

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

JULIET EVANCHO; ELISSA RIDENOUR;  
and A.S., a minor, by and through  
his parent and next friend,

Plaintiffs,

Civil Action

vs.

No. 16-1537

PINE-RICHLAND SCHOOL DISTRICT;  
DR. BRIAN R. MILLER, in his official  
capacity as Superintendent of the Pine-  
Richland School District; and NANCY  
BOWMAN, in her official capacity as  
Principal of Pine-Richland High School,

Defendants.

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Transcript of HEARING ON MOTION FOR PRELIMINARY  
INJUNCTION and MOTION TO DISMISS recorded on Thursday,  
December 1, 2016, in the United States District Court,  
Pittsburgh, Pennsylvania, before The Hon. Mark R. Hornak,  
United States District Judge

APPEARANCES:

For the Plaintiffs:

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1 APPEARANCES (cont.)

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8 ALSO PRESENT: Thomas Warnke  
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11  
12 Michael Brungo, Esq.  
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16 Pine-Richland School District

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P R O C E E D I N G S

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(9:35 a.m.; in open court:)

THE COURT: Good morning. Okay. We're here this morning for hearing and argument in Civil Action 16-CV-1537, Evancho versus Pine-Richland School District, et al. Will counsel for the Plaintiffs please enter their appearance?

MR. GONZALEZ-PAGAN: Thank you, Your Honor. Omar Gonzalez-Pagan for the Plaintiffs.

THE COURT: Good morning. Welcome to Pittsburgh, sir.

MR. GONZALEZ-PAGAN: I'm joined by my colleagues, Christopher Clark and Kara Ingelhart.

THE COURT: Mr. Clark, Miss Ingelhart, nice to see you. I understand you have someone else from your organization here also?

MR. GONZALEZ-PAGAN: Yes, Your Honor, our colleague, Tom Warnke.

THE COURT: Mr. Warnke, can you identify yourself?

MR. WARNKE: Good morning.

THE COURT: Nice to see you, sir. Thank you for coming in today.

Will counsel for the Defendants please enter their appearance?

MR. FOLEY: Roger Foley on behalf of the

1 Defendants.

2 THE COURT: Good morning, Mr. Foley. Good to see  
3 you again.

4 MS. LANE: Good morning, Your Honor. Christina Lane  
5 on behalf of Pine-Richland School District, Dr. Brian Miller  
6 and Miss Nancy Bowman.

7 THE COURT: Miss Lane, nice to see you. And Mr.  
8 Foley and Miss Lane, do you have other of your colleagues  
9 here today as I understand?

10 MR. FOLEY: Yes, we do, Your Honor. We have  
11 Mr. Michael Brungo, who is also from our firm.

12 THE COURT: Mr. Brungo, nice to see you, sir.

13 MR. FOLEY: And Attorney Pat Clair, Solicitor.

14 THE COURT: Mr. Clair, nice to see you, sir.

15 MR. FOLEY: And for purposes of the record, Your  
16 Honor, we also have one of the Defendants. The  
17 superintendent, Dr. Brian Miller, is here.

18 THE COURT: Dr. Miller, nice to see you.

19 MR. FOLEY: And we have also director of HR and  
20 legal affairs for the School District, who is an attorney,  
21 Owen Kenney.

22 THE COURT: Mr. Kenney, nice to see you, sir.

23 Thank you for coming to court today.

24 Mr. Gonzalez-Pagan, are any of your clients here  
25 today, sir?

1 MR. GONZALEZ-PAGAN: No, Your Honor. They're in  
2 school.

3 THE COURT: That's fine. Okay. We've had  
4 extensive discussions in status conferences. I've reviewed  
5 all the material that everyone has filed on the record. Was  
6 there anything filed after 9:00 last night that I have to be  
7 aware of that I would not have read yet? Mr. Foley,  
8 Miss Lane, anything from the defense side?

9 MS. LANE: No, Your Honor.

10 THE COURT: Mr. Gonzalez-Pagan, anything you filed  
11 late last night that I should be attentive to?

12 MR. GONZALEZ-PAGAN: No, Your Honor.

13 THE COURT: Okay. So the purpose of today is to  
14 hear from all counsel on all of the issues and briefs and  
15 motions that are currently pending before the Court.

16 I entered a case management order regarding the  
17 order of presentation today. I did indicate, because there  
18 are a number of issues that are each being presented on all  
19 sides of the case, that if counsel wants to divide argument  
20 issue by issue, all I'd ask is you let me know a little bit  
21 of a road map of how you're going to do that so I can  
22 anticipate that.

23 We'll hear from Plaintiff's counsel first on the  
24 motion for preliminary injunction. I'm sure as just a  
25 natural consequence, Mr. Gonzalez-Pagan, part of why you

1 think you should win will be why the Defendants should not  
2 win, which will go to their motion to dismiss, and then we'll  
3 hear from the Defendants in support of their motion to  
4 dismiss and in opposition to the motion for preliminary  
5 injunction. And we'll hear from the Plaintiff and then from  
6 the Defendants in rebuttal.

7 Counsel is welcome to argue from seated or standing  
8 at counsel table. You can also use the podium. We have a  
9 microphone there. Mr. Babik, is that microphone on, sir?

10 MR. BABIK: Not yet, Your Honor.

11 THE COURT: Can you flip that on? Wherever you're  
12 most comfortable. All I'd ask is that you adjust the  
13 microphone so we can hear you when you're speaking.

14 Nobody's going to be on the clock as such. It's  
15 not an invitation to go longer than you need to, but it's a  
16 recognition that I'm going to let you go as long as you need  
17 to as long as we're not being repetitive.

18 A couple of sort of ground rules in my short time  
19 on the bench. I'm told by others that I at times ask a lot  
20 of questions. You should not draw any conclusion from the  
21 fact I ask a question or the content of the question other  
22 than that I'm interested in the answer. It's not an  
23 indication of anything else.

24 I generally have found it helpful when counsel  
25 actually answers the question I ask. Now, you're welcome to

1 follow that up by explaining why you think it's a bad  
2 question, an irrelevant question, a dumb question, a  
3 pointless question. But it's always been helpful so far for  
4 me if you start by answering the question, if you can answer  
5 it.

6           And third, to the extent you make a reference to  
7 something being true or not true or the case or not the case,  
8 if you can tell me where that is in the record, not  
9 necessarily by pinpoint cite, but such and so's declaration  
10 says, or this document says or something that's in the public  
11 domain. Because Miss Lash, who's one of my law clerks, and  
12 I'll be taking note of that, it's helpful to know what's in  
13 the record and what you're saying that maybe isn't in the  
14 record but you nonetheless want me to consider today.

15           So Mr. Gonzalez-Pagan, are you folks on the  
16 Plaintiff's side dividing your argument? And if so, do you  
17 know how?

18           MR. GONZALEZ-PAGAN: Yes, Your Honor.

19           THE COURT: Who's going to do what? Feel free to  
20 come up to the podium, sir.

21           MR. GONZALEZ-PAGAN: Thank you, Your Honor. And  
22 may it please the Court, today we're going to address both  
23 the Plaintiff's motion for preliminary injunction and  
24 Defendant's motion to dismiss.

25           For the Court's convenience I will be handling the

1 likelihood of success on the merits on the Title IX and equal  
2 protection claims. My colleague Kara Ingelhart will be  
3 handling the irreparable harm prong of the preliminary  
4 injunction test.

5 My colleague Christopher Clark would address the  
6 balance of the equities and the public interest and how they  
7 lie in our client's favor because Resolution 2 cannot be  
8 justified under any standard of review.

9 THE COURT: The one thing I would also ask counsel  
10 is Miss Rowe is the fifth court reporter that has had to work  
11 with me in the time I've been here, and each of her  
12 predecessors have advised me that at times I speak too  
13 quickly, and I have been appropriately reprimanded by each of  
14 the court reporters.

15 So to avoid that happening to counsel, if you can  
16 make sure that you speak, not saying unnaturally, but in a  
17 way that Miss Rowe can take it all down and keep your voice  
18 up so that we can hear you. So with that, Mr.  
19 Gonzalez-Pagan, I'm happy to hear from you.

20 MR. GONZALEZ-PAGAN: Thank you, Your Honor, and  
21 I'll strive to speak a little slower.

22 First let me describe what this case is about. It  
23 is about the rights of three senior students at Pine-Richland  
24 High School, two girls and one boy, to be free from  
25 discrimination and to be respected for who they are in all



1 facets of their academic life at Pine-Richland High School.

2 Juliet, Elissa and A.S. are simply three students  
3 who want to attend school, take advantage of their  
4 educational opportunities and graduate from high school  
5 knowing that their school respected them for who they are.

6 For years and months each of these students were  
7 able to use the restrooms consistent with their gender  
8 identity. This longstanding and inclusive practice at the  
9 high school was in place without causing any disruption, any  
10 misconduct or any incidents.

11 And this is part of the record. It can be found in  
12 the March 11 E-mail that Superintendent Miller sent to the  
13 parents and legal guardians of students. It can be found in  
14 the February 4 communication that Superintendent Miller sent  
15 to some school board members and other recipients.

16 In fact, as one school board member put it, Peter  
17 Lyons, every indication from the school administration is  
18 that the use of restrooms by transgender students consistent  
19 with their gender identity has been a nonissue at the school.  
20 And this is in the September 12 transcript, partial  
21 transcript of the school board meeting.

22 In a few weeks after classes started this year, the  
23 school board passed Resolution 2, and Defendants implemented  
24 a new policy and practice that bars transgender students from  
25 using the restrooms consistent with their gender identity,

1 but allows cisgender students to use the restrooms consistent  
2 with their gender identity.

3           Such an action has marginalized our clients,  
4 Juliet, Elissa and A.S. Since this implementation of  
5 Resolution 2, our clients have suffered stigma, isolation and  
6 harassment. They have suffered distress --

7           THE COURT: Let me ask you about that,  
8 Mr. Gonzalez-Pagan. I read the declarations of each of the  
9 students, and I don't want to minimize what was reported in  
10 them. But as I recall -- and Juliet is Miss Evancho?

11           MR. GONZALEZ-PAGAN: That's correct.

12           THE COURT: As I recall, Miss Evancho reported  
13 three situations that had arisen, and Miss Ridenour is  
14 Elissa -- is it Elana or Elissa?

15           MR. GONZALEZ-PAGAN: Elissa.

16           THE COURT: She's reported one or two, and can you  
17 remind me what A.S. reported in his affidavit?

18           MR. GONZALEZ-PAGAN: A.S., who has remained  
19 anonymous --

20           THE COURT: Because A.S. is under 18?

21           MR. GONZALEZ-PAGAN: He's under 18, that's correct.  
22 He also had art projects vandalized, and he has been referred  
23 to by epithets from other students.

24           And I would note that there are other incidents  
25 beyond the three that the Defendants acknowledge. I would

1 point to the reply declaration from Juliet's father, Michael  
2 Evancho, who knows that there were other incidents, that they  
3 were also responded to the school --

4 THE COURT: Does the record reflect that there were  
5 any incidents of a similar ilk prior to the passage of  
6 Resolution 2?

7 MR. GONZALEZ-PAGAN: Not with regards to Elissa and  
8 A.S. With regards to Juliet, she noted that there might have  
9 been some comments, but that that has increased dramatically  
10 since the debate and passage of Resolution 2.

11 And I would also note that the avoidance of the use  
12 of the restrooms because of --

13 THE COURT: Let me ask you this,  
14 Mr. Gonzalez-Pagan. If the Court grants the request for  
15 preliminary injunctive relief, to -- as your request for  
16 relief has phrased it, to restore the status quo that existed  
17 prior to the passage of Resolution 2, it's only through the  
18 exercise of good will that any of what you have reported or  
19 what your clients have reported to you would come to an end?  
20 The Court's injunction would not affect as a legal matter the  
21 behavior of others.

22 We would hope -- one would hope through the  
23 implementation of good will, that others would be dissuaded  
24 of any basis from engaging in conduct that makes life  
25 difficult for any student. I mean an injunction wouldn't of

1 its own force stop it.

2 MR. GONZALEZ-PAGAN: That's correct, Your Honor, in  
3 part. And the reason why is because the resolution sends a  
4 message to the student body and the school community that  
5 Juliet, Elissa and A.S. are different, that they're different  
6 from other students, that they're markedly different from  
7 other students, and that, therefore, they don't need to be  
8 treated as the same.

9 And the injunction being put in place would  
10 actually erase that message and change it back to being one  
11 that they're equal to other students, that they -- in fact,  
12 they are girls. Elissa and Juliet are girls just like other  
13 cisgender girls; and that A.S. is a boy just like other  
14 cisgender boys.

15 THE COURT: Does the record reflect,  
16 Mr. Gonzalez-Pagan, that in any other fashion the  
17 Pine-Richland School District as either a matter of custom,  
18 policy or practice treats Ms. Ridenour and Miss Evancho as  
19 anything other than girls?

20 MR. GONZALEZ-PAGAN: The school records are not  
21 fully -- for A.S. and Elissa are not fully representative of  
22 their gender identity. But the school has been commendable,  
23 and I don't want to erase this, respectful of their gender  
24 identities until the passage of Resolution 2.

25 THE COURT: In terms of day-to-day living at the

1 Pine-Richland High School, Miss Ridenour and Miss Evancho are  
2 in all respects treated as girls?

3 MR. GONZALEZ-PAGAN: They're treated as girls, but  
4 they're also being -- the school community is also told we  
5 treat them as girls, but we do not believe them to be girls.  
6 And in fact, that's the message that Resolution 2 sends, and  
7 it's the very language that is, in fact, the response from  
8 the Defendants in the responses to our proposed findings of  
9 fact.

10 THE COURT: Doesn't it actually help your case that  
11 the Pine-Richland School District in all other regards  
12 recognizes and treats Miss Ridenour and Miss Evancho as  
13 girls?

14 MR. GONZALEZ-PAGAN: I think paradoxically it  
15 really proves that what this is about is not about the fact  
16 that they're not girls, but rather it's about the fact that  
17 they are transgender and that their gender identity is not  
18 compliant with the stereotypes of their sex assigned at  
19 birth, and they don't believe who they are to be true. And  
20 that is a problem with the Resolution 2 as passed and its  
21 implementing policy and practice.

22 So I would note that aside from the harms of stigma  
23 and marginalization that's imposed by Resolution 2, they have  
24 avoided using the restrooms because of that very badge of  
25 being very markedly different, and they have been distracted

1 from being students.

2 They have -- it has cost some of their school work  
3 to suffer. For example, the grades for some of the subjects  
4 for Juliet that are her favorite subjects, in fact, from her  
5 declaration have suffered, and that's markedly seen even from  
6 the --

7 THE COURT: Well, but the documents were  
8 appropriately filed under seal, and I want to be cautious  
9 about what I place on the record, but I don't think I'm  
10 exaggerating the record if just simply as a matter of example  
11 and not exclusion of anyone else, but in particular  
12 Miss Ridenour's academic achievement by any measure might be  
13 viewed as quite commendable.

14 MR. GONZALEZ-PAGAN: That's correct.

15 THE COURT: Consistently throughout her academic  
16 career.

17 MR. GONZALEZ-PAGAN: That's correct, Your Honor,  
18 and they're great students. And they're great teenagers, and  
19 really -- but the fact that they have to work even harder to  
20 continue their achievement because they're being continually  
21 distracted by this Resolution and this debate about who they  
22 are is, in fact, itself a harm.

23 And we can not erase the fact and we will not know  
24 the full consequences of this, that they're in the midst of  
25 also applying to colleges. They're in the midst of being

1 seniors and actually culminating their high school careers.  
2 So this case really is not one about --

3 THE COURT: And what grade is A.S. in?

4 MR. GONZALEZ-PAGAN: They're all seniors, Your  
5 Honor.

6 THE COURT: He just happens to be a senior under  
7 the age of 18 at the moment?

8 MR. GONZALEZ-PAGAN: That's correct, Your Honor.

9 THE COURT: Let me ask you this. Let's assume that  
10 the guidance letter from the Department of Education and the  
11 Department of Justice had never been issued, just for  
12 purposes of conversation. Let's assume that it had never  
13 been issued.

14 Let's assume that the predecessor Dear Colleague  
15 letter had never been issued, all relating to Title IX.  
16 Would settled Circuit law in our Circuit regarding sex  
17 stereotyping under Title VII, would that supply the answer in  
18 this case?

19 MR. GONZALEZ-PAGAN: Well, I think the reality is  
20 that it would not, and I would argue because the settled  
21 law -- the settled law, if it is to be applying sex  
22 stereotypes as it is under post Price Waterhouse law, it is  
23 to be the sex stereotypes that go to the entire spectrum of  
24 gender, that go beyond the mere behavior and appearance of a  
25 person, but also the stereotypes about who they are and how

1 they're supposed to behave and how they're supposed to live  
2 their life in accordance with the sex that --

3 THE COURT: I'm thinking in particular we have a  
4 Third Circuit case, Bibby versus Philadelphia Coca-Cola  
5 Bottling from 2001, a Judge Barry opinion that speaks about  
6 that topic, and I guess Hively was argued yesterday in the  
7 Seventh Circuit. And then we have a case called Prowel  
8 versus Wise Business Forms, which talks about sort of sex or  
9 gender stereotyping, and that an allegation that somebody was  
10 discriminated against because they did not fit, if you will,  
11 stereotypical views of a particular sex, could state a claim  
12 under Title VII, and that in particular is the Prowel case,  
13 and I guess the en banc Seventh Circuit is looking at all  
14 that in their context.

15 Doesn't that settled body of law help provide the  
16 answer here?

17 MR. GONZALEZ-PAGAN: I think that's correct, Your  
18 Honor. I think that Prowel and Bibby, however, that have to  
19 do with sexual orientation specifically --

20 THE COURT: Understood. But it went beyond that.  
21 I mean that was sort of the launching pad for the discussion  
22 of sex stereotyping?

23 MR. GONZALEZ-PAGAN: That's correct. I would note,  
24 however, that the sexual -- sex stereotypes go beyond what's  
25 recognized in Bibby and Prowel, and I would point the Court



1 to the recent decision from this district in the EEOC v.  
2 Scott Medical Health Center case explaining how sex  
3 stereotyping actually is much broader --

4 THE COURT: Judge Bissoon's opinion.

5 MR. GONZALEZ-PAGAN: That's correct. Much broader  
6 than what Bibby and Prowel recognize. But even under Bibby  
7 and Prowel, that's correct, the sex stereotyping would apply  
8 to our claim in Title IX and would allow for relief for our  
9 clients.

10 THE COURT: Let's assume for purposes of  
11 discussion, Mr. Gonzalez-Pagan, that Title IX did not exist,  
12 but that the Fourteenth Amendment to the United States  
13 Constitution did. Are you going to argue that, or is one of  
14 your colleagues?

15 MR. GONZALEZ-PAGAN: I will be arguing both, Your  
16 Honor.

17 THE COURT: So how do you believe you prevail under  
18 the Fourteenth Amendment? And I'm not saying I'm stopping  
19 your argument on the Title IX stuff. We'll come back to  
20 that, but I want to set sort of a broader framework. How do  
21 you believe you prevail under the Fourteenth Amendment?

22 MR. GONZALEZ-PAGAN: Of course, Your Honor. With  
23 regards to equal protection, we put forth two rationales  
24 under which we would prevail.

25 First, it has to be understood that facially

1 Resolution 2 classifies on the basis of sex, that it's an  
2 undeniable fact. And at the very least that makes it  
3 constitutionally suspect and subject to heightened scrutiny.  
4 It also classifies on the basis of sex because --

5 THE COURT REPORTER: Excuse me. It also classifies  
6 -- please slow down.

7 MR. GONZALEZ-PAGAN: My apologies.

8 THE COURT: I think the problem -- and this happens  
9 to me when you're using alliterative words, when you get post  
10 Price Waterhouse and sexual stereotypes.

11 MR. GONZALEZ-PAGAN: My apologies. It also  
12 classifies on the basis of sex stereotypes because it goes to  
13 the sex stereotypes that are associated with the sex assigned  
14 at birth to a person.

15 So not only does it classify then on the basis of  
16 sex, but it is clear that once we have proven that it is both  
17 facially -- it classifies and discriminates on the basis of  
18 sex, that that is at least more than enough to provide us a  
19 plausible claim that should allow for --

20 THE COURT: If you get past the motion to dismiss,  
21 any time the Government by Government action separates people  
22 into categories, even if they say they have a terrific reason  
23 for doing that, the act of separating them into categories  
24 you believe, as I understand your briefs, states a claim for  
25 relief.

1 MR. GONZALEZ-PAGAN: As a protected category,  
2 that's correct, Your Honor. And it is up to the Defendants  
3 to then provide the Court a compelling interest that's  
4 promoted by the policy and practice and also that is --

5 THE COURT: If the heightened standard applies.

6 MR. GONZALEZ-PAGAN: If the heightened standard  
7 applies. And here it also classifies on the basis of  
8 transgender sex.

9 I know that my colleagues say that the fact that  
10 the Supreme Court or the Third Circuit have not addressed  
11 whether transgender status is a suspected -- a suspect class  
12 means that this Court need not reach that question.

13 The opposite is true. We have presented the  
14 arguments that transgender status under the four factors test  
15 established by the Carolene Products case and Bowen v.  
16 Gilliard, that transgender status is a class that should be  
17 subject to heightened scrutiny. In fact, it should be  
18 subject to strict scrutiny.

19 All four factors -- and not all four factors need  
20 to be met, but here they are. I would note that --

21 THE COURT: Let's assume that just for purposes of  
22 conversation, Mr. Gonzalez-Pagan, that the lowest standard  
23 applies, rational basis. As I understand your brief, you  
24 think this doesn't pass muster even under that one?

25 MR. GONZALEZ-PAGAN: I think that's correct, Your

1 Honor; and my colleague, Christopher Clark, may well go into  
2 more of this. But the reality is that the only asserted  
3 rationale for -- and the only possible rationale that they  
4 have discussed is privacy. And Resolution 2 has nothing to  
5 do with privacy.

6 We know for a fact that this case specifically has  
7 to deal with restrooms, and we know for a fact that all of  
8 the restrooms at Pine-Richland High School have stalls with  
9 locking doors. We provided the Court with pictures that  
10 Defendants so provided to us and that show that. We have the  
11 testimony from our clients that says that.

12 We also know that on the February 4 communication  
13 from Superintendent Miller, he specifically noted that  
14 because the restrooms have stalls with locking doors, there  
15 is a sense of privacy in undress.

16 So really this doesn't go to any asserted  
17 justification to privacy. And even if there were, rational  
18 basis doesn't mean that a classification automatically passes  
19 constitutional scrutiny. There is still a test that needs to  
20 be met.

21 It needs to be rationally related and needs to  
22 promote those interests, and here there are many other ways  
23 in which privacy can be protected, even knowing the fact that  
24 privacy is already protected based on the set-up that  
25 currently exists.

1 More importantly, the reality is that our clients  
2 are the sex of the sex segregated restrooms that they're  
3 seeking access to.

4 Juliet and Elissa are girls, and A.S. is a boy. So  
5 what really needs to come to fruition here is why Resolution  
6 2 -- Resolution 2 did not create sex segregated facilities.  
7 To the contrary, what Resolution 2 did is change the existing  
8 school practice to specifically target and separate out  
9 transgender students from cisgender students. And the  
10 question is why?

11 And I don't believe that a purported asserted --

12 THE COURT: Does motive matter? I mean why -- when  
13 we talk about why in a Federal courtroom, we're almost always  
14 talking about motive. Does motive matter in a case like  
15 this?

16 MR. GONZALEZ-PAGAN: I think it is helpful to the  
17 Court in finding out that there is discrimination at issue  
18 here. But motive is not the only basis. Resolution 2 on its  
19 very application shows that it discriminates on the basis of  
20 gender identity --

21 THE COURT: Does Title IX require proof of  
22 discriminatory intent, or can discriminatory effect or impact  
23 make out a Title IX violation?

24 MR. GONZALEZ-PAGAN: For Title IX, Your Honor --  
25 one second.

1 THE COURT: Because the Fourteenth Amendment  
2 requires discriminatory intent; right?

3 MR. GONZALEZ-PAGAN: It requires intentional  
4 discrimination.

5 THE COURT: Okay.

6 MR. GONZALEZ-PAGAN: And here we have shown that  
7 that is the case. Title IX requires that the clients simply  
8 were discriminated against in an educational program or  
9 facility, that the educational institution was receiving  
10 Federal financial assistance and that the discrimination  
11 caused harm to the Plaintiffs.

12 But the question of intent with regards to Title IX  
13 would be a matter for damages, not for purposes of a  
14 preliminary injunction. Did they act intentionally? And  
15 that would really go to the question of whether damages can  
16 be asserted against the school.

17 So turning back, Your Honor, to the rest of the  
18 factors with regards to equal protection and transgender  
19 status, I think there can be no question that transgender  
20 people have experienced a long history of discrimination in  
21 this country. In fact, they continue to do so to this very  
22 day. Resolution 2 is just an example of that.

23 THE COURT: Let me ask you that. Is that something  
24 I can take judicial notice of? Because one could say that  
25 prior to the passage of Resolution 2, at least in the small

1 slice of the universe that your clients lived in, at least in  
2 terms of the Defendants, they didn't experience  
3 discrimination?

4 MR. GONZALEZ-PAGAN: Well, Your Honor, they didn't  
5 experience discrimination at the moment from the school. But  
6 the reality is that the test for heightened scrutiny for  
7 suspect classification, the history of discrimination is not  
8 to be looked at at the particular unit that is being the  
9 subject of the lawsuit at that very moment in time.

10 In fact, it's not even to be looked at at a state  
11 level, let alone a city level, a college level or even a  
12 school level. It's to be looked at at a national scope --

13 THE COURT: So what is in the record, what facts,  
14 what things that I can consider as having evidentiary weight?  
15 It does not appear to be disputed in any of the materials  
16 provided to the Court that, however it's assessed, that  
17 approximately six-tenths of one percent of adults in the  
18 United States are transgender. So that -- maybe it's .7,  
19 maybe it's .5, but it doesn't appear to be disputed that that  
20 proportion, if you will, is there.

21 But how is it that a Court, a trial Court comes to  
22 the conclusion that there is or is not a long history of  
23 pervasive systemic discrimination against any group of  
24 people?

25 MR. GONZALEZ-PAGAN: Sure, Your Honor. I believe

1 there are multiple ways in which this is represented in the  
2 record. For one, we have included reports from the United  
3 States Transgender Survey, for example, the Executive  
4 Summary, that details -- and this is one of the exhibits we  
5 provided, Exhibit 23-12 in the docket.

6 That talks about how it is part of the social and  
7 legal convention in the United States to discriminate  
8 against, ridicule and abuse transgender people within  
9 foundational institutions such as the family, schools, the  
10 work place and health care settings, every day.

11 THE COURT: Let me ask you this. And I want to be  
12 very clear, Mr. Gonzalez-Pagan, in phrasing the question.  
13 This is not meant as any assessment or evaluation of what  
14 happens to a specific human being at a specific point in time  
15 on any given day, week, month, wherever.

16 We're roughly -- I don't track it every day, but  
17 we're roughly 323 million people right now in the United  
18 States.

19 By way of example, and I know we don't -- lawyers  
20 don't try cases, Judges don't decide cases or should not  
21 decide cases based on anecdotal information because it may  
22 not have evidentiary value. So I'll frame it simply as an  
23 observation.

24 Every year roughly 2 million people go to the  
25 Pirates games at our baseball stadium. Maybe I'm out of the



1 loop, but I don't recall hearing any difficulties that anyone  
2 has encountered over -- 3 million people over the last 15  
3 years have attended baseball games at our baseball park.

4 I haven't heard -- I don't recall -- maybe that's  
5 the best way -- I don't recall any reports of any  
6 difficulties for transgender individuals or non-transgender  
7 individuals occurring in that one very small geographic slice  
8 of our region.

9 If that would turn out to be true, wouldn't that be  
10 reflective of perhaps at least two things? One, this isn't a  
11 big problem at all. And two, that there's not been some  
12 societal pervasive level of discrimination, notwithstanding  
13 that there will be specific incidents of discriminatory  
14 conduct that occur.

15 So how is it that -- how is it that we extrapolate  
16 on an evidentiary record from reports of individualized  
17 mistreatment that are very real? Let's assume that they are  
18 demonstrably true. How is it that we extrapolate from that?

19 And I'm thinking that if we turn the clock back to  
20 1949, 1950, we've institutionalized, both in some cases by  
21 positive law and otherwise by custom, mistreatment of  
22 African-Americans in the United States.

23 And come 1954, as a matter of law, that changed.  
24 It didn't change societally, but as a matter of law it  
25 changed.

1           But if you think about the litigation that came up  
2 from Delaware, from South Carolina, from the District of  
3 Kansas, all of which merged in Brown at the Supreme Court,  
4 there was a pretty robust evidentiary record of both de jure  
5 and de facto differential treatment based on race from which  
6 the Supreme Court of Delaware, the Fourth Circuit, the Tenth  
7 Circuit came to their conclusions about whether or not there  
8 was racial segregation.

9           And two of those courts said -- well, they all said  
10 there was. And two of them said it was constitutional, one  
11 of which said it was unconstitutional, Delaware. And then  
12 the Supreme Court said it was unconstitutional. But there  
13 was sort of a convergence that allowed that evidentiary  
14 record.

15           How do we in your case draw an evidentiary level  
16 conclusion that, in fact, there is pervasive, longstanding  
17 discrimination against transgender individuals? And is it,  
18 for purposes of this case, all transgender individuals or  
19 transgender individuals who attend schools?

20           MR. GONZALEZ-PAGAN: For purposes of the  
21 classification, Your Honor, it would be all transgender  
22 individuals. And I would note that just talking about the  
23 example that Your Honor posed, there is an existent and has  
24 been de jure discrimination against transgender people.

25           The Court can take judicial notice of the fact that

1 transgender people, in fact, weren't even allowed to serve  
2 openly in the armed services just until last year.

3           The reality is that there have been 270 bills that  
4 have been introduced just in the past year alone that have  
5 targeted transgender people specifically for discrimination,  
6 and a number of those are part of the record, as some of  
7 those cases were cited, like Carcano in the North Carolina  
8 case.

9           THE COURT: Judge Schroeder's opinion, which bears  
10 factually some might say a remarkable resemblance to the  
11 facts here.

12           MR. GONZALEZ-PAGAN: That is true, Your Honor.

13           THE COURT: And Judge Schroeder appeared --  
14 although he wrote a lengthy, detailed, thoroughly analyzed  
15 opinion, it didn't appear to take him very long to conclude  
16 at least as applied to the University of North Carolina HB1  
17 or HB2, whatever it is in North Carolina, was not  
18 constitutional or was not consistent with Title IX. He  
19 reserved on the equal protection claim.

20           MR. GONZALEZ-PAGAN: That's correct, Your Honor.  
21 And what I would continue to point out is that the history of  
22 pervasive discrimination goes beyond simply --

23           THE COURT: The 270 bills, how many of them passed?  
24 And are they all recent?

25           MR. GONZALEZ-PAGAN: That's just in the last year

1 270 bills, and of them there are a number that have passed,  
2 including bills in Mississippi, bills in -- religious  
3 discrimination bills that passed in Indiana, Kansas, the bill  
4 that has passed in North Carolina. There are other bills  
5 that have now been introduced in a number of other states as  
6 well.

7           And the -- but the reality is that it goes beyond  
8 that. Because here what we're talking about is not just what  
9 has occurred at present, but the history of discrimination.  
10 And the history of discrimination did not show -- Your Honor  
11 made the example of the baseball stadium and how Your Honor  
12 hasn't heard of a case of discrimination involving  
13 transgender people involving the baseball stadium.

14           Well, I think what really bears true is that of  
15 those 3 million people, only at most .6 were transgender.

16           And what bears from the record that we have  
17 proposed is that the statistics show that the majority of  
18 transgender people, the .6 of that very insular discrete  
19 minority, do experience discrimination.

20           Just because there is a very small population of  
21 which many people may not know or hear about the  
22 discrimination that is suffered, doesn't mean that it doesn't  
23 exist. In fact, what we have shown is that it does. And --

24           THE COURT: So you're saying the data you've  
25 provided has statistical significance, it has statistical

1 validation, and it demonstrates that within that segment of  
2 the population, whether it's .6, .7, .5 of one percent,  
3 within that population there's a statistically valid  
4 conclusion that can be reached that that population over time  
5 over a long enough period of time has experienced systemic  
6 discrimination.

7 MR. GONZALEZ-PAGAN: Systemic discrimination,  
8 harassment, violence as well, Your Honor. There are a number  
9 of cases of which this Court could take judicial notice.

10 In Norsworthy, which is one of the cases that we  
11 cited, in which discrimination is at an institutional level  
12 against transgender people who are incarcerated; and  
13 Norsworthy, I would point to the Court, is a case in which  
14 the Court also found the heightened scrutiny applied to  
15 transgender sex, as did the Adkins Court in New York, and I  
16 stated the Highland Local School District case in Ohio with  
17 regards to a very similar case to the one I had.

18 THE COURT: And Highlands is now sitting with the  
19 Sixth Circuit. That's being briefed at the Sixth Circuit.

20 MR. GONZALEZ-PAGAN: That's correct. And a stay  
21 has been denied.

22 THE COURT: By the Circuit or by the District  
23 Judge?

24 MR. GONZALEZ-PAGAN: I know for a fact from the  
25 District Court. I am not sure for the Circuit.

1 THE COURT: Okay.

2 MR. GONZALEZ-PAGAN: I would note the Seventh  
3 Circuit has denied a stay with regards to the Whitaker  
4 injunction in the Wisconsin case.

5 And Your Honor pointed out that it is undisputed  
6 with regards to the proportion of the population. The  
7 reality is that Defendants haven't disputed any of the facts  
8 with regards to why transgender people are subject to  
9 heightened scrutiny. They just say that the Court shouldn't  
10 reach it because the other Courts haven't reached it before.

11 THE COURT: But you're being very diplomatic in  
12 saying to me, Judge, because a party has raised it, you're  
13 obligated to reach it. I could make a decision --

14 MR. GONZALEZ-PAGAN: I think that's a diplomatic  
15 way of saying, Your Honor, we have presented enough arguments  
16 for the Court to consider and reach that conclusion --

17 THE COURT: Because the only way cases get to the  
18 Circuit Court or the Supreme Court is there's a decision in a  
19 trial court somewhere that somebody takes up.

20 MR. GONZALEZ-PAGAN: That's correct, Your Honor.  
21 And I would point out that it is exactly the very same  
22 framework -- those arguments represented to the Court in  
23 *Whitewood v. Wolf*, it's the very same framework that the  
24 Court considered.

25 The fact that the Supreme Court and the Third

1 Circuit have not addressed whether transgender status is a  
2 suspect -- or suspect classification does not mean in any way  
3 that this Court does not have the power, indeed the  
4 obligation, to surmise to really consider the --

5 THE COURT: What is the procedural status? What  
6 happened procedurally to the Johnston case, which was before  
7 Judge Gibson in this district? Did it just end there, or did  
8 it go to the Circuit?

9 MR. GONZALEZ-PAGAN: It went to the Third Circuit,  
10 and appeal was dismissed by joint agreement of the parties.

11 THE COURT: So there was never any merits  
12 consideration?

13 MR. GONZALEZ-PAGAN: Not by the Third Circuit. And  
14 I point out that, at least from the docket, that was an  
15 attempt to vacate the Johnston decision because of the  
16 agreement that was reached by the parties. That was denied  
17 by the District Court, however.

18 THE COURT: Let me ask you about Title IX for a  
19 minute, Mr. Gonzalez-Pagan. The letter, the most recent  
20 letter that was jointly signed by a representative of the  
21 Justice Department and the Department of Education, I'm not  
22 going to attempt because it's a risky process to read any tea  
23 leaves into why the Supreme Court accepts a specific cert.  
24 question, but one of the -- the question number 1 that  
25 they've accepted in G. G. from the Fourth Circuit could be

1 fairly read as calling into question the -- or at least there  
2 will be a discussion -- the continued viability of Auer,  
3 A-u-e-r, deference Point 4. That question has been squarely  
4 raised in Cert. Question 1 that's before the Court in G. G.  
5 That will be what it's going to be.

6 But let's assume that because as of today that is  
7 the law, the interpretive law in the United States, does it  
8 matter for purposes of a Federal trial Court determining  
9 whether, and, if so, how much deference to give under Auer  
10 that that letter is not signed by the principal officers of  
11 the Government? It's not signed by the Attorney General.  
12 It's not signed by the Secretary of Education.

13 And is there anything in the record that those  
14 principal officers of the Government delegated to the  
15 signatories of that letter the authority and power to issue  
16 an opinion on behalf of their agencies? And let me tell you  
17 why I ask the question.

18 There are a number of proceedings in other settings  
19 that come to this Court that require the authorization of the  
20 Attorney General of the United States, which means I either  
21 need to see the signature of the Attorney General of the  
22 United States, or I need to see another document by which  
23 General Lynch has delegated to the signatory the authority of  
24 the United States Department of Justice to sign the document  
25 that's being given to me for judicial action.



1           So does the fact that these -- it appears that the  
2 person that signed it for the Department of Justice is  
3 nominated by the President and confirmed by the Senate. I'm  
4 not so sure that's the case of the person that signed it for  
5 the Department of Education. Does it matter for issues of  
6 deference that that letter was not signed by the principal  
7 officers of those departments?

8           MR. GONZALEZ-PAGAN: I don't believe that that  
9 interpretation letter and clarification letter, because  
10 that's what it is, it just clarifies the request --

11           THE COURT: So you say. Miss Lane's going to tell  
12 me it's something else, or Mr. Foley will.

13           MR. GONZALEZ-PAGAN: At the request of several  
14 schools, it simply clarifies what was already the law. The  
15 guidance letter, I don't believe it matters that it doesn't  
16 have the signature of the Secretary of Education or the  
17 Attorney General --

18           THE COURT: Or anything in the record that  
19 indicates that those principal officers of the United States  
20 had delegated to the signatories the authority to sign that.

21           MR. GONZALEZ-PAGAN: I don't have anything in the  
22 record to point to for that, Your Honor. I would, however,  
23 point to something that is in the record, which is the letter  
24 from the U.S. Attorney General with regards to the same  
25 interpretation of Title VII. And that is signed by Eric

1 Holder, the Attorney General at the time.

2 And I think to the extent that that is confirmation  
3 of what is already set forth in the Dear Colleague letter --

4 THE COURT: And in all material respects, the  
5 verbiage of Title VII and Title IX are identical?

6 MR. GONZALEZ-PAGAN: They're not identical. In  
7 fact, Title IX is broader. Title VII deals with because of  
8 sex, which has to do -- because of an individual's sex, which  
9 has to do with the sex of that particular individual. In  
10 Title IX it's a little bit broader by talking about on the  
11 basis of sex. For our purposes it is the same, but that's  
12 the difference in the statutory language, Your Honor.

13 THE COURT: And as I read your briefs, the decision  
14 from Texas, the trial court decision from Texas, may be  
15 binding on the United States, but it's not binding on anybody  
16 else?

17 MR. GONZALEZ-PAGAN: It certainly is not binding on  
18 us. I think general principles of -- with regards to the  
19 fact that the general principles of Rule 65, that the  
20 injunction only binds the parties before the Court, but also  
21 general principles of comity really indicate that only the  
22 parties that were before that Court are --

23 THE COURT: So that injunction could protect the  
24 School District here in that if the Department of Education  
25 attempted to cut off funding covered by Title IX, the School

1 District could rely on that injunction to say not so fast;  
2 but it doesn't resolve the merits of the issue here?

3 MR. GONZALEZ-PAGAN: It does not resolve in any way  
4 the merits of the issue, and there are arguments that have  
5 been set forth by the Department of Justice that the  
6 injunction scope is not -- it's not -- it is at best  
7 questionable.

8 THE COURT: And that will be up to the Fifth  
9 Circuit.

10 MR. GONZALEZ-PAGAN: That would be up to the Fifth  
11 Circuit. And there is currently a petition to stay that  
12 portion of the injunction before the Fifth Circuit.

13 But really, Your Honor, I would also point out that  
14 we're not basing our claim solely or entirely in any way on  
15 the Dear Colleague letter at all. We're basing it on the  
16 text of the statute and the interpretation of the term sex as  
17 it has been given --

18 THE COURT: So one of your arguments is if that  
19 letter was never issued, I'm obligated in applying and  
20 construing Title IX to come to the same point, that the road  
21 gets to the same stopping point.

22 MR. GONZALEZ-PAGAN: That's correct, Your Honor.  
23 In fact, the letter is simply a clarification and a similar  
24 road map that we are articulating now.

25 THE COURT: Let's assume that I conclude that that

1 letter has evidentiary value or plays a role in the decision  
2 on the issues here. What do I do with the fact that the  
3 letter is not unequivocal? It talks about what school  
4 districts should do as a general matter. It talks about what  
5 they should typically do.

6 Don't those words in and of themselves recognize  
7 that on the facts of a given case, there may well be  
8 appropriate need for a balancing of interests? So doesn't  
9 the use of the words "typically" and "generally" lead to at  
10 least that conclusion?

11 MR. GONZALEZ-PAGAN: Well, Your Honor, I don't  
12 believe -- I would quibble with the characterization that it  
13 is equivocal with regards to our claim. And here is why.

14 On page 2 of the Dear Colleague letter,  
15 specifically, "The Departments treat a student's gender  
16 identity as the student's sex for purposes of Title IX and  
17 its implementing regulations. This means that a school must  
18 not treat a transgender student differently from the way it  
19 treats other students of the same gender identity." I  
20 believe that is not an unequivocal statement.

21 Specifically with the issue of restrooms on page 3  
22 of the Dear Colleague letter, Your Honor, it states "A school  
23 may provide separate facilities on the basis of sex but must  
24 allow transgender students access to such facilities  
25 consistent with their gender identity."

1 THE COURT: And Mr. Gonzalez-Pagan, Miss Lash  
2 reminds me I need to apologize to you and to Miss Lane.  
3 While I came pretty close to accurately reciting Cert.  
4 Question 1 as proposed in the petition for certiorari in  
5 G.G., the Court granted cert. as to Question 1 on the  
6 narrower subset.

7 They appeared to not have accepted the invitation  
8 to generally revisit Auer but to revisit it in the context of  
9 this Department of Education communication, if you will.

10 MR. GONZALEZ-PAGAN: I believe the questions as  
11 drafted have to do with specifically whether this particular  
12 letter is entitled to Auer deference, not to whether Auer  
13 deference is in question.

14 THE COURT: But who knows what the Supreme Court  
15 will do.

16 MR. GONZALEZ-PAGAN: You never know.

17 THE COURT: Okay. So I will hear from one of your  
18 colleagues?

19 MR. GONZALEZ-PAGAN: Yes, Your Honor.

20 THE COURT: Terrific. Thank you,  
21 Mr. Gonzalez-Pagan. Next up? Miss Ingelhart, nice to see  
22 you in person.

23 MS. INGELHART: Good morning.

24 THE COURT: So what are you going to talk about?

25 MS. INGELHART: Well, you asked us about the harms

1 to our clients, and I'm going to summarize that for you.

2 THE COURT: Okay.

3 MS. INGELHART: And so today our burden is to show  
4 that Juliet, Elissa and A.S. have suffered harm at the hands  
5 of our Defendants and that the ongoing harm, if permitted to  
6 continue, would be irreparable.

7 Now, there's a probability that Juliet, Elissa and  
8 A.S. have suffered irreparable harm; but in fact, there's a  
9 certainty here because where a constitutional right or a  
10 right granted by a civil rights statute has been violated,  
11 there is presumed irreparable harm.

12 But Plaintiffs have also filed in the record  
13 documents that show irreparable harm, and I'll address that  
14 as well.

15 But where a Defendant has violated a civil rights  
16 statute like Title IX, irreparable injury may be presumed  
17 from the fact of the Defendant's violation; Silver Sage  
18 Partners v. City of Desert Hot Springs at 827, because  
19 irreparable harm may be presumed from the fact of  
20 discrimination; Rogers v. Windmill Point at 528.

21 We know that constitutional rights are intangible  
22 and unquantifiable interests that cannot be compensated by  
23 damages after final judgment, and this violation of a  
24 constitutional right constitutes irreparable injury; Buck v.  
25 Stankovic --

1 THE COURT: Which is the reason if there is a  
2 proven violation for instance under the Fourteenth Amendment  
3 but no money damages, the jury is instructed to award one  
4 dollar in nominal damages.

5 MS. INGELHART: That is correct, Your Honor, and  
6 that is Buck v. Stankovic at 586. So here, Your Honor, we  
7 are seeking preliminary injunction to prevent the violation  
8 of Plaintiff's claims guaranteed by civil rights statute and  
9 the Constitution, so no further showing of irreparable injury  
10 is required. They're prima facie entitled to relief; Murray  
11 v. Silberstein at 64, citing Elrod vs. Burns at 373.

12 THE COURT: And under Lyons versus Los Angeles, you  
13 have to demonstrate there's a likelihood that harm will  
14 continue unabated as to these individuals; and you believe as  
15 long as Resolution 2 is in place, as I understand your  
16 briefs, the harm that you claim has occurred retrospectively  
17 will continue prospectively as to these specific people.

18 MS. INGELHART: That is absolutely correct, Your  
19 Honor. Thank you. So looking at this record, it's clear  
20 that they're suffering irreparable harm, and by Defendant's  
21 actions they're emotionally distressed and stigmatized.

22 Elissa says that Resolution 2 --

23 THE COURT: But if I understand your argument, even  
24 if none of that was in their declarations, your argument is  
25 under settled law from the Supreme Court, if I conclude that

1 there's a reasonable likelihood that they'll prevail on the  
2 merits of constitutional violations, that's the harm in and  
3 of itself?

4 MS. INGELHART: That is correct, Your Honor. But  
5 also in the record we can show that there is --

6 THE COURT: You have more.

7 MS. INGELHART: Yes.

8 THE COURT: But legally -- your position is legally  
9 you don't need more? You'll use more if it exists, but you  
10 don't need it?

11 MS. INGELHART: Yes. And we're happy to explain  
12 why. Yes, Your Honor. Thank you.

13 So like I said, they're emotionally distressed and  
14 stigmatized by the implementation of Resolution 2. Elissa  
15 says since Resolution 2 was implemented, she feels like she's  
16 under a microscope and being watched as if she were in a  
17 petri dish --

18 THE COURT: Let me ask you this, Miss Ingelhart.  
19 It appears from the record, at least to the knowledge of  
20 Plaintiff's counsel and defense counsel, that currently at  
21 the Pine-Richland High School, there are three students who  
22 have articulated and lived for some period of time as  
23 transgender students.

24 MS. INGELHART: Yes. That is correct.

25 THE COURT: There's not two. There's not six.



1 There's three.

2 MS. INGELHART: We have three clients that are  
3 transgender and out to some extent. But we don't want to  
4 stipulate that there are no more transgender students at  
5 Pine-Richland.

6 THE COURT: You have brought a case on behalf of  
7 them, and nobody has, as part of the evidentiary record,  
8 advanced that there are others. I'm not saying there are or  
9 there aren't, but nobody is relying on that on either side of  
10 the case.

11 Is there -- and this may be a reflection of my age  
12 or my 35 years since graduating law school. Is there a  
13 principle in the constitutional law under the Fourteenth  
14 Amendment -- and I'm not -- by phrasing the question this  
15 way, Mr. Foley and Miss Lane, I'm not making any assumption  
16 about anybody's motive -- but it would appear from the record  
17 that among the conclusions that could be plausibly reached is  
18 that Resolution 2 is aimed at exactly three people.

19 Can a unit of government consistent with the  
20 Fourteenth Amendment pass a law aimed specifically at  
21 specific people? Can City Council or a school board or the  
22 legislature or the executive of whatever unit of government  
23 say we're now going to have a policy, a governmental policy  
24 that applies to you?

25 MS. INGELHART: I would imagine no, Your Honor. I

1 don't know the legal support for that. I could confer with  
2 my colleagues.

3 THE COURT: Okay. Maybe somebody else will address  
4 that in their argument.

5 MS. INGELHART: Okay. So Elissa feels like she's  
6 under surveillance. Juliet explains that her school work has  
7 been affected by this and that she's even avoided attending  
8 school because of Resolution 2 --

9 THE COURT: But wasn't -- perhaps to the credit of  
10 her student colleagues, wasn't Miss Evancho a finalist for  
11 what at many schools is a big event of the fall each year,  
12 the Homecoming celebration that's part of a football game and  
13 a weekend and all sorts of attendant things with it? So  
14 wasn't she part and parcel of all that in a very material  
15 way?

16 MS. INGELHART: Yes. She was --

17 THE COURT: At the selection of her peers?

18 MS. INGELHART: Yes. At the selection of some of  
19 her peers --

20 THE COURT: Well, enough of her peers that she made  
21 it to the final round? She made the Sweet 16 or the Elite 8  
22 or however you want to call it?

23 MS. INGELHART: I think she was a princess for  
24 Homecoming. But the harms that we explain here and are in  
25 the record don't need to have been effected by all of her

1 peers or by all of the school administrators or teachers.  
2 It's the mere fact that she has experienced harm based on  
3 Resolution 2. There are students at the school that respect  
4 her gender identity and lifted her up --

5 THE COURT: But let me ask you this. I mean -- and  
6 I know that you've indicated under the law as you believe it  
7 is, and you cite to a lot of longstanding settled law, and I  
8 think it is certainly under the Constitution you don't have  
9 to -- if somebody says -- if somebody's speech has actually  
10 been impaired, they don't have to prove that they felt bad  
11 about it. They only have to prove that their speech was  
12 impaired. Because it's so important, we conclude that that  
13 violation has been made out.

14 But does it -- are the Defendants in this case  
15 accountable for what, at best, might be foolish and, at  
16 worst, might be cruel actions by other students?

17 If it's not pervasive, if it's not affirmatively  
18 fostered, if one or more of Miss Evancho's or Miss Ridenour's  
19 peers engages in reprehensible behavior towards them, is that  
20 a harm or a damage for which the Defendants are legally  
21 accountable? Or are they only legally accountable for it if  
22 they learn of it and do nothing about it so that they could  
23 be fairly said to have condoned it?

24 But if Dr. Miller and his colleagues swiftly -- but  
25 do two things: They take reasonable and appropriate measures

1 to state the expected standard of conduct; they take  
2 reasonable and appropriate measures to assess whether day in  
3 and day out appropriate conduct is occurring in the schools;  
4 and they take reasonable and appropriate measures to sanction  
5 impermissible conduct, does the fact that one or more of  
6 Miss Evancho's or Miss Ridenour's or A.S.'s peers engage in  
7 reprehensible conduct, is that attributable to the School  
8 District as a legal matter?

9 MS. INGELHART: Yes, Your Honor. I would argue  
10 that in passing Resolution 2 and in implementing it,  
11 Defendants are aware of the fact that they're fostering an  
12 environment where this kind of bullying or harassment  
13 behavior could happen. They've been made aware that the  
14 implementation is leading to these actions --

15 THE COURT: Well, they might be made aware of  
16 correlation. But tell me why it's causation rather than  
17 correlation. Why does the record reflect that whatever has  
18 occurred post passage is a causative result rather than a  
19 correlative result?

20 MS. INGELHART: Well, Juliet, Elissa and A.S. all  
21 report that prior to the passage of Resolution 2, they felt  
22 welcome and accepted at school. Their teachers and  
23 administrators allowed them to use sex designated facilities  
24 that matched who they were. They didn't have as extreme  
25 experiences, if any, harassment or bullying.

1           It was only after this public debate began months  
2 ago that they started feeling like their identities weren't  
3 respected at school and that other students were making a  
4 mockery of them and that teachers and administrators weren't  
5 respecting --

6           THE COURT: But let me ask you this. Is the School  
7 District responsible as a legal matter if less generous  
8 members of society, less generous members of the  
9 Pine-Richland society elect to hear that message from  
10 Resolution 2?

11           And the reason I ask that, as I read the  
12 transcripts of all those school board meetings, Mr. Clair, I  
13 felt bad for you in the sense that it appeared you were put  
14 through the equivalent of an oral Ph.D. exam on the current  
15 state of Constitutional law, and you sort of held your own.

16           MR. CLAIR: I appreciate your compassion, Your  
17 Honor.

18           THE COURT: But one could read those -- one  
19 inference that could be drawn from those transcripts was a  
20 Herculean effort on Mr. Clair's part, the District Solicitor,  
21 to state the law as he thought he knew it existed and to  
22 predict, as lawyers do all the time with clients, what he  
23 believes the law will evolve to, recognizing it's a murky  
24 crystal ball.

25           But that the questions from the school board at

1 least to Mr. Clair seemed one conclusion -- I'm not saying  
2 the only conclusion -- but a conclusion that plausibly could  
3 be drawn is the school board members were seeking to learn  
4 what the legal landscape was from Mr. Clair.

5 So if we have, as reported by your clients, conduct  
6 by what I'll generously describe as less generous members of  
7 the student community towards them, how is that -- how is it  
8 that I'm to draw a causative connection rather than a  
9 correlative connection between those events?

10 MS. INGELHART: Your Honor, per what you just said,  
11 the school board was made aware of the fact that there hadn't  
12 been any problems at school with the way Elissa, Juliet and  
13 A.S. were using the restrooms. They were, in fact, made  
14 aware at their school board meetings of the importance of  
15 respecting transgender students' social transition.

16 THE COURT: That's what Dr. Miller and the folks  
17 from Children's Hospital did, among others.

18 MS. INGELHART: Yes. That is correct. And they  
19 were made aware of their legal duty to comply with Title IX.  
20 And speaking to --

21 THE COURT: But it's entirely possible -- I know  
22 this is not what you're advocating. It's entirely possible  
23 that they did comply with Title IX.

24 Now, you're advocating why it's entirely certain  
25 that they did not. But I think in a couple minutes Mr. Foley

1 and Miss Lane are going to explain to me why they believe  
2 their client has complied with Title IX.

3 MS. INGELHART: That is correct, Your Honor. They  
4 will be arguing that.

5 THE COURT: So how do I get from correlation to  
6 causation? If I accept their affidavits at face value, and  
7 we've all agreed counsel to their credit has stipulated I can  
8 accept everything in the declarations as though it was  
9 testimony under oath in Court. So I accept their testimony,  
10 if you will, of what has happened since the passage of  
11 Resolution 2.

12 How is it that that moves from a certainty of  
13 correlation, because we can line up timing on a time line, to  
14 a plausible inference of causation?

15 MS. INGELHART: Well, we can certainly point to the  
16 school board meeting records of the live testimony that was  
17 both hateful and disrespectful of transgender identity, that  
18 in passing the resolution, that folks who were advocating  
19 that position were arguing for.

20 THE COURT: Yeah, but I mean aren't people who hold  
21 positions of Government responsibility, even me, aren't we  
22 from time to time, and perhaps in the popularly elected  
23 segments of Government more than time to time, bombarded by  
24 requests from the more uninformed perhaps in our society,  
25 people that may have less than pure motives, people that may

1 have cabin views of how other citizens should be treated?

2           Aren't they bombarded with that all the time? And  
3 does the fact that they hear it mean that those same motives  
4 or intents are attributed to the governmental listeners?

5           The fact that people come to a meeting, whether  
6 it's a school board or a council meeting, or write their  
7 Congressman or stand up and yell at a town hall meeting and  
8 say things that are by anyone's standard inconsistent with  
9 how we might view American society at any point in time, does  
10 that make that -- the fact that those Governmental officials  
11 heard it, does that mean that their conduct thereafter is  
12 unlawful or unconstitutional?

13           Because I don't think there's anybody that's ever  
14 taken the oath as a selectman in Vermont or a council foreman  
15 in Baltimore or wherever in the country that hasn't been  
16 lambasted with invective.

17           MS. INGELHART: I think you're correct, Your Honor,  
18 and I think it always comes back to that by marking these  
19 children as different, the school is sending a message that  
20 they should be treated as different than their cisgender  
21 peers. And so they should expect this, these outcomes.

22           THE COURT: Okay. I appreciate that,  
23 Miss Ingelhart. I have a feeling this won't be the last time  
24 I hear from you today.

25           Mr. Gonzalez-Pagan, next up for your side?



1 Mr. Clark? Nice to see you, sir. What are you going to talk  
2 about?

3 MR. CLARK: Thank you, Your Honor. It's a pleasure  
4 to be here. I want to talk a little bit about the  
5 justification that has been offered for the conduct here.

6 THE COURT: As I read your briefs, you'll take the  
7 facts and say on the facts you win. Not that  
8 Mr. Gonzalez-Pagan does not believe he has strong, logical  
9 arguments for either an intermediate or strict standard of  
10 scrutiny; but as I read that portion of your briefs, you'll  
11 take the cards as dealt and say that you win?

12 MR. CLARK: I think we win under any standard of  
13 review. I think we've made a very powerful argument that  
14 this is entitled to at the very least the heightened scrutiny  
15 that is articulated by the Supreme Court as according to sex  
16 based classification --

17 THE COURT: According to *Frontiero* versus  
18 *Richardson* --

19 MR. CLARK: Exactly right. And the language from  
20 the Supreme Court here is instructive. The justification  
21 that the Defendants must offer for their conduct has to be  
22 exceedingly persuasive. The burden is theirs.

23 They have the burden of offering an exceedingly  
24 persuasive justification --

25 THE COURT: The existence of a classification

1 shifts the obligation as a legal --

2 MR. CLARK: The existence of a sex-based  
3 classification shifts the burden to the Plaintiffs under the  
4 heightened scrutiny argument.

5 THE COURT: Let me ask you this. One of the  
6 questions I've been wondering about, Mr. Clark, and I don't  
7 know if you've thought about it, and I'm not being critical  
8 if you didn't, because this is a relatively new thought for  
9 me, but whether we look at rational basis, intermediate  
10 scrutiny or strict scrutiny, if you read Justice Breyer's  
11 majority opinion in Whole Women's Health of Texas, and if you  
12 read Judge -- I'm blocking on her name -- from the Fourth  
13 Circuit in the North Carolina voting rights case -- they seem  
14 to stand for, among other things, the proposition that  
15 whatever the Supreme Court has said in the past of the degree  
16 to which District Judges should in essence believe the  
17 reasons articulated, Federal trial Judges are now obligated  
18 to determine if they really believe it. They have to match  
19 up the articulated reason with logic and common sense.

20 And Justice Breyer -- and I recognized in Whole  
21 Women's Health there was a higher standard. Was there an  
22 undue burden on reproductive rights or the right to abortion?  
23 The Supreme Court says the Fifth Circuit's decision in the  
24 Texas law did not pass that, and the Fourth Circuit in the  
25 voting rights case, which, again, is at the highest level of

1 scrutiny, but did that change the landscape? Did Whole  
2 Women's Health change the landscape at all in terms of the  
3 degree of assumed deference that goes to legislative acts?

4 MR. CLARK: I do think in that case, I think also  
5 what you've seen in the marriage related litigation  
6 surrounding the rights of gays and lesbians to marry, you  
7 have seen a sharper focus on examining of Government  
8 rationales.

9 But our case is really based on longstanding  
10 precedent regarding sex-based classifications where it's very  
11 clearly the Defendant's burden, and there needs to be --

12 THE COURT: Under both Title IX and the Fourteenth  
13 Amendment, or is your argument now focused on the Fourteenth  
14 Amendment?

15 MR. CLARK: My argument is primarily focused on the  
16 equal protection analysis and examining the rationale. We  
17 have to ask ourselves so what is the rationale that's being  
18 offered here?

19 And if you go through the Defendant's brief,  
20 there's references to bodily privacy. And that appears to be  
21 their purported justification. You know, it's not quite  
22 clear what that means though, bodily privacy.

23 The Defendants tell us that that arises from the  
24 physiological differences between females and males. But you  
25 know, if you dig deep into the declarations that they've

1 provided to you, what really appears to be going on here is  
2 that the Defendants acted in passing Resolution 2 to address  
3 concerns expressed by some parents about students being able  
4 to shield their unclothed bodies from the view of strangers  
5 and, in particular, strangers of the opposite sex.

6           So I guess the rationale is that Resolution 2 was  
7 passed to help students prevent other people from seeing  
8 their unclothed bodies. And I got to tell you, that fails  
9 any standard of review here.

10           First of all, to the extent that they're concerned  
11 about the students' interest in shielding their bodies from  
12 people of the opposite sex, it doesn't do that because our  
13 clients are the same sex as the students in the restrooms  
14 that our clients want to use. So it doesn't actually sort of  
15 further that objective.

16           And it's not actually related to or certainly not  
17 at all substantially related to achieving the goal of  
18 protecting privacy because it's not an issue. And we have  
19 that in the record.

20           These students were using these restrooms for  
21 months and years, and there's not one incident in the record  
22 identified in which there was a bodily privacy incident in a  
23 restroom.

24           No one actually came forward and said that they  
25 were seen by someone else or that they saw something that

1 made them feel uncomfortable.

2 And any student who does not want to use a  
3 particular restroom has the option of using one of the unisex  
4 restrooms. So it's completely illogical to suggest that  
5 Resolution 2 --

6 THE COURT: If I understand that part of your  
7 argument, if your clients didn't exist and there was a  
8 student at the Pine-Richland High School for whatever reason  
9 that sincerely didn't want to be in a bathroom or use a  
10 toilet facility around any other people, you're saying there  
11 is a significant mechanism for that to happen? They can do  
12 it?

13 MR. CLARK: Absolutely. I think what the  
14 Defendants informed the Court through their declarations, and  
15 I think they're trying to do it to show that there are many  
16 restrooms that our clients can use --

17 THE COURT: Which is true --

18 MR. CLARK: Which is true. Equally true is those  
19 restrooms are open to all of the students. So if somebody is  
20 particularly sensitive, for example, about using the restroom  
21 for any number of reasons or wants to use the restroom --

22 THE COURT: You might have a student who, because  
23 of a physical situation, might have a colostomy or other  
24 things like that. If they -- if that is a factor in how they  
25 live their daily life, if they want to use, say, a unisex

1 single stall restroom, they can?

2 MR. CLARK: That's exactly right. And if, for  
3 example, a student were to need to change their clothes, they  
4 could certainly use the single user restroom in order to do  
5 that. So --

6 THE COURT: Does the record reflect any report  
7 coming to the School District from a student, directly or  
8 indirectly, that a student had had a problem or encountered a  
9 problem because of who else was in a restroom with them? Is  
10 there any --

11 MR. CLARK: I'm not aware of anything in the record  
12 like that. What I believe this record consists of is  
13 expressed concerns, generalized concerns about bodily privacy  
14 with no factual underpinning to them.

15 THE COURT: Now, let me ask you this. What about  
16 the fact that in implementing Title IX, the Department of  
17 Education has a regulation, a newly adopted regulation that  
18 apparently has gone through notice and comment and all those  
19 other things, to end up in a C.F.R. that actually  
20 affirmatively says that a school district is authorized to  
21 differentiate based on sex in terms of restrooms, locker  
22 rooms and similar facilities?

23 I mean it's a rare situation where we have a  
24 broadly written Congressional fair employment, fair treatment  
25 practice statute that has a regulation that affirmatively

1 allows classification on the very differential factor that  
2 the statute purports to prohibit, that creates a carve-out,  
3 if you will.

4 I know -- I suspect I'm going to hear from  
5 Miss Lane or Mr. Foley about that. What do you say about  
6 that?

7 MR. CLARK: And your question is that there is a  
8 carve-out sort of in Title IX that permits sex segregated  
9 facilities?

10 THE COURT: Yes.

11 MR. CLARK: I go back to my point, and I believe  
12 Mr. Gonzalez-Pagan made this point as well, that this is not  
13 segregating the bathrooms in that manner. What it's doing is  
14 it's treating students of the same sex, of the same gender  
15 identity differently.

16 THE COURT: But that requires the conclusion that I  
17 reach that Title IX goes beyond sex assigned at birth to  
18 persistent actual gender identity, that they sweep in the  
19 same thing.

20 MR. CLARK: Yes, because gender identity is a  
21 component of sex. And we've offered you the expert --

22 THE COURT: Dr. Ehrensaft.

23 MR. CLARK: -- declaration that establishes that.  
24 And there's nothing on the other side evidentiary that  
25 contradicts that.

1 THE COURT: What's your review of the report that  
2 was made to the Pine-Richland school board by the team that  
3 came out from the Children's Hospital of Pittsburgh? What's  
4 your position on whether that's consistent, inconsistent  
5 with, same thing only different with the declarations that  
6 you provided?

7 MR. CLARK: I think the declarations that we  
8 provide are more specific with respect to the current  
9 psychological and medical understanding of the different  
10 components of sex.

11 And you know, this is certainly an understanding  
12 that is not reflected in the current policy and is why the  
13 current policy Resolution 2 in its implementation is not  
14 consistent with the regulation. That sort of started our  
15 conversation in Title IX.

16 And I want to direct the Court to the cases that we  
17 cited that have sort of addressed very similar privacy  
18 rationales in very similar fact patterns, and that's the  
19 District 211 from Palatine, Illinois case, the so-called  
20 Students and Parents for Privacy case that talked about  
21 privacy considerations. And there again, the Court noted  
22 like --

23 THE COURT: What's the procedural status of that?  
24 Has that gone from the Magistrate Judge to the District  
25 Judge?



1 MR. CLARK: My understanding is that that's in our  
2 view a well-reasoned and extensive report. And  
3 recommendation and objections to that are going to be  
4 considered by the District Court Judge --

5 THE COURT: And that's pending in the Northern  
6 District?

7 MR. CLARK: Pending. Then you have the Whitaker  
8 case and the Highland case, both of which rejected this  
9 bodily privacy rationale as a justification for  
10 discriminating against transgender students.

11 And here again, there's a difference in the two  
12 sides' presentations. Those are case laws that -- those are  
13 cases that directly address this argument in this factual  
14 context. In contrast, there's no case law coming from the  
15 Defendants with respect to this issue.

16 They rely on the Johnston case, which we I think  
17 effectively explained in our briefs is not -- should not be  
18 applicable here. And then they cite to some sort of cases  
19 that have identified right to privacy --

20 THE COURT: But why isn't Johnston persuasive  
21 authority? I understand you've articulated and argued that  
22 it was wrongly decided. Why? Why was it wrongly decided,  
23 other than the outcome being inconsistent with the position  
24 you advocate here?

25 MR. CLARK: One reason is that it relies very

1 heavily on the Ulane case and cases like Ulane that have  
2 interpreted sex discrimination in the context of Title VII to  
3 conclude that gender identity is not included sort of in the  
4 prohibition in Title IX.

5           And there is a long line of cases that postdate  
6 Ulane and similar cases --

7           THE COURT: Do I have to conclude that when  
8 Congress passed Title IX, that they intended to include  
9 gender identity? What's sort of the judicial look-back? To  
10 what degree is the contemplation of Congress or the  
11 contemplation of the Department of Education when it adopted  
12 the regulation that you and I spoke about a couple minutes  
13 ago, Mr. Clark?

14           To what degree to do I have to or not have to  
15 conclude that Congress and/or the Department of Education  
16 then at the time contemplated gender identity being part and  
17 parcel of sex?

18           MR. CLARK: I think the statute needs to be  
19 interpreted with the facts that are before the Court. I  
20 think that the Supreme Court has recognized in the Oncale  
21 decision that a statute that is written at the time must be  
22 interpreted in a way that -- that it addresses evils broader  
23 than specifically contemplated at the time --

24           THE COURT: Justice Scalia I think wrote the  
25 majority opinion in that case. He said that the way that man

1 was treated on the oil rig, I think it was a deep well rig  
2 out in the Gulf of Mexico, was because of his sex. It wasn't  
3 because of his gender identity. And it perhaps wasn't  
4 even -- it had not yet reached what we've seen from some of  
5 the Courts of Appeals and what's before the Seventh Circuit  
6 en banc now in Hively, the issue of sex stereotypes.

7           And he said -- one of the core arguments advanced  
8 to the Supreme Court in Oncale was that in essence Title VII  
9 protected women and -- or it protected direct discrimination,  
10 men based on the fact that they're men, but the majority  
11 opinion in Oncale seemed to stand for the proposition that it  
12 was somewhat more nuanced than that, but it still came back  
13 to sex. It did not call into -- it did not put up on the  
14 table, if you will, the issue of gender identity or perhaps  
15 even sex stereotyping.

16           MR. CLARK: I'm not referencing that case for that  
17 purpose. I'm referencing the case to address the question  
18 that you had about sort of do we look to what the intent was  
19 at the time that the statute was enacted --

20           THE COURT: Title VII is not limited to what  
21 occurred in July of 1964.

22           MR. CLARK: That is correct. But I also think  
23 that -- the decision is instructive I think also on the  
24 notion of what is sex discrimination. Because you're  
25 correct. In that case there is a male Plaintiff, but was

1 subjected to a level -- who was subjected to a level of  
2 sexual harassment --

3 THE COURT: It was harassment based -- the Court  
4 held that a jury could -- a fact finder could conclude that  
5 he was treated differentially in terms and conditions of  
6 employment on account of his sex.

7 MR. CLARK: I think there's an analogy here to say  
8 that when someone discriminates against transgender  
9 individuals, they're discriminating against those individuals  
10 because of their sex --

11 THE COURT: Doesn't the regulation in the C.F.R.  
12 authorize a degree of differential treatment based on sex in  
13 terms of restrooms, locker rooms and similar facilities?

14 MR. CLARK: It does. And --

15 THE COURT: And if sex includes gender identity,  
16 for all other purposes, don't I have to read that into the  
17 use of the word sex in that regulation?

18 MR. CLARK: Well, then -- and that would permit the  
19 students who are -- who have the same gender identities to be  
20 using the same facilities, which is exactly our argument  
21 here. So Juliet and Elissa are girls and should be using the  
22 restroom that the other girls use.

23 THE COURT: Well, let me ask you this, Mr. Clark.  
24 What should I make, if anything, of what appears to be the  
25 facts in the record that for every other purpose other than

1 perhaps the current notations on private educational records  
2 that are really pretty private under the Buckley Amendment,  
3 but for all other purposes in day-to-day life in the  
4 Pine-Richland School District, Miss Evancho and Miss Ridenour  
5 are and are treated as girls, and A.S. is and is treated as a  
6 boy?

7           It appears that the record -- and you tell me if  
8 I'm missing the boat here -- it appears to be uncontradicted  
9 in every other facet of institutional relationship between  
10 the School District and its responsible adults and those  
11 children, Miss Evancho and Miss Ridenour are girls, and A.S.  
12 is a boy? What -- does that play into this analysis?

13           Because there is -- what your colleague has pointed  
14 out, there's a very direct written tension between how  
15 they're treated in every other phase of their daily existence  
16 and their use of the restrooms. What do I make of that, if  
17 anything?

18           MR. CLARK: One, we should be asking why. And I  
19 think that goes back to the start of my comments about what  
20 is the constitutional justification for the discrimination  
21 here? Because for all of the things that you've just  
22 articulated, we should be wondering why is there differential  
23 treatment with respect to the use of the restrooms? And for  
24 the reasons I stated, I don't think there's a  
25 constitutionally legitimate justification for that.

1           But I think your question also goes back to a  
2 conversation you were having with Ms. Ingelhart about harms,  
3 and balancing of harms is one of the aspects of evaluating a  
4 preliminary injunction.

5           And while it is commendable that in some aspects  
6 the school has treated our clients respectfully, they have  
7 come into this Court and said exactly what they said by  
8 passing Resolution 2, which is effectively to Juliet and  
9 Elissa you may say you're a girl, but you're not.

10           And that harm, the way that makes our clients feel  
11 isolated, stigmatized and marginalized, is far more  
12 significant than what some bully at school says to them quite  
13 frankly.

14           And so I respect the conversation that was had  
15 about the number of incidents and whether a school is  
16 responsible for that. But that is not the sum total of the  
17 evidence in this record about the harm to these students.

18           They have told you in their own words how this  
19 makes them feel. Juliet has told you she's thinking about  
20 dropping out of school. And there's nothing in this record  
21 that tilts the balance of harms back in favor of the  
22 Defendants.

23           They're telling you that if you issue an  
24 injunction, it might cause some controversy or might cause  
25 some disruption. But any controversy or any disruption has

1 been caused by the Defendants, by changing the rules, by  
2 isolating our clients during their last year of high school,  
3 when everything was fine. And they did it because some  
4 people in the community were afraid.

5 THE COURT: So when I'm listening to that argument,  
6 Mr. Clark -- and I don't want to put words in your mouth, but  
7 one of the things I'm tempted to go back and read is the  
8 majority opinion in Barnett, which it is the act -- the  
9 argument I think I hear you making is that the act of  
10 officially the statement of policy is the stigmatization that  
11 your clients would argue, that if we go back to Justice  
12 Jackson's words, if there's any thick scar in our  
13 constitutional constellation, it is that no official high or  
14 petty may prescribe what shall be conventional, and that it  
15 is the act of the policy's existence that you and  
16 Miss Ingelhart -- Miss Ingelhart says there's other things in  
17 the record as a factual matter, but if I understand the last  
18 part of your argument, it is the act of passing the  
19 resolution that creates the stigma?

20 MR. CLARK: I think that's right. And the  
21 implementation of it that then requires these -- our clients  
22 to make a choice about what they're going to do, and what  
23 they are unfortunately doing far too frequently is simply not  
24 using the restroom at all, which then creates --

25 THE COURT: Does the record have anything in it at

1 this point as to non-transgender students' utilization of  
2 the -- what I'll call the single spot or single use  
3 restrooms, the ten or so that are sprinkled around the  
4 building? Does the record reflect the degree to which  
5 non-transgender students are using those on any regular  
6 basis?

7 MR. CLARK: I believe the Defendants have offered  
8 information in that regard through their declarations, that  
9 certainly that the restrooms are open to all students. So --

10 THE COURT: Right. But are they being actually  
11 used? I mean one of the things I'm wondering is if, for  
12 instance, the record revealed that on a daily basis it sort  
13 of opened -- not only it's literally open for business, but  
14 being utilized, that all these restrooms are being utilized  
15 by a wide array of students and others in the school, then  
16 would the use of those, would the act of using one of those  
17 be stigmatizing?

18 I understand your argument of the directive that  
19 you have to use one of those is from the Plaintiff's  
20 perspective not only a constitutional violation, but  
21 constitutional harm; but as a factual matter, if the facts  
22 turned out to be that a wide array of students day in and day  
23 out are using these ten single user restrooms, would that not  
24 dissipate stigma factually arising from somebody using them?

25 MR. CLARK: I don't believe it does, Your Honor,



1 because it did not change the message that I think is being  
2 sent to Juliet, Elissa and A.S. It's not you can use this  
3 restroom. It's you can't use that one. And it's only the  
4 transgender students that are being told that message in this  
5 school.

6 THE COURT: Do you have any thoughts on the  
7 question I asked Miss Ingelhart about if the facts are such  
8 that on the current record, to the knowledge of the parties,  
9 at Pine-Richland High School there are three students who are  
10 transgender, and they happen to be your clients, and that  
11 that was known or reasonably known at the time Resolution 2  
12 was passed, that that resolution would affect three  
13 identifiable distinct people, is there any Constitution --  
14 how does that factor into an equal protection analysis if it  
15 turns out that a legislative body enacts legislation knowing  
16 it will affect three specific individual people only?

17 MR. CLARK: It is sort of a slightly expanded  
18 version. I think, Your Honor, kind of a class of one, which  
19 is that you still, regardless of the size of the  
20 classification, can proceed with the equal protection  
21 analysis.

22 And certainly when you get into the factor analysis  
23 that you were talking to Mr. Gonzalez-Pagan about in terms of  
24 whether heightened scrutiny applies, that is done by Courts  
25 generally from a sort of global level, and then the

1 application of it is with the Plaintiffs or classified as  
2 before you.

3 And so I don't think the number of students  
4 affected necessarily -- really in any way affects the equal  
5 protection analysis that is at play here.

6 I think there still needs to be a determination as  
7 to whether this is a sex based classification, and for all  
8 the reasons that we've explained in the briefs, and today we  
9 believe it is, and that tilts us back to the justification --

10 THE COURT: Can a legislative body constitutionally  
11 adopt a policy that's aimed at a specific person?

12 MR. CLARK: I think that would have to be examined  
13 also under equal protection principles and I think would  
14 warrant certainly a questioning eye looking at that sort of  
15 policy making legislation. And in some ways that is what was  
16 done here with respect to three students at least.

17 And we're not saying that these are the only  
18 transgender students in this school. We don't know that  
19 necessarily, and certainly there may be --

20 THE COURT: The report does not reflect that there  
21 are others. There may well be. It's just that the record at  
22 the moment doesn't reflect that there are or who they are.

23 MR. CLARK: That's right.

24 THE COURT: Thank you, Mr. Clark. Okay. Round one  
25 over, Mr. Gonzalez-Pagan?

1 MR. GONZALEZ-PAGAN: Yes, Your Honor. I would just  
2 point out that the record does reflect that there's a  
3 possibility of at least another student at the high school.

4 THE COURT: Okay.

5 MR. GONZALEZ-PAGAN: Besides the three Plaintiffs.

6 THE COURT: Okay. Miss Lane and Mr. Foley, as you  
7 get ready, why don't we take a five-minute recess or so? I  
8 see that it's three minutes after eleven. Let's assume that  
9 we'll start right around ten after eleven, something like  
10 that. So Mr. Babik, if you'd recess the Court.

11 MR. BABIK: All rise.

12 (A recess was taken at 11:03 a.m.)

13 (11:15 a.m.; in open court:)

14 THE COURT: Okay. The Court's happy to hear from  
15 the defense. I see Miss Lane is taking the starting line.  
16 Miss Lane, how are you and Mr. Foley going to divvy things  
17 up?

18 MS. LANE: Your Honor, I will address the  
19 District's motion to dismiss as well as the likelihood of  
20 success component.

21 THE COURT: Yeah. They fit together.

22 MS. LANE: Because they somewhat fit together,  
23 although different standards. We recognize in the motion to  
24 dismiss it's our burden based upon the facts taken at face  
25 value in their Complaint, but at the preliminary injunction

1 stage it's Plaintiff's burden to prove to the Court that they  
2 will have the likelihood of success on the merits.

3 THE COURT: It doesn't have to be a whopping big  
4 likelihood. It just has to be more likely than not; right?

5 MS. LANE: Not a whopping likelihood, as you  
6 stated, but certainly more than a minimum level. Probability  
7 would perhaps be the best word to use. Mr. Foley will  
8 address irreparable harm, and I will then address the  
9 balancing arguments.

10 It's our contention that you don't even need to  
11 reach those issues on the motion for preliminary injunction  
12 because we believe that they will not be able to prove to you  
13 that they have a likelihood of success on the merits, nor  
14 will they be able to prove irreparable harm as specific to  
15 the individual Plaintiffs themselves.

16 THE COURT: Do you agree -- let me ask you this  
17 question, Miss Lane, and I don't want to divert you at all,  
18 and this not meant to short circuit anything you or Mr. Foley  
19 want to say.

20 Do you agree as a matter of legal principle with  
21 Miss Ingelhart's observation to the Court that if there is a  
22 constitutional violation or a violation of Title IX, the fact  
23 of the violation itself provides presumed harm? That if  
24 somebody's constitutional rights are violated, they're harmed  
25 just by virtue of that violation?

1 MS. LANE: Your Honor, there is case law to support  
2 that when you have raised an issue regarding a deprivation of  
3 a fundamental right such as your right to free speech, that  
4 that is the case, that you do not even have to go through the  
5 analysis of irreparable harm.

6 That is not the case here. We certainly do not  
7 believe that they have raised a constitutional violation  
8 because the equal protection clause allows for, permits  
9 classifications based upon the differences of biology, as we  
10 see here.

11 THE COURT: Let me you ask this.  
12 Mr. Gonzalez-Pagan says, Judge, we've at least stated a claim  
13 under Twombly and Iqbal because we've pled that there's  
14 differential treatment based on sex.

15 And while he says they think they have a winner, he  
16 also says -- and I don't want to put words in your mouth,  
17 sir -- that at least at the pleading stage you've cleared the  
18 Twombly/Iqbal hurdle, that by pleading differential treatment  
19 based on governmental action, that states an equal protection  
20 claim, and the School District may have a winner but not at  
21 the pleadings stage.

22 MS. LANE: That's incorrect, Your Honor, because  
23 the 12(b)(6) states you are to take the facts as pled but not  
24 the legal conclusions. And they want you to jump to that  
25 conclusion that they have pled a legal claim on the basis of

1 equal protection.

2           The Johnston case, which was heard and decided by  
3 Judge Gibson, was decided at the motion to dismiss level. He  
4 decided that it was not a violation of Title IX because on  
5 the basis of sex under the statute specifically refers to  
6 male and female, the differences based upon biology,  
7 anatomical differences.

8           He then went into analysis under equal protection  
9 and found that the Plaintiff in that case had not raised a  
10 plausible claim for an equal protection because the equal  
11 protection itself allows for differences on the basis of  
12 biological differences being recognized in society, that  
13 there are those differences between men and women.

14           THE COURT: Well, but their affidavit, their  
15 declaration, which is the only evidentiary material other  
16 than perhaps the slide deck that the Children's Hospital  
17 folks used when they came to your client's board meeting,  
18 their affidavit says it's beyond the physical state of a  
19 human being's genitals at a moment to determine what their  
20 sex is. Their affidavit, their declaration, says there's a  
21 lot more to it than that.

22           Now, you could end up at the same spot in terms of  
23 the conclusion; but they say that as a medical, scientific  
24 matter, there's more to it than that, that it's more than  
25 somebody's genitals. I don't want to be blunt, but that's

1 what they say.

2 And pretty much every United States District Judge  
3 that's looked at this in the last 12 months has kind of said  
4 the same thing, all at the preliminary stage.

5 I mean not to the exclusion of others, but  
6 certainly I don't think anybody would say Judge Schroeder  
7 down in North Carolina is any type of pushover. If you look  
8 at the Carcano case, he went through all this, and he entered  
9 the injunction.

10 I mean it's pretty much the identical facts. I  
11 thought one of the things that was intriguing that Judge  
12 Schroeder reflected, "The record as advanced by the Governor  
13 and others that testified that for a long persistent period  
14 of time, transgender individuals had been using restrooms  
15 consistent with their gender identity at the University of  
16 North Carolina without any problems," and that the North  
17 Carolina statutes provided a mechanism, including criminal  
18 sanctions, for anybody that used any restroom for some  
19 improper purpose. And so he sort of got past the motion to  
20 dismiss stage.

21 But since then -- I mean there are few people on --  
22 I can't think of anyone at the moment who professionally and  
23 otherwise I respect more than Judge Gibson, but the world has  
24 continued to turn since Johnston was decided, and there have  
25 been a whole flurry of District Judges in highly diverse

1 geographic locations around the country that have considered  
2 this exact question and come down at a different spot. How  
3 should I consider all those decisions?

4 MS. LANE: To go back to your original question as  
5 to whether sex based upon their declaration is defined as a  
6 state, we haven't argued, Your Honor, that the medical  
7 definition of sex does not include the subjective gender  
8 identity. What's before you --

9 THE COURT: Their declarant says it's more than  
10 subjective. They're saying that it is fixed and it is, not  
11 that it's -- when I think of the word subjective -- and  
12 perhaps you and I are using it differently.

13 Subjective is my impression is the lighting in this  
14 room is adequate. For all I know, Dr. Miller is sitting  
15 there having difficulty reading because he believes the  
16 lighting is not adequate. And neither of us might be  
17 proveably right or wrong.

18 Their declaration seems to stand for the  
19 proposition that it is proveably right or wrong.

20 MS. LANE: I am using the term subjective meaning  
21 the individual Plaintiffs perceive themselves as the sex of  
22 their gender identity.

23 THE COURT: Doesn't your client perceive them to  
24 be -- doesn't your client perceive Miss Evancho and  
25 Miss Ridenour to be women and A.S. to be a man? Don't they



1 treat them in all other respects --

2 MS. LANE: They most certainly do, and we have not  
3 challenged how they themselves present themselves. And they  
4 do as girls and a boy.

5 THE COURT: Let's assume we had a trial. Let's  
6 assume we had a trial, and Mr. Gonzalez-Pagan called  
7 Dr. Miller as a witness or called -- I believe it's  
8 Miss Bowman, who's the principal?

9 MS. LANE: Yes.

10 THE COURT: And said, Miss Bowman, I have three  
11 questions for you. Does the Pine-Richland High School treat  
12 Miss Evancho as a girl? Presumably her answer will be yes?

13 MS. LANE: The answer would be, as reflected in our  
14 briefs, in all respects but for the limited space of which  
15 she uses her bodily excretion.

16 THE COURT: So how should I -- so how should any  
17 court, I'm not personalizing this Court. How should any  
18 Court view that if it appears that Miss Evancho -- and I'm  
19 using her just because she's the first named Plaintiff. I  
20 could use Miss Ridenour or A.S.

21 If they and the School District appear to agree  
22 that for every other purpose Miss Ridenour and Miss Evancho  
23 are girls and A.S. is a boy, how does that factor into the  
24 equation of whether it's lawful or not to treat them  
25 differently for this purpose?

1 MS. LANE: It doesn't, Your Honor, under Title IX,  
2 because Title IX specifically authorizes the distinction  
3 based upon men and women. Title IX refers in the statute --

4 THE COURT: Their declarant says -- but their  
5 declarant says Miss Evancho is a girl. I'm not -- that would  
6 be the testimony of their declarant if she was sitting on the  
7 witness stand and somebody, you or Mr. Clark, asked her a  
8 question, if they said: True or false, is Miss Evancho a  
9 girl? Their declarant, if I'm reading her declaration  
10 correctly, would say true. So what do I do with that?

11 MS. LANE: As further placed in her declaration,  
12 she believes she's a girl because the way she feels and  
13 perceives herself to be --

14 THE COURT: No. No. Their expert -- is it Dr.  
15 Ehrenhart or Ehrensaft?

16 MR. CLARK: Dr. Ehrensaft, Your Honor.

17 THE COURT: Dr. Ehrensaft. If that doctor, that  
18 Ph.D., was on the stand and somebody, some lawyer, you or  
19 Mr. Clark, asked her a question: True or false, is  
20 Miss Evancho a girl? That declaration says that witness  
21 would testify Miss Evancho is a girl.

22 MS. LANE: Okay.

23 THE COURT: They'd say true. What do I do with  
24 that in the context of considering this motion? That's the  
25 testimony.

1 MS. LANE: Because your role is to look at the  
2 statute, the text of the statute, and you look at it -- you  
3 don't view it as today and what is happening in society.

4 Your role is to look at the text at the time it was  
5 written. That's 1975. What did sex mean in 1975? And it  
6 meant men and women, because the biologically based men and  
7 women --

8 THE COURT: So every other District Judge that has  
9 said something else will be reversed in terms of the  
10 interpretation of Title IX?

11 MS. LANE: Your Honor, the other cases that you are  
12 referring to all relied upon the Dear Colleague letter. And  
13 the Dear Colleague letter was issued in May of 2016 in direct  
14 answer to the Fourth Circuit's decision in G.G.

15 The Fourth Circuit panel decision recognized that  
16 at the time Title IX was written, it meant biology, that it  
17 meant biological sex.

18 THE COURT: That's not exactly what Judge Floyd  
19 said. Because he cited to some other -- if you read Judge  
20 Floyd's majority opinion in G.G., he had two long block  
21 quotes, and the second of which -- and I'll see if I can find  
22 it here -- said in essence maybe not.

23 MS. LANE: I'm sorry?

24 THE COURT: Judge Floyd did not conclude that; did  
25 he, in G.G.? Judge Floyd, who wrote the majority opinion for

1 the panel in G.G., did not conclude that that's necessarily  
2 what the word "sex" meant in the text of Title IX.

3 MS. LANE: The panel decision referred to sex at  
4 the time Title IX was written as referring to biological sex  
5 but then looked at the argument of the regulation at 106.3  
6 and adopted the ambiguity argument that the exception to  
7 provide male and female restrooms, that that provided the  
8 room for something more, and that's where the panel decision,  
9 which was two to one, made their decision.

10 THE COURT: So what do I do with the fact that  
11 Judge Schroeder in the Carcano case relied on G.G. even post  
12 grant or review by the Supreme Court? Help me understand,  
13 did the District take the position that G.G. was correctly  
14 decided in terms of applying and interpreting Title IX or was  
15 incorrectly decided?

16 MS. LANE: Your Honor, as far as the interpretation  
17 of the statutory analysis of Title IX of the statute, G.G. is  
18 incorrect, and that is the issue that is before the Supreme  
19 Court on petition for cert., because the G.G. specifically  
20 relied upon the -- not the 2016 Dear Colleague letter. They  
21 had before them what is referred to as the third cabinet  
22 letter. And that is the letter that was written by a lower  
23 level deputy within the Department of Education that said  
24 this is our thoughts on this. And that's what the Court was  
25 reviewing, and that's what the Court gave deference to. The

1 Dear Colleague letter comes after, and it basically relies  
2 upon the reasoning in G.G.

3 Now, G.G.'s incredibly important because you are a  
4 Court sitting here, and G.G. issued a stay, and a stay was a  
5 stay of the preliminary injunction as well as a stay of the  
6 mandate. That's a very high standard to obtain from the  
7 Supreme Court. The Supreme Court, there were --

8 THE COURT: Well, the fifth vote on the stay, if  
9 you read the memorandum order of the Supreme Court, the fifth  
10 vote for the stay was Justice Breyer, and he said he's  
11 granting the stay as courtesy. He used that word.

12 MS. LANE: Yes. But there is a legal standard in  
13 order to argue to the Supreme Court, in order to effectuate  
14 the relief you seek, which is the likelihood of four Justices  
15 granting review, fair showing of prospect of reversal of the  
16 Circuit decision, irreparable harm to the school board, and  
17 balance of equities and public interest weighing in the  
18 School District's favor.

19 THE COURT: What do you do with Judge Schroeder's  
20 analysis post all of that happening where he says he's still  
21 bound by G.G.? He's a District Judge in that Circuit. All  
22 of that happened before he came down with his decision in  
23 Carcano, and he says he's still bound by the Circuit decision  
24 in G.G.

25 MS. LANE: Of course he is, because he sits in the

1 Circuit. But Your Honor sits in the Third Circuit.

2 THE COURT: Right.

3 MS. LANE: And we don't have a decision.

4 THE COURT: Right.

5 MS. LANE: We have the Johnston case that is right  
6 on point except for Johnston --

7 THE COURT: Johnston had locker rooms.

8 MS. LANE: Yes. And Johnston dealt with an older  
9 age group. We're talking about children in public education.

10 THE COURT: How many complaints from children were  
11 received by the officials at the Pine-Richland School  
12 District that they felt uncomfortable or that their privacy  
13 interests were impaired by these three students using  
14 restrooms consistent with their gender identity?

15 MS. LANE: I know that Nancy Bowman's declaration  
16 speaks to students being aware and specifically of Juliet  
17 using the restroom, the female restroom --

18 THE COURT: It appears that that was rather common  
19 knowledge, but how many complaints?

20 MS. LANE: That was the complaint, Your Honor, that  
21 that incident went to Ms. Bowman as a complaint of her using  
22 it. So I am aware of that specifically in the declaration.

23 THE COURT: Was that a complaint that Miss Evancho  
24 was using the restroom or that, because Miss Evancho was  
25 using the restroom, one or more specific students believed

1 that their privacy concerns were being impaired?

2 MS. LANE: I believe that the student I am  
3 referencing was uncomfortable, went into the bathroom, and  
4 Juliet was in the bathroom, which is the female bathroom.  
5 The student left the bathroom, and then the declaration is  
6 from her parent, Mr. Wiethorn, and it goes into his  
7 daughter's -- the conversation that he had with his daughter  
8 about how she felt or the privacy concerns --

9 THE COURT: So the complaint came to Ms. Bowman  
10 from the parent, not from the student?

11 MS. LANE: No. I do believe, Your Honor, that the  
12 student herself reported to Ms. Bowman, something of the fact  
13 where she comes out of the bathroom. What's wrong? She  
14 seemed visibly bothered by something, and the student reports  
15 there's a boy in the restroom. I believe -- it's not a  
16 perfect quote. But that's my understanding of the  
17 declaration.

18 THE COURT: So one?

19 MS. LANE: That I have --

20 THE COURT: In the record?

21 MS. LANE: In the record. Now, Miss Evancho  
22 herself is more -- has presented herself and the issues that  
23 she's dealing with in a more public setting than perhaps  
24 others. So she would be one that perhaps students are more  
25 aware of. I do not know as we stand here today whether there

1 have been other occasions of the same circumstances.

2 THE COURT: Okay. Let me ask you this. I looked  
3 at the photographs that were filed as an exhibit that were  
4 taken by the school district. And I don't know how old the  
5 school is, but they appear to reflect restrooms that are in  
6 incredibly fine repair, well lit, clean, all of those things,  
7 which is to the compliment of the staff of the school  
8 district.

9 But they also appear to reflect that at least in  
10 what's denominated as the women's room, that there are a  
11 series of toilets in metal partitioned, enclosed stalls, and  
12 in the men's room there are a series of toilets that are in  
13 metal partitioned, enclosed stalls, and there are a number of  
14 urinals with privacy screens. Is that the case in all of the  
15 non-single user restrooms at the high school?

16 MS. LANE: I think there's varying -- it was  
17 described to me that there's an older part of the building  
18 and a newer part of the building. Some parts of the building  
19 you can see over the stalls. Depending on your height, you  
20 could see over them. So it would be an older part of the  
21 building --

22 THE COURT: You would have to be pretty tall.

23 MS. LANE: No --

24 THE COURT: Are there any reports received by  
25 administration that a student at any point was using one of



1 those stalls and observed somebody else peering over the  
2 stall, of whatever gender identity? Has that ever come to  
3 the District's attention that there are Peeping Toms, if you  
4 will, the term used by Judge Schroeder in his opinion?

5 MS. LANE: No, Your Honor. You've asked me to  
6 describe the bathrooms --

7 THE COURT: Right.

8 MS. LANE: -- and it was described to me by  
9 Ms. Bowman that there are differences amongst their  
10 facilities; but no, we do not have within our record that any  
11 student has referred to a Peeping Tom situation.

12 THE COURT: What do I make of that? Because that  
13 was a big deal in the North Carolina case from the University  
14 of North Carolina, the Carcano decision, that there was not  
15 any record that there had ever been any issues with anybody  
16 using any of the restrooms. It just hadn't come up.

17 There might have been one where there was some  
18 criminal prosecution back in the day, but it had nothing to  
19 do with somebody who identified as transgender. And that  
20 seemed to be a very significant thing in Judge Schroeder's  
21 decision.

22 What, if anything, should we make of that factual  
23 current -- and I recognize it's not a complete record.  
24 There's been no discovery or other things. And I recognize  
25 that.

1 But the record as it is does not appear to reflect  
2 with the exception of the one situation you noted in  
3 Principal Bowman's declaration that there's ever been any  
4 issue in any of the restrooms at Pine-Richland High School.  
5 What, if anything, should we make of that?

6 MS. LANE: I don't believe you need to make  
7 anything of it, Your Honor, because the issue before you is  
8 the key question of what does sex mean under Title IX? Have  
9 they raised a plausible claim?

10 THE COURT: If Title IX didn't exist, we would be  
11 talking about the equal protection clause.

12 MS. LANE: Right. And we would rely upon the  
13 Supreme Court precedent that says that classification based  
14 upon the biological differences between men and women is  
15 permissible, as Judge Gibson --

16 THE COURT: That's the BMI case?

17 MS. LANE: Correct. And Judge Gibson found that  
18 that -- this particular scenario of a transgender individual  
19 seeking to use facilities of his gender identity, that that  
20 was not a protected -- that that did not raise a plausible  
21 claim for relief under equal protection.

22 THE COURT: So let's assume the Johnston case was  
23 never decided by Judge Gibson, and I'm not saying that that's  
24 the case. But what do you have beyond Johnston? And I'm not  
25 saying you have to, but I guess the question is do you --

1 does the District rely on -- for the Fourteenth Amendment  
2 claim, because as I understand the facts in G.G, Judge Clark,  
3 or whoever the District Judge was never got to the Fourteenth  
4 Amendment issue. That was remanded by the Fourth Circuit.

5 Judge Schroeder in Carcano does not resolve the  
6 Fourteenth Amendment issue, but it would appear that -- well,  
7 let me ask you this, Miss Lane.

8 One of the questions I asked Plaintiff's counsel  
9 was at the time Resolution 2 was passed, was the District  
10 leadership aware of any other transgender students at the  
11 high school other than the three Plaintiffs?

12 MS. LANE: Your Honor, no, they were not aware, and  
13 no other students have come forward.

14 THE COURT: Pardon?

15 MS. LANE: No other students have come forward.

16 THE COURT: Nor was the administration aware by any  
17 other means that you're aware of?

18 MS. LANE: No.

19 THE COURT: So is it constitutional in the United  
20 States for a legislative body to pass a piece of legislation  
21 that is specific to three individuals?

22 MS. LANE: Your Honor, any legislation just in the  
23 fact of passing something has -- provides a right or some  
24 benefit to one and not to the other. So that is in any  
25 legislation. But I don't accept the premise that that is the

1 basis of Resolution 2. What Resolution 2 did --

2 THE COURT: But isn't that the effect? It affects  
3 exactly three people, and it would have been known at the  
4 time of its passage that it would have affected only three  
5 people.

6 MS. LANE: No, Your Honor, because the resolution  
7 refers to biological sex, and I haven't heard, nor is it part  
8 of the record, that the three Plaintiffs do not have a  
9 biological sex. It treats all the same. So --

10 THE COURT: Yeah, but if the Administrative Office  
11 of the United States Courts put out a new regulation that  
12 says this applies to every Article III Judge that graduated  
13 from Steel Valley High School, it would be generally  
14 applicable to exactly one United States District Judge.

15 Is that Constitutional? You say it is. Because as  
16 long as by definition it sweeps widely, the fact that it's  
17 well known to everyone involved that it affects exactly one  
18 human being isn't a problem?

19 MS. LANE: No, Your Honor. I'm just not accepting  
20 the premise that Resolution 2 targeted the three  
21 individuals --

22 THE COURT: I didn't use the word targets.

23 MS. LANE: Or that it was -- affected -- placed an  
24 effect on conduct. Because the resolution reads that all  
25 students can use the restrooms of biological sex or the ten

1 unisex restrooms that are throughout our school district.

2 THE COURT: But the Plaintiffs point out the guts  
3 of their argument is that it impacts exactly their  
4 Plaintiffs, their clients and nobody else. It has a  
5 differential impact on them that was well known at the time  
6 of passage, and that it would not affect anybody else.

7 MS. LANE: The resolution reads that the  
8 students -- any student can choose to use the alternate of  
9 the biological sex. And that is the case because that is in  
10 the record, as you asked of Mr. Clark --

11 THE COURT: So that's not a problem.

12 MS. LANE: The students are, have been and were  
13 using it before Resolution 2. So these bathrooms at  
14 Pine-Richland School District which we are calling or  
15 referring to as unisex --

16 THE COURT: So why was the resolution passed? If  
17 there was at best one complaint received by the  
18 administration, and it appears from the record that, as is  
19 the case in Carcano, for some period of time, several years  
20 at least, Miss Ridenour and Miss Evancho and A.S. used  
21 restrooms that conformed to their gender identity without  
22 issue, why was the resolution passed?

23 MS. LANE: The reference to years is somewhat of a  
24 misnomer. The record doesn't reflect that I believe as to  
25 one Plaintiff possibly because she went through her

1 transitioning process at an earlier stage in her life than  
2 the others. So I want to make that clear.

3 Resolution 2 was passed because the issue was  
4 brought forward by the community, who the School District,  
5 more so the school board, is responsible to listen to. In  
6 Pennsylvania we recognize and we put education in local  
7 hands, local control with the school board.

8 The school board had complaints and concerns.  
9 Resolution 2 puts back in place, which is longstanding in our  
10 society over the 40-plus years of my life, that men and women  
11 are separated on the basis of biological sex for the use of  
12 these private facilities --

13 THE COURT: But they weren't. There was some  
14 extended period of time, whether it's months or a year in the  
15 case of one Plaintiff, there was some period of time where  
16 they used restrooms consistent with their gender identity  
17 with what appears to be either, A, no problems and B, no  
18 problems. So why was the status quo changed?

19 MS. LANE: The use of the restrooms, as we  
20 understand, that's based upon Plaintiff's declarations that  
21 they have used them consistent with gender identity, that was  
22 at their election, and the School District was not in the  
23 business of policing who was coming in and out of  
24 bathrooms --

25 THE COURT: So why did they decide to start

1 policing it?

2 MS. LANE: They didn't start to police it. They  
3 had issues of concern concerning the students who attended  
4 the school --

5 THE COURT: Well, the district --

6 MS. LANE: -- their right to privacy --

7 THE COURT: The district is policing it now because  
8 it passed Resolution 2, and I assume Dr. Miller's  
9 subordinates are enforcing Resolution 2.

10 MS. LANE: Resolution 2 requires students to use  
11 the restrooms of biological sex. There have been occasions  
12 where -- I believe it's in the supplemental declarations --  
13 where for whatever reason one or two of the Plaintiffs have  
14 used the restrooms in accordance with gender identity. They  
15 have not been disciplined. They have just been spoken to.  
16 The parents have been spoken to as to what else do we need to  
17 do? How do we --

18 THE COURT: So what happens if they keep doing it?  
19 What happens to Miss Evancho if she keeps using the women's  
20 room?

21 MS. LANE: I believe it will be the same as has  
22 been the current practice. They will meet with her as well  
23 as her parents and have a discussion of her needs as to why  
24 it is occurring when the resolution is in place.

25 THE COURT: So what if she keeps -- I'm not picking

1 on Miss Evancho. Person A, Person B. I don't want to  
2 personalize it in any way. But if a student plainly and  
3 clearly identifies themselves to the administration of the  
4 Pine-Richland School District that their birth sex as  
5 reflected on their birth certificate is male, but that they  
6 are a girl, and present themselves and engage with the world  
7 in all respects as a girl, and that person continues  
8 persistently to use the girl's room at the Pine-Richland High  
9 School, what's going to happen to her?

10 MS. LANE: I'm not aware of what will happen.  
11 Nothing has happened thus far.

12 THE COURT: So is this a tempest in a teapot?

13 MS. LANE: I do not believe so, Your Honor. I  
14 believe the administrators, as the record has shown, have  
15 been treating the three Plaintiffs in a very respectful  
16 manner, have addressed all of their needs and continue to do  
17 so to this day.

18 THE COURT: So if this is a central and important  
19 governmental policy, why isn't the district enforcing it with  
20 vigor?

21 MS. LANE: It's central and fundamental to the  
22 students who have privacy concerns, which is a constitutional  
23 right. And those privacy concerns aren't limited by the fact  
24 that there might be blinders on the urinals or a door on a  
25 stall.



1 THE COURT: So do those privacy concerns -- and I'm  
2 not disputing what you've articulated, Miss Lane, in phrasing  
3 my question -- if they are for a Constitutional and statutory  
4 reason a big deal, why isn't Dr. Miller and his subordinates  
5 enforcing this policy with vigor?

6 And if any of the transgender students used the  
7 restroom consistent with their gender identity but  
8 inconsistent with the sex recorded on their birth  
9 certificate, why aren't they being dealt with with vigor?

10 MS. LANE: Your Honor --

11 THE COURT: I'm not advocating one way or the  
12 other.

13 MS. LANE: The realistic answer is because we're in  
14 the midst of litigation. We're here before you for a motion  
15 on preliminary injunction, and that they are trying to be  
16 respectful of the students' needs.

17 THE COURT: I mean I don't want to put you in the  
18 hot seat here, Miss Lane. All the lawyers in this case have  
19 a tough -- because this is an evolving area of the law. It's  
20 not as though -- you or Mr. Foley or Mr. Gonzalez-Pagan or  
21 his clients come in. You're arguing in the Court's  
22 estimation at the highest levels of the profession why this  
23 case can be analogized to the various legal rules that have  
24 developed in other settings.

25 But as everyone has conceded, there's not a

1 controlling Third Circuit decision, and there's not yet a  
2 directly controlling Supreme Court decision.

3           Everyone's argued what direction this case should  
4 go as a result of portions and analyses and rationales of  
5 those decisions. But I guess I have a bit of what for the  
6 Court, I'll freely confess, is a bit of a head scratcher.

7           If this resolution is passed, was passed by the  
8 duly elected members of school board in Pine-Richland because  
9 they believed it was both appropriate and necessary to  
10 protect what you've articulated and Mr. Foley's articulated  
11 in your briefs as pretty close to a fundamental  
12 constitutional right to privacy, why isn't the School  
13 District enforcing that policy with vigor against somebody  
14 that violates the policy?

15           MS. LANE: There hasn't been consistent violation;  
16 and they in their enforcement, as with any violation of their  
17 rules, they meet with the individual and discuss it. I am  
18 aware that Juliet may have once done this and now Elissa.  
19 There have been two incidents. So there hasn't been this  
20 overwhelming need to --

21           THE COURT: So what will happen if they keep  
22 breaking the rule?

23           MS. LANE: Again, as I previously stated, I do  
24 not -- I cannot answer what will happen, what may happen in  
25 the future. I just know from our conversations with the

1 administrators and based upon their actions throughout this,  
2 that they will continue and will treat the three Plaintiffs  
3 with all due respect.

4 THE COURT: If one of the Plaintiffs -- because I  
5 think this does go to the factor of harm. If one or more of  
6 these Plaintiffs -- and Mr. Gonzalez-Pagan, I'm not imputing  
7 this to any of your clients. Miss Lane I believe is correct.  
8 What will happen we'll have to see, but I guess my question  
9 is is this policy enforceable under the School District's  
10 standard disciplinary policies?

11 Are these Plaintiffs subject to possible  
12 progressive discipline under the Pine-Richland's disciplinary  
13 policies if they violate this policy? Is this a policy that  
14 would be enforceable under those disciplinary standards?

15 MS. LANE: The Resolution 2 is passed, and the  
16 administrators were directed to put it in force in the high  
17 school building. There is a -- I believe it was in  
18 Plaintiff's findings of fact where they reference a  
19 communication that occurred between Mr. Gonzalez-Pagan and  
20 the School District's Solicitor inquiring into that.

21 And the School District's Solicitor's response was  
22 that anything is subject to the code of conduct. So based  
23 upon that, it could be. But that is still always at the  
24 administration's discretion.

25 THE COURT: Okay. That's a good point, Miss Lane.

1 Let me ask you this. Does the administration of the  
2 Pine-Richland School District have a present intention to  
3 enforce Resolution 2 via the School District's stated code of  
4 conduct?

5 MS. LANE: The administration believes they are  
6 enforcing it by informing the students of what the  
7 expectation is regarding Resolution 2, and then in the two  
8 incidents where the female Plaintiffs have chosen to do other  
9 than what Resolution 2 states, they have met with those and  
10 counseled them and requested what more is it, along with the  
11 parents, do you need from us in your educational setting?

12 So that is their level so far of enforcement of  
13 Resolution 2.

14 THE COURT: Mr. Gonzalez-Pagan -- and Miss Lane, I  
15 need to ask him a question. This is not in any constraint  
16 whatsoever on whatever else -- for however long you want to  
17 argue -- is this a ripe controversy?

18 MR. GONZALEZ-PAGAN: Yes, Your Honor.

19 THE COURT: Why?

20 MR. GONZALEZ-PAGAN: For several reasons. For one,  
21 the very fact of the enactment of Resolution 2 creates a  
22 stigma on our clients. For another, our clients have avoided  
23 the usage of the restroom for as much as they can, and that  
24 is part of their declarations, because they don't want to be  
25 subject to discipline.

1           What we do know is that they would be subject to  
2 the code of discipline should they violate Resolution 2. I  
3 believe that is an exhibit to my declaration, as Miss Lane  
4 indicated, between a communication from Solicitor Clair.

5           And it really -- I think ultimately the Court's  
6 question is really quite important and quite a reasonable  
7 one. We would love the answer to what the school would do  
8 should they enforce Resolution 2. What we do know is they  
9 will enforce the disciplinary conduct code. That's as much  
10 as we've received from the school --

11           THE COURT: Miss Lane, is a student subject to  
12 suspension or exclusion from school under the Public School  
13 Code of 1949 as amended for violation of Resolution 2?

14           MS. LANE: No, Your Honor. I do not believe that  
15 they view it as -- that would require a level 4 or a very  
16 heightened --

17           THE COURT: So persistent violation of Resolution 2  
18 could not result in a student's suspension or expulsion from  
19 school?

20           MS. LANE: Unless the circumstances -- again, we're  
21 looking at this crystal ball, and you're asking me to guess  
22 what may happen in the future, which doesn't take into  
23 account are Plaintiffs being told to poke at the District to  
24 perhaps create a situation that requires the District to go  
25 through this analysis?

1 THE COURT: Well, it sounds like if they are,  
2 they're not very good at it because you said it's only  
3 happened once or twice.

4 My question is if a student who uses and does  
5 nothing more than use, they don't engage in any conduct  
6 that's otherwise prescribed under the criminal laws of the  
7 Commonwealth, a student who is biologically listed on their  
8 birth certificate as a male but whose gender identity is  
9 without question is as a girl, if they consistently and  
10 persistently use the girl's restroom for one reason and one  
11 reason only, and that is to go to the bathroom, are they  
12 subject to being suspended from school or excluded by  
13 expulsion?

14 MS. LANE: Your Honor, Resolution 2 does not state  
15 any information as to what will occur should it be violated.  
16 And the student code of conduct does not right now in its  
17 present state reference Resolution 2.

18 So it would be my impression based upon the current  
19 status of how administration has treated the incidents, that  
20 they would treat it as their discretion and consultation and  
21 meeting with, counseling the individuals who violate  
22 Resolution 2.

23 THE COURT: So let me ask you this. Whether we  
24 look at rational basis or heightened standard of scrutiny  
25 under the Fourteenth Amendment, does it pass rational basis

1 analysis or heightened scrutiny if the legislative body  
2 passes a legislative directive that it has no intention of  
3 enforcing?

4 MS. LANE: Your Honor, the enforcement end of it  
5 has nothing to do with the rational basis test. And under --

6 THE COURT: Wait a second. How can a legislative  
7 body have a rational legislative basis for classifying people  
8 if they have no intention -- if it turns out they have no  
9 intention of enforcing that classification? Then why  
10 legislatively create a classification?

11 MS. LANE: They haven't created a classification.  
12 They have passed a resolution that requires, as all of us in  
13 our culture understand, the use of restrooms based upon  
14 biology.

15 They have not had occasion to use it, discipline  
16 for violation. The resolution under rational basis only  
17 needs to have some legitimate purpose.

18 THE COURT: So that's my question. If some -- if a  
19 legislative body passes an enactment that they don't intend  
20 on enforcing, what is the rational basis for the enactment?

21 If, as you tell me, there's no present intention to  
22 enforce by disciplinary sanction up to and including  
23 suspension from school, what's the rational legislative basis  
24 for having the rule? Can a legislative body pass a rule --

25 MS. LANE: Yes --

1 THE COURT: -- knowing that it has no intentions of  
2 enforcing it?

3 MS. LANE: Prior to Resolution 2, there wasn't a  
4 need to enforce the use of restrooms because everyone  
5 understood the use of restrooms to be occurring within the  
6 school building based upon biology --

7 THE COURT: Not everyone. No. No. No.  
8 Dr. Miller didn't understand that. As I read Dr. Miller's  
9 communications to the school board and others, he understood  
10 that the Plaintiffs were using restrooms consistent with  
11 their gender identity, which was not consistent with the sex  
12 listed on their birth certificate.

13 MS. LANE: That is after the issue was brought to  
14 his attention and he investigated the matter. Dr. Miller  
15 himself did not know who was going in or out of any restrooms  
16 at the high school.

17 THE COURT: Does that matter, that -- I'm not --  
18 and by phrasing my question this way, I'm not accusing  
19 Dr. Miller or his subordinate officials of any type of  
20 neglect at all. But does it matter that in the pantheon of  
21 issues they concerned them with day in and day out, that they  
22 didn't add to that list making it their business to know who  
23 was or was not using the restrooms?

24 If in essence -- I mean these were essentially the  
25 facts in the North Carolina case. What Judge Schroeder found



1 is there just was no problem, and, therefore, President  
2 Spellings and her predecessors never really had to pay  
3 attention to it because there was no reason to, and whatever  
4 was happening was working just fine.

5 How does that, if at all, factor into the analysis  
6 here? Because it appears that for some period of time,  
7 whether it's months or years, that's what was going on at  
8 Pine-Richland.

9 MS. LANE: As to the legitimacy of Resolution 2?  
10 That's your question?

11 THE COURT: Yes.

12 MS. LANE: It doesn't factor into that. The school  
13 board passed the resolution. They have -- within the  
14 declaration of Mr. Gonzalez-Pagan, it has all the hearing --  
15 well, not hearing, but board meeting minutes, and they  
16 specifically talk about the reason for it as putting back  
17 their understanding of restrooms separated on biological  
18 differences. And that they passed that, and they passed it  
19 at the time with the understanding that the Supreme Court had  
20 done the same thing in G.G., that the --

21 THE COURT: The Supreme Court has done absolutely  
22 nothing in G.G. other than put a case on their calendar.

23 MS. LANE: The Supreme Court issued a stay of a  
24 preliminary injunction which said to G.G. you say you're a  
25 boy. But you're going to use the biological restroom or

1 the --

2 THE COURT: Miss Lane, that is not even close to  
3 what the effect of a stay issued by an appellate Court does.  
4 It's no disposition of the merits; and, in fact, the fifth  
5 vote necessary for the stay, Justice Breyer, affirmatively  
6 said he is casting a vote for the stay as a courtesy. What  
7 more could a Justice of the U.S. Supreme Court say to  
8 indicate that he or she was deciding absolutely nothing on  
9 the merits?

10 MS. LANE: Your Honor, I am not saying that the  
11 Order says this. But the effect of that Order is that the  
12 preliminary injunction that was set forth by the Eastern  
13 District in Newport News of Virginia was that G.G. was  
14 supposed to be able to use the bathroom, restroom, of which  
15 he identified.

16 THE COURT: Right.

17 MS. LANE: The Supreme Court stayed that order. He  
18 is not able to use the restroom of which he identifies. They  
19 also stayed the Fourth Circuit mandate, which is an  
20 incredible change in the landscape of this issue. And at  
21 that time that --

22 THE COURT: So then is Judge Schroeder's decision,  
23 which came post all of that in Carcano, is he off on some  
24 frolic and detour when he says we're going to wait and see  
25 what -- we will all learn what the Supreme Court says, but as

1 a procedural matter, I am obligated to move ahead? Was he  
2 off on a judicial folic and detour?

3 MS. LANE: No, Your Honor. As I previously stated,  
4 he sits in that Circuit. So of course he has to follow what  
5 the Fourth Circuit decision states, and that that is still  
6 the Fourth Circuit panel decision until the Supreme Court  
7 issues its decision.

8 THE COURT: So help me understand, Miss Lane, if  
9 the record reflects that nobody knew that the Plaintiffs were  
10 using restrooms consistent with their gender identity, that  
11 with the one exception you stated relative to Miss Bowman's  
12 affidavit, nobody knew of any problems, and the District has  
13 no present intention of enforcing Resolution 2 by the  
14 sanctions that are available under its code of student  
15 conduct, what is the rational basis then for passing  
16 Resolution 2?

17 I'm not ruling that that's the standard, but let's  
18 start with the easy level. If there was no known problem,  
19 there was no perceived need to investigate how the restrooms  
20 were being used, and post passage of the resolution, there's  
21 no present intention to enforce it with the sanctions that  
22 are available to the School District, why did the District do  
23 it?

24 MS. LANE: Your Honor, respectfully, that's not the  
25 accurate reflection of the record. There was an

1 investigation when the complaints were brought forward by the  
2 community members. The declaration --

3 THE COURT: But prior to that nobody looked into  
4 it. This wasn't on anyone's radar.

5 MS. LANE: The resolution wasn't passed until after  
6 these events occurred. All of those community members  
7 attending board meetings, the District trying to have a  
8 six-month period of consensus building, the District bringing  
9 in Children's Hospital to inform the community as well as the  
10 school board members of the issue --

11 THE COURT: Was Resolution 2 consistent,  
12 inconsistent or indifferent to the presentation from  
13 Children's Hospital?

14 MS. LANE: Children's Hospital didn't give any  
15 opinion from the slides that I reviewed. I was not present  
16 during the actual presentation. But the slides that were  
17 part of the -- what we're referring to as a declaration,  
18 which was a bunch of exhibits attached, that do not  
19 specifically reference the use of restrooms within that  
20 PowerPoint slide from Children's Hospital.

21 THE COURT: So then that was indifferent to the  
22 board's decision making? It didn't matter one way or the  
23 other? It was important that they came, but what was  
24 reported by the medical and psychological professionals from  
25 Children's Hospital was neither in furtherance of nor in

1 opposition to the resolution that was adopted? Is that what  
2 you're saying?

3 MS. LANE: The resolution was adopted as the -- in  
4 our findings of fact, we have a statement by a board member  
5 saying that she believes after all the information, all of  
6 the legal information provided by their Solicitor, as well as  
7 the action of G.G. in issuing a stay, that this is the same  
8 effect in placing as we commonly understand the use of  
9 bathrooms to be based upon biology.

10 THE COURT: But that part of the declaration seems  
11 to -- one conclusion that could be reached from it is it  
12 stands for the proposition that the board members believed  
13 that it was lawful to do what they did.

14 The question is why did they do what they did? If  
15 my understanding is correct, that prior to this coming to the  
16 administration's attention due to a parent inquiry, who was  
17 using restrooms was not on the radar of things that the  
18 administration of the School District was concerned about day  
19 in and day out.

20 There was at best one student complaint; and if, as  
21 you tell me now, there's no present intention by Dr. Miller  
22 and his subordinates to enforce this resolution by the  
23 sanctions available under the code of conduct, why was this  
24 passed? What Governmental interest does this further?

25 MS. LANE: And if I could just -- your factual

1 pattern to me as far as enforcement was suspension. They are  
2 utilizing the interview, meeting and counseling that is  
3 within the code of conduct, just to provide that.

4 THE COURT: So they have no present intention to go  
5 beyond talking with the kids?

6 MS. LANE: I'm not aware of any present intention  
7 to suspend the particular Plaintiffs for a violation --

8 THE COURT: Or anybody else. We'll take it away  
9 from these three individuals. If there's a different  
10 transgender student No. 4, if they consistently and  
11 persistently use the restroom consistent with their gender  
12 identities but inconsistent with the sex listed on their  
13 birth certificate, the greatest disciplinary risk they will  
14 face is continued to be talked to?

15 MS. LANE: As we understand the fact pattern as it  
16 is today.

17 THE COURT: Okay. I got it.

18 MS. LANE: The Resolution 2 was passed as the  
19 school board's directive to be responsive to the community  
20 concerns over the privacy interests of the students, all  
21 students.

22 Resolution 2 applies to all students. It refers to  
23 biology as a basis for the use of restrooms --

24 THE COURT: But isn't the record clear, Miss Lane,  
25 that everyone knew that the moment after Resolution 2 was

1 passed, it would change the daily living of exactly three  
2 people? That the world would continue to spin on for  
3 everyone else other than the three Plaintiffs exactly as it  
4 has spun on before? Isn't that accurate?

5 MS. LANE: I'm not sure the record really reflects  
6 that because we have ten unisex restrooms, and we know that  
7 they were being used. We don't know -- and it's somewhat  
8 absent from any filings on behalf of Plaintiff the  
9 recognition that ten unisex restrooms exist in this high  
10 school.

11 And you know, they possibly are choosing or  
12 refusing to use those restrooms, but I don't know the level  
13 of use of the individual --

14 THE COURT: So there could be other transgender  
15 students who have for some time been using the single user  
16 restrooms?

17 MS. LANE: There could be, Your Honor, just as  
18 there are other students that are using those restrooms.  
19 Staff members are using the restrooms as well.

20 THE COURT: The post G.G. letter that came out from  
21 the Department of Justice and the Department of Education,  
22 from the District's perspective is the heft, if you will, of  
23 that letter and the analysis that's contained in it, would it  
24 have been effective if it had been signed by the Attorney  
25 General and the Secretary of Education, or would you be in

1 exactly the same spot?

2 MS. LANE: We're at the same spot because the  
3 document itself references that it's a significant guidance  
4 document. The Office of Management and Budget refers to what  
5 can be contained within a significant guidance document,  
6 which speaks squarely to the fact that the agency cannot  
7 impose new rules upon a recipient, that that is the  
8 legislative process.

9 This agency overstepped. They used language,  
10 mandatory language, "shall", "must", in that Dear Colleague  
11 letter, which makes it violation of the procedure --  
12 Administrative Procedures Act, which squarely says you can't  
13 impose new regulations, new requirements because at the time  
14 Title IX was written, it was written to address  
15 discrimination of women as opposed to men in the educational  
16 opportunities --

17 THE COURT: But we would all agree sitting here  
18 today, December 1, believe it or not, 2016, that Title IX  
19 protects the interests and rights of both men and women  
20 equally?

21 MS. LANE: It does, Your Honor.

22 THE COURT: So whatever its purpose was, we all  
23 know that sitting here today, just like Title VII protects  
24 the interests and rights of men and women on the same terms,  
25 even if what motivated Senator Humphrey to introduce Title



1 VII was the impact on women -- or to introduce the Humphrey  
2 amendment to Title VII was the impact on women, it applies to  
3 men and women equally?

4 MS. LANE: Right. And then the sponsor of Title IX  
5 specifically referenced the purpose and intent to address at  
6 that time the unequal opportunities in education for women.  
7 So there has been some movement in Title IX --

8 THE COURT: So doesn't that really create a little  
9 bit of a hurdle for you? Because if the record is clear that  
10 at the time Title IX was passed, its purpose was to remedy  
11 inequities in the treatment of women in an educational  
12 setting where federal funds are involved, but the case law is  
13 without doubt sitting here today that it protects the  
14 interests of both men and women from inequitable treatment  
15 based on sex in educational settings, that means that Title  
16 IX goes beyond what the purpose was in 1975 when it was  
17 passed? Right?

18 MS. LANE: No, Your Honor, because the text says  
19 you are to review it, as the text of the statute specifically  
20 says, on the basis of sex; and throughout the statute it  
21 refers to one sex and the other sex, which clearly provides  
22 guidance that they meant men and women at that time that it  
23 was written.

24 THE COURT: Okay. Shall we hear from Mr. Foley?  
25 Thank you, Miss Lane. Always good to see you. Thanks for

1 making your presentation.

2 MR. FOLEY: Good morning, Your Honor.

3 THE COURT: Good morning -- good afternoon, Mr.  
4 Foley.

5 MR. FOLEY: Yes. Good afternoon, to be accurate.  
6 I'm up here to address the irreparable harm aspect of the  
7 preliminary injunctive relief, Your Honor; and as you're  
8 aware --

9 THE COURT: Do you agree with Miss Ingelhart that  
10 as a matter of settled -- what she says is settled federal  
11 law, that if there's a demonstrated violation of the equal  
12 protection clause of the Fourteenth Amendment, there need not  
13 be actual harm, that the harm is to be presumed, and it's  
14 presumed to not be remedial through money damages?

15 MR. FOLEY: I don't believe that to be the case,  
16 Your Honor, for a couple of reasons. The first reason is I  
17 just want to differentiate one of the cases that she  
18 mentioned, which was the Murray decision, which was a Third  
19 Circuit case. And that case is actually where they obtained  
20 their cite for that proposition, and if I may, Your Honor,  
21 read that cite --

22 THE COURT: Sure.

23 MR. FOLEY: -- for the record it's, quote,  
24 "Moreover, whereas here preliminary injunctive relief is  
25 requested to prevent the violation of constitutional rights,

1 no further showing of irreparable harm is required," closed  
2 quote.

3 And what I just want to draw to the Court's  
4 attention is that quote that is taken from that Third Circuit  
5 Murray decision is part of the opinion that addresses the  
6 procedural history.

7 And what that quote is taken from or what that  
8 quote is is actually the memorandum -- not opinion, but the  
9 legal memorandum that was drafted by Plaintiff's counsel in  
10 the incidents. So that's what Plaintiff's counsel was saying  
11 and arguing to the Court, not what the actual holding of the  
12 Third Circuit Court was at that time.

13 But what the Murray Court does or what the Murray  
14 decision does discuss in terms of that memorandum is the  
15 Elrod opinion of the Superior Court. And what the Elrod  
16 opinion says, and I'll quote this as well, is "the loss of  
17 First Amendment freedoms for even minimal periods of time  
18 unquestionably constitutes irreparable injury," closed quote,  
19 and that in this instance, and this once again is a quote,  
20 "such injury was both threatened and occurring."

21 So we believe that the difference here, Your Honor,  
22 is that --

23 THE COURT: So you're saying if there is a  
24 proven -- I'm not saying there is or isn't, but if it would  
25 be demonstrated that there is a violation of the equal

1 protection clause of the Fourteenth Amendment, there's not  
2 presumed irreparable harm? Fourteenth Amendment equal  
3 protection is different than the First Amendment?

4 MR. FOLEY: Yes. That is exactly what I'm saying,  
5 especially when you're talking about fundamentally  
6 constitutional rights such as the First Amendment; and also,  
7 Your Honor, I think it's important to understand that we're  
8 talking about a violation that was actually occurring.

9 THE COURT: So if a school district in another  
10 place altogether -- I'm not imputing this at Pine-Richland at  
11 all. If a school district had two precisely equal schools,  
12 one for Caucasians and one for African-Americans, but the  
13 educational opportunities being provided were precisely  
14 identical so that we would have a hallmark facial violation  
15 of the equal protection clause, but no actual harm that could  
16 be proven, there would not be irreparable harm from that  
17 situation?

18 MR. FOLEY: I would -- responding to the  
19 hypothetical, I believe that it could be true that there  
20 would be; but once again, and I can't remember what your  
21 exact words were, Your Honor, but you're talking about a  
22 cliched instance of discrimination, which once again, and  
23 that's where I think the Elrod case was important --

24 THE COURT: Well, to paraphrase Chief Justice  
25 Warren, we hold that in the field of public education,

1 separate facilities are inherently unequal and violate the  
2 Constitution of the United States.

3 I'm not drawing any equality here; but in Brown,  
4 while there was anecdotal testimony in one of the underlying  
5 District Court cases from Professor Clark and others, a  
6 holding in Brown is that the fact of separation constituted  
7 the equal protection violation.

8 So the question is: To prove a violation of the  
9 equal protection clause of the Fourteenth Amendment, must a  
10 Plaintiff show discrete, actual harm? Or is the violation of  
11 the equal protection clause of the Fourteenth Amendment in  
12 and of itself a violation of the Constitution which deprives  
13 someone in a way that creates presumed irreparable harm?

14 MR. FOLEY: If I may, Your Honor, the distinction  
15 that I think is important to draw here -- and maybe I didn't  
16 draw this from your hypothetical -- is the distinction  
17 between actually establishing a claim of equal protection in  
18 and of itself, disposition on the merits, what are the  
19 damages, versus a claim the --

20 THE COURT: If there is no Fourteenth Amendment  
21 violation, nobody ever has to get to the question of harm.  
22 The Plaintiffs have to demonstrate that there is a fair  
23 probability of success on the merits. That is, to get their  
24 injunction, they have to show that there's a fair probability  
25 that they have a winner on the Fourteenth Amendment claim.

1           But what they say is if we can show, Judge, that we  
2 have a fair probability of having a winner on the Fourteenth  
3 Amendment claim, we don't have to prove actual harm to the  
4 Plaintiffs.

5           Now, Miss Ingelhart says I have a whole list of it,  
6 Judge, but I really don't need it. This is sort of extra  
7 stuff I'm telling the Court. But she says you don't have to  
8 make any findings that there was actual harm to any of the  
9 Plaintiffs because if we show that there's a Fourteenth  
10 Amendment violation -- and she seemed pretty certain about  
11 this -- she seemed to be telling the Court if they show that  
12 there's a Fourteenth Amendment violation, it's game, set,  
13 match. Harm is presumed.

14           You're telling me in the context of the Fourteenth  
15 Amendment harm is not presumed from a violation of the equal  
16 protection clause?

17           MR. FOLEY: That is what I believe, Your Honor.

18           THE COURT: Okay. Post Brown? Going back to 1954?  
19 I mean that's sort of the biggy in the field of equal  
20 protection.

21           MR. FOLEY: Right. Once again, I'm not aware of  
22 any case law that has established --

23           THE COURT: Fair enough. And the constitutional  
24 interests, there is a spectrum under the Constitution of the  
25 rights, and we'll hit the books here also, but you're of the

1 view that there is no presumed harm that flows as a matter of  
2 legal consequence if there is a violation of the equal  
3 protection clause of the Fourteenth Amendment?

4 MR. FOLEY: That is correct. I'm not aware of  
5 that.

6 THE COURT: I got it. And it has to be from your  
7 perspective not only harm, it has to be irreparable harm?  
8 Immediate and irreparable?

9 MR. FOLEY: Absolutely. And to that point, Your  
10 Honor, I would just like to comment on the -- there's a  
11 couple of harms that they've mentioned, as you're aware, and  
12 one of them I'd like to comment upon, which has been brought  
13 up on various occasions of course in their briefs and in  
14 terms of to this Court today, is the marginalization and  
15 stigmatization.

16 And I think that's important for this Court to  
17 understand on a couple of levels. The first one, Your Honor,  
18 is I just want to draw your attention to the fact --

19 THE COURT: Do you live in Allegheny County, Mr.  
20 Foley?

21 MR. FOLEY: I'm from Upstate New York, Your Honor.

22 THE COURT: Where do you live now?

23 MR. FOLEY: I live in Moon Township.

24 THE COURT: Okay. So you're in Allegheny County.

25 Just using this as an example, if tomorrow morning Allegheny

1 County Council passed an ordinance that was generally stated,  
2 but when you looked into it, it turned out it applied to  
3 exactly two people, you and Miss Lane, and I'm not saying  
4 they should do this or would do this, but if that's what it  
5 turned out, and the facts were pretty clear that they knew  
6 that it would apply just to you and Miss Lane, does that act  
7 in and of itself, does that legislative action constitute  
8 stigmatization? Because that seems to be, when you peel back  
9 all the layers of the onion, one of the parts of the guts of  
10 the Plaintiffs' argument.

11 MR. FOLEY: Right. And I think -- I want to speak  
12 to specifics of this case, Your Honor, if I may, just for a  
13 moment. And that is to say that I don't believe, Your Honor,  
14 and I think the School District at the time of trial will be  
15 extremely -- and I use that word --

16 THE COURT: Advisedly --

17 MR. FOLEY: Right -- extremely adamant that by the  
18 passage of Resolution No. 2, they in no way were saying to  
19 the Plaintiffs or any other of those students at the District  
20 that they are a boy or they are a girl.

21 What I believe that they were saying -- and once  
22 again, Your Honor, this will be brought out I think if this  
23 case was to go to trial, I believe what they were saying, and  
24 I believe the record reflects this, and our brief reflects  
25 this, is that if -- and as a side point, Your Honor, if that



1 was the case, they wouldn't be doing all the other things  
2 they're doing to treat these students consistent with their  
3 gender identities.

4 I think what Resolution 2 says, much similar to  
5 that Regulation 106.33, is that when you are performing a  
6 biological function, then you are to use a facility that is  
7 designated as specifically related to that biology or, to use  
8 a term of Plaintiffs, their anatomy, Your Honor.

9 THE COURT: Well, let me ask you this, Mr. Foley.  
10 I hear what you believe the evidence at trial would be, but  
11 all the time here in court, I suspect you and Miss Lane and  
12 Mr. Gonzalez-Pagan don't have different experiences, there  
13 are oftentimes situations in which witnesses, decision  
14 makers, actors in litigation don't affirmatively pronounce  
15 what their intention is before they do it for any number of  
16 reasons, not necessarily illegitimate.

17 But we allow fact finders, whether it's jurors  
18 sitting over there or a Judge, to infer intent from the  
19 natural and probable consequences of what adults see  
20 happening in front of them.

21 So how is it that in terms of using a restroom, the  
22 School District -- and I'm not saying this drives the legal  
23 conclusion. I don't know what the legal conclusion is -- but  
24 isn't the District telling Miss Evancho you're a boy, because  
25 your restroom choices are twofold: The single user facility

1 or the boy's room?

2 So, yes, in every other aspect of your day-to-day  
3 relationship with the School District, we recognize that you  
4 are a girl, but we're telling you you're a boy in terms of  
5 using the restroom? And again, I'm not coming to any legal  
6 conclusion as to whether that's permissible or not.

7 But no offense, isn't that kind of what's happening  
8 here, contrary to what you said?

9 MR. FOLEY: I don't believe so, Your Honor, and the  
10 reason why -- and once again, I don't want to misspeak for  
11 the District here, but in response to your question --

12 THE COURT: You and Miss Lane are all they have.

13 MR. FOLEY: -- is there's various levels of the  
14 analysis in this case. What does sex mean in terms of Title  
15 IX? What does sex mean at the time Title IX was drafted?  
16 What could it mean now? What does Ehrensaft say? What do  
17 experts we may put on say?

18 There's various levels of that, but I think when it  
19 relates to Resolution No. 2, I don't -- Resolution No. 2  
20 isn't driving at, so I'm just disagreeing -- driving at boy  
21 versus girl. And that's why the District specifically uses  
22 the word biology. Or I want to be more clear, and I do think  
23 that --

24 THE COURT: What did the duly elected and sworn  
25 members of the School District have in mind? Miss Lane, your

1 distinguished colleague, just got up and told me that they  
2 have all relied on seeking that in furtherance of a whole  
3 fleet of U.S. Supreme Court decisions that said that sex is a  
4 binary concept, men and women, boys and girls.

5           So if after Mr. Clair gave them his legal tutorial  
6 and was put through the ringer, and according to Miss Lane,  
7 the purpose of the resolution was to further what had been a  
8 lawful -- what the District says is a lawful distinction that  
9 is binary and biologically based between boys and girls, men  
10 and women, what else did they have on their mind? I'm not  
11 saying that's impermissible. I'm saying what else was it?

12           MR. FOLEY: Once again, I want to differentiate, if  
13 I may, Your Honor, between the legal arguments that Miss Lane  
14 was addressing and the factual aspect of the irreparable  
15 harm, and the only reason -- I'm not trying to get out of  
16 your question, but what I'm trying to say is I believe --

17           THE COURT: You won't be the first if you have --

18           MR. FOLEY: -- what Miss Lane I believe was getting  
19 at in terms of what sex means and binary means is when we're  
20 talking about discrimination based upon sex as related to  
21 Title IX. She can speak for herself when she comes up here,  
22 Your Honor, but that's my belief, but --

23           THE COURT: You're both partners in the same law  
24 firm; right? You're on the same team?

25           MR. FOLEY: Right.

1 THE COURT: This isn't like the Dolphins and the  
2 Jets.

3 MR. FOLEY: No, but when the District passed  
4 Resolution No. 2, they knew that they were addressing  
5 anatomy, which our position is is different than what anybody  
6 else may say in terms of what sex means, Ehrensaft, or what  
7 sex means in terms of Title IX. There's an anatomy to  
8 restroom use.

9 THE COURT: So they were declaring for purposes of  
10 the restroom use Miss Evancho is a boy? That's the natural  
11 and probable consequences of the enactment and enforcement of  
12 Resolution 2?

13 MR. FOLEY: What I believe it is, Your Honor, is  
14 that --

15 THE COURT: It's okay. You can say it.

16 MR. FOLEY: -- you have a penis, and you are to use  
17 the room with individuals who also have a penis. The same  
18 thing is true of a woman. You have a vagina, and there's  
19 certain things you have to do with that vagina as a woman in  
20 the restroom. We want you to do that in the presence of  
21 other women.

22 I'm not a woman, so -- I know you have a confused  
23 look on your face. But I'm assuming there's hygiene type --

24 THE COURT: I have a confused look, but it's not  
25 for that reason --

1 MR. FOLEY: -- that women must do in terms of that;  
2 and once again, I don't want to speak for what other board  
3 members may have positioned themselves as stating, my  
4 understanding by discussing these matters with a client is  
5 that it was a biological, slash, anatomical factor that went  
6 into Resolution No. 2, but too, once again, the reason why  
7 I'm up here, Your Honor --

8 THE COURT: So if -- and I know this is a  
9 hypothetical. So I'm not going to use the name of any  
10 Plaintiff. So if there was a student at the Pine-Richland  
11 High School that was over the age of 18 and through medical  
12 intervention had completely transitioned from a birth  
13 recorded sex of female -- of male to female, they had  
14 undergone complete hormonal treatment and gender reassignment  
15 surgery, which restroom would they use based on your example?

16 MR. FOLEY: If they were -- and I couldn't remember  
17 which way you were going, but if they were girl and they made  
18 the transition --

19 THE COURT: They were male at birth. They were  
20 listed on their birth certificate as a male at birth, and  
21 they've gone complete gender reassignment, including surgery.  
22 They could do that because they were over 18. So it's  
23 consistent -- or not inconsistent with current medical  
24 diagnosis at least as it's been reported to the Court, but  
25 they were still a student. Which restroom would they use?

1 Their birth certificate says male. They have undergone  
2 complete gender reassignment surgery.

3 MR. FOLEY: Female. Biology. And that's what --  
4 that would be how I would counsel if I was Mr. Clair to them  
5 in terms of what -- how that would go. I'd say she is  
6 biologically a female. So she uses the female restroom.

7 THE COURT: So I don't mean to demean the argument  
8 of any lawyer in the case or demean the proceeding. If I  
9 understand your argument reduced to its core, the question is  
10 what anatomy exists between a student's legs determines which  
11 restroom they use, and that is the important Governmental  
12 interest? Or is the Governmental interest?

13 And I know that sounds crude, and I don't intend to  
14 do that, but I'm following up on your argument.

15 MR. FOLEY: Right. And once again, I'm trying to  
16 circle back to let you know I'm not addressing here today in  
17 front of this Court what the interest was of the School  
18 District.

19 What I was trying to get at in terms of my role  
20 today with irreparable harm is the fact that the Plaintiff  
21 stated that the irreparable harm comes from the fact that the  
22 district is saying to them vis-a-vis Resolution No. 2 you are  
23 a boy or a girl, and my argument specifically regarding  
24 irreparable harm is that is not true, and there is no --

25 THE COURT: How can that not be true, Mr. Foley?

1 I'm not saying whether it is or isn't irreparable harm, but  
2 how can it not be a fact that it is telling Miss Evancho for  
3 purposes of using the restroom you're a boy? And I'm not  
4 saying they can or can't tell her that, but isn't that what  
5 they're telling her?

6 MR. FOLEY: It's saying you have -- once again,  
7 Your Honor, I think if it was saying boy or girl, I think the  
8 language used by Resolution No. 2 would have been boy or  
9 girl. But it doesn't. The word in Resolution No. 2 is  
10 biology. And I think that is very important --

11 THE COURT: But Dr. Miller and his colleagues have  
12 to enforce this resolution every day. Dr. Miller is a  
13 commissioned officer of the Commonwealth. I presume he's  
14 been duly -- Mr. Clair made sure he's duly appointed as the  
15 superintendent, sworn in, took the oath. He's obligated to  
16 enforce Resolution 2.

17 Isn't he obligated to tell Miss Evancho if she's  
18 going to use a non -- a restroom other than a single user  
19 restroom, she must use the boy's restroom? So for purposes  
20 of using the restroom in the eyes of the Pine-Richland School  
21 District, Miss Evancho is a boy? For all other purposes  
22 she's a girl for reasons you've articulated?

23 MR. FOLEY: Right.

24 THE COURT: And she will be treated as a girl, but  
25 for that purpose, she is a boy? I'm not saying it's legal or

1 illegal, but isn't that the reality?

2 MR. FOLEY: I respectfully disagree with you, Your  
3 Honor. I think there's a difference between saying you are a  
4 boy and the difference between saying you are to use that  
5 room that other people with the same biology would use.

6 We're going to have to respectfully disagree. I  
7 get your point, Your Honor --

8 THE COURT: But if any of us went out to the  
9 Pine-Richland School District and we went up to the restroom  
10 that's to be used by people that are biologically boys, would  
11 we see a sign outside of the restroom?

12 MR. FOLEY: Yes.

13 THE COURT: And what would it say?

14 MR. FOLEY: Boys or men. Yes.

15 THE COURT: So the natural and probable conclusion  
16 to be reached is the people that should use that room and the  
17 only people that should use that room are people that the  
18 Pine-Richland School District and perhaps others have  
19 designated as boys?

20 MR. FOLEY: I agree with that logic. Right. But  
21 once again --

22 THE COURT: So if we tell someone to use that room,  
23 inferentially we're telling them you should use that room  
24 because you're a --

25 MR. FOLEY: Boy. I think maybe inferentially --



1 THE COURT: I'm not saying -- I reach no conclusion  
2 as to right or wrong, but isn't that --

3 MR. FOLEY: I understand.

4 THE COURT: Isn't that --

5 MR. FOLEY: Yeah. But to go back, Your Honor --  
6 and maybe we can work it this way -- is that despite that  
7 scenario --

8 THE COURT: Notwithstanding.

9 MR. FOLEY: Notwithstanding that scenario, I  
10 fervently believe, and I think the District would fervently  
11 testify, is that sending a message or -- to any of their  
12 students regarding how they regard them as related to their  
13 gender identity was not an intent of Resolution No. 2.

14 THE COURT: Let me ask you this, Mr. Foley, and I  
15 appreciate that, sir, and I really -- I mean this beyond  
16 sincerely. I appreciate you bearing with me because I found  
17 in the time I've been in this job that pressing the issues  
18 all the way to the end points, both up, down, inside and out,  
19 is the way that it helps me get my arms around the arguments  
20 that are being advanced by counsel in any case --

21 MR. FOLEY: I'm glad you said that in front of my  
22 partner Mike Brungo so he knows when I do it with him.

23 THE COURT: No. I very much appreciate you bearing  
24 with me on this, but let me ask you this, sir. And I'm  
25 not -- I think the record reflects, and I think the

1 Plaintiffs have acknowledged the record reflects -- I think  
2 they said it at the podium today -- that in all the other  
3 aspects of the day-to-day relationship between the School  
4 District and the Plaintiffs, the School District has been  
5 respectful of those students. There's nothing in the record  
6 that certainly indicates to the contrary.

7 MR. FOLEY: Sure.

8 THE COURT: What is the -- part of what I think I'm  
9 reading in the materials submitted by the Plaintiffs is that  
10 the stigma that they say exists and that they say reaches  
11 legally cognizable proportions is -- part of it is what  
12 happens when those in official positions in essence speak out  
13 of both sides of their mouth, that we will treat -- pick any  
14 one of the Plaintiffs. Pick either Miss Evancho or  
15 Miss Ridenour. I'm not making it specific to either one.

16 We will in all respects of your life treat you as a  
17 girl except this one. We will treat you in multiple ways as  
18 a matter of official conduct and policy. Is that a problem  
19 or not? Maybe it isn't.

20 MR. FOLEY: Your Honor, I believe that is a problem  
21 if it is, in fact, true, that by doing so the District or any  
22 other legislative body is, in fact, speaking out of both  
23 sides of their mouth. But I don't think -- and let me make  
24 sure I get this point out -- I don't think we can infer, and  
25 I think that's what Plaintiffs are doing, is that by virtue

1 of the fact that we have a dichotomy between the practices at  
2 the School District as they've admitted are taking place with  
3 the Plaintiffs and the fact that Resolution No. 2 exists, I  
4 don't think we can say that that is per se speaking out of  
5 both sides of your mouth.

6 THE COURT: Let me ask you this, Mr. Foley, in that  
7 regard. For the legal analysis of an equal protection claim,  
8 through whose lens does the law examine? So let's assume for  
9 purposes of discussion a policy making body of a unit of  
10 Government, making it separate from the Pine-Richland School  
11 Board, a policy making unit of Government enacts a  
12 classification.

13 You could ask every one of the policy makers what  
14 their motives were for enacting the classification, and they  
15 uniformly credibly testify to only benign motives. There is  
16 no malevolent, malicious motive from their perspective at  
17 all, and it's credible when they say that.

18 So through their eyes, the classification is  
19 entirely benign and is not intended to cause and from their  
20 perception does not cause any diminishment or stigma.

21 We then talk to those who are being classified.  
22 And they say, again, credibly, we would all hear them and all  
23 come to the conclusion, we believe them, they testify  
24 credibly that the fact of separation stigmatizes us. The  
25 fact that we are being treated separately inherently makes us

1 unequal. Whose eyes does the law look through in making that  
2 analysis?

3 MR. FOLEY: I believe it will look through the eyes  
4 of the decision maker.

5 MR. GONZALEZ-PAGAN: Your Honor, if I may request a  
6 brief -- to be excused for a few --

7 THE COURT: We always grant recesses when requested  
8 by a participant in a proceeding. We will take a five-minute  
9 recess -- or when we're back. It's now 12:35. We'll take a  
10 recess until Mr. Babik tells me everybody's back in the  
11 courtroom. Once that happens, we'll then figure out what the  
12 schedule is for the balance of the proceedings.

13 MR. GONZALEZ-PAGAN: Thank you, Your Honor.

14 THE COURT: Mr. Babik, if you'd recess the Court.

15 MR. BABIK: All rise.

16 (A recess was taken at 12:35 p.m.)

17 (12:44 p.m.; in open court:)

18 THE COURT: Mr. Foley, let me ask you this -- and  
19 this is going to be a tough question. We've been at this for  
20 three hours and fifteen minutes. This is not an endurance  
21 contest. Should we take our lunch break now for a little  
22 bit?

23 MR. FOLEY: Sure, Your Honor.

24 THE COURT: I'm betting that your side of the case  
25 and Mr. Gonzalez-Pagan's side of the case have more than

1 about ten minutes each.

2 MR. FOLEY: Sure. Well, what I would ask, Your  
3 Honor, in all due respect, depending on what you want to get  
4 into with me for further discourse, do you need more  
5 information from me related to the irreparable harm?

6 THE COURT: I do not.

7 MR. FOLEY: No offense, but if I'm done --

8 THE COURT: Then you're done for this phase of the  
9 proceedings?

10 MR. FOLEY: Yes.

11 THE COURT: Terrific, Mr. Foley. I appreciate  
12 that.

13 Mr. Gonzalez-Pagan, I know that your side of the  
14 room has a slightly longer commute than the rest of us. And  
15 I'm not asking you to alter your travel plans, but I also  
16 want to be fair to counsel. If I thought we were all going  
17 to be done in half an hour, cumulatively then I'd say let's  
18 just plow ahead, you know, broadly spoken. But if not, then  
19 I would say let's take a lunch break. What do you think we  
20 should do, Mr. Gonzalez-Pagan?

21 MR. GONZALEZ-PAGAN: We would be in agreement with  
22 a lunch break, Your Honor, and we made plans accordingly.

23 THE COURT: Mr. Foley, do you have any problem if  
24 we take a lunch break?

25 MR. FOLEY: We do not, Your Honor.

1 THE COURT: Okay. I apologize to counsel. We no  
2 longer have our nice little cafeteria down on the first floor  
3 of the building. So you have to go out of the building. If  
4 we took an hour, but all tried to really be back, you know,  
5 maybe even if we did the best we could and got back here by  
6 like 1:35, do you think that's crazy? And nobody's going to  
7 be in hot water if it takes an hour to get back because you  
8 have to clear security and all that. Does that work, the old  
9 college try for that, Mr. Foley?

10 MR. FOLEY: Sure.

11 THE COURT: Mr. Gonzalez-Pagan, does that work for  
12 you?

13 MR. GONZALEZ-PAGAN: Yes, Your Honor.

14 THE COURT: So just so everyone knows so we have a  
15 preview of coming attractions, when we come back, I take it  
16 for this phase, phase two of the argument, the School  
17 District will be done. We'll now go back to rebuttal to the  
18 Plaintiffs? Miss Lane?

19 MS. LANE: We have just to address the balance of  
20 the harms and the --

21 THE COURT: Okay. So you'll come back up for  
22 little bit. Terrific. And then we'll hear from you, Mr.  
23 Gonzalez-Pagan in terms of rebuttal and in response to the  
24 motion to dismiss. And then we'll have any wrap-up from the  
25 School District. Is my sense of things correct?

1 MR. GONZALEZ-PAGAN: Yes, Your Honor.

2 THE COURT: Mr. Foley?

3 MR. FOLEY: Yes, Your Honor.

4 THE COURT: Okay. Great. Terrific. So Mr. Babik,  
5 if you could recess the Court, let's shoot for 1:35 or so,  
6 but nobody's going to be in trouble if we end up not getting  
7 started until about 1:45. Great. Thank you, Counsel.

8 (A luncheon recess was taken at 12:46 p.m.)

9 (1:45 p.m.; in open court:)

10 THE COURT: Miss Rowe, note that all parties are  
11 present represented by counsel. Mr. Foley, were you done  
12 with your side of things?

13 MR. FOLEY: Yes, Your Honor, other than Miss Lane  
14 discussing the balance of the equities --

15 THE COURT: Terrific. So Miss Lane, happy to hear  
16 from you.

17 MS. LANE: Thank you, Your Honor. If I may, you  
18 had questioned me on the enforcement of --

19 THE COURT: Right. We had a dialogue going --

20 MS. LANE: Yes. For my purposes and for the Court,  
21 I would like to direct your attention to within  
22 Mr. Gonzalez-Pagan's declaration is an E-mail that I've  
23 referenced, and I don't have the specific --

24 THE COURT: Is it the September 14, 2016, E-mail?

25 MS. LANE: Yes. Thank you, Your Honor.

1 THE COURT: Okay. I'll flip to that. I have it in  
2 front of me, Miss Lane.

3 MS. LANE: So the question is to the level of  
4 enforcement, and I was focusing on the incidents that the  
5 District was aware of through the declaration of Miss Nancy  
6 Bowman.

7 And in this correspondence, it refers to a  
8 telephone conversation the District Solicitor had with  
9 Mr. Gonzalez-Pagan, and it talks about the administration  
10 responding in accordance with its usual disciplinary  
11 processes and sequences. And it offers that interventions  
12 for violation of school rules are always measured and imposed  
13 in relation to the type, context, severity, and that it would  
14 be based upon the facts dependent of the circumstances.

15 It offers to Mr. Gonzalez-Pagan that lower level  
16 infractions carry low level consequences, higher level carry  
17 greater consequences, and that the District would, based upon  
18 the facts in the context of the violation, would refer to its  
19 disciplinary code, which is attached -- or reference is made  
20 as to where Mr. Gonzalez-Pagan could find that --

21 THE COURT: Right. It's hyperlinked.

22 MS. LANE: So I wanted to be clear that --

23 THE COURT: That's very helpful.

24 MS. LANE: -- the conversation was that -- and also  
25 it directs the intention is we are hopeful we never have to



1 do this, and we are hopeful that your clients would consider  
2 other avenues in seeking to challenge Resolution 2, but that  
3 in the need we would enforce through our discipline code  
4 specific to the facts as presented.

5 So the facts as presented thus far have warranted  
6 the lower level discussions and counseling. I just wanted to  
7 make sure that I cleared up the record --

8 THE COURT: No. That's very helpful. I appreciate  
9 that, Miss Lane. Thank you.

10 MS. LANE: As to the balance of the harms, we have  
11 set forth in declarations through a number of board members  
12 as well as through parents, there were two parents who had  
13 students within the District and removed the students because  
14 no action had been taken in reference to what the District  
15 was going to do with their restrooms.

16 And all of those issues were based upon parental  
17 concerns of privacy. And privacy in the use of restrooms  
18 extends to everyone, not just Plaintiffs, and not just to  
19 students who are using it as -- in comfort with their  
20 biology.

21 The interest of the privacy concerns as stated  
22 cannot be minimized because that is a recognized right.

23 THE COURT: It factually -- is there a privacy  
24 issue? I've noted that the photographs -- and I know you've  
25 referred to the principal's statement that there were some

1 older restrooms, but it appeared that all of the restrooms  
2 had stalls with closing doors. So what's --

3 MS. LANE: Correct, Your Honor.

4 THE COURT: So what's the privacy risk maybe is the  
5 best way to phrase it?

6 MS. LANE: I think that in the cases that have even  
7 reviewed restrooms, and we've cited to cases that say there  
8 are zones of privacy. Privacy isn't determined by the use of  
9 doors or dividers, and it doesn't stop at the doorway  
10 entrance.

11 The facility itself and the way that we have set  
12 them up is accorded an extended privacy and that that zone of  
13 privacy in the use of the restroom itself is sufficient  
14 enough to raise the fundamental interest, the fundamental  
15 right of privacy.

16 In our brief we reference the case of Barnett --  
17 let me get to that page. Excuse me.

18 THE COURT: Aren't we really talking about sexual  
19 privacy here? Because if somebody's just nervous, if you  
20 will, and I don't mean to minimize it by phrasing it that  
21 way, but if somebody is just kind of nervous about using a  
22 bathroom in the presence of others, that's been heard of I  
23 suspect in the literature, but if I understand Mr. Foley's  
24 argument as to what the justification for the resolution is,  
25 it relates to the presence or nonpresence of specific sexual

1 organs.

2 So I'm assuming the privacy interests to be  
3 addressed here is some form of sexual privacy; and therefore,  
4 if when somebody uses the bathroom, there are stalls with  
5 doors, how is there a privacy risk -- a risk to that zone of  
6 privacy?

7 MS. LANE: Your Honor, the restroom itself is the  
8 zone of privacy, which has been recognized --

9 THE COURT: But do people take their clothes off in  
10 the bathroom?

11 MS. LANE: Yes, they do, Your Honor. If you're a  
12 teenage girl and you need to make your cross country meet,  
13 and some other team's in the locker rooms, you run in there,  
14 and you don't go into the stall. You use the corner and you  
15 throw on your gear --

16 THE COURT: So why wouldn't she use one of the ten  
17 single use restrooms in the building so that you have  
18 absolute privacy? You don't have anybody looking in.

19 MS. LANE: Well, the scenario represented in my  
20 hypothetical, my district does not have ten single use  
21 restrooms --

22 THE COURT: Well, we're litigating the  
23 Pine-Richland School District High School today.

24 MS. LANE: We are, but the zone of privacy extends  
25 to the restroom facility, and the dividers by urinals or the

1 doors itself do not matter because there have been cases that  
2 found someone looking over the -- standing on the toilet,  
3 looking over and videoing the female in that stall.

4 THE COURT: Has that ever happened --

5 MS. LANE: -- it was a violation --

6 THE COURT: Has that ever happened in the  
7 Pine-Richland School District?

8 MS. LANE: It doesn't matter that it's happened.  
9 I'm offering to you that the case law supports that the zone  
10 of privacy itself --

11 THE COURT: So the possibility that it might have  
12 happened somewhere sometime is the rational basis for the  
13 School District's action?

14 MS. LANE: Yes, Your Honor. The interest of all  
15 students and their fundamental right to privacy is the  
16 balance of harm that the District was trying to address.

17 THE COURT: But doesn't that risk occur if you have  
18 everyone using the bathroom of the same designated-at-birth  
19 sex?

20 If we have everybody that was on their birth  
21 certificate listed as a boy or girl, doesn't matter either  
22 way, using the bathroom, another girl could do what you just  
23 described, and it might well be against the law. A boy could  
24 do that. It might be against the law.

25 Is there -- here's one of the things I was trying

1 as I was eating lunch to get my arms around. If you had to  
2 tell me, Miss Lane -- or Mr. Foley, you can feel free to dive  
3 in -- if you had to say, Judge, don't interrupt me because  
4 for the next 35 or so words I am going to articulate what the  
5 rational basis was for the District's action, what problem  
6 was this the solution to? The District's answer would be --

7 MS. LANE: Your Honor, in order to pass Resolution  
8 2, they were meeting the need as addressed by their community  
9 at the meetings that said we are concerned over privacy of  
10 our children, of our students in the school building.

11 And privacy, as the Third Circuit found in *Doe*  
12 *versus Luzerne County*, does not matter if the anatomical  
13 areas of one's body is actually viewed by another. There is  
14 still a reasonable expectation of privacy, a zone of privacy  
15 in the restroom. And Resolution 2 was an attempt by the  
16 District to place the use of restrooms as they have been in  
17 our society based upon biology.

18 MR. FOLEY: If I may, Your Honor, I do think  
19 strongly that whether an incident happened or didn't happen  
20 does not mean that someone's privacy rights aren't in some  
21 way implicated.

22 Additionally, if I remember correctly, I think that  
23 parents expressed concerns in that regard and phrased it such  
24 as do we have to wait for something to happen? Sure, it may  
25 not have happened now, but what happens if it does happen?

1           And additionally I think that the School District  
2 as a whole was concerned what if it did? So --

3           THE COURT: Do you have a metal detectors at the  
4 Pine-Richland High School?

5           MR. FOLEY: They do not.

6           THE COURT: Why not? Isn't it possible someone  
7 will walk in with a gun or a knife?

8           MR. FOLEY: That is correct.

9           THE COURT: Why wait until it happens?

10          MR. FOLEY: I don't know if the decision was -- it  
11 could be financial. It could be various. I can't answer  
12 that. I don't know.

13          THE COURT: No. I mean I'm not minimizing what was  
14 articulated to the school board, but the rational basis test  
15 isn't the rational possibility test. So I guess I'm -- right  
16 now if a boy or a girl at Pine-Richland takes their clothes  
17 off in the bathroom and they're not in a stall with the door  
18 closed, others can see them.

19          MS. LANE: If they're in the actual restroom.

20          THE COURT: Right. They're in the corner, the  
21 place that you described. So --

22          MS. LANE: The privacy concern is not being seen by  
23 someone who has the same parts, the same anatomy as you --

24          THE COURT: So this is all about anatomy? It's not  
25 about sexual attraction or anything else?

1 MS. LANE: No, Your Honor. Resolution 2  
2 specifically says biology. You will use it, as Mr. Foley  
3 explained, as to the parts that you use to use the facility.  
4 That's the basis. That's how Resolution 2 is written. And  
5 the concern by parents that are in our declarations is all  
6 about privacy for all --

7 THE COURT: But unless you're telling me that --  
8 and maybe you are, Miss Lane, and that will make it easier  
9 for me to get my arms around -- whatever the concerns were  
10 that were expressed by the parents or adopted by the board as  
11 its reasons for passing Resolution 2.

12 So if the Court needs to know what the District's  
13 basis was, what the rational basis was, it is a mirror image  
14 of the concerns that were expressed to the board? The board  
15 by its actions adopted those concerns?

16 MS. LANE: The board member declarations that are  
17 part of our submission have statements that they had an  
18 overwhelming majority of individuals speak to the issue of a  
19 concern over privacy. And that is one of the bases for their  
20 decision making.

21 THE COURT: What are the other ones?

22 MS. LANE: The other ones is, as I've expressed in  
23 our -- excuse me -- in Mr. Gonzalez-Pagan's declaration where  
24 he has the actual transcripts of conversations, there's a  
25 board member that refers to the stay being issued in G.G. and

1 finding that that provided a drastic change in circumstances  
2 and that a stay as he envisioned Resolution 2 would then  
3 create the situation as we understand that bathrooms are to  
4 be used according to biology.

5 THE COURT: So I should draw the conclusion that  
6 any reason articulated by an individual board member was  
7 adopted by the board as a whole? So whatever the board was  
8 told by the parents who are in the declarations and whatever  
9 any individual board member stated their reason was, those  
10 compose the rational basis, if that's the standard, the  
11 rational basis for the board's action as a whole?

12 MS. LANE: The rational basis test is if you were  
13 discussing equal protection. It's our argument that the  
14 restroom in and of itself has an expectation of privacy and  
15 that --

16 THE COURT: But you're saying that expectation of  
17 privacy is limited only to privacy as to people who have  
18 other sexual organs? Because there is no privacy vis-a-vis  
19 people that have the same sexual organs?

20 MS. LANE: There's no expectation when you walk  
21 into a female restroom that you are going to see a penis.  
22 It's the way our society is.

23 THE COURT: Is there an expectation that you'll see  
24 that if you walk into the boy's room?

25 MS. LANE: I --



1 THE COURT: Or somebody, anybody, not you  
2 personally obviously, but --

3 MS. LANE: The expectation and the fundamental  
4 right to privacy is clearly extended to the restroom, and  
5 Judge Niemeyer clearly stated that in his dissent in G.G. and  
6 that parents, we're talking about school-aged children,  
7 parents --

8 THE COURT: No. Two of the people involved here  
9 are legally adults. They're not school-aged children.  
10 They're children who lawfully attend school, but they're  
11 adults.

12 MS. LANE: Yes. But Resolution 2 was not passed to  
13 address Plaintiffs. It was addressed for the entirety of the  
14 school --

15 THE COURT: If the Plaintiffs didn't exist, would  
16 Resolution 2 have been passed? Isn't the only reason  
17 Resolution 2 passed was the existence of the Plaintiffs?

18 MS. LANE: The Resolution 2 was passed as far as  
19 the understanding that the District had to follow the Dear  
20 Colleague letter issued in 2016 that mandated the District  
21 must change and do the following, as indicated in that  
22 letter.

23 THE COURT: So part of the District's rationale was  
24 to affirmatively pass a policy that was contrary to the Dear  
25 Colleague letter?

1 MS. LANE: No, Your Honor. At the time that they  
2 passed the resolution, that Dear Colleague letter was on a  
3 stay, and they felt that the Supreme Court's issuance of a  
4 stay was important, significant enough for the School  
5 District to say as far as -- excuse me -- the Supreme Court  
6 to say to G.G. you're also in your senior year. You are also  
7 asking to use restrooms consistent --

8 THE COURT: But that would be a reason for the  
9 District to conclude that they're at no or little legal risk  
10 of doing it. Are you saying that because the Supreme Court  
11 issued a stay, the District concluded that it needed to do  
12 this?

13 MS. LANE: No, Your Honor. I'm saying that the  
14 issuance of the stay was a significant change in the legal  
15 landscape, that they had been following all the cases. They  
16 had been advised by the Solicitor, and they thought that was  
17 significant.

18 It was significant because the amount of proof that  
19 the party requesting the stay had to present, and the factual  
20 circumstances of G.G. are so similar to what we have here.  
21 We have a student that --

22 THE COURT: But if this was a claim for individual  
23 1983 liability against school district officials, you might  
24 have an absolute slam dunk argument for the application of  
25 qualified immunity for the reasons that you just articulated.

1           But the grant of the stay in G.G. might -- I can  
2 understand if the argument was that suggested to the District  
3 that their legal risk was minimal if they proceeded. But  
4 that doesn't -- I'm lawfully permitted to make a right turn  
5 on red in Pennsylvania. That doesn't mean I have to make a  
6 right turn on red. I'm permitted to do it. So I won't get  
7 in hot water if I do.

8           So the fact that Pennsylvania says I'm allowed to  
9 make a right turn on red does not compel me to make a right  
10 turn on red. I have to choose to do it. But I know I won't  
11 get in hot water.

12           So it seems to me that your argument is that once  
13 the stay comes down in G.G., the District may well have  
14 concluded it was lawfully permitted to pass the resolution.  
15 It was a right turn on red. Why did the District choose to  
16 pass the resolution?

17           MS. LANE: No. I don't think what -- the District  
18 when notified of the stay recognized that in that stay, that  
19 placed G.G. to use a restroom in accordance with his biology  
20 or to use --

21           THE COURT: You're not saying that was the Supreme  
22 Court saying that was required to be done. You're not saying  
23 the action of the U.S. Supreme Court mandated that.

24           MS. LANE: Your Honor, they released the  
25 preliminary injunction. The stay granted by --

1 THE COURT: You're just not getting my question,  
2 Miss Lane. That meant at best -- and it might be a big thing  
3 for somebody in Mr. Clair's shoes. That meant that he could  
4 properly advise the District that the passage of Resolution 2  
5 placed them at little or no legal risk. I get that argument.

6 But every day we do things that place us at little  
7 or no legal risk or we choose not to. So the question is the  
8 District chose to pass Resolution 2. Mr. Clair could argue  
9 or advise the board because of the stay I think your legal  
10 risk is minimal. So you can do what you want.

11 Okay. The District nonetheless did. So the  
12 question is what was the reason the District changed the  
13 status quo? Is it whatever reasons were told to it by the  
14 public? And therefore, the District's conclusions are  
15 co-terminus with the request, or is it something different?

16 MS. LANE: Resolution 2, as indicated in the  
17 declarations, was brought forth because there were complaints  
18 concerning the use of restrooms. An overwhelming majority of  
19 the complaints, as in the declaration that is the wording  
20 used by the declarants, involved concerns of privacy for all.  
21 That is why Resolution 2 was passed.

22 THE COURT: And therefore, the board adopted those  
23 concerns as its concerns?

24 MS. LANE: As to -- yes. As to the G.G. matter and  
25 the issuance of the stay, it specifically stayed the

1 preliminary injunction.

2           And you're correct, Your Honor. The School  
3 District could decide, well, we're going to continue  
4 following the preliminary injunction issued by the District  
5 Court. I'm not aware if that is, in fact, the case.

6           Lambda Legal's involved in that case, as in the  
7 guide. Perhaps they can present that information to you.  
8 But what we found was significantly important with the  
9 issuance of the stay is that the same factual issues of harm,  
10 the same balance as to the District's harm that they would  
11 receive if the preliminary injunction were to be granted here  
12 were privacy interests. All of that was submitted to  
13 the Supreme Court --

14           THE COURT: This is privacy from the potential for  
15 visualization by somebody who has different sex organs?  
16 Because it's clear that there is no privacy based on your  
17 example from people that have the same sex organs.

18           If people are changing into their track uniform or  
19 cross country or whatever, and they are on their birth  
20 certificate a boy, and everybody else in the room is a boy,  
21 they're going to see them. So they have no privacy from  
22 them.

23           So the narrow -- it doesn't mean it's improper, but  
24 the narrow privacy interests here is the privacy interests --  
25 and you can tell me whether I'm getting this right or wrong,

1 but what I think I'm hearing you say is that the privacy  
2 interests is the interests in not being visually observed by  
3 somebody who possesses different sexual organs?

4 MS. LANE: Your Honor, you started the questioning  
5 when I came up to ask -- to talk to you about the privacy  
6 concerns as the basis for the District's reasoning and what  
7 they heard from the community. And your question to me was,  
8 well, these are restrooms with doors and dividers. You know,  
9 why are we even worrying about being unclothed?

10 And I said to you that the case law supports that  
11 the restroom in and of itself is a zone of privacy; but in  
12 our culture, as we understand, as understood for time as  
13 we've had male and female restrooms, we don't have the  
14 concern of someone with different parts being in those  
15 facilities. Our understanding is when we walk into the  
16 female restroom, females are using it.

17 THE COURT: So there is no zone of privacy in a  
18 restroom as to somebody who has the same sexual organs?  
19 Right?

20 MS. LANE: The zone of privacy would be I guess if  
21 you're behind the dividers, but the Courts have said that the  
22 dividers don't even matter that they exist. Privacy is still  
23 part of --

24 THE COURT: I got it.

25 MS. LANE: -- is still part of the restroom.

1 THE COURT: But we have to agree based on your  
2 example there is no and therefore should not be any  
3 expectation of privacy in a bathroom according to your  
4 hypothesis except as to people who have different sexual  
5 organs. Otherwise there is no zone of privacy because people  
6 would be changing into their track clothes or otherwise  
7 taking their clothes off in the bathroom.

8 MS. LANE: Your Honor, the case law that talks  
9 about students who are --

10 THE COURT: Mr. Foley, do you want to take a chance  
11 at answering the question I'm actually asking? Because your  
12 partner isn't.

13 MR. FOLEY: Your Honor, I believe that you are  
14 correct. I mean --

15 THE COURT: Okay.

16 MR. FOLEY: Speaking from personal experience, if I  
17 go -- I have used a men's room and changed in the corner,  
18 just as she stated, and I have specifically done it for cross  
19 country. And when I've done so, I have done that without  
20 having any concern that another male may come in and --

21 THE COURT: You fully expect that it's entirely  
22 possible you will be observed in the process of doing that by  
23 somebody that has the same sexual anatomy as you?

24 MR. FOLEY: That is correct. Now, just as a  
25 disclaimer, I can't speak for what her cases say, Your Honor,

1 but in terms of that expectation, I would say on personal  
2 experience that that would be true.

3 But Miss Lane's point, again, when I use a men's  
4 room, I don't expect -- I absolutely do not expect to see  
5 female parts in there or anybody doing anything that involves  
6 female parts.

7 THE COURT: Okay. Understood. Miss Lane?

8 MS. LANE: Thank you, Your Honor. Schools have a  
9 relationship of trust with their parents and students, and  
10 this relationship is focused on the protection of all. And  
11 the balance of harms, when you enjoin a legislative body from  
12 effectuating a resolution in this on behalf of the District,  
13 it suffers a form of injury.

14 It suffers harm because you're enjoining that that  
15 the representatives of that community have put forth as  
16 important to their community and their school district.

17 So the balance of harms that weighs in favor of the  
18 Districts certainly are the privacy, as we've discussed. The  
19 Supreme Court jurisprudence certainly states as well as the  
20 Third Circuit that there is a zone of privacy in the  
21 restroom.

22 In addition to that, there's the parental right to  
23 upbringing of your children, which is a fundamental right.  
24 And in those balance -- when you're looking at the balance of  
25 harms, the balance of equities, you're not looking



1 specific -- to specific individuals who have complained or  
2 put forth a declaration. You are to look at the interests of  
3 the public at large.

4 And the declarants attempted in their summary of  
5 events to give you that sense of what was the interests at  
6 large. And the interests of the community at large, which is  
7 of constitutional --

8 THE COURT: That's the interests of those that  
9 elected to come to the school board meeting and speak about  
10 it.

11 MS. LANE: That's correct. And the declarations  
12 and everything we gave you is clear as to that.

13 THE COURT: Which may or may not be the public at  
14 large, but it certainly would be as expressed by those that  
15 elected to come to the meeting.

16 MS. LANE: Those who choose to participate, just as  
17 with any of our political opportunities, you have the choice  
18 to participate. So the interests of the constitutional  
19 magnitude is of the privacy. And we believe that without  
20 protection of that, it will cause disruption at the school.

21 THE COURT: What disruption?

22 MS. LANE: The same arguments were made in G.G.,  
23 and the disruption is having to change, having to counsel,  
24 perhaps meet with students, students who are upset with the  
25 change in circumstances as they understand it with the use of

1 restrooms on the basis of biology.

2 THE COURT: And how many times did that happen in  
3 the School District?

4 MS. LANE: It doesn't matter if it's happened. You  
5 are to look at, in the balance of equities, the interests of  
6 the public at large. And everyone can recognize that the  
7 interests of a restroom is privacy, and that basis is on the  
8 male/female use as to biology.

9 THE COURT: Just to identify perhaps a limited  
10 group of people that might not concur with that, if you turn  
11 to your right, you'll see three of them I suspect because  
12 they take the opposite position.

13 So I'm not sure I can find, but I'm also not sure I  
14 need to find that there's sort of a universal acclimation  
15 here. The question -- help me understand, Miss Lane, are you  
16 saying that because a segment of the public wanted this, that  
17 was the rational basis? If nobody had come to speak at the  
18 meeting, would the board have taken the same action?

19 MS. LANE: Your Honor, under the equal protection  
20 rational basis test they just have to have some legitimate  
21 end, and the interest of privacy of students is some  
22 legitimate end. We don't have to prove that there are a  
23 certain number of people that had that thought process.

24 Now, if we go into heightened scrutiny, we have  
25 to -- as the Johnston case found, that there has to be a

1 compelling interest. Certainly there is a compelling  
2 interest of this magnitude when we're talking about school  
3 age children, K to 12, versus what Judge Gibson found --

4 THE COURT: We're talking about -- the reach of the  
5 injunction request here is these three students. The  
6 proposed order is limited to an injunction as to these three  
7 students. So it's not K to 12. It's 12 as to the relief  
8 that's been requested.

9 I'm not saying that does or doesn't make a  
10 difference. But the relief the Plaintiffs have asked for  
11 relates to these three specific students.

12 MS. LANE: Yes, but we were speaking of to the  
13 rational basis test as far as the equal protection claim.  
14 And we're talking about the interests of the grant of the  
15 preliminary injunction. We contend that you don't even have  
16 to get to the balance and weight -- the weighing of the  
17 interests, and in that we don't have to pinpoint the number  
18 of people that it is accepted --

19 THE COURT: There doesn't have to be anyone; right?  
20 I mean under rational basis, there has to be -- the  
21 hypothetical possibility of a risk would be enough, if I  
22 understand your argument about the rational basis test?

23 MS. LANE: That is correct, Your Honor.

24 THE COURT: And if it's the heightened basis, the  
25 intermediate standard applied under *Frontiero*, what would be

1 the important Governmental interest here? The same thing?

2 MS. LANE: The same thing, the protection of  
3 privacy, which Judge Gibson found as related to an adult  
4 university, students enrolled in a university; and we contend  
5 that our interest in a School District, they are seniors  
6 themselves, but they attend a building that is 9 to 12, and  
7 that that interest is compelling in and of itself.

8 THE COURT: Okay. Got it. Thank you, Miss Lane.

9 Mr. Foley, anything else in this segment of  
10 presentation?

11 MR. FOLEY: No, Your Honor.

12 THE COURT: Okay. Thanks a lot, Mr. Foley. Thank  
13 you, Miss Lane.

14 Okay. Mr. Gonzalez-Pagan, is there anything you or  
15 one of your colleagues would want to say in rebuttal in  
16 support of your motion for preliminary injunction and/or in  
17 response to the motion to dismiss?

18 MR. GONZALEZ-PAGAN: Yes, Your Honor. Thank you.  
19 Your Honor, I think my colleague, Miss Lane, is correct --

20 THE COURT: Can I ask you this, Mr. Gonzalez? Is  
21 the little green light on on that microphone?

22 MR. GONZALEZ-PAGAN: It is.

23 THE COURT: Terrific.

24 MR. GONZALEZ-PAGAN: Schools do have a relationship  
25 of trust with their students and parents, and they broke it

1 here. They broke it by singling out our clients, Juliet,  
2 Elissa and A.S., when they asked for disparate treatment.  
3 And in so doing they have articulated now this zone of  
4 privacy interest that we have been debating back and forth  
5 for the past couple of hours.

6 I think what's really helpful here is to look at  
7 the affirmative case brought by some parents in the District  
8 211 litigation in Illinois where the use of restrooms by a  
9 transgender girl was found not to violate any constitutional  
10 right to privacy at all. And they point to speculation about  
11 violations of privacy.

12 THE COURT: But if I conclude that the correct  
13 equal protection standard here is rational basis, isn't  
14 speculation exactly what the law permits governmental  
15 agencies to use?

16 MR. GONZALEZ-PAGAN: No, Your Honor. As we have  
17 seen the case law evolve, rational basis means much more than  
18 just accepting as true whatever is proposed. Sure, it needs  
19 to be a legitimate interest, and it needs to be rationally  
20 related and promoted by the means that have been adopted.

21 But that means that there needs to be an actual  
22 evaluation of what -- whether it is a legitimate interest and  
23 whether it is actually rationally related and promoted --

24 THE COURT: Miss Lane makes the argument that as a  
25 legal matter, it is a legitimate interest. Whether or not on

1 the facts here it is actually in this case a real interest,  
2 she says, perhaps with some force, that under the law, that's  
3 not the question, that her argument is that it is a matter of  
4 law what she has articulated, what Mr. Foley has articulated  
5 is a legitimate interest, and that for her rational basis  
6 test analysis, once they say it, that's pretty much it -- and  
7 it's not a particular school district. Once any unit of  
8 Government articulates it, they've done their duty.

9 MR. GONZALEZ-PAGAN: Once any unit of Government  
10 has articulated an interest, first we need to evaluate  
11 whether that interest is legitimate. And sure, the  
12 protection of constitutional rights by the Government is a  
13 legitimate interest.

14 But then we also need to evaluate whether the  
15 interest as expressed is rooted in fact and whether it is  
16 rationally related. I think Romer v. Evans and even the  
17 Heller case which we cited in our memorandum of law, the  
18 Woman's Health case at Docket No. 28, really point to the  
19 fact that rational basis goes beyond merely accepting as true  
20 whatever is proposed.

21 The Court has an obligation to see if there is  
22 still a fit. It may be that it doesn't need to be as  
23 narrowly tailored as a compelling interest, but there still  
24 needs to be a rational relationship --

25 THE COURT: So what you are saying to Miss Lane's

1 argument, that for better or worse people use restrooms for  
2 things besides going to the bathroom. They use them as  
3 changing places, if they spill food or something on their  
4 shirt or slacks, and they want to get the spaghetti sauce off  
5 or whatever, they run into the restroom and take their shirt  
6 off and run it under the water or whatever, because where  
7 else are you going to go?

8           And she says that's not speculative. It may not  
9 happen frequently. It may not have specifically happened  
10 here, but it's a rational conclusion of what could happen.

11           So therefore, being outside of privacy stalled  
12 areas in some state of undress is not an irrational  
13 anticipation on behalf of a unit of Government. And she says  
14 therefore -- I think what she says is, therefore, we have to  
15 operate on the legitimate rational belief that there will be  
16 people outside of privacy stalled areas in various points of  
17 undress. And they're entitled to some level of privacy.

18           Now, it appears to the Court that since we -- even  
19 under the District's formulation, there will be other people  
20 in the room who have the same sexual organs, that that's not  
21 violative of this issue of privacy. The risk is that there  
22 would be people in the restroom who have different sexual  
23 organs who will observe somebody in a state of undress. I  
24 think that's the articulated privacy interest here.

25           MR. GONZALEZ-PAGAN: Yes, Your Honor. And I would

1 point to a couple of things with regards to that. For one, I  
2 would argue that there's nothing in the record to indicate  
3 that the restrooms are used for a changing area. For  
4 another --

5 THE COURT: But Miss Lane points out the  
6 District -- and, in fact, we have a Third Circuit case law,  
7 and we have the Supreme Court's -- if we look here, for  
8 instance, let's get the Third Circuit case that's hottest off  
9 the presses, National Association for the Advancement of  
10 Multi-Jurisdiction Practice, it says "the challenged rule  
11 comes bearing a strong presumption of validity, and those  
12 attacking the rationality of the rule have the burden to  
13 negative every conceivable basis which might support it. If  
14 there is any reasonably conceivable state of facts that could  
15 provide a rational basis for the classification, it must be  
16 upheld.

17 And that relies on a case called Federal  
18 Communications Commission versus Beach, which says a  
19 legislation need not articulate its reasons for enacting a  
20 statute. It's entirely irrelevant for constitutional  
21 purposes whether the legislature was actually motivated by  
22 the conceived reason for the challenged distinction.

23 Legislative choice is not subject to courtroom fact  
24 finding and may be based on rational speculation unsupported  
25 by evidence or empirical data.



1           So if Miss Lane articulates, as she did, that it's  
2 not implausible that people will be outside of stalls in some  
3 state of undress, if I conclude that rational basis is the  
4 standard, I could say, okay, we have to operate on that  
5 assumption.

6           I think what she then next told me, and I think Mr.  
7 Foley backed this up, was we will assume there will be other  
8 people in the restroom who have the same sexual anatomy, and  
9 that's never been viewed as impairing a right of privacy.

10           But it's always been assumed that there will not be  
11 other people in the restroom who have different sexual  
12 anatomy, and it's their presence or the possibility of their  
13 presence that impairs this narrow zone of privacy. I think  
14 that's what I've heard the Defendants articulate.

15           So what do you say to that if I'm right? If I'm  
16 right in that that's what I heard them articulate?

17           MR. GONZALEZ-PAGAN: Yes, Your Honor. So first I  
18 would like to quibble both with the theme -- but in answer to  
19 your question, I think they still would not pass a rational  
20 basis test. But let me first quibble with the standard, and  
21 I would note in *Romer v. Evans*, which postdates the FCC  
22 Commission versus Beach case, the Court said even in the  
23 ordinary equal protection case, calling for the most  
24 deferential of standards, the Courts insist on knowing the  
25 relation between the classification adopted and the object to

1 be obtained.

2 Just as similarly in the Heller case, the  
3 justifications offered must have -- and I quote -- a footing  
4 in the realities of the subject addressed by the legislation.

5 THE COURT: Which Heller case is that?

6 MR. GONZALEZ-PAGAN: The citation, Your Honor, is  
7 509 U.S. at 321.

8 THE COURT: Is that the D.C. Heller gun case or a  
9 different Heller case?

10 MR. GONZALES-PAGAN: I believe that's the case,  
11 Your Honor, but I don't know for sure.

12 THE COURT: Okay.

13 MR. GONZALEZ-PAGAN: But even if that were the  
14 case, even if the articulated interest is the narrow interest  
15 in the protection of privacy regards to not being exposed to  
16 anatomy different from yours, this doesn't achieve that. For  
17 one --

18 THE COURT: But it's actually, as I understood  
19 Miss Lane's articulation, it was the interests in not having  
20 your anatomy exposed to somebody who has different anatomy.

21 MR. GONZALEZ-PAGAN: Sure, Your Honor. But even if  
22 that's the case, first, for one, in the balance of the  
23 equities, one needs to really wonder, how do you know the  
24 anatomy of the other person that's observing you unless you  
25 invade their privacy? But also, it disregards, for example,

1 a whole set of scenarios.

2 Your Honor posited earlier the hypothetical of a  
3 student who had had gender affirming surgery, whose sex  
4 assigned at birth still differed from their gender identity  
5 and from their gender affirming surgery, and Mr. Foley said  
6 that that student would be admitted to the restroom in  
7 accordance with the gender identity of the student.

8 If that's the case, I do wonder another  
9 hypothetical which is not addressed here. What would happen  
10 to Resolution 2, if that is the articulated interest, what  
11 about the football player if for whatever reason had a  
12 horrible accident and his anatomy was affected? His gender  
13 identity continues to be a cisgender student. His gender  
14 identity continues to be male. He no longer has a penis, for  
15 lack of a better term, because of that accident. Is he no  
16 longer permitted to use the boy's restroom?

17 If that's the interest articulated by the  
18 Defendants, likewise, what is the Court or school to do with  
19 teens and youth who are intersex and have ambiguous genitalia  
20 or other ambiguous sex characteristics? Where are they to go  
21 but rather to the restroom that is consistent with their  
22 gender identity? Or are they saying you're not allowed to  
23 use any of the sex affiliated entities because we can't tell?

24 THE COURT: And in order to tell, presumably the  
25 next thing you're going to tell me, you have to invade their

1 privacy to perhaps an inconclusive end?

2 MR. GONZALEZ-PAGAN: Correct, Your Honor. And  
3 there's a whole set of scenarios here that don't work. And  
4 that really show and put into stark light why the asserted  
5 interests here is not proper.

6 And a further scenario would be what about the  
7 student that in Pennsylvania, as our client Juliet has  
8 already done -- it's in the record -- changes her birth  
9 certificate? They come into the district with their gender  
10 marker changing their birth certificate. It's a transgender  
11 student.

12 All their documents, as with the other documents  
13 for our clients, reflect their gender identity and their  
14 gender markers. Is the school going to inquire about their  
15 anatomy in order to talk --

16 THE COURT: So you say in the eyes of the laws of  
17 the Commonwealth of Pennsylvania Miss Evancho is a girl?

18 MR. GONZALEZ-PAGAN: Absolutely, Your Honor. And  
19 in the eyes of the law all three of our students are the  
20 gender identity they assert.

21 THE COURT: I guess in what I'll call the  
22 certificated eyes of the law, you're saying that the records  
23 of the Commonwealth of Pennsylvania in Miss Evancho's case  
24 currently reflect that she is --

25 MR. GONZALEZ-PAGAN: Her birth certificate states

1 that she is a girl. And it shouldn't be that it's dependent  
2 on gender affirming surgery or a birth certificate, but it's  
3 really about the articulation of the interests here. And  
4 legally what the articulated interests are here, rather than  
5 preserve privacy, invades the privacy of any person by having  
6 their anatomy examined.

7 THE COURT: Mr. Foley, what should I make of the  
8 fact -- I believe I have read it somewhere in the record. I  
9 don't think what counsel just said is a surprise. What, if  
10 anything, should I make of the fact that in the official  
11 records of the Commonwealth, Plaintiff Evancho is a girl?

12 MR. FOLEY: Yes, Your Honor. Once again, we just  
13 harken back to the specific language of the resolution. Once  
14 again -- and we keyed in on this -- the resolution  
15 specifically speaks of biology. So notwithstanding changing  
16 your name on a birth certificate --

17 THE COURT: No. He didn't say she changed her  
18 name.

19 MR. FOLEY: I'm sorry. My apologies. That was a  
20 misspeak. Changed her --

21 THE COURT: I didn't think anything intentional.

22 MR. FOLEY: I understand. That was just me  
23 misspeaking. Due to the fact that she's now indicated as a  
24 girl or a woman on her birth certificate does not make any  
25 difference as related to the provisions of Resolution 2.

1           THE COURT: But how does that address -- what's the  
2 privacy interest -- if the Commonwealth of Pennsylvania --  
3 and this is not a surprising turn of events. I'm not going  
4 to go into detail, but I have another case on a whole  
5 different part of the docket where I was presented with a  
6 certificate from the Supreme Court of another state, highest  
7 court in the state, that said that so-and-so is in the eyes  
8 of the law of that state a woman.

9           That's not what was on her birth certificate, but  
10 as of today the highest court of that state -- and it's an  
11 order and has the seal and all the stuff on it. So when  
12 we're in court, I address her as ma'am, just as I have  
13 addressed you as sir --

14           MR. FOLEY: Just as the District does with the  
15 three Plaintiffs. Right?

16           THE COURT: So but if the Commonwealth of  
17 Pennsylvania, and I'm not -- Mr. Gonzalez-Pagan is very  
18 careful to not say it's issue determinative. And I  
19 understand that. You're saying it's an additional thing to  
20 be aware of importance. I do not take your argument as being  
21 issue determinative. But I'm curious.

22           If in the eyes of the Commonwealth, which is beyond  
23 the district, Plaintiff Evancho is a woman, why would the  
24 District -- what is the District's interest in treating her  
25 as something that the Commonwealth says she's not?

1           And doesn't it go back to your question -- not your  
2 question. Your observation to the Court where you very --  
3 with certainty said to the Court, Judge, understand the  
4 District is not saying she's a boy. At least in her case,  
5 isn't that exactly what the District is saying? Within the  
6 geographic perimeter of the Pine-Richland School District,  
7 relevant to the use of the restroom, she's a boy, even though  
8 for all other purposes within the district and all other  
9 purposes within the Commonwealth, she's a woman?

10           MR. FOLEY: And I think that harkens back to the  
11 106.33, which really hasn't been discussed a lot today. I'm  
12 a little surprised at that.

13           But we have a provision once again where we have  
14 Title IX that says you can't discriminate on the basis of  
15 sex, but we're going to make a carve-out, using the word in  
16 this instance, where when we have restrooms or other  
17 facilities, we're going to carve that out.

18           But the same can be said here. The School  
19 District -- and I just want to make sure this is clear for  
20 the record. The School District in all other respects treats  
21 them consistent with their gender identity; in fact, treats  
22 them consistent with their gender as indicated on their birth  
23 certificate. But when it comes to much like 106.33, that  
24 biological or some biological or anatomical difference  
25 between males and females, there's the carve-out.

1 THE COURT: So are you saying that Congress in  
2 passing Title IX and the Department of Education in adopting  
3 the regulation was -- I'm to conclude that they would not be  
4 satisfied with Pennsylvania declaring Miss Evancho to be a  
5 woman, that the fact that the Commonwealth of Pennsylvania  
6 says Miss Evancho is a woman isn't the end of the matter?

7 Congress and the Department of Education  
8 specifically intended that there would be a local  
9 investigation, if you want. I can't think of a more apt word  
10 at the moment, I'm not sure that that's the best one, but  
11 there's to be a more local investigation and determination,  
12 so that the Commonwealth has said in its records -- if what  
13 you're telling me is accurate, and I don't think it's  
14 disputed, that Miss Evancho is a woman, that's not the end of  
15 the matter? She isn't a woman in the eyes of the  
16 Pine-Richland School District?

17 MR. FOLEY: I think I understand that as a  
18 question, and I'm not trying to be cute.

19 THE COURT: No. That's all right.

20 MR. FOLEY: But I think that's the million dollar  
21 question that's going to be decided ultimately by this Court  
22 and/or the Supreme Court in terms of what is the definition  
23 of sex under Title IX.

24 So if we take that definition as determined that it  
25 means gender identity, then I have to answer your question as



1 such. That would be under those circumstances, they would do  
2 it as consistent with that.

3 But if the determination is made that sex equals  
4 anatomy, then I would answer your question that's exactly  
5 what would happen in the --

6 THE COURT: So if the only Plaintiff in the case --  
7 if it had turned out that the only Plaintiff in the case was  
8 Miss Evancho, and the Plaintiffs filed a Complaint that was  
9 shorter -- I'm not being critical that it was long or that  
10 anyone's replies were long, but it wouldn't need to be as  
11 long because their Complaint would be Miss Evancho is a  
12 woman, Paragraph 1.

13 Paragraph 2, we know that because the records of  
14 the Commonwealth of Pennsylvania state that she is female.

15 Three: The Pine-Richland School District compels  
16 her to use either a single sex restroom or the men's room.

17 Four: The Pine-Richland School District is  
18 discriminating against her based on her sex in that every  
19 other female can use the women's room except her. Signed,  
20 Plaintiff's lawyers.

21 If they hadn't brought -- and I'm not saying you  
22 are right or wrong in having other clients, counsel, but if  
23 she was the only client, what would the Pine-Richland's  
24 defense to that case be? Because this case as to that  
25 Plaintiff could boil down to that.

1 MR. FOLEY: Because sex, Your Honor, means under  
2 Title IX anatomical biological sex.

3 THE COURT: As determined by who?

4 MR. FOLEY: The Supreme Court or whoever ultimately  
5 does so. That's what I mean. That's what I meant by saying  
6 this is the million dollar question. That's our position.  
7 Some Courts have taken that position, as you're very well  
8 aware. Other Courts have taken the opposite position.

9 That's why the Supreme Court obviously -- well, I  
10 won't speak for the Supreme Court, but you would think that  
11 there's some clarity that needs to be shed on this issue; but  
12 based upon our cases, Johnston, others, what has been  
13 briefed, we would say that that very short Complaint would be  
14 subject to a Rule 12(b)(6).

15 THE COURT: Because the end of the matter is not  
16 what's on the birth certificate?

17 MR. FOLEY: That is correct, Your Honor.

18 THE COURT: So Mr. Foley, let me ask you this.  
19 How -- and maybe -- and you're free to tell me, Judge, it's  
20 none of your business or it doesn't matter for disposition of  
21 the case, but I'm just curious. If the School District gets  
22 a report from a student that they're uncomfortable because  
23 there's somebody in the women's room that they believe is a  
24 man, and you ask that person produce your birth certificate,  
25 and they do, and it says female, what's Plan B?

1 MR. FOLEY: It's none of your business, Your Honor.  
2 No. I don't mean --

3 THE COURT: Trust me, Mr. Foley, you stand in a  
4 long line of distinguished counsel who tell me that. So I'm  
5 not bothered. No.

6 MR. FOLEY: No. Understood, Your Honor. And --

7 THE COURT: So what's Plan B if they say you're  
8 right, I'm in a woman's room, here's my birth certificate,  
9 female?

10 MR. FOLEY: Right. And if I understand your  
11 scenario correctly, if that -- if that student recognizes the  
12 person as someone of the opposite anatomy due to some visual,  
13 and that's how they were able to know that, then we would  
14 start the disciplinary process for being in the wrong  
15 facility, pursuant to Resolution 2.

16 THE COURT: And as a matter of legislative power in  
17 the public school district code, does a school district have  
18 the legal authority to make a determination as to sex  
19 contrary to the determination made by the Commonwealth, since  
20 each school district is a legislative -- is created by a  
21 legislation of the Commonwealth and exists only by virtue of  
22 the laws of the Commonwealth?

23 MR. FOLEY: Well, I would argue, Your Honor, and I  
24 would have to think this through, but at first blush I would  
25 say to you that I don't believe that an individual applying

1 for a birth certificate to get their gender changed is a  
2 affirmation for lack of a better word of the Commonwealth,  
3 that they're saying that that person is that sex. I'd have  
4 to think that through, but at first blush, I don't see how it  
5 would necessarily be contrary.

6 THE COURT: Okay. One last question, Mr. Foley.  
7 And I really appreciate you bearing with me because I think  
8 this is an important -- whether this turns out to be a  
9 legally significant issue, I don't know. But for the moment  
10 I think it's an important issue.

11 Mr. Gonzalez-Pagan brought up the hypothetical from  
12 medicine that there are people that are born with  
13 indeterminate anatomy. I don't know if that's the word you  
14 used, but that's --

15 MR. GONZALEZ-PAGAN: That's correct.

16 THE COURT: -- the phrase I determined. So  
17 therefore when the registry of live birth is made, there is  
18 something placed on the birth certificate. So somebody at  
19 that time is making a judgment. It could be the attending  
20 physician, certified nurse practitioner, whoever. Somebody  
21 is making that judgment I presume. It's on the birth  
22 certificate.

23 Are you saying that it's within the constitutional  
24 and statutory power of the school district -- and I'm not  
25 personalizing this to Pine-Richland -- it's within the

1 constitutional and statutory power of a school district to  
2 come independently to a different conclusion?

3           So if somebody's born in the Commonwealth of  
4 Pennsylvania, pick your hospital, they have indeterminate  
5 sexual anatomy, a sex is placed on the birth certificate,  
6 which is a judgment by somebody who's in a position to make a  
7 judgment. Could a school district be of a different  
8 conclusion? Or is that their sex? Because I don't think it  
9 says gender on a Pennsylvania birth certificate. The last  
10 time I looked, I think it says sex.

11           MR. FOLEY: It does, Your Honor.

12           THE COURT: And it's either an F or an M. So pick  
13 whether you want an F or M. Is a school district empowered  
14 to say it's the other?

15           MR. FOLEY: Just one second, Your Honor.

16           THE COURT: Absolutely.

17           (Brief pause.)

18           MR. FOLEY: I have to think this through, Your  
19 Honor, but I think -- let me back into it.

20           THE COURT: Sure.

21           MR. FOLEY: There's an issue associated with that  
22 in terms of the designation on the birth certificate and what  
23 could be going on biologically. And I guess when you first  
24 mentioned that to me, my first thought was I'm not sure how  
25 that's different from any scenario as portrayed by

1 Plaintiff's expert, Dr. Ehrensaft.

2           And what I mean by that is a person is born. And  
3 I'm not trying to embellish the point, but what I think to  
4 myself is what does Dr. Ehrensaft say? Did you have a  
5 daughter, or did you have a son? I don't know.

6           Well, why?

7           Well, we have to wait until that person is old  
8 enough in order to articulate some sort of a gender identity.  
9 It's a mystery for now. Don't give the cigars out that it's  
10 a boy, it's a girl, because we don't know. So that's odd to  
11 me.

12           So when you said to me that you have somebody  
13 making a judgment call, under their scenario somebody's  
14 always making a judgment call.

15           So I know that doesn't answer your question, but  
16 that's the quandary that I thought of when I read through the  
17 report of Dr. Ehrensaft.

18           And the quandary I also thought about in terms of  
19 school districts and school districts dealing with this issue  
20 with birth certificates is that from their perspective the  
21 birth certificate is always a guess until that person is able  
22 to articulate an identity.

23           THE COURT: But I'm phrasing it from the  
24 Governmental unit standpoint. Do you believe that a school  
25 district or any unit of Government for whom this inquiry they

1 believe becomes relevant for their operation, that they're  
2 authorized either statutorily, Constitutionally, to come to a  
3 different conclusion?

4           And more specifically, for Title IX, if it says  
5 that you can -- the regulation, the implementing regulation  
6 authorizes separation based on sex. There's no modifier of  
7 sex. It just says sex. And if somebody of indeterminate  
8 physical anatomy has a birth certificate from the state of  
9 issuance that says F, female, doesn't that begin and end the  
10 inquiry as to that person? Their sex is female?

11           MR. FOLEY: It may, Your Honor, only because -- and  
12 once again, I'm thinking this through just the same as you,  
13 because there's no other determinant. So if we have somebody  
14 that has female on their birth certificate, and we have a  
15 resolution that talks about biology, and the biology we're  
16 able to look at to make a determination of whether or not  
17 that is consistent with the birth certificate, I think that's  
18 different than your scenario where the only thing that we  
19 have in this instance is the birth certificate.

20           THE COURT: But I guess the question is does a  
21 school district have any legitimate interest in making an  
22 independent inquiry? Are you telling me that the -- a school  
23 district -- again, I don't want to personalize it to  
24 Pine-Richland, but you're certainly free to on behalf of your  
25 client -- a school district could, if it elected to -- it

1 might not elect to for any number of reasons -- but you're  
2 saying it would be within the province of the school district  
3 to elect to test by some form of investigation or evaluation  
4 the veracity of what's on the birth certificate?

5 MR. FOLEY: I do believe that's true if the  
6 circumstances warrant it. By way of example, Your Honor, as  
7 I described it --

8 THE COURT: How would they do that?

9 MR. FOLEY: What's that?

10 THE COURT: How would they do that?

11 MR. FOLEY: Well, by ways -- if we have -- and let  
12 me describe the scenario just so it's on the record. We have  
13 a scenario where a transgender girl by the name of Sue comes  
14 to the school district. And Sue is using the girl's room.  
15 Jane walks in and sees Sue with a penis and reports it to the  
16 District.

17 I would think -- and I'm thinking this through. I  
18 would think that under such circumstances, and I'd have to  
19 work with this, but under such circumstances, the District  
20 may have the ability and the right to look into that, so to  
21 speak.

22 However, I'm thinking this through. I don't think  
23 where it would be everybody's got to get -- okay. Everybody  
24 gets in line at the beginning of the school year because we  
25 got to maybe sure Resolution No. 2 is going to be followed,



1 and everybody lines up to make sure you're this way, you're  
2 that way (indicating), I don't think first blush that that  
3 would be supported.

4 THE COURT: Okay. I got it. I appreciate that,  
5 Mr. Foley.

6 MR. FOLEY: Absolutely.

7 THE COURT: Mr. Gonzalez-Pagan, I was going to  
8 apologize for interrupting, but I thought I'd get a sense of  
9 that portion of your argument from the other side.

10 MR. GONZALEZ-PAGAN: Absolutely, Your Honor. Thank  
11 you.

12 Your Honor, so I would posit that even with regards  
13 to that aspect, let's assume that that student were to  
14 transfer today to the Pine-Richland School District. She  
15 never undresses and there's nothing in the record to indicate  
16 that she has --

17 THE COURT: Because she's completed physical  
18 education, she doesn't participate in any interscholastic or  
19 intramural athletics.

20 MR. GONZALEZ-PAGAN: So what would then be the  
21 answer? And one must wonder even on that particular  
22 scenario, it's the same person. If the interest is not to be  
23 watched by somebody of the other anatomy, does it really  
24 change your perception or what is occurring on the facts when  
25 you find out that they have different anatomy? When in

1 reality it's the same person and there was no issue before?  
2 Right? So --

3 THE COURT: Well, but I think if I understand the  
4 portion of Miss Lane's argument, it is the privacy interest  
5 is impaired when you learn that someone of different anatomy  
6 has seen you in a state of undress. I think that's what --  
7 the moment of impairment of the privacy interest as Miss Lane  
8 has articulated.

9 MR. GONZALEZ-PAGAN: I think that's correct, Your  
10 Honor, and in terms of the articulation -- and I think what I  
11 heard from counsel, and my apologies if I misrepresent this,  
12 but I want to make sure -- but in the scenario where somebody  
13 comes in with a birth certificate that reflects their gender  
14 identity or is not discordant with their gender identity, and  
15 you don't know how to tell, you would go by what you see.  
16 And if you could perceive that person to be of a similar  
17 anatomy as yours, then that would be the answer.

18 And I would just like Your Honor, if I could have  
19 the Court's indulgence, to use the ELMO?

20 THE COURT: Absolutely. Sure. Let me make sure --  
21 you're requiring the Court to utilize audio-visual skills it  
22 may or may not have, counsel, but let's see what we can do  
23 here. I think it's on. If you lift it up, there's a little  
24 thing if you lift it up. It might take a minute to come up  
25 on the screen. Should we get Brian?

1           There we go. It just took a minute. I thought it  
2 had auto focus, but that little wheel at the top may do  
3 something. It does. There we go. Does counsel see that on  
4 their screen?

5           MR. FOLEY: Yes, Your Honor.

6           MR. GONZALEZ-PAGAN: It's not totally focused, Your  
7 Honor, but my point being is -- and these are part --

8           THE COURT: You may want to lift, like I do with my  
9 bifocals, lift the picture up or down a bit. There you go.

10          MR. GONZALEZ-PAGAN: This is in the record. This  
11 is Elissa Ridenour (indicating). She's a girl. And  
12 likewise, this is in the record. This is Juliet  
13 (indicating). She is a girl.

14          And my point is if that's really the test, then  
15 what are we getting at here? Is this really rationally  
16 related even to the asserted interests?

17          THE COURT: So Mr. Foley or Miss Lane, whoever  
18 wants to answer this question, I want to confirm, but I think  
19 I know the answer. The individuals whose photographs are in  
20 the record, who we've just seen on the ELMO, it's the  
21 legislative determination of the Pine-Richland School  
22 District that those two people should either use a single  
23 user restroom or use the men's room?

24          MR. FOLEY: That is correct, Your Honor.

25          THE COURT: Okay. So if they appeared at the high

1 school just by happenstance in exactly the same wardrobe and  
2 appearance that they had on in those photos coincidentally,  
3 if they need to use the restroom, those people dressed and  
4 appearing as such should use, and, in fact, the District  
5 would protect their right to use the men's room?

6 MR. FOLEY: That is correct.

7 THE COURT: And if any boy using the men's room at  
8 the same time one or both of those persons used the men's  
9 room, complained about it in a courteous but nonetheless  
10 direct way, the school district would disclaim their  
11 complaint?

12 If they said I am uncomfortable with the fact that  
13 Miss Ridenour, appearing and dressed exactly as she is in the  
14 photo that's in the record, used the restroom, the boy's  
15 restroom, the School District's position would be there's no  
16 act here inconsistent with policy? You do not have a valid  
17 complaint?

18 MR. FOLEY: That would be the bottom line. I don't  
19 know if it would be relayed in that manner --

20 THE COURT: There would be a process.

21 MR. FOLEY: I'm sure they would discuss it with  
22 them and find out what their --

23 THE COURT: They would be educationally appropriate  
24 in how they had that communication, but the conclusion of the  
25 communication to the boys that were otherwise in the room,

1 perhaps changing for cross country or whatever else, is  
2 there's no violation of District policy?

3 MR. FOLEY: Sure. And if you would just indulge me  
4 for a second, Your Honor, I do want to emphasize this and put  
5 it on the record. It's on paper, but for today's purposes,  
6 is the School District has been very diligent in  
7 communication regarding these issues.

8 And I'm sure you've seen in letters and in various  
9 declarations, as the School District, I think it was the day  
10 after the passage of Resolution No. 2 met -- or as soon as  
11 they could because one was on a college visit, met and tried  
12 to figure out what's the best way that we can accommodate  
13 you, given these circumstances?

14 And that's true both from a bathroom perspective  
15 and all of the other alleged harms that may be incurred, such  
16 as, you know, would you like us to change your class  
17 schedules? Would you like us to do X, Y and Z? And they met  
18 with the parents.

19 So I think that same communication would take place  
20 with a cisgender student who would say, hey, I am a cisgender  
21 student. Somebody with the same biological sex, however  
22 transgender, used the same restroom as me. I don't feel  
23 comfortable. I think that same care and consideration and  
24 due diligence that the School District has done since day one  
25 on this issue would continue at that time.

1 THE COURT: Okay. And I appreciate that, Mr.  
2 Foley. I just wanted to confirm sort of the -- kind of where  
3 the orange cones are in the road.

4 If those two individuals from Mr. Gonzalez-Pagan  
5 elected to use the boy's room at the Pine-Richland High  
6 School, coincidentally appearing and dressed just exactly as  
7 they are in those photos, whatever the mechanisms of  
8 communication, at the end of the day, if there was a concern  
9 expressed by a boy or the parent of a boy about that, the  
10 ultimate conclusion would be there would be no violation of  
11 District policy?

12 MR. FOLEY: I believe that to be accurate, Your  
13 Honor.

14 THE COURT: Okay. And conversely, I just want to  
15 make sure -- I think I know this -- if those two individuals,  
16 coincidentally appearing and dressed just as they happened to  
17 be in those photos, use the girl's room, either the District  
18 on its own or in response to an inquiry or complaint would  
19 advise them on that very day they were acting contrary to  
20 District policy?

21 MR. FOLEY: That's true, and that has actually been  
22 what has happened.

23 THE COURT: Okay. Thank you, Mr. Foley. I  
24 appreciate that.

25 MR. FOLEY: Certainly.

1           MR. GONZALEZ-PAGAN: And Your Honor, I would  
2 finally note with regards to biological sex here, and even  
3 the asserted interests, that the anatomy of a transgender  
4 girl or woman is not -- anatomy is not just limited to  
5 genitalia for one; and for example, the use of -- there's a  
6 difference in hormone levels already. And that is part of  
7 the record.

8           There is the fact that transgender women even  
9 without gender affirming surgery develop breasts. That's a  
10 different anatomy that the other -- that the cisgender boys  
11 would have in the boy's restroom --

12           THE COURT: It's a physiological indicator.

13           MR. GONZALEZ-PAGAN: Absolutely, Your Honor. But  
14 the reality is that the term biological sex is nowhere to be  
15 found in Title IX or in the regulation regarding sex  
16 segregated restrooms.

17           In fact, the regulation is a very narrow exception,  
18 and we should actually note that by the very fact that it is  
19 an exception to Title IX, it indicates that it is sex  
20 discrimination for the purposes of equal protection. But it  
21 is a very narrow exception that only references the term sex.

22           Your Honor rightly pointed out that the definitions  
23 even as noted in the majority opinion of the Fourth Circuit,  
24 and I would also point out to the Fabian decision which has  
25 been cited in our case, that the dictionary definitions of

1 what is sex go beyond merely anatomy.

2 And the reality is that our expert testimony from  
3 Dr. Ehrensaft indicates that not only is gender identity a  
4 component of sex, but it has a biological basis.

5 THE COURT: So hit the pause button for one second,  
6 Mr. Gonzalez-Pagan.

7 Mr. Foley, I'll come back to the well one more  
8 time. For purposes of Resolution No. 2, and if I'm incorrect  
9 in this, please correct me. What I believe I'm hearing  
10 Miss Lane and you advise the Court is the term biological sex  
11 means physical, primary sexual organs; nothing less, nothing  
12 more?

13 So irrespective of anything else that might be  
14 going on physiologically with somebody, that's what it is?  
15 Or is it something else?

16 MR. FOLEY: I believe that that is accurate.

17 THE COURT: Okay. And I'm not saying that it's  
18 required under whatever the relevant equal protection test  
19 is, but I may as well get the answer in case I later conclude  
20 that it is.

21 Are there any legislative findings or any  
22 legislative statements by the school board that draws that  
23 conclusion, that the District intended in using the word  
24 biological sex to be referring to nothing less or nothing  
25 more than the primary sexual organs of the student involved?



1 MR. FOLEY: Not that I can recall. And --

2 THE COURT: I'm not saying there have to be or  
3 are --

4 MR. FOLEY: I don't know if Miss Lane saw anything  
5 or not in the transcript.

6 MS. LANE: There isn't in the transcripts, but I  
7 can point to who speaks of that. Is it Mr. DiTullio possibly  
8 who speaks to why he's -- what the term biology means? And  
9 his frame of reference is as Roger stated.

10 THE COURT: Is he the author of the resolution,  
11 Miss Lane?

12 MR. GONZALEZ-PAGAN: He was, Your Honor.

13 THE COURT: Pardon?

14 MR. GONZALEZ-PAGAN: He was.

15 THE COURT: Mr. DiTullio?

16 MR. GONZALEZ-PAGAN: Yes.

17 THE COURT: Okay. We'll look it up. Thank you,  
18 Miss Lane. And thank you, Mr. Gonzalez-Pagan. And I think  
19 that quotation was actually in the transcript.

20 MR. GONZALEZ-PAGAN: Your Honor, I would point out  
21 two specific points and then move to a conclusory statement  
22 really.

23 With regards to the incident that has been reported  
24 with regard -- with regards to one of our clients' use of the  
25 restroom, what was reported is that a transgender girl was

1 seen in the restroom; nothing else. Just a mere discomfort  
2 of knowledge that there was a transgender girl in the  
3 restroom. That is from Paragraph 2 of the Wiethorn  
4 declaration and Paragraph 16 of the Bowman declaration.

5 And with regards to discipline, what is on the  
6 record -- and Miss Lane hopefully clarified that by reading  
7 the E-mail from Solicitor Clair -- is that they will go and  
8 use the disciplinary processes. There's nothing in the  
9 record of what they will not do. And there is -- what we do  
10 know --

11 THE COURT: So there's standing for prospective  
12 injunctive relief under Lyons?

13 MR. GONZALEZ-PAGAN: Absolutely, Your Honor. And  
14 what we do know anyway is what we know that has occurred  
15 already, which is they've been brought into the principal's  
16 office, had their parents called and have to go through what  
17 the opponents described as counseling --

18 THE COURT: The conversation that there was a  
19 tangible event out of the ordinary.

20 MR. GONZALEZ-PAGAN: And if they were to use the  
21 restroom consistent with their gender identity, and every  
22 time they used the restroom they have to go to the  
23 principal's office, have their parents called and go to  
24 counseling, whatever that means, then really that is a harm  
25 in itself. And I assume --

1 THE COURT: At least for Lyons' purposes, which is  
2 the current test.

3 MR. GONZALEZ-PAGAN: Yes, Your Honor. And I would  
4 point out that I would assume that the counseling, as the  
5 discussion has evolved today, really means that reminding  
6 them that they don't belong in the restrooms that they use,  
7 which is ultimately a reminder that the school doesn't  
8 acknowledge who they are.

9 Ultimately the weight of authority here is that the  
10 First, the Fourth, the Sixth, the Ninth and the Eleventh  
11 Circuits have all said that --

12 THE COURT: Courts within those Circuits?

13 MR. GONZALEZ-PAGAN: No. Those Circuits, Your  
14 Honor, have already said discrimination on the basis of  
15 general identity or transgender status is a form of sex  
16 discrimination. That's the weight of authority referred to  
17 by the Fourth Circuit in the G.G. case.

18 THE COURT: Is there any contrary Circuit  
19 authority?

20 MR. GONZALEZ-PAGAN: There are, Your Honor. One is  
21 Etsitty in the Tenth Circuit, which relies on pre-Price  
22 Waterhouse cases and Ulane specifically from the Seventh  
23 Circuit. And the second is the Ulane case from the 1980s,  
24 pre-Price Waterhouse from the Seventh Circuit. And I would  
25 argue, and I was fortunate enough to be --

1 THE COURT: I was going to ask you were you present  
2 for the argument --

3 MR. GONZALEZ-PAGAN: I was fortunate enough to be  
4 present at the Hively arguments yesterday, Your Honor, and  
5 the Court can just listen to the oral arguments and take  
6 judicial notice that the Ulane precedent's days are quite  
7 outnumbered.

8 So really the weight of authority lies here, but  
9 ultimately what we're talking about is the specific facts of  
10 this case.

11 And as Your Honor started today pointing out, every  
12 District Court to have addressed this in the past couple of  
13 months and, in fact, for the last year addressing similar  
14 facts, the Whitaker case, the Carcano case, the Highland  
15 Local School District case in Ohio and even the District 211  
16 litigation in Illinois have all concluded -- well, the first  
17 three have all concluded that there's a likelihood of success  
18 for transgender students who have similar claims to our  
19 clients, and they've also -- and by -- the District 211 has  
20 asserted that those seeking to challenge the existence of an  
21 inclusive practice because of some asserted interest in  
22 privacy do not have a likelihood of success on merits.

23 But I would point out that the Whitaker, the  
24 Highland and the District 211 litigation were all decided,  
25 just like the Carcano case, after the Supreme Court became

1 involved in G.G. And that even the Seventh Circuit denied a  
2 stay of the injunction in the Whitaker case out of Wisconsin.

3 And ultimately this is about restoring the status  
4 quo, and that is the purpose of our preliminary injunction.  
5 We have pointed out in our briefs why the status quo is  
6 markedly different in this case from the G.G. case.

7 Because the last case of noncontested status in  
8 this case predates all that happened in 2016. It really goes  
9 back to the year since Elissa was a freshman back in 2013 and  
10 has been using the girl's restroom without incident until the  
11 passage of Resolution 2.

12 Really this is about the fact that Defendants have  
13 repeatedly stated today that they do not send a message that  
14 Juliet and Elissa are not girls and A.S. is not a boy. One  
15 need only look at their objections to our findings of fact  
16 No. 13 and No. 14. And I'll just read one of them verbatim.

17 "Although the District recognizes that Plaintiffs  
18 Juliet Evancho and Elissa Ridenour identify as girls, said  
19 Plaintiffs are not girls biologically."

20 That is the message that they're sending these  
21 girls. And that is from their very own pleadings. The same  
22 is said with regards to A.S. But they are. They are two  
23 girls and one boy. What Resolution 2 does is to discriminate  
24 on the basis of a subclass of sex.

25 Specifically it distinguishes between two types of

1 girls, cisgender girls and transgender girls; and likewise  
2 between two types of boys, cisgender boys and transgender  
3 boys, even though both are girls and both are boys.

4 And when you discriminate based on those  
5 classifications, those subclasses of sex, you're  
6 discriminating based on gender identity, meaning you are  
7 discriminating based on sex.

8 Ultimately the Court should apply the same  
9 understanding of sex that we've proposed here, and that is  
10 undisputed really from the record from Dr. Ehrensaft's  
11 declaration that sex is a multi-factored -- determined by  
12 multiple factors, the primary determinant of which is gender  
13 identity. But gender identity is a component of sex and that  
14 gender identity is innate and has a biological basis.

15 It is with that understanding, Your Honor, that we  
16 ask the Court to really affirm what is true, and I think it  
17 is a part of the Complaint, and one would argue that  
18 Defendant's motion to dismiss does not take the facts of the  
19 Complaint as true when they dispute whether the students are  
20 the sex that they assert they are.

21 But really what we ask is that the Court affirm our  
22 students' rights to be treated equally as those of the same  
23 sex, to treat Juliet and Elissa the same as the girls that  
24 are treated -- the same way cisgender girls are treated at  
25 Pine-Richland High School and to treat A.S. the same way that

1 cisgender boys are treated at Pine-Richland High School.

2 Thank you, Your Honor. If you have any further  
3 questions --

4 THE COURT: I don't, Counsel. Thank you very much.

5 MR. GONZALEZ-PAGAN: Thank you.

6 THE COURT: Miss Lane or Mr. Foley, I promised you  
7 since you had the last motion in the segment here, you would  
8 get slot No. 4, if there's anything to add to the record.

9 MR. FOLEY: I don't have anything, Your Honor, to  
10 add.

11 THE COURT: Miss Lane?

12 MS. LANE: Your Honor, we would just point out that  
13 we believe that we've set forth the standards of the motion  
14 to dismiss. We've clearly relied on Judge Gibson's decision.

15 Title IX, the question is what does sex mean? So  
16 when we are confronted with findings of fact which we clearly  
17 in a very respectful manner informed the Court that we don't  
18 believe that issue of what Plaintiffs believe they are to be  
19 is at issue here. We don't contest it.

20 What we say to you, Your Honor, is you are to  
21 decide what the statutory meaning of sex is, not what  
22 Dr. Ehrensaft believes medically or what Plaintiffs believe.  
23 And our wish is to be careful that that's the issue before  
24 you, and it's certainly not meant to be in any manner  
25 disrespectful. And I believe we were careful --

1 THE COURT: No. Everyone's been very --

2 MS. LANE: -- to state that in our pleadings.

3 THE COURT: My impression of the argument,  
4 Miss Lane, and I -- if by something I've done, I certainly  
5 wouldn't have intended it. I hope -- I've taken counsel  
6 throughout this litigation, both in the numerous status  
7 conferences we've had and the writings that you've submitted  
8 to the Court and certainly here today, everyone has been a  
9 top notch professional.

10 There's hot disagreement on what the law is.  
11 There's significant disagreement on what the -- how the  
12 law -- the application of law to fact, what the results are,  
13 but that's why we have advocates.

14 That's why we have an adversary system in the  
15 United States. That's lawyers doing their job, and I've not  
16 seen any of the lawyers in this case do anything other than  
17 that. Their disagreements are their disagreements on behalf  
18 of their clients, and we're going to have to sort that out.

19 MS. LANE: Thank you, Your Honor.

20 THE COURT: Miss Lane, Mr. Foley, thank you very  
21 much.

22 Mr. Gonzalez-Pagan, Mr. Clark, Miss Ingelhart,  
23 thank you very much.

24 MR. CLARK: Thank you.

25 THE COURT: Miss Lash, recognizing the



1 probabilities are slim, but I'll ask is there anything we  
2 wanted to talk with the lawyers about that remains  
3 undiscussed with them?

4 MS. LASH: I don't think so, Judge.

5 THE COURT: Okay. We'll start with counsel for the  
6 Plaintiffs. I'm not inviting it. I'm not suggesting it.  
7 I'm also not prohibiting it. I'm just asking -- and this is  
8 not like a game show on TV. There's no prize for buzzing in  
9 fast. You're allowed to think about this. Is there any  
10 supplemental submissions based on the argument today that you  
11 believe need to be made to the Court?

12 MR. CLARK: Your Honor, since the submission of our  
13 papers, there have been additional incidents at the school  
14 involving our clients. And we have declarations prepared,  
15 and we had shared them with opposing counsel.

16 Unfortunately, when you're working with students as  
17 clients, it is sometimes difficult to get the signature on  
18 the declaration. And we were unable to get that signature --

19 THE COURT: The students' schedules are worse than  
20 adults'?

21 MR. CLARK: Busier than mine. We could not get the  
22 signatures until past the deadline you had set for this  
23 hearing. So counsel objected to the late submission of them.

24 THE COURT: I understand.

25 MR. CLARK: But in light of the fact that we -- but

1 we tendered the declarations to counsel on Wednesday was it?  
2 Tuesday evening. In light of the fact that Your Honor has  
3 asked specifically about harms and the ways in which our  
4 clients have been treated since the passage of Resolution 2,  
5 we would ask for leave to file those declarations.

6 THE COURT: How about we do this, Mr. Clark and  
7 Miss Lane? I will say this. I can't say you weren't warned  
8 that there are those that think I ask a lot of questions.  
9 I'm not saying I agree with that, but some have observed  
10 that.

11 What we'll do, because I think you're entitled to  
12 think about the argument today, think about what you heard  
13 from your colleagues on the opposite side of the caption,  
14 think about any questions the Court asked.

15 As with any matter under Rule 65 where there's a  
16 request for preliminary relief, this moves to the top of the  
17 stack. So I'm not telling you when the decision is going to  
18 come out, but it moves to the top of the stack because of the  
19 nature of the relief that's requested.

20 But it's not going to come out Monday or Tuesday.  
21 We have to work through some things at the Court's end here.  
22 We'll give each team, each side until next -- if we set a  
23 week from today, end of the day next Thursday, however you  
24 want to use them, you can file up to 20 pieces of paper. It  
25 can be copies of cases. It could be citations to things. It

1 could be declarations. It could be something you think  
2 weighs on, bears on things that are going on here.

3 I recognize 20 is a lot. But given what we have,  
4 sort of in for a dime, in for a dollar. So you can have 20  
5 pages, that's signatures, tables of contents, no more than 20  
6 sheets of paper. You can file it by the end of the day next  
7 Thursday.

8 If there's something that comes from the other side  
9 that you think absolutely cries out of a necessity of a  
10 response, you can have five pages by the following Monday.

11 But I urge you to use that standard, that you could  
12 not sleep at night in the interests of your client if you  
13 didn't file that reply.

14 And then that way -- and you may elect to file  
15 nothing. And if by the end of the day next Thursday or the  
16 end of the day a week from Monday nothing comes in, that's  
17 fine. I'll conclude you rest on what we heard at argument  
18 today and what you submitted, and I'm not the least bit  
19 intimating it's at all incomplete.

20 But I think given the exhaustive and perhaps to you  
21 exhausting nature of today's proceedings, in fairness to your  
22 clients and the interests you each have articulated with some  
23 significance to them, that's what would be my thought. Can  
24 you live with that, Mr. Clark?

25 MR. CLARK: Absolutely.

1 THE COURT: Miss Lane and Mr. Foley, can you live  
2 with that?

3 MR. FOLEY: Yes.

4 THE COURT: Anything else from the Plaintiff's side  
5 of the courtroom today?

6 MR. GONZALEZ-PAGAN: No, Your Honor. Thank you.

7 THE COURT: Okay. I wish counsel safe travels to  
8 wherever your cities would take you next.

9 From the defense side of the courtroom, anything  
10 else?

11 MR. FOLEY: No, Your Honor.

12 THE COURT: Okay. I want to commend counsel for  
13 the quality of the written submissions that the Court's  
14 received. I want to commend counsel for the efficiency with  
15 which you've dealt on behalf of your clients and in aid of  
16 the Court.

17 I want to further commend counsel, although I may  
18 have done this on the record, with the professionalism that  
19 you brought to a case that is at the front edge of the  
20 American legal jurisdiction prudence. That obviously is of  
21 significance to your clients, and it goes not unnoticed by  
22 the Court.

23 I don't anticipate directing Miss Rowe to prepare a  
24 transcript of any parts of this at the Court's direction. So  
25 if you anticipate for some reason you want that, talk with

1 each other, and talk with Miss Rowe. So if anyone was  
2 operating under the assumption that Judge Hornak's  
3 automatically going to do that, don't assume I'm  
4 automatically going to do that.

5 So if for some reason you need a part of it for  
6 something, talk with each other, and talk directly with  
7 Miss Rowe. Miss Rowe, is there anything else you need from  
8 the Court?

9 THE COURT REPORTER: No, thank you, Judge.

10 THE COURT: Miss Lash, with that, you can adjourn  
11 the Court, and I'll come down and greet counsel.

12 MS. LASH: All rise. This Honorable Court is now  
13 adjourned.

14 (Proceedings were concluded at 3:13 p.m.)

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18 C E R T I F I C A T E

19

20 I, Deborah Rowe, certify that the foregoing is  
21 a correct transcript from the record of proceedings in the  
22 above-titled matter.

23

24 S/Deborah Rowe \_\_\_\_\_

25 Certified Realtime Reporter