No. 18-35708
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

v.

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

BASIC RIGHTS OREGON,
Intervenor-Defendant-Appellee.

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

ANSWERING BRIEF OF INTERVENOR-DEFENDANT-APPELLEE BASIC RIGHTS OREGON

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, Intervenor-Defendant-Appellee states that it is an Oregon public benefit corporation with no members. It has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

s/ Peter D. Hawkes
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Of Attorneys for Intervenor-Defendant-Appellee Basic Rights Oregon

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JURISDICTIONAL STATEMENT

Appellee Basic Rights Oregon ("BRO") agrees with appellants' jurisdictional statement.

ISSUES PRESENTED

1. Did the district court correctly conclude that a school's decision to permit a transgender boy to use multi-occupancy boys' restrooms and locker rooms did not violate appellants' right to bodily privacy under the Fourteenth Amendment? ***Suggested answer: Yes.***

2. Did the district court correctly conclude that a school's decision to permit a transgender boy to use multi-occupancy boys' restrooms and locker rooms did not constitute sex discrimination against appellants under Title IX? ***Suggested answer: Yes.***

3. Did the district court correctly conclude that a school's decision to permit a transgender boy to use multi-occupancy boys' restrooms and locker rooms did not violate appellants' parental rights under the Due Process Clause of the Fourteenth Amendment? ***Suggested answer: Yes.***

4. Did the district court correctly conclude that a school's decision to permit a transgender boy to use multi-occupancy boys' restrooms and locker rooms did not violate appellants' right to free exercise of religion under the First Amendment? ***Suggested answer: Yes.***

5. Did the district court correctly dismiss appellants' Complaint with prejudice where appellants failed to move to amend, and any amendment would have been futile? ***Suggested answer: Yes.***

STATEMENT OF THE CASE

In 2016, appellee Dallas School District No. 2 (the "School District") adopted a Student Safety Plan, to ensure that Student A—a transgender boy—could safely participate in school activities.[1] The Plan acknowledged Student A as a "transgender male" and permitted him to use the boys' locker room and restroom facilities with his peers in Dallas High School. (ER 132-33.) To ensure his safety, the Student Safety Plan went on to state that staff would receive training and instruction regarding Title IX, that teachers would teach about anti-bullying and harassment, that the 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. (*Id*. at 132.) The Student Safety Plan also listed several "Safe Adults" with whom Student A could share any concerns. (ER 133.)

Appellants sued the School District, along with various federal officials and agencies,[2] because they object to the Student Safety Plan created by the School District. Appellants are two organizations and seven individuals, some of whom are or were students or parents of students in the School District. (ER 12-13.) Parents for Privacy is an unincorporated association whose members included, at the time of filing, current and former students and parents of current and former

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[1] A transgender person is someone whose gender identity is different from the sex assigned to them at birth.

[2] BRO did not address appellants' claims against the federal defendants below, and will not do so here, given that the federal government withdrew the guidance on which the complaint relies in 2017. (ER 390.) The district court found appellants failed to "plausibly allege[] a causal link between Federal Defendants' challenged Rule and the alleged injury." (ER 27.)

students in the School District. (ER 70.) Parents Rights in Education is a nonprofit "whose mission is to protect and advocate for parents' rights to guide the education of their children." (ER 69-70.)

Appellants sought a declaration that the Student Safety Plan violated their right to privacy, free exercise, and parental authority, as well as Title IX and state anti-discrimination law. They sought an order directing the School District to ban boys who are transgender from boys' restrooms and locker rooms, and girls who are transgender from girls' restrooms and locker rooms. If appellants were granted that relief, transgender students would be barred from the facilities used by all other students of their gender, and forced to use separate facilities that other students may *choose* to use, but that only transgender students would be *required* to use. Any such action would stigmatize transgender students by singling them out and isolating them from their peers. It would send a message that the mere presence of transgender students in facilities used by their peers is unacceptable.

Transgender youth are already highly vulnerable to harassment, bullying, violence, and suicide. *See Whitaker by Whitaker v. Kenosha Unified School Dist. No. 1 Board of Educ.*, 858 F.3d 1034, 1051 (7th Cir. 2017) ("There is no denying that transgender individuals face discrimination, harassment, and violence because of their gender identity."); *Prescott v. Rady Children's Hosp.—San Diego*, 265 F. Supp. 3d 1090, 1099 (S.D. Cal. 2017) (denying motion to dismiss where mother claimed her transgender son died by suicide following repeated, deliberate use of pronouns "she" and "her" for him by hospital staff); *Doe by & through Doe v. Boyertown Area Sch. Dist.*, 276 F. Supp. 3d 324, 367 (E.D. Pa. 2017), *aff'd*, 890

F.3d 1124 (3d Cir. 2018), and *aff'd*, 897 F.3d 518 (3d Cir. 2018), *cert. pet. pending* (quoting expert testimony that "[p]eer reviewed research demonstrates that as many as 45% of gender dysphoric adolescents have had thoughts of suicide compared to 17% in this age group"); *Evancho v. Pine-Richland Sch. Dist.*, 237 F. Supp. 3d 267, 288 (W.D. Pa. 2017) ("[T]ransgender people as a class have historically been subject to discrimination or differentiation[.]").

There are no allegations that any of the student-appellants were required to undress in the presence of any other students, transgender or not. The principal of the School District offered use of a staff lounge if students wished to change for PE in complete privacy outside of a multi-occupancy locker room. (ER 92.) The School District was also building more facilities with additional privacy options. (ER 90.) There are no allegations that those students who chose to change clothes in the locker rooms had to change clothes in common areas rather than in stalls, or that they undressed completely. Nor are there allegations that students were required to shower together or at all, or that any appellant wished to take showers at school.

At oral argument before the district court, counsel for appellants stated that, to their knowledge, none of the student-appellants had been inside a restroom or locker room at the same time as Student A or any other transgender person. (Supplemental Excerpts of Record ("SER") 4-5.) There are no allegations that Student A ever did anything inside restrooms or locker rooms other than simply use the restroom and change his clothes. Student A has since graduated high school and thus no longer attends school in the School District.

BRO is a not-for-profit organization committed to ensuring lesbian, gay, bisexual, transgender, and queer (LGBTQ) Oregonians live free from discrimination. (ER 13.) BRO works throughout the state of Oregon to ensure that transgender students have safe, non-discriminatory environments in which to go to school. BRO intervened in this case as a defendant. (*Id*.)

The School District and BRO each moved to dismiss appellants' Complaint. (*Id*.) Appellants opposed those motions, but at no point did they seek to amend their Complaint. (*See* ER 349-65.) The district court granted the motions to dismiss with prejudice (ER 8-9, 65), and this appeal followed. (ER 1-7.)

SUMMARY OF ARGUMENT

The School District's decision to permit a transgender boy to use the boys' facilities does not violate any law. To the contrary, as several courts have recognized, the exclusion of transgender students from school facilities—the policy and practice sought by appellants—would violate Title IX, the Equal Protection Clause, and state law. If the School District were to prohibit transgender boys from using the facilities that other boys use, or transgender girls from using the facilities other girls use, it would discriminate against them on the basis of sex, gender identity, and transgender status in violation of the Constitution, federal law, and state law, and it would put them at risk of harm.

Appellants' Complaint does not state any claims for which relief may be granted. First, the Student Safety Plan does not infringe appellants' constitutional right to privacy. The right to avoid compelled exposure of one's body is simply not implicated here—appellants have multiple options to avoid any such exposure.

No student is required to undress in the presence of any other student. What appellants actually seek is recognition of a novel right to exclude transgender people from common areas of restrooms and locker rooms. Such a right has been rejected by every court that has considered the issue and has no basis in any recognized privacy right. Moreover, even if appellants' privacy rights were somehow impinged, the Student Safety Plan is narrowly tailored to serve a compelling government interest in student safety and non-discrimination.

Second, the Student Safety Plan does not violate Title IX. The mere presence of transgender students in restrooms or locker rooms corresponding to their gender identities does not constitute sexual harassment. Moreover, appellants fail to explain how allowing everyone to use facilities that correspond to their respective gender identities discriminates against them on the basis of sex. To the contrary, excluding some students from facilities because they are transgender—as appellants urge—would constitute unlawful discrimination under Title IX and the Constitution, as well as Oregon nondiscrimination laws.

Appellants' remaining arguments fare no better. Appellants' Due Process rights to direct the upbringing of their children do not include the right to dictate school policies. And the School District's facially neutral and generally applicable policy is rationally related to legitimate governmental purposes, and therefore does not infringe appellants' rights to freely exercise their religion.

Finally, appellants' argument that they were improperly denied the opportunity to amend their Complaint—an issue they never raised with the district court—is baseless. Not only did appellants never move for leave to amend their

Complaint, they also fail to explain how any such amendment would not waste the district court's time.

STANDARD OF REVIEW

This Court reviews a dismissal for failure to state a claim under Fed. R. Civ. P. 12(b)(6) de novo. *E.g., O'Brien v. Welty*, 818 F.3d 920, 929 (9th Cir. 2016) (citing *Outdoor Media Grp., Inc. v. City of Beaumont*, 506 F.3d 895, 899 (9th Cir. 2007)). In order to survive a motion to dismiss, appellants are required to "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)). While courts must accept the facts alleged in the complaint as true for purposes of a motion to dismiss, they should not "assume the truth of legal conclusions merely because they are cast in the form of factual allegations." *Fayer v. Vaughn*, 649 F.3d 1061, 1064 (9th Cir. 2011) (internal citations and quotation marks omitted). Nor do "unwarranted inferences" suffice to defeat a motion to dismiss. *Id.*

ARGUMENT

I. The Student Safety Plan did not infringe appellants' right to privacy.

The district court correctly held that appellants failed to state a claim that the School District's actions violated their fundamental right to bodily privacy. Plaintiffs assert a new right under the Due Process Clause that has never been recognized by any court in this country, and should not be recognized now: the right to exclude people—here, transgender students—from common spaces.

Moreover, even if the School District's policy somehow interfered with appellants' right to privacy—and it does not—it would nevertheless survive strict scrutiny.

A. The district court correctly held that appellants did not state a constitutional privacy claim because they did not allege government-compelled viewing of their unclothed bodies.

The Fourteenth Amendment protects against "government-compelled exposure of [people's] bodies to government actors" of another gender. (ER 41.) This Court has found a violation of that right where a government official photographed, viewed, or touched the genital area of a person with a different gender against their will. *See Byrd v. Maricopa Cty. Sheriff's Dep't*, 629 F.3d 1135, 1142 (9th Cir. 2011) (finding cross-gender search unreasonable where, despite availability of male officers and lack of emergency, a female cadet conducted a highly public search of a man that included having him strip to his underwear, using her hand to move his testicles and scrotum, and placing her hand in between his buttocks to search his anus); *Sepulveda v. Ramirez*, 967 F.2d 1413, 1415-16 (9th Cir. 1992) (concluding that male parole officer entering the bathroom stall of a female parolee who was unclothed from the waist down and urinating, over her objection, violated parolee's privacy rights); *York v. Story*, 324 F.2d 450, 456 (9th Cir. 1963) (finding that female crime victim stated a claim for violation of her privacy rights where male police officer took pictures of her in the nude for no legitimate reason over her objection and circulated those pictures among other officers). Other Circuits have also found constitutional violations where the government compelled exposure of the unclothed body. *See, e.g., Poe v. Leonard*, 282 F.3d 123, 136 (2d Cir. 2002) (trooper surreptitiously videotaped another

trooper undressing); *Canedy v. Boardman*, 16 F.3d 183, 185-88 (7th Cir. 1994) (strip searches of male prisoner by female guard); *Fortner v. Thomas*, 983 F.2d 1024, 1029-30 (11th Cir. 1993) (male prisoners viewed by female correctional officers while showering and using the toilet).

But here, appellants alleged no facts about compelled exposure. Indeed, their allegations do not suggest they have ever been forced to expose their unclothed bodies to any student or school official of any gender, or to anyone at all. On the contrary, they alleged that ordinary, latching toilet stalls were available in the locker rooms and restrooms. (ER 94, ¶ 99; ER 90-91, ¶ 83.) Thus, students could change for physical education class in the stalls if they wished. And, according to appellants' Complaint, students concerned about the possibility that someone might observe them through a gap in the stall partition could use the school's staff lounge or possibly other single-user unisex facilities, thus eliminating any possibility of even accidental glances. (ER 89, ¶ 79; ER 92, ¶ 91.)

In a very similar case, the en banc Third Circuit concluded unanimously that plaintiffs were unlikely to succeed in a privacy claim. *Doe by & through Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518, 526 (3d Cir. 2018). The court reasoned that no student was forced to disrobe in the presence of any other student of any gender, because of the presence of privacy stalls in facilities and the option of using single occupancy facilities. *Id.* at 531. The only court aside from the Third Circuit to address the same sort of privacy claim reached the same conclusion. In *Students & Parents for Privacy v. U.S. Dep't of Educ.*, a federal district court in

Illinois denied a motion for preliminary injunction in a case virtually identical to this one:

> This case also does not involve the type of forced invasion of privacy that animated the cases cited by Plaintiffs. The restrooms and the physical education locker room at Fremd High School have traditional privacy stalls that can be used when toileting, changing clothes, and showering. There is no reason why a student who does not want to do so would have to take off clothing or reveal an intimate part of his or her body outside of the private stalls. Inside the stalls, there is no meaningful risk that any part of a student's unclothed body would be seen by another person. Therefore, these protections almost entirely mitigate any potential risk of unwanted exposure either by or to any Student Plaintiff.

No. 16-CV-4945, 2016 WL 6134121, at *29 (N.D. Ill. Oct. 18, 2016), *report and recommendation adopted sub nom. Students & Parents for Privacy v. U.S. Dep't of Educ.*, No. 16-CV-4945, 2017 WL 6629520 (N.D. Ill. Dec. 29, 2017) (internal citation omitted); *see also Evancho*, 237 F. Supp. 3d at 290-91 (finding that the presence of a girl who is transgender in a girls' school bathroom did not demonstrate "any threatened or actually occurring violations of personal privacy" because the layout of the restrooms meant that "anyone using the toilets or urinals at the High School is afforded actual physical privacy from others").

This Court has held that mere inconvenience in avoiding the exposure of one's unclothed body does not violate the Constitutional right to privacy. *Caribbean Marine Servs. Co. v. Baldrige*, 844 F.2d 668, 678 (9th Cir. 1988) (reversing grant of preliminary injunction because the district court did "not indicate that the court considered whether less drastic alternatives were available that could accommodate both the [fishing vessel] crew members' alleged privacy interests and the governmental and public interest in gender-neutral hiring");

Castagnola v. Mosbacher, 720 F. Supp. 155, 156-58 (S.D. Cal. 1989) (concluding on remand that privacy claim amounted to no more than inconvenience, and any potential privacy violation could be avoided by complying with new regulations requiring female observers in all-male crews to be assigned to a private cabin, and instituting schedules for time-sharing the common toilet and shower facilities). Here, the availability of latching toilet stalls and the unisex staff lounge in the School District, like the provision of a private cabin and shower schedules aboard fishing vessels in *Caribbean Marine Servs. Co.*, provided all students with options for heightened privacy should they want it, imposing on them, at most, inconvenience.

Indeed, while appellants attempt to shoehorn their claim into constitutional privacy, what they actually seek is recognition of an entirely novel right: the right to exclude transgender people from the common areas of restrooms and locker rooms. No court in this country has recognized a fundamental right to exclude others from common spaces, or to discriminate against transgender people. *See Boyertown*, 897 F.3d at 531.

The mere presence of transgender people in the common areas of these facilities does not violate any fundamental right "deeply rooted in this Nation's history and tradition." *Washington v. Glucksberg*, 521 U.S. 702, 721, 117 S. Ct. 2258, 138 L. Ed. 2d 772 (1997). No court has ever held that the presence of transgender students in public restrooms or locker rooms infringed anyone's constitutional right to privacy, and many courts have ruled to the contrary. *See, e.g.*, *Boyertown*, 897 F.3d at 533 ("[T]he presence of transgender students in these

spaces does not offend the constitutional right of privacy any more than the presence of cisgender students in those spaces."); *Students & Parents for Privacy v. U.S. Dep't of Educ.*, No. 16-CV-4945, 2016 WL 6134121, at *2 (N.D. Ill. Oct. 18, 2016), *report and recommendation adopted sub nom. Students & Parents for Privacy v. U.S. Dep't of Educ.*, No. 16-CV-4945, 2017 WL 6629520 (N.D. Ill. Dec. 29, 2017) ("High school students do not have a constitutional right not to share restrooms or locker rooms with transgender students whose sex assigned at birth is different than theirs."); *Bd. of Educ. of Highland Local Sch. Dist. v. U. S. Dept. of Educ.*, 208 F. Supp. 3d 850, 874-76 (S.D. Ohio 2016) ("*Highland*") (finding that school district's policy preventing a girl who was transgender from using a girl's bathroom was not substantially related to the district's interest in student privacy), *aff'd by Dodds v. U.S. Dep't of Educ.*, 845 F.3d 217, 220-22 (6th Cir. 2016).[3]

Appellants assert that permitting a transgender boy to use the same restrooms and locker rooms used by other boys amounts to an unconstitutional condition on a government benefit. The government benefit they identify is

[3] Indeed, such a "right" not only lacks any legal foundation, but it would also invalidate the practice at public educational institutions across the country of offering a mix of multi-user restrooms open to all genders. *See, e.g.*, Shelly Webb, *Transgender Students Find Safe Spaces at New College*, THE HERALD-TRIBUNE (Mar. 20, 2016, 1:17 PM), https://perma.cc/4F23-5X7K; *Gender-Inclusive Restroom Now Offered at UCSB Library*, UCSB LIBR., (Mar. 17, 2017, 1:40 PM), https://www.library.ucsb.edu/news/gender-inclusive-restroom-now-offered-ucsb-library; *All User Restrooms, Portland Community College*, PORTLAND COMMUNITY C., https://www.pcc.edu/queer/district-efforts/all-user-restrooms/; Sylvia Borstad et al., *SB25 Resolution Regarding Gender Neutral Restrooms on the University of Montana Campus* (Dec. 12, 2017), https://scholarworks.umt.edu/cgi/viewcontent.cgi?article=1648&context=asum_resolutions.

changing clothes in the common areas of public locker rooms and using the toilet in latching stalls in multi-occupancy restrooms designated for boys. The constitutional condition they claim is the presence of transgender boys in those common spaces. But the claimed right to government-enforced exclusion of transgender boys from the boys' facilities does not exist. Appellants have a right to choose not to expose their unclothed body to others. But if they choose to undress in public places like the common area of a locker room, they have no right to selectively exclude peers from that space.

It is unclear what the appellants mean by "unconsented" exposure as opposed to "compelled" exposure. (Op. Br. 34.) To the extent they mean one of them might have used a restroom without realizing that a transgender student could also use that same restroom, this does not rise to the level of a constitutional violation.[4] "There is simply nothing inappropriate about transgender students using the restrooms or locker rooms that correspond to their gender identity * * * ." *Boyertown*, 897 F.3d at 532. Moreover, they have not alleged that this ever happened. No allegations in the Complaint indicate that any individual boy appellant attended Dallas High School at the same time as Student A, and, at

[4] Appellants complain of "secretive" implementation of the Student Safety Plan. (Op. Br. 31.) But there is no constitutional obligation to inform people that one of the students who will be using boys' restrooms and locker rooms is transgender, or that one student in a school has had a plan put in place to protect his safety. Indeed, doing so could implicate the right to informational privacy for the transgender student. *Tucson Woman's Clinic v. Eden*, 379 F.3d 531, 551 (9th Cir 2004) ("Individuals have a constitutionally protected interest in avoiding 'disclosure of personal matters * * * .'"). But regardless, the characterization of the implementation of the Student Safety Plan as secretive is inconsistent with the facts as alleged. Appellants alleged that every student in Student A's PE class was informed that Student A would be using the boys' locker room. (ER 90, ¶ 80.)

oral argument, counsel for appellants stated that no appellant had been in a restroom or locker room at the same time as a transgender person. (SER 4-5).

Appellants cite a range of cases outside of the context of the constitutional right to privacy in an attempt to manufacture a right that does not exist. For example, they attempt to import Fourth Amendment standards into substantive due process privacy analysis. (Op. Br. 26.) Even if the Fourth Amendment standard did somehow apply, it would not help appellants. A transgender boy's use of the boys' restrooms or locker room cannot be compared to government officials, of any gender, wiretapping a phone, entering and searching a home without a warrant, or surreptitiously filming the interior of a restroom. *See Brannum v. Overton County Sch. Bd.*, 516 F.3d 489 (6th Cir. 2008); *see also Katz v. U.S.*, 389 U.S. 347, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967).

Appellants identify cases where courts have held that Title VII does not prohibit discrimination against people for being lesbian, bisexual, or gay. (Op. Br. 30-31.) It is unclear how those cases relate to a claimed constitutional right to exclude boys who are transgender from boys' locker rooms and restrooms. They also identify cases that held that the exclusion of transgender people from restrooms that accord with their gender identity did not violate a statutory prohibition on sex discrimination in employment. (*Id.* at 31-32.) Those cases, which are outdated or outliers (*see* Section II), do not address a claimed constitutional privacy right to exclude transgender people from public facilities.

Appellants' assertion that federal regulations establish a right to restrict access to sex-separated facilities based on "biological sex" is without merit. They

cite to 34 C.F.R. § 106.33, which permits schools to provide separate restrooms and locker rooms on the basis of sex. But this provision contains permissive as opposed to mandatory language, and does not create a constitutional right; define "sex," "male," or "female"; or address which facilities boys and girls who are transgender should use. *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 720 (4th Cir. 2016) ("*G.G. I*") (Title IX regulation providing for separate facilities for boys and girls "is silent as to how a school should determine whether a transgender individual is a male or female for the purpose of access to sex-segregated restrooms"), *vacated and remanded on other grounds*, 137 S. Ct. 1239 (2017). Plaintiffs assume a definition based on sex assigned at birth, but there is no basis to assume that the people who promulgated the federal regulation would consider a boy who is transgender like Student A to belong in the girls' facilities. Nor does *United States v. Virginia*, 518 U.S. 515, 116 S. Ct. 2264, 135 L. Ed. 2d 735 (1996), which required the Virginia Military Institute to open its doors to female cadets, establish a right to restrict restroom use based on "biological sex" or anatomy. Its reference to "physiological differences between male and female individuals" referred to training standards, not sex-separated facilities. *Id.* at 550 n.19. Appellants' references to state criminal and tort law, none of which address transgender people or imply that the mere presence of a transgender person in a restroom or locker room would violate the relevant law, do no more to manufacture the fundamental right appellants seek.[5]

[5] Appellants' opening brief states that appellants' privacy rights as protected by state law are diminished when transgender students are permitted to access facilities consistent with their gender identities. (*See* Op. Br. 9, 15-16.) But

Similarly, some courts have commented in dicta that separate-sex restrooms are not illegal. None of those cases held that separate-sex facilities were constitutionally (or otherwise) required, or discussed which facilities transgender men and women should use. For example, in *Faulkner v. Jones*, the Fourth Circuit affirmed a preliminary injunction ordering a state military academy to permit a woman to attend day classes. 10 F.3d 226, 233 (4th Cir. 1993). The court noted that separate-sex restrooms may not violate the Equal Protection Clause. *Id.* at 232. "But that case did not recognize a constitutional mandate that bathrooms and locker rooms must be segregated by birth-determined sex." *Boyertown*, 897 F.3d at 532. Similarly, in *Chaney v. Plainfield Healthcare Center*, the Seventh Circuit reversed a grant of summary judgment in favor of a healthcare center that catered to patient requests to receive services exclusively from white providers. 612 F.3d 908, 913, 916 (7th Cir. 2010). When it commented that catering to patient preference about gender could be acceptable, it did not establish any constitutional

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appellants never complained of, and the district court never ruled on, a violation of appellants' rights to privacy under Oregon state law. To the extent appellants seek to raise a new claim for the first time in this appeal, they may not do so. *See Royal Ins. Co. v. Sea-Land Service Inc.*, 50 F.3d 723, 729 (9th Cir. 1995) ("We do not consider issues not raised in the district court, unless they implicate jurisdiction, injustice might otherwise result, or public policy demands their resolution."). Moreover, appellants have no basis to allege a violation of any state law. Permitting a transgender student to use restrooms and locker rooms in the same way as other students is not an unreasonable police search or unnecessary rigor in the treatment of a confined person. *State v. Holiday*, 258 Or. App. 601, 310 P.3d 1149 (2013) (finding a police search was unreasonable when they used a key to enter a single-user public restroom to find and arrest a person locked therein); *Sterling v. Cupp*, 290 Or. 611, 625 P.2d 123 (1981) (cross gender touching of prisoners' genitals by corrections officers violated the Oregon constitution's prohibition of "unnecessary rigor").

right or address permissible categorization of transgender people. *Id.*; *see also Boyertown*, 897 F.3d at 532.[6]

Finally, Appellants cite to *Blau v. Fort Thomas Public School District*, 401 F.3d 381 (6th Cir. 2005). In *Blau*, the parent of a student raised free expression and substantive due process challenges to a school dress code. *Id.* at 385, 387. The Sixth Circuit rejected those claims. *Id.* at 388-96. The actual language appellants quote about being "compel[led] to lay bare the body, or to submit to the touch of a stranger, without lawful authority" is originally from *Union Pacific Railway v. Botsford*, 141 U.S. 250, 252 (1891),[7] and has no more bearing here than it did in

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[6] In *Koeppel v. Speirs*, 779 N.W. 2d 494, 2010 WL 200417, at *1 (Iowa Ct. App. 2010), which involved a privacy tort claim under Iowa law, the intrusion at issue was secret filming in a private, single-user restroom, not ordinary use of common space in a multi-user restroom. In *Borse v. Piece Goods Shop, Inc.*, 963 F.2d 611, 621 (3d Cir. 1992), which involved a wrongful discharge claim under Pennsylvania law, the court noted that monitoring the collection of urine for urinalysis by visual or aural observation could, depending on the method used, intrude upon the statutory right to seclusion. The court did not suggest that the presence of other individuals (regardless of sex) in the common space of a restroom constituted an intrusion upon seclusion or an infringement of constitutional privacy rights. *People v. Grunau*, which involved state criminal charges against an adult with prior convictions for sexual misconduct against children, involved wildly different law and facts. No. H015871, 2009 WL 5149857, at *1 (Cal. Ct. App. Dec. 29, 2009) (unpublished). As the *Boyertown* court put it, "[a] case involving transgender students using facilities aligned with their gender identities after seeking and receiving approval from trained school counselors and administrators implicates different privacy concerns than * * * a case involving an adult stranger sneaking into a locker room to watch a fourteen-year-old girl shower." 897 F.3d at 533.

[7] In *Union Pacific*, the Court ruled that the common law did not permit a defendant to require a plaintiff in a tort case to undergo a medical examination. That decision is no longer good law. *See, e.g.*, *Erie R. Co. v. Tompkins*, 304 U.S. 64, 79 (1938); *Boswell v. Schultz*, 2007 OK 94, ¶ 7, 175 P.3d 390, 393 (Okla. 2007); *Privee v. Burns*, 46 Conn. Supp. 301, 304-05, 749 A.2d 689, 693 (Super. Ct. 1999).

Blau. As the district court acknowledged, "[t]he Sixth Circuit in *Blau* concluded that the plaintiff's reliance on *Pacific Railway* was misplaced and the quote was taken out of context. * * * Here, too, the facts of *Blau* and *Pacific Railroad* are distinguishable and do not lend any support for Plaintiffs' purported privacy right relating to the presence of transgender students in school facilities." (ER 41-42.)

Appellants have not alleged that they are compelled to undress in front of anyone. And the constitutional right to bodily privacy does not encompass excluding transgender students from common restrooms and locker rooms. The district court correctly dismissed appellants' constitutional privacy claim.

B. The Student Safety Plan is narrowly tailored to serve compelling government interests in safety and non-discrimination.

Even putting aside the lack of allegations sufficient to show that appellants' right to bodily privacy had been infringed upon, the Student Safety Plan would survive strict scrutiny. It is narrowly tailored to achieve the compelling government interests of furthering student safety and eliminating discrimination on the basis of sex and transgender status.

Protecting student safety is a compelling government interest. *See, e.g.*, *Goehring v. Brophy*, 94 F.3d 1294, 1300 (9th Cir. 1996) (finding that university had a compelling interest in the health and wellbeing of its students); *Cheema v. Thompson*, 67 F.3d 883, 885 (9th Cir. 1995) (finding that school district had a compelling interest in campus safety). Likewise, the Supreme Court has recognized repeatedly that the government has a compelling interest "of the highest order" in "eliminating discrimination and assuring * * * 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); *id*. at 628 (finding that discrimination "cause[s] unique evils that government has a compelling interest to prevent"); *see also N.Y. State Club Ass'n, Inc. v. City of N.Y.*, 487 U.S. 1, 14 n.5, 108 S. Ct. 2225, 101 L. Ed. 2d 1 (1988) (recognizing the "State's 'compelling interest' in combating invidious discrimination"); *Bd. of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 549, 107 S. Ct. 1940, 95 L. Ed. 2d 474 (1987); *Bob Jones Univ. v. United States*, 461 U.S. 574, 604, 103 S. Ct. 2017, 76 L. Ed. 2d 157 (1983). Anti-discrimination laws and policies ensure "society the benefits of wide participation in political, economic and cultural life." *Roberts*, 468 U.S. at 625.

The School District has a compelling interest in ending the "stigmatizing injury" of discrimination against transgender students, as well as "the denial of equal opportunities that accompanies it." *Id.* at 625; *see also Boyertown*, 897 F.3d at 528 ("[T]ransgender students face extraordinary social, psychological, and medical risks and the School District clearly had a compelling state interest in shielding them from discrimination."). The injunctive relief appellants seek—prohibiting Student A from using facilities with other boys solely because he is transgender—would perpetrate the very harms the School District seeks to avoid. [8] (*See* Section II.) Forcing transgender students to use bathrooms or locker rooms that do not match their gender causes "severe psychological distress often leading to attempted suicide," "medical problems[,] and decreases in academic learning." *Boyertown*, 897 F.3d at 523 (internal quotations omitted).

[8] Moreover, given that Student A has graduated from Dallas High School, appellants' requested injunctive relief is no longer practically available.

The Plan was narrowly tailored to achieve the purpose of ensuring the safety and non-discrimination of Student A. The Plan applied only to Student A. There was no less restrictive means of preventing discrimination against Student A than allowing him to use the same facilities used by other boys. Other components of the Plan, such as putting Student A's locker in line of sight of the PE teacher, having the PE teacher be the first one in and last one out of the locker room, and teaching students about anti-bullying and harassment, further demonstrate the precise tailoring of the Student Safety Plan to student safety needs. The fact that the District could take other actions to promote other safety and nondiscrimination goals, as appellants suggest—such as by supporting an LGBTQ student club or enforcing additional anti-harassment policies (Op. Br. 62)—has no bearing on the compelling interests served by the Student Safety Plan. It is not possible to achieve the compelling state interest in nondiscrimination while banning one or more students from using common facilities because they are transgender. As the Third Circuit held, not only would

> forcing transgender students to use single-user facilities or those that correspond to their birth sex not serve the compelling interest that the School District has identified here, it would significantly undermine it. * * * Adopting the appellants' position would very publicly brand all transgender students with a scarlet "T," and they should not have to endure that as the price of attending their public school.

Boyertown, 897 F.3d at 530.

The School District's plan accommodates all students, including appellants, who object to using shared facilities by permitting them to access single-occupancy facilities available to all students. The District went even further by preparing for construction of additional options for all students. (ER 90.) Ironically, what

appellants at one point claim to want the School District to do—give "all students * * * the *choice* to access individualized facilities"—is precisely what the School District has done. (Op. Br. 62-63) (emphasis added). The relief appellants actually seek is not the *choice* for all students to access single-occupancy facilities, but to *force* only transgender students to do so. When "sincere, personal opposition" to sharing common areas with transgender people becomes official school policy that excludes transgender students from common areas used by other students, "the necessary consequence is to put the imprimatur of the [school] itself on an exclusion that soon demeans or stigmatizes those whose own liberty is then denied." *Obergefell v. Hodges*, 135 S. Ct. 2584, 2602, 192 L. Ed. 2d 609 (2015). In short, appellants seek to enforce rather than prevent discrimination.

To the extent appellants suggest that anti-discrimination interests on behalf of transgender students are not compelling because of the existence of sex-separated facilities, their conclusion does not follow. The Student Safety Plan did not dismantle, and appellees do not challenge, the existence of sex-separated facilities. Rather, the Student Safety Plan simply permitted Student A, a transgender boy, to access common boys' restroom and locker room facilities at school, rather than relegating him to a separate facility no one else was required to use. The School District's Student Safety Plan was narrowly tailored to a "compelling state interest in protecting transgender students from discrimination." (ER 46 (quoting *Doe by & through Doe v. Boyertown Area Sch. Dist.*, 893 F.3d 179 (3d Cir. 2018), *opinion superseded on reh'g*, 897 F.3d 518 (3d Cir. 2018) (en banc))).

II. The Student Safety Plan does not violate Title IX.

As the district court correctly held, appellants did not plausibly allege a claim under Title IX. In fact, the injunctive relief Appellants sought would violate Title IX by discriminating against students because of sex.

A. Appellants failed to allege, and cannot allege, harassment on the basis of sex.

The district court correctly held that appellants failed to state a claim for sex-based discrimination by the School District against any appellant. Pursuant to Title IX, "[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). To state a hostile environment claim under Title IX, appellants must allege and ultimately prove that the School District (1) had actual knowledge of and (2) was deliberately indifferent to (3) harassment on the basis of sex that was (4) sufficiently serious to deprive Student Appellants of an educational opportunity or benefit provided by the School District. *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 650 (1999); *see also Reese v. Jefferson School Dist. No. 14J*, 208 F.3d 736, 739 (9th Cir. 2000). The district court properly dismissed appellants' claim because it failed to meet the third and fourth elements.

Appellants unpersuasively attempt to re-allege their privacy claim as a Title IX violation. Appellants cast Title IX's sex discrimination prohibition as a species of privacy protection by relying on regulations and statutes that permit—

but do not require—sex-separated living and restroom facilities,[9] arguing that these regulations expressly contemplate separate "privacy facilities" and therefore the exclusion of transgender students from such facilities. This is simply not true. The language *permits* schools to create separate-sex facilities. It does not *require* schools to do so. Moreover, nothing in the language of Title IX suggests that schools must force transgender students out of facilities that are most consistent with their gender, not to mention critical to their health, safety, and dignity.

As the district court properly recognized, the use of facilities for their intended purpose does not turn into an act of harassment simply because a person is transgender. (ER 50-51.) The mere use of facilities does not involve sex-based harassment or sexual violence. *See Davis*, 526 U.S. at 634. Appellants failed to allege that any student, teacher, or staff member in the School District sexually harassed or discriminated against them in any way, much less in a way that was severe, pervasive, or objectively offensive.

No court has ever held that a transgender student's use of a facility in the same manner as anyone else qualifies as harassing conduct. In fact, several courts have held just the opposite. *See Cruzan v. Special Sch. Dist. No. 1*, 294 F.3d 981, 983-84 (8th Cir. 2002) (per curiam) (finding that a transgender woman's use of the women's restrooms did not constitute sexual harassment of her co-workers);

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[9] *See* 34 C.F.R. §§ 106.33 ("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.") (emphasis added); 20 U.S.C. § 1686 ("Notwithstanding anything to the contrary contained in this chapter, nothing contained herein shall be construed to *prohibit* any educational institution receiving funds under this Act, from maintaining separate living facilities for the different sexes.") (emphasis added).

Boyertown, 276 F. Supp. 3d at 391, 401 (mere presence of transgender students in locker rooms did not violate Title IX); *Students & Parents for Privacy*, 2016 WL 6134121, at *32 ("The 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."). Appellants have not alleged any conduct on the part of any person remotely approaching the conduct that has been found to rise to the level of sexual harassment in other cases. *See e.g. Davis*, 526 U.S. at 633-34 (conduct including vulgar statements, attempts to touch breasts and genitals, and rubbing body).

Moreover, Appellants failed to assert, and cannot assert, that any alleged harassment experienced by Student Plaintiffs was *on the basis of sex*, as required to state a claim under Title IX. The District Court correctly found, "as in *Students & Parents* and [*Boyertown*], District's plan does not target any Student Plaintiff because of their sex." (ER 48-49); *see also Boyertown*, 276 F. Supp. 3d at 394-95. Appellants have not alleged, and cannot allege, they are subject to different treatment than others on the basis of sex under the Plan, or that they are being harassed because they do not match sex stereotypes. Like all other students, appellants are permitted to use multi-occupancy single-sex facilities consistent with their gender identity. Like all other students, appellants are permitted to use single-occupancy facilities if they would prefer. The Plan does not permit sex-based harassment, and does not say that schools will abstain from taking action against students, teachers, or staff who discriminate against or harass others on the basis of sex. Rather, the Student Safety Plan explicitly affirms the importance of

anti-bullying and harassment protections.[10] Like all other students, appellants are entitled to those protections against harassment and bullying. Indeed, appellants' real grievance is not that they are receiving different or worse treatment than other students, but that the School District refused to treat Student A differently from or worse than the remainder of the student body because he is transgender. Thus, the district court correctly held that the Plan "does not discriminate on the basis of sex within the meaning of Title IX." (ER 48.)

B. The relief appellants seek would constitute sex discrimination under Title IX and the Equal Protection Clause.

The relief sought by appellants would violate Title IX and the Equal Protection Clause by discriminating against transgender students on the basis of sex.[11] This Court has already recognized that discrimination because someone is

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[10] (*See* ER 132 ("All Teachers will take time to teach about anti-bullying and harassment."); ER 134 ("The district prohibits discrimination and harassment on any basis protected by law, including but not limited to, an individual's perceived or actual * * * sex [or] sexual orientation."); ER 138 ("Every student of the district will be given equal educational opportunities regardless of * * * sex."); ER 139 ("Sexual harassment is strictly prohibited and shall not be tolerated."); ER 145 ("Inservice training on sexual harassment and sexual violence will be developed by the District and made available to all district employees and students."); ER 147 ("Harassment, intimidation or bullying and acts of cyberbullying by students, staff and third parties toward students is strictly prohibited.")).

[11] As the district court found, the relief appellants seek would also violate state non-discrimination laws because they seek a judgment requiring a public school to discriminate against transgender students. Oregon law explicitly prohibits discrimination based on gender identity in public accommodations and public education. Or. Rev. Stat. § 659A.403 (prohibiting discrimination based on sex and sexual orientation in public accommodations); Or. Rev. Stat. § 659.850 (prohibiting discrimination based on sex and sexual orientation in public education); Or. Rev. Stat. § 174.100(7) (defining "sexual orientation" to include actual or perceived gender identity). When an action excludes transgender people from public spaces based on others' discomfort in sharing the same space, it is discriminatory. *See Blachana, LLC v. Oregon BOLI*, 273 Or. App. 806, 816-19,

transgender constitutes discrimination on the basis of sex. *See Schwenk v. Hartford*, 204 F.3d 1187, 1201-03 (9th Cir. 2000) ("[Title VII] prohibit[s] discrimination based on gender as well as sex."); *Prescott v. Rady Children's Hosp.—San Diego*, 265 F. Supp. 3d 1090, 1099 (S.D. Cal. 2017) ("Other Circuits have similarly interpreted the sex discrimination provision under Title IX and Title VII to protect transgender individuals from discrimination."); *see also Equal Emp't Opportunity Comm'n v. R.G. &. G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 574 (6th Cir. 2018), *cert. pet. pending*; *Dodds v. U.S. Dep't of Educ.*, 845 F.3d 217, 221 (6th Cir. 2016); *Glenn v. Brumby*, 663 F.3d 1312, 1316-19 (11th Cir. 2011); *Smith v. City of Salem*, 378 F.3d 566, 572 (6th Cir. 2004); *Rosa v. Park W. Bank & Tr. Co.*, 214 F.3d 213, 215-16 (1st Cir. 2000).

Discrimination against transgender people is discrimination based on inherently sex-based characteristics. The incongruence between gender identity and gender designated at birth is what makes a person transgender. Treating a person differently because of the relationship between those two sex-based characteristics is necessarily discrimination on the basis of "sex." *See Schwenk*, 204 F.3d at 1201-03 (finding discrimination on the basis of gender interchangeable with discrimination on the basis of sex for purposes of federal anti-discrimination statutes); *see also Roberts v. Clark Cty. Sch. Dist.*, 215 F. Supp. 3d 1001, 1014 (D. Nev. 2016), *reconsideration denied*, No. 215CV00388JADPAL, 2016 WL

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359 P.3d 574, 581 (Or. App. 2015) (finding a violation of Oregon's public accommodation law when a bar excluded transgender people it blamed for reduced patronage). Excluding transgender students from restrooms and locker rooms that match their gender is the very type of harm Oregon's nondiscrimination laws seek to prevent.

6986346 (D. Nev. Nov. 28, 2016); *Norsworthy v. Beard*, 87 F. Supp. 3d 1104, 1119 (N.D. Cal. 2015).

Likewise, discrimination against people because they have undergone gender transition is inherently based on sex. By analogy, religious discrimination includes not just discrimination against Jews and Christians, but also discrimination against people who convert from Judaism to Christianity. *Cf. Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136, 144 (1987) (refusing to adopt interpretation of Free Exercise Clause that would "single out the religious convert for different, less favorable treatment"). Similarly, sex discrimination includes discrimination against people who have undergone a gender transition from the gender designated for them at birth. *See Schroer v. Billington*, 577 F. Supp. 2d 293, 306-07 (D.D.C. 2008) (making same analogy); *Glenn*, 663 F.3d at 1314 (firing employee because of her "intended gender transition" is sex discrimination); *Dawson v. H&H Elec., Inc.*, No. 4:14-CV-00583-SWW, 2015 WL 5437101, at *3 (E.D. Ark. Sept. 15, 2015) (same).

Finally, discrimination against people because they are transgender is sex discrimination because it necessarily rests on gender-based stereotypes. By definition, transgender people depart from stereotypes and overbroad generalizations about men and women. *See Whitaker by Whitaker v. Kenosha Unified Sch. Dist.*, 858 F.3d 1034, 1049 (7th Cir. 2017) ("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."); *Schwenk*, 204 F.3d at 1202 ("Discrimination because one fails

to act in the way expected of a man or woman is forbidden under Title VII."); *Smith v. City of Salem, Ohio*, 378 F.3d 566, 574-75 (6th Cir. 2004) (discriminating based on a person's failure to "act and/or identify with" one's sex assigned at birth is discrimination on the basis of sex). Indeed, "a person is defined as transgender precisely because" that person "transgresses gender stereotypes." *Glenn*, 663 F.3d at 1316; *accord Whitaker*, 858 F.3d at 1048; *Dodds*, 845 F.3d at 221; *see also Schwenk*, 204 F.3d at 1201-03.

An injunction prohibiting transgender students from using the restrooms consistent with their gender identity like other students—part of the relief appellants seek—would discriminate against transgender students by subjecting them to different conditions than their cisgender (non-transgender) peers, effectively punishing them for their sex. *See Whitaker*, 858 F.3d at 1049; *Boyertown*, 897 F.3d at 530-31.[12] In fact, the Supreme Court has found "the overt, physical deprivation of access to school resources" to be "the most obvious example" of a Title IX violation. *Davis*, 526 U.S. at 650.

Such exclusion also stigmatizes transgender students by singling them out as different and unfit to be in spaces with their peers. *See G.G. v. Gloucester County Sch. Bd.*, 853 F.3d 729, 730 (4th Cir. 2017) (Davis, J., concurring) ("[I]t is

[12] In an unpublished decision with little analysis, this Court ten years ago held that while a transgender person could bring a claim for sex discrimination under Title VII, the transgender employee there could not meet her burden to prove her termination was motivated by gender rather than by safety concerns related to restrooms. *Kastl v. Maricopa Cty. Cmty. Coll. Dist.*, 325 Fed. App'x 492, 493 (9th Cir. 2009) (unpublished) ("[T]ransgender individuals may state viable sex discrimination claims on the theory that the perpetrator was motivated by the victim's real or perceived non-conformance to socially-constructed gender norms").

humiliating to be segregated from the general population."); *cf. J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 142, 114 S. Ct. 1419, 128 L. Ed. 2d 89 (1994) (explaining that when a juror is excluded based on gender "[t]he message it sends to all those in the courtroom, and all those who may later learn of the discriminatory act, is that certain individuals, for no reason other than gender, are presumed unqualified"); *United States v. Windsor*, 570 U.S. 744, 772, 133 S. Ct. 2675, 186 L. Ed. 2d 808 (2013) (explaining that refusal to recognize marriages of same-gender couples "tells those couples, and all the world, that their otherwise valid marriages are unworthy of federal recognition"). This stigmatization in turn causes other harms. *Heckler v. Mathews*, 465 U.S. 728, 729, 104 S. Ct. 1387, 79 L. Ed. 2d 646 (1984) ("[D]iscrimination itself, * * * by stigmatizing members of the disfavored group[,] * * * can cause serious noneconomic injuries to those persons who are denied equal treatment solely because of their membership in a disfavored group."); *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 727-28 (4th Cir. 2016) ("*G.G. I*"), *vacated and remanded on other grounds*, 137 S. Ct. 1239, 197 L. Ed. 2d 460 (2017) (describing evidence of daily psychological harm and repeated urinary tract infections resulting from boy who is transgender not being permitted to use boys' restrooms); *Whitaker*, 858 F.3d at 1041 (describing harm to boy who is transgender from not being permitted to use boys' restrooms, including fainting due to dehydration, stress-related migraines, and suicidal thinking); *Evancho v. Pine-Richland Sch. Dist.*, 237 F. Supp. 3d 267, 294 (W.D. Pa. 2017) (finding irreparable harm where girls who are transgender were marginalized through being prohibited from using girls' restrooms, "causing them

genuine distress, anxiety, discomfort and humiliation"); *Highland*, 208 F. Supp. 3d at 878, *aff'd by Dodds.*, 845 F.3d at 220-22 (finding irreparable harm where girl who is transgender was not permitted to use a girl's restroom, singling her out and exacerbating her mental health conditions).

The School District's Plan comports with Title IX by treating all students equally, as opposed to discriminating on the basis of sex. The district court correctly recognized that appellants have failed to state a claim for which relief may be granted under Title IX, and in fact, the relief appellants seek would itself constitute discrimination on the basis of sex.

III. The district court correctly ruled that appellants failed to state a claim under the fundamental right to parent one's children.

The district court properly dismissed appellants' claim that the Student Safety Plan violates their right to direct the education and upbringing of their children. (ER 61.)

The Supreme Court has held the Due Process Clause of the Fourteenth Amendment encompasses a parental liberty right to "direct the upbringing and education of children." *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534-35, 45 S. Ct. 571, 69 L. Ed. 1070 (1925) (striking down Oregon's compulsory attendance law); *see also Meyer v. Nebraska*, 262 U.S. 390, 403, 43 S. Ct. 625, 67 L. Ed. 1042 (1923) (striking down a Nebraska law prohibiting teaching of foreign language). However, the district court properly recognized that this right is not exclusive "'nor is it beyond regulation [by the state] in the public interest.'" (ER 60 (quoting *Fields v. Palmdale Sch. Dist.*, 427 F.3d 1197, 1204 (9th Cir. 2005))). The district court was correct in concluding that the *Meyer-Pierce* right does not encompass

the right appellants seek in this case, which is the right to require the School District to prevent transgender students from sharing school facilities with their children. (ER 61.)

This Court recognized in *Fields* that parents have the right to decide where their children obtain an education, but once they make that choice, "their fundamental right to control the education of their children is, at the least, substantially diminished." *Fields*, 427 F.3d at 1206. Contrary to appellants' argument, it makes no difference that *Fields* involved the school's ability to regulate dissemination of information in a survey (or "curriculum" as appellants call it) and not "conduct." (Op. Br. 55.) *Fields* made clear that schools have authority to regulate many aspects of the school day, stating that, "[w]hile 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," including "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." *Fields*, 427 F.3d at 1206 (quoting *Blau*, 401 F.3d at 395-96).

Appellants' citations to cases involving other legal obligations of schools are unpersuasive and inapplicable to the parental liberty right. Of course schools cannot enforce policies that run afoul of the First Amendment. *See West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 63 S. Ct. 1178, 87 L. Ed. 1628 (1943) (striking down forced flag salute and recitation of the Pledge of Allegiance

as a violation of the freedom of speech and religion). Schools also have obligations to address sex-based harassment and violence under Title IX, 20 U.S.C. § 1681. But appellants have made no claims that the Student Safety Plan violates their right to free speech, and their Title IX claims are without merit. (*See* Section II). Likewise, the fact that the state has chosen to permit parents to inspect certain educational materials or opt their students out of certain programs has no bearing on whether the Student Safety Plan infringes on appellants' parental liberty rights under the Due Process Clause.

Appellants seek to force the School District to exclude transgender students from restroom and locker room facilities because of their own personal objection to their children sharing common spaces with transgender people. It is clear the Due Process Clause encompasses no such right. The fundamental right to parent children does not include a right to force the state to run its public schools in accordance with a parent's own particular moral or religious beliefs. *See Fields*, 427 F.3d at 1205-06 ("*Meyer*, *Pierce*, and their progeny * * * do not afford parents a right to compel public schools to follow their own idiosyncratic views as to what information the schools may dispense."); *Blau*, 401 F.3d at 395-96. The district court correctly concluded it would be an improper expansion of the *Meyer-Pierce* right to allow appellants to exercise control over the School District's decision-making authority with respect to the Student Safety Plan, and noted appellants "cite no case standing for the proposition that parents retain the right to prevent transgender students from sharing school facilities with their children." (ER 61.)

Parents who disapproved of their sons using facilities used by a transgender boy retained the right to instruct their children to use the staff lounge instead or to remove their children from Dallas High School, as well as the right to instruct their children about the reasons for their disapproval. But they have no fundamental right to prohibit the School District from allowing transgender students to use facilities consistent with their gender identity because of their own personal moral or religious opposition. The district court was therefore correct in dismissing appellants' parental liberty claim for failure to state a claim.

IV. The district court correctly ruled that appellants failed to state a free exercise claim.

Some appellants—Kris Golly, Jon Golly, Lindsay Golly, and A.G.—claimed that the Student Safety Plan violated their free exercise of religion. The district court properly dismissed those claims.

As a threshold matter, the district court rightly concluded that appellants failed to allege any facts suggesting the Student Safety Plan implicated any appellant's exercise of religion in any way. (ER 63.) The district court properly concluded the Complaint contained "no allegations that District forced any Plaintiff to embrace a religious belief, nor does the Student Safety Plan punish anyone for expressing their religious beliefs." (*Id.*) Appellants' opening brief continues to presume the Student Safety Plan implicates religion while offering no arguments to support their "generalized allegation" that the Student Safety Plan burdens "the unspecified religious beliefs of unidentified plaintiffs." (*Id.*)

Even if the Student Safety Plan had burdened an appellant's religious beliefs in some way, the district court was also correct to hold that the Student Safety Plan

is neutral and generally applicable with respect to religion, and does not implicate another fundamental right. (*Id.*) The Student Safety Plan is thus subject to rational basis review, which it easily survives.

As the district court stated, "Plaintiffs misunderstand the law" of general applicability. (*Id.*) Appellants argue that the Student Safety Plan is not neutral or generally applicable because it was adopted to support a specific student. (Op. Br. 63.) That Student A was the student protected by the Student Safety Plan has no bearing on the analysis as "[n]eutrality and general applicability are considered *with respect to religion*." (ER 63 (emphasis added).) *See, e.g., Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532-33, 113 S. Ct. 2217, 124 L. Ed. 2d 472 (1993); *Emp't Div. v. Smith*, 494 U.S. 872, 878, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (1990), *superseded on other grounds by statute*. In assessing whether a law is neutral and generally applicable, the Supreme Court has considered whether it is enforced "in a selective manner" to "impose burdens only on conduct motivated by religious belief" and not on conduct motivated by other reasons. *See Lukumi*, 508 U.S. at 543.

Here, as the district court held, there are no allegations the Student Safety Plan targets religious groups or practices, that the School District selectively enforces the Student Safety Plan against religiously-motivated conduct, or that the Student Safety Plan's "object" is the suppression of anyone's free exercise of religion. *Emp't Div.*, 494 U.S. at 878. The Student Safety Plan applies without regard to religious beliefs.

The district court also properly rejected the application of the hybrid rights doctrine. Appellants argue that the Student Safety Plan is subject to strict scrutiny because they have alleged violations of multiple fundamental rights. (Op. Br. 64.) However, appellants must do more than *allege* multiple fundamental rights claims. Rather, they must demonstrate a "fair probability or a likelihood * * * of success on the merits" of such claims. *Miller v. Reed*, 176 F.3d 1202, 1207 (9th Cir. 1999). Because appellants did not meet this burden, as discussed above, the district court was correct in concluding their "assertion of a hybrid claim also fails." (ER 63 n.10.)

Because the Student Safety Plan is neutral and generally applicable with respect to religion, and any burden on religious practice is incidental, rational basis review applies. The Student Safety Plan easily meets that standard, and appellants do not argue otherwise. Further, even if this Court were to apply strict scrutiny, the Student Safety Plan is narrowly tailored to serve the compelling government interests of student safety and non-discrimination, for the same reasons addressed in I.B.

V. The district court acted properly in dismissing the Complaint with prejudice where appellants did not move to amend the Complaint.

Appellants allege that the district court erred when it did not grant them an opportunity to amend the complaint. They are mistaken.

In the School District's motion to dismiss, it indicated that counsel for the School District and counsel for appellants had conferred, and that appellants had consented to the dismissal of Lindsay Golly's and Nicole Lillie's claims, and had consented to dismissal of the claims for damages from A.G. and T.F. (ER 333-34.)

It also indicated that appellants intended to amend the Complaint. (*Id.*) In their opposition to the School District's motion to dismiss, appellants indicated that, "as recited in" the School District's brief, they had "agreed to replead" allegations where they conceded the existing allegations were insufficient, including with regard to Nicole Lillie, claims for compensatory damages, and claims regarding LaCreole Middle School. (ER 350.) But they took no action to do so. Nor did appellants indicate that, if the motions to dismiss were granted, they could amend their Complaint in a manner that would address the grounds for dismissal raised by appellees.

Appellants' arguments rely on cases in which a district court denied a motion to amend the complaint. *See Polich v. Burlington N., Inc.*, 942 F.2d 1467, 1469 (9th Cir. 1991) (noting district court denied plaintiff's motion to file a third amended complaint); *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 700 (9th Cir. 1988) (noting that pro se plaintiff specifically requested the alternative relief of permission to file an amended complaint in her response to a motion to dismiss); *Scott v. Eversole Mortuary*, 522 F.2d 1110, 1116 n.8 (9th Cir. 1975) (noting that the plaintiffs had made a specific written request to amend, even though it was not on properly-captioned motion papers). Here, however, appellants never sought leave to amend in any form. Appellants have no basis to appeal the denial of a motion they never made. *See Karn v. Hanson*, 197 F. App'x 538, 539 (9th Cir. 2006).

Even if appellants had sought leave to amend their pleadings, they offer no argument as to why the outcome of the case would have been different had they

been permitted to do so. *See Dahnken v. Wells Fargo Bank, NA*, 705 F. App'x 508, 510 (9th Cir. 2017). Futility of amendment justifies denial of a motion for leave to amend. *Johnson v. Buckley*, 356 F.3d 1067, 1077 (9th Cir. 2004). For the reasons explained above, additional facts would neither conjure a constitutional right where none exists nor transform the mere ordinary use of a restroom or locker room into an act of harassment. Thus, any effort to amend the Complaint would have been futile.

Extending this litigation needlessly would not only waste judicial resources, but prejudice the transgender youth whose interests Intervenor-Defendant BRO represents. While Student A has graduated, other members of this already highly vulnerable group remain in suspense over whether their schools could be forced to discriminate against them and prevented from protecting their safety.

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's judgment dismissing appellees' claims with prejudice.

Respectfully submitted,

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STATEMENT REQUIRED BY CIRCUIT RULE 28-2.6

Case No. 18-35708

Intervenor-Defendant-Appellee is not aware of any cases pending in this Court that might be deemed related to this case within the meaning of Circuit Rule 28-2.6.

DATED: March 4, 2019

s/ Peter D. Hawkes
Peter D. Hawkes

Of Attorneys for Intervenor-Defendant-Appellee Basic Rights Oregon

CERTIFICATE OF COMPLIANCE

Case No. 18-35708

This brief contains 10,692 words, excluding the items exempted by Fed. R. App. P. 32(f). The type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

I certify that this brief complies with the word limit of Cir. R. 32-1.

DATED: March 4, 2019

s/ Peter D. Hawkes
Peter D. Hawkes

Of Attorneys for Intervenor-Defendant-Appellee Basic Rights Oregon

CERTIFICATE OF SERVICE

Case No. 18-35708

I hereby certify that on March 4, 2019, I caused the foregoing to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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

s/ Peter D. Hawkes
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