United States Court of Appeals

for the

Third Circuit

Case No. 17-3113

JOEL DOE, a Minor, by and through his Guardians John Doe and Jane Doe; MACY ROE; MARY SMITH; JACK JONES, a Minor, by and through his Parents John Jones and Jane Jones,

Appellants,

– v. –

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

Appellees,

PENNSYLVANIA YOUTH CONGRESS FOUNDATION,

Intervenor-Appellee.

ON APPEAL FROM AN ORDER ENTERED IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA IN CASE NO. 5:17-CV-01249, HONORABLE EDWARD G. SMITH, U.S. DISTRICT JUDGE

BRIEF FOR INTERVENOR-APPELLEE

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STATEMENT OF ISSUES PRESENTED FOR REVIEW ON APPEAL

I. Did the District Court misapprehend the law or make clearly erroneous findings of fact when it concluded that Plaintiffs failed to demonstrate a likelihood of success on the merits of their claims that the mere presence of boys and girls who are transgender in the same common restrooms and locker rooms that other boys and girls use:

   A. Violates Plaintiffs' right to bodily privacy under the Fourteenth Amendment to the U.S. Constitution?

   B. Creates a sexually harassing hostile environment in violation of Title IX?

   C. Constitutes an intrusion upon seclusion under Pennsylvania law?

II. Did the District Court make a clearly erroneous finding of fact when it concluded that Plaintiffs failed to demonstrate irreparable harm warranting a preliminary injunction given the privacy protections in place at the school, including single-user restrooms, which Plaintiffs admit would adequately protect their privacy during the pendency of this litigation?

III. Do the balance of the hardships and the public interest weigh in favor of excluding boys and girls who are transgender from the same common restrooms and locker rooms that other boys and girls use?

Suggested answer to all: No.

INTRODUCTION

Courts around the country are addressing the question of whether the Equal Protection Clause and Title IX require that schools allow boys and girls who are transgender to use the same common restrooms and locker rooms as other boys and girls. *See, e.g.*, *Whitaker v. Kenosha Unified Sch. Dist. No. 1*, 858 F.3d 1034 (7th Cir. 2017) (Constitution and Title IX require school to allow boy who is transgender to use same facilities as other boys). That question is not at issue here. This case presents a different question: whether school districts that choose to do so *may* allow boys and girls who are transgender to use the same common restrooms and locker rooms as other boys and girls. The answer to that question is yes.

In the 2016-17 school year, the Boyertown Area School District (the "District") began to consider individual requests by transgender students to use restrooms and locker rooms that match their gender identity. After consulting with those students, their parents, and their guidance counselors, the District "permitted transgender students to use restrooms and locker rooms aligned with their gender identity on a case-by-case basis." J.A. vol. I 22 (Op. ¶ 28).

One of those students, Aidan DeStefano, explained to the District Court how it felt to finally be allowed to use the boys' facilities in his senior year: It "fe[lt] so good—I am finally 'one of the guys,' something I have waited for my whole life."

J.A. vol. II 218 (DeStefano Decl. ¶ 11). He also described why using the girls' facilities was not an option:

> I could not go back to using the female facilities any more than any other male student could. It would be distressing for me to do so. And it would be deeply uncomfortable for everyone. Even before I began hormones and had chest surgery, it was clear that the girls bathroom was the wrong place for me. Now, I have facial hair, a male chest, a deep voice, and everyone knows I'm a guy.

J.A. vol. II 219 (DeStefano Decl. ¶ 17). Moreover, he said, being required to use separate facilities than those used by the other boys, including his teammates on the boys' cross-country team, would be "humiliating and stigmatizing." J.A. vol. II 218-20 (DeStefano Decl. ¶¶ 10, 18). The serious negative psychological consequences of excluding boys and girls who are transgender from the common facilities used by other boys and girls are well recognized within the medical and mental health fields. J.A. vol. I 78-81 (Op. ¶¶ 360-64, 368). Such treatment can also negatively affect students' education by causing them to miss class or leave school altogether. J.A. vol. I 78-79 (Op. ¶ 361).

Plaintiffs seek to upend the status quo at the Boyertown Area Senior High ("BASH") via a preliminary injunction that would order the District to bar boys and girls who are transgender from continuing to use the restrooms and locker rooms used by other boys and girls. That result would be unprecedented. No court in the country has granted such an extraordinary request and, in the one other decision that has addressed precisely the same request, it was denied. *Students &*

Parents for Privacy v. U.S. Dep't of Educ., No. 16-cv-4945, 2017 WL 6629520 (N.D. Ill. Dec. 29, 2017). In fact, courts around the country have held that the very relief requested by Plaintiffs—the exclusion of transgender students from facilities that match their gender identity—violates the Equal Protection Clause, Title IX, or both, and have issued injunctions barring school districts from discriminating against transgender students in that manner.[1]

The District Court's decision denying Plaintiffs' motion for a preliminary injunction was not an abuse of discretion. The court found that no student at BASH is forced to expose his or her unclothed body to any student of any gender given the privacy protections available to all students at the school, including locking stalls in the common restrooms, locking stalls and curtained shower stalls in the locker rooms, and several single-user restrooms. Thus, the court found, there was no irreparable harm to Plaintiffs during the pendency of this litigation. Plaintiffs offer no basis to disturb these findings of fact. Nor could they, as they conceded that the single-user facilities adequately protect their privacy. The lack

[1] *Whitaker*, 858 F.3d 1034; *Dodds v. U.S. Dep't of Educ.*, 845 F.3d 217 (6th Cir. 2016) (denying stay of preliminary injunction issued in *Board of Education of the Highland Local School District v. United States Department of Education*, 208 F. Supp. 3d 850 (S.D. Ohio 2016)); *Evancho v. Pine-Richland Sch. Dist.*, 237 F. Supp. 3d 267 (W.D. Pa. 2017); *see also A.H. ex rel. Handling v. Minersville Area Sch. Dist.*, No. 3:17-CV-391, 2017 WL 5632662 (M.D. Pa. Nov. 22, 2017) (denying school district's motion to dismiss claim by transgender student related to access to single-sex facilities).

of compulsion to undress in view of other students also dooms Plaintiffs' constitutional bodily privacy claim. Their Title IX sexual harassment and state tort claim for intrusion upon seclusion are equally devoid of legal support.

Plaintiffs' claims fail for the additional reason that they ignore the reality of what it means to be transgender, as discussed in the District Court's extensive findings of fact. *See infra* pp. 7-12. As the court observed, "although the plaintiffs refuse to refer to them as such, this case involves transgender students"; it "does not merely involve members of the opposite sex" in the single-sex facilities. J.A. vol. I 105 (Op. ¶ 100).

The District's practice of permitting transgender boys and girls to use the same facilities used by other boys and girls—a practice endorsed and followed by numerous Pennsylvania school districts[2] as well as state and federal agencies[3] and

[2] This includes the following: Abington, East Pennsboro, Lower Merion, Marple Newtown, New Hope-Solebury, Parkway West Career and Technology Center, Philadelphia, Pittsburgh, Rose Tree Media, Springfield, Upper Dublin, and Wissahickon. *See* Index of Pennsylvania Sch. Dist. Transgender Policies (ECF No. 59-1).

[3] This includes the Pennsylvania Office of Administration, which oversees the state workforce, *see* PENN. OFFICE OF ADMIN., GENDER TRANSITION GUIDELINES (Dec. 14, 2016), https://perma.cc/K5GL-ZEKP, and the General Services Administration, which oversees the federal workforce, *see* Federal Management Regulation; Nondiscrimination Clarification in the Federal Workplace, 81 Fed. Reg. 55148 (Aug. 18, 2016), as well as the federal Occupational Safety and Health Administration, U.S. OCCUPATIONAL SAFETY & HEALTH ADMIN., A GUIDE TO RESTROOM ACCESS FOR TRANSGENDER WORKERS 1 (2015), https://perma.cc/24CH-CGAX, and the federal Job Corps program, LENITA JACOBS-SIMMONS, JOB CORPS

other institutions[4]—harms no one and violates no law or constitutional right. The Opinion and Order of the District Court denying Plaintiffs' request for a preliminary injunction should be affirmed.

COUNTERSTATEMENT OF THE CASE

The Counterstatement of the Case is based on the District Court's findings of fact, which followed an extensive evidentiary presentation including the live testimony of students (Plaintiffs Joel Doe and Mary Smith as well as Aidan DeStefano), an expert witness (Dr. Scott Leibowitz), and one of BASH's administrators (Dr. Brett Cooper). J.A. vol. I 15 (Op. 10). The District Court also had before it the trial depositions of the remaining Plaintiffs (Jack Jones and Macy Roe), the discovery depositions of all four Plaintiffs, discovery depositions of all three BASH administrators who were named Defendants (Dr. Richard Faidley, Dr.

NATIONAL OFFICE, JOB CORPS PROGRAM INSTRUCTION NOTICE NO. 14-31, ENSURING EQUAL ACCESS FOR TRANSGENDER APPLICANTS AND STUDENTS TO THE JOB CORPS PROGRAM 3-5 (May 1, 2015), https://perma.cc/Y3GJ-AQHV, among others.

[4] This includes Pennsylvania universities, *see, e.g.*, *Single Occupancy Restrooms*, University of Pittsburgh, https://perma.cc/U9RA-HJ35 (noting that community members may use "any restroom that corresponds to their gender identity"); Penn State University, *University Reaffirms Support and Protections for Transgender Penn Staters*, Penn State News (Mar. 13, 2017), https://perma.cc/R5SE-ML39, and the National Collegiate Athletic Association, NCAA OFFICE OF INCLUSION, NCAA INCLUSION OF TRANSGENDER STUDENT-ATHLETES 20 (2011), https://perma.cc/3N6K-9KEH.

E. Wayne Foley, and Dr. Cooper), and the discovery deposition of Dr. Leibowitz. *Id.*

Transgender Adolescents

The District Court accepted the testimony of Dr. Scott Leibowitz, a clinical psychiatrist with extensive experience in treating children and adolescents with gender dysphoria, as an expert in gender dysphoria and gender identity issues in children and adolescents. J.A. vol. I 83 (Op. ¶ 380 & n.41); *see also* J.A. vol. I 68-70 (Op. ¶¶ 312-21). The Court made the following findings of fact based on the unrefuted expert testimony:

The term "transgender" describes a person whose gender identity is different from the sex that person was assigned at birth. J.A. vol. I 70 (Op. ¶ 322). Typically, sex is assigned at birth based on a baby's genitalia. J.A. vol. I 70 (Op. ¶ 324). A transgender boy is a person who has a lasting, persistent male gender identity but was assigned the sex female at birth. J.A. vol. I 71 (Op. ¶ 328). A transgender girl is a person who has a lasting, persistent female gender identity but was assigned the sex male at birth. *Id.*

Many people who are transgender experience a clinically significant level of distress because of the incongruence between their gender identity and their sex assigned at birth. J.A. vol. I 73 (Op. ¶ 338). Gender dysphoria is the clinical classification for this distress. J.A. vol. I 71 (Op. ¶¶ 332-33).

Gender dysphoria, if not addressed, places adolescents at greater risk for mental health problems, including depression, anxiety, self-injurious behavior, and suicidal ideation and behavior. J.A. vol. I 74 (Op. ¶¶ 343-45). Studies show that 45% of transgender adolescents have had thoughts of suicide, compared to 17% in that age group, in 2015. J.A. vol. I 74 (Op. ¶ 344).

The accepted standards in the medical and mental health fields for treating gender dysphoria in adolescents are documented in the World Professional Association for Transgender Health ("WPATH") Standards of Care, currently in its seventh edition. J.A. vol. I 73-74 (Op. ¶¶ 340-42); *see generally* J.A. vol. IX 2260-2379 (WPATH Standards of Care). The WPATH Standards of Care are accepted as the appropriate treatment protocols by the major medical and mental health professional associations including the American Medical Association, the American Psychological Association, the American Psychiatric Association, the American Academy of Child and Adolescent Psychiatry, the American Academy of Pediatrics, the Endocrine Society, and the American College of Obstetrics and Gynecology. J.A. vol. I 73 (Op. ¶ 341); J.A. vol. III 557 (7-31-17 Tr. 63).

The goal of treatment for adolescents with gender dysphoria is to alleviate the distress due to the lack of alignment between their gender identity and assigned sex at birth, or in other words, "to help one not experience that internal sense of chaos that they live day-to-day, being and feeling as though they were born with a

sex assigned at birth that differs from their core sense of self, that deep conviction of who they are." J.A. vol. I 74 (Op. ¶ 347).

Among the accepted clinical interventions to treat adolescents with gender dysphoria are social transition, pubertal suppression, hormone therapy, and surgeries. J.A. vol. 75 (Op. ¶ 349); *see generally* J.A. vol. IX 2275-86 (WPATH Standards of Care, Part VI, Assessment and Treatment of Children and Adolescents with Gender Dysphoria).

Social transition refers to the process of living in accordance with one's gender identity. For example, a transgender girl might adopt a name traditionally associated with girls, use feminine pronouns, and grow her hair. J.A. vol. I 76 (Op. ¶ 356). Social transition also involves using single-sex facilities, like restrooms and locker rooms, consistent with one's gender identity. J.A. vol. I 77 (Op. ¶ 356).[5]

When adolescents with gender dysphoria are able to use restrooms and lockers that match their gender identity, it can have a significant positive effect on their mental well-being. J.A. vol. I 79 (Op. ¶ 363). A burden is lifted and they feel

[5] It is difficult for a person who is not transgender to understand the significance of access to single-sex facilities. Every time we use the restroom we are confronted with a sign that demands that we identify ourselves as male or female. This is something most people never think twice about, but for transgender people, this is a ubiquitous, constant reminder of a profound conflict in their lives—the conflict between who they are and how others see them. *See* J.A. vol. III 393-95 (testimony of Dr. Leibowitz).

a sense of relief and emotional alignment. *Id.*; *see also id.* (quoting DeStefano Decl. ¶ 11) (being able to use the male facilities at BASH "feels so good—I am finally 'one of the guys,' something I have waited for my whole life."); *id.* (quoting (DeStefano Decl. ¶ 12) ("Being able to be my true self is more important than I can describe. I am on track to make the Honor Roll for the third marking period in a row, something I have never done before because I was too distracted and stressed.").

Conversely, barring transgender adolescents from using restrooms and other sex-separated facilities consistent with their gender identity can erode their psychological well-being. J.A. vol. I 78 (Op. ¶ 360). It can cause depression and negatively impact their self-esteem and self-worth, ability to trust others, and willingness to go out into the world, during a crucial aspect of development. J.A. vol. I 78-79 (Op. ¶ 361). Transgender youth who cannot use the restroom or other facilities consistent with their gender identity may miss class or leave school. J.A. vol. I 78 (Op. ¶ 361). This hampers their ability to access opportunities traditionally associated with growing up and maturing into adults, such as getting a job or exploring educational enrichment opportunities. J.A. vol. I 78-79 (Op. ¶ 361).

Forcing transgender youth to use a separate single-user restroom can undermine the benefits of their social gender transition by sending the message that

they are not really who they identify as. J.A. vol. I 80 (Op. ¶ 364). It is also stigmatizing for the individuals required to use them by reinforcing a sense of "otherness." J.A. vol. I 80 (Op. ¶ 364).

The major medical and mental health professional organizations have taken the position that transgender people should be able to use restrooms that accord with their gender identity. J.A. vol. I 80-81 (Op. ¶ 368). Those organizations include the American Medical Association, the American Psychological Association, the American Psychiatric Association, the National Association of Social Workers, the American Academy of Pediatrics, and the American Academy of Child and Adolescent Psychiatry. *Id.*

Accepted and available treatments for transgender adolescents with gender dysphoria also include puberty suppressing drugs, hormone therapy, and surgeries. J.A. vol. I 75 (Op. ¶ 349). Adolescents treated with puberty suppressing drugs do not go through puberty of their assigned sex at birth. J.A. vol. I 75 (Op. ¶ 350). For example, a transgender boy—an adolescent who was assigned female at birth—will not develop breasts or widening of the hips. *Id.* Hormone therapy for transgender adolescents—providing testosterone for boys and estrogen for girls—produces secondary sex characteristics that match one's gender identity. J.A. vol. I 75 (Op. ¶ 351). For example, a transgender girl who takes estrogen will develop breasts and the fat distribution typical of females. J.A. vol. I 75-76 (Op. ¶ 351). A

transgender boy who takes testosterone will develop facial and body hair, a deeper voice, and muscle mass typical of males. J.A. vol. I 76 (Op. ¶ 351). For transgender boys, another clinical intervention that may be used in adolescents is mastectomy to remove the breast tissue and create a male chest. J.A. vol. I 76 (Op. ¶ 353).

"[A]s a result of the [different types of available] medical treatments . . . for gender dysphoria in adolescents, transgender adolescent males will not necessarily align with cisgender[6] girls, and transgender adolescent females will not necessarily align physically with cisgender males." J.A. vol. I 76 (Op. ¶ 352) (second brackets and ellipsis in original).

Transgender Students at BASH

Transgender students exist at BASH, as they do at high schools across America. The District has been aware of at least one student who is transgender since the 2014-15 school year, J.A. vol. I 19 (Op. ¶ 17), but it was not until the 2016-17 school year that the District began to consider individual requests by those students to use facilities like restrooms and locker rooms in accordance with their gender identity. J.A. vol. I 22 (Op. ¶ 28). Although the District's decision to consider such requests was prompted by guidance from the federal government

[6] "Cisgender" is a term to refer to an individual who is not transgender. J.A. vol. I 31 (Op. ¶ 80).

that has been withdrawn by the current administration, J.A. vol. I 35 (Op. ¶ 103), the District has chosen to continue the practice because it "believes that transgender students should have the right to use school bathroom and locker facilities on the same basis as non-transgender students." J.A. vol. I 35 (Op. ¶ 103). The District also believes its "position is consistent with guidance from the Pennsylvania School Boards Association, the National School Boards Association, [its] Solicitor and what the school district administration believe is fair and equitable under the circumstances." J.A. vol. I 35 (Op. ¶ 103); *see also* J.A. vol. VII 2016-19 (District FAQs about *Doe v. Boyertown Area Sch. Dist.*).

During the 2016-17 school year, the District received requests from three transgender students, including Aidan DeStefano (pictured below), to use facilities in accordance with their gender identity. J.A. vol. I 23 (Op. ¶¶ 36-37).

J.A. vol. II 222 (DeStefano Decl. 7).

Aidan has always identified as male, but he was designated female at birth. J.A. vol. I 83 (Op. ¶ 382). During his junior year, he started hormone therapy and legally changed his name to Aidan. J.A. vol. I 85 (Op. ¶¶ 392-93).[7] He dresses and styles his hair as a male, ran for BASH's boys' cross country team, and was elected to the homecoming court as a boy. J.A. vol. I 84-85 (Op. ¶¶ 383 & n.42, 394, 396). At BASH's graduation ceremony, he wore the black robe worn by other boys. J.A. vol. I 84 (Op. ¶ 384).

[7] *See also* JA vol. II 218 (DeStefano Decl. ¶ 10) ("I have changed my legal documents from saying 'female' to saying 'male,' including my birth certificate. Last summer, I had bilateral mastectomy to further bring my physical appearance in line with my identity as male.").

When Aidan attempted to use the girls' restroom in seventh grade, he was told never to return because the girls thought he was male. J.A. vol. I 84 (Op. ¶ 386). When he again attempted to use the girls' restrooms at high school, he "got yelled at by literally everyone that was in there" and was told "not to come back." J.A. vol. I 84 (Op. ¶ 389). Aidan used the nurse's restroom. J.A. vol. I 84-85 (Op. ¶¶ 387, 390).

At the start of the 2016-17 school year, Aidan requested permission to use the facilities that other boys use. J.A. vol. I 23 (Op. ¶ 32). When he was permitted to use the boys' facilities, it "fe[lt] so good—I am finally 'one of the guys,' something I have waited for my whole life." J.A. vol. I 79 (Op. ¶ 363 (quoting DeStefano Decl. ¶ 11)).[8]

Restrooms and Locker Rooms at BASH

No student at BASH is required to disrobe in the presence of any other student of any gender. BASH's common restrooms have individual toilet stalls with locking doors and may be used to change clothes. J.A. vol. I 29 (Op. ¶ 67).

[8] *See also* J.A. vol. II 219 (DeStefano Decl. ¶ 17) ("I could not go back to using the female facilities any more than any other male student could. It would be distressing for me to do so. And it would be deeply uncomfortable for everyone. Even before I began hormones and had chest surgery, it was clear that the girls bathroom was the wrong place for me. Now, I have facial hair, a male chest, a deep voice, and everyone knows I'm a guy."); J.A. vol. II 218-20 (DeStefano Decl. ¶¶ 10, 18) (being required to use separate facilities than those used by the other boys, including his teammates on the men's cross-country team, would be "humiliating and stigmatizing").

Additionally, the locker rooms have individual locking toilet stalls as well as private curtained shower stalls. J.A. vol. I 29 (Op. ¶ 69). Finally, after renovations undertaken in part to address privacy concerns raised by Plaintiffs, BASH now offers eight single-user restrooms throughout the school. J.A. vol. I 28, 30 (Op. ¶¶ 66, 75). These facilities can be used as restrooms or for changing clothes for gym or sports. Some of them have lockers. J.A. vol. I 44, 60 (Op. ¶¶ 154, 295).

Plaintiffs and their parents admitted that using single-user facilities would adequately protect their privacy. J.A. vol. I 40, 44, 50, 53, 60, 65 (Op. ¶¶ 133, 154, 197, 216, 263, 295); *see also* J.A. vol. X 2394 (John Doe Tr. 15), 2435-36 (Jane Doe Tr. 14-15).

Plaintiffs' Complaints

Plaintiffs object to boys and girls who are transgender using the same common restrooms that other boys and girls use.

Joel Doe and Jack Jones complain of each seeing, on one occasion, Student A, a boy who is transgender, changing clothes for gym in the common area of the boys' locker room. J.A. vol. I 36 (Op. ¶¶ 109-12).[9] In neither case were any of

[9] Plaintiffs describe Student A, a boy who is transgender, as a "biological girl," but there is no evidence in the record about Student A's sex-based biological characteristics. *See* J.A. 36 (Op. ¶ 113).

the boys fully undressed. J.A. vol. I 36, 46-47 (Op. ¶¶ 111-12, 171, 173).[10]

Mary Smith complains that she walked into the girls' common restroom and saw Student B, a girl who is transgender, washing her hands at the sink. J.A. vol. I 56 (Op. ¶ 234).

Macy Roe, who has graduated from BASH, is unaware of ever seeing a transgender student in the girls' restroom or locker room. J.A. vol. I 63, 65 (Op. ¶¶ 278, 292, 293).

Plaintiffs testified that they did not object to sharing facilities with students who have different anatomy than theirs. To the contrary, Macy testified that she had no objection to penises in the girls' locker room, as long as the student was "born female." J.A. vol. I 66 (Op. ¶ 301-02). Joel and Jack testified that they had no objection to breasts in the boys' locker room, as long as the student was "born male." J.A. vol. I 44-45, 52 (Op. ¶¶ 159, 208). Some of their parents echoed those sentiments. For example, "John and Jane Jones [Jack's parents] have no objection to Jack Jones sharing a locker room with students who have different anatomy from him, as long as the students were designated male at birth. This would include Jack Jones's possible exposure to breasts or a vagina, as long as the person with the breasts and/or vagina is a male." J.A. vol. I 53 (Op. ¶ 213). "John Jones

[10] Student A was wearing a t-shirt or sports bra and shorts. J.A. vol. I 39, 46-47 (Op. ¶¶ 128, 171). Joel Doe was in his underwear. J.A. vol. I 45 (Op. ¶ 166). Jack Jones was in a t-shirt and underwear. J.A. vol. I 47 (Op. ¶ 173).

would not oppose his daughter sharing the girls' locker room with a transgender boy who has a penis, as long as the student was assigned female at birth." J.A. vol. I 53 (Op. ¶ 217). Yet Plaintiffs also admitted that there is no way to tell someone's sex assigned at birth—"born male" or "born female" in Plaintiffs' parlance—just by looking at them. J.A. vol. I 45, 52, 62, 65 (Op. ¶¶ 161, 206, 270, 294).

Procedural History

Joel Doe filed the initial complaint in this matter on March 21, 2017, nearly five months after he saw Student A changing in the locker room on October 31, 2016. J.A. vol. I 9-10 (Op. 4, 5). Jack Jones, Mary Smith, and Macy Roe joined the action via an amended complaint filed on April 18, 2017. *Id.* Plaintiffs waited another month before they filed a motion for preliminary injunctive relief on May 17, 2017. J.A. vol. I 14 (Op. 9).

The District Court held a scheduling conference on Plaintiffs' motion two days later to ensure the parties had sufficient time to complete discovery and argument before students returned to BASH for the 2017-18 school year. J.A. vol. I 14 (Op. 9). The District Court also granted the unopposed motion to intervene of the Pennsylvania Youth Congress. *Id.*

In addition to the evidentiary record, *see supra* pp. 6-7, the District Court also had the benefit of multiple rounds of briefing on the preliminary injunction motion, including memoranda of law, proposed findings of fact and conclusions of

law, and supplemental proposed findings of fact and conclusions of law from all parties. J.A. vol. I 15-16 (Op. 10-11). The District Court heard oral argument on the motion on August 11, 2017. J.A. vol. I 16 (Op. 11).

The District Court issued its 142-page memorandum opinion and order denying Plaintiffs' motion for a preliminary injunction on August 25, 2017. J.A. vol. I 6-147 (Op.). Plaintiffs filed a notice of appeal of the denial one month later on September 25, 2017. J.A. vol. I 1-3 (Notice of Appeal).

STANDARD OF REVIEW

This Court reviews the District Court's decision to deny a preliminary injunction for abuse of discretion. *Ferring Pharm., Inc. v. Watson Pharm., Inc.*, 765 F.3d 205, 210 (3d Cir. 2014). "The District Court's findings of fact are reviewed for clear error and its conclusions of law are subject to plenary review." *Id.*; *Am. Express Travel Related Servs., Inc. v. Sidamon-Eristoff*, 669 F.3d 359, 366 (3d Cir. 2012).

SUMMARY OF ARGUMENT

Plaintiffs seek an injunction that would bar boys and girls who are transgender from using the same common restrooms and locker rooms that other boys and girls use. Whether couched in terms of the constitutional right to bodily privacy, Title IX, or the tort of intrusion upon seclusion, their claims are legally groundless, as the District Court correctly found.

First, Plaintiffs attempt to shoehorn their request into the constitutional right to bodily privacy. Although the Fourteenth Amendment may be implicated when government officials subject people to involuntary exposure of their unclothed bodies, the District Court found that no student at BASH is forced to undress in view of *any* student of *any* gender. Moreover, the constitutional right to bodily privacy does not give Plaintiffs the right to exclude others from common spaces. Plaintiffs' reliance on language borrowed from far-flung cases involving forcible strip searches under the Fourth Amendment, criminal activity, and other inapposite topics, does not support their novel constitutional theory. Even if Plaintiffs' fundamental rights were somehow implicated by the mere presence of boys and girls who are transgender in the common facilities that other boys and girls use, the District's practice satisfies strict scrutiny because it furthers a compelling interest in ensuring equal treatment of transgender students while ensuring everyone's privacy is protected. Plaintiffs' constitutional claim must fail, as have other attempts to exclude transgender students from common spaces in the name of others' privacy.

Second, Plaintiffs' assertion that the mere presence of boys and girls who are transgender amounts to a sexually harassing hostile environment in violation of Title IX fares no better. Being transgender is not "objectively offensive," a necessary element of Plaintiffs' hostile environment claim. Their Title IX claim is

not only baseless; it turns Title IX on its head. Federal courts have held that excluding boys and girls who are transgender from the common facilities used by other boys and girls—the relief Plaintiffs seek here—violates Title IX.

Finally, Plaintiffs' claim of intrusion upon seclusion under Pennsylvania law also fails because they have no expectation of seclusion in common areas of restrooms or locker rooms when other people are present. Even if they did, there is nothing "highly offensive" about students' use of common restrooms or locker rooms, whether those students are transgender or not.

In addition to concluding that Plaintiffs have no likelihood of success on the merits of any of their claims, the District Court also found that Plaintiffs were not entitled to a preliminary injunction because they failed to establish that they would suffer irreparable harm absent an injunction. To the contrary, Plaintiffs admitted that the availability of single-user facilities adequately protects their privacy during the pendency of this litigation. Plaintiffs do not even attempt to argue that the District Court's factual finding on this point was clearly erroneous. They claim they are entitled to a presumption of irreparable harm based on their constitutional privacy claim, but because Plaintiffs have not shown that they are likely to succeed on the merits of that claim, they are not entitled to any such presumption.

Because Plaintiffs have failed to establish either of the necessary threshold factors—likelihood of success on the merits and irreparable harm—to support a

preliminary injunction, the District Court's denial of the preliminary injunction was not an abuse of discretion and should be affirmed.

Moreover, the remaining factors—the balance of the hardships and the public interest—strongly support denial of the requested injunction. Boys and girls who are transgender are likely to suffer significant harms to their psychological well-being and education if a preliminary injunction should issue requiring them to be banished from the common restrooms and locker rooms that other boys and girls use, as the District Court found based on unrebutted expert testimony. These harms include depression, increased absences, and even leaving school altogether. The public interest also supports treating all students, including students who are transgender, equally.

ARGUMENT

"A primary purpose of a preliminary injunction is to maintain the status quo until a decision on the merits of a case is rendered." *Acierno v. New Castle Cty.*, 40 F.3d 645, 647 (3d Cir. 1994). Accordingly, a party seeking a preliminary injunction to alter the status quo, as Plaintiffs seek to do here, "bears a particularly heavy burden in demonstrating its necessity." *Id.* at 653.

To warrant entry of a preliminary injunction, a plaintiff must satisfy four factors: (1) likelihood of success on the merits; (2) irreparable harm absent preliminary injunctive relief; (3) that the balance of hardships weighs in favor of

the plaintiff; and (4) that a preliminary injunction would be in the public interest. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). The first two factors are the "most critical," *Reilly v. City of Harrisburg*, 858 F.3d 173, 179 (3d Cir. 2017), and "failure to demonstrate either [of the first two factors] is fatal to the Plaintiff's request," *Dorval v. Moe's Fresh Market*, 694 F. App'x 92, 94 (3d Cir. 2017); *see, e.g., NutraSweet Co. v. Vit-Mar Enters., Inc.*, 176 F.3d 151, 153 (3d Cir. 1999).

I. THE DISTRICT COURT CORRECTLY CONCLUDED THAT PLAINTIFFS ARE NOT LIKELY TO SUCCEED ON THE MERITS OF ANY OF THEIR CLAIMS.

A. Plaintiffs are not likely to succeed on their Fourteenth Amendment bodily privacy claim.

1. *The constitutional right to bodily privacy is not implicated because no student is compelled to expose his or her body to anyone.*

The zone of privacy protected by the Fourteenth Amendment includes a privacy interest in avoiding disclosure of "highly personal matters presenting the most intimate aspects of human affairs." *Doe v. Luzerne Cty.*, 660 F.3d 169, 175-76 (3d Cir. 2011) (internal quotation marks omitted). This includes a right to bodily privacy. *Id.* at 176-77.

This Court has held that the constitutional right to bodily privacy may be violated by forced exposure of intimate parts of one's body. *Id.* *Luzerne County* involved a male police officer who surreptitiously filmed a female officer in a

decontamination room who was naked except for a thin paper wrap and then uploaded photos and videos of her to the county network. *Id.* at 171-74. Other cases cited by Plaintiffs similarly recognized that the constitutional right to bodily privacy may be violated when government officials subject people to involuntary exposure of their unclothed bodies. *See, e.g.*, *Poe v. Leonard*, 282 F.3d 123, 136-39 (2d Cir. 2002) (trooper surreptitiously videotaped another trooper undressing); *Canedy v. Boardman*, 16 F.3d 183, 185-88 (7th Cir. 1994) (strip searches of male prisoner by female guard); *Fortner v. Thomas*, 983 F.2d 1024, 1029-30 (11th Cir. 1993) (male prisoners viewed by female correctional officers while showering and using the toilet); *York v. Story*, 324 F.2d 450, 455-56 (9th Cir. 1963) (police officer photographed nude body of assault complainant over her objection and distributed photos).

The District Court correctly held that there is no likelihood of Plaintiffs prevailing on their constitutional bodily privacy claim because, based on the evidence presented, no student is forced to undress in view of any other student of any gender. Students may change in locking toilet stalls or curtained shower areas in the locker rooms, or they may use single-user facilities. J.A. vol. I 29, 30, 44, 47, 60, 65 (Op. ¶¶ 66, 67, 69, 75, 154, 177, 263, 295). Indeed, Plaintiffs and their parents admitted that using single-user facilities would adequately protect their

privacy. J.A. vol. I 40, 44, 50, 53, 60, 65 (Op. ¶¶ 133, 154, 197, 216, 263, 295); *see also* J.A. vol. X 2394 (John Doe. Tr. 15), 2435-36 (Jane Doe Tr. 14-15).[11]

Other courts that have addressed constitutional privacy arguments related to transgender students' use of common facilities have rejected them for the same reason. In *Students & Parents for Privacy*, 2017 WL 6629520, a federal district court in Illinois denied a motion for a preliminary injunction in a case virtually identical to this one. The district court adopted the magistrate judge's Report and Recommendation, which explained:

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

[11] Plaintiffs contend that Joel Doe and Jack Jones unknowingly exposed their partially clothed bodies because, at the time Joel Doe and Jack Jones were changing, they did not know that the District had allowed some boys and girls who are transgender to use the facilities used by other boys and girls at BASH. Pl. Br. 24 n.12. On a motion for preliminary injunction, however, the only relevant question is whether there is any risk of unwanted exposure *in the future*. *See, e.g.*, *Campbell Soup Co. v. ConAgra, Inc.*, 977 F.2d 86, 91-92 (3d Cir. 1992). Whatever Plaintiffs may have known or not known in the fall of 2016, it is undisputed that they now know that some boys who are transgender use the same common facilities as other boys and that they can avoid any unwanted exposure to anyone by using private spaces the District has made available.

Students & Parents for Privacy v. U.S. Dep't of Educ., No. 16-cv-4945, 2016 WL 6134121, at *29 (N.D. Ill. Oct 18, 2016) ("*Students R&R*") (internal citation omitted); *see also Students & Parents for Privacy*, 2017 WL 6629520, at *6 ("[T]he restrooms at issue here have privacy stalls that can be used by students seeking an additional layer of privacy, and single-use facilities are also available upon request. Given these protections, there is no meaningful risk that a student's unclothed body need by seen by any other person.").

The Western District of Pennsylvania considered an identical privacy argument raised by a school district that refused to allow transgender students to use facilities that matched their gender identity. *See Evancho*, 237 F. Supp. 3d at 290-91. In holding that the school district's policy violated the transgender students' rights under the Equal Protection Clause, the court rejected the school district's argument that the policy implicated any actual privacy concerns at all "given the actual physical layout of the student restrooms at the High School," which meant that "anyone using the toilets or urinals at the High School is afforded actual physical privacy from others." *Id.*; *see also Highland*, 208 F. Supp. 3d at 874 (finding no evidence that allowing transgender girl to use girls' facilities "would infringe upon the privacy rights of any other students").

Plaintiffs argue that the availability of private spaces within the locker rooms and restrooms and separate single-user facilities does not resolve the issue because,

they say, they have a right to use the common spaces based on their biological sex.[12] They claim that requiring them to give up their right to privacy—as Plaintiffs define it—in order to use common spaces in the shared facilities amounts to an unconstitutional condition. Remarkably, Plaintiffs seem to be arguing that the constitutional right to bodily privacy gives them the right to choose to disrobe in front of other students of their choosing in the common spaces of the locker rooms and restrooms rather than change in private areas of locker rooms and restrooms. The District Court properly rejected Plaintiffs' unconstitutional conditions argument, holding that "[t]here is no evidence that the School District is coercing the students to give up their constitutional right to privacy by providing

[12] Plaintiffs' assertion that federal regulations and state law establish a right to use sex-segregated facilities based on "biological sex" or sex-based anatomy is without basis. They cite to 34 C.F.R. § 106.33 and numerous state laws regarding the provision of separate facilities for boys and girls, but none of those provisions define sex or male or female or address where boys and girls who are transgender should go. *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 720 (4th Cir. 2016) ("*G.G. I*") (Title IX regulation providing for separate facilities for boys and girls "is silent as to how a school should determine whether a transgender individual is a male or female for the purpose of access to sex-segregated restrooms"), *vacated and remanded on other grounds*, 137 S. Ct. 1239 (2017). Plaintiffs assume a biological definition, but there is no basis to assume that the people who enacted the federal regulation or Pennsylvania statutes cited would consider a boy who is transgender like Aidan DeStefano to belong in the girls' facilities. *See supra* n.3.

Nor does *United States v. Virginia*, 518 U.S. 515, 550 n.19 (1996), which required the Virginia Military Institute to open its doors to female cadets, establish a right to use the restroom based on "biological sex" or anatomy, and its reference to "physiological differences between male and female individuals" referred to training standards, not sex-separated facilities.

them with additional facilities if they are uncomfortable in the locker room for any reason, including because of the presence of transgender students. The School District is also not denying any benefit to the plaintiffs because they are exercising a constitutional right." J.A. vol. I 144 (Op. 139).

2. *The constitutional right to bodily privacy does not encompass the right to exclude others from common spaces.*

The absence of compelled exposure of their bodies to any student means Plaintiffs' constitutional bodily privacy claim fails. Plaintiffs nevertheless argue that their right to privacy is violated by the mere presence of boys who are transgender (whom they call girls) in the boys' facilities and girls who are transgender (whom they call boys) in the girls' facilities, even if Plaintiffs are not required to undress in front of any other students. Plaintiffs say they are uncomfortable with those students being in the common area of the restroom when they use the toilet and the possibility of viewing those students undressing. As the District Court observed, "[t]he plaintiffs have not identified and this court has not located any court that has recognized a constitutional right of privacy as broadly defined by the plaintiffs." J.A. vol. I 100 (Op. 95).[13]

[13] Two cases cited by Plaintiffs do not help them. In *Koeppel v. Speirs*, 779 N.W.2d 494, 2010 WL 200417, at *1 (Iowa Ct. App. 2011), which involved a privacy tort claim under Iowa law, the intrusion at issue was secret filming in a private, single-user restroom, not common space in a multi-user restroom. In *Borse v. Piece Goods Shop, Inc.*, 963 F.2d 611, 621 (3d Cir. 1992), the court noted

Moreover, the District Court explained, if the constitutional right to bodily privacy were broad enough to encompass the right to exclude others from common spaces, this Court would have had no need to remand *Luzerne County* to resolve the issue of whether defendants violated plaintiff's privacy "because the male officers would have violated her right to privacy merely by entering the decontamination room while she was in there." J.A. vol. I 104 (Op. 99).

Although Plaintiffs try to shoehorn this claimed right into the constitutional right to bodily privacy, what they are really doing is asking this Court to establish a new fundamental right separate and apart from involuntary exposure of "highly personal matters" such as the intimate parts of one's body. *Luzerne Cty.*, 660 F.3d at 175-76; *cf. Students & Parents for Privacy*, 2017 WL 6629520, at *5-6. What Plaintiffs in fact seek is a constitutional right to exclude others from common facilities, even where the District has made private, single-user facilities available to all.[14]

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that monitoring the collection of urine for urinalysis by visual or aural observation could, depending on the method used, intrude upon the statutory right to seclusion. The court did not suggest that the presence of other individuals (regardless of sex) in the common space of a restroom constitutes such an intrusion upon seclusion or constitutional privacy rights.

[14] That "right" not only lacks any legal foundation, but it would invalidate the practice at public educational institutions across the country of offering a mix of multi-user restrooms open to all genders as well as private, single-user facilities for those who seek additional privacy. *See* Shelly Webb, *Transgender Students Find Safe Spaces at New College*, The Herald-Tribune (Mar. 20, 2016, 1:17 PM), https://perma.cc/4F23-5X7K.

Plaintiffs' proposed right to exclude others is premised on the notion that boys and girls who are transgender are "members of the opposite sex" than other boys and girls such that, they say, it would be unconstitutional to allow boys who are transgender to share single-sex spaces with other boys and girls who are transgender to share single-sex spaces with other girls. Even if the presence of members of the opposite sex in single-sex facilities constituted a per se violation of the constitutional right to bodily privacy—and it does not—as the District Court recognized, "this case does not merely involve members of the opposite sex." J.A. vol. I 105 (Op. 100); *Students R&R*, 2016 WL 6134121, at *25 ("A transgender boy or girl, man or woman, does not live his or her life in conformance with his or her sex assigned at birth."); *see also Evancho*, 237 F. Supp. 3d at 285 (requiring transgender students to use facilities in accordance with sex assigned at birth would mean "Plaintiffs would have to use restrooms where they are wholly unlike everyone else in appearance, manner, mode of living, and treatment at school."). Calling boys who are transgender "girls" and girls who are transgender "boys" is not only deeply offensive, it ignores reality. By definition, a boy who is transgender has a lasting, persistent male gender identity. J.A. vol. I 71 (Op.

There is nothing unconstitutional about a school choosing to make such options available.

¶ 328). Similarly, a girl who is transgender has a lasting, persistent female gender identity, despite having been assigned the sex male at birth. *Id.*[15]

Moreover, despite Plaintiffs' selective reliance on anatomical differences,[16] transgender adolescents do not necessarily anatomically resemble members of their birth-assigned sex. The District Court found, based on unrefuted expert testimony, that medical protocols for treating transgender adolescents with gender dysphoria include puberty blockers, hormone therapy, and surgeries, which result in boys who receive such treatment having the secondary sex characteristics that other boys have, e.g., a male chest and musculature and facial hair, and treated girls having the secondary sex characteristics that other girls have, e.g., breasts and wider hips. Particularly when used in combination, the result of these therapies is that the transgender boys Plaintiffs call "girls" may not resemble cisgender girls

[15] Plaintiffs point to various definitions of nonbinary gender identities as inconsistent with separate facilities for boys and girls. Pl. Br. 12 n.6. Those definitions are wholly irrelevant given the unrebutted testimony that no nonbinary students have identified themselves as such to the District, let alone asked for permission to use facilities other than the ones they may currently use. J.A. vol. I 32-33 (Op. ¶ 91).

[16] At the District Court, Plaintiffs and their parents expressly disclaimed any reliance on sex-based anatomical differences, insisting that they had no concern whatsoever about breasts in the boys' room or penises in the girls' room, as long as students were assigned to facilities based on the sex they were "born" as, yet they admitted there is no way to tell what sex a person was assigned at birth just by looking at them. J.A. vol. I 45, 52, 62, 65 (Op. ¶¶ 161, 206, 270, 294).

anatomically or otherwise. And the transgender girls the Plaintiffs call "boys" may not resemble cisgender boys.

Plaintiffs concede that they are unable to ascertain a person's sex assigned at birth just by looking at them and, indeed, when presented with photographs of transgender and non-transgender young people, they could not identify who was transgender. For example, Plaintiffs were unable to identify H.S., the young woman in the photograph below, as male or female. J.A. vol. V 1360, 1523 (Joel Doe Tr. 240; Mary Smith Tr. 152). When first shown the photograph, Plaintiff Mary Smith testified that she would "probably not" have any concerns if she saw H.S. using the girls' room. J.A. vol. V 1525 (Mary Smith Tr. 154). However, when told that H.S. is transgender and involved in a lawsuit about which restrooms she may use,[17] Mary Smith changed her mind and said she would not be comfortable with H.S. using the girls' restroom. J.A. vol. V 1526 (Mary Smith Tr. 155).

[17] *See Three More Plaintiffs Join Lawsuit Against North Carolina's Discriminatory HB 2*, Lambda Legal (Apr. 21, 2016), https://perma.cc/7FAU-SEE2.

Joel Doe Dep. Ex. D-17.

Although Plaintiffs claim they would be comfortable sharing common facilities with transgender students based on the sex assigned to them at birth, regardless of their anatomy, that feeling may not be shared by others. Some boys may feel more comfortable running into Aidan in the boys' locker room than H.S., and some girls my feel the opposite. Indeed, Joel Doe's guardian, John Doe, testified that he would object to H.S. using the boys' locker room at BASH because she "appears to be a girl." J.A. vol. X 2409 (John Doe Tr. 30); *see also* J.A. vol. X 2455 (Jane Doe Tr. 34) ("[H.S.] looks like a typical female."). And Jane Doe testified that, if Joel Doe came to her and told her that he had seen H.S. in the boys' locker room, she would consider reporting the incident to the District.

J.A. vol. X 2455 (Jane Doe Tr. 34). It is unsurprising, then, that Aidan testified that when he attempted to use the girls' restroom in the past, he received cries of there's-a-boy-in-the-girls'-room and was told to get out. J.A. vol. I 84 (Op. ¶¶ 386, 389).

Of course, not all transgender adolescents receive medical treatment to align their bodies with their gender identities. Under either the District's practice or the result that Plaintiffs seek, there may be students with different sex-based anatomical characteristics using the same common facilities. Put simply, to the extent that Plaintiffs now claim they are worried about breasts in the boys' room, the reality is that there may be breasts in the boys' room under either rule. Separating students according to anatomy is impossible unless transgender students are banished from common facilities.

Plaintiffs' insistence on referring to boys who are transgender as "girls" and girls who are transgender as "boys" and dismissing gender identity as a "theory," Pl. Br. 12 n.6, ignores the reality of what it means to be transgender. They offer no argument as to why the District Court's findings of fact are clearly erroneous and, thus, may be disturbed on appeal.

3. *Plaintiffs' reliance on cases involving forcible searches, crimes, and other areas of law does not support their constitutional claim.*

In the absence of case law supporting their invented right, Plaintiffs attempt to cobble together support by relying on cases outside of the area of the constitutional right to privacy. For example, they rely repeatedly on cases involving forcible searches under the Fourth Amendment involving circumstances wholly unlike those in this case. *See, e.g., Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364 (2009) (Fourth Amendment challenge to adult female strip search of female student); *Cornfield v. Consol. High Sch. Dist. No. 230*, 991 F.2d 1316 (7th Cir. 1993) (Fourth Amendment challenge to adult female strip search of male student).

They also cite employment and public accommodations cases allowing sex discrimination for certain jobs or in certain businesses because of privacy or modesty considerations. Pl. Br. 18, 19, 28, 30. But this confuses statutory permission with a constitutional mandate. And those cases do not address how transgender people must be treated in those contexts.

Plaintiffs also rely on some Title VII cases that concluded that employers need not allow transgender employees to use facilities consistent with their gender identity. Pl. Br. 23. But these cases did not suggest employers *could not* do

so.[18] Their reliance on criminal statutes covering child pornography, indecent exposure, and invasion of privacy, Pl. Br. 20, is especially misplaced, particularly given that all of these crimes apply equally regardless of whether the perpetrator and victim are of the same or different genders.

The plaintiffs in the Illinois case, who are represented by the same counsel as Plaintiffs here, relied on many of the same citations, but as the district court there noted, "[t]his case does not involve the forced or extreme invasions of privacy that the courts addressed in the cases cited by Plaintiffs." *Students & Parents for Privacy*, 2017 WL 6629520, at *6.

4. *Even if Plaintiffs' fundamental rights were implicated, the District's practice satisfies strict scrutiny and is therefore permissible.*

Even if Plaintiffs' constitutional bodily privacy rights were implicated by the mere presence of boys and girls who are transgender in the same common facilities that other boys and girls use—and they are not—the District's practice would satisfy any level of constitutional review, including strict scrutiny. The District Court correctly concluded that the District has a compelling interest in not

[18] In any case, the EEOC—the federal agency with primary enforcement responsibility for Title VII—has concluded that the ban on sex discrimination in the workplace does require employers to allow transgender men and women to use facilities like restrooms and locker rooms consistent with their gender identity. *Lusardi v. Dep't of Army*, EEOC No. 0120133395, 2015 WL 1607756, at *13 (EEOC Apr. 1, 2015). As discussed above, several courts that have considered the same question in the schools context have agreed.

discriminating against transgender students by excluding them from facilities that accord with their gender identity. Based on unrebutted expert testimony, the District Court found that excluding boys and girls who are transgender from facilities that match their gender identity can negatively affect their health and well-being and can even interfere with their ability to attend school at all. J.A. vol. I 78-79 (Op. ¶¶ 360-61). The District's interest in not inflicting these harms on transgender students is compelling. Indeed, it is legally required under the Equal Protection Clause and Title IX, as a number of courts have now recognized. *Whitaker*, 858 F.3d at 1046-54 (affirming grant of preliminary injunction allowing boy who is transgender to use same common facilities as other boys at school under Equal Protection Clause and Title IX); *Evancho*, 237 F. Supp. 3d at 274 (granting preliminary injunction allowing boys and girls who are transgender to use same common facilities as other boys and girls at school under Equal Protection Clause); *Highland*, 208 F. Supp. 3d at 865-79 (same under Equal Protection Clause and Title IX); *see also A.H.*, 2017 WL 5632662, at *3-7 (denying motion to dismiss equal protection and Title IX claims brought by girl who is transgender).[19]

[19] In *Johnston v. University of Pittsburgh*, 97 F. Supp. 3d 657 (W.D. Pa. 2015), one court rejected a Title IX claim brought by a transgender male student seeking access to male facilities, but that decision has been rejected by subsequent courts as unpersuasive. *See Whitaker*, 858 F.3d at 1047; *Evancho*, 237 F. Supp. 3d at 286-87; *Highland*, 208 F. Supp. 3d at 869.

The District's practice of granting case-by-case requests of transgender students to use common facilities that match their gender identity is narrowly tailored to further the compelling interest in equal educational opportunity for boys and girls who are transgender. *See G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 853 F.3d 729, 730 (4th Cir. 2017) (Davis, J., concurring); *see also Whitaker*, 858 F.3d at 1053 (concluding that school district lacked exceedingly persuasive justification, as required by Equal Protection Clause, to bar boy who is transgender from same common restrooms used by other boys); *Evancho*, 237 F. Supp. 3d at 289 (same); *see infra* § I.B (discussing Title IX cases).

Plaintiffs' proffered alternative is for the District to require transgender students to use separate facilities from everyone else. This fails to take into account how profoundly humiliating and degrading it is to be told that your very presence in a restroom or locker room is objectionable. Conversely, many alternatives are available to Plaintiffs, including private areas within the multi-user facilities as well as single-user facilities that afford privacy from everyone. The difference is that, while Plaintiffs may *choose* to use single-user facilities, they are not *required* to do so. There is a significant difference between making the choice to use single-user facilities to protect one's own sense of privacy and being required to use separate facilities because your existence is deemed unacceptable. *G.G. I*, 822 F.3d at 729 (Davis, J., concurring) ("For other students, using the

single-stall restrooms carries no stigma whatsoever, whereas for G.G., using those same restrooms is tantamount to humiliation and a continuing mark of difference among his fellow students."). As the District Court concluded, "[t]he School District has attempted to provide transgender students with the opportunity to live their lives in a manner consistent with their gender identity, while attempting to minimize as much as possible any discomfort felt by other students by offering various form of privacy protection." J.A. vol. I 112 (Op. 107).

B. Plaintiffs are not likely to succeed on their Title IX claim.

Plaintiffs' assertion that the mere presence of boys and girls who are transgender in the same common facilities used by other boys and girls amounts to sexual harassment is both offensive and devoid of legal support. To establish a claim of sexual harassment under Title IX, Plaintiffs must show "sexual harassment of students that is so severe, pervasive, and objectively offensive, and that so undermines and detracts from the victims' educational experience, that the victim students are effectively denied equal access to an institution's resources and opportunities." *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 205-06 (3d Cir. 2001) (internal quotation marks omitted).

The lack of objectively offensive conduct dooms Plaintiffs' Title IX claim. Being transgender is not "objectively offensive." The magistrate judge in the similar case in Illinois rejected precisely the same argument advanced by Plaintiffs

here because "[t]he mere presence of a transgender student in a restroom or locker room does not rise to the level of conduct that has been found to be objectively offensive, and therefore hostile, in other cases." *Students R&R*, 2016 WL 6134121, at *32; *see, e.g.*, *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 653 (1999) (sexually suggestive rubbing and making vulgar statements objectively offensive); *Bruning ex rel. Bruning v. Carrol Cmty. Sch. Dist.*, 486 F. Supp. 2d 892, 917 (N.D. Iowa 2007) (repeated acts of touching and sexual groping objectively offensive).[20]

Plaintiffs argue that the presence of a person of the "opposite sex" in a single-sex facility automatically constitutes actionable sexual harassment under Title IX. As discussed above, despite Plaintiffs' refusal to recognize the existence of transgender people, "this case does not merely involve members of the opposite sex." J.A. vol. I 105 (Op. 100); *see supra* pp. 30-34. The presence of boys who are transgender in the girls' facilities may be far more discomfiting to the girls present than sharing the facilities with girls who are transgender.

Even if Plaintiffs' mischaracterization of transgender boys and cisgender boys as being of the "opposite sex" were accepted, Title IX does not actually

[20] Plaintiffs' comparison to the display of pinup pictures in the workplace, Pl. Br. 40, similarly misses the mark, and the fact that the EEOC discourages such displays in its sexual harassment Compliance Manual does not support the notion that the presence of transgender students amounts to sexual harassment. To the contrary, as noted above, the EEOC's position with respect to transgender employees is wholly consistent with the District's treatment of transgender students. *See Lusardi*, 2015 WL 1607756, at *13.

prohibit mixed facilities as Plaintiffs appear to assume. Rather, "Title IX is a broadly written general prohibition on [sex] discrimination, followed by specific, narrow exceptions to that broad prohibition," *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 175 (2005), and one of those exceptions is that a school "*may* provide separate toilet, locker room and shower facilities on the basis of sex," as long as the facilities are comparable. 34 C.F.R. § 106.33 (emphasis added); *see Students & Parents for Privacy*, 2017 WL 6629520, at *3. In other words, Title IX's ban on sex discrimination would prohibit separate facilities if not for the regulatory exception allowing—but not requiring—sex separation in this context. Thus, the assertion that it is a violation of Title IX to have shared facilities for boys and girls, regardless of the circumstances, is without basis. Additionally, Plaintiffs' argument that the statutory definition of "sex" is limited to "biological sex," and cannot take into account a person's gender identity, Pl. Br. 34-37, is not only wrong, *see G.G. I*, 822 F.3d at 729 (Davis, J., concurring) ("[T]he weight of authority establishes that discrimination based on transgender status is already prohibited by the language of federal civil rights statutes, as interpreted by the Supreme Court."); *Students & Parents for Privacy*, 2017 WL 6629520, at *3-4, it is also irrelevant, because Title IX does not prohibit mixed-sex facilities at all.

Moreover, the cases cited by Plaintiffs simply do not support a finding that the mere presence of men in women's facilities or women in the men's facilities—

regardless of the circumstances—constitutes actionable sexual harassment. Their cases involved unwanted exposure of plaintiffs while undressing, *see, e.g.*, *Lewis v. Triborough Bridge & Tunnel Auth.*, 31 F. App'x 746, 747 (2d Cir. 2002); *Washington v. White*, 231 F. Supp. 2d 71, 73-74 (D.D.C. 2002)—which, as discussed above, is not required of any students at BASH given the abundance privacy options available—offensive conduct on the part of the harassers that constituted the sexual harassment, or both. For instance, in *Schonauer v. DCR Entertainment Inc*., 905 P.2d 392, 400-01 (Wash. Ct. App. 1995), the focus of the complaint was the fact that defendant "pressured [plaintiff], repeatedly and intentionally, to provide fantasized sexual information and to dance on stage in sexually provocative ways" and that she was fired for refusing to dance nude on stage. *Lewis*, 31 F. App'x at 747, involved "a variety of specific acts of sexual harassment," not merely the entry of male cleaning service employees in the women's locker room. *See also Lewis v. Triborough Bridge & Tunnel Auth.*, 77 F. Supp. 2d 376, 378 (S.D.N.Y. 1999) (cleaning service employees were leering at the female plaintiff and would crowd the entrance of the locker room, forcing her to "run the gauntlet" and brush up against them; the supervisor referred to the employees who complained of the conduct as "cunts" and "fucking crybabies;" and the supervisor said "boss man don't want no women with tiny hinnies [sic] on this

job"). Importantly, none of the cases on which Plaintiffs rely involve fellow students or employees entering facilities in order to use them.[21]

The cases that actually involve sexual harassment challenges to transgender people using facilities alongside their cisgender peers have rejected Plaintiffs' argument. In *Cruzan v. Special School District No. 1*, 294 F.3d 981, 983 (8th Cir. 2002), a female teacher brought a hostile work environment sex discrimination claim after the school where she worked allowed a transgender female teacher to use the women's faculty restroom. The Eighth Circuit determined that the plaintiff failed to show the school district's policy allowing her transgender colleague to use the women's faculty restroom created a hostile working environment:

> [The plaintiff] does not assert [her transgender female colleague] engaged in any inappropriate conduct other than merely being present in the women's faculty restroom. Given the totality of the circumstances, we conclude a reasonable person would not have found the work environment hostile or abusive.

Id. at 984. Here, similarly, there is no allegation that transgender students have done anything other than "merely being present" in restrooms and locker rooms

[21] Just as Plaintiffs try to shore up their constitutional privacy claim with cases that do not involve bodily privacy, Plaintiffs also attempt to support their sexual harassment claim with cases that do not involve sexual harassment. *People v. Grunau*, No. H015871, 2009 WL 5149857, at *1 (Cal. Ct. App. Dec. 29, 2009), involved criminal charges of loitering on school grounds and annoying a child under 18 against a man who was peeping on girls in the locker room. *Norwood v. Dale Maintenance System, Inc.*, 590 F. Supp. 1410, 1415-16 (N.D. Ill. 1984), involved whether Title VII's bar on sex discrimination prohibits an employer from choosing to hire only women to clean female restrooms.

that match their gender. That is not sexual harassment. In *Students & Parents for Privacy*, 2017 WL 6629520, at *5, the District Court for the Northern District of Illinois rejected an identical Title IX claim, noting that "the presence of a transgender[] student in" restrooms or locker rooms does not implicate the rights of others.

Even if Plaintiffs could establish that the mere presence of another student in a shared restroom or locker room, without more, is objectively offensive—and they cannot—their Title IX sex discrimination claim would nonetheless fail because they cannot show that they have been targeted "on the basis of sex." *See* 20 U.S.C. § 1681. The District allows both boys and girls who are transgender to use facilities that match their gender. Any discomfort that Plaintiffs claim they experience stems from a practice that is not directed at Joel Doe and Jack Jones because they are male or at Mary Smith and Macy Roe because they are female. The District's practice concerning single-sex facilities is not directed at non-transgender students at all. As the magistrate judge in the Illinois case noted,

> Girl Plaintiffs are not being targeted or singled out by District 211 on the basis of their sex, nor are they being treated any different than boys who attend school within District 211. The Restroom Policy applies to *all* restrooms. . . . All of Plaintiffs' Title IX claims suffer from this threshold problem.

Students R&R, 2016 WL 6134121, at *31; *cf. Moeck v. Pleasant Valley Sch. Dist.*, 179 F. Supp. 3d 442, 448 (M.D. Pa. 2016) (no Title IX violation where school staff "'harassed' everyone on the team, male and female").

Plaintiffs' Title IX sexual harassment claim fails as a matter of law. Moreover, Plaintiffs have fully private facilities available to them that would avoid any exposure to individuals whose presence they consider to constitute sexual harassment. *See Cruzan*, 294 F.3d at 984 ("Cruzan had convenient access to numerous restrooms other than the one [the transgender teacher] used"); *Students R&R*, 2016 WL 6134121, at *31.

Plaintiffs' Title IX claim is not only baseless; it turns Title IX on its head. As the Seventh Circuit held, the exclusion of transgender students from facilities that accord with their gender identity—precisely the relief sought by Plaintiffs—violates Title IX. *Whitaker*, 858 F.3d at 1050; *Evancho*, 237 F. Supp. 3d at 294-95 (violates Equal Protection Clause); *Highland*, 208 F. Supp. 3d at 877 (same); *see also Dodds*, 845 F.3d at 221 (transgender student likely to succeed on merits of Title IX claim); *A.H.*, 2017 WL 5632662, at *6-7 (denying motion to dismiss transgender student's equal protection and Title IX claim); *cf. Lusardi*, 2015 WL 1607756, at *13 (violates Title VII).

In *Whitaker*, the Seventh Circuit joined every other federal appellate court that has considered sex discrimination claims brought by transgender people after

Price Waterhouse v. Hopkins, 490 U.S. 228 (1989), to affirm that laws prohibiting sex discrimination do not exclude transgender people from their protections. *See Whitaker*, 858 F.3d at 1048-49. In *Price Waterhouse*, 490 U.S. at 250 (plurality opinion), the Supreme Court recognized that sex discrimination includes adverse actions based on sex stereotypes, including a person's gender expression and conformity (or lack of conformity) with social gender roles.

As many courts have recognized, because "[a] person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes," discrimination based on transgender status is a form of impermissible sex stereotyping. *See Glenn v. Brumby*, 663 F.3d 1312, 1316-18 (11th Cir. 2011) (collecting cases). And "[a] policy that requires an individual to use a bathroom that does not conform with his or her gender identity punishes that individual for his or her gender non-conformance, which in turn violates Title IX." *Whitaker*, 858 F.3d at 1049; *Evancho*, 237 F. Supp. 3d at 285 (excluding transgender students from shared restrooms "is essentially the epitome of discrimination based on gender nonconformity"); *see also G.G. I*, 822 F.3d at 729 (Davis, J., concurring); *Dodds*, 845 F.3d at 221.

C. Plaintiffs are not likely to succeed on their Pennsylvania tort claim.

Plaintiffs' state tort claim fails because they have no expectation of seclusion in common areas of restrooms or locker rooms when other people are present. Accordingly, they are not entitled to a preliminary injunction on that claim.

To prevail on a claim of intrusion upon seclusion under Pennsylvania law, Plaintiffs must show that (1) there was an intentional intrusion, (2) upon their solitude or seclusion, or their private affairs or concerns, that was (3) substantial and (4) highly offensive to a reasonable person. *Harris by Harris v. Easton Publ'g Co.*, 483 A.2d 1377, 1383 (Pa. 1984) (quoting Restatement (Second) of Torts, § 652B, cmt. b). Whether conduct is highly offensive is an objective standard, not subjective one. *See Gabriel v. Giant Eagle, Inc.*, 124 F. Supp. 3d 550, 572 (W.D. Pa. 2015).

None of the elements of this tort are met by transgender students' use of the same restrooms and locker rooms that other students use. There is no expectation of solitude or seclusion in common facilities used by other students. *Craig v. M & O Agencies, Inc.*, 496 F.3d 1047, 1061 (9th Cir. 2007); *Nilson v. Softmart, Inc.*, Civ. No. 12-3914, 2014 WL 12603514, at *2 (E.D. Pa. May 28, 2014). Thus, there could be no intentional intrusion onto anyone's seclusion—substantial or otherwise—by being among the students in those facilities. And there is nothing

objectively "highly offensive" about students' ordinary use of common restrooms or locker rooms, whether those students are transgender or cisgender.

Indeed, courts have found that even inappropriate behavior in the common area of a restroom does not intrude on anyone's seclusion because there is "no reasonable expectation of privacy in the common area of the restroom." *Craig*, 496 F.3d at 1061. In *Craig*, a case involving a supervisor who followed his employee into the restroom to kiss her on the mouth—circumstances egregious enough to establish a triable claim for intentional infliction of emotional distress—the Ninth Circuit concluded that the employee could not prevail on a claim for intrusion upon seclusion because "she would expect her conduct to be observed by other individuals in the restroom." *Id.*; *see also Nilson*, 2014 WL 12603514, at *2 (open urinal is not a place of seclusion).

None of Plaintiffs' citations involves a claimed intrusion upon seclusion by fellow users in a common facility. Rather, they involve clandestine surveillance of employees or hotel guests in places where they had an expectation of being secluded from others. *See Kohler v. City of Wapakoneta*, 381 F. Supp. 2d 692, 704 (N.D. Ohio 2005) (chief of police secretly placed a tape recorder next to the toilet in a stall in the restroom);[22] *Koeppel*, 808 N.W.2d at 178-79 (employer placed

[22] While the *Kohler* Court posited that a woman might expect privacy from men but not women in the restroom, on the facts of the case, the plaintiff believed she

hidden video camera in employees' single-user restroom);[23] *Carter v. Innisfree Hotel, Inc.*, 661 So. 2d 1174, 1179 (Ala. 1995) (peephole giving "secret viewing access" into hotel room). That is a far cry from the circumstances in this case, which merely involve students using common restrooms and locker rooms alongside their peers.

* * *

Because Plaintiffs have not shown that they are likely to succeed on the merits of any of their claims, they are not entitled to a preliminary injunction. *See Am. Express Travel Related Servs.*, 669 F.3d at 374.

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was alone in the restroom—a fact the court found highly relevant to whether her privacy was invaded by her employer's secret placement of a tape recorder near the toilet. 381 F. Supp. 3d at 704. Here, by contrast, Plaintiffs have no expectation of being alone in the common area of shared facilities, especially not when other people are actually present. Moreover, even if common spaces could be deemed places of "seclusion" for purposes of this tort with respect to people of the opposite sex, as discussed above and as the District Court recognized after making extensive findings on what it means to be transgender, "this case does not merely involve members of the opposite sex." J.A. vol. I 105 (Op. 100).

[23] Contrary to Plaintiffs' suggestion, *Koeppel* did not turn on the fact that the employer and employee were of different sexes but, rather, the offensiveness of recording someone using the restroom.

II. THE DISTRICT COURT'S FINDING THAT PLAINTIFFS FAILED TO DEMONSTRATE THAT THEY WILL SUFFER IRREPARABLE HARM ABSENT INJUNCTIVE RELIEF WAS NOT CLEARLY ERRONEOUS.

Irreparable harm is the sine qua non of a preliminary injunction, *Goadby v. Phila. Elec. Co.*, 639 F.2d 117, 122 (3d Cir. 1981), but Plaintiffs do not even argue that they would suffer any harm absent an injunction. Nor could they. Plaintiffs and their parents admitted that the availability of single-user private facilities adequately protects Plaintiffs' privacy. J.A. vol. I 40, 44, 50, 53, 60, 65 (Op. ¶¶ 133, 154, 197, 216, 263, 295); *see also* J.A. vol. X 2394 (John Doe. Tr. 15), 2435-36 (Jane Doe Tr. 14-15). The District Court found that the privacy protections currently in place at BASH precluded a finding of irreparable harm to Plaintiffs during the 2017-18 school year. J.A. vol. I 143 (Op. 138); *cf. Evancho*, 237 F. Supp. 3d at 294 (finding no harm to school community in allowing transgender students to use facilities that match their gender identity).

Plaintiffs offer no argument as to why the District Court's finding of no irreparable harm was clearly erroneous. *See Ferring Pharm.*, 765 F.3d at 218. Instead, they claim they are entitled to a presumption of irreparable harm based on their constitutional privacy claim. Pl. Br. 53. Even assuming that irreparable harm may be presumed in cases involving the constitutional right to bodily privacy, Plaintiffs would not be entitled to that presumption because they have not made the prerequisite showing of a likelihood of success on the merits of that claim. *See*

supra § I.A; *cf. Students R&R*, 2016 WL 6134121, at *36. Accordingly, there is no basis to disturb the District Court's conclusion that Plaintiffs failed to establish the necessary element of irreparable harm.

III. THE BALANCE OF THE HARDSHIPS AND PUBLIC INTEREST ALSO WEIGH IN FAVOR OF AFFIRMANCE.

Because the District Court found that Plaintiffs failed to establish a likelihood of success on the merits of any of their claims or irreparable injury absent an injunction, it found it unnecessary to balance the hardships or consider the public interest. J.A. vol. I 146 (Op. 141); *see Am. Express Travel Related Servs.*, 669 F.3d at 374; *cf. Students R&R*, 2016 WL 6134121, at *40. Should this Court reach those factors, they, too, weigh decisively against entry of a preliminary injunction.

As noted above, Plaintiffs will suffer no harm absent a preliminary injunction because of the privacy protections now in place. Conversely, transgender students are likely to suffer significant harms if a preliminary injunction should issue requiring the District to bar its transgender students from continuing to use the facilities that correspond to their gender identity. As the District Court found based on unrebutted expert testimony, barring boys and girls who are transgender from common restrooms and locker rooms used by other boys and girls is stigmatizing and can result in serious harm to the student's psychological well-being such as depression, negative self-esteem, inability to trust

others, and unwillingness to go out into the world. J.A. vol. I 78-79 (Op. ¶ 361). The court further found that such exclusion of transgender students can also negatively affect their education, leading to increased absences and missed class-time and leaving school altogether. *Id.*[24]

Plaintiffs wholly disregard these factual findings and do not even acknowledge or attempt to address the extraordinary impact of the injunction they seek on their transgender classmates. Rather, they insist that the only relevant interest is the government's interest in enforcing what they call an "illegal law." Pl. Br. 53. They misunderstand the interests at stake.

At the balancing of the hardships stage, the harm to transgender students (who, like all students, are entrusted to the District's care and who are represented by Intervenor Pennsylvania Youth Congress) is highly relevant. *See Whitaker*, 858 F.3d at 1055 (balancing hardships and concluding that "all students' needs are best

[24] *See also Whitaker*, 858 F.3d at 1040-41 (describing physical and emotional harms to transgender boy caused by school district's policy barring him from common restrooms used by other boys); *Dodds*, 845 F.3d at 221-22 (barring transgender girl from common restrooms used by other girls "has already had substantial and immediate adverse effects on the daily life and well-being of an eleven-year-old child (i.e. multiple suicide attempts)" and to do so again would "subject her to further irreparable harm"); *G.G. I*, 822 F.3d at 728 (Davis, J., concurring) (noting harms to transgender boy including "daily psychological harm," repeated urinary tract infections, and "significant long-term consequences" from being barred from common restrooms used by other boys); *Evancho*, 237 F. Supp. 3d at 294 (barring transgender students from facilities that match their gender identity is "causing them genuine distress, anxiety, discomfort, and humiliation").

served when students are treated equally"); *G.G. I*, 822 F.3d at 727-29 (Davis, J., concurring) (balancing hardships and concluding that "minimal or non-existent hardship to other students of using the single-stall restroom if they object to [transgender boy]'s presence in the communal restroom thus does not tip the scale in the [school]'s favor"); *Evancho*, 237 F. Supp. 3d at 294 (balancing hardships and concluding that preliminary injunction in favor of transgender students "would cause relatively little 'harm' in the preliminary injunction sense—if any harm at all—to the District and the High School community").

For the same reasons, the public interest strongly favors affirmance of the District Court's decision. *See Whitaker*, 858 F.3d at 1054; *Dodds*, 845 F.3d at 222; *G.G. I*, 822 F.3d at 729 (Davis, J., concurring); *Evancho*, 237 F. Supp. 3d at 294-95; *Highland*, 208 F. Supp. 3d at 878.

CONCLUSION

For the foregoing reasons, the District Court's Memorandum Opinion and Order denying Plaintiffs' motion for a preliminary injunction should be affirmed.

Respectfully submitted,

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CERTIFICATES

Mary Catherine Roper, one of the attorneys for Intervenor-Appellee Pennsylvania Youth Congress, hereby certifies that:

1. Pursuant to L.A.R. 28.3(d), I hereby certify that I am a member in good standing of the Bar of the United States Court of Appeals for the Third Circuit.

2. This Brief complies with the type/volume limitation in Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because, excluding the parts of the document exempted by Rule 32(f), this document contains 12,987 words.

3. This Brief complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) of the Federal Rules of Appellate Procedure because this document has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman.

4. On this date, the foregoing Brief for Intervenor-Appellee Pennsylvania Youth Congress was filed electronically and served on the other parties via the Court's ECF system and that counsel for Intervenor-Appellee has delivered an electronic copy of the same to counsel for Appellant and Appellee and is sending the same by regular mail to:

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5. Pursuant to L.A.R. 31.1(c), I hereby certify that the text of the electronic Brief for Intervenor-Appellee Pennsylvania Youth Congress has been filed with the Court in both electronic and paper form, and that the text of the electronic brief is identical to the text in the paper copies.

6. Pursuant to L.A.R. 31.1(c), I hereby certify that a computer virus detection program was run on the electronic version of this Brief for Intervenor-Appellee Pennsylvania Youth Congress and that no virus was detected. The virus detection program utilized was Vipre Virus Protection, version 3.1.

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