UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

PRIVACY MATTERS, a voluntary unincorporated association; and **PARENT A**, president of Privacy Matters, Plaintiffs, vs. **UNITED STATES DEPARTMENT OF EDUCATION; JOHN B. KING, JR.**, in his official capacity as United States Secretary of Education; **UNITED STATES DEPARTMENT OF JUSTICE; LORETTA E. LYNCH**, in her official capacity as United States Attorney General, and **INDEPENDENT SCHOOL DISTRICT NUMBER 706, STATE OF MINNESOTA**, Defendants, Jane Doe, by and through her mother, Sarah Doe, Intervenor-Defendant.	Case No. 0:16-CV-03015-WMW-LIB **INTERVENOR'S MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

INTRODUCTION

Jane Doe is a 15-year-old high school girl in Virginia, Minnesota. At school, she plays basketball and runs track with her friends. Like any other girl on the team, Jane and her teammates laugh, talk, and dance while changing in the locker room. Unlike every other girl on the team, however, Jane was not allowed to join the teams until last year because she had been assigned a male sex at birth.

A small group of parents, acting through an organization they have named "Privacy Matters," have publicly singled Jane out from the rest of the team and filed a Complaint that uses misleading innuendo and salacious phrasing to depict the ordinary behavior of a teenage girl as threatening or scandalous just because she is transgender. The parents' allegations are particularly painful because Jane is private and extremely self-conscious about the parts of her anatomy that are different than those of her friends; she never undresses below a sports bra and spandex athletic shorts, the same outfit used by the girls' volleyball team. Plaintiffs seek to take away Jane's right to be an ordinary high school girl, marginalizing and segregating her from her classmates and teammates. And they seek to do this under a law designed to end, not foster, discrimination based on sex.

Title IX protects everyone – including transgender students – from being "excluded from participation in" or "denied the benefits of" any education program or activity "on the basis of sex." 20 U.S.C. § 1681(a). As recognized by courts across the country, the Department of Education ("Department") correctly recognized that this mandate under Title IX, while permitting separate toilet, locker room, and shower facilities, does not allow schools to exclude transgender students by prohibiting them from using facilities consistent with their gender identity. *G.G. ex rel. Grimm v. Gloucester Cnty. Sch. Bd.*, 822 F.3d 709, 720 (4th Cir.), *mandate recalled and stayed*, 136 S. Ct. 2442 (2016); *Bd. of Educ. of the Highland Local Sch. Dist. v. U.S. Dep't of Educ.*, No. 2:16-CV-524, 2016 WL 5372349, at *11 (S.D. Ohio Sept. 26, 2016); *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. Of Educ.*, No. 16-CV-943-PP, 2016

WL 5239829, at *3 (E.D. Wis. Sept. 22, 2016). In allowing transgender students like Jane to use the same facilities as the other girls in her class, the Defendant School District has ended discrimination that caused significant, well-recognized harm to the transgender students in its school system.

Privacy Matters, in contrast, argues that discrimination against Jane and other transgender students is not merely permissible, but legally and constitutionally required. The purpose of a preliminary injunction is to preserve the status quo until a final determination can be reached, not grant a plaintiff the relief it seeks at trial. On behalf of its members, Privacy Matters seeks a preliminary injunction that would fundamentally change the status quo, single Jane out from the rest of the girls at school, and stigmatize her as unfit to use the same restrooms and locker rooms as her peers. That radical position is unprecedented and, if accepted, would invalidate the nondiscriminatory policies adopted by countless school districts across the country. The requested injunction would not avert irreparable harm to Privacy Matters or its members because all students, including the student members of Privacy Matters, have the option of using private restrooms and changing facilities if they are uncomfortable changing near other students. But granting an injunction would cause significant and irreparable harm to Jane, wrongfully depriving of her of the right enshrined in Title IX and recognized by courts across the country against discrimination on the basis of sex before any merits determination has been reached.

Jane Doe respectfully requests that the motion for preliminary injunction be denied.

FACTUAL BACKGROUND

I. Gender Identity

Gender identity is an established medical concept that refers to a deeply held, inherent sense of belonging to a particular gender.[1] It is an innate and immutable aspect of personality, with biological roots.[2] Everyone has a gender identity. A transgender person has a gender identity that differs from the sex assigned to that person at birth, which is usually based on external anatomy.[3] Gender dysphoria is the diagnostic term recognized in the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (DSM-V) for the feeling of clinically significant distress caused by incongruence between an individual's gender identity and an individual's sex assigned at birth.[4]

"[G]ender nonconformity is not in itself a mental disorder. The critical element of gender dysphoria is the presence of clinically significant distress associated with the condition."[5] Treatment for gender dysphoria is designed to help transgender individuals

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[1] Am. Psychological Ass'n. *Guidelines for Psychological Practice with Transgender and Gender Nonconforming People*, The American Psychologist 70, no. 9, at 862 (2015), at https://www.apa.org/practice/guidelines/transgender.pdf.

[2] *Id.* at 835; Aruna Saraswat, M.D., et. al., Evidence Supporting the Biologic Nature of Gender Identity, 21 Endocrine Practice 199, 199- 202 (2015)

[3] *Guidelines for Psychological Practice* at 862.

[4] Am. Psychiatric Ass'n, Gender Dysphoria Fact Sheet, at 1 (2013), http://www.dsm5.org/documents/gender%20dysphoria%20fact%20sheet.pdf.

[5] *Id.*

live congruently with their gender identity and eliminate such distress.[6] Treatment for gender dysphoria requires living consistently with gender identity, including with respect to the use of restrooms and other sex-segregated facilities.[7]

II. Jane Doe

Jane Doe, referred to in the Complaint as "Student X," is a fifteen year-old girl in her sophomore year at Virginia High School in Virginia, Minnesota.[8] (Declaration of Jane Doe in Support of Motion to Intervene ("J. Doe Decl.") ¶¶ 1-2). Jane came out to her mother as transgender in the fall of 2014, when she was in eighth grade. (Declaration

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[6] *See id.*; World Professional Ass'n for Transgender Health, Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People (7th ed. 2011), at https://s3.amazonaws.com/amo_hub_content/Association140/files/Standards%20of%20Care%20V7%20-%202011%20WPATH%20(2)(1).pdf; Am. Psychological Ass'n, Transgender, *Gender Identity, & Gender Expression Non-Discrimination* (August 2008), at http://www.apa.org/about/policy/transgender.aspx; Am. Academy of Pediatrics, *Office-Based Care for Lesbian, Gay, Bisexual, Transgender, and Questioning Youth*, Pediatrics 132, no. 1, at e297-98 (2013), at http://pediatrics.aappublications.org/content/pediatrics/132/1/e297.full.pdf.

[7] Am. Psychological Ass'n & Nat'l Ass'n of School Psychologists, *Resolution on gender and sexual orientation diversity in children and adolescents in schools* (2015), at http://www.apa.org/about/policy/orientation-diversity.aspx; Human Rights Campaign, Am. Academy of Pediatrics, Am. Coll. of Osteopathic Pediatricians, *Supporting & Caring for Transgender Children* 9 (September 2016), at http://hrc-assets.s3-website-us-east-1.amazonaws.com//files/documents/SupportingCaringforTransChildren.pdf.

[8] The Complaint conspicuously refers to Jane as "male" and uses pronouns such as "he," "him," and "his." (Compl. ¶ 37 n.4.) Jane respectfully requests that the Court refer to her with female-gendered pronouns consistently with Jane's identity as a girl. *See, e.g.*, *Rumble v. Fairview Health Servs.*, No. 14-cv-2037, 2015 WL 1197415 (D. Minn. Mar. 16, 2015) (referring to transgender man with male pronouns); *Jade v. Scutt*, No. 2:13-CV-10149, 2015 WL 6470862, at *1 n.2 (E.D. Mich. Oct. 27, 2015) ("Petitioner is a transgender individual and will be referred to by feminine pronouns because she identifies as female.").

of Sarah Doe in Support of Motion to Intervene ("S. Doe Decl.") ¶ 4). Jane was diagnosed with gender dysphoria in January 2015. (*Id.*).

Consistent with the treatment standards described above, Jane's healthcare providers prescribed that she live consistently with her female gender as a core part of her treatment. (*Id.* ¶ 5). In spring 2015, Jane began to do so by using a woman's name and pronouns, dressing in women's clothes, and using sex-divided facilities designated for women. (*Id.*). Jane's school records have been changed to reflect her female identity. (*Id.*). She has also begun transitioning medically, receiving injections to block testosterone and preparing to begin estrogen therapy. (*Id.*).

In eighth grade, Jane was initially denied access to girls' facilities and directed to use the staff or nurse's restroom. (J. Doe Decl. ¶ 3; S. Doe Decl. ¶ 6). When she had to change clothes, using these separate facilities frequently made her late for class because of the distance between them and the school's gym and their use by others. (J. Doe Decl. ¶ 4). She also felt like an outsider, different from her peers, and embarrassed by being forced to use separate restrooms. (J. Doe Decl. ¶ 5; S. Doe Decl. ¶7).[9]

When she began ninth grade in 2015, Jane asked to play on the girls' basketball team. (S. Doe Decl. ¶ 8). Her request was initially denied. (*Id.*). After an appeal to the Minnesota State High School League ("MSHSL") that included being required to

[9] The Complaint asserts through hearsay that at some point in middle school, Jane asked girl F. to "trade body parts" or commented on the size of other girls' breasts without specifying whether the comment was supposedly made in the locker room or in gym. (Compl. ¶ 225). Those allegations, which are supported only in the form of a verified Complaint signed pseudonymously but without a real-name filing under seal by student F.'s parent, are completely false and extremely hurtful. (J. Doe Dec. ¶ 6).

"prove" her identity by submitting medical documentation of her transgender status and diagnosis of gender dysphoria, in December 2015, the MSHSL granted her request to play basketball on the girls' team with her friends. (*Id.*).

During this time, Jane became aware of her right to use restrooms and locker rooms consistent with her female identity, and began to do so without hearing complaints from any of the other girls at her high school. (J. Doe Decl. ¶ 7). About a week later, her counselor and dean of students called Jane to the counselor's office, and told her they were upset that she had begun using those restrooms and locker rooms without consulting them first. (*Id.* ¶ 8). Jane apologized, and received no discipline or instruction about the use of those facilities. (*Id.*).

In January 2016, Jane began playing basketball on the girls' team, and the school formally declared that she was permitted to use the girls' restrooms and locker rooms. (*Id.* ¶ 9). According to the Complaint, Student B was another student on the basketball team. (Compl. ¶ 30.) The Complaint states that Student B did not want to change in the same locker room as Jane and that, in response, the school district provided additional changing spaces for her to use. (*Id.* ¶¶ 130-46.). The Complaint does not identify any purported misconduct by Jane other than merely being present in the locker room.

Most of the Complaint's incendiary allegations relate to alleged incidents occurring in Spring 2016 when Jane participated as a member on the track team and are asserted by a parent's hearsay on behalf of another member of the track team identified as Student A. (*Id.* ¶¶ 147-97). These allegations single Jane out from the rest of the team and use misleading innuendo and salacious phrasing to depict ordinary teenage girl

behavior as threatening or scandalous. For example, the Complaint insinuates that Jane completely undresses in front of other students (*id.* ¶ 154) and portrays Jane's actions of "sit[ing] on a bench" or "moving throughout the locker room to change, dance, or sit" as an invasion of Student A's privacy (*id.* ¶¶ 153-57). In reality, Jane never undresses in the locker room beyond a sports bra and bike shorts, which is essentially the same as the volleyball team uniform. (J. Doe Decl. ¶ 12). Jane is also very self-conscious about parts of her body that are different than other girls' bodies, and if she has to undress beyond a sports bra and bike shorts, she uses a restroom stall. (*Id.* ¶¶ 11-12.). Jane does not follow girls who want to change in separate areas, and she does not make comments about girls who wish to change in separate areas. (*Id.* ¶¶ 11, 13). She is not attracted to girls and does not use girls' facilities to watch other girls undress. (*Id.* ¶ 11).

Some of the most incendiary allegations accuse Jane of "'twerking,' 'grinding' or dancing like [she] was on a 'stripper pole.'" (*Id.* ¶ 159.). Jane has no control over the music played in the locker rooms, which is chosen by the senior girls. Like many high school girls, Jane does dance with her friends in the school's locker rooms. (*Id.* ¶ 16). But when Jane has danced, it has always been when her friends were dancing and she joined in. (*Id.*). Jane's dancing is no different – and no less appropriate – than the dancing of other girls in the locker room. (*Id.*).[10]

[10] In addition to singling out Jane for public shaming as a transgender student, the Complaint's hypersexualized references, including to "twerking," also single Jane out as one of the few students of color at school. (J. Doe Decl. ¶ 17.).

On two occasions, Jane unknowingly entered locker room facilities that were being used as alternative changing areas for girls who did not want to change in the same locker room as Jane, because she had not been told that those locker rooms were being used for that purpose. (*Id.* ¶¶ 14-15). On the first occasion, a friend had left something in the junior varsity locker room, and asked Jane to accompany her to pick it up. (*Id.* ¶ 14). Jane saw some members from her own team (the c-team), but did not think anything of it. (*Id.*). She was later called to the principal's office and told for the first time that the junior varsity room had been designated for use by girls on the c-team who did not want to change with Jane. (*Id.*). Jane apologized and said it would not happen again. (*Id.*).[11]

Similarly, when Jane was on the track team, due to the high number of girls on the track team, the coach announced that girls who wanted to use the boys' locker room (not being used by boys at the time) instead of the cramped girls' locker room could do so. (*Id.* ¶ 15). Jane went with a friend to use the boys' locker room because it appeared that few people were using it. (*Id.*). She was again called to the principal's office and was told for the first time that it was an alternative locker room for girls who did not want to change near her. (*Id.*). Had she known, she would not have used that locker room. (*Id.*).[12]

Before this lawsuit was filed, playing on the girls' team and being included with the rest of the team had positive effects on Jane, helping her feel that she could fit in with

[11] Some of the allegations related to Student A appear to be a reference to this incident. (Compl. ¶¶ 170-72.)

[12] The allegations related to Student D appear to be a reference to this incident. (Compl. ¶¶ 198-209.)

her peers and have bonds with her teammates. (J. Doe Decl. ¶ 9). Jane's mother noticed that she was happier, more confident, and had a more positive attitude about school. (S. Doe Decl. ¶ 11). Jane had started to overcome past bullying and was feeling like she could fit in with the other students. (*Id.*). But since this lawsuit was filed and widely publicized, Jane has been devastated. (*Id.* ¶ 16). Jane is upset about the things being said about her, and concerned about losing her ability to play on the girls' sports teams and use the same facilities as her friends. (*Id.*). Since the lawsuit began, members of the community have said things like "kill her" and "get rid of that thing." (*Id.* ¶ 18). The impact on Jane's emotional well-being has already begun to show in her schoolwork and assignments. (*Id.* ¶ 19). Jane is extremely worried that if Privacy Matters obtains an injunction and she is prohibited from using the same facilities as the rest of the team, she would lose the bonds she has formed with her friends on the team and "would again feel like an outcast." (J. Doe Decl. ¶ 18.)

ARGUMENT

Plaintiffs seek a preliminary injunction based on their claims under the Administrative Procedure Act, Title IX, and the constitutional right to privacy. "A preliminary injunction is an extraordinary remedy never awarded as of right." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). "The primary function of a preliminary injunction is to preserve the status quo until, upon final hearing, a court may grant full, effective relief." *Sanborn Mfg. Co., Inc. v. Campbell Hausfeld/Scott Fetzer Co.*, 997 F.2d 484, 489 (8th Cir. 1993). "The burden of demonstrating that a preliminary

injunction is warranted is a heavy one where, as here, granting the preliminary injunction will give plaintiff substantially the relief it would obtain after a trial on the merits." *Dakota Indus., Inc. v. Ever Best Ltd.*, 944 F.2d 438, 440 (8th Cir. 1991); *see also United States v. Xcel Energy, Inc.*, 759 F. Supp. 2d 1106, 1111 (D. Minn. 2010).

In deciding whether a preliminary injunction is warranted, courts consider "(1) the threat of irreparable harm to the movant; (2) the state of the balance between this harm and the injury that granting the injunction will inflict on other parties litigant; (3) the probability that movant will succeed on the merits; and (4) the public interest." *Dataphase Sys., Inc. v. C L Sys., Inc.*, 640 F.2d 109, 113 (8th Cir. 1981). The party seeking the injunction bears the burden of proof as to these factors. *Id.* No single factor is determinative; instead, a preliminary injunction is warranted when the "balance of equities so favors the movant that justice requires the court to intervene to preserve the status quo until the merits are determined." *Id.*

Privacy Matters therefore carries a very heavy burden. It must show sufficient likelihood of success on the merits to justify (a) changing the status quo, to (b) the relief that Privacy Matters seeks on the merits, which (c) if ultimately denied, would have therefore resulted in court-ordered denial of Jane's constitutional and statutory rights for the time in which the preliminary injunction was in place. Privacy Matters cannot carry that burden. It is unlikely to succeed on the merits of its claims, which have already been rejected by the only circuit court and the majority of district courts to consider the matter. The harm alleged by Plaintiffs is primarily speculative, and it pales when balanced against the specific harms, well-recognized by other courts, that Jane would suffer from a

massive disruption to her medical treatment at this crucial stage in her development. And the public interest is best served by vigorous enforcement of Title IX, rather than forcing a school district to adopt discriminatory policies with respect to sex-segregated facilities. The balance of equities weighs heavily against disrupting the status quo with Plaintiffs' requested preliminary injunction.

I. Plaintiffs Are Unlikely to Succeed on the Merits of Their Claim Under the Administrative Procedure Act.

An injunction cannot issue if there is little or no chance of success on the merits. *Katch, LLC v. Sweetser*, 143 F. Supp. 3d 854, 865 (D. Minn. 2015) (citing *Mid-Am. Real Estate Co. v. Iowa Realty Co.*, 406 F.3d 969, 972 (8th Cir. 2005)). The moving party must therefore show that it has a "fair chance of prevailing" on its claims. *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 530 F.3d 724, 732 (8th Cir. 2008). This is the most significant factor. *Home Instead, Inc. v. Florance*, 721 F.3d 494, 497 (8th Cir. 2013).

Title IX protects everyone – including transgender students – from being "excluded from participation in" or "denied the benefits of" any education program or activity "on the basis of sex." 20 U.S.C. § 1681(a). Under one of the statute's longstanding regulations, 34 C.F.R. § 106.33, schools may "provide separate toilet, locker room, and shower facilities on the basis of sex." For students whose sex at birth matches their gender identity, it is straightforward to assign restrooms and locker rooms that are consistent with all aspects of sex. In recent years, however, advances in treatment and support for transgender youth have allowed students like Jane to medically

and socially transition while still at school. For these students, it is impossible to assign restrooms and locker rooms that correspond with all aspects of sex. Through consent agreements, enforcement actions, amicus briefs, and published guidance, the Department has clarified that 34 C.F.R. § 106.33 does not authorize schools to prohibit transgender students from using single-sex facilities consistent with their gender identity.

Jane agrees with Defendants that there has been no final agency action in this case and that the Court lacks jurisdiction over Plaintiffs' claims under the Administrative Procedure Act. *See Highland*, 2016 WL 5372349, at *8 (citing *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 215 (1994)) (finding no jurisdiction to rule on similar APA challenge to the Department's interpretation of 34 C.F.R. § 106.33). But even if jurisdiction existed, Plaintiffs' APA claim would fail on the merits because the Department's interpretation of 34 C.F.R. § 106.33 is both reasonable and correct. Indeed, it is the only interpretation of the regulation that is consistent with Title IX's mandate that no student – including students who are transgender – may be "excluded from participation in" or "denied the benefits of" any education program or activity "on the basis of sex." 20 U.S.C. § 1681(a).

A. The Court Should Follow the Fourth Circuit's Reasoning in *G.G.*, Which Remains Good Law.

The Department's interpretation has been upheld as reasonable by the only Court of Appeals to consider the question. *G.G.*, 822 F.3d at 720. Although the Supreme Court has recalled and stayed the mandate in *G.G.*, the decision remains persuasive and continues to be binding authority for district courts within that Circuit. *See Carcaño v.*

McCrory, --- F. Supp. 3d ---, No. 1:16cv236, 2016 WL 4508192, at *13 (M.D.N.C. Aug. 26, 2016) (following *G.G.*). Moreover, unlike in most cases in which the Supreme Court stays a mandate, one of the five Justices who voted for the stay, Justice Breyer, wrote a brief concurrence stating only that he voted to grant the application "as a courtesy." *G.G.*, 136 S. Ct. at 2442 (Breyer, J., concurring). Even after the stay, two district courts followed the reasoning of the *G.G.* court and issued preliminary injunctions protecting the rights of transgender students to use facilities consistent with their gender identity. *Highland*, 2016 WL 5372349, at *11; *Whitaker*, 2016 WL 5239829, at *3.

The only court that has declined to follow *G.G.* is the district court in *Texas v. United States*, --- F. Supp. 3d. ---, No. 7:16-CV-00054-O, 2016 WL 4426495 (N.D. Tex. Aug. 21, 2016). Although that court issued an injunction against enforcement of the Department's guidance interpreting Title IX, its decision does not affect other district courts, all of which have followed *G.G.* instead of *Texas*. *See Highland*, 2016 WL 5372349, at *7 ("The *Texas* court's analysis can charitably be described as cursory."); *see also Whitaker*, 2016 WL 5239829, at *3; *Carcaño*, 2016 WL 4508192, at *13. This Court should do so as well.

B. Excluding Transgender Students From Restrooms and Locker Rooms Consistent With Their Gender Identity Discriminates "On the Basis of Sex" Under Title IX.

Discrimination "on the basis of sex" under Title IX encompasses all components of sex. Since Title IX was enacted, the definition of "sex" has encompassed the sum of all properties and characteristics associated with sex, including anatomical, physiological, and behavioral elements. *See G.G.*, 822 F.3d at 721; (summarizing dictionary

definitions); *Highland*, 2016 WL 5372349, at *11 n.4 (same); *Fabian v. Hosp. of Cent. Conn.*, --- F. Supp. 3d ---, No. 3:12-CV-1154 (SRU), 2016 WL 1089178, at *13 (D. Conn. Mar. 18, 2016) (same). Discrimination "on the basis of being transgender, or intersex, or sexually indeterminate, constitutes discrimination on the basis of the properties or characteristics typically manifested in sum as male and female – and that discrimination is literally discrimination 'because of sex.'" *Fabian*, 2016 WL 1089178, at *13.[13]

The broad dictionary definitions of the term "sex" are consistent with Supreme Court precedent that discrimination based on "sex" includes discrimination based on an

[13] Plaintiffs assert that Title IX and its implementing regulations distinguish between "sex" and "gender." Pls.' Mem. at 11-12. This misunderstands the history of those terms. Until the late 20th Century, the word "sex" described "a social or cultural phenomenon, and its manifestations," and the word "gender" described the grammatical classification of words as masculine or feminine. "sex, n., 4a," OED Online, Oxford University Press (2016). "In the 20th cent., as sex came increasingly to mean sexual intercourse . . . gender began to replace it (in early use euphemistically) as the usual word for the biological grouping of males and females." "gender, n., 3a" OED Online. This evolution is reflected in Supreme Court Court's equal protection cases, which exclusively referred to "sex" discrimination until *Kahn v. Shevin*, 416 U.S. 351 (1974), when Justice Ginsburg's brief for petitioner first used "gender" as a synonym. *See also* Catherine Crocker, *Ginsburg Explains Origins of Sex, Gender*, Associated Press (Nov. 21, 1993).

Plaintiffs' asserted distinction between sex as a biological term and gender as a cultural term did not gain prominence until the late 1970s, when it was embraced by feminist theory. *See* David Haig, *The Inexorable Rise of Gender and the Decline of Sex: Social Change in Academic Titles, 1945–2001*, Archives of Sexual Behavior, Vol. 33, No. 2 (Apr. 2004). As the American Heritage Dictionary explains, "some people maintain that word gender should be used only to refer to sociocultural roles," but "[t]he distinction can be problematic . . . and it may seem contrived to insist that sex is incorrect in this instance." The American Heritage Dictionary of the English Language 730 (5th Ed, 2011). More recent legislation distinguishing between "sex" and "gender identity," *see* Pls.' Mem. 11-12, is irrelevant when interpreting the term "sex" in statutes enacted in 1964 and 1972.

individual's gender nonconforming characteristics. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 242 (1989), *superseded by statute on other grounds as stated in Burrage v. United States*, 134 S. Ct. 881, 889 n.4 (2014). In *Price Waterhouse*, the Supreme Court ruled that an employer discriminated on the basis of "sex" when it advised a female employee to be less "macho" and "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." *Id.* at 235. *Price Waterhouse* thus demonstrated "that Title VII barred not just discrimination based on the fact that [the employee] was a woman, but also discrimination based on the fact that she failed 'to act like a woman.'" *Schwenk v. Harford*, 204 F.3d 1187, 1201 (9th Cir. 2000).

Applying *Price Waterhouse*, the First, Sixth, Ninth, and Eleventh Circuits have all held that discrimination against transgender persons is discrimination on the basis of sex. *See G.G.*, 822 F.3d at 727 (Davis, J., concurring) (citing *Glenn v. Brumby*, 663 F.3d 1312, 1317-18 (11th Cir. 2011); *Smith v. City of Salem*, 378 F.3d 566, 573 (6th Cir. 2004); *Rosa v. Park W. Bank & Trust Co.*, 214 F.3d 213, 215-16 (1st Cir. 2000); *Schwenk*, 204 F.3d at 1202. Because transgender individuals are, by definition, individuals whose gender identity does not conform to their sex assigned at birth, there is inherently "a congruence between discriminating against transgender and transsexual individuals and discrimination on the basis of gender-based behavioral norms." *Glenn*, 663 F.3d at 1316. Thus, "any discrimination against transsexuals (as transsexuals) – individuals who, by definition, do not conform to gender stereotypes – is . . . discrimination on the basis of sex as interpreted by *Price Waterhouse*." *Finkle v. Howard*

Cty., Md., 12 F. Supp. 3d 780, 788 (D. Md. 2014); *accord Schwenk*, 204 F.3d at 1202 (explaining that transgender individuals are inherently gender nonconforming in their outward appearance and inward identity); *Smith*, 378 F.3d at 574-75 (explaining that discrimination based on failure to "act and/or identify with" one's sex assigned at birth is sex discrimination); *Schroer v. Billington*, 577 F. Supp. 2d 293, 305 (D.D.C. 2008) (explaining that discrimination against an "inherently gender-nonconforming transsexual" is sex discrimination).

Courts in this Circuit agree. As Judge Nelson explained in *Rumble v. Fairview Health Services*:

> Because the term "transgender" describes people whose gender expression differs from their assigned sex at birth, discrimination based on an individual's transgender status constitutes discrimination based on gender stereotyping. Therefore, Plaintiff's transgender status is necessarily part of his "sex" or "gender" identity.

No. 14-CV-2037 SRN/FLN, 2015 WL 1197415, at *2 (D. Minn. Mar. 16, 2015); *see also Dawson v. H&H Elec., Inc.*, No. 4:14CV00583 SWW, 2015 WL 5437101, at *3 (E.D. Ark. Sept. 15, 2015) (holding that under *Price Waterhouse*, discrimination based on "sex" includes discrimination "because of [a person's] gender transition and her failure to conform to gender stereotypes").

C. Plaintiffs Rely Heavily on *Sommers* and *Ulane*, Title VII Cases That Have Been Recognized As Eviscerated by *Price Waterhouse* and Do Not Control This Case.

Plaintiffs' argument that the term "sex" refers solely to a person's sex assigned at birth is built entirely on *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748, 750 (8th Cir. 1982), and *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1087 (7th Cir. 1984). Pls.' Mem. at

11-12. Those decisions adopted a "narrow" interpretation of sex based "on a close analysis of Title VII and its particular legislative history." *Radtke v. Miscellaneous Drivers & Helpers Union Local No. 638 Health, Welfare, Eye & Dental Fund*, 867 F. Supp. 2d 1023, 1032 (D. Minn. 2012). Since *Price Waterhouse*, however, "federal courts have recognized with near-total uniformity that the approach in . . . *Sommers*, and *Ulane* . . . has been eviscerated by *Price Waterhouse*'s holding." *Glenn*, 663 F. 3d at 1318 n.5 (internal quotation marks and citations omitted). That near-unanimous consensus has been recognized by other courts in this District and Circuit. *See Radtke*, 867 F. Supp. 2d at 1032 ("In any case, the 'narrow view' of the term 'sex' in Title VII in *Ulane* and *Summers* 'has been eviscerated by *Price Waterhouse*'.") (*quoting Smith*, 378 F.3d at 573); *Rumble*, 2015 WL 1197415, at *2; *Dawson*, 2015 WL 5437101, at *3.[14]

Sommers and *Ulane* have been further undermined by *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998). *Sommers* relied on presumed legislative intent and decided that "discrimination based on one's transsexualism does not fall within

[14] Plaintiffs assert that "[t]he enduring validity of the reasoning in *Ulane* and *Sommers* was recently confirmed by" the Seventh Circuit's decision in *Hively v. Ivy Tech Cmty. Coll., S. Bend*, 830 F.3d 698, 717-18 (7th Cir. July 28, 2016) (Pls.' Mem. 13), but the Seventh Circuit has now granted a petition for rehearing en banc in that case and vacated the panel's decision, *see Hively Ivy Tech Cmty. Coll., S. Bend*, No. 15-1720, ECF No. 60 (7th Cir. Oct. 11, 2016). In any event, the panel opinion in *Hively* addressed the viability of claims based on sexual orientation, and did not address *Ulane* in the context of discrimination based on transgender status, which – unlike sexual orientation – is literally part of a person's sex. *See Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 764 (6th Cir. 2006) (reasoning that discrimination based on a person's sexual orientation is not discrimination for "fail[ing] to act and/or identify with his or her gender"); *Fabian*, 2016 WL 1089178, at *11 n.8 (holding that circuit precedent excluding sexual orientation discrimination from Title VII does not also exclude discrimination based on transgender status); *Lewis v. High Point Reg'l Health Sys.*, 79 F. Supp. 3d 588, 590 (E.D.N.C. 2015) (same).

the protective purview of" Title VII, because the legislative history did not show an affirmative "'intention to protect transsexuals.'" *Sommers*, 667 F.2d at 750. *Oncale*, however, unanimously decided that "sex" discrimination includes sexual harassment between two members of the same sex even though "male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII." *Oncale*, 523 U.S. at 79. The Court explained that "statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Oncale*, 523 U.S. at 79.

Moreover, even if *Sommers* were still good law for purposes of Title VII, the decision is not controlling for purposes of Title IX and its implementing regulations. *Whitaker*, 2016 WL 5239829, at *3. The EEOC does not have authority to issue substantive rules implementing Title VII. By contrast, Title IX delegates power to the Department of Education to create implementing regulations, and the agency's interpretation of its own regulations is entitled to deference. 20 U.S.C. § 1682. To uphold that interpretation, the court "need not find that the agencies' interpretation is the only plausible reading of 'sex' in the statute, but, rather, that it is one of the plausible readings." *Highland*, 2016 WL 5372349, at *13. Decisions interpreting Title VII–or decisions interpreting Title IX before the Department of Education advanced its own interpretation – are, therefore, not controlling here. *See id.*; *G.G.*, 822 F.3d at 723 n.9.[15]

[15] Congress was well aware that the statute delegated policy questions about restrooms and locker rooms to the administrative agency. When the topic of locker rooms came up

II. Plaintiffs Are Unlikely to Prevail on Their Title IX Claim

Plaintiffs are unlikely to prevail on their claim that Title IX requires the District to provide sex-segregated restrooms and exclude transgender girls from using those restrooms consistent with their gender identity. Plaintiffs' position cannot be reconciled with the plain text of 34 C.F.R. § 106.33, which states that schools "may" provide separate locker rooms and restrooms on the basis of sex – not that they must do so. Because schools do not have to create sex-segregated restrooms and locker rooms in the first place, they cannot be required to exclude transgender girls from using such restrooms based on other students' discomfort with sharing spaces with their transgender peers.

In addition to contravening the clear text of the regulation, Plaintiffs' argument is foreclosed by *Cruzan v. Special Sch. Dist, No. 1*, 294 F.3d 981 (8th Cir. 2002). In that case, the Eighth Circuit held that a non-transgender woman could not prevail on a claim for a hostile work environment under Title VII based on the mere presence of a transgender woman in the women's restroom absent any proof that the transgender woman "engaged in any inappropriate conduct other than merely being present." *Id.* at 984.

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during congressional debate, Title IX's sponsor opposed a statutory exception analogous to the "bona fide occupational qualification" exception in Title VII "because all too often this is the hook on which discrimination can be hung." 117 Cong. Rec. 30407 (1971). Instead, he argued that "the rulemaking powers . . . give the Secretary discretion to take care of this particular policy problem." *Id.*; *accord* 118 Cong. Rec. 5807 (1972) (Statement of Sen. Bayh) ("[R]egulations would allow enforcing agencies to permit differential treatment by sex . . . where personal privacy must be preserved.").

Plaintiffs have not even alleged – much less, proved – that Jane engaged in any inappropriate conduct here. The only allegations are that Jane danced in the locker room with the rest of the track team while Student A was present. Girls on the athletic teams regularly sing, dance, and listen to music in the locker rooms. (J. Doe Decl. ¶ 16). Like many other teenage girls, girls on the basketball team would listen to "to music with sexually explicit lyrics." And, like many other teenage girls, girls on the basketball team would dance to the music. There is no allegation that Jane initiated the playing of music or dancing (or that it would be improper for her to do so), and Jane's dancing was no different and no less appropriate than the dancing of any other girl.[16]

Plaintiffs attempt to distinguish *Cruzan* by asserting that "Ms. Cruzan had a safe haven" because she could access other facilities in which her transgender colleague would not be present. Pls.' Mem. at 16. *See Cruzan*, 294 F.3d at 984 (noting that teacher could use "female students' restroom" or "[s]ingle-stall, unisex bathrooms."). But the same is true here. Under the District's policy: "No one will be required to use a changing facility and any of our physical education students and student-athletes may use a private individual changing location in our locker rooms, or if they choose, a suitable space and accommodation will be made." (Declaration of Andrew W. Davis in Support

[16] The Complaint also alleges that Jane "made rude comments" about Student A not wanting to change near her (an allegation that Jane denies (J. Doe Decl. ¶ 13)); and that two years ago, in middle school, Jane allegedly asked Student F about her bra size and said she wished they could "trade body parts" (an allegation that Jane also denies (J. Doe Decl. ¶ 6)). Even if true, these vague allegations, submitted as hearsay through the verified compliant signed pseudonymously and not submitted under seal with Plaintiffs' signatures, do not come close to alleging inappropriate or even unusual conduct for teenage girls.

of Motion to Intervene, Ex. C).[17] Students may use one of these accommodations, but Title IX does not confer the right to exclude transgender girls from the girls' locker room because some other girls object to their mere presence.

III. Plaintiffs Are Unlikely to Prevail on Their Constitutional Claim

None of the cases cited by Plaintiffs suggests that a non-transgender girl has a fundamental privacy right to exclude transgender girls from common restrooms and locker rooms. Across the country, school districts, cities, municipalities, states, and federal entities allow transgender students to use restrooms consistent with their gender identity. *Carcaño*, 2016 WL 4508192, at *4 (summarizing information from amicus brief of school administrators). If accepted, Plaintiffs' argument would render all those policies unconstitutional. No authority supports that extreme position.

As an initial matter, the cases relied on by Plaintiffs all involve privacy between men and women, not privacy between women who are transgender and women who are not. Separating restrooms on the basis of sex may reflect traditions of modesty, but, as the Fourth Circuit explained, that does not answer the question of which locker room a transgender girl like Jane should use. *G.G.*, 822 F.3d at 723. For many people, the presence of a transgender man (who may look indistinguishable from a non-transgender man) in the girls' locker room would be more discomfiting than the presence of a transgender girl (who may look indistinguishable from a non-transgender girl).

[17] On two occasions, Jane accompanied friends to one of the locker rooms to retrieve something without having been informed or realizing that the locker room was being used as a private changing area. (J. Doe Decl. ¶¶ 14-15). No similar incidents have occurred.

Confusion about or discomfort with transgender people in no way gives rise to a constitutionally-protected privacy interest to be free from sharing space with transgender people.

Plaintiffs rely heavily on cases from the early 1980s and 1990s in which courts upheld employers' decisions to make sex a "bona fide occupational qualification" for the position of being a restroom or locker room attendant. *Norwood v. Dale Maint. Sys., Inc.*, 590 F. Supp. 1410 (N.D. Ill. 1984); *Brooks v. ACF Indus., Inc.*, 537 F. Supp. 1122 (S.D. W. Va. 1982); *Livingwell (North) Inc. v. Pa. Human Relations Com'n*, 147 Pa. Commw. 116, 125-27 (1992). Those cases, none of which involved transgender people, held that restricting employment based on sex was permissible, but do not suggest that such accommodation would be constitutionally required by schools or public employers.

In other cases relied on by Plaintiffs, people were forced to undress or surreptitiously be viewed undressing against their will. Under the District's policy, however, no one is forced to undress in the presence of any other student, including a student who is transgender. Every student has the option of dressing and undressing in a private location. In any case, Jane herself never fully undresses in view of other students and always changes in a private area of the locker room – a choice equally available to any of her classmates or teammates. (J. Doe Decl. ¶ 12). Exposure to nudity is simply not an issue. *See G.G.*, 822 F.3d at 723 n.10 (distinguishing privacy cases cited in this case); *Highland*, 2016 WL 5372349, at *18 (same).

According to educators and administrators across the country who have filed amicus briefs in several cases, allowing transgender students to use restrooms and locker

rooms consistent with their gender identity has never resulted in actual invasions of anyone's privacy. *See Highland*, 2016 WL 5372349, at *17 (discussing amicus brief). School districts can accommodate the privacy interests of all students in a nondiscriminatory manner. But they cannot segregate transgender students from the common restrooms and locker rooms based on "'mere negative attitudes [and] fear,' which are not 'permissible bases for" differential treatment." *Id.* at *19 (quoting *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 448 (1985)).

IV. Plaintiffs Cannot Satisfy the Remaining Preliminary Injunction Factors.

In addition to establishing a likelihood of success on the merits, Plaintiffs must establish that they will face irreparable harm if the injunction is denied, that the balance of hardships weighs in their favor, and that an injunction is in the public interest. *Dataphase*, 640 F.2d at 113. Once again, Plaintiffs cannot satisfy these requirements. To the contrary, in similar circumstances courts have held that all of the relevant factors weigh in favor of granting a preliminary injunction for transgender students seeking equal access to facilities under Title IX and the Equal Protection Clause. *Highland*, 2016 WL 5372349, at *19-*20; *Whitaker*, 2016 WL 5239829, at *5-*7.

Plaintiffs cannot establish irreparable harm because they have many options for protecting their privacy and modesty including use of private changing areas or restrooms if they do not want to use the same facilities as Jane, or any other student. *See G.G.*, 822 F.3d at729 (Davis, J., concurring) (explaining that students who object to using same restroom as transgender students would not be harmed by an injunction because "all students have access to the single-stall restrooms.")

The balance of hardships also strongly tips in favor of Jane, not the Plaintiffs. *See id.*; *Highland*, 2016 WL 5372349, at *20; *Whitaker*, 2016 WL 5239829, at *6. When considering the balance of hardships, a court's goal is to assess the harm the movant would suffer absent an injunction, as well as the harm other interested parties and the public would experience if the injunction issued. *Pottgen v. Missouri State High Sch. Activities Ass'n*, 40 F.3d 926, 928 (8th Cir. 1994). Plaintiffs downplay the harm Jane would suffer if forcibly segregated again from the other girls in her school. They argue that "the prior accommodation given [Jane] wholly satisfied her privacy needs." (Pls.' Mem. at 33). They cherrypick Jane's statement from her YouTube channel that she could not complain about her prior accommodations to suggest they were sufficient. (*Id.*). In fact, Jane felt – as would anyone – like an outsider, different and embarrassed to have to use a restroom different from everyone else. (J. Doe Decl. ¶ 5). Her attempt to "make the best of it" (*id.*) was not a statement of satisfaction with the situation, and Plaintiffs acknowledge in the Complaint that Jane continued to ask for the same treatment as the other girls in her class. (Compl. ¶ 97).

The balance of equities tilts firmly against issuing the preliminary injunction, changing the status quo, and reversing the hard-won progress Jane has made in her treatment. The ability to live consistently as her gender at school, as recommended by treating psychologists, has had positive effects on Jane's emotional health. It has helped her feel happier, more confident, with a more positive attitude about school, and to fit in with her peers and have bonds with her teammates. (J. Doe Decl. ¶ 9; S. Doe Decl. ¶ 11). Forcing her to return to segregated restrooms, separating her from her classmates and

teammates because she is transgender, would seriously set back that progress and compromise her well-being in violation of her rights under both Title IX and the Equal Protection Clause.

Finally, an injunction would be contrary to public interest, which "lay[s] in the firm enforcement of Title IX." *Cohen v. Brown Univ.*, 991 F.2d 888, 906 (1st Cir.1993); *Highland*, 2016 WL 5372349. Protecting Jane's "right to be free from discrimination on the basis of sex in an educational institution is plainly in the public interest." *G.G.*, 822 F.3d at 729 (Davis, J., concurring).

Taken together, the balance of equities weighs heavily against granting the requested injunction.

CONCLUSION

For the foregoing reasons, Jane respectfully requests that this Court deny Plaintiffs' requested preliminary injunction and allow her to continue to use school facilities consistent with her identity as a girl.

Dated: October 28, 2016

s/Brian W. Thomson

Timothy P. Griffin (#0285717)
Brian W. Thomson (#0322416)
Andrew W. Davis (#386634)
Ivan Ludmer (#0389498)
STINSON LEONARD STREET LLP
150 South Fifth Street, Suite 2300
Minneapolis, MN 55402
(612) 335-1500
brian.thomson@stinson.com
timothy.griffin@stinson.com
andrew.davis@stinson.com
ivan.ludmer@stinson.com

Teresa Nelson (#0269736)
ACLU OF MINNESOTA
2300 Myrtle Avenue, Suite 180
St. Paul, MN 55114
(651) 645-4097
tnelson@aclu-mn.org

Joshua Block
(pro hac vice motion to be submitted)
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street
New York, NY 10004
(212) 549-2593
jblock@aclu.org

ATTORNEYS FOR INTERVENOR

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

PRIVACY MATTERS, a voluntary unincorporated association; and **PARENT A**, president of Privacy Matters, Plaintiffs, vs. **UNITED STATES DEPARTMENT OF EDUCATION; JOHN B. KING, JR.**, in his official capacity as United States Secretary of Education; **UNITED STATES DEPARTMENT OF JUSTICE; LORETTA E. LYNCH**, in her official capacity as United States Attorney General, and **INDEPENDENT SCHOOL DISTRICT NUMBER 706, STATE OF MINNESOTA**, Defendants, Jane Doe, by and through her mother, Sarah Doe, Intervenor-Defendant.	Case No. 0:16-CV-03015-WMW-LIB **INTERVENOR'S LR 7.1(f) WORD COUNT COMPLIANCE CERTIFICATE**

I, Brian W. Thomson, hereby certify that the foregoing Intervenors' Memorandum of Law in Support of its Motion to Intervene complies with the length and type size limitations of Local Rule 7.1(f). The length of this Memorandum is 4,424 words.

I further certify that, in preparation of this Memorandum**,** I used Microsoft Word 2010, and that this word processing program has been applied specifically to include all text, including headings, footnotes, and quotations in the following word count.

Respectfully submitted this 28th day of October, 2016.

s/Brian W. Thomson

Timothy P. Griffin (#0285717)
Brian W. Thomson (#0322416)
Andrew W. Davis (#386634)
Ivan Ludmer (#0389498)
STINSON LEONARD STREET LLP
150 South Fifth Street, Suite 2300
Minneapolis, MN 55402
(612) 335-1500
timothy.griffin@stinson.com
brian.thomson@stinson.com
andrew.davis@stinson.com
ivan.ludmer@stinson.com

Teresa Nelson (#0269736)
ACLU OF MINNESOTA
2300 Myrtle Avenue, Suite 180
St. Paul, MN 55114
tnelson@aclu-mn.org
(651) 645-4097

Joshua Block
(pro hac vice motion to be submitted)
AMERICAN CIVIL LIBERTIES UNION
125 Broad Street
New York, NY 10004
(212) 549-2593
jblock@aclu.org

ATTORNEYS FOR INTERVENOR