UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Case No. 17-3113

JOEL DOE, a minor; by and through his Guardians JOHN DOE and JANE DOE; MARY SMITH; JACK JONES, a minor; by and through his Parents JOHN JONES and JANE JONES; and MACY ROE,

Appellants

v.

BOYERTOWN AREA SCHOOL DISTRICT; DR. BRETT COOPER, in his official capacity as Principal*; DR. E. WAYNE FOLEY, in his official capacity as Assistant Principal*; DAVID KREM, Acting Superintendent*,

Appellees

and

PENNSYLVANIA YOUTH CONGRESS FOUNDATION,

Appellee-Intervenor

BRIEF OF APPELLANTS

APPEAL FROM THE ORDER DATED AUGUST 25TH, 2017 OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA AT DOCKET NO. 5:17-CV-01249-EGS DENYING APPELLANTS' MOTION FOR PRELIMINARY INJUNCTION

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**The District Court dismissed the individual Defendants/Appellees from the case on November 7, 2017, pursuant to agreement of the parties.*

***Pending admission*

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JURISDICTIONAL STATEMENT

JURISDICTION OF THE DISTRICT COURT

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

JURISDICTION OF THE THIRD CIRCUIT COURT OF APPEALS

This Court has jurisdiction over this appeal of the order of the District Court that denied Plaintiffs' Motion for Preliminary Injunction, under 28 U.S.C. § 1292(a)(1); App. at 4-5.[1]

This appeal was timely filed. The District Court entered its order denying Plaintiffs' Motion for Preliminary Injunction on August 25, 2017, and Appellants filed their Notice of Appeal from that order on September 25, 2017, App. at 1-3.

The District Court's Order denying Plaintiffs' Motion for a Preliminary Injunction considered the merits of Appellants' claims, and concluded that Appellants are unlikely to prevail on the merits. App. at 4-5. The Order denying

[1] Appellants complied with 3D CIR. R. 30.3(a) and FED. R. APP. P. 30(b) in seeking to limit the size of Appendix but including what the parties designated.

Plaintiffs' Motion for a Preliminary Injunction was immediately appealable by Appellants pursuant to 28 U.S.C. § 1292(a)(1).

STATEMENT OF THE ISSUES

1) Whether the court correctly interpreted "sex" to include the concept of "gender identity" in the Fourteenth Amendment and Title IX contexts involving access to privacy facilities (locker rooms, showers, and restrooms).

The lower court conflated the terms throughout its opinion.

2) Whether a school policy permitting students of one sex to access the privacy facilities of the opposite sex (if they self-identify with the opposite sex) violates the Fourteenth Amendment right to bodily privacy.

The issue was addressed in the Opinion at App. 90-112.

3) Whether this policy constitutes sexual harassment under Title IX, particularly when state law requires separate facilities for school students.

The issue was addressed in the Opinion at App. 112-131.

4) Whether this policy constitutes an intrusion upon seclusion.

The issue was addressed in the Opinion at App. 132-139.

5) Whether the students suffer irreparable injury in the absence of an injunction.

The issue was addressed in the Opinion at App. 139-145.

6) Whether preventing harm to the students, vindicating the students'

constitutional rights, and preventing sexual harassment by restoring the status quo will result in greater harm to the school district and Intervenor.

The issue was addressed in the Opinion at App. 146.

7) Whether preventing harm to the students, vindicating the students' constitutional rights, and preventing sexual harassment by restoring the status quo is in the public interest.

Because the court ruled against Appellants on the other prongs, it did not address this issue. *See* Op., App. 146.

STATEMENT OF RELATED CASES

Neither this case or any case related to Appellees' policy has been before this Court or any tribunal.

CONCISE STATEMENT OF THE CASE

In the 2016-17 school year, the Boyertown Area School District (the "District") began authorizing students of one sex to use the locker room and restroom of the opposite sex if those students self-identified with the opposite sex.[2] *See* App. 22 (Op. ¶ 28), App. 602-04 (7-31-17 Tr.), App. 783-85, 794-95, 843 (Faidley Dep.), App. 1040 (Cooper Dep.), App. 2016 (District FAQs). The District

[2] Appellants use "sex" as referring to male or female as grounded in reproductive biology—sex is binary, fixed at conception, and objectively verifiable. "Gender" is used in the sense that the Appellees have defined it: a malleable, subjectively discerned continuum of genders that range from male to female to something else.

informed neither students nor their parents of this new policy. *See* App. 25 (Op. ¶ 47), App. 628 (7-31-17 Tr.), App. 806-07 (Faidley Dep.), App. 898 (Foley Dep.), App. 985 (Cooper Dep.). Instead, the policy was discovered when Joel Doe, clad only in his underwear in the boys' locker room, encountered a girl wearing nothing above her waist other than a bra. *See* App. 36 (Op. ¶¶ 111-12), App. 320-21 (7-17-17 Tr.), App. 1142-43, 1236-37 (Joel Doe Dep.). Doe, a Junior at the time, and several other boys raised concerns with the Assistant Principal, who told them to "tolerate" changing with a girl, that there were no other options to protect the boys, and to make the arrangement as "natural" as possible. *See* App. 38 (Op. ¶ 123), App. 2013 (Doe-Foley Audio Transcript); App. 325, 350 (7-17-17 Tr.). Because he did not want to repeat the experience, Doe ceased changing in the locker room. *See* App. 42 (Op. ¶ 145), App. 342-344 (7-17-17 Tr.).

The school refused to restore the long-standing pre-2016-17 status quo--privacy facilities separated by sex, *see* App. 35, 45 (Op. ¶¶ 104, 166), App. 317 (7-17-17 Tr.)--and Joel Doe sued in the United States District Court for the Eastern District of Pennsylvania on March 21, 2017, to protect his right of privacy and stop the sexual harassment and the intrusion upon his seclusion. Upon learning of the lawsuit, three more students joined the suit and filed an Amended Complaint on April 18, 2017. Jack Jones, a Junior at the time, learned about the policy as Doe did: in his underwear in the locker room with a girl standing near him. *See* App.

46-47 (Op. ¶¶ 170-73), App. 1928, 1942, 1946 (Jack Jones Trial Dep.), App. 1611, 1613, 1620, 1724, 1732 (Jack Jones Dep.). Mary Smith, a Junior at the time, learned about the policy when she encountered a male student in the girl's restroom and rushed out in shock. *See* App. 55, 57 (Op. ¶¶ 228, 237), App. 263-64, 276 (7-17-17 Tr.), App. 1385-86, 1390-91 (Mary Smith Dep.), App. 2021 (BASD Mary Smith Report). She spoke to her teacher, who sent her to the principal's office because of the significance of the claim. *See* App. 57 (Op. ¶ 238), App. 277 (7-17-17 Tr.). There, she learned that the male was now permitted to use the girls' privacy facilities. *See* App. 58 (Op. ¶ 244), App. 281 (7-17-17 Tr.); App. 1387 (Mary Smith Dep.). This greatly affects Smith because she plays sports, and she and fellow players use the common areas of the restrooms to change because of the cramped, unsanitary condition of the stalls. *See* App. 55-56 (Op. ¶¶ 232-33), App. 273-74 (7-17-17 Tr.). In changing in the locker room and in the restrooms, she and others often fully undress, revealing their unclothed bodies. *See id.* Macy Roe, who graduated at the end of the 2016-17 school year, also observed same-sex nudity and partial nudity in the privacy facilities, *see* App. 63-64 (Op. ¶¶ 278, 289), App. 1986, 1993 (Macy Roe Trial Dep.); App. 1787, 1810-12 (Macy Roe Dep.). She wished to prevent violations of her privacy, *see* App. 65 (Op. ¶ 295), App. 1996, 2000 (Macy Roe Trial Dep.); App. 1809 (Macy Roe Dep.). Distressed at the thought of using privacy facilities with the opposite sex, Appellants used the

restrooms much less frequently, *see* App. 43, 50, 59, 63 (Op. ¶¶ 147, 193, 254, 282), App. 1947-48 (Jack Jones Trial Dep.), App. 1639-40 (Jack Jones Dep.), App. 282, 345 (7-17-17 Tr.), App. 1991 (Macy Roe Trial Dep.), did not change in the common areas, *see* App. 39 (Op. ¶ 130), App. 353 (7-17-17 Tr.), and Joel Doe left the school and is currently missing his senior year, *see* App. 46 (Op. ¶ 167), App. 316-17 (7-17-17 Tr.) (stating that he may leave the school). Appellants believe they and their younger siblings should be able to use the privacy facilities set aside for their sex without members of the opposite sex being present. *See* App. 44, 50, 60, 65 (Op. ¶¶ 155, 197, 263, 295), App. 293, 347 (7-17-17 Tr.), App. 1949, 1967 (Jack Jones Trial Dep.), App. 1996, 2000 (Macy Roe Trial Dep.), App. 1809 (Macy Roe Dep.).

A Motion for Preliminary Injunction was filed on May 17, 2017, to enjoin the new policy so that violations of bodily privacy, sexual harassment, and intrusions upon seclusion would cease. After two days of hearings on July 17, 2017, and July 31, 2017, and oral arguments on August 11, 2017, the court denied the students' motion on August 25, 2017. The District Court has stayed all proceedings as of November 7, 2017, pending the resolution of this appeal.

SUMMARY OF THE ARGUMENT

Americans enjoy a right to bodily privacy. Separate privacy facilities for men

and women, boys and girls, are mandated precisely because of the anatomical and biological differences between the sexes, and those differences impact modesty, dignity, sexual harassment, and personal safety. Were such physical differences between the sexes not *the* defining factor for privacy facilities, there would be no reason to separate the sexes. As Ruth Bader Ginsburg once said, "Separate places to disrobe, sleep, perform personal bodily functions are permitted, in some situations required, by regard for individual privacy. Individual privacy, a right of constitutional dimension, is appropriately harmonized with the equality principle." Ruth Bader Ginsburg, *The Fear of the Equal Rights Amendment*, THE WASHINGTON POST, April 7, 1975.

Until recent efforts to redefine "sex" (objectively male or female, as grounded in reproductive roles) to mean "gender" (subjectively perceiving oneself to be male, female, or something else), bodily privacy claims typically arose within the Fourth Amendment context of searches or correctional or juvenile facilities or in employment discrimination cases where the fundamental right to privacy would be compromised. This right to bodily privacy from persons of the opposite sex is also recognized under the Fourteenth Amendment. *Doe v. Luzerne Cty.*, 660 F.3d 169, 175-76 n.5 (3d Cir. 2011) (finding a Fourteenth Amendment fundamental right to bodily privacy from persons of the opposite sex viewing our partially clothed

bodies).

The Appellees' rejection of "sex" as being grounded in human reproductive nature and objectively confirmable via the biological differences between male and female in favor of a subjective continuum of genders eliminates the law's longstanding respect for the anatomical differences between the sexes. This protection of privacy is deeply rooted in our traditions, and the governmentally-imposed violation of such privacy steals our modesty, dignity, and sexual privacy in a way that is inconsistent with ordered liberty.

Bodily privacy is the basis for which the implementing regulations for Title IX preserve separate facilities on the basis of "sex," *see* 34 C.F.R § 106.33, a term that has long been understood to mean biological sex. When the school authorizes a student of one sex to use the privacy facilities of the opposite sex, unlawful sexual harassment occurs because a person of one sex is being exposed in an unwanted, compromised way with regards to his or her personal privacy. Similarly, these facts demonstrate that Appellees have intruded upon the students' seclusion by inviting students of the opposite sex into facilities reserved for one sex.

Appellants seek a preliminary injunction to protect their right (and that of their fellow students) to personal privacy while using facilities that were designed, pursuant to state law and consistent with Title IX and the Fourteenth Amendment,

to be used exclusively by members of one sex. The court below erred in failing to grant a preliminary injunction protecting Appellants' constitutional right to bodily privacy from persons of the opposite sex and preventing sexual harassment and intrusion upon seclusion. The court's error rested largely on failing to apply the clear and consistent legal definition of sex, one grounded in human physiology and anatomy. Instead, it redefined sex as self-perceived gender, with the ineluctable results of male and female students being intermingled in privacy facilities pursuant to the school's policy.

ARGUMENT

I. STANDARD OF REVIEW FOR THE ISSUES ON APPEAL.

"A party seeking a preliminary injunction must show: (1) a likelihood of success on the merits; (2) that it will suffer irreparable harm if the injunction is denied; (3) that granting preliminary relief will not result in even greater harm to the nonmoving party; and (4) that the public interest favors such relief." *Conestoga Wood Specialties Corp. v. Sec'y of the U.S. Dep't of Health & Human Servs*., 724 F.3d 377, 382 (3d Cir. 2013), *rev'd sub nom on other grounds*, *Burwell v. Hobby Lobby Stores, Inc*., 134 S.Ct. 2751 (2014). The District Court's denial of Appellants' Motion for a Preliminary Injunction is reviewed for abuse of discretion. *Graham v. Triangle Pub., Inc*., 344 F.2d 775, 776 (3d Cir. 1965).

Questions of law are reviewed *de novo, Paredes v. Att'y Gen. of the U.S.,* 528 F.3d 196, 198 (3d Cir. 2008), and where (as here) there is legal error, review is plenary, *Donivan v. Dallastown Borough*, 835 F.2d 486, 487 (3d. Cir. 1987).

The court below erred as a matter of law in denying injunctive relief because Appellants are likely to prevail on the merits of their claims. This error resulted from the court redefining sex to mean one's self-perceived gender and not human physiology and anatomy, thus eliminating the privacy that we expect based on the anatomical differences between the sexes. Moreover, the court erred as a matter of law in concluding that Appellants will suffer no irreparable harm and by failing to find that the balance of the harms and the public interest favor injunctive relief.

II. THE LOWER COURT'S ERRORS RESULTED FROM MISCONSTRUING THE MEANING OF SEX.

The issues of bodily privacy, sexual harassment, and intrusion upon seclusion turn on whether persons of the opposite sex are invading those areas reserved for a single sex. The court erred in finding that self-identification with the opposite sex alters Appellants' rights under the constitution[3], Title IX[4], and state law[5] as applied to privacy facilities.

If, as the court below has stated, *see* App. 102-106, 119-120, 130, 138, 146

[3] *Infra*, section III(A)(1)(b).
[4] *Infra*, section III(B)(1).
[5] *See* 24 P.S. § 7-740.

(Op.), any student entering boys' facilities are boys and those entering girls' facilities are girls, Appellants' claims evaporate. Historically, all of the cases discussing these issues shared a common understanding of sex as our anatomical differences rooted in biology, not individual subjective perceptions of sex or sex-stereotypes. The meaning behind the caselaw disappears, however, if subjective gender supplants objective sex.

Some courts have read "sex" to include "gender identity" under Title VII. In employment, merging those terms seldom takes away protections on the basis of sex or infringes on privacy rights. But they are mutually exclusive in the privacy facilities context. The very purpose behind sex-based privacy facilities is eliminated if facilities are provided based on gender identity rather than sex because it results in the intermingling of the two sexes.

Regardless of whether we call the student who entered the locker room at the times when Doe or Jones was present a biological girl or a transgender boy, that student was anatomically female. Likewise, whether we call the student a biological boy or a transgender girl who shocked Mary Smith in the girls' room, that student was anatomically male. It is the anatomical and biological differences between the sexes that have justified separate spaces and that inform our understanding of privacy, and which should guide this Court as it analyzes the

claims below.

III. THE LOWER COURT ERRED IN CONCLUDING THAT APPELLANTS WERE UNLIKELY TO SUCCEED ON THE MERITS.

A. The Lower Court Erred in Failing to Recognize that a Policy Authorizing Students of One Sex to Access the Privacy Facilities of the Opposite Sex Violates the Fourteenth Amendment Right to Bodily Privacy.

The school adopted a new policy beginning in the 2016-17 school year that separates privacy facilities like locker rooms and restrooms based on students' subjective perception of their own gender rather than on the objective basis of their sex. In doing so, the school transformed those facilities designed to protect persons based on anatomical differences between the two sexes into places of vulnerability where students see and are seen undressed by persons of the opposite sex. Appellees argue that this is necessary to *affirm* the gender identity of those who identify with the opposite sex. The policy disregards the very purpose of separate privacy facilities.[6] But that novel "affirming" interest does not justify ignoring the

[6] Although Appellees appear to accept a binary male/female taxonomy (albeit based in subjective gender perception), their gender identity theory is not binary, but rather includes those who describe themselves as neither male nor female or both or somewhere in between. *See, e.g.*, App. 70 (Op. ¶ 322) (quoting Dr. Leibowitz's definition of gender identity as "one's subjective, deep-core conviction sense of self as a particular gender. In most situations, male or female, but maybe some aspect of both, or in between."); App. 71 (*id*. ¶ 331) (quoting Dr. Leibowitz's discussion of gender fluidity); App. 72 (*id.* ¶ 336) (quoting Dr. Leibowitz's discussion of non-binary); American Psychological Association. *Answers to your questions about transgender people, gender identity, and gender*

differences in anatomy. Nor does a person's desire to live out their perceptions of gender justify infringing the fundamental rights of others.

The lower court made the following errors regarding Appellants' right to bodily privacy: 1) it failed to recognize the rights' contours, 2) it failed to recognize that a policy opening up facilities to persons of the opposite sex necessarily violates that right, 3) it erred in concluding this policy advances a compelling interest, and 4) it erred in finding the policy was narrowly tailored to that interest.

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

One has a "constitutionally protected privacy interest in his or her *partially* clothed body." *Luzerne Cty.*, 660 F.3d at 175-76 (emphasis added).[7] *Accord*

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expression. 1-2 (2011), *available at* http://www.apa.org/topics/lgbt/transgender.aspx (explaining that "Genderqueer is a term that some people use who identify their gender as falling outside the binary constructs of 'male' and 'female.'" Other terms "include androgynous, multigendered, gender nonconforming, third gender, and two-spirit people." These "often include a sense of blending or alternating genders. Some people who use these terms to describe themselves see traditional, binary concepts of gender as restrictive.").

[7] The District Court suggested that this circuit was never explicit that such a right exists. *See* App. 98 (Op. at 93 n.47). However, after acknowledging a disagreement between the circuits as to whether this right was located in the Fourth or Fourteenth Amendment, this Court stated that the contours of this right were the same and located this right in the Fourteenth Amendment. *See Luzerne Cty.*, 660 F.3d. at 176 n.5.

Canedy v. Boardman, 16 F.3d 183, 185 (7th Cir. 1994) (recognizing that the "right to privacy is now firmly ensconced among the individual liberties protected by our Constitution"); *Poe v. Leonard*, 282 F.3d 123, 138 (2d Cir. 2002) (recognizing a "right to privacy in one's unclothed or partially unclothed body"). There is no "requirement that certain anatomical areas of one's body, such as genitals, must have been exposed for that person to maintain a privacy claim under the Fourteenth Amendment. . . ." *Luzerne Cty.*, 660 F.3d at 176. A "reasonable expectation of privacy" exists "particularly while in the presence of members of the *opposite sex*." *Id.* at 177 (emphasis added). "The desire to shield one's unclothed figure from views of strangers, and *particularly* strangers *of the opposite sex*, is impelled by elementary self-respect and personal dignity." *York v. Story*, 324 F.2d 450, 455 (9th Cir. 1963) (emphasis added). "[M]ost people have 'a special sense of privacy in their genitals, and involuntary exposure of them in the presence of people of the other sex may be especially demeaning and humiliating.'" *Fortner v. Thomas*, 983 F.2d 1024, 1030 (11th Cir. 1993) (quoting *Lee v. Downs*, 641 F.2d 1117, 1119 (4th Cir. 1981)). That feeling is magnified for teens, who are "extremely self-conscious about their bodies[.]" *Cornfield by Lewis v. Consol. High Sch. Dist. No. 230*, 991 F.2d 1316, 1323 (7th Cir. 1993). "[A]dolescent vulnerability intensifies the . . . intrusiveness of the exposure." *Safford Unified Sch. Dist. No. 1 v. Redding*, 557

U.S. 364, 375 (2009).[8] The Supreme Court itself recognized that the real physical differences between male and female students merited the provision of sex-specific privacy facilities when it mandated the admission of women at the Virginia Military Institute ("VMI"). *United States v. Virginia*, 518 U.S. 515, 550 n.19 (1996).

The VMI standard is paralleled in Pennsylvania law.[9] The privacy interest is so

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[8] The lower court dismissed references to *Cornfield* and *Redding* as well as *Beard v. Whitmore Lake Sch. Dist*., 402 F.3d 598 (6th Cir. 2005), because these cases all involve strip searches. Regardless, all of these cases recognize our central point: the right to bodily privacy has been long recognized in various environments.

[9] *See* Public School Code of 1949, 24 P.S. § 7-740 (privacy facilities "shall be suitably constructed for, and used separately, by the sexes"). *See also* 43 P.S. § 109 (applying industrial sanitation code, which requires separate restrooms, to all employers); 7 Pa. Code § 1.57 (separate facilities for meat packers); 7 Pa. Code § 78.75 (at eating establishments); 7 Pa. Code § 82.9 (separate facilities for seasonal farm labor, "distinctly marked 'for men' and 'for women' by signs printed in English and in the native languages of the persons" using those facilities); 28 Pa. Code § 18.62 ("separate dressing facilities, showers, lavatories, toilets and appurtenances for each sex" at swimming pools); 25 Pa. Code § 171.16 (requiring schools to follow the provisions of the Public Bathing Law (35 P.S. §§ 672—680d) and 28 Pa. Code Chapter 18 (requiring separate privacy facilities at swimming and bathing places)); 28 Pa. Code §19.21 (separate restrooms on the basis of sex at camps); 28 Pa. Code § 205.38 (at long term care facilities); 34 Pa. Code § 41.121 (on railroads); 34 Pa. Code § 41.122 (separate bathrooms to be provided for each sex and clearly designated and forbidding any person to use or frequent a toilet room assigned to the opposite sex); 34 Pa. Code § 47.127 (same); 34 Pa. Code § 403.28 (requiring restrooms for each sex); 34 Pa. Code § 41.24 (designating the entrance of "retiring rooms" to be clearly marked by sex and preventing opposite sex entry); 34 Pa. Code § 41.31 (requiring separate toilet rooms "for each sex" which shall be clearly designated and that "no person shall be permitted to use or frequent a toilet room assigned to the opposite sex"); 34 Pa. Code § 41.32 (requiring partitions separating toilet rooms on account of sex, which shall be

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

Based on these legal principles, there were clear privacy violations when Joel Doe, wearing his underwear, encountered the bra-clad female student in the boys' locker room, *see* App. 36 (Op. ¶¶ 111-12), App. 320 (7-17-17 Tr.), App. 1142-43, 1236-37 (Joel Doe Dep.); when Jack Jones suffered a similar incident, *see* App. 47 (Op. ¶ 173), App. 1942, 1946 (Jack Jones Trial Dep.), App. 1613, 1620, 1732 (Jack Jones Dep.), and when Mary Smith fled the girls' restroom in shock having discovered a boy within her privacy facility, *see* App. 57 (Op. ¶ 237), App. 276 (7-17-17 Tr.), App. 1390-91 (Mary Smith Dep.), App. 2021 (BASD Mary Smith Report).

"soundproof").

Fundamental rights, like students' bodily privacy in locker rooms, showers, and restrooms are "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty." *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997). This ordered liberty cannot exist if government officials authorize private parties to intrude upon the bodily privacy of others, justified only by an interest in self-affirmation of a few individuals.

a. Bodily privacy--particularly for our children--is solidly grounded in our history and tradition.

The lower court stated that recognizing "that a male's constitutional privacy rights are violated . . . even by seeing a female in a state of undress in a locker room, would extend constitutional privacy rights beyond acceptable bounds." Op. at 103-04. On the contrary, the school may not use their control over the students in their care to condition the use of the same type of privacy facilities contemplated by the Supreme Court in the VMI case, *supra*, upon surrendering the students' fundamental privacy rights. Indeed, the lower court's concern about Appellants stretching privacy too far ignores well-established law. We recognize "society's undisputed approval of separate public restrooms for men and women based on privacy concerns. The need for privacy justifies separation. . . ." *Faulkner v. Jones*, 10 F.3d 226, 232 (4th Cir. 1993). That is why "same-sex restrooms [and] dressing rooms" are allowed "to accommodate privacy needs" and why "white only rooms,"

which have no basis in bodily privacy, are illegal. *Chaney v. Plainfield Healthcare Ctr.*, 612 F.3d 908, 913 (7th Cir. 2010). Mary Smith, an African American herself, finds it offensive to compare sex based privacy facilities with racism. *See* App. 293-94 (7-17-17 Tr.). Females "using a women's restroom expect[] a certain degree of privacy from ... members of the opposite sex." *State v. Lawson*, 340 P.3d 979, 982 (Wash. App. 2014). Specifically, teenagers are "embarrass[ed] ... when a member of the opposite sex intrudes upon them in the lavatory." *St. John's Home for Children v. W. Va. Human Rights Comm'n*, 375 S.E.2d 769, 771 (W. Va. 1988).

The privacy interest is vitiated when a member of one sex is "viewed by a member of the opposite sex." *Canedy*, 16 F.3d at 185. Thus, while students may be strip searched by same-sex teachers, opposite-sex teachers may not conduct the search. *Cornfield*, 991 F.2d at 1320. At bottom, government actors cannot force minors to endure the risk of unconsented intimate exposure to the opposite sex as a condition for using the very facilities set aside to protect their privacy. "[P]rivacy matters" to children and is "central to their development and integrity." Samuel T. Summers, Jr., *Keeping Vermont's Public Libraries Safe: When Parents' Rights May Preempt Their Children's Rights*, 34 VT. L. REV. 655, 674 (2010) (quoting Ferdinand Schoeman, *Adolescent Confidentiality and Family Privacy*, in PERSON

TO PERSON 213, 219 (George Graham & Hugh Lafollette eds., 1989)). Allowing opposite-sex persons to view adolescents in restrooms and locker rooms, risks their "permanent emotional impairment" under the mere "guise of equality." *City of Phila. v. Pa. Human Relations Comm'n*, 300 A.2d 97, 103 (Pa. Commw. Ct. 1973).

Schools have separate facilities for boys and girls to protect the student's right to privacy. "Unquestionably, a girls' locker room is a place where a normal female should, and would, reasonably expect privacy, especially when she is performing quintessentially personal activities like undressing, changing clothes, and bathing." *People v. Grunau*, No. H015871, 2009 WL 5149857, *3 (Cal. Ct. App. Dec. 29, 2009). In *Grunau*, the defendant argued that briefly viewing a teenager showering in a full swim suit, the same thing she was wearing while swimming where members of both sex could see her, would not shock or irritate the average person. The *Grunau* court vigorously disagreed: "[A] normal female who was showering in a girls locker room would unhesitatingly be shocked, irritated, and disturbed to see a man gazing at her, no matter how briefly he did so." *Id*. It further explained:

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

Id. (emphasis added).[10]

The constitutional principle requiring privacy from the opposite sex is what inspired the Title IX regulation that provided for privacy facilities to continue to be separated on the basis of sex. *See* 34 C.F.R. § 106.33. That norm is why the Kentucky Supreme Court observed that "there is no mixing of the sexes" in school locker rooms and restrooms. *Hendricks v. Commonwealth*, 865 S.W.2d 332, 336 (Ky. 1993).

Criminal law reflects the same constitutional principle. *See, e.g.,* 18 Pa.C.S.A. § 7507.1 (viewing or filming a person in a state of undress without their consent in a place where a person "would have a reasonable expectation of privacy"); 18 Pa.C.S.A. § 3127 (regarding the exposure of genitalia when "likely to offend, affront or alarm"). State law prohibits students from consensually transmitting nude pictures to one another, *see, e.g.,* 18 Pa.C.S.A. § 6321 (prohibiting minors from sexting), but the school claims authority to open sex-specific privacy facilities so that students are at constant risk of unconsented exposure to the opposite sex. Our traditions, statutes, and caselaw demonstrate that our children have a right to be free from such exposure.

[10] The lower court tried to distinguish *Grunau*, implying that the sole problem was that an adult was looking at a teenager. But that gloss does not overcome the fact that a girls' locker room is "a place that by definition is to be used exclusively by girls and where males are not allowed." *Id*.

b. The court erred in finding that self-identity with the opposite sex alters the privacy analysis.

The court below suggests that "students' right of bodily privacy from the opposite sex in bathrooms and locker rooms" does not express the

> contours of the underlying right in this case because this case does not merely involve members of the opposite sex. . . . Instead, although the plaintiffs refuse to refer to them as such, this case involves transgender students and whether it violates cisgender students' right to privacy for transgender students to be in the locker room or bathroom that does not correspond to the transgender student's biological sex at birth.[11]

App. 105.

This is a remarkably clear window into what went wrong below. The court conflated two incompatible theories of sex, treating the subjective perception of

[11] That is essentially the same mistake made in *Students and Parents for Privacy v. United States Dep't of Education*, No. 16-cv-4945, 2016 WL 6134121 (N.D. Ill. Oct. 18, 2016). The magistrate judge's recommendation ignores the shared understanding regarding the right of privacy by jettisoning the definition of sex. It claimed that the court "is not bound by the narrow, traditional, and biological understanding of 'sex.'" *Id*. at *23. The problem, of course, is that privacy has always turned on an understanding of sex as defined by our biological and anatomical differences. The magistrate went on to say, "Contemporary notions of liberty and justice are inconsistent with the existence of the right to privacy asserted by Plaintiffs and properly framed by this Court. A transgender boy or girl, man or woman, does not live his or her life in conformance with his or her sex assigned at birth." *Id*. at *25. But the magistrate judge missed the point. While on one hand liberty allows persons to pursue their own deepest understanding of the world and their own existence, *see Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992), it does not require others to affirm those beliefs and ignore biological realities in privacy facilities. To do otherwise would strip our liberty in determining with whom of the opposite sex we will reveal our unclothed bodies.

gender as controlling, and treating male or female as determined by humans being a sexually reproducing species, as irrelevant. By denoting a female student to be a transgender male, the court spurns objective anatomical reality in favor of an individual's conceptions about gender. But no matter how strongly a student believes themselves to be a certain sex or dresses or grooms like a stereotypical member of that sex, anatomical differences define sex and are the precise reason that our caselaw and statutes have spoken so consistently about separate privacy facilities.

This is well illustrated in a recent case where a female who identified as a male challenged a school policy barring use of the men's locker rooms and restrooms. The court recognized a university's interest "in providing its students with a safe and comfortable environment for [using the restroom and locker room] . . . consistent with society's long-held tradition of performing such functions in sex-segregated spaces based on biological or birth sex," *Johnston v. University of Pittsburgh of Commonwealth System of Higher Education*, 97 F. Supp. 3d 657, 668 (W.D. Pa. 2015), as well as in ensuring "the privacy of its students to disrobe and shower outside of the presence of members of the opposite sex." *Id*. at 669. The court noted that, while the question of whether students may use opposite-sex facilities is new, "the applicable legal principles are well-settled." *Id*. at 668. The

court approved of "separating students by sex based on biological considerations—which involves the physical differences between men and women—for restroom and locker room use." *Id*. at 670.

The constitutional principles are reflected in employment discrimination cases recognizing the privacy rights of restroom users. For instance, the Tenth Circuit found no Title VII violation when a female-identifying male was fired because that employee used women's restrooms. *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1224 (10th Cir. 2007). The employee argued that "the use of women's restrooms is an inherent part of" living in accordance with their gender. *Id*. The court noted other restroom users' interests, and ruled Title VII does not require allowing biological males who identify as female to use the women's restroom. *See id*. The Eighth Circuit concluded likewise in *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748, 748-50 (8th Cir. 1982), finding no Title VII violation when an employer discharged a man who identified as a female who insisted on using the women's restroom. The court agreed that the employee's presence in the women's restroom threatened the female employees' privacy rights. *See id. Goins v. West Group, Inc*., 635 N.W.2d 717 (Minn. 2001) (ruling that a state parallel to Title VII was not violated when an employer refused to allow a man identifying as a woman to use the women's restroom).

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

c. The court erred in concluding that the analysis changes because Appellants are not compelled by force to use the locker rooms and multi-user restrooms.

The court below discounted the students' right to privacy because some of the privacy cases dealt with forced exposure. But while compelled exposure would be an egregious privacy violation, violations also arise under policies which foster unconsented exposure: it is axiomatic that the government cannot condition the use of a legal benefit--in this instance, access to government-provided multi-user privacy facilities--on foregoing a constitutional right. Yet this is precisely what the school district has done.[12]

The District cannot escape liability by telling the students that they may use alternative facilities, because the students have a right to use the facilities that are, by state law, designated exclusively for one sex. Conditioning the use of the multi-

[12] The school's secretive implementation of the policy was coercive. Under the policy, it was inevitable that students would find themselves changing with members of the opposite sex without opportunity to object to the policy beforehand. When confronted, Assistant Principal Foley told Joel Doe and several of his peers that there were no other options and to tolerate it. *See* App. 38 (Op. ¶ 123), App. 2008 (Doe-Foley Audio Tr.), App. 325, 350 (7-17-17 Tr.).

user privacy facilities upon students having to self-cure the privacy violations fostered by the school's policy violates the unconstitutional conditions doctrine, which protects constitutional rights "by preventing the government from coercing people into giving them up." *Koontz v. St. Johns River Water Management Dist.*, 133 S.Ct. 2586, 2594 (2013).

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

escape constitutional privacy violation liability by telling Appellants to abandon the very facilities that are provided for their privacy under state law and 34 C.F.R. § 106.33.

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

The District Court concluded that Appellants "have yet to prove that" the District "violated their constitutionally protected privacy interest in their partially clothed bodies." App. 99. Yet the evidence is uncontradicted that Joel Doe and Jack Jones were undressed within plain sight of a biological girl.

Students undress in locker rooms *and* bathrooms, *see* App. 56, 64 (Op. ¶¶ 233, 287, 289), App. 271-72 (7-17-17 Tr.), App. 1993 (Macy Roe Trial Dep.), App. 1810-12 (Macy Roe Dep.); sometimes partially and sometimes completely, *see* App. 60, 64 (Op. ¶¶ 259, 289), App. 271-72, 288-89 (7-17-17 Tr.), App. 1511-12 (Mary Smith Dep.), App. 1826 (Macy Roe Dep.). Indeed, places like locker rooms are not known for their privacy from members of the same sex due to the "communal undress" typical of such facilities. *Schaill by Kross v. Tippecanoe Cty. School Corp.*, 864 F.2d 1309, 1318 (7th Cir. 1988). Female students necessarily attend to their menstrual hygiene, a process of exceptional sensitivity to these students, when the presence of the opposite sex is extremely inappropriate. *See*

App. 61, 66 (Op. ¶¶ 265, 298), App. 293, 304 (7-17-17 Tr.), App. 1996 (Macy Roe Trial Dep.). For these reasons, the right to bodily privacy discussed above *is* violated when the sexes intermingle in these facilities. Thus, so long as injunctive relief is not granted, Appellants' bodily privacy is at risk any time they use the multi-user facilities provided by law to protect their privacy. Because the policy infringes a fundamental right, it may survive only if it withstands strict scrutiny. Thus Appellees must show that the policy serves a compelling interest and uses the least restrictive means of furthering that interest. *Reno v. Flores*, 507 U.S. 292, 301-02 (1993).

3. The lower court erred in concluding that the District's policy advances a compelling government interest.

The District Court erroneously concluded that the policy advances a compelling governmental interest in eradicating discrimination. *See* Op. at 106. That ignores the actual interest that the policy advances, which is novel and far narrower: affirming individual student's subjective perception of gender by officially authorizing their use of opposite-sex privacy facilities.[13] Even if we consider the general interest in preventing sex discrimination, it is not unlimited as illustrated in the following cases where bodily privacy interests properly limit the

[13] *See* App. 85 (Op. ¶ 398). Additionally, Dr. Scott Leibowitz testified that social transition, including using the privacy facility of the opposite sex, is used to diagnose gender dysphoria. *See* App. 541-42, 544, 550 (7-31-17 Tr.).

reach of antidiscrimination interests by explaining the contours of discrimination. For instance, employers may hire on the basis of sex to vindicate "a juvenile's 'privacy interest'" that "would be violated if required to . . . disrobe and shower in front of a staff member of the opposite sex." *Livingwell, Inc. v. Pa. Human Relations Comm'n*, 606 A.2d 1287, 1290 (Pa. Commw. Ct. 1992) (citing *Philadelphia v. Pa. Human Relations Comm'n*, 300 A.2d 97). "[W]here there is a distinctly private activity involving exposure of intimate body parts, there exists an implied bona fide public accommodation qualification which may justify otherwise illegal sex discrimination. Otherwise . . . sex segregated accommodations such as bathrooms, showers and locker rooms, would have to be open to the public." *Livingwell*, 606 A.2d at 1291.

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

Id. at 1293. "To hold otherwise would mean that separate changing rooms in factories, mines and construction sites where workers change from street clothes to work clothes and back and where 'intimate areas' are not exposed, would not be permitted." *Id*. at 1293 n.6. *Livingwell*, involving a women-only health club, and the cases cited above point to something truly compelling: bodily privacy. As sex

discrimination itself must give way to such a compelling interest, so must mere affirmation of subjective perceptions about gender.

The *Livingwell* court further reasoned that "in relation to one's body, there are societal norms, i.e., a spectrum of modesty, which one either follows or respects, and if one is required to breach a modesty value, one becomes humiliated or mortified." *Id*. at 1292. Moreover, "[p]rivacy interests are not determined by the lowest common denominator of modesty that society considers appropriate. What is determinative is whether a reasonable person would find that person's claimed privacy interest legitimate and sincere, even though not commonly held." *Id*. at 1293.

As the *Livingwell* court explained, we must understand discrimination based on the circumstances. "Laws forbidding discrimination in hiring on the basis of sex do not purport to erase all differences between the sexes. . . . The biological difference between men and women . . . are the facts that justify limiting personal contact under intimate circumstances to those of the same sex." *Id*. (quoting *City of Philadelphia*, 300 A.2d at 103 n.7). "[T]he purpose of the sex provisions of the Civil Rights Act is to eliminate sex discrimination in employment, not to make over the accepted mores and personal sensitivities of the American people in the more uninhibited image favored by any particular commission or court or

commentator." *Id.* at 1293 (quoting A. Larson, Employment Discrimination Sex § 14.30 (3d Ed. 1980)). The principles set forth in *Livingwell* apply with all the more force to adolescent students compelled to attend school, in contrast to adult customers in a commercial contractual context.

Similarly, in *Brooks v. ACF Industries, Inc.*, 537 F.Supp. 1122 (S.D. W.Va. 1982), the court permitted an employer to hire only men as janitors because of the male employees' "privacy rights that would have been violated by a female's entering and performing janitorial duties" in the locker rooms (along with the bath areas and restrooms) "during their use thereof." *Id*. at 1132. "[T]o protect those rights, those male employees were entitled to insist that defendant not assign" someone of the opposite sex to be there. *Id*. The court recognized "the right of the hundreds of male employees who use the three bathhouses" (described as locker rooms, showers, and toilet areas) "during any given shift not to be required to undress, dress, shower and perform the grosser biological functions in the presence and view of a female engaged in the performance of janitorial duties assigned to her." *Id*. at 1128.

And in *Norwood v. Dale Maint. Sys., Inc.*, 590 F. Supp. 1410, 1415-16 (N.D. Ill. 1984), the severe privacy violation arising from allowing janitors to enter the restroom of the opposite sex trumped Title VII's bar on sex-based discrimination.

No showing that the opposite sex employee would do some other bad act was discussed, only "the fundamental nature of the privacy rights involved". *Id*. at 1422. The court concluded, "Time spent by an individual in a washroom is personal and private. The court will not require defendants to institute an alternative which would allow opposite sex cleaning but which would also infringe on privacy rights. . . ." *Id*. at 1423.[14]

These cases[15] demonstrate that anti-discrimination interests are properly limited by bodily privacy interests in the commercial and employment contexts. The same result should obtain in the school privacy context, especially when the state interest is novel (personal affirmation) and the privacy concerns are enhanced due to the young age and inherent vulnerability of students.

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[14] *United States v. Virginia*, *supra*, one of the most historic sex discrimination cases, still noted that "[a]dmitting women to VMI would undoubtedly require alterations necessary to afford members of each sex privacy from the other sex in living arrangements. . . ." 518 U.S. at 551 n.19.

[15] While *Evancho v. Pine-Richland School District,* No. CIV. A. 2:16-1537, 2017 WL 770619 (W.D. Pa. Feb. 27, 2017), determined there to be an Equal Protection violation, that case is both distinguishable and improperly reasoned. Not only did that case not involve the use of locker rooms, *see id*. at *16, but the court reasoned that all students, except for the transgender students, were able to use the restrooms according to their gender identity, *see id.* at *21. But the court conflated gender with sex, because on the basis of sex everyone was treated equally. Indeed, in *Johnston*, 97 F. Supp. 3d at 670, the court determined that "separating students by sex based on biological considerations—which involves the physical differences between men and women—for restroom and locker room use simply does not violate the Equal Protection Clause."

4. The trial court erred in concluding that the District's policy was narrowly tailored.

Even if there were a compelling interest in affirming gender identity, the broad brush, no exceptions, all-facility access policy officially authorizing the two sexes to intermingle in privacy facilities is not the least restrictive means of effectuating such an interest. Here, the school may affirm gender identity by many routes that do not encroach upon privacy interests, such as permitting students to wear the graduation gown color of their choice, using the students' name of choice, using a student's initial if preferred, and allowing students to run for the homecoming court based on the sex with which they identify. *See* App. 23-24, 33, 85 (Op. ¶¶ 38, 97, 396), App. 454-56, 466 (7-17-17 Tr.), App. 630-32 (7-31-17 Tr.).

In respect to privacy facilities, a much more tailored solution is to provide single-user accommodations, which Intervenor's hearing witness Aidan DeStefano stated he suggests other transgender students utilize when persons are uncomfortable sharing facilities, *see* App. 87 (Op. ¶ 409), App. 476-77 (7-17-17 Tr.), and which Dr. Leibowitz testified most of his patients utilize, *see* App. 80 (Op. ¶ 365), App. 404 (7-17-17 Tr.). As all students would be allowed to access the individual facilities, no stigma would attach to the professed transgender students' using them, and preserving the sex-specific communal facilities to single-sex use would resolve all privacy concerns.

Because the current policy burdens students' right to bodily privacy, serves no compelling interest, and does not employ the least restrictive means, it fails strict scrutiny. Thus, Appellants are likely to succeed on the merits.

B. The District Court Erred in Failing to Recognize that the District's Policy Violates Title IX by Turning Locker Rooms, Showers, and Multi-User Restrooms into Sexually Harassing Environments and By Forcing Students to Forgo Use of Such Facilities as the Solution to the Harassment.

Title IX provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance[.]" 20 U.S.C. § 1681(a). The school violates Title IX by opening sex-specific locker rooms, showers, and restrooms, separated on the basis of sex, to members of the opposite sex, thus allowing biological girls into boys' facilities and biological boys into girls' facilities and creating a hostile environment on the basis of sex.

A student has a right "to sue a school under Title IX for 'hostile environment' harassment." *Dejohn v. Temple Univ.*, 537 F.3d 301, 316 n.14 (3d Cir. 2008) (quoting *Saxe v. State College Area Sch. Dist.*, 240 F.3d 200, 205-06 (3d Cir. 2000)). "To recover in such a case, a plaintiff must establish 'sexual harassment [ ] that is so severe, pervasive, and objectively offensive, and that so undermines and

detracts from the victims' educational experience, that [he or she is] effectively denied equal access to an institution's resources and opportunities.'" *Dejohn*, 537 F.3d at 316 n.14 (quoting *Saxe*, 240 F.3d at 205-06). Appellants satisfy each element.

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

The District's policy fails to conform with Title IX, which was created to prevent discrimination on the basis of "sex." The school unilaterally replaced the term "sex" with "gender identity," two terms that in the privacy facility context are mutually exclusive. Title IX's language uses the phrases "one sex," "the other sex," and "both sexes."[16] The regulations likewise require that facilities "of one sex" shall be comparable to those for "the other sex." *See* 34 C.F.R. §§106.32-106.33. This language explicitly emphasizes the binary view of sex, not non-binary "gender identity."[17] Title IX's legislative history leaves no doubt that Congress intended "sex" to mean *biological sex*. Title IX's sponsor stated that the bill would

[16] *See*, 20 U.S.C. § 1681(2) (some educational institutions admit "students of both sexes"); 20 U.S.C. § 1681(8) (if certain sex-specific activities are provided "for one sex," reasonably comparable ones must be provided to "the other sex"); 20 U.S.C. § 1686 (authorizing "separate living facilities for the different sexes").
[17] *Supra*, note 6.

not require co-ed dormitories or locker rooms. *See* 117 Cong. Rec. 30407 (1971). The legislative record also confirms that Title IX allows differential treatment among the biological sexes, such as "classes for pregnant girls . . . , in sport facilities *or other instances where personal privacy must be preserved*." 118 Cong. Rec. 5807 (1972) (Statement of Sen. Bayh) (emphasis added). As one court recently put it in issuing a nationwide injunction against redefining sex to include gender identity:

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

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

The plain language of Title IX, contemporary dictionary definitions, legislative history, and subsequent Congressional inaction on gender identity in schools all communicate that Congress intended to preserve distinct privacy facilities on the basis of sex, not theories of gender identity.

The school's new policy subjects Appellants and other students to an environment where all locker rooms, showers, and multi-user restrooms are always open to opposite-sex use, just as Doe, Smith, and Jones personally experienced. It

is well-settled that employers who permit members of the opposite sex into privacy facilities create a hostile and sexually harassing environment,[18] so too does the school when it officially authorizes opposite-sex access to school privacy facilities.

Although Appellants relied on sound precedent showing that sex is what matters in contexts like privacy facilities, the lower court wrongly mischaracterized the issue as hostility towards transgender students. For instance, it stated that "plaintiffs' position is that the presence of 'members of the opposite sex', meaning transgender students, creates a hostile environment for plaintiffs and other cisgender students at BASH." App. 123. Elsewhere it repeats the false characterization, claiming "plaintiffs are clearly opposed to having themselves viewed by a transgender student in a state of undress or potentially viewing a transgender student in a state of undress." App. 130. To the contrary, Appellants' position is that the presence of members of the same sex in privacy facilities, *including transgender students of the same sex*, does not create a hostile environment. But permitting students of the opposite sex to enter multi-user privacy facilities, regardless of their gender identity, creates a hostile environment. Appellants' rights under Title IX to use multi-user privacy facilities without the

[18] *Infra*, section III(B)(2)(b). It is so well-settled that to prevent such "intrusions of personal privacy," employers can even make certain hiring decisions based on sex, and such decisions do not constitute unlawful discrimination. *Norwood*, *supra*, section III(A)(1)(c)(3).

hostile environment created by the District's policy is not diminished because a student of the opposite sex has a sincerely held belief about their own personal gender identity.

The lower court erred by redefining the meaning of sex in Title IX, thus ignoring the core purpose of this statute. Under that misreading of the law, Title IX is misused to justify the sexual harassment that Appellants have experienced, even though Title IX was designed to protect bodily privacy while ensuring equal access to educational opportunity for both sexes.

2. The policy subjects students to sexual harassment in violation of Title IX.

"[I]n order for conduct to constitute harassment under a 'hostile environment' theory, it must both: (1) be viewed subjectively as harassment by the victim and (2) be objectively severe or pervasive enough that a reasonable person would agree that it is harassment." *Saxe*, 240 F.3d at 205.

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

The lower court held that Appellants subjectively viewed the District's practice as harassment. *See* App. 121. In fact, they have been forced to either continue to subject themselves to sexual harassment when using multi-user facilities or to opt to leave the harassing situation and give up what is part and parcel of the

provisions of educational services covered by Title IX.[19]

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

"[T]he objective prong of this inquiry must be evaluated by looking at the 'totality of the circumstances.' 'These may include . . . the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Saxe*, 240 F.3d at 205 (citing *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 23 (1993)). These standards have been imported into the Title IX context. *See id*. That is why courts have gone on to restate the "work performance" phrase to read that the harassment "so undermines and detracts from the victims' educational experience, that [he or she is] effectively denied equal access to an institution's resources and opportunities." *Dejohn*, 537 F.3d at 316 n.14 (quoting *Saxe*, 240 F.3d at 205-06).

Conduct need not be *both* severe *and* pervasive. One or the other suffices. *Castleberry v. STI Group*, 863 F.3d 259, 264 (3rd Cir. 2017) (specifically clarifying the correct standard is "severe *or* pervasive"). "Indeed, the distinction 'means that severity and pervasiveness are alternative possibilities: some

[19] The lower court agreed that this case involves an "educational program or activity" under Title IX and that use of school restrooms is part and parcel of the provision of educational services covered by Title IX. *See* App. 117 (Op. at 112, n.58).

harassment may be severe enough to contaminate an environment even if not pervasive; other, less objectionable, conduct will contaminate the workplace only if it is pervasive." *Id*. Yet both are present here.

i. The harassment is pervasive

If Appellants seek to use locker rooms or multi-user restrooms, they know that students of the opposite sex are now specifically authorized to be present at any time Appellants are using the same facility. This is not an isolated occurrence that the school has since fixed, nor is it a "deliberate indifference" case where the school fails to rein in the conduct of others. Instead, it is the policy of the school to authorize opposite-sex use at any time and in every locker room and multi-user bathroom, every day of the school year--establishing it as *de jure* pervasive harassment that the school told Appellants to "tolerate" or leave the facility. The District Court wrongly treated Joel Doe and Jack Jones encountering females in the locker room, and Mary Smith walking in on a boy in the restroom as isolated, trivial incidents comprising the sum of possible harassment. *See* App. 122. But what these incidents evidence is a pervasive harassing environment where students must face loss of privacy and the stress and anxiety that their privacy is no longer protected from all members of the opposite sex, or forgo entirely the use of these educational services covered by Title IX.

ii. The harassment is severe

The three privacy violations that Appellants suffered are sound evidence that the protections offered by requiring sex-specific privacy facilities per Pennsylvania law and 34 C.F.R. § 106.33 no longer exist. Indeed, this creates an ongoing environment that is objectively offensive because a reasonable person would find the practice of allowing students to use the opposite sex facilities to be hostile, threatening, and humiliating--an assessment backed up by the extensive Pennsylvania legislative enactments providing sex-distinct privacy facilities as well as 34 C.F.R. § 106.33.

Furthermore, the *EEOC Policy Guidance on Current Issues of Sexual Harassment* says the "Commission believes that a workplace in which sexual slurs, displays of 'girlie' pictures, and other offensive conduct abound can constitute a hostile work environment even if many people deem it to be harmless or insignificant."[20] Surely if a pinup picture constitutes harassment, there can be no question that officially authorizing members of the opposite sex to be present within privacy facilities creates a more harassing environment.

An instructive, unreported case upheld a jury verdict that a company created a hostile environment when it failed to prevent male cleaners inside the women's locker room while female employees were changing clothes. *Lewis v. Triborough*

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

Bridge & Tunnel Auth., 31 F. App'x 746 (2d Cir. 2002). The lower court, in attempting to distinguish *Lewis*, reasoned there were other allegations of harassment. *See* App. 124. However, the Second Circuit explained that "entering the . . . women's locker room when female employees were undressed" was a "specific acts of sexual harassment."

Other bad acts were not, as the lower court suggests, an element which transformed otherwise permissible entry into illegal, sexually harassing visits. The *Lewis* district court explained that when the plaintiff complained of earlier improper entries and other bad acts, her supervisors assured her the problem was addressed, and that "[a]lthough there was a period of approximately one year in which there were no incidents *involving improper entry into the women's locker room*, on or about November 20, 1995, [the plaintiff] reported that the . . . *cleaners were again entering the locker room while women were changing*." *Lewis v. Triborough Bridge and Tunnel Auth.*, 77 F. Supp. 2d 376, 377-78 (S.D. N.Y. 1999) (emphasis added). And unlike the employees in *Lewis* who violated company policy, the school's policy is itself the instrument authorizing opposite-sex, privacy-violating entry into privacy facilities.[21]

[21] If the lower court's reasoning in the present matter were applied to *Lewis*, the employer could have escaped liability by simply telling the women to retreat to an alternate facility or to use a toilet stall within the women's room.

Even in the context of a nude dance club, a jury could find a sexually harassing environment where a male entered into a ladies dressing room and restroom where a waitress was present. *Schonauer v. DCR Entm't, Inc.*, 905 P.2d 392, 401 (Wash. Ct. App. 1995). The lower court sought to distinguish this case by pointing to other bad acts, namely a manager and other employees who attempted to persuade her to become one of the nude dancers. *See* App. 125. Even without those additional bad acts,[22] the *Schonauer* court pointed out that when the male was present in her restroom, the waitress said "[h]is presence made me extremely uncomfortable." *Schonauer*, 905 P.2d at 396. The court stated the male's presence "intensified" "the hostile and offensive nature of that environment." *Id*. at 401. Notably, there is no evidence that the waitress was unclothed, unlike the incidents with Joel Doe and Jack Jones, who were partially undressed when a female was present.

In *Washington v. White*, 231 F. Supp. 2d 71, 80-81 (D.D.C. 2002), the court held that a female entering the men's locker room "on five to ten occasions,"

[22] Just as the employer in *Schonauer* attempted to coerce the employee to disregard her privacy and enter the nude waitress contest, Principal Foley urged Joel Doe and other classmates to disregard their bodily privacy by continuing to use the locker room with the female student. Though Dr. Foley denied under oath that he was asked whether there was a way to separate the boys from the situation and also denied telling the students that they "just needed to tolerate it" and "make it as natural as they possibly could," *see* App. 914-15 (Foley Dep.), an audio transcript of that meeting was produced, directly contradicting this testimony, *see* App. 2013-14 (Audio Tr.).

despite being reprimanded was sufficient evidence to show a hostile work environment, resulting in sexual harassment. The plaintiff felt "embarrassed and uncomfortable" by the intrusions, one of which occurred when the female employee entered as he was taking off his shirt. *Id*. at 73. The lower court again tried to distinguish that case by saying that there was no allegation of "improper conduct" by the students using opposite sex facilities in this case. *See* App. 126. Based on this reasoning, no privacy violations, sexual harassment, or intrusions upon seclusion are possible so long as an individual of the opposite sex is well behaved.

However, a reasonable student would find the environment created by the school hostile and harassing. *Grunau*, 2009 WL 5149857 at *3 (a "normal female" would "unhesitatingly be shocked, irritated, and disturbed" because a girls locker room "by definition is to be used exclusively by girls and where males are not allowed").[23] The same is true for restrooms. A woman's right to bodily privacy does not spring into existence, or cease to exist, depending on what a man believes about the nature of his own internal sense of "gender identity." Her right to bodily privacy is hers and hers alone. Likewise, a man's right to bodily privacy does not exist or cease existing depending on the beliefs or intentions of a woman who walks into the men's restroom.

[23] *Grunau*, *supra*, section III(A)(1)(a).

Indeed, the cases show that the mental state of the opposite-sex person entering the privacy facility is irrelevant. For instance, in *Norwood, supra*, the court held "privacy would be invaded" by permitting employees to clean restrooms while members of the opposite sex are present. *See* 590 F. Supp. at 1422. This was true even though the cleaners had no motive other than to do their job. An expert testified that permitting opposite sex entry would constitute an "extreme" violation of privacy by their presence in that facility, and "would cause embarrassment and increased stress in both male and female washroom users." *Id*. at 1417. The forced intermingling of sexes in school privacy facilities is equally, if not more of a severe sexually harassing environment than intermingling adults in commercial privacy facilities.

iii. The harassment effectively denies access to school resources.

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

the school, and the remaining Appellants have been avoiding these facilities when possible and risking further exposure to opposite sex persons in those facilities when they cannot do so.

While Appellants typically must show that those with authority to fix the hostile situation know about it and did not remedy it, that they demonstrated "deliberate indifference" to a third party's improper behavior, *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290 (1998), here no such showing need be made because the Appellees are being *deliberate and intentional* in authorizing access to privacy facilities by the opposite sex, which as demonstrated above creates a hostile environment.

Nor may Appellees escape liability by requiring victims to remove themselves from the environment. A school that responds to allegations of harassment by moving the victim to a different class, rather than addressing the harassment, violates Title IX. *See Seiwert v. Spencer-Owen Cmty. Sch. Corp.*, 497 F. Supp. 2d 942, 954 (S.D. Ind. 2007). While the school initially suggested no other options and coerced students to continue using the privacy facilities with opposite sex persons, the school now coerces them to give up their right to bodily privacy and endure the harassment, or else leave that harassing environment--telling students who object to opposite-sex persons using the privacy facilities to go to the nurse's office or one of a few new single user bathrooms. Either way, the District's policy

hijacks multi-user privacy facilities required by law to protect privacy and misuses them to affirm individuals' subjective gender identities. The District thus effectively prevents Appellants from using the multi-user facilities reserved for use by their sex.

Appellants avoid using the restroom as much as possible. *See* App. 166, 170-171, 173, 175 (Am. V. Compl. ¶¶ 63-64; 93-94, 113-116, 126-127). During his junior year, Doe altogether stopped using the boys' locker room because of the harassing environment, leaving him without a place to store his clothes. *See* App. 168 (*Id*. at ¶ 73). Because of the policy, he ultimately chose not to return to the District, a difficult choice since this is his senior year. *See* App. 2020 (Joel Doe Declaration). Appellants thus satisfy their burden of showing that they are denied access to school resources as well as all the other elements of sexual harassment under Title IX.

c. The harassment is based on sex.

Federal and state law unequivocally contemplates separate privacy facilities for boys and girls, and when persons enter their respective facilities, they are doing so to preserve their privacy. But when the school authorizes a student to enter a privacy facility for the opposite sex, that student is not seeking privacy from the opposite sex but to be affirmed in their identification with the opposite sex. The only way to effect the Policy's purpose of opposite-sex affirmation is to select the

facility based on the sex of the users. The policy is thus sex-based, as is its specific impact on Appellants. The District Court held that the harassment is not on the basis of sex because it affects males and females equally. This two-wrongs-make-a-right approach is mistaken. A calendar of nude females in the workplace would not cease being a hostile environment on the basis of sex merely because the employer permitted another employee to post a second calendar of nude men. Likewise, a situation where one supervisor improperly propositions men and another improperly propositions women would not insulate an employer from a sexual harassment claim on the basis that the employer permitted both sexes to be sexually harassed.

The school's policy created the sexual harassment for Doe and Jones by permitting female students to enter the boys locker room, which is not erased by the fact that they let male students enter the girls privacy facilities and create a sexually harassing environment for Smith and Roe. This policy violates Title IX by removing privacy protections on the basis of sex thus creating a hostile environment on the basis of sex.

C. The District Court Erred in Concluding that the District's Policy was not an Intrusion upon Seclusion.

The Restatement (Second) of Torts "defines the elements of invasion of privacy as that tort has developed in Pennsylvania." *Harris by Harris v. Easton Pub. Co.*, 483 A.2d 1377, 1383 (Pa. Super. 1984).

> One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other person for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.

Restatement (Second) of Torts § 652B (1977). "The tort may occur by (1) physical intrusion into a place where the plaintiff has secluded himself or herself [or by] (2) use of the defendant's senses to oversee or overhear the plaintiff's private affairs...." *Borse*, 963 F.2d at 621.

In *Koeppel v. Speirs*, 808 N.W.2d 177, 180 (Iowa 2011), the court explained:

> The importance of privacy has long been considered central to our western notions of freedom.
>
> "[A] measure of personal isolation and personal control over the conditions of [privacy's] abandonment is of the very essence of personal freedom and dignity, is part of what our culture means by these concepts. A man whose . . . familial intimacies may be overseen at the will of another, is less of a man, has less human dignity, on that account. He who may intrude upon another at will is the master of the other and, in fact, intrusion is a primary weapon of the tyrant."

Citing, Edward J. Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. Rev. 962, 973-74 (1964).

The District Court erred by concluding that there is no intrusion upon seclusion because neither the District nor its agents are entering the privacy facilities of the opposite sex. However, a third party may "be held liable for the tortious conduct of another where the third party . . . gives substantial assistance to the other in accomplishing a tortious result and his own conduct, separately considered, constitutes a breach of duty to the third person." *Galaxy Prods. & Servs., Inc. v. AMI Entm't Network, Inc*., No. 12-6963, 2015 WL 4630058, *6 (E.D. Pa. Aug. 4, 2015) (quoting Restatement (Second) of Torts § 876 (1979)). The District's policy authorizes students to enter the privacy facility of the opposite sex in violation of the school's duty under state law to provide separate facilities to the students on the basis of sex. In *Carter v. Innisfree Hotel, Inc*., 661 So. 2d 1174, 1177 (Ala. 1995), the Supreme Court of Alabama considered an intrusion upon seclusion in a hotel where a peep hole was discovered. The court found that the hotel management company could be liable for the loss of privacy because "[i]t had an affirmative duty, stemming from a guest's rights of privacy and peaceful possession not to allow unregistered and unauthorized third parties to gain access to the rooms of its guests." *Id*. at 1179 (internal quotations and citation omitted).

The case is stronger here where the District is officially authorizing persons to intrude upon the seclusion of its students.

The District Court also erred in concluding that entry by the opposite sex into privacy facilities did not give rise to a claim. However, injunctive relief is necessary to prevent all foreseeable intrusions upon seclusion. The common areas of the locker rooms and restrooms are used to change clothes, *see* App. 56, 64 (Op. ¶¶ 233, 287), App. 271-72 (7-17-17 Tr.), App. 1993 (Macy Roe Trial Dep.), App. 1810-12 (Macy Roe Dep.), sometimes to become fully unclothed, *see* App. 60, 64 (Op. ¶¶ 259, 289), App. 288-89 (7-17-17 Tr.), App. 1511 (Mary Smith Dep.), App. 1826 (Macy Roe Dep.). Moreover, the spaces themselves are those afforded protection from intrusion. While there "can be no dispute a bathroom is a place where one enjoys seclusion," *Koeppel*, 779 N.W.2d 494, at *6, the District Court attempted to limit this to single user facilities and toilet stalls because in *Koeppel* the bathroom was single user and in *Kohler v. City of Wapakoneta*, 381 F. Supp. 2d 692 (N.D. Ohio 2005), a stall. But *Kohler* acknowledged that there is a privacy interest that extends beyond a commode stall, and into the common areas of a women's restrooms. *Id.* at 703. Where a woman "did not expect privacy from other women in the women-only restroom, she reasonably expected her activities to be secluded from perception by men." *Id*. at 704. Yet the lower court's reasoning would effectively open those common areas to members of the opposite sex.

While physical intrusion is enough to support a violation, the violations here also include the second manner of intruding upon another's seclusion, the use of senses to oversee or overhear Appellants' private affairs. *See Borse*, 963 F.2d at 621. Hearing the act of urination itself implicates privacy interests and could constitute an intrusion upon seclusion. Additionally, where the performance of an activity, if performed in public, would be "generally prohibited by law as well as social custom," that would also constitute an intrusion upon seclusion. *Id.* at 621. In the context of being viewed by a person of the opposite sex in a restroom or locker room, "[t]here is no question viewing or recording [a person] while in the bathroom would be considered 'highly offensive' by any reasonable person." *Koeppel*, 779 N.W.2d 494, at * 2. The events experienced by Joel Doe and Jack Jones, being viewed in their underwear by a member of the opposite sex, and in Joel Doe's case, also seeing a member of the opposite sex in a state of undress, would be highly offensive and humiliating to a reasonable person and was to both Joel Doe and Jack Jones. Yet this is what Appellants continue to face. While all Appellants experience humiliation, anxiety, and loss of dignity, female Appellants experience additional humiliation in attending to feminine hygiene needs, *see* App. 61, 66 (Op. ¶¶ 265, 298), App. 293, 304 (7-17-17 Tr.), App. 1996 (Macy Roe Trial Dep.), where males are now permitted to be present.

The statutory requirement to have separate privacy facilities on the basis of sex is a clear recognition and directive by the legislature that privacy from the opposite sex is a fundamental need worthy of protection. *Cf. Harris*, 483 A.2d at 1386-87 ("statutory ban against disclosing the names of public assistance recipients is a clear recognition and directive by the legislature that the privacy of the recipient is a fundamental need worthy of protection" and the "[c]ourt is bound to give great deference to this sound legislative judgment").

The District removed Appellants' personal control over the conditions of the abandonment of their own bodily privacy, and in so doing removed the very essence of their personal freedom and dignity. Appellees' actions continue to invite intrusions upon Appellants' seclusion unless the policy is enjoined.

IV. APPELLANTS WILL SUFFER IRREPARABLE HARM IN THE ABSENCE OF AN INJUNCTION.

Irreparable injury is presumed when Appellants establish likelihood of success in a case involving privacy rights. *See Pub. Serv. Co. of N.H. v. Town of W. Newbury*, 835 F.2d 380, 382 (1st Cir. 1987). *See also Deerfield Med. Ctr. v. City of Deerfield Beach*, 661 F.2d 328, 338 (5th Cir. 1981) ("the right of privacy must be carefully guarded for once an infringement has occurred it cannot be undone by monetary relief"). The policy has stolen Appellants' right to privacy, is altering the conditions of their education by subjecting them to sexual harassment, and

constitutes an intrusion upon seclusion. No amount of money can rectify the harm.

In respect to Title IX, the irreparable harm question is what "injury the plaintiff will suffer if he or she loses on the preliminary injunction but ultimately prevails on the merits, paying particular attention to whether the remedies available at law, such as monetary damages, are inadequate to compensate for that injury." *Salinger v. Colting*, 607 F.3d 68, 80 (2d Cir. 2010) (internal quotations and citations omitted). The inadequacy of the remedy may be demonstrated by showing that "'the particular circumstances of the instant case bear substantial parallels to previous cases' in which irreparable harm has been found." *Hoop Culture, Inc. v. GAP Inc.,* 648 F. App'x 981, 985 (11th Cir. 2016) (quoting *N. Am. Med. Corp. v. Axiom Worldwide, Inc.*, 522 F.3d 1211, 1228 (11th Cir. 2008)).

This situation is at least as egregious as situations where irreparable injury was recognized, such as placing children in a sex segregated learning environment with the only remedy being a parental opt-out that could result in a change in schools, *see Doe v. Wood Cty. Bd. of Educ.*, 888 F. Supp. 2d 771, 777 (S.D. W.Va. 2012), depriving players access to a championship playoff, *see McCormick ex rel. McCormick v. Sch. Dist. of Mamaroneck,* 370 F.3d 275, 301–02 n. 25 (2d Cir. 2004), and denial of access to play softball, *see Roberts v. Colo. State Bd. of Agric.,* 998 F.2d 824, 833 (10th Cir. 1993). Thus, Appellants have established irreparable injury.

V. THE BALANCE OF HARDSHIP SHARPLY FAVORS APPELLANTS.

In balancing the harms, courts must examine "the potential injury to the plaintiff if an injunction does not issue versus the potential injury to the defendant if the injunction is issued." *Novartis Consumer Health, Inc. v. Johnson & Johnson--Merck Consumer Pharm. Co.*, 290 F.3d 578, 596 (3d Cir. 2002). The balance of hardships favors preventing the violations at issue in this case. *Ariz. Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1069 (9th Cir. 2014) (quoting *Valle del Sol Inc. v. Whiting*, 732 F.3d 1006, 1029 (9th Cir.2013)) (finding that it would be inequitable to allow the government to violate the requirements of federal law or the Constitution, "especially when there are no adequate remedies available").

Only an injunction will stop the irreparable harm. An injunction does no harm to Appellees because the government is not harmed when it is prevented from enforcing unconstitutional and illegal laws. *Joelner v. Village of Wash. Park, Ill.* 378 F.3d 613, 620 (7th Cir. 2004). Moreover, issuing an injunction would restore the status quo of protecting student privacy.

VI. THE PUBLIC INTEREST FAVORS A PRELIMINARY INJUNCTION.

"[T]here is the highest public interest in the due observance of all the constitutional guarantees[.]" *United States v. Raines*, 362 U.S. 17, 27 (1960). It is

also in the public interest to prevent the government from "violat[ing] the requirements of federal law," *Ariz. Dream Act Coal.*, 757 F.3d at 1069, such as Title IX. Because Appellants established likelihood of success in these claims, public policy favors the granting of an injunction.

Additionally, the public interest in preventing other violations of bodily privacy, sexual harassment, and intrusion upon seclusion in a multitude of contexts are served by granting an injunction. The lower court, in justifying denial of injunctive relief, reasoned that there is little expectation of privacy in the common areas of locker room and restrooms. Imagine that the facts of this case involved a male maintenance worker walking into the women's locker room or restroom by permission of the employer while women were using it. We would be hard pressed to discount the invasion of bodily privacy, sexual harassment, or intrusion upon seclusion simply because the women were in the *common area*. Nor could the employer point to the fact that the male maintenance worker was well behaved while he did his job, because women's right to privacy does not disappear based on the motives or manners of the male who enters their privacy facility. The public interest is not served by denying an injunction on the basis of reasoning that eliminates necessary protections, even outside of the present context.

CONCLUSION

Appellees' policy violates the right to privacy and constitutes sexual harassment and an intrusion upon seclusion. The only reason for separate privacy facilities are the differences between the two sexes, and the lower courts' importing "gender" into "sex" eliminates that distinction. Appellants respectfully request that the District Court be reversed and that a preliminary injunction issue.

Respectfully submitted this 10th day of November, 2017.

By: /s/ Randall L. Wenger

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CERTIFICATION OF BAR MEMBERSHIP, ELECTRONIC FILING AND WORD COUNT

I hereby certify that I am a member in good standing of the Bar of the United States Court of Appeals for the Third Circuit.

I further certify that the text of the electronic Brief filed by ECF and the text of the hard copies filed or to be filed with the Court are identical. The electronic copy of the Brief has been scanned for viruses using Trend Micro Virus Protection.

I further certify that this Brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 13,621 words as calculated by the word processing program used in the preparation of this brief, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

I further certify that this brief complies with the typeface requirements of Fed. R. App. P. (32)(a)(5) and type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14 point Times New Roman font.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on November 10, 2017, the foregoing was filed electronically and served on the other parties via the court's ECF system. The undersigned hereby certifies that counsel for Appellants has also delivered an electronic copy of the foregoing to counsel for Appellees and is sending the same by regular mail to:

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