan is "widely applied" and that the Plan is objectively

offensive because sex-segregated facilities are the well-established norm. *Id.* at 1103–04.

Again, we agree with the district court's analysis and find Plaintiffs' contrary arguments unpersuasive. First, Plaintiffs argue broadly that Title IX "unequivocally uphold[s] the right to bodily privacy" and therefore requires that facilities be segregated based on "biological" sex rather than "gender identity." To support this argument, Plaintiffs point out that the statute provides that it should not be construed to "prohibit any educational institution ... from maintaining separate living facilities for the different sexes," 20 U.S.C. § 1686, and that Title IX's implementing regulations specifically authorize providing separate but comparable "toilet, locker room, and shower facilities on the basis of sex," 34 C.F.R. § 106.33. Plaintiffs further argue that Title IX's text and its legislative history make clear that the permitted basis on which such "separate" facilities may be segregated—"sex"— refers to "biological sex" as assigned at birth, and cannot encompass gender identity.

But just because Title IX authorizes sex-segregated facilities does not mean that they are required, let alone that they must be segregated based only on biological sex and cannot accommodate gender identity. Nowhere does the

statute explicitly state, or even suggest, that schools may not allow transgender students to use the facilities that are most consistent with their gender identity. That is, Title IX does not specifically make actionable a school's decision not to provide facilities segregated by "biological sex"; contrary to Plaintiffs' suggestion, the statute does not create distinct "bodily privacy rights" that may be vindicated through suit. Instead, Title IX provides recourse for discriminatory treatment "on the basis of sex." 20 U.S.C. § 1681(a). Thus, even if Plaintiffs are correct that "Congress intended to preserve distinct privacy facilities based on biological sex" and that the District chose not to do so, that fact alone is insufficient to state a legally cognizable claim under Title IX. Rather, to show that the District violated Title IX, Plaintiffs must establish that the District had actual knowledge of and was deliberately indifferent to harassment because of sex that was "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*, 526 U.S. at 650, 119 S.Ct. 1661; *see also Reese*, 208 F.3d at 739.

Plaintiffs focus on the third and fourth elements of a Title IX hostile environment claim, as did the district court, namely whether there was

harassment because of sex that was so severe, pervasive, and objectively offensive that it deprived Plaintiffs of access to the educational opportunities or benefits provided by Dallas High School. First, Plaintiffs assert that the Student Safety Plan created harassment on the basis of sex "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 users." But just because the Student Safety Plan implicitly addresses the topics of sex and gender by seeking to accommodate a transgender student's gender identity, or because it segregates facilities by gender identity, does not mean that the Plan harasses other students on the basis of their sex. As the district court explained, the Plan does not target students or discriminate against them on the basis of their sex; the Student Safety Plan treats all students—male and female—the same. *See Parents for Privacy,* 326 F. Supp. 3d at 1096–97.

Plaintiffs respond that the district court's conclusion that there was no harassment based on sex because the Student Safety Plan affects all students equally is "legally and logically indefensible." Plaintiffs argue that the fact that the Student Safety Plan affects both sexes does not preclude a Title IX violation, because the Plan actually harasses both sexes on the basis of

their sex by allowing students assigned the opposite sex at birth to enter privacy facilities. But Plaintiffs cite no authority to support the notion that "equal harassment" against both sexes is cognizable under Title IX.

To the contrary, treating both male and female students the same suggests an absence of gender/sex animus, while Title IX is aimed at addressing discrimination based on sex or gender stereotypes. Numerous courts have ruled that a Title IX sexual harassment hostile environment claim fails where the alleged harassment is inflicted without regard to gender or sex, i.e., where there is no discrimination. *See Doe ex rel. Doe v. Boyertown Area Sch. Dist.,* 276 F. Supp. 3d 324, 394–95 (E.D. Pa. 2017) (collecting cases), aff'd, 897 F.3d 518 (3d Cir. 2018), cert. denied, —— U.S. ——, 139 S. Ct. 2636, 204 L.Ed.2d 300 (2019). We see no reason to arrive at a different conclusion here. Plaintiffs' argument that the alleged harassment was "based on sex" because it involved opposite-sex nudity conflates the basis for the perceived harm—a distinction between biological sexes—with the basis for the alleged harassment, which, as discussed above, Plaintiffs have not shown was discriminatory or motivated by any gender animus. In sum, the district court correctly ruled that Plaintiffs

failed to establish the third element of their Title IX claim. *See Parents for Privacy*, 326 F. Supp. 3d at 1102.

The district court also correctly ruled that Plaintiffs failed to establish the fourth element of their Title IX claim. *See id.* at 1104. Plaintiffs argue that they satisfy the fourth element of a hostile environment claim because the alleged harassment is both viewed subjectively as harassment by the victims and is, objectively, sufficiently severe or pervasive that a reasonable person would agree that it is harassment. However, even crediting Plaintiffs' subjective perceptions, under the totality of the circumstances, the alleged harassment is not so severe, pervasive, and objectively offensive to rise to the level of a Title IX violation. Plaintiffs do not allege that transgender students are making inappropriate comments, threatening them, deliberately flaunting nudity, or physically touching them. Rather, Plaintiffs allegedly feel harassed by the mere presence of transgender students in locker and bathroom facilities. This cannot be enough. The use of facilities for their intended purpose, without more, does not constitute an act of harassment simply because a person is transgender. *See Cruzan v. Special Sch. Dist., # 1*, 294 F.3d 981, 984 (8th Cir. 2002) (per curiam) (concluding that

a transgender woman's "merely being present in the women's ... restroom" did not constitute actionable sexual harassment of her female co-workers); *cf. Davis*, 526 U.S. at 650, 652–53, 119 S.Ct. 1661 (explaining that "peer harassment ... is less likely to [violate Title IX] than is teacher-student harassment" in part because "simple acts of teasing and name-calling among school children" do not establish severe harassment, and noting that "[t]he most obvious example of student-on-student sexual harassment capable of triggering a damages claim would ... involve the overt, physical deprivation of access to school resources," for example by making effective physical threats).

Accordingly, we affirm the district court's dismissal with prejudice of Plaintiffs' Title IX hostile environment claim. Because the Student Safety Plan does not discriminate on the basis of sex, amendment would be futile.

C.

Next, Plaintiffs challenge the dismissal of their Fourteenth Amendment claim for violation of Parent Plaintiffs' fundamental rights to direct the care, education, and upbringing of their children.

As discussed above, the Fourteenth Amendment's 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." *Glucksberg*, 521 U.S. at 720–21, 117 S.Ct. 2258 (internal quotation marks and citations omitted). The Supreme Court has held that one such fundamental liberty interest protected by the Due Process Clause is "the fundamental right of parents to make decisions concerning the care, custody, and control of their children."[14] *Troxel v. Granville*, 530 U.S. 57, 66, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000); *see also Fields*, 427 F.3d at 1204. Among other things, this right means that the state cannot prevent parents from choosing a specific educational program—whether it be religious instruction at a private school or instruction in a foreign language. That is, the state does not have the power to "standardize its children" or "foster a homogenous people" by completely foreclosing the opportunity of

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[14] This right is commonly referred to as the *Meyer– Pierce* right because it finds its origin in two Supreme Court cases, *Meyer v. Nebraska*, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923), and *Pierce v. Society of Sisters*, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925).

individuals and groups to choose a different path of education.

Id. at 1205 (*quoting Brown v. Hot, Sexy & Safer Prods., Inc.*, 68 F.3d 525, 533–34 (1st Cir.1995), abrogated on other grounds by *Martinez v. Cui*, 608 F.3d 54 (1st Cir. 2010)). This freedom, however, does not "encompass[ ] a fundamental constitutional right to dictate the curriculum at the public school to which [parents] have chosen to send their children." *Id.*

Parent Plaintiffs allege that the fundamental parental right to make decisions concerning the care, custody, and control of their children also encompasses the following rights: (1) "the power to direct the education and upbringing of [their] children"; (2) the right to "instill moral standards and values in their children"; (3) the "right to determine whether and when their children will have to risk being exposed to opposite sex nudity at school"; and (4) the "right to determine whether their children, while at school, will have to *1230 risk exposing their own undressed or partially unclothed bodies to members of the opposite sex" in "intimate, vulnerable settings like restrooms, locker rooms and showers." Parent Plaintiffs claim that the District's implementation of the Student Safety Plan violates these rights, and therefore the Fourteenth Amendment, because Parent

Plaintiffs "do not want their minor children to endure the risk of being exposed to the opposite sex ... nor do they want their minor children to attend to their personal, private bodily needs in the presence of members of the opposite sex." They explain that they "desire to raise their children with a respect for traditional modesty, which requires that one not undress or use the restroom in the presence of the opposite sex," and that some parents also object to the Student Safety Plan because of "sincerely-held religious beliefs."

The district court disposed of this claim on the ground that the fundamental parental right protected by the Fourteenth Amendment's Due Process Clause is narrower than Plaintiffs assert. *See Parents for Privacy*, 326 F. Supp. 3d at 1108–09. The district court reasoned that although Parent Plaintiffs have the right to choose where their children obtain an education, meaning that they have a right to remove their children from Dallas High School if they disapprove of transgender student access to facilities, binding Ninth Circuit authority makes clear that "Parent Plaintiffs' Fourteenth Amendment liberty interest in the education and upbringing of their children 'does not extend beyond the threshold of the school door.' " *Id.* at

1109 (*quoting Fields*, 427 F.3d at 1207).[15] The district court thus disagreed with Plaintiffs' unsupported proposition that parents "retain the right to prevent transgender students from sharing school facilities with their children." *Id.*

On appeal, Parent Plaintiffs argue that the district court erroneously limited their fundamental parental rights. They challenge in particular the district court's conclusion that their parental rights do not "extend beyond the threshold of the school door." Plaintiffs, relying on *Troxel*, 530 U.S. at 65–66, 120 S.Ct. 2054 (quoting *Prince v. Massachusetts*, 321 U.S. 158, 166, 64 S.Ct. 438, 88 L.Ed. 645 (1944)), note 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." But other than affirming that parents have a long-recognized constitutional right to

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[15] Although it does not affect the application of *Fields* to this case or the merits of Plaintiffs' substantive argument, it is worth noting that we deleted the phrase "do[ ] not extend beyond the threshold of the school door" from the *Fields* opinion upon denial of rehearing. *See Fields,* 427 F.3d at 1207.

"make decisions concerning the care, custody, and control of their children," *Troxel* lends no concrete support to Plaintiffs' specific argument in this case. *Id.* at 66, 120 S.Ct. 2054. *Troxel* concerned a state government's interference with a mother's decision about the amount of visitation with her daughters' paternal grandparents that was in her daughters' best interests; it did not address the extent of parents' rights to direct the policies of the public schools that their children attend.[16] *See id.* at

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[16] Similarly, Plaintiffs' reliance on *Wisconsin v. Yoder*, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972), in their reply brief is unavailing. In that case, the Supreme Court held that the state of Wisconsin could not compel Amish parents to send their children to formal high school up to the age of 16, because as applied to the Amish parents in that case, doing so violated the Free Exercise Clause of the First Amendment, and also interfered with "the traditional interest of parents with respect to the religious upbringing of their children." *Id.* at 214, 92 S.Ct. 1526; *see also id*. at 232–36, 92 S.Ct. 1526. *Yoder* supports the district court's recognition that parents have the right to remove their children from Dallas High School, but it does not support Plaintiffs' assertion that their parental rights go beyond that decision and extend to a right to require a

67–73, 120 S.Ct. 2054. Moreover, we have previously explained that although the Supreme Court "recognized that parents' liberty interest in the custody, care, and nurture of their children resides 'first' in the parents, [it] does not reside there exclusively, nor is it 'beyond regulation [by the state] in the public interest.' " *Fields*, 427 F.3d at 1204 (second alteration in original) (*quoting Prince*, 321 U.S. at 166, 64 S.Ct. 438).

Next, Plaintiffs attempt to distinguish *Fields*, the Ninth Circuit case on which the district court relied, by pointing out that the instant case is not about curriculum, but rather "about conduct authorized by the school allowing opposite-sex students into privacy facilities." *Fields* involved conduct authorized by the school allowing a researcher to administer a survey that included questions about sexual topics. *Fields*, 427 F.3d at 1200–01. We held that although "[p]arents have a right to inform their children when and as they wish on the subject of sex," they "have no constitutional right ... to prevent a public school from providing its students with whatever information it wishes to

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particular bathroom access policy for transgender students.

provide, sexual or otherwise, when and as the school determines that it is appropriate to do so." *Id.* at 1206. While the purported risk of Parent Plaintiffs' children being exposed to the unclothed bodies of students who were assigned the opposite sex at birth does not involve the provision of information, as did *Fields*, it similarly involves students being exposed to things of which their parents disapprove.

In any case, in *Fields* we adopted the Sixth Circuit's view that parents not only lack a constitutional right to direct the curriculum that is taught to their children, but that they also lack constitutionally protected rights to direct school administration more generally. *See id.* at 1206 (rejecting a "curriculum exception"). Specifically, we endorsed the Sixth Circuit's explanation that:

> While parents may have a fundamental right to decide whether to send their child to a public school, they do not have a fundamental right generally to direct how a public school teaches their child. Whether it is the school curriculum, the hours of the school day, school discipline, the timing and content of examinations, the individuals hired to teach at the

> school, the extracurricular activities offered at the school or ... a dress code, these issues of public education are generally committed to the control of state and local authorities.

Id. (internal quotation marks omitted) (quoting *Blau v. Fort Thomas Pub. Sch. Dist.*, 401 F.3d 381, 395–96 (6th Cir. 2005)). This binding precedent thus directly supports the district court's conclusion that Parent Plaintiffs lack a fundamental right to direct Dallas High School's bathroom and locker room policy.

Plaintiffs nonetheless argue that, contrary to *Fields*, the Supreme Court has extended parental rights into the classroom. Specifically, they argue that the Supreme Court has ruled that students from Jehovah's Witness families could not be compelled to recite the Pledge of Allegiance at school.[17] *See W. Va. State Bd. of*

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[17] Plaintiffs cite *Minersville School District v. Gobitis*, 310 U.S. 586, 60 S.Ct. 1010, 84 L.Ed. 1375 (1940), for this proposition, but *Gobitis* actually held the opposite—namely, that the government could require students to salute the flag. The Supreme Court, however, overruled *Gobitis* three years later in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624,

Educ. v. Barnette, 319 U.S. 624, 642, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943). But that Supreme Court decision rested on the First Amendment;[18] nowhere did the Supreme Court reference the fundamental rights of parents to direct their children's upbringing.[19] *See Barnette*, 319 U.S.

642, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943). Thus, we assume that Plaintiffs actually intended to cite *Barnette*, particularly because their *Gobitis'* pincite of "642" appears in *Barnette*, but not in *Gobitis*.

[18] Similarly, *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969), and *Shelton v. Tucker*, 364 U.S. 479, 81 S.Ct. 247, 5 L.Ed.2d 231 (1960), both of which Plaintiffs cite in their reply, also rested on the First Amendment and its protection of students' and teachers' freedoms of speech and association.

[19] Moreover, unlike the instant case, *Barnette* involved "a compulsion of students to declare a belief." *Barnette*, 319 U.S. at 631, 63 S.Ct. 1178. The Student Safety Plan does not compel a declaration of support for any particular belief. And in *Barnette*, the Court also noted that the appellees' asserted freedom not to salute the flag "does not bring them into collision with rights asserted by any other individual." *Id*. at 630, 63

at 639, 642, 63 S.Ct. 1178. Thus, Plaintiffs fail to cite any Supreme Court authority showing that parents' substantive due process rights under the Fourteenth Amendment encompass a right to direct the curriculum, administration, or policies of public schools.

Finally, perhaps recognizing the lack of supporting case law, Plaintiffs argue that the following items both "undercut[ ] the district court's unprincipled expansion of *Fields*" and support the constitutional parental rights that Plaintiffs assert: (1) that "no one would seriously suggest [that] parents lack any means to assure their students are free from physical assault, coercive threats[,] or criminal activity"; (2) that "federal law and Oregon law confer on parents

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S.Ct. 1178. Here, in contrast, Plaintiffs' asserted right not to be exposed to any risk of seeing in a state of undress (or being seen by) any person who was assigned the opposite sex at birth does "bring them into collision with rights asserted by ... other[s]," namely the rights of transgender students to use the locker rooms that match their gender identity and to avoid being subject to discrimination based on gender stereotypes regarding the sex assigned to them at birth. *See id.*

the right to inspect instructional materials upon request"; (3) that Congress in 2002 "enacted a federal law that no student can be required to take a survey concerning sexual behavior or attitudes unless the school provides parents with the survey before administering the survey to students and receives consent to administer the survey"; and (4) that "many states, including Oregon, have in place laws regulating public school education that require schools to allow parents to opt their children out of certain situations concerning sexual right [sic] and sex education." However, those assertions, even if true, do not establish that the Fourteenth Amendment's Due Process Clause protects the right asserted by Plaintiffs in this case. Although state and federal statutes may expand upon constitutional protections by creating new statutory rights, statutes do not alter the protections afforded by the Constitution itself.[20]

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[20] Plaintiffs provide no citation suggesting that the statutes they cite were enacted in order to enforce existing constitutional parental rights. Rather, the opposite inference—that the statutes were enacted to create rights specifically because the Constitution does not protect such rights—may be the more reasonable one. *Cf. Holt v. Hobbs*, 574 U.S. 352,

In sum, Plaintiffs fail to cite any authority that supports their asserted fundamental Fourteenth Amendment parental right to "determine whether and when their children will have to risk being exposed to opposite sex nudity at school" and "whether their children, while at school, will have to risk exposing their own undressed or partially unclothed bodies to members of the opposite sex" in "intimate, vulnerable settings like restrooms, locker rooms and showers." In fact, *Fields* makes clear that the fundamental right to control the upbringing of one's children does not extend so far as Plaintiffs' hypothesize. *See Fields*, 427 F.3d at 1206–07. Plaintiffs neither distinguish this precedent nor address the practical issue raised by Fields: that accommodating the different "personal, moral, or religious concerns of every parent" would be "impossible" for public schools, because different parents would often likely, as

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135 S. Ct. 853, 859–60, 190 L.Ed.2d 747 (2015) ("Following our decision in *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990), Congress enacted [the Religious Freedom Restoration Act of 1993] in order to provide greater protection for religious exercise than is available under the First Amendment.").

in this case, prefer opposite and contradictory outcomes. *Id.* at 1206. As a result, Plaintiffs' legal theory fails. Considering that Supreme Court and Ninth Circuit case law not only have not recognized the specific rights asserted by Plaintiffs, but further forecloses recognizing such rights as being encompassed by the fundamental parental rights protected by the Fourteenth Amendment's Due Process Clause, amendment of this claim would be futile.

For the foregoing reasons, we affirm the district court's dismissal with prejudice of this claim.

D.

Fourth, Plaintiffs contend that the district court erred in dismissing their claim for violation of their First Amendment free exercise rights.

The First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof ...." U.S. Const., amend. I. "The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires." *Emp't Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872 877, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990), superseded by statute in other contexts as stated in *Holt*, 135 S. Ct. at 859–60. The Supreme Court has explained that the First Amendment

"obviously excludes all 'governmental regulation of religious beliefs as such,' " meaning that "[t]he government may not compel affirmation of religious belief, punish the expression of religious doctrines it believes to be false, impose special disabilities on the basis of religious views or religious status, or lend its power to one or the other side in controversies over religious authority or dogma." *Id.* (citations omitted) (quoting *Sherbert v. Verner*, 374 U.S. 398, 402, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963)). The Supreme Court has also suggested that the government would interfere with the free exercise of religion impermissibly if it sought to ban the performance of or abstention from certain physical acts, but "only when [those acts] are engaged in for religious reasons, or only because of the religious belief that they display." *Id.* Nevertheless, the "freedom to act" pursuant to one's religious beliefs "cannot be" absolute; "[c]onduct remains subject to regulation for the protection of society." *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1128 (9th Cir. 2009) (citing *Cantwell v. Connecticut*, 310 U.S. 296, 303–04, 60 S.Ct. 900, 84 L.Ed. 1213 (1940)). Thus, "[t]he Cantwell right to freely exercise one's religion ... 'does not relieve an individual of the obligation to comply with a "valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his [or

her] religion prescribes (or proscribes).' " *Id.* at 1127 (quoting *Smith*, 494 U.S. at 879, 110 S.Ct. 1595).

Here, Plaintiffs claim that the Student Safety Plan violates their First Amendment rights to freely exercise their religion because the Student Safety Plan forces them to be exposed to an environment in school bathrooms and locker facilities that conflicts with, and prevents them from fully practicing, their religious beliefs. Specifically, the complaint alleges that many Student Plaintiffs and some Parent Plaintiffs "have the sincere religious belief" that children "must not undress, or use the restroom, in the presence of a member of the opposite biological sex, and also that they must not be in the presence of the opposite biological sex while the opposite biological sex is undressing or using the restroom." Because the Student Safety Plan permits transgender students who were assigned the opposite biological sex at birth into their locker rooms, the Plan "prevents Student Plaintiffs from practicing the modesty that their faith requires of them, and it further interferes with Parent Plaintiffs teaching their children traditional modesty and insisting that their children practice modesty, as their faith requires." Plaintiffs further assert that, as a result, "[c]omplying with the requirements of

the Student Safety Plan ... places a substantial burden on the Plaintiffs' exercise of religion by requiring Plaintiffs to choose between the benefit of a free public education and violating their religious beliefs."

The district court dismissed this claim on the basis that the Student Safety Plan was neutral and generally applicable with respect to religion, noting that "neutral, generally applicable laws that incidentally burden the exercise of religion usually do not violate the Free Exercise Clause of the First Amendment" because they need only be "rationally related to a legitimate government interest." *Parents for Privacy*, 326 F. Supp. 3d at 1110 (quoting *Holt*, 135 S. Ct. at 859) (citing *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993)). The district court rejected Plaintiffs' assertion that, because the Plan pertains specifically to Student A, the Plan is not generally applicable. *Id*. The court, citing *Lukumi*, 508 U.S. at 532–33, 113 S.Ct. 2217, explained that "Plaintiffs misunderstand the law," because neutrality and general applicability are "considered with respect to religion" rather than with respect to the person or groups to which the law most directly pertains. *Parents for Privacy*, 326 F. Supp. 3d at 1110. Because the District's Plan did not force

any Plaintiff to embrace a religious belief and did not punish anyone for expressing their religious beliefs, the district court concluded that the Plan is "neutral and generally applicable with respect to religion," and therefore did not violate Plaintiffs' First Amendment rights. *Id.*

On appeal, Plaintiffs argue that the district court should have applied strict scrutiny because, contrary to the district court's conclusion, the Student Safety Plan is not neutral or generally applicable. Plaintiffs point out that the Student Safety Plan was implemented to benefit one student in particular, and they claim, without any supporting citation, that "a policy implemented for a single student is not generally applicable." Plaintiffs do not address the district court's reasoning that neutrality and general applicability are considered with respect to religion. Nor does their argument acknowledge that the Plan applies to all transgender students, not just to Student A; that is, the argument does not distinguish between an event that triggered development of a policy and the breadth of the resulting policy itself.

In assessing neutrality and general applicability, courts evaluate both "the text of the challenged law as well as the effect ... in its

real operation." *Stormans, Inc. v. Wiesman*, 794 F.3d 1064, 1076 (9th Cir. 2015) (ellipsis in original) (internal quotation marks omitted). As the district court correctly explained, the two tests for whether a law is neutral and generally applicable focus on whether a law specifically targets or singles out religion. *See Parents for Privacy*, 326 F. Supp. 3d at 1110; Lukumi, 508 U.S. at 532, 113 S.Ct. 2217 ("[T]he protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons.").

First, "if the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral." *Selecky,* 586 F.3d at 1130 (emphasis added) (quoting *Lukumi*, 508 U.S. at 533, 113 S.Ct. 2217). For example, "[a] law lacks facial neutrality if it refers to a religious practice without a secular meaning discernable from the language or context." *Lukumi*, 508 U.S. at 533, 113 S.Ct. 2217. Even if a law is facially neutral, it may nonetheless fail the neutrality test if "[t]he record ... compels the conclusion that suppression of [a religion or religious practice] was the object of the ordinances." *Id*. at 534, 542, 113 S.Ct. 2217. Thus, in *Lukumi*, the Supreme Court concluded that an animal

ordinance that in its operation effectively banned only the ritual animal sacrifice performed by practitioners of the Santeria religion, was not neutral because it accomplished a "religious gerrymander," i.e., an impermissible attempt to target religious practices through careful legislative drafting. *See id*. at 535–37, 113 S.Ct. 2217.

Here, on the other hand, Plaintiffs' complaint contains no allegation suggesting that the Student Safety Plan was adopted with the object of suppressing the exercise of religion. To the contrary, Plaintiffs allege that the District developed and implemented the Student Safety Plan in "response to the threat of [federal] enforcement action" and in "response to Student A's complaints for accommodation." Moreover, the Student Safety Plan "make[s] no reference to any religious practice, conduct, belief, or motivation." *See Wiesman*, 794 F.3d at 1076. Instead, the Plan itself states that it was "created to support a transgender male expressing the right to access the boy's locker room at Dallas High School." Plaintiffs do not counter this evidence or point to anything in the record suggesting that the Student Safety Plan was adopted with the specific purpose of infringing on Plaintiffs' religious practices or suppressing Plaintiffs' religion. Accordingly, the

district court correctly concluded that the Student Safety Plan is neutral for purposes of analyzing the free exercise claim.

Second, the question of general applicability addresses whether a law treats religious observers unequally. *See Lukumi*, 508 U.S. at 542, 113 S.Ct. 2217. For example, "inequality results when a legislature decides that the governmental interests it seeks to advance are worthy of being pursued only against conduct with a religious motivation." *Id.* at 542–43, 113 S.Ct. 2217. Thus, "[a] law is not generally applicable if its prohibitions substantially underinclude non-religiously motivated conduct that might endanger the same governmental interest that the law is designed to protect." *Wiesman*, 794 F.3d at 1079 (citing *Lukumi*, 508 U.S. at 542–46, 113 S.Ct. 2217). "In other words, if a law pursues the government's interest 'only against conduct motivated by religious belief,' but fails to include in its prohibitions substantial, comparable secular conduct that would similarly threaten the government's interest, then the law is not generally applicable." *Id.* (quoting *Lukumi*, 508 U.S. at 545, 113 S.Ct. 2217). For example, in *Lukumi*, the Court concluded that the challenged ordinances were not generally applicable because they "pursue[d] the city's governmental

interests only against conduct motivated by religious belief" and "fail[ed] to prohibit nonreligious conduct that endanger[ed] these interests in a similar or greater degree than Santeria sacrifice does." *Lukumi*, 508 U.S. at 543, 545, 113 S.Ct. 2217; *see also Selecky*, 586 F.3d at 1134.

Here, the Student Safety Plan is not underinclusive, because it does not require only religious students to share a locker room with a transgender student who was assigned the opposite sex at birth, nor does the Plan require only religious teachers and staff to receive training or to teach about anti-bullying and harassment. In other words, the Student Safety Plan affects all students and staff—it does not place demands on exclusively religious persons or conduct. Plaintiffs' singular argument that the Student Safety Plan is underinclusive because it was aimed at a particular student and does not allow every student to use the facilities of their choosing regardless of biological sex or self-identified gender misses the mark because it misunderstands the applicable test. Underinclusiveness is determined with respect to the burdens on religious and non-religious conduct and the interests sought to be advanced by the policy. That the Student Safety Plan focuses on transgender students rather than

allowing all students to claim a right to use whichever facility they wish regardless of gender is irrelevant because that alleged underinclusion is not related to the interests furthered by the plan, and Plaintiffs have not tied it to burdens on secular versus religious conduct. The correct inquiry here is whether, in seeking to create a safe, non-discriminatory school environment for transgender students, the Student Safety Plan selectively imposes certain conditions or restrictions only on religious conduct. Because Plaintiffs have not made any showing that the Plan does so, the district court correctly determined that the Plan is generally applicable for purposes of the free exercise analysis. *See Parents for Privacy*, 326 F. Supp. 3d at 1110.

Because the Student Safety Plan qualifies as neutral and generally applicable, it is not subject to strict scrutiny. *See Selecky*, 586 F.3d at 1129 ("[A] neutral law of general applicability will not be subject to strict scrutiny review."); *see also Smith*, 494 U.S. at 888, 110 S.Ct. 1595 ("Precisely because we are a cosmopolitan nation made up of people of almost every conceivable religious preference, and precisely because we value and protect that religious divergence, we cannot afford the luxury of deeming presumptively invalid, as applied to the

religious objector, every regulation of conduct that does not protect an interest of the highest order." (citation and internal quotation marks omitted)).

Plaintiffs argue that strict scrutiny should nevertheless apply because this suit concerns the alleged infringement of multiple constitutional rights. Relying on *Smith*, 494 U.S. at 882, 110 S.Ct. 1595, they argue that "[w]here, 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." The district court rejected this argument because it had already dismissed Plaintiffs' other constitutional claims. *See Parents for Privacy*, 326 F. Supp. 3d at 1110 n.10. For the following reasons, we agree with the district court that Plaintiffs' argument—that strict scrutiny is required simply because Plaintiffs alleged multiple constitutional claims concerning fundamental rights—fails here.

The extent to which the hybrid rights exception truly exists, and what standard applies to it, is unclear. In *Smith*, the Court noted that "[t]he only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated

action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections." *Smith*, 494 U.S. at 881, 110 S.Ct. 1595. However, *Smith* did "not present such a hybrid situation," and thus the Court did not further explain how a hybrid rights scenario should be scrutinized. *See id.* at 882, 110 S.Ct. 1595. The Ninth Circuit subsequently discussed the nature of "hybrid rights" at length, and a three-judge panel majority concluded that, "[i]n order to trigger strict scrutiny, a hybrid-rights plaintiff must show a 'fair probability'—a 'likelihood'—of success on the merits of his companion claim." *Thomas v. Anchorage Equal Rights Comm'n*, 165 F.3d 692, 706 (9th Cir.), reh'g granted, opinion withdrawn, 192 F.3d 1208 (9th Cir. 1999). The dissent, however, noted that "there is real doubt whether the hybrid-rights exception even exists" because "the Supreme Court itself has never explicitly held that it exists." *Id.* at 722–23 (Hawkins, J., dissenting). "[T]he paragraph in Smith purporting to carve out a hybrid-rights exception is dicta," "the Supreme Court in Smith did not announce a different test for hybrid-rights cases," and "[e]ven the cases which the Supreme Court cited as involving 'hybrid rights' did not explicitly refer to or invoke strict scrutiny or a compelling government interest

test." *Id.* at 723–24. In any case, that opinion discussing the appropriate hybrid rights test in our Circuit was withdrawn upon granting rehearing en banc, and the en banc court did not address the hybrid rights issue. *See Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1148 (9th Cir. 2000) (en banc) (noting that "we postpone ... application of [Smith's] newly developed hybrid rights doctrine") (O'Scannlain, J., concurring).

Moreover, *Miller v. Reed*, the Ninth Circuit case that Plaintiffs cite as the basis for the hybrid rights exception in our Circuit, was decided after the panel opinion in *Thomas* was issued, but before the three-judge opinion was withdrawn upon granting rehearing en banc. *See Miller v. Reed*, 176 F.3d 1202 (9th Cir. 1999). Thus, no weight can be given to *Miller*'s citation to the Thomas panel opinion for the suggestion that the hybrid rights exception has been established in our Circuit. *See id.* at 1207 ("[W]e recently held that, to assert a hybrid-rights claim, 'a free exercise plaintiff must make out a "colorable claim" that a companion right has been violated—that is, a "fair probability" or a "likelihood," but not a certitude, of success on the merits.' " (quoting *Thomas*, 165 F.3d at 703, 707)). There is therefore no binding Ninth Circuit authority deciding the issue of whether

the hybrid rights exception exists and requires strict scrutiny.

Nonetheless, we need not resolve that question now, because even if a hybrid rights exception does exist, it would not apply in this case. For the reasons discussed in the *Thomas* panel opinion, alleging multiple failing constitutional claims that do not have a likelihood of success on the merits cannot be enough to invoke a hybrid rights exception and require strict scrutiny. *See Thomas*, 165 F.3d at 703–07; *cf. id*. at 705 ("[A] plaintiff invoking *Smith*'s hybrid exception must make out a 'colorable claim' that a companion right has been infringed."); *Miller*, 176 F.3d at 1207–08 (collecting cases and noting that "[o]ther circuits have adopted ... predicates for a hybrid-rights claim" that are "similar or more stringent" than the standard adopted in Thomas, and holding that "a plaintiff does not allege a hybrid-rights claim entitled to strict scrutiny analysis merely by combining a free exercise claim with an utterly meritless claim of the violation of another alleged fundamental right or a claim of an alleged violation of a non-fundamental or non-existent right"). As explained earlier in this opinion, Plaintiffs have not established colorable companion claims—they have not shown even a likelihood of success, which is why their claims were all dismissed

with prejudice. Thus, even if the hybrid rights exception does exist, it would not apply to require strict scrutiny in this case. Alternatively, if the hybrid rights exception does not actually exist, then, of course, it cannot apply to this case to require strict scrutiny of Plaintiffs' purported hybrid claims. *Cf. Leebaert v. Harrington*, 332 F.3d 134, 143 (2d Cir. 2003) ("Several circuits have stated that Smith mandates stricter scrutiny for hybrid situations than for a free exercise claim standing alone, but, as far as we are able to tell, no circuit has yet actually applied strict scrutiny based on this theory."); *Catholic Charities of Sacramento, Inc. v. Superior Court*, 32 Cal.4th 527, 10 Cal.Rptr.3d 283, 85 P.3d 67, 88 (2004) (explaining that a rule requiring only a "colorable" and not an "ultimately meritorious" companion claim would not make sense because it would allow the hybrid exception to swallow the Smith rule, and noting that the California Supreme Court was "aware of no decision in which a federal court has actually relied solely on the hybrid rights theory to justify applying strict scrutiny to a free exercise claim").

In sum, whether the hybrid rights exception exists and requires at least a colorable companion claim, or whether it does not really exist at all—an issue that we do not resolve

here—Plaintiffs' argument that the hybrid rights exception requires that we apply strict scrutiny to their free exercise claim fails. Because strict scrutiny does not apply, we also need not address Plaintiffs' arguments about narrow tailoring.

Instead, we review the Plan for a rational basis, which means that the Plan must be upheld if it is rationally related to a legitimate governmental purpose. *See Wiesman*, 794 F.3d at 1084; *see also Selecky*, 586 F.3d at 1127–28 ("Under the governing standard, 'a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice.' " (quoting *Lukumi*, 508 U.S. at 531, 113 S.Ct. 2217)). "Plaintiffs 'have the burden to negate every conceivable basis which might support [the Plan].'" *Wiesman*, 794 F.3d at 1084 (brackets omitted) (quoting *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315, 113 S.Ct. 2096, 124 L.Ed.2d 211 (1993)). They fail to meet that burden, because they fail to negate what the record makes clear: the Student Safety Plan is rationally related to the legitimate purpose of protecting student safety and well-being, and eliminating discrimination on the basis of sex and transgender status. *Cf. New York v. Ferber*,

458 U.S. 747, 756–57, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982) (explaining that "a State's interest in 'safeguarding the physical and psychological well-being of a minor' is 'compelling' " (quoting *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607, 102 S.Ct. 2613, 73 L.Ed.2d 248 (1982))); *Goehring v. Brophy*, 94 F.3d 1294, 1300 (9th Cir. 1996) (holding that a university had a compelling interest in the "health and well-being of its students").[21] Plaintiffs' argument

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[21] In their arguments regarding the compelling governmental interest that would be required if we were to apply strict scrutiny, Plaintiffs argue that "[t]he relevant government interest ... 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, 115 S.Ct. 2338, 132 L.Ed.2d 487 (1995)." But *Hurley* is inapposite because that was a free speech case; the Supreme Court's suggestion in *Hurley* that a broad statutory objective of forbidding discriminatory speech in public parades would be "fatal" because "[o]ur tradition of free speech commands that a speaker who takes to the street corner to express his views in this way should be free from interference by the State based on the content of what he says" is hardly

that the Supreme Court has also recognized bodily privacy as a compelling interest is

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surprising or controversial. *See id.* at 578–79, 115 S.Ct. 2338. That statement in *Hurley* certainly does not preclude the District here from asserting an interest in providing an accommodating and safe school environment for transgender students and assuring that they do not suffer the stigmatizing injury of discrimination by being denied access to multi-user bathrooms that match their gender identity. And in fact, the Supreme Court has recognized repeatedly that the government has a compelling interest "of the highest order" in "eliminating discrimination and assuring its citizens equal access to publicly available goods and services." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 624, 104 S.Ct. 3244, 82 L.Ed.2d 462 (1984); *see also id.* at 623, 628, 104 S.Ct. 3244 (noting that "acts of invidious discrimination in the distribution of publicly available goods, services, and other advantages cause unique evils that government has a compelling interest to prevent," and holding that "Minnesota's compelling interest in eradicating discrimination against its female citizens justifies the impact that application of the statute to the Jaycees may have on the male members' associational freedoms").

unavailing, because it does not negate the fact that the Student Safety Plan has a rational basis. Thus, we conclude that because the Student Safety Plan is neutral, generally applicable, and rationally related to a legitimate governmental purpose, the Plan does not impermissibly burden Plaintiffs' First Amendment free exercise rights. *See Wiesman*, 794 F.3d at 1085. And because Plaintiffs have not shown that any new factual allegations could alter these conclusions based on settled precedent, amendment would be futile.

For the foregoing reasons, we affirm the dismissal with prejudice of Plaintiffs' First Amendment free exercise claim.

V.

Finally, Plaintiffs argue that the district court erred in failing to allow Plaintiffs leave to replead. Although Plaintiffs correctly point out that leave to amend should be liberally granted if the complaint can be saved by amendment, Plaintiffs have not shown, either in their briefing or at oral argument, how they could amend their complaint to remedy the many legal deficiencies in their claims. Instead, Plaintiffs simply argue that their complaint, as currently alleged, is sufficient to state their claims because their claims "were not conclusory;

rather, they were extensive, well-articulated statements of fact that clearly pleaded claims for relief" and "exceeded both the *Twombly* and *Iqbal* standards."

The problem with Plaintiffs' complaint, however, is not the sufficiency of their factual allegations. Rather, as we have explained above, Plaintiffs' legal theories fail. Amending the complaint will not change, for example, the extent of the rights that are protected by the Fourteenth Amendment's Due Process Clause. As a result, we affirm the district court's denial of leave to amend.[22] Further amendment would

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[22] Because we affirm the dismissal with prejudice of Plaintiffs' complaint, we do not reach the district court's determination that Plaintiffs' requested relief—a court order requiring transgender students to use single-user facilities or facilities that match their biological sex—would itself violate Title IX because it "would punish transgender students for their gender nonconformity and constitute a form of [impermissible] sex-stereotyping." *Parents for Privacy*, 326 F. Supp. 3d at 1106 (citing *Whitaker ex rel. Whitaker*, 858 F.3d at 1048–50).

simply be a futile exercise. *See V.V.V. & Sons Edible Oils. Ltd.*, 946 F.3d at 547.

VI.

In summary, we hold that Dallas School District No. 2's carefully-crafted Student Safety Plan seeks to avoid discrimination and ensure the safety and well-being of transgender students; it does not violate Title IX or any of Plaintiffs' cognizable constitutional rights. A policy that allows transgender students to use school bathroom and locker facilities that match their self-identified gender in the same manner that cisgender students utilize those facilities does not infringe Fourteenth Amendment privacy or parental rights or First Amendment free exercise rights, nor does it create actionable sex harassment under Title IX.

Accordingly, Plaintiffs have failed to state a federal claim upon which relief can be granted. The judgment of the district court is

AFFIRMED.

326 F.Supp.3d 1075

United States District Court, D. Oregon.

PARENTS FOR PRIVACY; Kris Golly and Jon Golly, individually and as guardians ad litem for A.G.; Lindsay Golly; Nicole Lillie; Melissa Gregory, individually and as guardian ad litem for T.F.; and Parents' Rights in Education, an Oregon nonprofit corporation, Plaintiffs,

v.

DALLAS SCHOOL DISTRICT NO. 2; Oregon Department of Education; Governor Kate Brown, in her official capacity as the Superintendent of Public Instruction; and 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.

No. 3:17-cv-01813-HZ

Signed 07/24/2018

Synopsis

Background: Current and former high school students and their parents brought action against school district, United States

Department of Education (DOE), Secretary of Education, United States Department of Justice (DOJ), and Attorney General, alleging that high school's policy of allowing transgender students to use restrooms, locker rooms, and showers that matched their gender identity, rather than their biological sex assigned at birth, violated the Due Process Clause, Title IX, the First Amendment's Free Exercise Clause, and Oregon law. School district, DOE, Secretary, DOJ, and Attorney General moved to dismiss.

Holdings: The District Court, Hernández, J., held that:

[1] students' purported injuries were not causally linked to actions of DOE and DOJ in promulgating federal guidelines concerning transgender students and in enforcing those guidelines, and thus, students lacked Article III standing to maintain action against DOE and DOJ;

[2] students did not have fundamental privacy right under the Due Process Clause to not share restrooms, locker rooms, and showers with transgender students whose biological sex was different than theirs, and thus, high school's policy did not violate students' constitutional right to privacy;

[3] high school's policy did not discriminate on the basis of sex within meaning of Title IX;

[4] high school's policy did not unreasonably differentiate in its treatment of students and did not have discriminatory impact, and thus did not violate Oregon's discrimination in education statute;

[5] high school's policy did not violate Oregon's discrimination in public accommodations statute; and

[6] high school's policy did not violate parents' fundamental right to direct the education and upbringing of their children under the Due Process Clause.

Motions granted.

Procedural Posture(s): Motion to Dismiss.

OPINION & ORDER

HERNÁNDEZ, District Judge:

The Court must determine whether Oregon public schools may allow transgender students to use restrooms, locker rooms, and showers that match their gender identity rather than their biological sex assigned at birth. Dallas High School, located in Dallas, Oregon, and under the control of Defendant Dallas School District No. 2 ("District"), adopted and implemented the

Student Safety Plan ("Plan") together with underlying policies allowing transgender students to use restrooms, locker rooms, and showers that match their gender identity. Plaintiff Parents for Privacy is composed of current and former Dallas High School students ("Student Plaintiffs") and their parents ("Parent Plaintiffs"). Plaintiff Lindsay Golly formerly attended Dallas High School during the 2015–2016 school year while the Plan was in place. Compl. ¶ 16, ECF 1. Plaintiffs Kris Golly and Jon Golly are her parents as well as the parents of their son A.G., an eighth-grade student who will soon attend Dallas High School. Compl. ¶ 16. Plaintiff Melissa Gregory is a parent of T.F., a student at Dallas high school. *Id.* at ¶ 17.[1]

Plaintiffs challenge the legality of the plan, seek to enjoin District from enforcing it, and request that the Court order District to require students to only use the restrooms, locker rooms, and showers that match their biological sex.

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[1] Plaintiffs also include Parents' Rights in Education, a nonprofit organization based out of Washington County, Oregon. Compl. ¶ 9. This Plaintiff, however, is merely a named party and is not specifically mentioned in any factual allegations of the Complaint nor in any briefing.

Additionally, Plaintiffs seek to enjoin the U.S. Department of Education ("USDOE"), U.S. Department of Justice ("USDOJ"), and their respective secretaries (collectively "Federal Defendants") from taking any action based on USDOE's alleged rule redefining the word "sex" as used in Title IX to include gender identity. District and Federal Defendants have separately filed motions to dismiss Plaintiffs' claims.

Moreover, Basic Rights Oregon ("BRO"), a non-profit organization dedicated to protecting the rights of Oregon's LGBTQ community, filed a motion to intervene as a defendant in this case. See Mot. to Intervene, ECF. 24. The Court granted BRO's motion to intervene and BRO filed its own motion to dismiss. *See* BRO's Mot. to Dismiss, ECF 30.

Lastly, the Oregon Department of Education ("ORDOE") and Governor Kate Brown (collectively "State") were originally named parties in this lawsuit. Upon the parties' stipulation, Plaintiffs' claims against those defendants were dismissed. See Stip. Notice of Dismissal, ECF 11. State, however, moved to rejoin this litigation as amicus curiae. See Mot. for Leave to Appear as Amicus Curiae, ECF 50. The Court granted that motion, and State filed its amicus brief in support of District's Motion to

Dismiss. See Amicus Br., ECF 50-1. In sum, there are three fully-briefed motions to dismiss before the Court.[2] For the reasons discussed below, the motions are GRANTED and this case is DISMISSED.

Plaintiffs bring the following eight claims for relief:

First Claim: (against Federal Defendants) Violation of the Administrative Procedure Act ("APA"), 5 U.S.C. § 500 et seq. Compl. ¶¶ 136–185.

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[2] A motion for a preliminary injunction is also embedded in the Complaint's prayer for relief. See Compl. pp. 63–64. In substantially similar cases, courts have adjudicated motions for preliminary injunctions before entertaining Rule 12 motions to dismiss. Here, however, Plaintiffs have not pressed the issue, and the parties do not discuss an injunction anywhere in their briefing. At oral argument, the parties indicated their intent to litigate the motions to dismiss currently before the Court, since resolution of the motions may moot any potential injunction.

Second Claim: (against District and Federal Defendants) Violation of the Fundamental Right to Privacy. Id. at ¶¶ 186–206.

Third Claim: (against District and Federal Defendants) Violation of the Parents' Fundamental Right to Direct the Education and Upbringing of Their Children. Id. at ¶¶ 207–220.

Fourth Claim: (against District) Violation of Title IX, 20 U.S.C. § 1681 et seq. Id. at ¶¶ 221–247.

Fifth Claim: (against Federal Defendants): Violation of the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb et seq. Id. at ¶¶ 248–255.

Sixth Claim: (against District and Federal Defendants): Violation of the First Amendment's Guarantee of Free Exercise of Religion. Id. at ¶¶ 256–264.

Seventh Claim: (against District) Public Accommodation Discrimination, Or. Rev. Stat. ("O.R.S.") §§ 659A.400, 659A.885. Id. at ¶¶ 265–271.

Eighth Claim: (against District) Discrimination in Education, O.R.S. 659.850. Id. at ¶¶ 272–277.

Plaintiffs and District conferred and consent to the dismissal of some of Plaintiffs' claims. First,

they agree that Plaintiff Lindsay Golly should be dismissed because she does not have standing. Second, 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. Third, Plaintiffs consent to the dismissal of their request for compensatory damages as to Plaintiffs A.G. and T.F. Furthermore, Plaintiffs concede that their third claim for relief—violation of the right to direct the education and upbringing of one's children—should be dismissed to the extent that it is based on the District's alleged liability for the LaCreole Middle School special needs assessment. See Pl.'s Resp. to District's Mot. to Dismiss 2, ECF 41.

BACKGROUND[3]

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[3] The facts recited below are taken from Plaintiffs' complaint and exhibits attached thereto. The Court assumes that the Complaint's factual allegations are true unless they are contradicted by the Complaint's exhibits. *See Warren v. Fox Family Worldwide*, Inc., 328 F.3d 1136, 1139 (9th Cir. 2003) ("[W]e are not required to accept as true conclusory allegations which are contradicted by documents referred to in the complaint, and we do not necessarily assume the truth of legal

I. Definitions

As a preliminary matter, the Court finds it necessary to explain its use of several relevant terms. In a recent decision, the Third Circuit aptly summarized the same set of terms the Court uses throughout this Opinion & Order. *See Doe v. Boyertown Area Sch. Dist.*, 893 F.3d 179, 183–84 (3d Cir. 2018). The Court adopts the following definitions from the Third Circuit:

> "Sex" is defined as the "anatomical and physiological processes that lead to or denote male or female." Typically, sex is determined at birth based on the appearance of external genitalia.
>
> "Gender" is a "broader societal construct" that encompasses how a "society defines what male or female is within a certain cultural context." A person's gender identity is their subjective, deep-core sense of self as being a particular gender.... "[C]isgender" refers to a person who identifies with the sex that person

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conclusions merely because they are cast in the form of factual allegations.") (internal quotation marks, citations, and alterations omitted).

> was determined to have at birth. The term "transgender" refers to a person whose gender identity does not align with the sex that person was determined to have at birth. A transgender boy is therefore a person who has a lasting, persistent male gender identity, though that person's sex was determined to be female at birth. A transgender girl is a person who has a lasting, persistent female gender identity though that person's sex was determined to be male at birth.

Id. (citations omitted).

II. Dallas School District and the Student Safety Plan

Dallas High School is located in Dallas, Oregon in Polk County. Compl. ¶ 19. Student A was a twelfth grade student at Dallas High School. *Id.* at ¶ 76. Student A was born and remains biologically female. *Id.* at ¶ 77. Before September 2015, Student A used the girls' restrooms, locker rooms, and showers (collectively "facilities"). *Id.* at ¶ 77. In September 2015, Student A publicly identified

as a boy and asked District to allow him[4] to use the boys' facilities. *Id.* at ¶ 78–79.

In November 2015, District responded to Student A's request by implementing the Student Safety Plan entitled "Transgender Student Access to Locker Room." Compl. Ex. A, at 1. The Plan permits Student A to use Dallas High School's locker rooms, restrooms, and showers consistent with his gender identity. Compl. ¶ 75, Ex. A, at 1. The preamble to the Plan states:

> All students have rights for attendance at public schools, and we have to follow the laws which protect those students['] rights. This safety plan has been created to support a transgender male expressing the right to access the boy's locker room at Dallas High

[4] Following Ninth Circuit decisions involving transgender people, the Court uses the masculine rather than feminine pronouns when referring to Student A. *See Schwenk v. Hartford*, 204 F.3d 1187, 1192 n.1 (9th Cir. 2000). In other words, when referring to a transgender person, the Court uses the pronoun consistent with that person's gender identity.

> School. Following are targeted areas of concern and the procedures or actions aimed to support all students in this transition.

Compl. Ex. A, at 1. At that time, Student A had not expressed which bathroom he felt comfortable using. *Id.* at ¶ 79. Accordingly, the Plan states that Student A "can use any of the bathrooms in the building to which he identifies sexually." Compl. Ex. A, at 2.

Furthermore, the Plan, as referred to by the parties, also encompasses several previously established District policies. Compl. Exs. B–G. District's nondiscrimination policy provides that District "prohibits discrimination and harassment on any basis protected by law, including ... an individual[']s perceived or actual ... sex" or "sexual orientation." Compl. Ex. B, at 1. Sexual orientation under the policy "means an individual's actual or perceived ... gender identity, regardless of whether the individual's gender identity, appearance, expression or behavior differs from that traditionally associated with the individual's sex at birth." *Id.* Likewise, District has a policy entitled "Equal Education Opportunity" providing that "[e]very student of the district will be given equal educational opportunities regardless of ... sex" or

"sexual orientation." Compl. Ex. C. The policy explains:

> Further, no student will be excluded from participating in, denied the benefits of, or subjected to discrimination under any educational program or activity conducted by the district. The district will treat its students without discrimination on the basis of sex as this pertains to course offerings, athletics, counseling, employment assistance and extracurricular activities.

Id.

In accordance with the Plan, Student A used the boys' locker rooms, showers, and restrooms at Dallas High school. Compl. ¶ 79. Other male students, including Student Plaintiffs, have used school facilities at the same time as Student A. *Id.* at ¶ 79. Specifically, Student A has used the boys' locker room and showers and has changed clothes while male students were present. *Id.* at ¶ 82. Plaintiffs allege that male students at Dallas High school experience "embarrassment, humiliation, anxiety, intimidation, fear, apprehension, and stress produced by using the restroom with students of

the opposite sex[.]" *Id.* at ¶ 83. The alleged risks posed to those students persist despite the presence of privacy stalls in the bathrooms because "there are large gaps above and below the stall doors, and gaps along the sides of the doors" through which "another student could see through even inadvertently." *Id.* Therefore, Plaintiffs maintain that Student Plaintiffs "must risk exposing themselves to the opposite sex every time they use the restroom." *Id.* at ¶ 83. Consequently, Student Plaintiffs and other students use the restroom as little as possible and "risk tardiness by hurrying to distant facilities of the school, during short 5-minute passing periods, to try and find a restroom not likely to be used by a student of the opposite biological sex." *Id.* at ¶ 85.

Student and Parent Plaintiffs expressed their concerns about the Plan to Dallas High School's principal who informed them that all facilities may be used by any student regardless of biological sex. *Id.* at ¶ 87. The principal also told Parent Plaintiffs that their students could use the unisex staff lounge which has no shower. *Id.* at ¶ 91. Dallas School Board meetings were held on December 14, 2015, January 19, 2016, and February 11, 2016. *Id.* at ¶ 93. At those meetings, District supported the Plan over

Plaintiffs' objections and those of other parents and students. *Id.*[5]

II. Federal Defendants' Administrative Actions

Plaintiffs allege that Federal Defendants have exercised their authority to promulgate, administer, and enforce a new legislative rule redefining "sex" within the meaning of Title IX to include gender identity and prohibiting school districts from providing sex-specific facilities. Id. at ¶¶ 26–30, 32–39, 49–73. Federal Defendants' new legislative rule ("Rule") as alleged in the Complaint is composed of a series of Federal

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[5] Plaintiffs also challenge another action taken by District related to La Creole Middle School. Compl. ¶ 96. In February 2017, District administered a "Needs Assessment" to La Creole Middle School students without prior notice, knowledge, or consent of the students' parents. Compl. Ex. P. The Needs Assessment asked students to disclose information about problems or issues they were experiencing involving clothing, school supplies, family food sufficiency, alcohol or drug abuse, suicide, self-image, sexual orientation and gender identity, unhealthy relationships and other subjects of a personal or family nature. Compl. ¶ 96. As noted above, Plaintiffs conceded this claim.

Guidelines promulgated between April 2014 and May 2016, including:

- USDOE, Office for Civil Rights, Questions and Answers on Title IX and Sexual Violence (Apr. 2014). Compl. Ex. H [hereinafter "Q & A on Sexual Violence"].

- USDOE, Office for Civil Rights, Questions and Answers on Title IX and Single-Sex Elementary and Secondary Classes and Extracurricular Activities, (Dec. 2014). Compl. Ex. I [hereinafter "Q & A on Single-Sex Activities"].

- USDOE, Office of Civil Rights, Title IX Resource Guide. (Apr. 2015). Compl. Ex. J.

- USDOJ, Civil Rights Division, USDOE, Office for Civil Rights, Dear Colleague Letter on Transgender Students (May 13, 2016). Compl. Ex. K [hereinafter "May 2016 Dear Colleague Letter"].

First, in April 2014, USDOE published the Q & A on Sexual Violence which provides: "Title IX's sex discrimination prohibition extends to claims of discrimination based on gender identity or failure to conform to stereotypical notions of masculinity or femininity[.]" Compl. Ex. H at 12. That guidance was withdrawn in September 2017, before this lawsuit was filed. See U.S. Dep't of Educ., Office for Civil Rights, Dear

Colleague Letter (Sept. 22, 2017), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf.

Second, in December 2014, USDOE published the Q & A on Single-Sex Classes, providing that:

> All students, including transgender students and students who do not conform to sex stereotypes are protected from sex-based discrimination under Title IX. Under Title IX, a recipient generally must treat transgender students consistent with their gender identity in all aspects of planning, implementation, enrollment, operation, and evaluation of single-sex classes.

Compl. Ex. I, at 30.

Third, in April 2015, USDOE published the Title IX Resource Guide which reiterates that Title IX's prohibition of sex discrimination includes gender identity. Compl. Ex. J, at 5. Specifically, the prohibition extends to claims of discrimination based on gender identity or failure to conform to stereotypical notions of masculinity or femininity. Id. at 5–6. "Similarly, the actual or perceived sexual orientation or

gender identity of the parties does not change a recipient's obligations." *Id*. at 21.

The fourth challenged document is the May 2016 Dear Colleague Letter jointly issued by the USDOJ and USDOE. Compl. Ex. K. The May 2016 Dear Colleague Letter repeated that Title IX's sex-discrimination prohibition "encompasses discrimination based on a student's gender identity, including discrimination based on a student's transgender status." *Id.* at 2. Federal Defendants characterized this letter as "significant guidance" that "does not add requirements to applicable law, but provides information and examples to inform recipients about how the Departments evaluate whether covered entities are complying with their legal obligations." *Id*. at 2. Most importantly, this document provides specific guidance on transgender students' access to sex-segregated activities and facilities:

3. Sex-Segregated Activities and Facilities

Title IX's implementing regulations permit a school to provide sex-segregated restrooms, locker rooms, shower facilities, housing, and athletic teams, as well as single-sex classes under certain circumstances. When a school provides sex-segregated activities and facilities, transgender students must be allowed to

participate in such activities and access such facilities consistent with their gender identity.

Restrooms and Locker Rooms. A school may provide separate facilities on the basis of sex, but must allow transgender students access to such facilities consistent with their gender identity. A school may not require transgender students to use facilities inconsistent with their gender identity or to use individual-user facilities when other students are not required to do so. A school may, however, make individual-user options available to all students who voluntarily seek additional privacy.

> Athletics. Title IX regulations permit a school to operate or sponsor sex-segregated athletics teams when selection for such teams is based upon competitive skill or when the activity involved is a contact sport. A school may not, however, adopt or adhere to requirements that rely on overly broad generalizations or stereotypes about the differences between transgender students and other students of the same sex (i.e., the same gender identity) or others' discomfort with transgender students. Title IX does not prohibit

> age-appropriate, tailored requirements based on sound, current, and research-based medical knowledge about the impact of the students' participation on the competitive fairness or physical safety of the sport.

Id. at 4.

On February 22, 2017, the USDOJ and USDOE published a second dear colleague letter withdrawing the guidance provided in their May 2016 Dear Colleague Letter. *See* U.S. Dep'ts of Educ. & Justice, Dear Colleague Letter (Feb. 22, 2017), *https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf* [hereinafter "February 2017 Dear Colleague Letter"]. The February 2017 Dear Colleague Letter began: "The purpose of this guidance is to inform you that the Department of Justice and the Department of Education are withdrawing the statements of policy and guidance reflected" in the May 2016 Dear Colleague Letter. *Id.* The letter explained that prior guidance's interpretation of "on the basis of sex" in Title IX to include gender identity has "given rise to significant litigation regarding school restrooms and locker rooms." *Id.*

The February 2017 Dear Colleague Letter did not state that the prior guidance was unlawful, nor did Federal Defendants replace the prior guidance with new guidance. Rather, the letter stated that, in light of litigation on the issue producing differing results, "there must be due regard for the primary role of the States and local school districts in establishing education policy." *Id.* "In these circumstances, the [USDOE and USDOJ] have decided to withdraw and rescind the above-reference guidance documents in order to further and more completely consider the legal issues involved. The Departments thus will not rely on the views expressed within them." *Id.*; see also Compl. Ex. N (USDOE instructions to field offices stating that in light of the February 2017 Dear Colleague Letter and other litigation developments, the USDOE should not rely on the May 2016 Dear Colleague letter when analyzing Title IX discrimination claims).

STANDARDS

On a motion to dismiss, the court must review the sufficiency of the complaint. *Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974). A complaint is construed in favor of the plaintiff, and its factual allegations are taken as true. *Daniels–Hall v. Nat'l Educ. Ass'n*, 629 F.3d 992, 998 (9th Cir. 2010). "[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, 129 S.Ct. 1937, 173 L.Ed.2d 868 (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, 127 S.Ct. 1955, 167 L.Ed.2d 929 (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, 127 S.Ct. 1955.

DISCUSSION

As outlined above, Plaintiffs allege eight claims for relief which the Court has grouped together as follows: (I) APA; (II) the right to privacy; (III)

Title IX; (IV) Oregon state law; (V) parents' rights to direct the education and upbringing of their children; and (VI) First Amendment and RFRA. The Court will discuss each topic in turn.

I. APA

Plaintiffs' first claim for relief alleges that Federal Defendants violated by the APA through promulgating and enforcing "a new legislative rule that redefines the term 'sex' in Title IX and its accompanying regulations to mean, or at least include, 'gender identity.'" Compl. ¶ 137. They argue that the May 2016 Dear Colleague Letter demonstrates that Federal Defendants will investigate and enforce Title IX against school districts that do not permit transgender students to use restrooms, locker rooms and showers consistent with their gender identity. *Id.* at ¶¶ 140–41. Plaintiffs contend that Federal Defendants' administrative actions are in excess of legal authority, arbitrary and capricious, contrary to the U.S. Constitution, and done without observance of required administrative procedures. *Id.* at ¶ 145 (citing 5 U.S.C. § 706(2)(A)–(D)).

In response, Federal Defendants move to dismiss Plaintiffs' APA claim on the ground that Plaintiffs lack standing. Two of the four

guidance documents that comprise the challenged Rule were withdrawn before this lawsuit commenced. Federal Defendants claim that Plaintiffs cannot show that they suffered any injury as a result of the Rule or that Plaintiffs' alleged injuries would be redressed by the relief that they seek from Federal Defendants. The May 2016 Dear Colleague Letter—the only guidance specifically addressing transgender students' use of school facilities—was expressly withdrawn by the February 2017 Dear Colleague Letter. Federal Defendants point to District's Plan as the sole source of Plaintiffs' alleged injuries. In other words, withdrawal of Federal Defendants' Rule would neither compel District to rescind its Plan nor require students at Dallas High School to use facilities matching their biological sex.

To have Article III standing, a plaintiff must show that, (1) it suffered an "injury in fact," (2) arising out of the defendant's conduct, and (3) "it must be 'likely,' as opposed to 'speculative,' that the injury will be redressed by a favorable decision." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992) (citations omitted).

A. Injury

Plaintiffs allege that they have "suffered a legal wrong as a direct result of USDOE's actions, because Plaintiffs' constitutional and statutory rights were and continue to be violated by the Student Safety Plan, which is the direct result of USDOE's enforcement of its new rule." Compl. ¶ 144. Federal Defendants do not challenge the injury requirement for standing. Instead, they argue that the alleged injury is solely attributable to District's Plan and that Plaintiffs are unable to establish either causation or redressability. As discussed below, however, the Court finds that Plaintiffs have not plausibly alleged their remaining claims based on District's Plan. Accordingly, because those dismissed claims form the basis for Plaintiff's alleged injury, Plaintiffs' APA claim falls with them. The Court will nevertheless determine whether Plaintiffs have satisfied the remaining elements of standing.

B. Causation

Assuming that Plaintiffs have plausibly alleged an injury-in-fact, Federal Defendants argue that Plaintiffs' injuries are not fairly traceable to the challenged administrative actions. Federal Defendants point out that four of the five claims that Plaintiffs allege against them do not

mention any federal action. *See* Fed. Defs.' Mot. to Dismiss 8, ECF 49. Plaintiffs' second, third, fifth, and sixth claims for relief only allege actions taken by District. Plaintiffs' sole causal connection lies in Federal Defendants' alleged influence on District's decision to enact and enforce the Plan. Particularly, Plaintiffs allege that Federal Defendants' enforcement of Title IX against other school districts based on the Rule caused District to enact the Plan.

Causation requires showing that an injury is "fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court." *Bennett v. Spear*, 520 U.S. 154, 167, 117 S.Ct. 1154, 137 L.Ed.2d 281 (1997). An indirect injury, however, "does not in itself preclude standing." *Warth v. Seldin*, 422 U.S. 490, 504, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975). "Causation may be found even if there are multiple links in the chain connecting the defendant's unlawful conduct to the plaintiff's injury, and there's no requirement that the defendant's conduct comprise the last link in the chain." *Mendia v. Garcia*, 768 F.3d 1009, 1012 (9th Cir. 2014) (citing *Bennett*, 520 U.S. at 167, 117 S.Ct. 1154). "[W]hat matters in not the 'length of the chain of causation,' but rather the 'plausibility of the links that comprise the chain[.]' " *Nat'l Audubon*

Soc'y, Inc. v. Davis, 307 F.3d 835, 849 (9th Cir. 2002) (quoting *Autolog Corp. v. Regan*, 731 F.2d 25, 31 (D.C. Cir. 1984)).

District's Plan was enacted in November 2015. At that time, of the four challenged guidance documents comprising the Rule, the Q & A on Sexual Violence, the Q & A on Single-Sex Activities, and the Title IX Resource Guide were in effect. All three of those documents state that USDOE interprets Title IX as prohibiting discrimination on the basis of gender identity. None of those documents, however, state that Title IX requires school districts to permit transgender students to use school facilities consistent with their gender-identity. Only the May 2016 Dear Colleague Letter—issued six months after the Plan was made effective—requires school districts to take such action. Compl. Ex. K, at 4. Plaintiffs allege that Federal Defendants "have enforced the Rule through public investigations, findings, and threats to revoke millions of dollars in federal funding from several school districts because they provided sex-specific private facilities." Compl. ¶ 63. In particular, Plaintiffs point to USDOE's actions against Township High School District 211 ("District 211") in Palantine, Illinois. Id. at ¶ 64. There, in November 2015, USDOE issued a letter stating that District 211 violated Title

IX by not allowing a transgender female to use the girls' locker room. Id. at ¶¶ 65–66. District 211 and USDOE entered into an agreement allowing transgender student access to the disputed facilities. Compl. ¶ 67, Ex. M. Likewise, the USDOJ filed a lawsuit in May 2016 against North Carolina based on the University of North Carolina's enforcement of sex-specific private facilities. Compl. ¶¶ 69–71.

In response to Federal Defendants' actions, students, parents, and interest groups similar to Plaintiffs in this case, joined together and filed federal lawsuits asserting substantially similar claims. *See* Fed. Defs.' Mot. to Dismiss 4–5 (collecting cases). Students and parents involved in the District 211 case filed their own lawsuit alleging claims substantially identical to those asserted in this case. That particular case will be discussed in greater detail below.

In turn, Federal Defendants issued the February 2017 Dear Colleague Letter. The purpose of the letter was, in part, to inform the public that Federal Defendants were "withdrawing the statements of policy and guidance reflected in" the May 2016 Dear Colleague Letter. U.S. Dep'ts of Educ. & Justice, Dear Colleague Letter (Feb. 22, 2017). The February 2017 Dear Colleague Letter states that its interpretation that "on the basis of sex"

in Title IX "requires access to sex-segregated facilities based on gender identity" has "given rise to significant litigation regarding school restrooms and locker rooms." Id. The letter continues by acknowledging then-existing conflicting judicial rulings on the issue among federal courts. Based on those circumstances, the letter states that Federal Defendants "have decided to withdraw and rescind the above-referenced guidance documents in order to further and more completely consider the legal issues involved. The Departments thus will not rely on the views expressed within them." Id. Furthermore, Plaintiffs attach to their complaint another letter from USDOE to its field offices dated June 6, 2017. Compl. Ex. N. Similar to the February 2017 Dear Colleague Letter, this letter informs regional directors of USDOE's Office for Civil Rights that they "may not rely on the policy set forth in the May 2016 Dear Colleague Letter." *Id.* at 1.

In response to the February 2017 Dear Colleague Letter, several lawsuits challenging Federal Defendants' Rule were voluntarily dismissed. See Fed. Defs.' Mot. to Dismiss 5 (collecting cases). In addition, the Supreme Court previously granted certiorari on the question of whether courts should defer to the May 2016 Dear Colleague Letter. *See Gloucester*

Cty. Sch. Bd. v. G.G. ex rel. Grimm, —— U.S. —— —, 137 S. Ct. 369, 196 L.Ed.2d 283 (2016) (mem.). Again, upon issuance of the February 2017 Dear Colleague Letter, the Supreme Court vacated the Fourth Circuit's decision in that case and remanded for a determination of whether the issue had been mooted. *Gloucester County School Bd. v. G. G. ex rel. Grimm*, —— U.S. ——, 137 S.Ct. 1239, 197 L.Ed.2d 460 (2017) (mem.). Upon remand, the district court determined that the transgender student plaintiff's Title IX claim was not mooted and was sufficiently pled regardless of Federal Defendants' administrative actions. *Grimm v. Gloucester Cty. Sch. Bd.*, 302 F.Supp.3d 730, 748 (E.D. Va. 2018).

Based on the Complaint and its attached exhibits, Plaintiffs have not plausibly alleged a causal link between Federal Defendants' challenged Rule and the alleged injury. Despite having full knowledge of the events described above, Plaintiffs nevertheless filed this lawsuit on November 13, 2017, including allegations against Federal Defendants based on their rescinded interpretation of Title IX. District's Plan was enacted in November 2015, well before the May 2016 Dear Colleague letter was issued. Similarly, most of Federal Defendants' enforcement actions alleged in the complaint

occurred after the Plan was enacted. Other than USDOE's letter of a Title IX violation to District 211, the remaining enforcement allegations pertain to actions taken after the Plan's enactment. Therefore those enforcement actions cannot support Plaintiff's alleged causal link.

As to the District 211 action, USDOE issued its violation letter on November 2, 2015, and it entered into an agreement with District 211 on December 2, 2015. Compl. Exs. L & M. While it is possible that USDOE's letter issued to District 211 influenced the District's decision to enact the Plan that same month, that conclusion is merely speculative and fails to plausibly establish causation. Plaintiffs "must offer facts showing that the government's unlawful conduct is at least a substantial factor motivating the third parties' actions" and they must "make that showing without relying on 'speculation' or 'guesswork' about the third parties' motivations." *Mendia*, 768 F.3d at 1013 (internal quotation marks and citations omitted).

The sequence of events in this case shows that District's Plan was enacted in response to Student A's accommodation request, not Federal Defendants' actions. Compl. ¶ 78–82. Upon first receiving Student A's request in September 2015, District initially provided an

accommodation by allowing him to access single-use facilities. Id. at ¶¶ 78–79. District then formalized its response to Student A by issuing the Student Safety Plan in November 2015. Compl. ¶ 82. The Plan begins by stating that "[a]ll students have rights for attendance at public schools, and we have to follow the laws which protect those student rights." Compl. Ex. A, at 1. Nothing in the Plan states that District was motivated by external litigation or enforcement of Title IX as a basis for its action. Rather, District lists elsewhere that its nondiscrimination policies comply with several Oregon state laws as well as over a dozen federal laws, including Title IX. *See, e.g.*, Compl. Ex. B, at 2; Ex. D at 3. It would be purely speculative to conclude that Federal Defendants' enforcement actions—as opposed to Student A's request or the requirements of many other state and federal laws—substantially motivated District to enact its Plan. There are no allegations based on District's statements explaining why they enacted the Plan. Plaintiffs simply allege that Federal Defendants' enforcement actions caused District to implement the Plan. However, in light of the documents attached to the complaint, the Court is no longer required to accept that allegation as true.

Accordingly, the Court concludes that Plaintiffs have not alleged that their purported injuries are fairly traceable to Federal Defendants' actions. Therefore, Plaintiffs have not sufficiently pleaded causation sufficient to establish Article III standing.

C. Redressability

Lastly, assuming Plaintiffs sufficiently alleged injury and causation, they must still establish standing's third requirement—redressability. Generally, a plaintiff must show that its requested relief will redress its alleged injury. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 103, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998).

> When ... a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of someone else, much more is needed. In that circumstance, causation and redressability ordinarily hinge on the response of the regulated (or regulable) third party to the government action or inaction—and perhaps on the response of others as well.

Lujan, 504 U.S at 562, 112 S.Ct. 2130. The concept of redressability "has been ingrained in

our jurisprudence from the beginning," the point of which is to determine "whether a plaintiff 'personally would benefit in a tangible way from the court's intervention.'" *Steel Co.,* 523 U.S. at 103 n.5, 118 S.Ct. 1003 (*quoting Warth v. Seldin*, 422 U.S. 490, 508, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975)). The Supreme Court has found that there is no standing for lack of redressability where "the injury to the plaintiff by the defendant was indirect (e.g., dependent on the action of a third party)." *Id*. at 125, 118 S.Ct. 1003.

In this case, Plaintiffs seek relief including a Court order declaring the challenged guidance documents unlawful and directing Federal Defendants to remove those documents from their public websites. Compl. ¶ 147, p. 63. Plaintiffs also seek to enjoin Federal Defendants from "enforcing Title IX in a manner that requires District to give any students the right of entry to, and use of, the private facilities (including locker rooms, showers and restrooms) designated for students of the opposite sex." *Id.* at ¶147, p. 63.

Plaintiffs have not established that obtaining the relief they seek against Federal Defendants will redress their alleged injury. A favorable ruling for Plaintiff would result in the rescission of the Rule and would enjoin Federal

Defendants from taking enforcement actions against District described above. This relief would not, however, redress Plaintiffs' alleged injury. District adopted its plan independent of any action by Federal Defendants and an order invalidating the Rule would not result in the Plan's withdrawal. In other words, District's plan would continue and Plaintiffs' injury would persist notwithstanding granting Plaintiffs' relief against Federal Defendants. Plaintiffs' alleged legal wrongs based on their other claims would remain unaffected by a Court order invalidating the Rule and enjoining Federal Defendants.

Furthermore, as discussed above, District cites to over two dozen state and federal laws as bases for its non-discrimination policy underlying the Student Safety Plan. *See* Compl. Ex. B. Invalidation of Rule as to Title IX would not affect District's obligations under other state and federal laws. In any event, Federal Defendants have unequivocally withdrawn the only guidance on the issue of transgender student access to school facilities and they have forbidden reliance on that guidance. See Feb. 2017 Dear Colleague Letter. The February 2017 Dear Colleague Letter states that Federal Defendants believe "there must be due regard for the primary role of the States and local school

districts in establishing educational policy." *Id.* In sum, District retains the discretion to continue enforcing the Plan even if the Court granted Plaintiffs the relief they sought against Federal Defendants. Therefore, Plaintiffs have not demonstrated that their requested relief as to Federal Defendants will redress their alleged injury.

II. The Right to Privacy

Next, Plaintiffs allege that District and Federal Defendants violated Parent and Student Plaintiffs' right to privacy guaranteed by the U.S. Constitution. While there is no generalized right to privacy, the Supreme Court has recognized a privacy right against certain kinds of governmental intrusions under the Due Process Clause of the Fourteenth Amendment. *Katz v. United States*, 389 U.S. 347, 350, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967); *Roe v. Wade*, 410 U.S. 113, 152, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973). "[O]nly personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty,' are included in this guarantee of personal privacy." *Roe*, 410 U.S. at 152, 93 S.Ct. 705 (*quoting Palko v. Connecticut*, 302 U.S. 319, 325, 58 S.Ct. 149, 82 L.Ed. 288 (1937)). 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 sacrifices." *Washington v. Glucksberg*, 521 U.S. 702, 721, 117 S.Ct. 2302, 138 L.Ed.2d 772 (1997) (internal quotation marks and citations omitted). The law further requires "a 'careful description' of the asserted fundamental liberty interest." *Id.* Courts are, however, "reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended." *Collins v. City of Harker Heights, Tex.*, 503 U.S. 115, 125, 112 S.Ct. 1061, 117 L.Ed.2d 261 (1992).

A. Fundamental Right

Plaintiffs formulate their privacy right as "a fundamental right to bodily privacy" which includes "a right to privacy of one's fully or partially unclothed body and the right to be free from State-compelled risk of intimate exposure of oneself to the opposite sex." Compl. ¶ 188. Reformulated elsewhere in the Complaint, Plaintiffs argue:

> The ability to be clothed in the presence of the opposite biological sex, along with the freedom to use the restroom, locker room and

> shower away from the presence of the opposite biological sex, is fundamental to most people's sense of self-respect and personal dignity, including plaintiffs', who should be free from State-compelled risk of exposure of their bodies, or their intimate activities.

Id. at ¶ 199.

District and BRO argue that Plaintiffs' asserted fundamental right is overbroad and unrecognized by any federal court. Under substantially similar circumstances, a district court considered a nearly identically-phrased fundamental right. *See Students v. U.S. Dep't of Educ.*, No. 16-CV-4945, 2016 WL 6134121, at *22 (N.D. Ill. Oct. 18, 2016) [hereinafter "*Students & Parents R & R*"], report and recommendation adopted, *Students and Parents for Privacy v. U.S. Dep't of Educ.*, 2017 WL 6629520 (N.D. Ill. Dec. 29, 2017) [hereinafter "Students & Parents"]. That court also considered a second restatement of the right at issue: "does letting a biological male use the girls' locker room and restrooms, and so subjecting Girl Plaintiffs to the risk of compelled exposure of their bodies to the opposite biological sex, violate Girl Plaintiffs' constitutional right to privacy?" *Students & Parents R & R,* 2016 WL

6134121, at *23. The district court found the latter formation more apt than the one from the complaint; it then posited its own version of the issue: "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?" *Id*. The Court adopts the district court's formation in *Students & Parents*, which is a more specific and complete statement of Plaintiffs' asserted privacy right in this case.

Equipped with this description of the asserted right, the Court must determine whether high school students have a fundamental right not to share restrooms or locker rooms with transgender students. Defendants direct the Court to several cases similar to this one in which courts have rejected Plaintiffs' purported privacy interest in favor of transgender students' access to school facilities. 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. Defendants primarily rely upon *Students & Parents*, 2017 WL 6629520. As discussed above, the court in Students & Parents concluded that high school students did not have a fundamental

right not to share school facilities with transgender students whose assigned sex is different than theirs. *Students & Parents R & R*, 2016 WL 6134121, at *23. In reaching that conclusion, the court considered the practical implications of transgender students' access to facilities, our Nation's history of protecting and deferring to school administrators' discretion, and contemporary notions of liberty and justice. *Id.* at *24–27.

The court noted that no student was "compelled" by a state actor to use facilities with a transgender student. Rather, District 211's policy allowed transgender students to use facilities of their choice. The facilities included privacy stalls as well as other protections. Additionally, privacy alternatives such as separate, single-user facilities were available. Students could also request the use of an alternate changing area within the locker rooms. The court found these privacy protections significant and that they distinguished the case from those involving compulsion and involuntary invasions of privacy. The court opined:

> Generally speaking, the penumbral rights of privacy the Supreme Court has recognized in other contexts protect certain aspects of a person's

> private space and decision-making from governmental intrusion. Even in the context of the right to privacy in one's own body, the cases deal with compelled intrusion into or with respect to a person's intimate space or exposed body. No case recognizes a right to privacy that insulates a person from coming into contact with someone who is different than they are, or who they fear will act in a way that causes them to be embarrassed or uncomfortable, when there are alternative means for both individuals to protect themselves from such contact, embarrassment, or discomfort.

Id. at *24. Regarding the Nation's history of deferring to schools, the court wrote:

> Therefore, our Nation's deeply rooted history and tradition of protecting school administrators' discretion require that this Court not unduly constrain schools from fulfilling their role as a principal instrument in awakening the child to cultural values, in preparing him or her for later professional

> training, and in helping him or her to adjust normally to his or her environment.

Id. (internal quotation marks, alterations, and citations omitted). The court also found that the plaintiffs' asserted privacy right was inconsistent with contemporary notions of liberty and justice. *Id.* at *25. It was persuaded that transgender people do not live their lives in conformance with their sex assigned at birth and the transgender students at issue in that case were treated by others in a manner that was consistent with their gender identities. Additionally, the court reflected on the fact that, at that time, the U.S. military and militaries of other nations allowed transgender personnel to serve fully and openly. Recognition and acceptance of transgender people in various areas of society contradicted plaintiffs' asserted right of high school students not to share facilities with transgender students.

Similarly, the Seventh Circuit granted a transgender boy's request for a preliminary injunction enjoining a school district from preventing him from using facilities consistent with his gender identity. *See Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.,* 858 F.3d 1034, 1038 (7th Cir. 2017), *cert. dismissed, Kenosha Unified Sch. Dist. No. 1 Bd.*

of Educ. v. Whitaker ex rel. Whitaker, —— U.S. –––, 138 S.Ct. 1260, 200 L.Ed.2d 415 (2018). The plaintiff in that case, a transgender boy named Ash, was forced by the school district to use either the girls' restroom or a gender-neutral restroom in the school's main office. *Id.* at 1040. Ash had publicly transitioned and believed using the girls' restroom would undermine his transition. *Id.* He also feared that being the only student allowed to use the restroom in the main office would draw unwanted attention to his transition and have a stigmatizing effect. *Id.* Lastly, he was concerned about being disciplined for attempting to use the girls' restroom. *Id.* As a result, Ash drank less water and avoided using restrooms during the school day even though it exacerbated his medical condition that made him more susceptible to fainting and seizures. *Id.* at 1041. Ash ultimately used the boys' restroom later in high school and was punished for violating school policy. *Id.* at 1042.

When analyzing Ash's assertion of irreparable harm, the Seventh Circuit found that Ash's use of the boys' restroom was integral to his transition and emotional well-being. *Id.* at 1045. The court also found that "he was faced with the unenviable choice between using a bathroom that would further stigmatize him and cause him to miss class time, or to avoid use of the

bathroom altogether at the expense of his health." *Id.* When considering Ash's likelihood of success on the merits of his Equal Protection claim, the court found that the school's policy "does nothing to protect the privacy rights of each individual student vis-à-vis students who share similar anatomy and it ignores the practical reality of how Ash, as a transgender boy, uses the bathroom: by entering a stall and closing the door." *Id.* at 1052.

The court in that case elaborated:

> A transgender student's presence in the restroom provides no more of a risk to other students' privacy rights than the presence of an overly curious student of the same biological sex who decides to sneak glances at his or her classmates performing bodily functions. Or for that matter, any other student who uses the bathroom at the same time. Common sense tells us that the communal restroom is a place where individuals act in a discreet manner to protect their privacy and those who have true privacy concerns are able to utilize a stall.

Id. Accordingly, the court found that Ash was likely to succeed on the merits of his Equal Protection claim. Lastly, the court found the balance of harms favored Ash and the school district had not demonstrated that it will suffer any harm "[n]or have they demonstrated that Ash's presence has actually caused an invasion of any other student's privacy." *Id.* at 1054.[6]

In further example, a Western District of Pennsylvania court granted transgender high school students' motion for a preliminary injunction enjoining the school from requiring them to use only bathrooms matching their sex assigned at birth or single-user bathrooms. *Evancho v. Pine-Richland Sch. Dist.*, 237

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[6] The Supreme Court granted certiorari on the dispositive issue in *Whitaker*. The relevant question presented asked: "Whether a school policy requiring boys and girls to use separate bathroom facilities that correspond to their biological sex is sex stereotyping that constitutes discrimination 'based on sex' in violation of Title IX." *Whitaker*, 858 F.3d 1034, petition for cert. filed, 2017 WL 3713066, at *1 (U.S. Aug. 27 2017) (No. 17-301). The parties, however, voluntarily dismissed the case, leaving this Court without further guidance.

F.Supp.3d 267, 272 (W.D. Pa. 2017). When analyzing the plaintiffs' Equal Protection claim, that court considered whether other students' right to privacy provided a constitutionally sufficient basis supporting the school district's policy. The court found that the physical layout of the school's facilities ensured adequate privacy. *Id.* at 290–91. The court was persuaded that the bathroom stalls "afforded actual physical privacy from others viewing their external sex organs and excretory functions. Conversely, others in the restrooms are shielded from such views." *Id*. at 291.

In another example, the Eastern District of Pennsylvania in *Doe v. Boyertown Area School District* rejected a high school student's challenge to a school rule allowing transgender students to use facilities consistent with students' gender identities. 276 F.Supp.3d 324 (E.D. Pa. 2017), *aff'd*, 890 F.3d 1124 (3d Cir. 2018). The Third Circuit unanimously and emphatically affirmed the district court's decision from the bench.[7] The *Doe* court

[7] On June 18, 2018, the Third Circuit subsequently issued a formal written opinion stating: "Although we amplify the District Court's reasoning because of the interest in this issue, we affirm substantially for the reasons set

summarized the student plaintiffs' asserted right to bodily privacy as follows:

> At bottom, the plaintiffs are opposed to the mere presence of transgender students in locker rooms or bathrooms with them because they designate them as members of the opposite sex and note that, inter alia, society has historically separated bathrooms and locker rooms on the basis of biological sex to preserve the privacy of individuals from members of the opposite biological sex.

Id. at 330. In that case, a transgender boy changed clothes with the student plaintiffs in the boys' locker room and one plaintiff observed the transgender boy "wearing nothing but shorts and a bra." *Id.* at 332. In response to that encounter and others like it, student boy plaintiffs felt ashamed and embarrassed, changed quickly, and otherwise avoided encountering a transgender student in school facilities. *Id.* When analyzing the plaintiffs' § 1983 claim based on the fundamental right to

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forth in the District Court's opinion." *Doe*, 893 F.3d at 180.

privacy, the court wrote that plaintiffs believe "[t]he Constitution prohibits Defendants from placing students in situations where their bodies or private, intimate activities may be exposed to the opposite sex or where the students will use privacy facilities with someone of the opposite sex." *Id.* at 376–77. The *Doe* Court found that "[t]he plaintiffs have not identified and this court has not located any court that has recognized a constitutional right of privacy as broadly defined by the plaintiffs." *Id.* at 383. The court noted that the plaintiffs' right:

> is so expansive that it would be a constitutional violation for a female to be in the presence of a male inside of a locker room or bathroom and vice versa, and it would be a violation of one's constitutional right of privacy to view a member of the opposite sex in a state of undress even if the viewing party was fully clothed at the time. There is no support for such a broad right of privacy that has yet to be recognized.

Id. at 386. Indeed, the Third Circuit agreed, writing: "[W]e decline to recognize such an expansive constitutional right to privacy—a right that would be violated by the presence of

students who do not share the same birth sex. Moreover, no Court has ever done so." *Doe*, 893 F.3d at 193.

The district court in *Doe* then engaged in an in-depth analysis of *Students & Parents,* ultimately adopting the reasoning therein. *Doe*, 276 F.Supp.3d at 385–86. The court concluded that plaintiffs "have no constitutional right not to share restrooms and locker rooms with transgender students whose sex assigned at birth is different from theirs." *Id.* at 387. Similar to *Students & Parents,* the court in *Doe* was persuaded that the case did not involve any compelled and involuntary exposure of genitals nor did it involve a strip search or other egregious privacy infringement. The court concluded that the school's policy was narrowly tailored to serve a compelling government interest in not discriminating against transgender students.

Lastly, Defendants rely on a Southern District of Ohio decision denying a school district's motion for a preliminary injunction against USDOE. *Bd. of Educ. of the Highland Local Sch. Dist. v. United States Dep't of Educ.,* 208 F.Supp.3d 850, 854 (S.D. Ohio 2016). The plaintiff school district in that case sought to enjoin USDOE from requiring it to permit a transgender girl to use the girls' restroom. *Id.*

The district attempted to justify excluding Jane, a transgender girl student, by asserting the privacy rights of other students. *Id.* at 874. The court found that there was "no evidence that Jane herself, if allowed to use the girls' restroom, would infringe upon the privacy rights of any other students." *Id.*[8] The district argued that the "students' 'zone of privacy' in the restroom starts at the door of the restroom, not merely at the stall door, and that, therefore, students' privacy interests would be imperiled if Jane even enters the girls' bathroom." *Id.* at 875. The court found that there were no complaints of privacy violations and the district's "purported justification for its policy is 'merely speculative' and lacks any 'factual underpinning.'" *Id.* It concluded that the district "cannot show that its refusal to let Jane use the girls' restroom is substantially related to its interest in student privacy." *Id.* at 867.

In contrast with Defendants' authority, Plaintiffs present the Court with unpersuasive

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[8] The Third Circuit in *Doe* affirmed the district court's ruling "that even if a cisgender plaintiff had been viewed by a transgender student, it would not have violated the cisgender student's constitutional right to privacy." 893 F.3d at 186.

precedent that fails to establish their purported privacy right. Plaintiffs argue that their asserted privacy right finds its genesis in the Ninth Circuit's decision in *York v. Story*, 324 F.2d 450, 455 (9th Cir. 1963). The Ninth Circuit explained: "We cannot conceive of a more basic subject of privacy than the naked body. The desire to shield one's unclothed figured from the view of strangers, and particularly strangers of the opposite sex, is impelled by elementary self-respect and personal dignity." *Id.*; see also *Sepulveda* v. Ramirez, 967 F.2d 1413, 1415 (9th Cir. 1992) (stating that the "right to bodily privacy was established" in *York*). *York* involved a male police officer taking unnecessary nude photographs of a female victim in provocative positions and circulating them to other officers. 324 F.2d at 452. The Ninth Circuit reversed the trial court's decision to dismiss the plaintiff's claim, holding that the complaint sufficiently alleged that the officer's acts "constitute an arbitrary intrusion upon the security of her privacy, as guaranteed to her by the Due Process Clause of the Fourteenth Amendment." *Id.* at 456.

Based in part on *York*, Plaintiffs cite to several Ninth Circuit decisions acknowledging a right to bodily privacy. For example, in *Byrd v. Maricopa County Sheriff's Department*, 629 F.3d 1135 (9th

Cir. 2011), the Ninth Circuit considered the constitutionality of a strip search in jail. A female cadet conducted a strip search of a male detainee in the presence of approximately three dozen cadets and detention officers as well as other male detainees. *Id*. at 1137. The cadet searched over the detainee's boxer shorts using her hands to search over his buttocks and genitals. *Id*. The Ninth Circuit held that the cross-gender strip search, in the absence of an emergency, was a violation of the plaintiff's Fourth Amendment right to be free from unreasonable searches. *Id*. at 1146–47.

Similarly, in *Caribbean Marine Services Co. v. Baldrige*, 844 F.2d 668, 670 (9th Cir. 1988), the Ninth Circuit considered whether a federal regulation requiring the presence of a female wildlife observer on a commercial fishing vessel violated the male crewmembers' right to privacy. Given the tight quarters of the fishing vessel, the plaintiff crew members alleged that the observer may both see and be seen by crew members while undressing or performing bodily functions. *Id*. at 672. The Ninth Circuit vacated the district court's grant of a preliminary injunction in the crew members' favor. The court found, in relevant part, that the crew members' "mere allegations of inconvenience" would not support a claim of "irreparable harm to their

constitutional rights." *Id.* at 676. The court continued, however, that it would not reach the issue of whether "a female observer would infringe any constitutionally protected privacy interests" because the district court had not considered the plaintiffs' likelihood of success on the merits when it issued the preliminary injunction. *Id.*

In *Sepulveda v. Ramirez*, the Ninth Circuit considered whether a male parole officer violated a female parolee's right to bodily privacy by entering the bathroom stall she occupied while she was partially clothed. 967 F.2d 1413, 1416 (9th Cir. 1992). The plaintiff parolee was required to produce a urine sample for a drug test and the male parole officer entered the stall without her consent. *Id.* at 1415. The plaintiff strongly objected, asking the officer to leave. In response, he said that she "did not have anything he had not seen before." *Id.* The parole officer "remained in the stall while Supelveda finished urinating, cleaned herself, and dressed." *Id.* The Ninth Circuit found that, unlike other inmate cases involving obscured cross-sex observations from a distance, Supelveda experienced a "far more degrading" observation. *Id.* The Ninth Circuit rejected the parole officer's claim for qualified immunity,

concluding that the plaintiff had asserted a clearly established right to bodily privacy. *Id.*

Each of the Ninth Circuit cases that Plaintiffs cite deal with alleged violations outside of the school context. Further still, these cases involve very different circumstances than the facts of this case. Plaintiffs' Ninth Circuit authority involves a strip search that violated the Fourth Amendment, a female observer sharing ship quarters with male fishermen, a police officer taking unnecessary nude photos of a female crime victim, and a male parole officer entering a female parolee's bathroom stall while she urinated. Simply put, each involved government-compelled exposure of the plaintiffs' bodies to government actors of the opposite biological sex. At its core, none of these cases support the proposition that high school students have a fundamental right not to share restrooms and locker rooms with transgender students who have a different assigned sex than theirs. Indeed, Plaintiffs' Ninth Circuit authority does not establish that the purported privacy right is implicit in the concept of ordered liberty.

Plaintiffs also rely on two out-of-circuit cases that the Court finds unpersuasive. The only case Plaintiffs cite that discusses a privacy right in the school context is a Sixth Circuit decision

involving a parent's challenge to the dress code at his daughter's middle school. *Blau v. Fort Thomas Pub. Sch. Dist.*, 401 F.3d 381, 385 (6th Cir. 2005). The court there framed the plaintiff's asserted privacy right as the right to wear blue jeans, which it rejected. *Id.* at 393–94. Plaintiffs point to the *Blau* court's citation to an old Supreme Court case to support their position. Specifically, in *Union Pacific Railway Co. v. Botsford,* 141 U.S. 250, 251, 11 S.Ct. 1000, 35 L.Ed. 734 (1891), the Supreme Court stated:

> To compel any one ... 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.

Id. at 252. That case involved a defendant's request in a tort action that the plaintiff submit to a surgical examination to determine the extent of her injuries. *Blau*, 401 F.3d at 395. The Sixth Circuit in *Blau* concluded that the plaintiff's reliance on *Pacific Railway* was misplaced and the quote was taken out of context. "Quite plainly, forcing someone to 'lay bare the body' to a surgical procedure is not the

same thing as forcing a middle-school student to wear certain types of clothes to school." *Id.* at 395. Here too, the facts of *Blau* and *Pacific Railway* are distinguishable and do not lend any support for Plaintiffs' purported privacy right relating to the presence of transgender students in school facilities.

The second out-of-circuit case Plaintiffs rely upon is a District of Maine decision involving a pretrial detainee's lawsuit against a jail. *Crosby v. Reynolds*, 763 F.Supp. 666, 667 (D. Me. 1991). The plaintiff alleged that the jail unlawfully housed her with a transgender woman who retained male genitalia. *Id.* Particularly, she alleged that she encountered the transgender detainee while using the shower and restroom. The district court found that it was not "called upon to decide whether a right to privacy would be clearly invaded if males and females generally were housed together." *Id.* at 670 n.5. Instead, it concluded that the contours of the right to privacy were not clear and the defendants were entitled to qualified immunity. *Id.*

Plaintiffs also argue that the language of Title IX and one of its implementing regulations support segregating school facilities based on biological sex. Particularly, 20 U.S.C. § 1686 states that "nothing contained herein shall be

construed to prohibit any educational institution receiving funds under this Act, from maintaining separate living facilities for different sexes." Likewise, a regulation states: "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 from students of the other sex." 34 CFR § 106.33. As District points out, however, the first statutory provision above is permissive, not mandatory. *See Doe*, 893 F.3d at 195. ("This exception is permissive—Title IX does not require that an institution provide separate privacy facilities for the sexes."). This Court agrees that the regulation providing for equivalent facilities does not mandate sex-segregated facilities. Simply put, while Plaintiffs' legal authorities support a school district's decision to provide sex-segregated facilities, those authorities do not "unequivocally uphold the right to bodily privacy" as Plaintiffs claim. *See* Pls.' Resp. to District Mot to Dismiss 6.

The Court finds that Plaintiffs have failed to sufficiently allege a fundamental right to privacy cognizable under the Fourteenth Amendment. The cases that Plaintiffs rely on are inapposite and involve egregious state-

compelled intrusions into one's personal privacy. Put another way, Plaintiffs draw heavily on prisoner and police cases distinguishable from the issue presented in this case. Those cases involved government officials viewing or touching the naked bodies of persons of the opposite sex against their will. Even under some of those circumstances, courts have rejected the asserted privacy right.

The Court is persuaded by Defendants' authority and concludes that high school students do not have a fundamental privacy right to not share school restrooms, lockers, and showers with transgender students whose biological sex is different than theirs. The potential threat that a high school student might see or be seen by someone of the opposite biological sex while either are undressing or performing bodily functions in a restroom, shower, or locker room does not give rise to a constitutional violation. *See Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 657, 115 S.Ct. 2386, 2393, 132 L.Ed. 2d 564 (1995) (recognizing that "[p]ublic school locker rooms ... are not notable for the privacy they afford" and legitimate expectations of privacy in such spaces are lessened); *Doe*, 893 F.3d at 193; *Whitaker*, 858 F.3d at 1052–53; *Students & Parents R & R*, 2016 WL 6134121, at *24–27; *Evancho*, 237

F.Supp.3d at 291. To hold otherwise would sweepingly expand the right to privacy beyond what any court has recognized. The Supreme Court has repeatedly emphasized its reluctance to expand substantive due process rights such as the right to privacy. It has stressed that the short list of liberty rights "protected by the Due Process Clause includes the rights to marry, to have children, to direct the education and upbringing of one's children, to marital privacy, to use contraception, to bodily integrity, and to abortion." *Washington v. Glucksberg*, 521 U.S. 702, 720, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997). The right that Plaintiffs' assert cannot be added to that list.

B. Infringement of the Right

Even assuming Plaintiffs' asserted privacy right is fundamental, then the Court must determine whether District's challenged conduct infringed the right and if so whether "the infringement is narrowly tailored to serve a compelling government interest." *Reno v. Flores*, 507 U.S. 292, 301–02, 113 S.Ct. 1439, 123 L.Ed.2d 1 (1993).

Plaintiffs allege that because Student A has been allowed to access school facilities, "biologically male and female students ... have experienced, or may experience,

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 sex." Compl. ¶ 43. Students are allegedly afraid of being seen by and sharing space with students of the opposite biological sex while undressing. *Id.* at ¶ 44. Particularly, Plaintiffs allege that students are afraid to attend to their personal needs, avoid using school facilities, have dropped PE classes, change as quickly as possible, or avoid restrooms altogether. *Id.* at ¶ 47. Further still, Plaintiffs allege that the facilities do not adequately ensure student privacy because the stalls are not fully private as there are large gaps all around the stall doors that would allow other students to inadvertently see through. *Id.* at ¶ 83. Because of those gaps, students are at risk of exposing themselves to the opposite sex when they use the restroom. *Id.* In sum, Plaintiffs allege that this risk of intimate exposure to the opposite sex violates the students' fundamental right to privacy. *Id.* at ¶¶ 198–204.

In cases involving similar or stronger factual allegations, courts found that the student plaintiffs had failed to sufficiently allege that their schools had violated their right to privacy. In *Students & Parents*, the district court

considered allegations that student plaintiffs would suffer fear and anxiety given the risk of exposure to the opposite sex in school facilities. Plaintiffs in this case, like the plaintiffs in *Students & Parents*, do not allege that any transgender student and any Student Plaintiff "ever saw an intimate part of the other's body." *Students & Parents R & R*, 2016 WL 6134121, at *28. The court found that "[i]nside the stalls, there is no meaningful risk that any part of a student's unclothed body would be seen by another student. Therefore, these protections almost entirely mitigate any potential risk of unwanted exposure by or to any Student Plaintiff." *Id.* at *29.

In *Doe*, the court considered greater evidence of possible infringement and found no constitutional violation. As described above, a boy plaintiff in *Doe* saw a transgender boy in the locker room wearing only shorts and a bra. *Doe*, 276 F.Supp.3d at 382. In that case, a female student also entered a bathroom and saw a transgender girl while both were fully clothed. *Id.* Another boy student testified that while he was in his underwear in the locker room, a transgender boy was in close proximity to him. *Id.* The *Doe* court concluded:

> Since this matter does not involve any forced or involuntary exposure

> of a student's body to or by a transgender person, and the School District has instituted numerous privacy protections and available alternatives for uncomfortable students or to protect against involuntary exposure of a student's partially clothed or unclothed body, the plaintiffs have not shown that the defendants infringed upon their constitutional privacy rights.

Id. at 388–89; *see also Whitaker*, 858 F.3d at 1054 (the Seventh Circuit held that the plaintiffs had not demonstrated that presence of a transgender student in school facilities caused an invasion of any other student's privacy).

Even assuming that the presence of a transgender student in school facilities posed a risk of privacy infringement, which this Court finds it does not, the cases discussed above also found that policies permitting transgender access were narrowly tailored to satisfy constitutional scrutiny. For example, in *Doe*, the Third Circuit recognized that cisgender plaintiffs may experience a certain level of stress due to transgender students' presence in school facilities, but that stress was not "comparable to the plight of transgender students who are not allowed to use facilities consistent with their

gender identity." 893 F.3d at 185. The *Doe* court found that the school district "had a compelling state interest in protecting transgender students from discrimination." *Id.* at 190. The plaintiffs in *Doe* and Plaintiffs in this case both argued that a school policy allowing all students to use single-user accommodations or restrooms consistent with their biological sex would be narrowly tailored. The *Doe* court rejected that argument, finding that such a policy would violate the compelling interest identified above and brand transgender students, inviting greater scrutiny from their peers. *Id.* at 192.

In conclusion, based on the facts alleged in this case and the authority discussed above, Plaintiffs' Fourteenth Amendment claim for a violation of the right to privacy must be dismissed.

III. Title IX

Plaintiffs claim that District's Plan violates Title IX's prohibition of sex discrimination by creating a sexually harassing hostile environment. District responds that the Plan comports with Title IX. BRO and State extend District's argument and contend that Plaintiffs' request that school facilities to be segregated based on biological sex would itself violate Title IX. Title IX provides: "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....” 20 U.S.C. § 1681(a). An implementing regulation similarly provides: “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 C.F.R. § 106.33.

A. Hostile Environment

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, 119 S.Ct. 1661, 143 L.Ed.2d 839 (1999). Defendants move to dismiss the Title IX claim on the basis that Plaintiffs fail to establish the third and fourth hostile environment elements. First, Plaintiffs have not shown that the Plan targets or treats them any differently from other students who attend Dallas High School. Second, Defendants

argue that transgender students' use of school facilities is not severe, pervasive, or objectively offensive.

As to Defendants' first argument, they explain that the Plan applies equally to all students and is not discriminatory on the basis of sex. The district court in *Students & Parents* agreed with that position. There, the court found that the student plaintiffs "are not being targeted or singled out by District 211 on the basis of their sex, nor are they being treated any different than boys who attend school within District 211." *Students & Parents R & R*, 2016 WL 6134121, at *31. The court elaborated that the bathroom policy applied to all restrooms:

> That means cisgender boys use the boys' restrooms with transgender boys just like cisgender girls use the girls' restrooms with transgender girls. District 211 also has made clear that it will allow transgender boys to use the boys' locker rooms and will provide the same privacy protections in the boys' locker rooms as exist in the girls' locker rooms, if requested. Therefore, the alleged discrimination and hostile environment that Girl Plaintiffs claim to experience is not on the

> basis of their sex, and any discomfort Girl Plaintiffs allege they feel is not the result of conduct that is directed at them because they are female. All of Plaintiffs' Title IX claims suffer from this threshold problem.

Id. (internal citation omitted); *see also Doe*, 276 F.Supp.3d at 394 (considered the same issue, agreeing with *Students & Parents*, and concluding that the plaintiffs failed to make the threshold showing that they suffered discrimination on the basis of sex).

The *Doe* court also found that the school district's "similar treatment of all students is fatal to the plaintiffs' Title IX claim." 276 F.Supp.3d at 394. The court explained:

> The plaintiffs have failed to cite to any case holding that a plaintiff can maintain a sexual harassing hostile environment claim when the allegedly sexually harassing party treats all individuals similarly and there is, as such, no evidence of gender/sex animus. Simply because the plaintiffs feel a particular way which they equate to their sex does not take away from the fact that the

> School District's practice is not targeting any group or individual because of their sex. Even if the court were to find that the practice is based on sex, the plaintiffs ignore that Tile IX deals with 'discrimination' based on sex and there can be no discrimination when everyone is treated the same.

Id.

The Court is persuaded that District's Plan does not discriminate on the basis of sex within the meaning of Title IX. Plaintiffs argue that the Plan does not treat everyone the same because students are experiencing apprehension about encountering someone of another sex in an intimate space. Plaintiffs do not, however, assert any legal support for the proposition that the Plan discriminates against on the basis of their sex. *See* Pls.' Resp. to District's Motion to Dismiss 10–12. Nor do Plaintiffs attempt to overcome *Students & Parents* or *Doe* previously discussed. In this case, as in *Students & Parents* and *Doe*, District's plan does not target any Student Plaintiff because of their sex. In other words, Student Plaintiffs have not demonstrated that they are being treated any differently from other students at Dallas High School.

As outlined above, Defendants also argue that Plaintiffs have not alleged harassment that was severe, pervasive, and objectively offensive such that it deprived Student Plaintiffs of educational opportunities. Defendants contend that conduct which rises to this level generally requires instances of physical sexual contact or threatened physical sexual contact. The mere presence of a transgender student is insufficient to establish a hostile environment. Indeed, it is telling that Plaintiffs' complaint does not contain any allegation of harassment or misuse of school facilities.

Courts have recognized that the presence of transgender people in an intimate setting does not, by itself, create a sexually harassing environment that is severe and pervasive. For example, in *Students & Parents*, the court considered the same argument proffered by Plaintiffs in this case and concluded that "[g]eneralized statements of fear and humiliation are not enough to establish severe, pervasive or objectively offensive conduct." 2016 WL 6134121, at *32. The trial court found that "[t]he mere presence of a transgender student in a restroom or locker room does not rise to the level of conduct that has been found to be objectively offensive, and therefore hostile, in other cases." *Id.* The court then explained that

cases which found that the conduct was severe and pervasive involved egregious and persistent acts of sexual violence and verbal harassment. *Id*. Additionally, the court in *Students & Parents* found that any risk of a hostile environment was sufficiently mitigated by privacy protections put in place at the school. *Id.* at *33–34. The court concluded that the plaintiffs failed to show that any students were denied equal educational opportunities or access to benefits. *Id.*

Likewise, Doe followed Students & Parents, finding that the plaintiffs failed to show that the school district's practice was "so severe, pervasive, and objectively offensive that it undermined and detracted from their educational experience." 276 F.Supp.3d at 396. As with Title VII, the objective prong of this element requires looking at the totality of the circumstances which includes "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it so undermines and detracts from the victims' educational experience, that he or she is effectively denied equal access to an institution's resource and opportunities." *Id*. at 396–97 (citation and alterations omitted). In that case, the district court found that the few instances in which transgender and cisgender students

encountered each other in different stages of undress in school facilities was insufficient to show that "plaintiffs were subjected to pervasive sexual harassment in regard to their actual interaction with transgender students in the privacy facilities[.]" *Id*. at 397.

The court in *Doe* also rejected the plaintiffs' fallback position that the mere presence of transgender students in school facilities was severe and pervasive. The *Doe* court stated that plaintiffs failed to cite "any case stating that the mere possibility of future exposure to the alleged harassment can render a single instance of harassment pervasive." *Id*. It concluded that plaintiffs failed to establish that the mere presence of transgender students was severe and pervasive. Additionally, the plaintiffs there had not established that the school district's conduct was objectively offensive "because a reasonable person would not find the practice of allowing transgender students to use the locker rooms and bathrooms corresponding to their gender identity to be hostile, threatening or humiliating." *Id*. The court explained:

> There is no evidence that these students have committed any lewd acts in the locker room or bathrooms or that they have even interacted with the plaintiffs in any way

> whatsoever. There is no evidence that the transgender students have harassed the plaintiffs or any other student. All the evidence showed was that the transgender students were in the facilities for their intended purposes and they conducted themselves appropriately while in those areas.

Id. at 401–02.

Similarly, in the Title VII employment context, the Eighth Circuit determined on summary judgment that the presence of a transgender woman in the women's faculty bathroom did not create a sexually harassing environment. *Cruzan v. Special Sch. Dist, No. 1*, 294 F.3d 981, 984 (8th Cir. 2002). The *Cruzan* court found that the plaintiff "failed to show the school district's policy allowing Davis to use the women's faculty restroom created a working environment that rose to this level." *Id.* The appellate court was further persuaded by the fact that the plaintiff did not assert that the transgender woman "engaged in any inappropriate conduct other than merely being present in the women's faculty restroom." *Id.* Under the totality of the circumstances, the court concluded that a reasonable person would not have found that environment hostile or abusive. *Id.*

In this case, Plaintiffs' response to Defendants' arguments and the line of cases discussed above lacks merit. Without citing any authority, Plaintiffs argue the following:

> Severity may vary with the students affected. Its pervasiveness cannot be doubted when [the Plan] applies to an entire campus and student body, and may later be applied to other schools as well. Objective offensiveness should also not be determined as a matter of law in a society where sex-segregated facilities in public and private venues are the norm.

Pls.' Resp. to District's Motion to Dismiss 12. The Court is unpersuaded. Whether the alleged harassment is severe, pervasive, or objectively offensive requires showing that the victims were effectively denied equal access to educational resources and opportunities. Plaintiffs have not satisfied that burden by simply alleging that District's plan may be widely applied and sex-segregated facilities are well-established.

In conclusion, Plaintiffs have not made out the necessary elements of their hostile environment Title IX claim. Plaintiffs have failed to cite to any case law supporting the propositions that

District's Plan discriminates because of sex, or that it creates a severe, pervasive, and objectively offensive environment.

B. Plaintiffs' Requested Relief

BRO and State further argue that Plaintiffs' requested relief would violate Title IX. Specifically, Plaintiffs' request for a court order requiring transgender students to use single-user facilities or facilities that match their biological sex is a form of sex discrimination under the statute. The Ninth Circuit has recognized that discrimination against a transgender person because of their gender identity is discrimination because of sex. *See Kastl v. Maricopa Cty. Cmty. Coll. Dist.*, 325 F. App'x 492, 493 (9th Cir. 2009).[9] In *Kastl*, a transgender woman brought Title VII and Title IX claims against the community college where she worked as an instructor. *Id.* Kastl challenged the defendant's decision to ban her from using the women's restroom in response to a complaint that a man was using it. *Id.* Additionally, Kastl's contract was not renewed. Id. The Ninth Circuit stated that "gender

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[9] Notably, Justice Gorsuch sat by designation on this case alongside Judges Fletcher and McKeown.

stereotyping is direct evidence of discrimination prohibited by Title VII." *Id.* (citing *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989)). The court elaborated that "it is unlawful to discriminate against a transgender (or any other) person because he or she does not behave in accordance with an employer's expectation for men or women." *Id.* The Ninth Circuit, nevertheless, upheld the district court's decision to grant summary judgment on her gender discrimination claim because she was unable to prove that the defendant's actions were motivated by her gender. *Id.* at 494. Kastl's Title IX claim fell with her Title VII claim on the same ground. *Id.*

In a recent decision coming out of the Southern District of California, a court relied on *Kastl* to emphasize that "sex" under Title VII and Title IX encompasses both biological difference and gender. *Prescott v. Rady Children's Hosp.-San Diego*, 265 F.Supp.3d 1090, 1098–99 (S.D. Cal. 2017). The court in *Prescott* recognized that "[o]ther Circuits have similarly interpreted the sex discrimination provisions under Title IX and Title VII to protect transgender individuals from discrimination." *Id.* at 1098–99 (collecting cases). While these two cases may demonstrate that the Ninth Circuit interprets the term "sex"

as used in Title IX to include gender identity, neither case expressly supports the proposition that a policy requiring transgender students to use facilities that match their biological sex is sex discrimination. Indeed, in the February 2017 Dear Colleague Letter, Federal Defendants maintain that discrimination against transgender students is prohibited by Title IX, while at the same time they deferred to the discretion of school administrators on the issue of segregated facilities. The question remains, then, whether preventing transgender students from using facilities consistent with their gender identity constitutes discrimination because of sex.

Other circuits have provided more direct guidance on this issue. The Seventh Circuit in *Whitaker* unequivocally found that the relief which Plaintiffs in this case seek would violate Title IX. 858 F.3d at 1047–50. The court explained that "[b]y definition, a transgender individual does not conform to the sex-based stereotypes of the sex that he or she was assigned at birth." *Id.* at 1048. Like the court in *Prescott*, the *Whitaker* court also noted that several circuits and district courts have recognized that discrimination against someone because they are transgender is sex-

stereotyping and discrimination for gender nonconformity. *Id.* at 1048–49 (collecting cases).

A policy that requires an individual to use a bathroom that does not conform with his or her gender identity punishes that individual for his or her gender non-conformance, which in turn violates Title IX. The School District's policy also subjects Ash, as a transgender student, to different rules, sanctions, and treatment than non-transgender students, in violation of Title IX.

Id. at 1049–50. The Seventh Circuit further held that providing Ash with gender-neutral alternatives was insufficient because it increased the stigmatization he faced. *Id.* at 1050.

Likewise, the Third Circuit in *Doe* relied on *Whitaker* to write that "barring transgender students from restrooms that align with their gender identity would itself pose a potential Title IX violation." *Doe*, 893 F.3d at 195. The Third Circuit, however, did not provide a definitive ruling on that issue, instead relying on *Whitaker* to hold that the plaintiffs were not likely to succeed on the merits of their Title IX claim. Id. at 198. The Third Circuit held that "a court may not issue an injunction that would subject the transgender students to different

conditions than their cisgender peers are subjected to." *Id.* at 199; *see also Glenn v. Brumby*, 663 F.3d 1312, 1316–17 (11th Cir. 2011) (recognizing that discrimination against a transgender person because of their gender identity is discrimination because of sex); *Smith v. City of Salem*, 378 F.3d 566, 573 (6th Cir. 2004) (holding that gender stereotyping is a form of sex discrimination under Title VII).

Other district courts have reached similar conclusions. On remand from the Fourth Circuit, the district court in *Grimm* concluded that "discrimination on the basis of transgender status constitutes gender stereotyping because by definition, transgender persons do not conform to gender stereotypes." *Grimm v. Gloucester Cty. Sch. Bd.*, 302 F.Supp.3d 730, 745 (E.D. Va. 2018) (internal quotation marks and citation omitted) (quoting *M.A.B. v. Bd. Of Educ. Of Talbot Cty.,* 286 F.Supp.3d 704, 714 (D. Md. 2018)). When analyzing whether the Title IX claim based on gender stereotyping was sufficiently pled, the *Grimm* court relied on *Whitaker* to conclude that a policy requiring transgender students to use bathrooms that do not conform with their gender identity is a violation of Title IX. Id. at 747 (citing *Whitaker*, 858 F.3d at 1049–50). The availability of gender-neutral alternatives is "insufficient to relieve

the school board of liability, 'as it is the policy itself which violates [Title IX.]'" *Id.* (quoting *Whitaker*, 858 F.3d at 1040); see also *M.A.B.,* 286 F.Supp.3d at 716 (finding that a policy denying a transgender boy from accessing the boys' locker rooms because of his gender identity was sex discrimination under Title IX).

The Court finds that the reasoning in *Whitaker* and cases following it is persuasive. 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. Forcing transgender students to use facilities inconsistent with their gender identity would undoubtedly harm those students and prevent them from equally accessing educational opportunities and resources. Such an injunction or District policy would punish transgender students for their gender nonconformity and constitute a form of sex-stereotyping. *Whitaker*, 858 F.3d at 1048–50. Accordingly, the Court finds that Plaintiffs' requested relief itself would violate Title IX.

IV. Oregon State Law Claims

Plaintiffs allege that District's Plan violates the Oregon law prohibiting discrimination in education and public accommodation. See O.R.S. 659.850, 659A.403. District and BRO move to

dismiss these claims. BRO further argues that the relief Plaintiffs seek violates Oregon anti-discrimination laws.

A. O.R.S. 659.850: Discrimination in Education

To make out a discrimination in education claim under Oregon law, Plaintiffs must show that District's action either: (1) "unreasonably differentiates treatment"; or (2) "is fair in form but discriminatory in operation ... based on sex." O.R.S. 659.850(1). The Oregon Court of Appeals has interpreted "unreasonably differentiates treatment" to mean "disparate treatment discrimination—i.e., a policy or practice that affirmatively treats some persons less favorably than other persons based on certain protected criteria, such as ... sex[.]" *Nakashima v. Or. Bd. of Educ.,* 344 Or. 497, 509, 185 P.3d 429, 437 (2008). In *Nakashima*, the appellate court recognized that the second requirement above was taken directly from the Supreme Court's decision in *Griggs v. Duke Power Co.*, 401 U.S. 424, 431, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971), which embraced the disparate impact theory of discrimination. *Id.* at 509–10, 185 P.3d at 437.

In this case, there are no allegations that the Plan differentiates or is discriminatory in operation. As discussed above, the Plan does not

single out or treat any Student Plaintiff differently from any other student on the basis of sex. *See supra* Part III. Further, Plaintiffs have not demonstrated that their privacy right encompasses the right to use school facilities to the exclusion of transgender students. *See supra* Part II. Simply put, Plaintiffs have not carried their burden of sufficiently alleging either disparate treatment or discriminatory impact. Therefore, the Court dismisses this claim.

B. O.R.S. 659A.403: Public Accommodation

Under Oregon law all persons "are entitled to the full and equal accommodations, advantages, facilities and privileges of any place of public accommodation, without any distinction, discrimination or restriction on account of ... sex" or "sexual orientation." O.R.S. 659A.403(1). The scope of this statute was expanded to include "sexual orientation" which means "an individual's actual or perceived heterosexuality, homosexuality, bisexuality or gender identity, regardless of whether the individuals gender identity, appearance, expression or behavior differs from that traditionally associated with the individual's sex at birth." O.R.S. 174.100(7) (emphasis added).

There are no allegations in the Complaint that implementation of District's Plan denied students equal or full access to public accommodations based on sex. The opposite is true. The Plan ensures that all students have access to school facilities. *See e.g., Doe*, 893 F.3d at 191 (concluding that a similar policy "benefits all students by promoting acceptance"). Plaintiffs argue that the presence of transgender students in school facilities denies equal access to Student Plaintiffs who are ashamed or embarrassed to share such spaces with transgender students. Those feelings, however, do not equate to unlawful discrimination in public accommodation because the Plan itself does not deny students access to school facilities.

Contrary to Plaintiffs' position, the Oregon Court of Appeals has held that denying access to public accommodations because someone is transgender violates Oregon public accommodations law. *See Blachana, LLC v. Or. Bureau of Labor & Indus.*, 273 Or. App. 806, 808, 359 P.3d 574, 575 (2015), opinion adhered to as modified on reconsideration, 275 Or. App. 46, 362 P.3d 1210 (2015). In *Blachana*, the court held that a club owner violated Oregon's public accommodations law by banning a group of people, including transgender people, from accessing the club on Friday nights because it

was allegedly bad for business. Id. The court found that the club owner had discriminated because of the group members' sexual orientation and gender identity. *Id.* at 808–810 n.3, 359 P.3d at 575 (citing ORS 659A.403 and OAR 839-005-0003(16)).

Plaintiffs' argument in response is a non sequitur. *See* Pls.' Resp to District's Mot. to Dismiss 15–16; Pls.' Resp. to BRO's Mot. to Dismiss 9–10. Plaintiffs generally argue that what "would truly be equal treatment would be to allow any student to use single-use facilities on an equal basis[.]" Pls. Resp. to District's Mot. to Dismiss 15. Plaintiffs argue that "other students should have the same opportunity" as Student A and that their requests for accommodations not to share space with transgender students should be granted. Pls.' Resp. to BRO's Mot. to Dismiss 10. Plaintiffs provide no legal support for their public accommodations claim nor do they rebut the authority cited above. The Court's analysis of Plaintiff's arguments made in defense of their Title IX claim applies with equal force here. See supra Part III. Accordingly, this claim has not been plausibly alleged and is dismissed.

C. Plaintiffs' Requested Relief

More broadly, BRO and State raise the issue of whether a policy requiring transgender students to use facilities consistent with their biological sex would violate Oregon law. *See* BRO Mot. to Dismiss 18–19; Amicus Br. 9–10.

Beyond the *Blachana* case discussed above, State—which includes ORDOE responsible for administering and enforcing Oregon's public education law— takes the litigation position that treating transgender students differently by preventing them from using their desired facilities would violate Oregon's public accommodation law. ORDOE promulgated guidance for school districts entitled: "Creating a Safe and Supportive School Environment for Transgender Students." Compl. Ex. M-1, at 1. That guidance provides:

> It is recommended that school districts accept a student's assertion of his/her/their own gender identity. A student who says she is a girl and wishes to be regarded that way throughout the school day should be respected and treated like any other girl. So too with a student who says he is a boy and wishes to be affirmed that way throughout the school day. Such a student should be respected and treated like any other boy.

Id. at 4. ORDOE's guidance further recommends that "alternative accommodations, such as single 'unisex' bathroom or private changing space, should be made available to students who request them, but should not be forced upon students, or presented as the only option." Id. at 10. Additionally, the guidance recommended that transgender students be allowed to use facilities consistent with the student's gender identity. *Id.* at 11.

State contends that Oregon anti-discrimination law requires that transgender students be allowed to use facilities they desire. Oregon's statutory scheme, case law, and administrative guidance discussed above support State's position. Oregon law prohibits discrimination in public education based on an individual's gender identity. Plaintiffs seek a Court order directing District to treat transgender students differently based on their gender identity in violation of Oregon law. O.R.S. 659A.403(1); O.R.S. 174.100(7). A policy that segregates school facilities based on biological sex and prevents transgender students from accessing facilities that align with their gender identity violates Oregon law.

V. The Right to Direct the Education and Upbringing of One's Children

Next, Defendants move to dismiss Plaintiffs' claim that District's Plan violates Parent Plaintiffs' fundamental right to direct the education and upbringing of their children. Plaintiffs allege that District violated their parental rights by exposing their children to members of the opposite biological sex in school facilities.

Federal courts recognize the so-called *Meyer-Pierce* right of parents under the Due Process Clause of the Fourteenth Amendment. *Meyer v. Nebraska*, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923); *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925). "The Supreme Court has held that the right of parents to make decisions concerning the care, custody, and control of their children is a fundamental liberty interest protected by the Due Process Clause." *Fields v. Palmdale Sch. Dist.*, 427 F.3d 1197, 1204 (9th Cir. 2005) (citing *Troxel v. Granville*, 530 U.S. 57, 66, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000)).

In this case, Plaintiffs allege that their parental right includes "the duty to instill moral standards and values in their children, and to direct their education and upbringing" which

"encompasses the right to determine whether and when their minor children endure the risk of being exposed to members of the opposite sex in intimate, vulnerable settings like restrooms, locker rooms and showers." Compl. ¶ 210. Plaintiffs allege that they:

> have a fundamental right to determine whether and when their children will have to risk being exposed to opposite sex nudity at school, as well as a fundamental right to determine whether their children, while at school, will have to risk exposing their own undressed or partially unclothed bodies to members of the opposite sex.

Id. at ¶ 211. In *Fields*, the Ninth Circuit recognized that "the right of parents to make decisions concerning the care, custody, and control of their children is not without limitations." 427 F.3d at 1204. Parents' liberty interest does not reside "exclusively" in the parents "nor is it 'beyond regulation [by the state] in the public interest.'" *Id*. (quoting *Prince v. Massachusetts*, 321 U.S. 158, 166, 64 S.Ct. 438, 88 L.Ed. 645 (1944)). The Ninth Circuit elaborated that the *Meyer- Pierce* right does not allow parents to restrict the flow of information

in public schools. *Id.* at 1206. "Schools cannot be expected to accommodate the personal, moral or religious concerns of every parent. Such an obligation could not only contravene the educational mission of the public schools, but also would be impossible to satisfy." *Id.*

More importantly, the *Fields* court explained that parents are vested with the right to choose where their children obtain an education. However, "once parents make the choice as to which school their children will attend, their fundamental right to control the education of their children is, at the least, substantially diminished." *Id.* Parents are not vested with the power to determine how a school "will provide information to its students or what information it will provide, in its classrooms or otherwise." *Id.* (emphasis added). The Ninth Circuit then adopted the Sixth Circuit's position on this right:

> Perhaps the Sixth Circuit said it best when it explained, "While parents may have a fundamental right to decide whether to send their child to a public school, they do not have a fundamental right generally to direct how a public school teaches their child. Whether it is the school curriculum, the hours of the school day, school discipline, the timing

> and content of examinations, the individuals hired to teach at the school, the extracurricular activities offered at the school or, as here, a dress code, these issues of public education are generally 'committed to the control of state and local authorities.' "

Id. (quoting *Blau*, 401 F.3d at 395–96).

In this case, Parent Plaintiffs seek to expand their right and exercise control over District's decisionmaking authority embodied in the Plan. It is within Parent Plaintiffs' right to remove their children from Dallas High School if they disapprove of transgender student access to facilities. Once the parents have chosen to send their children to school, however, their liberty interest in their children's education is severely diminished. Plaintiffs cite no case standing for the proposition that parents retain the right to prevent transgender students from sharing school facilities with their children. As the Ninth Circuit explained in *Fields*, Parent Plaintiffs' Fourteenth Amendment liberty interest in the education and upbringing of their children "does not extend beyond the threshold of the school door." *Id.* at 1207. Accordingly, the Court dismisses this claim.

VI. Plaintiffs' Religious Claims

Lastly, Plaintiffs allege that District's Plan violates their First Amendment right to freely exercise their religion. Additionally, Plaintiffs claim that Federal Defendants' administrative actions violate the Religious Freedom Restoration Act ("RFRA"). District and BRO move to dismiss the free exercise claim. By contrast, Federal Defendants generally move that Plaintiffs' claims be dismissed for lack standing.

A. First Amendment — Free Exercise

The First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof...." U.S. Const., Amdt. 1 (emphasis added). The Supreme Court explained:

> The First Amendment obviously excludes all governmental regulation of religious beliefs as such. The government may not compel affirmation of religious belief, punish the expression of religious doctrines it believes to be false, impose special disabilities on the basis of religious views or religious status, or lend its power to one or the other side in

> controversies over religious authority or dogma.

Emp't Div. v. Smith, 494 U.S. 872, 877, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990) (internal quotation marks and citations omitted). On the other hand, "neutral, generally applicable laws that incidentally burden the exercise of religion usually do not violate the Free Exercise Clause of the First Amendment." *Holt v. Hobbs*, —— U.S. ——, 135 S.Ct. 853, 860, 190 L.Ed.2d 747 (2015) (citing *Smith*, 494 U.S. at 878–82, 110 S.Ct. 1595). Generally applicable neutral laws "need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993). Such laws are permissible if they are rationally related to a legitimate government interest. *Id.* at 531, 113 S.Ct. 2217. "A law failing to satisfy these requirements must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest." *Id.* at 531–32, 113 S.Ct. 2217.

Plaintiffs' religious allegations are succinct. They contend that the Plan is not generally applicable and that it burdens the free exercise rights of some Plaintiffs. Compl. ¶¶ 258–264.

The complaint alleges that "[s]ome students and parent members of Parents for Privacy, including Jon & Kris Golly and their children, are devout Christians whose faith requires that they preserve their modesty and not use the restroom, shower, or undress, in the presence of the opposite sex." *Id.* at ¶ 120. Likewise, the Complaint alleges that "[s]ome parent Plaintiffs, including Jon and Kris Golly, object to the Student Safety Plan for religious reasons because of their sincerely-held religious beliefs about modesty and other religious doctrines." *Id.* at ¶ 216.

Plaintiffs claim that the Plan is not generally applicable because it pertains specifically to Student A. Plaintiffs misunderstand the law. Neutrality and general applicability are considered with respect to religion. *Lukumi*, 508 U.S. at 532–33, 113 S.Ct. 2217. A law is neutral and generally applicable if it does not "infringe upon or restrict practices because of their religious motivation," and if it does not "in a selective manner impose burdens only on conduct motivated by religious belief[.]" *Id.* at 533, 113 S.Ct. 2217. Moreover, the Plan states in its opening paragraph that it is "aimed to support all students in this transition." Compl. Ex. A.

In this case, the law is neutral and generally applicable with respect to religion. There are no allegations that District forced any Plaintiff to embrace a religious belief, nor does the Plan punish anyone for expressing their religious beliefs. In any event, Plaintiffs do not have standing to bring this claim. The Gollys do not have a child at Dallas High School and are therefore unaffected by the Plan. Plaintiffs' generalized allegation that the unspecified religious beliefs of unidentified plaintiffs would be burdened lacks specificity, cannot sustain Plaintiffs' First Amendment claim.[10]

B. RFRA

The Supreme Court recognizes that Congress enacted RFRA "in order to provide greater protection for religious exercise than is available under the First Amendment." *Holt*, 135 S.Ct. at 860 (citing *Burwell v. Hobby Lobby Stores, Inc.,*

[10] Plaintiffs argue that strict scrutiny should apply because they have asserted a hybrid-rights claim combining free exercise with their other asserted rights, i.e. privacy and parental rights. *See Miller v. Reed*, 176 F.3d 1202, 1207 (9th Cir. 1999). However, given that the Court dismisses Plaintiffs' parental rights claim, Plaintiffs' assertion of a hybrid claim also fails.

—— U.S. ——, 134 S.Ct. 2751, 2761, 189 L.Ed.2d 675 (2014)).

> RFRA provides that "[g]overnment shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability," unless the government "demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest."

Id. at 860 (quoting 42 U.S.C. §§ 2000bb-1(a), (b)).

Plaintiffs allege:

> Many student Plaintiffs have religious convictions that they practice modesty. These students have the sincere religious belief that they must not undress, or use the restroom, in the presence of the opposite biological sex, and also that they must not be in the presence of the opposite biological sex while the opposite biological sex is undressing or using the restroom.

Compl. ¶ 249. Plaintiffs also reassert Kris and Jon Golly's religious beliefs in support of the RFRA claim. *Id.* at ¶ 250.

This claim is alleged solely against Federal Defendants; however, it lacks any allegation relating to their actions. The only causal connection Plaintiffs posit is that Federal Defendants' administrative actions caused District to enact the Plan. As discussed above when analyzing Plaintiffs' APA claim, Plaintiffs have failed to allege the requisite causation to establish Article III standing. *See supra* Part I. Plaintiffs' lack of standing extends to all of its claims against Federal Defendants, as the sole and tenuous thread of causation fails to tie Federal Defendant's Rule to District's Plan. Once more, assuming Federal Defendants contributed to the promulgation of the Plan, granting Plaintiffs the relief they seek under RFRA would not cause District to withdraw its Plan—which is the sole source of injury alleged in their RFRA claim. Accordingly, Plaintiffs' RFRA claim is dismissed.

CONCLUSION

District, Federal Defendants, and BRO's motions to dismiss [30] [31] [49] are GRANTED. The Court finds that Plaintiffs cannot plausibly re-allege their claims and that any amendment

would be futile. For the reasons discussed above, the Court dismisses with prejudice all of Plaintiffs' claims. Accordingly, Plaintiffs' motion for a preliminary injunction is DENIED as moot.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Constitution Amend. I

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.

U.S. Constitution Amend. XIV

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 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice

President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including

debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

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

Title IX of the Education Amendments of 1972, in relevant part:

> 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....

20 U.S.C. § 1681(a).

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
Portland Division
Case No. 3:17-cv-01813-HZ

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

DALLAS SCHOOL DISTRICT NO. 2; OREGON DEPARTMENT OF EDUCATION; GOVERNOR KATE BROWN, in her official

capacity as the Superintendent of Public Instruction; and 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.

COMPLAINT FOR DAMAGES & DECLARATORY & INJUNCTIVE RELIEF

Plaintiffs PARENTS FOR PRIVACY and PARENTS RIGHTS IN EDUCATION, along with other plaintiffs named and identified by name or their initials in the caption above (the "Plaintiffs"), allege:

1. This case is about protecting the privacy of every student within Dallas School District No. 2 ("Dallas School District" or "DISTRICT' or "District Defendant")—privacy that Defendants violate each school day through new rules and policies that radically changed the meaning of "sex" in Title IX. Defendants have unilaterally rejected the Title IX meaning of sex, which for 40 years has meant biologically male and

female, two objectively determined, fixed, binary sexes rooted in our human reproductive nature. In lieu of this unambiguous meaning of sex, Defendants inject a distinct and altogether different concept of gender identity which is subjectively discerned, fluid, and nonbinary. The Department of Education and Department of Justice (collectively "Federal Defendants") acted without regard for statutory authority or required rule-making procedures, and created and promulgated a new ultra vires rule ("Federal Rule" or "Rule") through the artifice of issuing "guidelines" ("Federal Guidelines" or "Guidelines") and then enforcing those guidelines against several schools. Those enforcement actions put all school districts nationwide on notice that they must treat a student's gender identity as their sex for the purpose of Title IX if they wish to retain federal funding. The Federal Rule redefines "sex" in Title IX and requires school districts to regulate access to sex specific private facilities such as locker rooms, restrooms, shower rooms, and hotel rooms on overnight school-sponsored trips by gender identity rather than by sex.

DALLAS SCHOOL DISTRICT ("District") fully adopted and implemented the Federal Defendant's Rule as their own district policy in the form of a Student Safety Plan. The consequence of the Federal Rule and the District

policy is unavoidable: adolescent students, in the midst of disrobing within private intimate spaces, will encounter an adolescent student of the opposite sex in their midst. The risk of such encounters, and the encounters themselves, merit prompt judicial intervention to enjoin Federal Defendants' rules and guidelines as well as DISTRICTS Student Safety Plan and policies and protect Plaintiffs' bodily privacy.

JURISDICTION AND VENUE

2. This action arises under 42 U.S.C. §§ 1983 et seq. (the "Civil Rights Act"), 5 U.S.C. §§ 500 et seq. (the "Administrative Procedure Act" or the "APA"), 20 U.S.C. §§ 1681 et seq. ("Title IX"), the Religious Freedom Restoration Act ("RFRA"), 42 USC §§ 2000bb et seq., and the First and Fourteenth Amendments to the United States Constitution.

3. The Court has subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331, 1343, 1361, and 1367.

4. The Court has jurisdiction to issue the requested declaratory relief pursuant to 28 U.S.C. §§ 2201 and 2202 and FRCP 57.

5. The Court has jurisdiction to award the requested injunctive relief under 5 U.S.C. §§ 702 and 703, 20 U.S.C. § 1683, 42 U.S.C. § 20000bb-

l(c), 28 U.S.C. § 1343(a)(3), 775 111. Comp. Stat. Ann. § 35/20, and FRCP 65.
6. The Court has jurisdiction to award nominal and compensatory damages under 28 U.S.C. § 1343(a)(4).
7. The Court has jurisdiction to award reasonable attorneys' fees and costs under the Equal Access to Justice Act, 28 U.S.C. § 2412, and 42 U.S.C. § 1988.
8. Venue lies in this district pursuant to 28 U.S.C. § 1391(b) and (e), because a substantial part of the events or omissions giving rise to all claims occurred in this district where one or more defendants are located.

PARTIES: PLAINTIFFS

9. All plaintiffs are citizens of the United States and residents of Polk County, Oregon; except that plaintiff PARENTS RIGHTS IN EDUCATION has its primary office in Washington County, Oregon.
10. Plaintiff PARENTS RIGHTS IN EDUCATION is a nonprofit organization comprised of educators, school board members, parents and grandparents whose mission is to protect and advocate for parents' rights to guide the education of their children, including but not limited to addressing "health services" and sexually explicit content and materials given or

promoted to students through educational services under the guise of comprehensive sexuality education.

11. Plaintiff PARENTS FOR PRIVACY is a voluntary unincorporated association of current and former students, as well as their parents and other concerned members of the District community who are directly impacted by the USDOE's adoption and enforcement of the legislative rule redefining the term "sex" in Title IX to include "gender identity" and implementation of the Student Safety Plan (Ex. A) and its underlying policies which are identified in ¶ 28 below.

12. Student Plaintiffs object to being required to share restrooms, locker rooms and shower rooms with students of the opposite biological sex.

13. One or more female students has attended Dallas High School, and has been subject to both the Student Safety Plan and underlying polices (Ex. A).

14. In addition, there are boy plaintiffs who attend Dallas High School and other District schools, and so are currently subject to the Student Safety Plan.

15. Each plaintiff who is individually identified by his/her initials is also a member of one of the subgroups listed below. For clarity, when used below: "Student Plaintiffs" refers to all students who were, are or will be subject to the Student

Safety Plan; "Parent Plaintiffs" refers to all parents who are part of PARENTS FOR PRIVACY (including those who are individually identified by initials); "Girl Plaintiffs" refers to all female students who attend or have attended Dallas High School who are subject to the Student Safety Plan; and "Boy Plaintiffs" refers to all male students who attend DALLAS HIGH SCHOOL or other DISTRICT schools who are subject to the Student Safety Plan.

16. Plaintiff LINDSAY GOLLY, recently attended DALLAS HIGH SCHOOL and was subject to Student Safety Plan during the 2015-2016 school year. Plaintiffs KRIS GOLLY and JON GOLLY are her parents, as well as the parents and petitioning guardians ad litem for their son A.G., currently an eighth grade student in the Dallas School District who is or soon will be subjected to the Student Safety Plan.

17. Plaintiff MELISSA GREGORY is the parent and petitioning guardian ad litem for T.F., currently an eleventh grade student at Dallas High School who is subject to the Student Safety Plan.

18. The factual statements and allegations of law below apply as alleged to a number of individual plaintiffs.

PARTIES: DEFENDANTS
Defendant Dallas School District No, 2

19. DALLAS SCHOOL DISTRICT NO. 2 ("DISTRICT") is a public school district located in Dallas, Polk County, Oregon organized under the laws of the State of Oregon, and it is a government entity capable of suing and being sued in all courts, including this court. All of DISTRICT'S actions complained of herein were conducted under color and pretense of law, including the enactment and enforcement of policies pursuant to Oregon and United States law.
20. DISTRICT is comprised of public educational institutions that provide K-12 education to both male and female students within the meaning of ORS
659A.850. DISTRICT is an employer within the meaning of ORS 659A.001 and 659A.106, as well as a place of public accommodation within the meaning of ORS 659A.400, et seq.
21. The public schools that comprise DISTRICT receive federal funds and are thereby subject to the requirements of Title IX.
22. Defendant DISTRICT is charged with the formulation, adoption, implementation, and enforcement of its policies for its schools as alleged in H 74 through 94, including the following policies challenged herein:

a. The Student Safety Plan, together with the underlying policies identified in subparagraphs b-g below, was enacted and implemented at DALLAS HIGH SCHOOL by DISTRICT on or about November 15, 2015 (Ex. A);

b. Policy AC (entitled Nondiscrimination) prohibiting discrimination and harassment in educational opportunities and services offered students on certain protected grounds, including sex and religion (Ex. B);

c. Policy AD (entitled Philosophy of Education) reciting in relevant part that "The primary purpose of the Dallas School District is to provide opportunities for the full intellectual development of each child", a "shared responsibility with parents/legal guardians [and others]...for the social, physical and emotional growth and development of the individual child" and "a shared responsibility for developing in all children an awareness of the societal responsibilities to themselves, other individuals and to the local community or to the larger community of state, nation, or world" (Ex. C);

d. Policy JBA/GBN (entitled Sexual Harassment) defines "sexual harassment"

to include "conduct or communication [that] is so severe, persistent, or pervasive that it has the purpose or effect of unreasonably interfering with a student's educational performance...; or creates an intimidating, offensive or hostile educational or working environment" (Ex. D);

e. Policy JBA/GBN-AR (entitled Sexual Harassment and Sexual Violence) further provides "sexual harassment" includes "...9. Other sexually motivated behavior which may affect working conditions, or the educational process" (Ex. E);

f. Policy JF/JFA (entitled Student Rights and Responsibilities) whereby the Board acknowledges responsibility to afford students "civil rights - including the rights to equal educational opportunity... and 5. The right to privacy..." (Ex. F);

g. Policy JFCF (entitled Harassment/Intimidation/Cyberbullying/ Teen Dating Violence/Domestic Violence-Student), whereby the Board acknowledges in its "its commitment to providing a positive and productive learning environment will consult with parents/guardians,...students...in developing this policy", and again defining "Harassment, intimidation or bullying" to

> mean "any act that substantially interferes with a student's educational benefits, opportunities or performance... having the effect of knowingly placing a student in reasonable fear of physical harm...[or] creating a hostile educational environment, including interfering with the psychological well-being of the student." (Ex. G).

23. Defendant DISTRICT is responsible for the enforcement of its policies by its board of directors, Superintendent, administrators, teachers, and all other district personnel.

Defendant Oregon Department of Education

24. Defendant OREGON DEPARTMENT OF EDUCATION ("ODE") is an executive agency of the state of Oregon and is responsible for the administration and funding of K-12 public education in the state of Oregon, as well as the enforcement of Title IX, 20 U.S.C. §§ 1681-1688, and its implementing regulation at 34 C.F.R. Part 106 for schools under its jurisdiction. On or about May 5, 2016 ODE issued its "Guidance to School Districts: Creating a Safe and Supportive School Environment for Transgender Students", official policy based in part on legal advice given

in documents issued by USDOE and USDOJ. (Ex. M-l). ODE has not changed its policies in light of subsequent actions by federal officials recited in ¶ 39 below.

Defendant Governor Kate Brown

25. Governor KATE BROWN is the Superintendent of Public Instruction and the highest ranking executive official at OREGON DEPARTMENT OF EDUCATION. In this capacity, she is the final policymaker responsible for the operation and management of the ODE, including the issuance of Exhibit M-l. She is sued in her official capacity only.

Defendant United States Department of Education

26. Defendant United States Department of Education ("USDOE") is an executive agency of the United States government and is responsible for the promulgation, administration, and enforcement of Title IX, 20 U.S.C. §§ 1681-1688, and its implementing regulation at 34 C.F.R. Part 106.

27. The USDOE, through its Office for Civil Rights ("OCR"), has exercised its alleged authority to promulgate, administer and enforce its new legislative rule for Title IX, as alleged in

¶¶ 49 to 73, to the detriment of Student Plaintiffs and their respective parents.

Defendant Secretary Betsy DeVos

28. JOHN B. KING, JR. ("KING"), was the United States Secretary of Education at all times material to the enactment of the Rule and Guidelines. In this capacity, he was the final policymaker responsible for the operation and management of the USDOE. Defendant BETSY DEVOS subsequently became the Secretary of Education in early 2017 and is currently the final policymaker for the operation and management of the USDOE. DEVOS is sued in her official capacity only.

Defendant United States Department of Justice

29. Defendant United States Department of Justice ("USDOJ") is an executive agency of the United States government and is responsible for the enforcement of Title IX, 20 U.S.C. §§ 1681-1688, and its implementing regulation at 34 C.F.R. Part 106. Pursuant to Executive Order 12250, the DOJ has authority to bring enforcement actions to enforce Title IX.

Defendant Attorney General Jeff Sessions

30. LORETTA E. LYNCH ("LYNCH") was the United States Attorney General at all times material to the enactment of the Rule and Guidelines. In this capacity, she was the final policymaker responsible for the operation and management of the USDOJ, including the enforcement of Title IX, 20 U.S.C. §§ 1681-1688, and its implementing regulation at 34 C.F.R. Part 106. Subsequently, Defendant JEFF SESSIONS became the Attorney General in early 2017 and is currently the final policymaker for the operation and management of the USDOJ. SESSIONS is sued in his official capacity only.

FACTUAL BACKGROUND

31. Plaintiffs believe no student can or should be forced to use private facilities at school, like locker rooms, showers and restrooms, with students of the opposite sex. Plaintiffs further believe no government agency can legitimately hold hostage education funding to advance an unlawful agenda enacted unlawfully, and no school district should trade its students' constitutional and statutory rights for dollars and cents from the U.S. Government. This is especially true when it means abandoning a

common-sense practice that has long protected every student's privacy and access to education.
32. Bypassing congressional intent, judicial rulings, and more than 40 years of Title IX history enforcing the unambiguous term "sex" (meaning males and females), the Federal Defendants decreed by unlawful agency fiat a new legislative rule redefining "sex" in Title IX and its implementing regulations to include "gender identity", thereby requiring that a school must treat a student's gender identity as the student's sex for purposes of Title IX and its implementing regulations.[1] The Federal

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[1] The term "sex," as used in both Title IX and this Complaint, is a binary concept that refers to one's biological status as either male or female determined at birth and manifest by biological indicators such as chromosomes, gonads, hormones, and genitalia. See, e.g., Am. Psychological Ass'n, Answers to Your Questions About Transgender People, Gender Identity and Gender Expression 1, http://www.apa.org/topics/lgbt/transgender.pdf (Sex is assigned at birth, refers to one's biological status as either male or female, and is associated primarily with physical attributes such as chromosomes, hormone prevalence, and external and internal anatomy."); Am. Psychological Ass'n, Diagnostic and Statistical

Defendants' new Rule is succinctly stated this way: a school must "treat a student's gender identity as the student's sex for purposes of Title IX and its implementing regulations." May 13,

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Manual of Mental Disorders 451 (5th ed. 2013) ("DSM-5") (noting that sex "refer[s] to the biological indicators of male and female (understood in the context of reproductive capacity), such as in sex chromosomes, gonads, sex hormones, and nonambiguous internal and external genitalia."). When "male" and "female" are used in this Complaint, they are used consistently with this definition. "Gender identity" as defined by the Department of Education "refers to an individual's internal sense of gender. A person's gender identity may be different from or the same as the person's sex assigned at birth." U.S. Department of Justice and U.S. Department of Education, Dear Colleague Letter: Transgender Students 1 (May 13, 2016). Exhibit K. It is also subjective, fluid, and not rooted in human reproduction or tied to birth sex. Lawrence S. Mayer & Paul R. McHugh, *Sexuality and Gender: Findings from the Biological, Psychological, and Social Sciences*, New Atlantis, at 87-93 (2016). When "gender identity" is used in this Complaint, it is used consistently with this definition.

2016 Dear Colleague Letter: Transgender Students (Ex. K).

33. Federal Defendants created and promulgated this new legislative rule ("Rule") through a series of Federal Guidelines that were sent to school districts between April 2014 and May 2016, including:

• U.S. Department of Education, Office for Civil Rights, Questions andAnswers on Title IX and Sexual Violence, 5 (Apr. 2014) (Ex. H)

• U.S. Department of Education, Office for Civil Rights, Questions and Answers on Title IX and Single-Sex Elementary and Secondary Classes and Extracurricular Activities, 25 (Dec. 2014) (Ex. I)

• U.S. Department of Education, Office for Civil Rights, Title IX Resource Guide, 1, 15, 16, 19, 21-22 (Apr. 2015) (Ex. J) and

• Dear Colleague Letter on Transgender Students (Ex. K).

34. Contemporaneously, Federal Defendants enforced the policies announced in these Guidelines as "a condition of receiving Federal funds", publicly threatening to remove all federal funding from school districts that did not submit to their Guidelines. (Ex. K).

35. The Rule made two radical changes to the law that are directly at issue in this case: It (1) redefined the term "sex" in Title IX to include gender identity, and (2) prohibited school

districts from providing sex-specific facilities including locker rooms, shower rooms, restrooms, and hotel rooms on school sponsored trips.

36. Under the Rule, school districts must provide any male student who professes a female gender identity unrestricted use of girls' private facilities and any female student who professes a male gender identity unrestricted use of boys' private facilities.

37. The Rule is ultra vires because it violates both substantive and procedural requirements of the Administrative Procedure Act ("APA") in that it was considered or adopted through notice and comment rulemaking and was not approved or promulgated by the President of the United States.

38. The Rule is unlawful because it mandates a school policy that creates a sexually harassing hostile environment and violates privacy.

39. Subsequently, on or about February 22, 2017, USDOE and USDOJ issued a letter withdrawing the guidance in their May 13, 2016 Dear Colleague Letter (Ex. K) and an April 2015 Letter "in order to further and more completely consider the legal issues involved." Additionally, on or about March 3, 2017 the U.S. District Court for the Northern District of Texas dismissed without prejudice the multi-state lawsuit challenging the Rule and dissolving its

preliminary injunction. Finally, on or about March 6, 2017 the United States Supreme Court stayed and ultimately remanded Gloucester County School Board v. G.G., 2016 WL 1567467, F3d (4th Cir. 2016). for further consideration. Gloucester County School Board v. G.G, 132 S.Ct. 2442 (2016). More recently, USDOE's Office of Civil Rights has instructed its field offices to continue investigation and potential enforcement of claims from transgender students on a case-by-case basis. Ex. N. Notwithstanding the foregoing, the Rule has not been formally repealed, and it has continuing legal force and effect binding DISTRICT.

40. In response to the foregoing Federal Guidelines and enforcement, the DISTRICT stopped its historic and lawful practice of sex-separating locker rooms and restrooms and adopted and implemented the DISTRICT Student Safety Plan. Ex. A. Despite the actions recited in ¶ 39 above, DISTRICT has not changed its policies or the Student Safety Plan complained of herein.

41. The Student Safety Plan regulates all DISTRICT schools, programs, and students aged pre-school through 12th grade, including the Student Plaintiffs.

42. Because of the Student Safety Plan, Student A currently uses both the boys' locker rooms and the boys' restrooms at DALLAS HIGH

SCHOOL, which creates an intimidating and hostile environment for male students attending there, some of whom are as young as 14, because Student A—who is biologically a female but professing a male gender identity—regularly uses their private facilities at the same times as Boy Plaintiffs.

43. As a direct result of Defendants' policies and actions, every day biologically male and female students go to school, where they have experienced, or may experience, 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.

44. Because of Defendants' policies and actions, these students are afraid of being seen by, and being forced to share intimate spaces with a student of the opposite biological sex while they are in various stages of undress.

45. Because of Defendants' policies and actions, these students are afraid they will have to see other students of the opposite biological sex in a state of undress.

46. Because of Defendants' policies and actions, male and female students are afraid of having to attend to their most personal needs, especially during a time when their body is often undergoing what they and other students may

regard as embarrassing changes as they transition from childhood to adulthood, in a locker room, shower or restroom with a student of the opposite biological sex present. Additionally, no provision has been made in the Student Safety Plan or otherwise for appropriate disposal of Student A's feminine hygiene products in facilities previously reserved for male students, thereby creating sanitation and health concerns.

47. The Student Safety Plan has had and continue to have a profoundly negative effect on the students' access to educational opportunities, benefits, programs, and activities at their schools in one or more of the following particulars:

a. Some students actively avoid using the locker rooms, restrooms and showers at school;

b. One or more students have dropped physical education classes to avoid having to encounter other students of the opposite biological sex in the locker room, as documented in the minutes of the December 14, 2015 school board meeting;

c. Other students change as quickly as possible in the locker room, avoiding all eye contact and conversation, all the while experiencing great stress and anxiety over whether a student of the opposite biological sex will walk in while they are undressing or changing; and

d. Some students avoid the restroom altogether, and others wait as long as possible to use the restroom, so they won't have to share it with a student of the opposite biological sex, thus potentially risking a variety of health problems.

48. These negative effects on the students' access to educational opportunities, benefits, programs, and activities at their school are a direct result of USDOE's adoption and enforcement of the Rule redefining the term "sex" in Title IX to include "gender identity", which in turn forms the justification for the Student Safety Plan.

49. USDOE's action violates the Administrative Procedure Act, and the Student Safety Plan violates the student plaintiffs' right to privacy, discriminates on the basis of sex under Title IX by creating a hostile environment, and violates additional constitutional and statutory rights of Student Plaintiffs, for which they seek relief from this Court. Additionally, the aforementioned violations violate Parent Plaintiffs' rights as parents to exercise their constitutional right to direct the upbringing and education of their children, for which they too seek relief from this Court.

Federal Defendants' Unlawful Title IX Policy

50. Congress passed Title IX of the Education Amendments of the Civil Rights Act in 1972 pursuant to its Spending Clause power to prohibit invidious sex discrimination. Title IX 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...." 20 U.S.C. § 1681.

51. Title IX was designed to "expand basic civil rights and labor laws to prohibit the discrimination against women which has been so thoroughly documented." 118 Cong. Rec. 3806 (1972) (Statement of Senator Birch Bayh of Indiana).

52. Congress delegated authority to federal agencies to "effectuate the provisions of section 1681 of this title...by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute..." but specified that "no such rule, regulation, or order shall become effective unless and until approved by the President." 20 U.S.C. § 1682.

53. Regulations implementing Title IX in relevant part provide that "no person shall, on

the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any academic, extracurricular...or other education program or activity operated by a recipient which receives Federal financial assistance," and that no funding recipient shall on the basis of sex "treat one person differently from another in determining whether such person satisfies any requirement or condition for the provision of such aid, benefit, or service; ... Provide different aid, benefits, or services or provide aid, benefits, or services in a different manner; ... Deny any person any such aid, benefit, or service; ... Subject any person to separate or different rules of behavior, sanctions, or other treatment; ...[or] Otherwise limit any person in the enjoyment of any right, privilege, advantage, or opportunity." 34 C.F.R. § 106.31.

54. Title IX does not authorize Federal Defendants to regulate the content of speech or discriminate on the basis of viewpoint, which is presumptively unconstitutional under the First Amendment to the United States Constitution.

55. Title IX and its implementing regulations use the term "sex" to categorize the persons protected from invidious discrimination by the law.

56. The term "sex" in Title IX and its implementing regulations means the

immutable, genetic, reproductively-based binary male-female taxonomy. See p. 12, fn. 1. The text of Title IX demonstrates this male-female taxonomy by using terminology such as "both sexes," "one sex," and "the other sex."

57. Title IX and its implementing regulations do not use the term "gender identity," or alternate terms referring to the same concept (e.g., "transgender," or "transsexual"). Nothing in the text, structure, or legislative history of Title IX suggests or supports that the term "sex" in Title IX includes "gender identity." Nothing in the text, structure, and drafting history of Title IX's implementing regulations suggests or supports that the term "sex" in these regulations includes "gender identity."

58. Although Senator Al Franken of Minnesota began in 2011 introducing legislation modeled after Title IX to prohibit gender identity discrimination in schools, Congress has repeatedly failed to enact the legislation.

59. Title IX and its implementing regulations expressly permit sex-specific private facilities, providing in relevant part: "nothing contained herein shall be construed to prohibit any educational institution...from maintaining separate living facilities for the different sexes...." 20 U.S.C. § 1686.

60. The implementing regulations confirm that living facilities include restrooms, locker rooms,

and shower rooms - "[school districts] may provide separate toilet, locker room, and shower facilities on the basis of sex, [as long as] such facilities provided for students of one sex [are] comparable to such facilities provided for students of the other sex." 34 C.F.R. § 106.33.

61. Federal Defendants have provided no explanation for the new Rule, including its basis for the decision to promulgate the Rule, a description of the factors relied upon to formulate the Rule, its recognition of the fundamentally different nature of sex and gender identity, or any recognition or explanation for the reversal of long-standing policy that permitted districts to separate private facilities by sex without regard to a student's professed gender identity.

62. Federal Defendants also failed to substantively assess how the new Rule would impact privacy rights of all male and female students on a given campus, including District schools.

63. Federal Defendants have enforced the Rule through public investigations, findings, and threats to revoke millions of dollars in federal funding from several school districts because they provided sex-specific private facilities. U.S. Department of Education, Resources for Transgender and Gender Nonconforming Students: OCR Resolutions,

http://www2.ed.gov/about/offices/list/ocr/lgbt.html (last visited August 10, 2016). Federal Defendants have no statutory authority to investigate a claim based on gender identity or gender nonconformity.

64. Township High School District 211 ("District 211") in Palatine, Illinois was one of the districts investigated.

65. The Office of Civil Rights for the DOE ("OCR") issued a Letter of Findings against District 211 in November 2015. Township High School District 211, 05-14-1055 (Office of Civil Rights November 2, 2015) (letter of findings). (Ex. L). That letter stated in relevant part that when OCR investigates Title IX complaints it looks for evidence of "discrimination based on sex, gender identity, or gender nonconformity." *Id.*

66. The letter also stated that District 211 violated Title IX by discriminating on the basis of gender identity because District 211 did not let a male student who professes a female gender identity use girls' locker rooms. OCR then threatened to revoke $6 million in federal funding from District 211 if it continued to sex-separate private facilities.

67. In December 2015, District 211 signed an Agreement with OCR and granted the male student access to the girls' locker rooms. (Ex. M).

68. Parents and students who suffered privacy and constitutional harm filed a federal lawsuit regarding that Agreement. *Students and Parents for Privacy v. Dep't of Educ, et al.*, No. l:16-cv-04945 (N.D. 111. filed May 4, 2016).
69. Similarly, in May 2016, Defendant USDOJ sent letters to the North Carolina Governor and the University of North Carolina system threatening to revoke Title IX funding from North Carolina schools if the state and University System enforced a state law that mandates sex-specific private facilities in government buildings, including schools.
70. When the Governor resisted, Defendant USDOJ filed a federal lawsuit against the State of North Carolina. *U.S. v. N.C.*, No. l:16-cv-00425 (M.D. N.C. filed May 9, 2016).
71. These enforcement actions, with the Guidelines, sent a clear message to school districts nationwide, including Dallas School District, that they too could lose millions in federal funding for maintaining sex-specific private facilities, specifically authorized pursuant to Title IX.
72. Despite the subsequent actions taken by USDOE, USDOJ and federal courts (See H 39), DISTRICT continues to implement its Student Safety Plan in derogation of the rights of Plaintiffs and others.

73. Because the Rule has not been repealed (See ¶39), DISTRICT still faces potential legal liability from OCR and others on the basis of "gender identity", allegedly in violation of Title IX, by refusing a biological female, who perceives herself to be male, access to the boys' locker and shower rooms.
74. Per the Dallas School District No. 2 Adopted Operating Budget 2015-2016, DISTRICT has faced and potentially continues to face the threat of losing over $2 million dollars in federal funds for each school year from 2015-2016 to the present if it fails to grant a biologically female student access to the boys' restroom, locker room and shower rooms.

Dallas School District's Unconstitutional Policy

75. In response to the threat of OCR enforcement action, on or about November 15, 2015, DISTRICT developed and implemented the Student Safety Plan (Ex. A) granting Student A the right to enter and use all boy's locker rooms, restrooms and showers at DISTRICT schools according to her perceived gender identity. DISTRICT has publicly defended the Student Safety Plan based on USDOE's unlawful action described above.

Despite the actions recited in ¶39 above, DISTRICT has not changed its policies.

76. Student A is currently a 12th grade student at Dallas High School.

77. Student A was born a girl and is anatomically female. Throughout most of her school career, Student A identified to her classmates, including Student Plaintiffs, as a girl, consistent with her biological sex, and used the restrooms, locker rooms and showers consistent with her biological sex prior to and including her high school career until September 2015.

78. In September 2015, Student A decided to publicly identify herself as male, although prior to that time she had been using the girls' facilities in middle school and high school. Student A requested that she be allowed to use the boys' locker rooms and shower facilities, but was unsure which restroom facilities she preferred.

79. DISTRICT provided Student A with her choice of private facilities to change her clothes for physical education from the fall of 2015 through the end of the school year in June, 2016. DISTRICT told Student A that she could use the boys' locker rooms and shower facilities while biologically male students are present, even though her presence would invade the privacy of those male students, and even though her

parent and legal guardian objected. DISTRICT further permitted Student A to "use any of the bathrooms in the building to which he identifies sexually." A true copy of the floor plan of DALLAS HIGH SCHOOL is attached hereto as Ex. 0. DISTRICT elected not to accommodate Student A by granting her access to separate existing unisex restroom, locker room and shower facilities accessible through the main office as alleged herein, and Because of the Student Safety Plan (Ex. A), Student A is currently using the boys' locker rooms, showers and restrooms at Dallas High School while male students are present, including some of the Boy Plaintiffs and other biologically male students.

80. The Student Safety Plan described above was shared with other students in Student A's PE class, but was not otherwise disclosed or discussed with DISTRICT students or parents of DISTRICT students.

81. In response to Student A's complaints for accommodation, DISTRICT is preparing to make changes to its locker room, shower and restroom facilities for the use of Student A and others at a cost variously estimated at $200,000-$500,000. Even if such changes are made, DISTRICT will still allow all persons to utilize the facilities of their choice without accommodating those who still desire segregated facilities.

82. Under DISTRICT'S previous discrimination policy biological females were not expressly authorized to enter male locker rooms or other facilities. However, Student A has utilized the boys' locker room and shower facilities on numerous occasions from November 15, 2015 to the present and has changed clothes while male students were present.

83. Similarly, even using toilets in stalls does not resolve the embarrassment, humiliation, anxiety, intimidation, fear, apprehension, and stress produced by using the restroom with students of the opposite sex, because the stalls are not fully private; and, besides, the Student Plaintiffs are still attending to private bodily needs in the immediate presence of the opposite sex. In both the boys' and girls' restrooms, there are large gaps above and below the stall doors, and gaps along the sides of the door, that another student could see through even inadvertently. These gaps mean that the Student Plaintiffs, both boys and girls, must risk exposing themselves to the opposite sex every time they use the restroom. DISTRICT cannot assure Student Plaintiffs' that their partially unclothed bodies will not be exposed to members of the opposite biological sex while using the restroom.

84. As a consequence, some Plaintiffs and other students are using the restroom as little as

possible while at school so they will not have to risk using the restroom with a student of the opposite biological sex present. This may increase their risk for various health conditions, like bladder infections.

85. Some students risk tardiness by hurrying to distant facilities of the school, during short 5-minute passing periods, to try and find a restroom not likely to be used by a student of the opposite biological sex.

86. The stress and anxiety some students feel over having to use the restroom with biologically opposite-sex students is an ever-present distraction throughout the school day, including during class instruction time.

87. The DALLAS HIGH SCHOOL Principal has told students that all restroom facilities may be utilized by any student regardless of their biological sex and may not object to students of the opposite sex utilizing the same facilities, which is not acceptable to Parent Plaintiffs for multiple reasons set forth in the following paragraphs:

88. Depending on the classes a student has, this can mean that they travel significant distances from one class to another in a limited passing period.

89. Restrooms are often a significant distance apart, so a student's choice to find another restroom may mean there is not enough time to

find another restroom, attend to their personal needs, and still arrive to class on time. Tardiness may result in detention or other sanctions.

90. The suggested solution is even more unworkable if there are lines in the restrooms, or if there is an urgent or immediate need to use the restroom.

91. DISTRICT'S response to Parent Plaintiffs makes the restroom environment hostile to Student Plaintiffs since each time they use the restroom they must do so knowing that a student of the opposite biological sex can walk in on them. In the same way, in response to the request for a private locker room facility, the DALLAS HIGH SCHOOL Principal told Parent Plaintiffs that their students could use the unisex staff lounge, which has no functioning shower. None of these is an acceptable alternative.

92. Students at DALLAS HIGH SCHOOL have expressed their discomfort with the accommodations provided for Student A and attempted to circulate a petition objecting to such accommodations. However, Principal Steve Spencer confiscated the petitions being circulated and ordered students circulating them to discontinue doing so or face disciplinary action.

93. At Board meetings on December 14, 2015, January 19, 2016 and February 11, 2016,

despite public opposition from Plaintiffs and many other parents and students, DISTRICT defended its policies and practices indefinitely granting Student A right of entry to and use of any and all boys' locker rooms, shower rooms and restrooms in DALLAS HIGH SCHOOL. DISTRICT represents speakers at these meetings as experts on gender identity issues, all of whom have exclusively supported the Student Safety Plan and condemned any objections to these policies.

94. Based on DISTRICT'S public defense of these policies, Plaintiffs further believe that Student A will similarly be allowed access to other DISTRICT facilities of her choice throughout the DISTRICT when attending school or other programs at such other DISTRICT facilities.

95. In addition to Student A, plaintiffs understand on information and belief there are one or more other students attending DISTRICT schools who self-identify as transgender or "gender fluid."[2]

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[2] "Gender fluidity" is generally defined to mean that one's gender identity can change day-to-day, or even moment-to-moment, and is not limited to the two binary genders (i.e., to "male" or "female"). So, for example, one may identify as female one moment, as male the next, and as

96. In February, 2017 the staff at DISTRICT'S La Creole Middle School administered a "Needs Assessment" to students at La Creole on their school-issued Chrome Book computers without prior notice, knowledge or consent of parents or guardians. Ex. P. Among the students required to take the Needs Assessment was A.G. The Needs Assessment asked students to disclose confidential information about various problems or issues they were experiencing the students might want assistance with, including clothing, school supplies, family food sufficiency, alcohol or drug abuse, suicide, self-image, sexual orientation and gender identity, unhealthy relationships and other subjects of a personal or family nature. After some parents learned of the survey and objected, school officials said participation in the survey was voluntary, whereas A.G. and other students understood their participation was required.

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neutrois (a neutral gender that is neither male nor female) the next. See, e.g., Gender Diversity, "Gender Fluidity," available at http://www.genderdiversity.org/resources/terminology/A^Q7i6marv.org','"Genderfluid," Available at http://nonbinary.org/wiki/Genderfluid (both websites last visited May 3, 2016).

Damaging Effects of District's Actions on Students at Dallas High School
Boy Plaintiffs

97. A number of biologically male students, including Boy Plaintiffs, had physical education during the same class period as Student A, and were forced to use the PE locker room with her in spite of their objections to doing so.

98. Boy Plaintiffs and other biologically male students cannot escape forced interactions with Student A in the locker room because physical education ("PE") is a mandatory course for two or more years of school in DISTRICT, and is a requirement to graduate. Moreover, it is mandatory that all students in PE class change into clothing appropriate for PE class, and all must change their clothes at the beginning and end of each PE class.

99. The main boys' locker room is a square room with four banks of lockers and wooden benches, plus communal showers along one wall, used by approximately 30 students in physical education classes to change clothes during a given class period. Also within that space are segregated lockers, showers and restroom facilities and coach's office spaces.

Girl Plaintiffs,

100. Because of the Student Safety Plan (Ex. A), Girl Plaintiffs and other biologically female students at DALLAS HIGH SCHOOL face living in ongoing anxiety, fear, and apprehension that a biological boy will be permitted to walk in at any time while they are using the school locker rooms or showers and see them in a state of undress or while changing.

101. Because of the Student Safety Plan, Girl Plaintiffs and other biologically female students at DALLAS HIGH SCHOOL live in constant anxiety, fear, and apprehension that a biological boy will be permitted to walk in at any time while they are using the restroom engaged in intimate and private bodily functions.

102. In that event, Girl Plaintiffs cannot escape forced interactions with biologically male students in the locker room because physical education ("PE") is a mandatory course for two or more years of school in DISTRICT, and is a requirement to graduate. Moreover, it is mandatory that all students in PE class change into clothing appropriate for PE class, and all must change their clothes at the beginning and end of each PE class. Some Girl Plaintiffs and other biologically female students also change into sports bras, resulting in even greater bodily exposure while in the locker rooms.

103. The Girls' locker room is constructed similarly to the boys' locker room.
104. Girl Plaintiffs object to being forced to use a locker room, shower or restroom with any biological male student as the Student Safety Plan mandates when a biological male student informs the DISTRICT of his new gender as a female.
105. The dread, anxiety, stress, and fear the Girl Plaintiffs feel over having to use the same locker room, shower or restroom as a biologically male student is a constant distraction during the school day, including during class instruction time.
106. The Girl Plaintiffs and other biologically female students are also anxious, afraid and embarrassed to see any biologically male students in a state of undress or naked because he is a biological male.
107. The Girl Plaintiffs and other female students feel compelled to change their clothing as quickly as possible during PE classes, while trying not to observe other students.
108. Because of the Defendants' actions that allow a biological male into the girls' locker room, Girl Plaintiffs and other female students have come to view the PE locker room as a scary and intimidating environment.
109. Additionally, DISTRICT has, through various announcements to the students at

DALLAS HIGH SCHOOL and through board and community meetings on gender identity DISTRICT has organized and sponsored, conveyed to the Student Plaintiffs and parents the message that any objection to the Student Safety Plan (Ex. A) or restriction on Student A's use of opposite sex facilities based on her gender identity will be viewed by DISTRICT administration as intolerance and bigotry.

110. Because of DISTRICT'S message that differing views will not be tolerated, most of the Student Plaintiffs have been deterred from asking for a separate, private locker room or restroom.

111. Because of DISTRICT'S message, at least some Student Plaintiffs are afraid to be named publicly in this lawsuit, for fear that other students and their schools will retaliate against them.

112. Third, even if Student Plaintiffs could use the facilities without suffering ridicule and harassment, they do not remedy the privacy violation caused by the presence of a person of the opposite biological sex sharing the same small, intimate settings where they are naked or in various states of undress.

Parent Plaintiffs

113. DISTRICTS response to Parent Plaintiffs does nothing to alleviate the stress and anxiety of having their student subjected to the presence of a student of the opposite biological sex already using the locker room, shower or restroom.
114. All Parent Plaintiffs also adamantly object to their sons and daughters using locker rooms, showers and restrooms with students of the opposite sex while that student is naked or in a state of undress, nor do they want their children to attend to their private bodily needs in the presence of the opposite biological sex.
115. Some Parents have asked DISTRICT for private options for their students to change their clothes and use the restroom, but the options offered are inadequate and inferior to the facilities provided to Student A. Additionally, options offered are also unworkable in terms of the practical locker room and shower needs of the Student Plaintiffs.
116. The Student Safety Plan (Ex. A) interferes with some Parent Plaintiffs' preferred moral and/or religious teaching of their children concerning modesty and nudity.
117. The Student Safety Plan (Ex. A) further interferes with Parent Plaintiffs' right to control whether their children will be exposed to the

opposite sex in intimate, vulnerable settings like restrooms, locker rooms, and showers.

118. The Student Safety Plan (Ex. A) interferes with Parent Plaintiffs' right to control whether their children's partially or fully unclothed body is exposed to the opposite sex.

119. Because of the Student Safety Plan (Ex. A), at least one Parent Plaintiff has decided to send his daughter to private school, instead of a DISTRICT school, when she starts high school.

120. Some student and parent members of PARENTS FOR PRIVACY, including JON & KRIS GOLLY and their children, are devout Christians whose faith requires that they preserve their modesty and not use the restroom, shower, or undress, in the presence of the opposite sex.

121. These students and parents also believe that they should not be in the presence of a member of the opposite sex while that person is using the restroom, showering, or undressing.

122. The Student Safety Plan (Ex. A) is particularly likely to cause emotional and psychological trauma to girls who have been sexually assaulted, for whom the presence of a biological male in their private facilities can be especially unnerving, or even terrifying. The Centers for Disease Control (the "CDC") has observed that almost 12% of high school girls reported that they had already experienced the

horror of rape. Center for Disease Control, Sexual Violence: Facts at a Glance (2012); http://www.cdc.gov/violenceprevention/pdf/sv-datasheet-a.pdf. This means that nearly 1 out of every 8 high school girls is likely to have suffered sexual assault, a statistic that compounds the problem with the Student Safety Plan. DISTRICT'S policies thereby cause stress, fright, embarrassment, humiliation, and anxiety for the Student Plaintiffs, they are likely more traumatizing to other students who have been sexually assaulted.

ALLEGATIONS OF LAW

123. All Student Plaintiffs have suffered and continue to suffer the loss of their constitutionally guaranteed right to bodily privacy, as well as their right under Title IX to an education that is free from a hostile environment based on sex, because of the Defendants' policies and actions, including the Student Safety Plan.

124. Additionally, all Student Plaintiffs suffer embarrassment, humiliation, anxiety, intimidation, fear, apprehension, stress, degradation, and loss of dignity as a result of the Defendants' actions, including the Student Safety Plan.

125. Defendants' actions and the Student Safety Plan negatively impacts Student Plaintiffs' ability to receive an education, creating a hostile environment where Student Plaintiffs experience sexual harassment and loss of dignity at the hands of their school every day.

126. Federal Defendants have exceeded their statutory authority, acted arbitrarily and capriciously, and violated plaintiffs' constitutional rights by adopting a legislative rule redefining "sex" under Title IX to include "gender identity" and enforcing that rule in a manner that effectively requires DISTRICT to allow students to use the locker rooms and restrooms of the opposite sex.

127. Federal Defendants have acted without observing the proper administrative procedure for adopting and enforcing such a new legislative rule, which includes notice and comment under the APA and presidential approval under Title IX.

128. It is a violation of the right to bodily privacy to force students to have their partially or fully unclothed bodies viewed by students of the opposite sex.

129. The right to bodily privacy also bars the government from forcing students into situations where they risk exposure of their unclothed body to the opposite sex.

130. Minors have a fundamental right to be free from compelled intimate exposure of their bodies to members of the opposite sex, which is violated when the defendants force them to use the restrooms and locker rooms with students of the opposite sex.
131. Defendants are violating the parental right to control the upbringing and education of one's child by exposing Parent Plaintiffs' children to the opposite sex in intimate, vulnerable settings like restrooms, locker rooms, and showers, especially where their children, the opposite-sex children, or both, may be in a state of undress or even naked. District Defendants are further violating the rights of Parent Plaintiffs in administering surveys to students delving into personal and family matters without advance notice, knowledge or consent of parents and guardians.
132. Providing single-sex restrooms, locker rooms, and shower facilities does not violate Title IX, so long as the facilities provided for one sex are comparable to the facilities provided to the other sex.
133. Defendants' actions and the Student Safety Plan violate Plaintiffs' free exercise rights under the United States Constitution and state statutory law.
134. Plaintiffs are suffering and continue to suffer irreparable harm.

135. Plaintiffs have no adequate remedy at law.

FIRST CLAIM FOR RELIEF (FEDERAL DEFENDANTS): VIOLATION OF THE ADMINISTRATIVE PROCEDURE ACT

136. Plaintiffs re-allege and incorporate all matters set forth in ¶¶1 through 135 herein.
137. Federal Defendants promulgated, and are enforcing, a new legislative rule that redefines the term "sex" in Title IX and its accompanying regulations to mean, or at least include, "gender identity."
138. USDOE has expressed its intention to enforce this new redefinition of "sex" as a legislative rule against DISTRICT.
139. USDOE's new legislative rule contradicts the text, structure, legislative history, and historical judicial interpretation of Title IX, all of which confirm that "sex" means male and female in the binary and biological sense.
140. According to USDOE's new legislative rule, Title IX requires schools to permit students to use restrooms, locker rooms, and showers based on their gender identity rather than their biological sex.
141. USDOE has communicated this new legislative rule to school districts nationwide via a "Dear Colleague" letter dated May 13, 2016

(Exhibit K) and stated that their failure to comply with it will result in investigation and enforcement action up to and including withdrawal of millions of dollars in federal funding.

142. USDOE's promulgation and enforcement of this new legislative rule are reviewable actions under the Administrative Procedure Act ("APA") pursuant to 20 U.S.C § 1683.

143. USDOE's actions are also final, and there is no other adequate remedy because the Student Safety Plan binds DISTRICT such that Plaintiffs cannot get relief unless the Rule is set aside, and the Federal Defendants are enjoined from continuing to communicate and enforce the new rule redefining the meaning of "sex."

Plaintiffs continue to be denied an effective remedy, despite the remedial actions alleged in ¶ 39, because the Rule remains in effect.

144. Plaintiffs have suffered a legal wrong as a direct result of USDOE's actions, because Plaintiffs' constitutional and statutory rights were and continue to be violated by the Student Safety Plan, which is the direct result of USDOE's enforcement of its new rule.

145. Under the APA, a reviewing Court must "hold unlawful and set aside agency action" in one or more of four instances that apply to this case:

• If the agency action is "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2)(C);
• If the agency action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A);
• If the agency action is "contrary to constitutional right, power, privilege, or immunity." 5 U.S.C. § 706(2)(B); and
• If the agency action is "without observance of procedure required by law." 5 U.S.C. § 706(2)(D).
146. USDOE's action here violates all four of these standards and should be held unlawful and set aside.
147. Plaintiffs ask this Court (1) to set aside and remove from its official website all guidance documents, (See ¶¶ 32, 39; Exs. H-N), to the extent that they incorporate gender identity within the meaning of "sex" for purposes of Title IX, as well as the Student Safety Plan, and (2) to declare and enjoin USDOE and USDOJ from further enforcing Title IX in a manner that requires DISTRICT to give any students the right of entry to, and use of, the private facilities (including locker rooms, showers and restrooms) designated for students of the opposite sex.

USDOE's Action Is Unlawful under the APA Because It is in Excess of Statutory Jurisdiction, Authority, or Limitations

148. USDOE's actions in promulgating and enforcing its new rule are "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right," because they redefine the unambiguous term "sex" and add gender identity to Title IX without the authorization of Congress.

149. Congress has not delegated to USDOE the authority to define or redefine unambiguous terms in Title IX.

150. Title IX does not require that DISTRICT or any other school open its girls' restrooms, locker rooms and shower rooms to biological males who identify as female, nor does it require that DISTRICT open their boys' facilities to biological females who identify as male.

151. USDOE's unilateral decree that "sex" in Title IX means, or includes, "gender identity," which requires schools to allow males who identify as female to use the girls' facilities, and vice versa, requires DISTRICT to give students the right of entry and use of opposite sex locker and shower rooms, and requires DISTRICT to give all students right of entry and use of the restrooms that correspond to their gender identity, irrespective of their biological sex.

152. This new rule is not supported by Title IX's text, implementing regulations, or legislative history.
153. Therefore, USDOE's rule was promulgated and enforced "in excess of statutory jurisdiction, authority or limitations, or short of statutory right[,]" See 5 U.S.C. § 706(2)(C). This Court should hold USDOE's rule unlawful and set it aside, including removing it from its official website.
154. Additionally, even if USDOE's rule was interpretive, it would still exceed USDOE's statutory authority and should be declared unlawful and set aside.

USDOE's Action Is Unlawful under the APA Because It is Arbitrary, Capricious, an Abuse of Discretion, or Not in Accordance with Law

155. USDOE's actions in promulgating and enforcing its new rule are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." See 5 U.S.C. § 706(2)(A).
156. Congress requires that whenever an agency takes action it do so after engaging in a process by which it "examine[s] the relevant data and articulate[s] a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Motor Veh.*

Mfrs. Ass'n. v. State Farm Ins., 463 U.S. 29, 43 (1983) (quotation omitted).

157. An agency action is "arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or product of agency expertise." *Motor Veh. Mfrs. Ass's v. State Farm Ins.*, 463 U.S. at 43.

158. USDOE has given no explanation for its redefinition of "sex" in Title IX, whereby USDOE unilaterally decreed that the term "sex" in Title IX means, or includes, gender identity; requires DISTRICT to give Student A right of entry and use of opposite sex locker and shower rooms; and requires DISTRICT to give all students access to the facilities that correspond to their gender identity, if the students desire to use them.

159. USDOE has given no explanation of the relevant factors that were the basis of its actions, and USDOE has failed to consider important implications and adverse consequences caused by allowing biological boys and girls to share intimate settings, including: the language and structure of Title IX and its regulations; the congressional and judicial histories of Title IX and its regulations; the

practical and constitutional harms created by its unlawful application of Title IX; and the violation of Title IX caused by this unlawful application.

160. USDOE's action was also made without a rational explanation, inexplicably departed from established policies, or rested on other considerations that Congress could not have intended to make relevant.

161. USDOE has offered no explanation for its rule redefining "sex"; the rule departed from the established Title IX policy that allowed schools to maintain private facilities separated by biological sex; and the rule rested on considerations related to "gender identity" despite the fact that the legislative history indicates Congress did not intend "sex" to mean anything other than biological sex.

162. USDOE's legislative action was also taken even though it is contrary to law or regulation.

163. USDOE's rule purporting to redefine Title IX violates Title IX as it applies to the very group Title IX was created to protect by creating a hostile environment for Girl Plaintiffs.

164. USDOE's promulgation and enforcement of its rule is thus arbitrary, capricious, an abuse of discretion, and not in accordance with law. This Court should therefore hold that it is unlawful and set it aside. Additionally, even if USDOE's rule was interpretive, it would still be arbitrary,

capricious, an abuse of discretion, and not in accordance with law, and so should be declared unlawful, set aside and removed from its official website.

USDOE's Action Is Unlawful under the APA Because It is Contrary to Constitutional Right, Power, Privilege, or Immunity

165. For the reasons set forth herein, USDOE's actions are "contrary to constitutional right, power, privilege, or immunity." See 5 U.S.C. § 706(2)(B).

166. USDOE's legislative rule is an unlawful application of Title IX contrary to the Constitution because it violates the privacy rights of Student Plaintiffs, their parents' fundamental liberty interest in controlling their children's upbringing and education, and the rights of some Student Plaintiffs and their parents to freely live out their religious beliefs.

167. Also, USDOE's legislative rule is in violation of the Spending Clause of the United States Constitution, under which Title IX was enacted, in that Congress uses its Spending Clause power to generate legislation in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions.

168. Congress must clearly and unambiguously state the conditions to which the States are agreeing in exchange for federal funds, so that the States can knowingly decide whether to accept the funding. The crucial inquiry is whether Congress spoke so clearly that it can be fairly said that the State could make an informed choice.

169. Requiring schools to allow biological females access to facilities designated for males cannot pass this test, no matter how the females identify. Nor can allowing biological males access to facilities designated for females pass this test, no matter how the males identify.

170. As set forth herein, the plain language of the text, along with the legislative history, clearly indicates that Congress intended that (1) "sex" means "biological sex"; (2) Title IX prevents discrimination based on biological sex; and (3) Title IX allows sex-separated restrooms, locker rooms and showers.

171. Further, the implementing regulations specifically allow schools to maintain restrooms, locker rooms and showers separated by biological sex. 34 CFR 106.33.

172. For over 40 years of Title IX's existence, it has been universally understood by schools that receive federal education funding that Title IX's definition of "sex" does not include gender identity.

173. It has likewise been universally understood by schools that received federal education funding that maintaining separate restrooms, locker rooms, showers and other private facilities on the basis of biological sex is consistent with Title IX.

174. No school could have possibly made an informed choice, because no school could have known that the funds it agreed to accept were conditioned on allowing cross-sex private facilities, or otherwise recognizing gender identity as within the meaning of the term "sex."

175. For these reasons, this Court should hold USDOE's actions unlawful, set aside its Guidance Documents (Exs. H-K) and the Student Safety Plan (Ex. A), and enjoin it, along with USDOJ, from further communicating to DISTRICT the new rule that "sex" in Title IX includes "gender identity."

176. Additionally, even if USDOE's rule was interpretive, it would still be contrary to constitutional right, power, privilege, or immunity and should be declared unlawful, set aside and removed from its official website.

USDOE's Action Is Unlawful under the APA Because It is Without Observance of Procedure Required by Law

177. For the reasons set forth herein, USDOE's actions were taken "without observance of procedure required by law." 5 U.S.C. § 706(2)(D).
178. The rule imposes rights and obligations which, through administrative enforcement actions, applies generally to and binds all school districts, including DISTRICT.
179. Under the Administrative Procedure Act, any "rules which do not merely interpret existing law or announce tentative policy positions but which establish new policy positions that the agency treats as binding must comply with the APA's notice-and-comment requirements, regardless of how they initially are labeled." 72 Fed. Reg. 3433.
180. The United States Supreme Court has additionally ruled that all legislative rules, which are those having the force and effect of law and are accorded weight in agency adjudicatory processes, are subject to notice-and-comment requirements. *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1204 (2015).
181. "Notice-and-comment rulemaking" requires that USDOE (1) issue a general notice to the public of the proposed rule-making, typically by

publishing notice in the Federal Register; (2) give interested parties an opportunity to submit written data, views, or arguments on the proposed rule, and consider and respond to significant comments received; and (3) include in the promulgation of the final rule a concise general statement of the rule's basis and purpose.

182. Notice-and-comment rulemaking also requires that USDOE consider all the relevant comments offered during the public comment period before finally deciding whether to adopt the proposed rule.

183. Additionally, under Title IX all final rules, regulations, and orders of general applicability issued by USDOE must be approved by the President of the United States, who has hitherto declined to do so.

184. USDOE promulgated and enforced its new rule redefining "sex" in Title IX to include "gender identity" without notice and comment as required by law. 5 U.S.C. § 553. It promulgated this new legislative rule without signature by the president as required by Title IX. 20 U.S.C. § 1682.

185. Simply stated, USDOE did not follow the required procedure when it adopted its new rule defining "sex" in Title IX to mean, or include, gender identity.

This Court should therefore hold that it is unlawful, set it aside and remove it from its official website.

WHEREFORE, Plaintiffs respectfully pray that the Court grant the relief set forth hereinafter in the Prayer for Relief.

SECOND CLAIM FOR RELIEF
(Against DISTRICT and the FEDERAL DEFENDANTS):
VIOLATION OF THE FUNDAMENTAL RIGHT TO PRIVACY

186. Plaintiffs re-allege all matters set forth in ¶¶ 1 through 185 and incorporate them herein by reference.

187. "Fundamental rights" are rights deeply rooted in this nation's history and tradition and are implicit in the concept of ordered liberty, grounded in the Fourteenth Amendment's Due Process Clause.

188. Numerous courts have recognized a fundamental right to bodily privacy, which right includes a right to privacy of one's fully or partially unclothed body and the right to be free from State-compelled risk of intimate exposure of oneself to the opposite sex.

189. Student Plaintiffs, like everyone else, enjoy the fundamental right to bodily privacy.

190. The right to be free from State-compelled risk of intimate exposure of oneself to the opposite sex, while part of the right to bodily privacy, is a fundamental right grounded in the Fourteenth Amendment's Due Process Clause.
191. Throughout its history, American law and society have recognized and upheld a commitment to protecting citizens, and especially children, from suffering the risk of exposing their bodies, or their intimate activities, to the opposite sex.
192. From colonial times, the law allowed civil actions against "Peeping Toms", and as American law developed after the Founding, it criminalized surreptitiously viewing others while they reasonably expect privacy.
193. These protections are heightened for children.
194. While pornography involving only adults is legal and cannot be constitutionally banned, federal law makes it a crime to possess, distribute, or even view images of naked children. Moreover, nearly every state, including Oregon, has laws criminalizing "sexting," which occurs when someone (often a minor) sends a naked picture of himself or herself via email, text messaging, or other electronic means to a minor.
195. In the late 1800s, as women began entering the workforce, the law developed to protect

privacy by mandating that workplace restrooms and changing rooms be separated by sex. Massachusetts adopted the first such law in 1887. By 1920, 43 of the (then) 48 states had similar laws protecting privacy by mandating sex separated facilities in the workplace.

196. Because of our national commitment to protect our citizens, and especially children, from the risk of being exposed to the anatomy of the opposite sex, as well as the risk of being seen by the opposite sex while attending to private, intimate needs, sex-separated restrooms, locker rooms and showers are an American social and modesty norm ubiquitous in public places, including public schools.

197. Historically, purposefully entering a restroom or locker room designated for the opposite biological sex has been considered wrongful, and even criminal, behavior, and historically there has been no mixing of the biological sexes in school restrooms, locker rooms or showers.

198. Freedom from the risk of compelled intimate exposure to the opposite sex, especially for minors, is a fundamental right deeply rooted in this nation's history and tradition and is also implicit in the concept of ordered liberty.

199. The ability to be clothed in the presence of the opposite biological sex, along with the freedom to use the restroom, locker room and

shower away from the presence of the opposite biological sex, is fundamental to most people's sense of self respect and personal dignity, including plaintiffs', who should be free from State- compelled risk of exposure of their bodies, or their intimate activities.

200. If government is granted the far-reaching and extreme power to compel its citizens to disrobe or risk being unclothed in the presence of the opposite sex, little personal liberty involving our bodies would remain.

201. The government may not infringe fundamental rights, unless the infringement satisfies strict scrutiny review, which requires that the government demonstrate that the law or regulation furthers a compelling interest using the least restrictive means available.

202. The Student Safety Plan allows Student A, a biological female, and other biological females the right of entry to, and use of, the boys' locker rooms, showers and restrooms any time she wants.

203. The Student Safety Plan similarly allows biological male students who may or may not identify as female access and use of the girls' locker rooms, showers and restrooms, and it similarly allows biological female students who may or may not identify as male access and use of the boys' locker rooms, showers and restrooms.

204. For these reasons, the Student Safety Plan requires Student Plaintiffs to risk being intimately exposed to those of the opposite biological sex, thereby infringing Student Plaintiffs' fundamental right to privacy in their unclothed bodies, as well as their fundamental right to be free from government-compelled risk of intimate exposure to the opposite sex, without any compelling justification.

205. Defendants have no compelling interest to justify forcing school children to share restrooms and locker rooms with opposite sex classmates, and Defendants have not used the least restrictive means of serving any interest they may have.

206. Accordingly, the Student Safety Plan fails strict scrutiny review and is unconstitutional as applied to any minor, including the Student Plaintiffs.

WHEREFORE, Plaintiffs respectfully pray that the Court grant the relief set forth hereinafter in the Prayer for Relief.

THIRD CLAIM FOR RELIEF
(Against DISTRICT and the FEDERAL DEFENDANTS):
VIOLATION OF PARENTS' FUNDAMENTAL RIGHT TO DIRECT THE EDUCATION AND UPBRINGING OF THEIR CHILDREN

207. Plaintiffs re-allege all matters set forth in ¶¶1 through 185 and incorporate them herein.
208. The right of parents to make decisions concerning the care, custody, and control of their children is a fundamental right protected by the Fourteenth Amendment's Due Process Clause.
209. Included within that parental fundamental right is the power to direct the education and upbringing of one's children, including the right, as well as the duty, to instill moral standards and values in their children. Additionally, parents enjoy the fundamental right to notice and the opportunity to consent to their children's participation in surveys seeking personal and family information for use by schools and others.
210. Parents' right and duty to instill moral standards and values in their children, and to direct their education and upbringing, encompasses the right to determine whether and when their minor children endure the risk of being exposed to members of the opposite sex

in intimate, vulnerable settings like restrooms, locker rooms and showers.

211. Parents also have a fundamental right to determine whether and when their children will have to risk being exposed to opposite sex nudity at school, as well as a fundamental right to determine whether their children, while at school, will have to risk exposing their own undressed or partially unclothed bodies to members of the opposite sex.

212. Defendants have no legal authority to dictate whether and when minor children will risk being exposed to the opposite sex and/or opposite-sex nudity in such settings in derogation of each parents' right to decide for his or her own child, especially when those children's parents object. Defendants further have no legal authority to seek or obtain personal and family confidential information from students without the knowledge and consent of their parents or guardians.

213. All Parent Plaintiffs object to the Student Safety Plan and agree that they do not want their minor children to endure the risk of being exposed to the opposite sex in intimate, vulnerable settings like locker rooms, showers and restrooms, nor do they want their minor children to attend to their personal, private bodily needs in the presence of members of the opposite sex.

214. All Parent Plaintiffs desire to raise their children with a respect for traditional modesty, which requires that one not undress or use the restroom in the presence of the opposite sex.
215. All Parent Plaintiffs desire to prevent their children from enduring the risk of being observed while undressing by members of the opposite sex, or enduring the risk of being exposed to the unclothed bodies of members of the opposite sex.
216. Some Parent Plaintiffs, including JON AND KRIS GOLLY, object to the Student Safety Plan for religious reasons because of their sincerely-held religious beliefs about modesty and other religious doctrines.
217. The Student Safety Plan, instituted and enforced by the Defendants, impermissibly infringes and undermines the right of Parent Plaintiffs to direct the upbringing and education of their children.
218. Defendants may not infringe fundamental rights, including parents' fundamental right to direct the education and upbringing of their children, unless the infringement satisfies strict scrutiny review, which requires that Defendants demonstrate that the law or regulation furthers a compelling interest using the least restrictive manner available.
219. Defendants have no compelling interest to justify forcing school children to share

restrooms, locker rooms and showers with opposite sex students, and Defendants have not used the least restrictive means of serving any interest they may have.

220. Accordingly, the Student Safety Plan fails strict scrutiny review and unconstitutionally infringes on parents' fundamental right to direct the education and upbringing of their children.

WHEREFORE, Plaintiffs respectfully pray that the Court grant the relief set forth hereinafter in the Prayer for Relief.

FOURTH CLAIM FOR RELIEF
(Against DISTRICT):
VIOLATION OF TITLE IX

221. Plaintiffs re-allege all matters set forth in ¶¶ 1 through 185 and incorporate them herein.

222. 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).

223. Courts have given Title IX broad effect in order to combat sex discrimination in the educational setting.

224. Title IX is a broadly-written general prohibition on discrimination based on sex that does not explicitly list every discriminatory act prohibited.
225. There is an implied right of action under Title IX and no requirement that a claimant must first exhaust administrative remedies before bringing a Title IX claim.
226. Allowing people to use restrooms, locker rooms or showers designated for the opposite biological sex violates privacy and creates a sexually harassing hostile environment.
227. Exposure to opposite-sex nudity creates a sexually harassing hostile environment.
228. The Student Safety Plan allows some students to use locker rooms, restrooms and showers designated for students of the opposite biological sex.
229. The Student Safety Plan needlessly subjects Student Plaintiffs to the risk that their partially or fully unclothed bodies will be exposed to students of the opposite sex and that they will be exposed to opposite-sex nudity, causing the Student Plaintiffs to experience embarrassment, humiliation, anxiety, intimidation, fear, apprehension, stress, degradation, and loss of dignity.
230. Some Student Plaintiffs are avoiding the restroom as a result of the embarrassment, humiliation, anxiety, intimidation, fear,

apprehension, stress, degradation, and loss of dignity they experience because of the Student Safety Plan.

231. Some Student Plaintiffs are not able to concentrate as well in school as they did before because of these policies.

232. All Student Plaintiffs find that school has become intimidating and stressful as a result of the Student Safety Plan.

233. The Student Safety Plan violates Title IX in that it produces unwelcome sexual harassment and create a hostile environment on the basis of sex.

234. As recited below, Student Plaintiffs satisfy the five elements of a Title IX in that they each: (1) belong to a protected group in that they are female and male students at an educational institution that receives federal funds; (2) were and are subjected to harassment in that the Student Safety Plan allows biological males to use girls' locker rooms, restrooms and showers, and further allows biological females to use the boys' locker rooms, restrooms and showers, thereby creating a sexually harassing hostile environment; (3) were and are subjected to harassment based on sex; (4) were subjected to harassment so pervasive or severe that it altered the conditions of plaintiffs education; and (5) can establish knowledge by school officials.

235. There are real and significant differences between the biological sexes, including but not limited to differences in anatomy and physiology, which differences do not disappear when biological males identify as female, and vice versa.

236. Biological and anatomical differences between the sexes is the reason that Title IX and its implementing regulations allow for separate living facilities, restrooms, locker rooms and changing areas for each biological sex to recognize that each biological sex has unique needs and vulnerabilities when using these facilities.

237. Title IX and its implementing regulations further allow for separate living facilities, restrooms, locker rooms and changing areas for each biological sex based on the recognition that permitting a biological male to enter and use such facilities designated for females, or permitting a biological female student to enter and use such facilities designated for males would be sexually harassing to the opposite sex.

238. Moreover, both male and female Student Plaintiffs experience humiliation, anxiety, intimidation, fear, apprehension, stress, degradation, and loss of dignity as a result of the Student Safety Plan permitting the opposite sex to be in locker rooms and restrooms designated for their biological sex.

239. It is the significant and real differences between the biological sexes that creates the hostile environment, which is harassment.
240. The harassment created by the Student Safety Plan, because it denies real differences between the biological sexes, is sufficiently severe or pervasive (either of which is actionable) in that it is ongoing and continuous, occurring every time any of the Student Plaintiffs use the locker room, showers or restroom. It is further severe in that it places the bodily privacy of both sexes at risk.
241. The environment is one that a reasonable person would find hostile or abusive, and one that Student Plaintiffs in fact perceive to be so.
242. The sexually harassing hostile environment is threatening and humiliating, and has altered the conditions of Student Plaintiffs' educational opportunities, benefits, programs and/or activities.
243. DISTRICT officials are aware of the hostile environment and the fact DISTRICTS own official policies (including the Student Safety Plan) are the direct cause of this hostile environment because some Student Plaintiffs, and some Parent Plaintiffs, have contacted DISTRICT officials, including the principal and superintendent, about the hostile environment. Even though these officials have authority to stop the hostile environment, and despite the

knowledge that their policies are creating a hostile environment based on sex, Defendants have not remedied the situation. Instead, these officials have advised that, if the students perceive the environment to be hostile, the students should remove themselves from it by accepting an "accommodation" or using a different restroom.

244. Schools cannot escape liability for Title IX violations by requiring the victim of harassment to remove themselves from the hostile environment or otherwise suggesting they are responsible for the harassment.

245. Additionally, the accommodations themselves violate Title IX in that some Girl Plaintiffs have been told that instead of using the locker room to change for PE class, they may change their clothing in a nurse's office located on the other side of the school. This facility for changing is inferior to the locker room facilities provided for boy students in violation of 34 CFR § 106.33, which provides that schools receiving federal funding "may provide separate toilet, locker room, and shower facilities on the basis of sex, [as long as] such facilities provided for students of one sex [are] comparable to such facilities provided for students of the other sex."

246. Additionally, the accommodations themselves violate Title IX in that some of the Student Plaintiffs have been told that, if they

are uncomfortable using a restroom because a member of the opposite sex is present, they may find another restroom. Because there are only five minutes between classes, any student leaving one restroom to find another is almost certain to be tardy and will also miss instructional time.

247. The Student Safety Plan violates Title IX by creating a hostile environment on the basis of sex.

WHEREFORE, Plaintiffs respectfully pray that the Court grant the relief set forth hereinafter in the Prayer for Relief.

FIFTH CLAIM FOR RELIEF
(Against FEDERAL DEFENDANTS):
RELIGIOUS FREEDOM RESTORATION ACT
42 USC §§ 2000bb et seq

248. Plaintiffs re-allege all matters set forth in ¶¶ 1 through 184 and incorporate them herein.

249. Many Student Plaintiffs have religious convictions that they practice modesty. These students have the sincere religious belief that they must not undress, or use the restroom, in the presence of the opposite biological sex, and also that they must not be in the presence of the opposite biological sex while the opposite

biological sex is undressing or using the restroom.

250. Some Parent Plaintiffs, including JON AND KRIS GOLLY, have the sincere religious belief that they must teach their children to practice modesty. Their religious faith also requires them to protect the modesty of their children. These parents have the sincere religious belief that their children must not undress, or use the restroom, in the presence of a member of the opposite biological sex, and also that they must not be in the presence of the opposite biological sex while the opposite biological sex is undressing or using the restroom.

251. The Student Safety Plan requires Student Plaintiffs to use restrooms, locker rooms and shower rooms, knowing that a student of the opposite biological sex either is present with them, or could enter while they are using these private facilities.

252. The Student Safety Plan prevents Student Plaintiffs from practicing the modesty that their faith requires of them, and it further interferes with Parent Plaintiffs teaching their children traditional modesty and insisting that their children practice modesty, as their faith requires of Parent Plaintiffs.

253. Complying with the requirements of the Student Safety Plan thus places a substantial

burden on the Plaintiffs' exercise of religion by requiring Plaintiffs' to choose between the benefit of a free public education and violating their religious beliefs.

254. Federal Defendants have no "compelling interest" that would justify burdening Plaintiffs' exercise of religion in this manner, nor have they used the "least restrictive means" to achieve their purported interest in burdening Plaintiffs' exercise of religion in this manner.

255. The Student Safety Plan thus violates Plaintiffs' rights protected by the Religious Freedom Restoration Act.

WHEREFORE, Plaintiffs respectfully pray that the Court grant the relief set forth hereinafter in the Prayer for Relief.

SIXTH CLAIM FOR RELIEF
(Against DISTRICT and the FEDERAL DEFENDANTS):
VIOLATION OF THE FIRST AMENDMENT'S GUARANTEE OF FREE EXERCISE OF RELIGION

256. Plaintiffs re-allege all matters set forth in ¶¶1 through 255 and incorporate them herein.

257. The First Amendment provides that Congress shall make no law respecting an

establishment of religion, nor prohibiting the free exercise thereof.

258. The Student Safety Plan burdened the free exercise rights of some Plaintiffs as previously alleged.

259. Laws that burden free exercise, but are not neutral or generally applicable, are subject to strict scrutiny.

260. The Student Safety Plan is not generally applicable in that it does not expressly allow all students to use the opposite-sex restrooms, locker rooms and showers, but arguably only students who perceive themselves as a different gender than their biological sex, and further may allow accommodations of some, but not all, students.

261. Similarly, the Student Safety Plan is not generally applicable in that it applies only to one student, Student A, but does not apply to all students, allowing them to access whatever locker and shower rooms they want.

262. The Student Safety Plan does not even apply to all students who perceive their gender identity to be different than their biological sex.

263. Because the Student Safety Plan is not generally applicable, it is subject to strict scrutiny, which it fails.

264. Additionally, the Student Safety Plan is subject to strict scrutiny and fails the strict scrutiny standard because, in addition to

burdening free exercise rights, it also burdens other constitutional rights, including the privacy rights of Student Plaintiffs and the parental rights of Parent Plaintiffs as alleged above.

WHEREFORE, Plaintiffs respectfully pray that the Court grant the relief set forth hereinafter in the Prayer for Relief.

SEVENTH CLAIM FOR RELIEF
PUBLIC ACCOMMODATION DISCRIMINATION
ORS 659A.400 et sea. ORS 659A.885
(Against DISTRICT and STATE DEFENDANTS)

265. Plaintiffs re-allege all matters set forth in ¶¶ 1 through 255 and incorporate them herein.
266. Oregon public elementary and secondary schools, including Dallas High School and other District schools, are places of public accommodation within the meaning of ORS 659A.400, and discrimination is prohibited in such places based on religion, sex and sexual orientation, including gender identity.
267. DISTRICT and STATE DEFENDANTS have engaged in discrimination against DISTRICT students, parents and those entering school premises on grounds of their sex and

sexual orientation in that they have been deprived of the right to utilize restrooms, locker rooms and showers without encountering persons of the opposite biological sex.

268. DISTRICT and STATE DEFENDANTS have engaged in discrimination against DISTRICT students, parents and those entering school premises on grounds of their religion in that they have been deprived of their right to utilize restrooms, locker rooms and showers without encountering persons of the opposite biological sex contrary to their sincerely-held religious beliefs.

269. STATE DEFENDANTS have further participated in, condoned, aided, abetted and/or incited the unlawful discrimination in the foregoing paragraphs against Plaintiffs contrary to ORS 659A.406.

270. Plaintiffs are each entitled to recover actual damages or $200, whichever is greater, pursuant to ORS 659A.885(7) against District, and further to declaratory and injunctive relief against State Defendants prohibiting the discrimination alleged above.

271. Plaintiffs are further entitled to recover reasonable and necessary attorney fees and costs incurred in the prosecution of this action pursuant to ORS 21.107 and 659A.885Q) and (7)(d) against District and State Defendants.

WHEREFORE, Plaintiffs respectfully pray that the Court grant the relief set forth hereinafter in the Prayer for Relief.

EIGHTH CLAIM FOR RELIEF
(Against DISTRICT)
DISCRIMINATION IN EDUCATION (ORS 659.850)

272. Plaintiffs re-allege all matters set forth in ¶¶ 1 through 271 and incorporate them herein.
273. DISTRICT has subjected plaintiffs to discrimination on the basis of religion, sex and sexual orientation as defined in ORS 659.850(1) in public elementary and secondary education programs, services and schools where such programs, services and schools are financed in whole or in part by moneys appropriated by the Legislative Assembly without providing reasonable accommodations based on the health and safety needs of plaintiffs and others coming on school premises.
274. Plaintiffs have unsuccessfully presented their grievances and objections to DISTRICT'S school board on multiple occasions within 180 days of the policies causing the alleged discrimination, as required by ORS 659.860(3).
275. Plaintiffs are entitled to recover actual damages or $200, whichever is greater, pursuant to ORS 659.860(1).

276. DISTRICT'S violation of ORS 659.850 should subject DISTRICT to appropriate sanctions, which may include withholding of all or part of state funding for the period of the discrimination.
277. Plaintiffs are further entitled to recover reasonable and necessary attorney fees and costs incurred in the prosecution of this action pursuant to ORS 21.107, ORS 659.860(7), 659A.885(1) and (7)(d).

WHEREFORE, Plaintiffs respectfully pray that the Court grant the relief set forth hereinafter in the Prayer for Relief.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully pray for judgment as follows and request
the following relief:

A. That this Court enter preliminary and permanent injunctions restraining all Defendants, their officers, agents, employees, and all other persons acting in concert with them, from enforcing the Student Safety Plan and ordering them to permit only biological females to enter and use DISTRICTS girls' restrooms, locker rooms and showers, and permit only biological males to enter and use

DISTRICTS boys' restrooms, locker rooms and showers;

B. That this Court hold unlawful, set aside and remove from its official websites the Federal Defendants' Rule that redefines the word "sex" in Title IX to mean, or include, gender identity, which it announced in at least the following documents—U.S. Department of Education, Office for Civil Rights, Questions and Answers on Title IX and Sexual Violence, 5 (Apr. 2014); U.S. Department of Education, Office for Civil Rights, Questions and Answers on Title IXand Single-Sex Elementary and Secondary Classes and Extracurricular Activities, 25 (Dec. 2014); U.S. Department of Education, Office for Civil Rights, Title IX Resource Guide, 1, 15, 16, 19, 21-22 (Apr. 2015);

C. That this Court enter preliminary and permanent injunctions restraining the Federal Defendants, their officers, agents, employees, and all other persons acting in concert with them, from taking any action based on USDOE's new rule that redefines the word "sex" in Title IX, including implementing the revocation of funding as indicated in the Dear Colleague Letter sent to DISTRICT and from communicating to DISTRICT through these documents or in any other manner that the term "sex" means, or includes, gender identity or that Title IX bars gender identity discrimination or

mandates that regulated entities allow students to use restrooms, locker rooms and showers based on their gender identity;

D. That this Court enter a declaratory judgment declaring that the Student Safety Plan impermissibly burdens the Student Plaintiffs' constitutional right to privacy; impermissibly burdens the Student Plaintiffs' constitutional right to be free from State-compelled risk of intimate exposure of themselves and their intimate activities to members of the opposite sex; impermissibly burdens Parent Plaintiffs' constitutional right to direct the upbringing and education of their children;

E. Enter declaratory judgment declaring that Defendants must provide parents advance notice of School Safety Plan and the opportunity to consent or object to its implementation with respect to their child(ren);

F. Enter declaratory judgment that Defendants must provide parents advance notice of surveys or assessments seeking personal and family information of a confidential nature, must secure consent of parents in advance of administering such surveys or assessments, and prohibiting Defendants from compelling student participation in such surveys or assessments;

G. That this Court award statutory damages, and compensatory damages for violation of Plaintiffs' constitutional and statutory rights,

except those claimed under the Administrative Procedure Act and against the Oregon Department of Education and Governor Kate Brown arising under federal law;

H. That this Court retain jurisdiction of this matter for the purpose of enforcing any Orders;

I. That this Court award Plaintiffs costs and expenses of this action, including a reasonable attorneys' fees award, in accordance with 775 ILCS 35/20, 28 U.S.C. § 2412, and 42 U.S.C § 1988;

J. That this Court award Plaintiffs costs and expenses of this action, including a reasonable attorneys' fees award, in accordance with ORS 21.107, ORS 659.860(7), 659A.885(1) and (7)(d).

K. That this Court issue the requested injunctive relief without a condition of bond or other security being required of Plaintiffs; and

L. That this Court grant such other and further relief as the Court deems just and equitable in the circumstances.

DATED this 13th day of November, 2017.

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Transgender Student Access to Locker Room
Student Safety Plan

All students have rights for attendance at public schools, and we have to follow the laws which protect those student rights. This safety plan has been created to support a transgender male expressing the right to access the boy's locker room at Dallas High School. Following are targeted areas of concern and the procedures or actions aimed to support all students in this transition.

Staff Communication:

• All staff will receive training during the November 3rd staff meeting regarding the transition.
• All staff will receive talking points from legal counsel.
• All staff will receive instruction communicating who the title IX officer is (Tim Larson) and who complaints should be directed to (Steve Spencer, Tim Larson, Dennis Engle)
• Additional practice will be given to help prepare for "grocery store conversations" so appropriate responses can be provided.

Classroom Communication:

• All PE Teachers will take time to review locker room expectations for all students.
• All Teachers will take time to teach about anti-bullying and harassment (Policy JFCF pg 21-23) along with disciplinary implications from the Offenses Against Persons section in the student handbook (pgl9)
• Teachers and administrators will teach the talking points provided by legal counsel to 4th period PE classes

Preferred Locker Assignment:

• Locker will be in the middle of the locker room in direct line of sight to PE teachers in coaches' office.

Teacher Locker Room/ Classroom Supervision:

• Identified Student's PE Teacher will deliberately be the 1st one in and last one to leave the locker room during 4th period in order to provide visual observation and safety from physical and or verbal harassment or bullying. There will always be an adult in the locker room and in the gymnasium.

Bathrooming:

• Identified student has not identified which bathroom he feels comfortable using at the present time. The boy's locker room is available for use but is not in direct line of sight for PE Teachers in the locker room. It is critical that the identified student communicate any concerns he may be having when using the facilities. Identified student does not yet possess a STP (Stand to Pee) device, so using the stall would be the only viable option.
• Identified student can use any of the bathrooms in the building to which he identifies sexually. Parent (mom) does not give permission for Identified student to leave campus to go home to use the bathroom. This is a change from current practice which was to check in and out with Kelli McGuire at the attendance office.
• Planning for the monthly menstrual cycle will be undertaken. There is no available waste disposal for sanitary napkins in the boy's locker room. There will not be any product available in the boy's locker room. Identified student will need to ensure that disposal of waste is taken care of properly.

Reporting Concerns:
• The Identified student has named the following staff as "Safe Adults" who he feels

comfortable talking to about anything related to the transgender transition into the locker room or any other related concerns:
o Dana Goodale, Polk County Mental Health-School Based Counselor
o Toni Hannan, DHS School Counselor
o Anna Jackson, Choir Teacher
o Steve Spencer, Principal
o Tim Larson. Athletic Director and Title IX Coordinator

• Additionally, DHS has communicated that Bill Masei and Shane Grimm (PE Teachers), along with all administrators and their secretaries are "Safe Adults" whom Student can share concerns about bullying, harassment, etc.

• It has also been communicated that Dallas School District expects all employees to comply with all presently adopted policies and corresponding reporting obligations.