Case No. 18-35708

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

Plaintiffs-Appellants,

v.

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

Defendants-Appellees.

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

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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PORTLAND DIVISION

PARENTS FOR PRIVACY; **KRIS GOLLY** and **JON GOLLY**, individually [and as guardians ad litem for A.G.]; **LINDSAY GOLLY**; **NICOLE LILLIE**; **MELISSA GREGORY**, individually and as guardian ad litem for T.F.; and **PARENTS RIGHTS IN EDUCATION**, an Oregon nonprofit corporation,

Plaintiffs,

Case No. 3:17-cv-01813-HZ

Defendant-Intervenor Basic Rights Oregon's **NOTICE OF SUPPLEMENTAL AUTHORITY**

v.

DALLAS SCHOOL DISTRICT NO. 2; **OREGON DEPARTMENT OF EDUCATION**; **GOVERNOR KATE BROWN**, in her official capacity as the Superintendent of Public Instruction; and **UNITED STATES DEPARTMENT OF EDUCATION**; **BETSY DEVOS**, in her official capacity as United States Secretary of Education as successor to **JOHN B. KING, JR.**; **UNITED STATES DEPARTMENT OF JUSTICE**; **JEFF SESSIONS**, in his official capacity as United States Attorney General, as successor to **LORETTA F. LYNCH**,

Defendants.

Defendant-Intervenor Basic Rights Oregon ("BRO"), respectfully wishes to alert the Court to recent opinions filed in the United States District Court, the United States Court of Appeals for the Sixth Circuit, and the United States Court of Appeals for the Third Circuit, that bear on the issues presented in BRO's motion to dismiss, which the Court has taken under advisement. Several of the opinions summarized below, which BRO referenced during oral arguments in the current case on May 23, 2018, were filed after the parties submitted their briefing on the motion to dismiss. Courtesy copies of the opinions are attached to this document for the Court's convenience.

***M.A.B. v. Bd. of Educ. of Talbot Cty.*, 286 F. Supp. 3d 704 (D. Md. Mar. 12, 2018)**

Plaintiff, a transgender boy, filed suit after defendants required him to use the girls' restrooms and locker rooms at his high school. Plaintiff asserted claims under Title IX, the Equal Protection Clause of the Fourteenth Amendment, and the Maryland Declaration of Rights. Defendants moved to dismiss plaintiff's claims. The court denied defendants' motion to dismiss, finding plaintiff stated claims under Title IX and the Equal Protection Clause. The court found the school's policy was subject to heightened scrutiny because it relied on a sex-based classification, and because transgender status is itself at least a quasi-suspect classification.

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***Grimm v. Gloucester Cty. Sch. Bd.*, No. 4:15-CV-54, 2018 WL 2328233 (E.D. Va. May 22, 2018)**

Plaintiff, a transgender boy, filed suit against the school board for prohibiting him from using the boys' restrooms. Plaintiff alleged the board's decision violated Title IX and the Equal Protection Clause of the Fourteenth Amendment. Defendant moved to dismiss plaintiff's complaint, and the court denied the motion, finding plaintiff had stated claims under Title IX and the Equal Protection Clause, and heightened scrutiny applies because transgender individuals are at least a quasi-suspect class, and the board's policy was grounded in sex-stereotypes and was thus a sex-based classification.

***EEOC v. R.G. & G.R. Harris Funeral Homes*, 884 F.3d 560 (6th Cir. Mar. 7, 2018)**

Defendant terminated its funeral director after the funeral director informed defendant's owner and operator that the director is transgender and intended to transition. The funeral director filed a complaint with the EEOC. The EEOC filed suit against defendant, charging it with violating Title VII by unlawfully terminating the funeral director on the basis of her transgender or transitioning status, and by administering a discriminatory clothing-allowance policy. Both parties filed motions for summary judgment, which the district court granted in favor of defendant on both Title VII claims. On appeal, the Sixth Circuit reversed the district court's grant of summary judgment, granted summary judgment to the EEOC on the unlawful termination claim, and remanded the clothing-allowance policy for further proceedings. The court found discrimination on the basis of transgender or transitioning status is always discrimination because of sex under Title VII.

***F.V. v. Barron*, 286 F. Supp. 3d 1131 (D. Idaho Mar. 5, 2018)**

Transgender individuals filed suit against Idaho state employees, alleging that the state policy of denying transgender individuals the ability to change the listed sex on their birth certificates to match their gender identity violates the Equal Protection and Due Process clauses of the Fourteenth Amendment, and was compelled speech in violation of the First Amendment.

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Plaintiffs moved for summary judgment. The court granted summary judgment on plaintiffs' equal protection claim and permanently enjoined defendants from enforcing the policy of rejecting applications from transgender individuals to change the sex listed on their birth certificates.[1] The court found that the policy lacked even a rational basis, and also found discrimination against transgender people is subject to heightened scrutiny because it is sex discrimination and because transgender people are a quasi-suspect class.

***Karnoski v. Trump*, No. 2:17-CV-01297-MJP, 2018 WL 1784464 (W.D. Wash. Apr. 13, 2018)**

Following President Trump's announcement of a ban on military service by openly transgender people, plaintiffs and the State of Washington filed suit challenging the constitutionality of the ban under the Equal Protection Clause, Due Process Clause, and First Amendment. Plaintiffs also moved to preliminary enjoin the ban from being carried out. The court entered a preliminary injunction. On plaintiffs' motion for summary judgment, the court found that transgender people are a suspect class and, therefore, discrimination against them is subject to strict scrutiny.[2]

***Doe v. Boyertown Area Sch. Dist.*, No. 17-3113, 2018 WL 2355999 (3d Cir. May 24, 2018)**

Plaintiffs filed suit against a school district under similar circumstances to the current case before this court, alleging their rights had been violated under Title IX, the Fourteenth Amendment, and Pennsylvania common law of privacy by a school policy allowing transgender students to use restroom and locker room facilities consistent with their gender identity. In a

[1] The court did not consider plaintiffs' Due Process claim because it found that resolution of the Equal Protection claim captured the essence of the right in a more accurate and comprehensive way than the Due Process Clause. Additionally, the court did not consider plaintiffs' First Amendment claim because defendants conceded and agreed to amend the policy to do away with the issues giving rise to that claim.

[2] The court denied plaintiffs' motion for summary judgment on the Equal Protection, Due Process, and First Amendment claims because the issue of whether the plan implementing the ban is entitled to deference raised an unresolved question of fact, as plaintiffs had not yet had an opportunity to respond to defendants' claimed justifications for the ban.

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unanimous ruling from the bench, the Third Circuit affirmed the district court's "exceptionally well reasoned Opinion" denying plaintiffs' request for preliminary injunction. A formal opinion will follow.

BRO is prepared to discuss the above-referenced cases or submit supplemental briefing should the Court so require.

DATED: May 31, 2018

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that are chargeable under provisions under State law punishable by imprisonment for more than one year; acts that are indictable").) And in the rare instances where Plaintiff does supply specific factual allegations, they are inconsistent with each other. (*Id.* (Plaintiff variously lists the starting date of the alleged RICO conspiracy as "1999," *id.* ¶ 75, "the ten (10) calendar years preceding December 10, 2014," *id.* ¶109, "the eight (8) calendar years preceding December 10, 2014," *id.* ¶ 133, and "the eight (8) calendar years preceding January 13, 2015," *id.* ¶ 140).)

Simply put, the complaint is "way too long, detailed and verbose for either the Court or the defendants to sort out the nature of the claims or evaluate whether the claims are actually supported by any comprehensible factual basis." *Belanger v. BNY Mellon Asset Mgmt., LLC*, 307 F.R.D. 55, 58 (D. Mass. 2015).

[6] "Ordinarily, the remedy for noncompliance with Rule 8(a) is dismissal with leave to amend." *Brown*, 75 F.R.D. at 499 (citing *Koll*, 397 F.2d at 125). Here, however, Plaintiff has already been given two opportunities to amend his complaint with specific instructions from the Court to conform his pleading to the standards laid out in Rule 8, yet Plaintiff has proven unable or unwilling to do so, with each filing only increasing in length and verbosity. Despite several opportunities, Plaintiff has shown no inclination to comply with the low bar of Rule 8 or the Court's orders; affording him yet another opportunity to do so would needlessly burden Defendants and the Court. Accordingly, dismissal with prejudice is appropriate under the circumstances. *See McHenry*, 84 F.3d at 1174, 1177 (affirming district court's order dismissing fifty-three page third amended complaint with prejudice because it "mixe[d] allegations of relevant facts, irrelevant facts, political argument, and legal argument in a confusing way" and despite district court's specific instructions in prior orders the complaint remained "argumentative, prolix, replete with redundancy, and largely irrelevant"); *Kuehl v. F.D.I.C.*, 8 F.3d 905, 907–909 (1st Cir. 1993) (affirming district court's dismissal with prejudice of forty-three page, 358 paragraph amended complaint for failure to comply with Rule 8 and district court's order).

IV. Conclusion

For the foregoing reasons, an Order shall enter GRANTING Defendants' Motion to Dismiss with Prejudice the Second Amended Complaint. (ECF No. 16.)

M.A.B., Plaintiff,

v.

BOARD OF EDUCATION OF TALBOT COUNTY, et al., Defendants.

Civil Action No. GLR–16–2622

United States District Court,
D. Maryland.

Signed 03/12/2018

Background: Person who was designated female at birth but had male gender identity, by and through his parents and next friends, brought action against school board, school superintendent, and school principal, alleging claims under Title IX, Equal Protection Clause, and Maryland Declaration of Rights for not being allowed to use boys' locker rooms on same terms as male students. Defendants moved to dismiss.

Holdings: The District Court, George L. Russell III, J., held that:

(1) school board was not entitled to Eleventh Amendment sovereign immunity;

(2) plaintiff could bring claim of discrimination under Title IX on basis of his transgender status;

(3) plaintiff stated claim under gender-stereotyping theory;

(4) policy of board of education barring person who was designated female at birth but had male gender identity from boys' locker rooms warranted heightened scrutiny;

(5) policy of board of education barring plaintiff from boys' locker rooms who was designated female at birth but had male gender identity did not have exceedingly persuasive justification; and

(6) harm from policy of board of education barring person from boys' locker rooms who was designated female at birth but had male gender identity was not actual and imminent, and therefore that person was not entitled to preliminary injunction.

Motion denied.

1. Federal Courts ⚿2375(2), 2388(2)

County board of education was not entitled to Eleventh Amendment sovereign immunity to discrimination claims under Title IX and claims under Fourteenth Amendment and associated Maryland Declaration of Rights provisions, since state statute waived board's Eleventh Amendment immunity to suit from plaintiff's discrimination claim under federal law. U.S. Const. Amends. 11, 14; Education Amendments of 1972 § 901, 20 U.S.C.A. § 1681 et seq.; Md. Code Ann., Cts. & Jud. Proc. § 5-518(c).

2. Federal Courts ⚿2381

Eleventh Amendment immunity extends to state agents and instrumentalities. U.S. Const. Amend. 11.

3. Education ⚿89

Federal Courts ⚿2388(2)

As a matter of Maryland law, county school boards of education are state instrumentalities, and therefore are generally entitled to immunity under the Eleventh Amendment. U.S. Const. Amend. 11.

4. Federal Courts ⚿2375(2)

Under Maryland law, the definition of "tortious act or omission," under the provision waiving a county board of education's Eleventh Amendment immunity, encompasses constitutional torts. U.S. Const. Amend. 11; Md. Code Ann., Cts. & Jud. Proc. § 5-518(c).

5. Civil Rights ⚿1068, 1166

Allegations of gender stereotyping were cognizable as sex-discrimination claims under Title VII, and consequently, Title IX. Education Amendments of 1972 § 901, 20 U.S.C.A. § 1681 et seq.; Civil Rights Act of 1964 § 701, 42 U.S.C.A. § 2000e et seq.; 34 C.F.R. § 106.33.

6. Civil Rights ⚿1067(1)

To allege a violation of Title IX, a plaintiff must show: (1) that he was excluded from participation in an education program because of his sex; (2) that the educational institution was receiving federal financial assistance at the time of his exclusion; and (3) that the improper discrimination caused the plaintiff harm. Education Amendments of 1972 § 901, 20 U.S.C.A. § 1681; 34 C.F.R. § 106.33.

7. Courts ⚿90(2)

Court of Appeals panel decision that was vacated by Supreme Court remained binding law of Circuit unless it was overruled by subsequent en banc opinion of Circuit or superseding contrary decision of Supreme Court.

8. Civil Rights ⚿1067(1)
Courts ⚿89

Case law interpreting Title VII guides courts in evaluating a Title IX claim. Education Amendments of 1972 § 901, 20 U.S.C.A. § 1681 et seq.; Civil Rights Act of 1964 § 701, 42 U.S.C.A. § 2000e et seq.

9. Civil Rights ⚿1068

Person who was designated female at birth but had male gender identity sufficiently stated Title IX claim under gender-stereotyping theory on allegation that county board of education denied him access to boys' restrooms and locker rooms because he was transgender. Education Amendments of 1972 § 901, 20 U.S.C.A. § 1681 et seq.; 34 C.F.R. § 106.33.

10. Constitutional Law ⚿3039

Equal Protection Clause requires a state to avoid distinguishing between classes of people in an arbitrary or irrational manner or out of a bare desire to harm a politically unpopular group. U.S. Const. Amend. 14.

11. Constitutional Law ⚿1021, 3053

Generally, courts presume state action to be lawful under the Equal Protection Clause, and so, uphold classifications as long as they are rationally related to a legitimate state interest; this is known as rational basis review. U.S. Const. Amend. 14.

12. Constitutional Law ⚿3062

When the state classifies a "suspect" or "quasi-suspect" group of people, courts apply "heightened scrutiny" under the Equal Protection Clause; heightened scrutiny, unlike rational basis review, is a more exacting standard of judicial review. U.S. Const. Amend. 14, § 1.

13. Constitutional Law ⚿3081

Sex-based classifications require heightened scrutiny under the Equal Protection Clause because sex frequently bears no relation to the ability to perform or contribute to society; for classifications based on sex, courts apply an "intermediate" form of heightened scrutiny which requires the state to show that its justification for the classification is exceedingly persuasive. U.S. Const. Amend. 14.

14. Constitutional Law ⚿3082
Education ⚿733

Policy of board of education barring person from boys' locker rooms who was designated female at birth but had male gender identity warranted heightened scrutiny, which required board on claim under Equal Protection Clause to show that justification for classification was exceedingly persuasive, since policy was sex-based classification and transgender status itself was at least quasi-suspect classification. U.S. Const. Amend. 14, § 1.

15. Constitutional Law ⚿3060

When determining whether a new classification requires heightened scrutiny under the Equal Protection Clause, a court considers: (1) whether the class has been historically subjected to discrimination; (2) whether the class has a defining characteristic that frequently bears a relation to ability to perform or contribute to society; (3) whether the class exhibits obvious, immutable, or distinguishing characteristics that define them as a discrete group; and (4) whether the class is a minority or politically powerless. U.S. Const. Amend. 14, § 1.

16. Constitutional Law ⚿3433
Education ⚿733

Policy of board of education barring person from boys' locker rooms who was designated female at birth but had male gender identity did not have exceedingly persuasive justification, as required to survive intermediate form of heightened scrutiny as applied on claim under Equal Protection Clause based on sex-based classification, since classification did not

serve important governmental objectives and discriminatory means employed were not substantially related to achievement of those objectives. U.S. Const. Amend. 14, § 1.

17. Constitutional Law ⚿3380

An exceedingly persuasive justification, as required to survive an intermediate form of heightened scrutiny as applied on a claim under the Equal Protection Clause based on a sex-based classification, requires the state to demonstrate that the classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives. U.S. Const. Amend. 14, § 1.

18. Constitutional Law ⚿3380

To survive an intermediate form of heightened scrutiny as applied on a claim under the Equal Protection Clause based on a sex-based classification, the government's justification must be genuine, and therefore one that is hypothesized or invented post hoc in response to litigation is not sufficient, and the justification cannot rely on overbroad generalizations about the different talents, capacities, or preferences of males and females. U.S. Const. Amend. 14, § 1.

19. Injunction ⚿1074, 1106

The purpose of a preliminary injunction is to protect the status quo and to prevent irreparable harm during the pendency of a lawsuit ultimately to preserve the court's ability to render a meaningful judgment on the merits. Fed. R. Civ. P. 65(b).

20. Injunction ⚿1092

A plaintiff seeking a preliminary injunction must demonstrate: (1) likelihood of success on the merits; (2) likelihood of suffering irreparable harm in the absence of preliminary relief; (3) the balance of equities favors preliminary relief; and (4) an injunction is in the public interest. Fed. R. Civ. P. 65(b).

21. Injunction ⚿1103, 1104, 1106

To demonstrate a clear likelihood of suffering irreparable harm, a plaintiff seeking a preliminary injunction must demonstrate more than just a possibility of the harm; the harm to be suffered must be actual and imminent, rather than remote or speculative, and the plaintiff must be likely to suffer the harm before a decision on the merits can be rendered. Fed. R. Civ. P. 65(b).

22. Civil Rights ⚿1457(3)

Harm from policy of board of education barring person from boys' locker rooms who was designated female at birth but had male gender identity was not actual and imminent, and therefore that person was not entitled to preliminary injunction in action asserting discrimination claims under Title IX and claims under Fourteenth Amendment and associated Maryland Declaration of Rights provisions, since that person was not enrolled in class for current school year that would have required use of locker room and locker room was not needed by that person for any other purpose, such as participation in interscholastic athletics. U.S. Const. Amend. 14, § 1; Education Amendments of 1972 § 901, 20 U.S.C.A. § 1681; Fed. R. Civ. P. 65(b); 34 C.F.R. § 106.33.

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MEMORANDUM OPINION

George L. Russell, III, United States District Judge

THIS MATTER is before the Court on Defendants Board of Education of Talbot County (the "Board"), Kelly L. Griffith, and Tracy Elzey's Motion to Dismiss for Failure to State a Claim (ECF No. 36) and Plaintiff M.A.B.'s Motion for Preliminary Injunction (ECF No. 41). This action arises from Defendants' decision to require M.A.B., a transgender boy, to use restrooms and locker rooms for girls. The Motions are ripe for disposition, and no hearing is necessary. See Local Rule 105.6 (D.Md. 2016). For the reasons outlined below, the Court will deny the Motion to Dismiss. In addition, the Court will deny without prejudice the Motion for Preliminary Injunction.

I. BACKGROUND [1]

M.A.B. is a fifteen-year-old boy [2] who attends high school at St. Michaels Middle High School (the "High School"), which is located in Talbot County, Maryland. (Compl. ¶ 2, ECF No. 1). His birth sex,[3] which is usually based on "the appearance of the person's external genitalia," is "female." (Id. ¶¶ 20, 21). Yet M.A.B.'s "deeply-held internal sense of his own gender," known as his gender identity, is male. (Id. ¶¶ 2, 20). "[D]eterminations of gender," unlike determinations of birth sex, are based on "multiple factors." (Id. ¶ 21). These factors include "chromosomes, hormone levels, internal and external reproductive organs, and gender identity," with gender identity being the "primary determinant" among them. (Id. ¶¶ 21, 22).

Because M.A.B. was designated female at birth but has a male gender identity, that designation does not accurately reflect his gender identity—giving him the status of a transgender boy. (Id. ¶ 20). As a result, he also has had feelings of gender dysphoria since early childhood. (Id. ¶¶ 2, 26). Gender dysphoria and "the status of being transgender" are "not synonymous," though "they are correlated." (Id. ¶ 24). Gender dysphoria is the "clinically significant distress" experienced by transgender individuals. (Id. ¶ 23). Treatment for gender dysphoria includes "social transitioning," which consists of "living consistent with one's gender identity . . . in all aspects of one's life, including when accessing single-sex spaces like restrooms and locker rooms." (Id. ¶ 25).

When M.A.B. was in the sixth grade, he "arrived at the clear realization" that he was a boy. (Id. ¶¶ 2, 26). M.A.B. received a clinical diagnosis of gender dysphoria in 2014, and has been seeing a medical professional regularly for his gender dysphoria and process of gender transition. (Id. ¶ 26). When M.A.B. turned thirteen, therefore, he began to socially transition to life as male, including going by "a more traditionally masculine chosen first name." (Id. ¶ 28). The Board and the High School "took several steps" to assist M.A.B.'s social transition. (Id. ¶ 30). They addressed him by his new name, addressed him with male pronouns, and conducted a professional development workshop for its staff in 2015 on the topic of transgender students. (Id.). M.A.B. later legally changed his name. (Id. ¶ 28). Since his transition

1. Unless otherwise noted, the Court takes the following facts from M.A.B.'s Amended Complaint and accepts them as true. See Erickson v. Pardus, 551 U.S. 89, 94, 127 S.Ct. 2197, 167 L.Ed.2d 1081 (2007) (citations omitted).

2. Throughout the Complaint and the parties' briefing of the instant Motions, the parties have used masculine pronouns to refer to M.A.B. Accordingly, the Court will also use masculine pronouns.

3. The Court uses terms such as "birth sex" to refer to gender designations made at birth.

began, M.A.B. "has been generally accepted and recognized as male" by his peers at the High School. (Id. ¶ 29).

While aiding M.A.B.'s social transition in some ways, Defendants prohibited M.A.B. from using the High School's boys' locker rooms, and initially, its boys' restrooms. (Id. ¶ 31). Instead, the Board "designated" three of the High School's single-use restrooms as "gender neutral" and required M.A.B. to use them when he needed to use the restroom or change his clothes. (Id. ¶ 32). After the United States Court of Appeals for the Fourth Circuit issued its opinion in G.G. ex rel. Grimm v. Gloucester County School Board., 822 F.3d 709 (4th Cir. 2016), Defendants permitted M.A.B. to use the boys' restrooms. (Id. ¶¶ 31, 45). Since M.A.B. began using the boys' restrooms, no male students at the High School have voiced "any discomfort" about M.A.B.'s access. (Id. ¶ 49). In fact, many of M.A.B.'s peers "congratulated him" on the Board's decision to allow M.A.B. access. (Id.).

The Board, however, continued to prohibit M.A.B. from using the boys' locker rooms. (Id. ¶¶ 31, 45). It maintained its decision to require M.A.B. to use the restrooms it designated as gender neutral whenever M.A.B. had to change his clothes (the "Policy").[4] (Id. ¶¶ 32, 45). Unlike the locker rooms, the designated restrooms the Board requires M.A.B. to use do not have benches or showers. (Id. ¶ 36). Meanwhile, the boys' locker rooms have partitioned stalls for changing clothes and partitioned stalls that have toilets and stall doors. (Id. ¶ 48).

The Board requires only M.A.B., and no other student, to change clothes in the designated restrooms. (Id. ¶ 37). This has resulted M.A.B. experiencing humiliation and embarrassment, as well as alienation from his peers. (Id. ¶ 38). He has received "weird looks" from other students when using the designated restrooms to change. (Id.). M.A.B., then, "has tried to use them as infrequently and inconspicuously as possible." (Id.).

The designated restrooms are "remotely located" from the boys' and girls' locker rooms and the gymnasium. (Id. ¶ 35). The designated restrooms also do not have lockers. (Id. ¶ 36). So, M.A.B. has to go to his student locker, which is far away from the designated restrooms, before changing his clothes, and his physical education teacher gives him extra time to change. (Id. ¶¶ 40, 41). Thus, when M.A.B. took physical education class in 2015, substitute teachers unaware of the Policy forced him to explain why he was tardy to class. (Id. ¶ 41). This required M.A.B. to disclose his transgender status to avoid disciplinary action. (Id.). The "stigma and impracticality" of changing his clothes in the designated restrooms led M.A.B. to attend physical education class without changing when he thought he would not sweat very much. (Id. ¶ 42). At times, his physical education teacher penalized M.A.B.'s grade for not changing his clothes. (Id.).

M.A.B., by and through his parents and next friends L.A.B. and L.F.B., filed the present action on July 19, 2016 against the Board, Kelly L. Griffith in her official capacity as Superintendent of Talbot County Public Schools, and Tracy Elzey in her official capacity as Principal of the High School. (ECF No. 1). In his four-count Complaint, he alleges claims under: Title IX of the Education of Amendments of 1972, 20 U.S.C. § 1681 et seq. (2018) ("Title IX") (Count I); the Equal Protection

4. The Court will refer to the Board's decision to prohibit M.A.B. from using the boys' locker rooms as a "policy," even though the Board simply made a decision and communicated it to M.A.B.'s counsel. (Id. ¶ 45). The High School's principal at the time later advised M.A.B. and his parents of this decision. (Id.).

Clause of the Fourteenth Amendment to the United States Constitution (Count II); Article 24 of the Maryland Declaration of Rights (Count III); and Article 46 of the Maryland Declaration of Rights (Count IV). (Id. ¶¶ 51–75). M.A.B. seeks judgment declaring that the Policy violates his rights under Title IX, the Fourteenth Amendment, and Articles 24 and 26. (Id. at 17). M.A.B. also seeks a preliminary injunction requiring Defendants to allow him to use the High School boys' locker room on the same terms as other male students. (Id.). Finally, M.A.B. seeks nominal and compensatory damages, costs, and attorneys' fees. (Id.).

Defendants now move to dismiss all counts against them for failure to state a claim upon which relief may be granted under Federal Rule of Civil Procedure 12(b)(6), filing their Motion on April 18, 2017. (ECF No. 36). M.A.B. filed an Opposition on May 22, 2017. (ECF No. 40). Defendants filed a Reply on June 5, 2017. (ECF No. 42). M.A.B. also moves for a preliminary injunction under Rule 65, filing his Motion on May 22, 2017. (ECF No. 41). Defendants filed an Opposition on June 5, 2017. (ECF No. 43). M.A.B. filed a Reply on June 19, 2017. (ECF No. 44).

II. DISCUSSION

A. Rule 12(b)(6) Standard of Review

"The purpose of a Rule 12(b)(6) motion is to test the sufficiency of a complaint," not to "resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses." King v. Rubenstein, 825 F.3d 206, 214 (4th Cir. 2016) (quoting Edwards v. City of Goldsboro, 178 F.3d 231, 243–44 (4th Cir. 1999)). A complaint fails to state a claim if it does not contain "a short and plain statement of the claim showing that the pleader is entitled to relief," Fed.R.Civ.P. 8(a)(2), or does not "state a claim to relief that is plausible on its face," Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)). A claim is facially plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id. (citing Twombly, 550 U.S. at 556, 127 S.Ct. 1955). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." Id. (citing Twombly, 550 U.S. at 555, 127 S.Ct. 1955). Though the plaintiff is not required to forecast evidence to prove the elements of the claim, the complaint must allege sufficient facts to establish each element. Goss v. Bank of Am., N.A., 917 F.Supp.2d 445, 449 (D.Md. 2013) (quoting Walters v. McMahen, 684 F.3d 435, 439 (4th Cir. 2012)), aff'd sub nom., Goss v. Bank of Am., NA, 546 Fed.Appx. 165 (4th Cir. 2013).

In considering a Rule 12(b)(6) motion, a court must examine the complaint as a whole, consider the factual allegations in the complaint as true, and construe the factual allegations in the light most favorable to the plaintiff. Albright v. Oliver, 510 U.S. 266, 268, 114 S.Ct. 807, 127 L.Ed.2d 114 (1994); Lambeth v. Bd. of Comm'rs of Davidson Cty., 407 F.3d 266, 268 (4th Cir. 2005) (citing Scheuer v. Rhodes, 416 U.S. 232, 236, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974)). But, the court need not accept unsupported or conclusory factual allegations devoid of any reference to actual events, United Black Firefighters v. Hirst, 604 F.2d 844, 847 (4th Cir. 1979), or legal conclusions couched as factual allegations, Iqbal, 556 U.S. at 678, 129 S.Ct. 1937.

B. Rule 12(b)(6) Analysis

[1] As a threshold matter, Defendants argue that the Court must dismiss all of M.A.B.'s claims against the Board because

the Board enjoys sovereign immunity under the Eleventh Amendment to the United States Constitution. The Court disagrees.

[2, 3] The Eleventh Amendment provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State." U.S. Const. amend. XI. The Supreme Court of the United States has construed the Eleventh Amendment as also protecting states from federal court suits brought by the state's own citizens. Lee–Thomas v. Prince George's Cty. Pub. Schs., 666 F.3d 244, 248 (4th Cir. 2012) (quoting Port Auth. Trans–Hudson Corp. v. Feeney, 495 U.S. 299, 304, 110 S.Ct. 1868, 109 L.Ed.2d 264 (1990)). Eleventh Amendment immunity extends to "state agents and instrumentalities." Id. (quoting Regents of the Univ. of Cal. v. Doe, 519 U.S. 425, 429, 117 S.Ct. 900, 137 L.Ed.2d 55 (1997)). As a matter of Maryland law, county school boards of education are state instrumentalities, and therefore are generally entitled to immunity under the Eleventh Amendment. See, e.g., Farrell v. Bd. of Educ., No. GLR-16-2262, 2017 WL 1078014, at *3 (D.Md. Mar. 21, 2017) (citing Lewis v. Bd. of Educ., 262 F.Supp.2d 608, 612 (D.Md. 2003)).

[4] Nevertheless, there are exceptions. One exception is when a state waives its Eleventh Amendment immunity from suit in a federal court. Lee–Thomas, 666 F.3d at 249. The Maryland legislature enacted a statute that waived a county board of education's Eleventh Amendment immunity "for all claims in the amount of $100,000 or less." Md.Code Ann., Cts. & Jud. Proc. § 5–518(c) (West 2018). As interpreted by the Court of Appeals of Maryland, § 5–518(c) waives a county board of education's Eleventh Amendment immunity to suit from a plaintiff's discrimination claim under a federal law. Bd. of Educ. v. Zimmer–Rubert, 409 Md. 200, 973 A.2d 233, 243 (2009). The Court of Appeals later clarified that its interpretation of § 5–518(c) in Zimmer–Rubert applies to all "tort or insurable" claims. Beka Indus., Inc. v. Worcester Cty. Bd. of Educ., 419 Md. 194, 18 A.3d 890, 896 (2011). Under Maryland law, the definition of "tortious act or omission" encompasses constitutional torts. See Espina v. Jackson, 442 Md. 311, 112 A.3d 442, 450 (2015) (holding that under Maryland's Local Government Tort Claims Act, "tortious acts or omissions" includes constitutional torts); see also, e.g., Green v. N.B.S., Inc., 409 Md. 528, 976 A.2d 279, 287 (2009) ("[T]he term 'tort' as defined by Blacks encompasses all 'civil wrong.' " (citation omitted)).

Here, M.A.B. brings two sets of causes of action against the Board and the other Defendants: (1) a discrimination claim under Title IX (Count I); and (2) claims under the Fourteenth Amendment to the United States Constitution and associated Maryland Declaration of Rights provisions (Counts II–IV). Because § 5–518(c) waives a county board of education's Eleventh Amendment immunity from discrimination claims under federal law and the constitution, the Court concludes that such immunity does not apply to M.A.B.'s claims against the Board. Accordingly, the Court will not dismiss M.A.B.'s claims against the Board on Eleventh Amendment immunity grounds.

Defendants move to dismiss all of M.A.B.'s remaining claims for failure to state a claim under Title IX and the Fourteenth Amendment and associated state constitutional provisions. At bottom, the Court concludes that M.A.B. sufficiently states a claim under both sets of causes of action. The Court addresses each set in turn.

1. Title IX

[5] Defendants contend that the Court should interpret Title IX narrowly to only prohibit discrimination on the basis of birth sex. M.A.B. replies that the Court should interpret Title IX more broadly to include discrimination on the basis of transgender status. In short, the Court agrees with M.A.B.'s interpretation of Title IX and concludes that M.A.B. has sufficiently stated a claim of sex discrimination.

i. 34 C.F.R. § 106.33 (2017) and Transgender Status

[6, 7] Title IX provides, in relevant part: "[n]o person . . . shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a) (2018). To allege a violation of Title IX, M.A.B. must show: "(1) that he was excluded from participation in an education program because of his sex; (2) that the educational institution was receiving federal financial assistance at the time of his exclusion; and (3) that the improper discrimination caused [M.A.B.] harm." G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd. (Grimm I), 822 F.3d 709, 718 (4th Cir. 2016), vacated, —— U.S. ——, 137 S.Ct. 1239, 197 L.Ed.2d 460 (2017).[5]

Title IX does not prohibit all distinctions on the basis of sex. Id. Under one of Title IX's implementing regulations, 34 C.F.R. § 106.33 (2017), Title IX permits separating toilets, locker rooms, and shower facilities on the basis of sex as long as they are "comparable." Grimm I observed that "[b]y implication," then, § 106.33 permits schools to exclude those with a birth sex of female from male facilities and vice-versa. 822 F.3d at 720.

Defendants maintain that because § 106.33 refers to males and females unambiguously, the Court must interpret Title IX to apply only to discrimination on the basis of birth sex, and does not prohibit discrimination on the basis of transgender status. The Court disagrees.

As Grimm I observed, the Court's "inquiry is not ended" by § 106.33's reference to males and females. Id. "Although the regulation may refer unambiguously to males and females, it 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." Id.; see also Whitaker by Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ., 858 F.3d 1034, 1047 (7th Cir. 2017) ("Neither [Title IX] nor [its] regulations define the term 'sex.' Also absent from the statute is the term 'biological,' which [the defendant school district] maintains is a necessary modifier.").

The Fourth Circuit went on to hold that a January 7, 2015 opinion letter by the Department of Education's Office for Civil Rights, which interpreted the regulation to

5. The Supreme Court vacated the Fourth Circuit's judgment in Grimm I in light of the United States Department of Education and United States Department of Justice issuing a letter withdrawing the guidance documents that the judgment examined. See 137 S.Ct. at 1239; see also U.S. Dep't of Just. Civil Rights Div. & U.S. Dep't of Educ. Office for Civil Rights, Dear Colleague Letter (Feb. 22, 2017), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf. Grimm I remains binding law of the Fourth Circuit, however, "unless it is overruled by a subsequent en banc opinion of [the Fourth Circuit] or a superseding contrary decision of the Supreme Court." United States v. Giddins, 858 F.3d 870, 886 n.12 (4th Cir. 2017) (quoting United States v. Collins, 415 F.3d 304, 311 (4th Cir. 2005)). There has been neither an en banc Fourth Circuit opinion nor a superseding contrary Supreme Court decision overruling Grimm I. Thus, the Court will rely on Grimm I to the extent it offers guidance for deciding issues the Motions present.

require access to sex-segregated facilities be based on gender identity (the "2015 Opinion Letter"), is entitled to deference under Auer v. Robbins, 519 U.S. 452, 117 S.Ct. 905, 137 L.Ed.2d 79 (1997). Id. But on February 22, 2017, after the Fourth Circuit decided Grimm I, the Department of Education and the Department of Justice issued a guidance document withdrawing the 2015 Opinion Letter. U.S. Dep't of Just. Civil Rights Div. & U.S. Dep't of Educ. Office for Civil Rights, Dear Colleague Letter (Feb. 22, 2017), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf. Thus, with the 2015 Opinion Letter no longer in effect, Grimm I no longer resolves how § 106.33 applies to a transgender student.

[8] The Fourth Circuit has not spoken on how § 106.33 applies to a transgender person since Grimm I. And the Supreme Court has never addressed the issue. It is well-settled within the Fourth Circuit, however, that case law interpreting Title VII of the Civil Rights Act of 1964 ("Title VII"), as amended, 42 U.S.C. §§ 2000e et seq. (2018), guides courts in evaluating a Title IX claim. Grimm I, 822 F.3d at 718 (citing Jennings v. Univ. of N.C., 482 F.3d 686, 695 (4th Cir. 2007)).[6] Accordingly, the Court turns to Title VII precedent for guidance.

ii. Title VII and Transgender Status

The Supreme Court has never addressed how Title VII applies to transgender individuals. Nevertheless, other Supreme Court cases interpreting Title VII provide helpful guidance. In Price Waterhouse v. Hopkins, the Supreme Court held that plaintiff Hopkins, a woman who was denied partnership in an accounting firm, had an actionable claim against that firm because the firm denied her a promotion for failing to conform to gender stereotypes. 490 U.S. 228, 250–53, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989). Various firm partners described Hopkins as "macho," in need of "a course in charm school," "a lady using foul language," and someone who had been "a tough-talking somewhat masculine hard-nosed manager." Id. at 235, 109 S.Ct. 1775. Partners advised her that she could improve her chances for partnership if she were to "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." Id. (internal quotation marks omitted).

Writing for a plurality, Justice Brennan held that "[i]n the specific context of sex stereotyping," these comments were sufficient to show that the accounting firm "acted on the basis of gender" when it denied Hopkins a promotion. Id. at 250, 109 S.Ct. 1775. In doing so, six members of the Court agreed that Title VII barred not only discrimination because Hopkins was a woman, but also for "sex stereotyping" because she failed to act according to the gender stereotype of a woman. Id. at 250–51, 109 S.Ct. 1775; id. at 258–61, 109 S.Ct. 1775 (White, J., concurring); id. at 272–73, 109 S.Ct. 1775 (O'Connor, J., concurring). Thus, Price Waterhouse establishes that Title VII's prohibition on discrimination because of sex includes—more broadly—gender stereotyping. See id. at 251, 109 S.Ct. 1775 ("[W]e are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group.").

After Price Waterhouse, the Supreme Court confirmed this broader interpretation of Title VII in Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75, 118

6. For this reason, Defendants' various arguments about why the "very different natures" of Title VII and Title IX precludes reliance on Title VII precedent have no merit. (Defs.' Reply at 3, ECF No. 42).

S.Ct. 998, 140 L.Ed.2d 201 (1998). There, the Court held that Title VII's prohibition of sex discrimination is broad enough to include same-sex harassment claims. Id. at 79, 118 S.Ct. 998. Justice Scalia, writing for a unanimous Court, observed that "statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." Id.

The Fourth Circuit has not applied Price Waterhouse in the context of claims brought by transgender persons, or gender stereotyping claims more generally, under Title VII. But see G.G. v. Gloucester Cty. Sch. Bd. (Grimm II), 654 Fed.Appx. 606, 606–07 (4th Cir. 2016) (Davis, J., concurring) (observing that the Supreme Court "has expressly recognized" that "failure to conform" to gender stereotypes constitutes sex discrimination under Title VII (citing Price Waterhouse, 490 U.S. at 250–51, 109 S.Ct. 1775)). Still, this Court has concluded that discrimination on the basis of transgender status constitutes gender stereotyping because "by definition, transgender persons do not conform to gender stereotypes." Finkle v. Howard Cty., 12 F.Supp.3d 780, 787–88 (D.Md. 2014). As a result, transgender discrimination is per se actionable sex discrimination under Title VII based on Price Waterhouse. Id.

This Court's conclusion is in accord with the First, Sixth, Ninth, and Eleventh Circuits, which have all recognized that claims of discrimination on the basis of transgender status is per se sex discrimination under Title VII or other federal civil rights laws based on Price Waterhouse. See EEOC v. R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560, 571–82, 2018 WL 1177669, at *5–12 (6th Cir. Mar. 7, 2018) (Title VII); Glenn v. Brumby, 663 F.3d 1312, 1316–19 (11th Cir. 2011) (Title VII); Rosa v. Park W. Bank & Tr. Co., 214 F.3d 213, 215–16 (1st Cir. 2000) (Equal Credit Opportunity Act); Schwenk v. Hartford, 204 F.3d 1187, 1201–03 (9th Cir. 2000) (Gender Motivated Violence Act); see also Smith v. City of Salem, 378 F.3d 566, 575 (6th Cir. 2004) (holding that "sex stereotyping based on a person's gender nonconforming behavior" is unlawful under Title VII); Grimm II, 654 Fed.Appx. at 607 (Davis, J., concurring) (noting that Glenn, Rosa, Schwenk, and Smith "have all recognized that discrimination against a transgender individual based on that person's transgender status is discrimination because of sex under federal civil rights statutes").[7]

In addition, more generally, the First, Second, Third, Seventh, and Ninth Circuits have all recognized that an allegation of gender stereotyping is actionable sex discrimination under Title VII based on Price Waterhouse. See Hively v. Ivy Tech Cmty. Coll., 853 F.3d 339, 351–52 (7th Cir. 2017)

7. The only Courts of Appeals that arguably have held to the contrary are the Seventh, Eighth, and Tenth Circuits' rulings that transgender status, taken alone, is not entitled to Title VII protection. See Etsitty v. Utah Transit Auth., 502 F.3d 1215, 1221–22 (10th Cir. 2007); Sommers v. Budget Mktg., Inc., 667 F.2d 748, 749–50 (8th Cir. 1982); Ulane v. E. Airlines, Inc., 742 F.2d 1081, 1084 (7th Cir. 1984).

As this Court has noted, however, "it is unclear what, if any, significance to ascribe" to these holdings because "[i]n light of Price Waterhouse," transgender individuals may bring sex-discrimination claims under a gender-stereotyping theory. Finkle, 12 F.Supp.3d at 788. Indeed, the Seventh Circuit recently explained that its prior decision in Ulane "cannot and does not foreclose" transgender students from bringing sex-discrimination claims based on Price Waterhouse's gender-stereotyping theory. Whitaker, 858 F.3d at 1047.

(en banc); Christiansen v. Omnicom Grp., Inc., 852 F.3d 195, 200–01 (2d Cir. 2017) (per curiam); Prowel v. Wise Bus. Forms, Inc., 579 F.3d 285, 290 (3d Cir. 2009); Nichols v. Azteca Rest. Enters., Inc., 256 F.3d 864, 874–75 (9th Cir. 2001); Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 261 n.4 (1st Cir. 1999).[8] What is more, no Court of Appeals has held otherwise.

Thus, on the basis of the Supreme Court's holding in Price Waterhouse, subsequent opinions of several Courts of Appeals, and this Court's opinion in Finkle, the Court concludes that allegations of gender stereotyping are cognizable as sex-discrimination claims under Title VII, and consequently, Title IX. The Court further concludes, on the basis of Finkle and several Courts of Appeals decisions, that claims of discrimination on the basis of transgender status are per se actionable under a gender stereotyping theory.

iii. The Policy under a Gender–Stereotyping Theory

[9] Having determined that M.A.B. may bring a claim of discrimination under Title IX on the basis of his transgender status, the Court turns to whether M.A.B. has sufficiently alleged his claim under a gender-stereotyping theory. In brief, the Court concludes that M.A.B. has done so.

M.A.B. asserts that under a gender-stereotyping theory, the alleged Policy subjects him to sex discrimination. Defendants submit that even under a gender-stereotyping theory, M.A.B. fails to state a claim. M.A.B. has not alleged that Defendants denied M.A.B. access to the boys' locker rooms "because of the way he dresses, talks, acts, or any other outward expression," as in Price Waterhouse. (Defs.' Reply at 7). Defendants highlight that unlike Price Waterhouse, the Policy is "based on biology alone." (Id. at 8).[9] The Court agrees with M.A.B.

Defendants' argument is unavailing because they define gender stereotyping too narrowly. Granted, the employer in Price Waterhouse did deny the plaintiff a promotion because her appearance and behavior did not conform to the employer's gender stereotype of a woman. Yet the Supreme Court did not require gender stereotyping to take the specific form of discrimination on the basis of appearance or behavior. In fact, Price Waterhouse forecloses Defendants' argument because it explicitly left open the possibility of other forms of gender stereotyping: "By focusing on [appearance and behavior], however, we do not suggest a limitation on the possible ways of proving that stereotyping played a motivating role in an employment decision . . ." 490 U.S. at 251–52, 109 S.Ct. 1775; see also id. at 251, 109 S.Ct. 1775 (observing that Congress intended "to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes" when it enacted Title VII (quoting L.A. Dep't. of Water & Power v. Manhart, 435 U.S. 702, 707, n.13, 98 S.Ct. 1370, 55 L.Ed.2d 657 (1978)) (emphasis added)). Thus, the Court will not limit its analysis to whether M.A.B. alleges that Defendants discriminated against him based on his appearance or behavior.

8. As a matter of fact, Defendants appear to agree that under Title VII, sex-discrimination claims under a gender-stereotyping theory are cognizable based on Price Waterhouse. (See Defs.' Reply at 7) ("...[T]he Supreme Court has recognized since [Price Waterhouse] that gender[-]stereotype discrimination may be evidence of sex discrimination.").

9. Defendants also advance this argument in an attempt to distinguish this Court's opinion in Finkle. For the reasons stated below, this argument is unavailing. See Finkle, 12 F.Supp.3d at 788 (concluding that the plaintiff stated a Title VII claim because she alleged that defendants discriminated against her because of her transgender status without relying on the particular form of the discrimination).

The Court concludes that the alleged Policy subjects M.A.B. to sex discrimination under a gender stereotyping theory because he has alleged that Defendants denied him access to the boys' locker room because he is transgender.

Since the 2015 Opinion Letter was withdrawn, only one United States Courts of Appeals, the Seventh Circuit, has addressed whether denying transgender students access to the sex-segregated facility that aligns with their gender identity may violate Title IX. In Whitaker by Whitaker v. Kenosha Unified School District. No. 1 Board of Education, a recent decision with very similar facts, the court held that the plaintiff, a transgender boy, was entitled to a preliminary injunction granting him access to the boys' restrooms. 858 F.3d 1034 (7th Cir. 2017).

In Whitaker, the plaintiff was a high school student in his senior year. Id. at 1040. His birth certificate designated him as female, but his gender identity is male. Id. He began to see a therapist during his freshman year of high school, who diagnosed him with gender dysphoria, and socially transition to life as male. Id. His social transition included using a different name, asking his teachers and peers to refer to him by that name and to use male pronouns, and changing his legal name. Id. The school's administration decided, nonetheless, that the plaintiff could only use the girls' restrooms or gender-neutral restrooms, which were far from his classrooms. Id. at 1040, 1041–42. As a result of the administration's decision, he suffered from depression and anxiety. Id. at 1041. The plaintiff even restricted his water intake to avoid using the restroom, which exacerbated medical problems. Id. at 1040–42. He also contemplated suicide. Id. at 1041. The school later required the student to complete a surgical transition before permitting him access to the boys' restrooms. Id. Despite the school's prohibition, the plaintiff used the boys' restrooms in violation of the administration's decisions, causing administrators to remove him from class on several occasions and instruct security guards to monitor his restroom usage. Id. at 1041.

In assessing the student's likelihood of success on the merits on his Title IX claim, Whitaker reasoned that "[b]y definition, a transgender individual does not conform to the sex-based stereotypes" associated with the individual's birth sex. Id. at 1048. Relying on the logic of Title VII gender stereotyping cases—including Price Waterhouse, Oncale, the Eleventh Circuit's opinion in Glenn, and the Sixth Circuit's opinion in Smith—the Seventh Circuit concluded that discrimination on the basis of transgender status itself constitutes gender stereotyping. Id. at 1048. Thus, the student had demonstrated a likelihood of success on the merits of his Title IX claim because he alleged that the school district "denied him access to the boys' restroom because he is transgender." Id.

The court explained that 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." Id. at 1049. Moreover, the school district's decision barring the student from the boys' restrooms unlawfully subjects him, "as a transgender student, to different rules, sanctions, and treatment than non-transgender students." Id. at 1048–49.

Here, "[b]y definition" as a transgender boy, M.A.B. "does not conform to the sex-based stereotypes" associated with being assigned female at birth. Id. at 1048. So, as in Whitaker, M.A.B.'s allegation that Defendants "denied him access" to the boys' locker room "because he is transgender" sufficiently states a Title IX claim for gender stereotyping. See id. at 1048.

The main difference between the policy in Whitaker and Defendants' policy here is that the school administrators in Whitaker barred the student from the boys' restrooms, whereas here, Defendants barred M.A.B. from the boys' locker room.[10] See, e.g., id. at 1041. That difference does not change the Court's Title IX analysis. Like the policy in Whitaker, Defendants' policy of barring M.A.B. from the boys' locker room requires him to use a facility that "does not conform" with his gender identity. See id. at 1049. The Policy, then, "punishes" M.A.B. for his "gender non-conformance, which in turn violates Title IX." See id. And most notably, like the policy in Whitaker, Defendants' decision to bar M.A.B. from the boys' locker room subjects him, "as a transgender student, to different rules, sanctions, and treatment than non-transgender students." See id. at 1049–50.[11]

The Court, therefore, concludes that M.A.B. has sufficiently stated a claim for gender-stereotyping discrimination because he alleges that Defendants "denied him access" to the boys' locker room "because he is transgender." See id. at 1049. As such, the Court will not grant Defendants' Motion as to M.A.B.'s Title IX claim. The Court now turns to M.A.B.'s constitutional claims.

2. Constitutional Claims

M.A.B. brings claims under the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution and Articles 24 and 26 of the Maryland Declaration of Rights. (Compl. ¶¶ 61–75). Defendants argue that the Court should dismiss M.A.B.'s constitutional claims because M.A.B. does not allege that Defendants have treated him differently than any other students at the High School. Defendants further contend that transgender status is not a suspect class under the Equal Protection Clause, and, accordingly, the Policy requires and survives rational basis review.

M.A.B. responds that the Court should apply intermediate scrutiny rather than rational basis review because the Policy constitutes a form of sex discrimination and because transgender status is a quasi-suspect classification. M.A.B. further submits that the Policy does not withstand intermediate scrutiny because it is not substantially related to an important government interest. At bottom, the Court agrees with M.A.B.

[10] The Equal Protection Clause provides: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. In simpler terms, "all persons similarly situated should be treated alike." City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985) (citing Plyler v. Doe, 457 U.S. 202, 216, 102 S.Ct. 2382, 72 L.Ed.2d 786 (1982)). Likewise, the state must avoid distinguishing between classes of people in an "arbitrary or irrational" manner or out of a "bare . . . desire to harm a politically unpopular group." Id. at 446–47, 105 S.Ct. 3249 (quoting USDA v. Moreno, 413 U.S. 528, 534, 93 S.Ct. 2821, 37 L.Ed.2d 782 (1973)); see also Vill. of Willowbrook v. Olech, 528 U.S. 562, 564, 120 S.Ct. 1073,

10. As described above, however, Defendants also barred M.A.B. from the boys' restrooms until the Fourth Circuit issued its opinion in Grimm I. (Compl. ¶¶ 31, 45).

11. Defendants attempt to distinguish Whitaker by highlighting that M.A.B. makes no allegation that Defendants "have sex-stereotyped [him] based on his outward expression." (Reply at 8 n.7). But neither did the plaintiff in Whitaker. 858 F.3d at 1048 (describing the school district's argument that the policy the student alleges "is not based on whether the student behaves, walks, talks, or dresses in a manner that is inconsistent" with any gender stereotypes (emphasis added)).

145 L.Ed.2d 1060 (2000) (per curiam) (prohibiting "intentional and arbitrary discrimination" (quoting Sioux City Bridge Co. v. Dakota Cty., 260 U.S. 441, 445, 43 S.Ct. 190, 67 L.Ed. 340 (1923))).

[11, 12] Generally, courts presume state action to be lawful, and so, uphold classifications as long as they are "rationally related to a legitimate state interest." Cleburne, 473 U.S. at 440, 105 S.Ct. 3249. This is known as "rational basis review." See, e.g., Clark v. Jeter, 486 U.S. 456, 461, 108 S.Ct. 1910, 100 L.Ed.2d 465 (1988). Conversely, when the state classifies a "suspect" or "quasi-suspect" group of people, courts apply "heightened scrutiny." Cleburne, 473 U.S. at 440–41, 105 S.Ct. 3249. Heightened scrutiny, unlike rational basis review, is "a more exacting standard of judicial review." Id. at 442, 105 S.Ct. 3249.

[13] One quasi-suspect class is sex. Sex-based classifications require heightened scrutiny because sex "frequently bears no relation to the ability to perform or contribute to society." Id. at 440–41, 105 S.Ct. 3249 (quoting Frontiero v. Richardson, 411 U.S. 677, 686, 93 S.Ct. 1764, 36 L.Ed.2d 583 (1973) (plurality opinion)). For classifications based on sex, courts apply an "intermediate" form of heightened scrutiny. See, e.g., Clark, 486 U.S. at 461, 108 S.Ct. 1910. Intermediate scrutiny requires the state to show that its justification for the classification is "exceedingly persuasive." United States v. Virginia, 518 U.S. 515, 533, 116 S.Ct. 2264, 135 L.Ed.2d 735 (1996).

i. Proper Level of Scrutiny

[14] As a preliminary matter, the parties disagree over whether rational basis review or heightened scrutiny applies to the Policy. Defendants maintain that the more deferential rational basis review applies, while M.A.B. asserts that the more rigorous intermediate scrutiny applies. As with M.A.B.'s Title IX claim, neither the Supreme Court, nor the Fourth Circuit, has decided the rights of transgender people under the Equal Protection Clause.[12] Based on the weight of decisions issued by other Courts of Appeals and recent decisions issued by sister United States District Courts, the Court concludes that the Policy warrants heightened scrutiny for two reasons. First, the Policy is a sex-based classification. Second, transgender status itself is at least a quasi-suspect classification.

a. Transgender Discrimination as Sex–Based Discrimination

Only two Courts of Appeals have considered whether transgender classifications are sex-based, and, consequently, are deserving of intermediate scrutiny—the Seventh Circuit and the Eleventh Circuit. See Whitaker, 858 F.3d at 1051; Glenn, 663 F.3d at 1316. Both concluded that intermediate scrutiny applies. Whitaker, 858 F.3d at 1051; Glenn, 663 F.3d at 1316; see also Smith, 378 F.3d at 577 (holding that the plaintiff, a transgender firefighter, sufficiently stated a claim of sex discrimination under the Equal Protection Clause without further specifying the level of scrutiny that applied).

As the Seventh Circuit explained, if the state cannot justify a sex-based classification "by relying on overbroad generalizations," then "sex-based stereotypes are also insufficient" to justify such a classification. Whitaker, 858 F.3d at 1051; see also J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, 138, 114 S.Ct. 1419, 128 L.Ed.2d

12. Grimm I declined to consider the plaintiff's claim under the Equal Protection Clause. 822 F.3d at 717 n.3.

89 (1994) (rejecting, as a proper reason for discrimination during jury selection, reliance on sex-based stereotypes). Because the court had already concluded that the policy barring the student from the boys' restrooms constitutes gender stereotyping under Title IX, the Whitaker court held that "[i]t is enough to say that, just as in Price Waterhouse," such a policy and related facts in the record "show[ ] sex stereotyping" under the Equal Protection Clause. Id. at 1051. The school district's policy "cannot be stated without referencing sex" because the school district "decides which bathroom a student may use based upon the sex listed on the student's birth certificate." Id. Thus, Whitaker held that the policy "is inherently based upon a sex-classification" and intermediate scrutiny applies. Id.

Similarly, the Eleventh Circuit in Glenn held that classifications on the basis of transgender status are sex-based classifications. Relying on a variety of Supreme Court decisions, the court pointed out that "the consistent purpose" of applying intermediate scrutiny to sex-based classifications "has been to eliminate discrimination on the basis of gender stereotypes." Glenn, 663 F.3d at 1319–20.[13] The court reasoned that "[b]ecause these protections are afforded to everyone, they cannot be denied to a transgender individual." Id. at 1319. Glenn then held that such protections apply when there is discrimination on the basis of transgender status: a "person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes." Id. at 1316. "[D]iscrimination against a transgender individual because of her gender-nonconformity," therefore, "is sex discrimination" under the Equal Protection Clause. Id. at 1317.

Here, the Policy is a sex-based classification because it relies on sex-based stereotypes. The Policy classifies M.A.B. differently on the basis of his transgender status, and, as a result, subjects him to sex stereotyping. For the same reasons why the Court concluded that the Policy impermissibly stereotypes under Title IX, "[i]t is enough to say that, just as in Price Waterhouse," the Policy M.A.B. alleges exists "shows sex stereotyping" under the Equal Protection Clause. Whitaker, 858 F.3d at 1051. Likewise, the Equal Protection Clause protects M.A.B. from "discrimination on the basis of gender stereotypes," and because the Policy classifies M.A.B. on the basis of his transgender status, it constitutes "sex discrimination." Glenn, 663 F.3d at 1317, 1319. Further, like the policy in Whitaker, Defendants' decision to bar M.A.B. from the boys' locker room "cannot be stated without referencing sex" because they decide which locker room M.A.B. may use based upon his birth sex—female. See 858 F.3d at 1051.

The Policy, therefore, is subject to heightened scrutiny because as alleged, it relies on sex-based stereotypes.

b. Transgender People as a Quasi–Suspect Class

Second, the Policy warrants heightened scrutiny because it classifies M.A.B. on the basis of his transgender status. Classifications based on transgender status require heightened scrutiny because transgender individuals are, at minimum, a quasi-suspect class.

[15] The Supreme Court uses certain factors to decide whether a new classification requires heightened scrutiny. They include: (1) whether the class has been historically "subjected to discrimination," Bowen v. Gilliard, 483 U.S. 587, 602, 107

13. Glenn expressly rejected making a distinction between describing this kind of discrimination "as being on the basis of sex or gender." 663 F.3d at 1317.

S.Ct. 3008, 97 L.Ed.2d 485 (1987) (citation omitted); (2) whether the class has a defining characteristic that "frequently bears [a] relation to ability to perform or contribute to society," Cleburne, 473 U.S. at 440–41, 105 S.Ct. 3249; (3) whether the class exhibits "obvious, immutable, or distinguishing characteristics that define them as a discrete group;" Bowen, 483 U.S. at 602, 107 S.Ct. 3008 (citation omitted); and (4) whether the class is "a minority or politically powerless." Id.

Here, all four factors justify treating transgender people as at least a quasi-suspect class. First, transgender people have been historically subjected to discrimination. For instance, Whitaker observed that "[t]here is no denying that transgender individuals face discrimination, harassment, and violence because of their gender identity." 858 F.3d at 1051. Indeed, recent reports found that transgender individuals suffer very high rates of violence due to their transgender status. In a 2015 survey of transgender individuals, 9% of survey respondents reported that they were physically attacked in the past year because of their transgender status. Sandy E. James et al., Nat'l Ctr. for Transgender Equal., The Report of the 2015 U.S. Transgender Survey 198 (2016), https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf. Meanwhile, at least 25 transgender persons in the United States were homicide victims in 2017, the highest annual total on record. Mark Lee, Human Rights Campaign Found., A Time to Act: Fatal Violence Against Transgender People in America 2017 4 (2017), https://assets2.hrc.org/files/assets/resources/A_Time_To_Act_2017_REV3.pdf.

Tantamount here is the discrimination they face in the context of K–12 education:

> 78% of students who identify as transgender or as gender non-conformant[ ] report being harassed while in grades K–12. Jaime M. Grant et al., Injustice at Every Turn: A Report of the National Transgender Discrimination Survey, Nat'l Center for Transgender Equal., at 33 (2011), http://www.transequality.org/sites/default/files/docs/resources/NTDS_Report.pdf. These same individuals in K–12 also reported an alarming rate of assault, with 35% reporting physical assault and 12% reporting sexual assault. Id. As a result, 15% of transgender and gender non-conformant students surveyed made the decision to drop out. Id. These statistics are alarming.

Whitaker, 858 F.3d at 1051. And as other district courts have recognized, transgender individuals report high rates of discrimination in education, employment, housing, and access to healthcare. Evancho v. Pine–Richland Sch. Dist., 237 F.Supp.3d 267, 288 (W.D.Pa. 2017); Bd. of Educ. of the Highland Local Sch. Dist. v. U.S. Dep't of Educ., 208 F.Supp.3d 850, 874 (S.D. Ohio 2016); Adkins v. City of New York, 143 F.Supp.3d 134, 139 (S.D.N.Y. 2015).

Second, transgender status bears no relation to ability to contribute to society. The Court is not aware of any argument suggesting that a transgender person or person experiencing gender dysphoria is any less productive than any other member of society. Accord Evancho, 237 F.Supp.3d at 288; Highland, 208 F.Supp.3d at 874; Norsworthy v. Beard, 87 F.Supp.3d 1104, 1120 (N.D. Cal. 2015); Adkins, 143 F.Supp.3d at 139.

Third, transgender individuals exhibit "obvious, immutable, or distinguishing characteristics that define them as a discrete group." See Bowen, 483 U.S. at 602, 107 S.Ct. 3008 (quoting Lyng v. Castillo, 477 U.S. 635, 638, 106 S.Ct. 2727, 91 L.Ed.2d 527 (1986)). As several district courts have concluded, transgender status is immutable. Evancho, 237 F.Supp.3d at 288; Highland, 208 F.Supp.3d at 874 (quot-

ing Lyng, 477 U.S. at 638, 106 S.Ct. 2727); Norsworthy, 87 F.Supp.3d at 1119 n.8; Adkins, 143 F.Supp.3d at 139. They have, moreover, distinguishing characteristics—mainly, their gender identity does not align with the gender they were assigned at birth. (Compl. ¶ 20).

Fourth, as a class, transgender people are "a minority or politically powerless." Bowen, 483 U.S. at 602, 107 S.Ct. 3008 (quoting Lyng, 477 U.S. at 638, 106 S.Ct. 2727). They comprise of a small fraction of the population. Doe 1 v. Trump, 275 F.Supp.3d 167, 209 (D.D.C. 2017) (highlighting an amicus party's estimate that transgender people make up approximately 0.6% of the American adult population); Highland, 208 F.Supp.3d at 874 (describing transgender people as "a tiny minority of the population").

They are also politically powerless. Courts have had to block enforcement of policies approved by the federal government or laws passed by state legislatures because they violated the rights of transgender individuals. Notably, just months ago, this Court enjoined enforcement of a memorandum issued by President Trump that permitted discrimination against transgender members of the military because it likely violated their rights under the Equal Protection Clause. Stone v. Trump, 280 F.Supp.3d 747, 767–71, 2017 WL 5589122, at *14–17 (D.Md. 2017); see also Doe 1, 275 F.Supp.3d 167 (enjoining implementation of two of the memorandum's directives). In 2016, a sister district court within the Fourth Circuit enjoined North Carolina from enforcing a so-called "bathroom bill" requiring individuals to use bathrooms that align with their birth sex because it likely violated Title IX. Carcaño v. McCrory, 203 F.Supp.3d 615 (M.D.N.C. 2016).

Relatedly, there are very few transgender elected officials. Only two openly transgender candidates have ever been elected; both won seats in a state legislature. Maggie Astor, Danica Roem Wins Virginia Race, Breaking a Barrier for Transgender People, N.Y. Times, Nov. 7, 2017, https://www.nytimes.com/2017/11/07/us/danica-roem-virginia-transgender.html. The first never took office, and the second was just elected last November. Id. Nor are there any openly transgender members of the United States Congress or the federal judiciary.[14] Adkins, 143 F.Supp.3d at 140; see also G.G. v. Gloucester Cty. Sch. Bd. (Grimm III), 853 F.3d 729, 730 (4th Cir. 2017) (Davis, J., concurring), as amended (Apr. 18, 2017) (observing that transgender people are a "vulnerable group that has traditionally been unrecognized, unrepresented, and unprotected").

The Court, therefore, concludes that classifications based on transgender status are per se entitled to heightened scrutiny because transgender status itself is at least a quasi-suspect class. Transgender people have been historically subjected to discrimination, their status bears no relation to their ability to contribute to society, they exhibit immutable and distinguishing characteristics, and they are both a minority and politically powerless.

What is more, this Court in Stone recently concluded that transgender status deserves "at least a quasi-suspect classification." 280 F.Supp.3d at 768, 2017 WL

14. For that matter, the Court observes that one judicial nominee to the United States District Court for the Eastern District of Texas described a first grade transgender student's lawsuit to access the girls' restroom as part of "Satan's plan." Chris Massie & Andrew Kaczynski, Trump Judicial Nominee Said Transgender Children are Part of 'Satan's Plan,' Defended 'Conversion Therapy', CNN Politics (Sept. 20, 2017), http://www.cnn.com/2017/09/20/politics/kfile-jeff-mateer-lgbt-remarks/index.html.

5589122, at *15 (citing Doe 1, 275 F.Supp.3d at 208–09).

Most district courts that have considered the issue came to the same conclusion. Compare Doe 1, 275 F.Supp.3d at 208 (concluding that classifications on the basis of transgender status are "at least a quasi-suspect classification"); Evancho, 237 F.Supp.3d at 288 (concluding that transgender status is a classification requiring heightened scrutiny); Highland, 208 F.Supp.3d at 874 (same); Adkins, 143 F.Supp.3d at 139–40 (same); and Norsworthy, 87 F.Supp.3d at 1119 (same), with Johnston v. Univ. of Pittsburgh of the Commonwealth Sys. of Higher Educ., 97 F.Supp.3d 657, 668 (W.D.Pa. 2015) (declining to recognize transgender status as a class entitled to heightened scrutiny because neither the Supreme Court nor the United States Court of Appeals for the Third Circuit have ruled otherwise).[15]

In short, the Policy is subject to heightened scrutiny. The Policy, as alleged, relies on sex-based stereotypes, warranting heightened scrutiny. Further, transgender status itself is at least a quasi-suspect classification.

ii. The Policy under Heightened Scrutiny

[16] Having concluded that the Court must examine the Policy by applying heightened scrutiny, the question remains whether the Policy withstands this review. At bottom, the Court concludes that, for the purpose of deciding the pending Motion to Dismiss, the Policy fails heightened scrutiny.

[17, 18] As mentioned above, sex-based classifications require an intermediate form of heightened scrutiny, which requires the state to show that the justification for the classification is "exceedingly persuasive." Virginia, 518 U.S. at 533, 116 S.Ct. 2264. An exceedingly persuasive justification requires the state to demonstrate that the "classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives." Virginia, 518 U.S. at 533, 116 S.Ct. 2264 (quoting Miss. Univ. for Women v. Hogan, 458 U.S. 718, 724, 102 S.Ct. 3331, 73 L.Ed.2d 1090 (1982)) (internal quotation marks omitted). "The justification must be genuine," and one that is "hypothesized or invented post hoc in response to litigation" is not sufficient. Id. at 533, 116 S.Ct. 2264. Nor can the justification rely on "overbroad generalizations about the different talents, capacities, or preferences of males and females." Id.

The Seventh Circuit in Whitaker is the only United States Courts of Appeals that has addressed whether a policy that denies transgender students access to the sex-segregated facility that aligns with their gender identity violates the Equal Protection Clause. There, the defendant school district defended its policy by first arguing that the policy does not implicate the Equal Protection Clause because it treats all boys and girls the same. Whitaker, 858 F.3d at 1051. It further asserted that the policy is necessary to protect the privacy rights of all of the district's students. Id. at

15. The only Court of Appeals to address the issue, the Ninth Circuit in Holloway v. Arthur Andersen & Co., held that transgender people were not a suspect or quasi-suspect class. 566 F.2d 659, 663 (9th Cir. 1977). The Ninth Circuit later raised significant doubt as to whether Holloway remains good law. See Schwenk v. Hartford, 204 F.3d 1187, 1201 (9th Cir. 2000) ("The initial judicial approach taken in cases such as Holloway has been overruled by the logic and language of Price Waterhouse."). In Whitaker, the Seventh Circuit expressly declined to consider whether transgender status is per se entitled to heightened scrutiny. See 858 F.3d at 1051 ("[T]his case does not require us to reach the question of whether transgender status is per se entitled to heightened scrutiny.").

1052. The court rejected both arguments. Id. at 1051, 1052.

Whitaker held that the school district's contention that "it treats all boys and girls the same" is "untrue." Id. at 1051. Under the policy, if transgender students choose to use a bathroom that aligns with their gender identity, the school district disciplines them. Id. As a result, the policy implicates the Equal Protection Clause. Id. at 1051–52.

In assessing the plaintiff student's likelihood of success on the merits of his claim under intermediate scrutiny, Whitaker held that the record demonstrated that the school district's privacy justification, though "legitimate," was not "genuine" because it was "based upon sheer conjecture and abstraction." Id. at 1052. The court highlighted that the student used the boys restrooms without "incident or complaint" from other students. Id.

Nor, the court held, was the policy substantially related to protecting other students' privacy rights. Preventing the student from using the boys' restrooms "does nothing to protect the privacy rights" the school district sought to protect. Id. The court explained that a "transgender student's presence in the restroom provides no more of a risk to other students' privacy rights than the presence of an overly curious student of the same biological sex who decides to sneak glances at his or her classmates performing their bodily functions." Id. In addition, "those who have true privacy concerns are able to utilize a stall," and "[n]othing in the record suggests that the bathrooms at [the high school] are particularly susceptible to an intrusion upon an individual's privacy." Id. Further, Whitaker pointed out that if the school district was concerned that children with different-looking anatomies were in the bathroom together, "then it would seem that separate bathrooms also would be appropriate for pre-pubescent and post-pubescent children who do not look alike anatomically," which the school district had not provided. Id. at 1052–53. Thus, the court held that the school district did not establish an exceedingly persuasive justification. Id. at 1053.

Here, Defendants make very similar arguments to the ones Whitaker rejected. Defendants contend that the Policy does not implicate the Equal Protection Clause because it treats M.A.B. like every other student at the High School. The Policy requires him to use the locker room of his birth sex. Defendants further maintain that even under intermediate scrutiny, the Policy survives because it protects the privacy rights of the High School's students. The Court disagrees.

The Policy clearly implicates the Equal Protection Clause. It treats M.A.B. differently from the rest of the High School's students. While the rest of M.A.B.'s peers may use the locker room that aligns with their gender identity, M.A.B. may not. Instead, Defendants discipline M.A.B. if he uses such a locker room—the boys' locker room. As a matter of fact, his physical education teacher penalized his grade when M.A.B. did not change his clothes because he did not want to deal with the "stigma and impracticality" of changing in the designated restrooms. (Compl. ¶ 42). Also, M.A.B. had to disclose his transgender status to substitute teachers to avoid disciplinary action for being late to class after changing in those distant restrooms. (Id. ¶ 41). None of these events would occur if the Policy permitted M.A.B. to change in the locker room that aligns with his gender identity, like the rest of the students at the High School. Thus, the Policy implicates the Equal Protection Clause.

The Court concludes that the Policy does not withstand intermediate scrutiny because, as alleged, it is not substantially

related to the privacy rights Defendants raise.

To be sure, Whitaker and the Fourth Circuit in Grimm I both acknowledged that bodily privacy is a "legitimate and important interest." Grimm I, 822 F.3d at 723; see also Whitaker, 858 F.3d at 1052 (recognizing that the school district "has a legitimate interest in ensuring bathroom privacy rights are protected"). M.A.B. highlights that Defendants have not offered a factual basis to support their privacy concerns. But on a motion to dismiss, the Court may only consider M.A.B.'s allegations in the Complaint and accept them as true. Albright, 510 U.S. at 268, 114 S.Ct. 807; Lambeth, 407 F.3d at 268 (citing Scheuer, 416 U.S. at 236, 94 S.Ct. 1683). M.A.B. does not describe the basis of Defendants' privacy concerns in his Complaint. Unlike in Whitaker, where the court had the benefit of a factual record from which to conclude that the school district's privacy concerns were not "genuine," in this case there is not yet a factual record.

The Court need not assess whether the privacy concerns Defendants raise are sufficiently "important governmental objectives," however. See Virginia, 518 U.S. at 524, 116 S.Ct. 2264. Even assuming they are, the Court concludes that the Policy, as alleged, is not "substantially related" to those asserted privacy rights. See id.

The policy in Whitaker was not substantially related to protecting other students' privacy rights. See 858 F.3d at 1052. Defendants attempt to distinguish Whitaker's holding by emphasizing that the policy at issue in that case related to access to restrooms, instead of the locker room access at issue here. Nonetheless, Whitaker's reasoning applies with similar force. No allegations in the Complaint suggest that the High School's boys' locker room is "particularly susceptible to an intrusion upon an individual's privacy." Id. In fact, the boys' locker room here has partitioned stalls for changing clothes and stalls that have toilets and stall doors. (Compl. ¶ 48). And the single-use restrooms Defendants require M.A.B. to change in are available as well. (See Compl. ¶¶ 31, 32, 45).

Like in Whitaker, then, students "who have true privacy concerns are able to utilize a stall" to change in. 858 F.3d at 1052; see also Grimm I, 822 F.3d at 729 (Davis, J., concurring) (observing that if a student objects to using the restroom in the presence of a transgender student, "all students have access to the single-stall restrooms"). Thus, Defendants' argument that permitting M.A.B. to use the boys' locker room amounts to "government compulsion of students to expose their bodies and to be exposed to the bodies of students of the opposite [birth] sex" is misplaced. (See Mem. Supp. Mot. Dismiss at 27, ECF No. 36–1).

The presence of single-use restrooms and stalls in the boys' locker room is not enough to assuage Defendants' privacy concerns. They assert that if M.A.B. changing clothes in the designated restrooms makes him feel humiliated and embarrassed, as well as alienated from his peers, then students who use those restrooms for greater privacy will feel the same way. Defendants' argument is flawed for at least four reasons.

First, unlike a boy who decides to change clothes in a single-use restroom or stall for greater privacy, barring M.A.B. from changing in the boys' locker room harms his health and well-being. M.A.B. has been diagnosed with gender dysphoria, whose treatment requires "social transitioning." (Compl. ¶¶ 25, 26). This includes accessing single-sex spaces, like locker rooms, that align with his gender identity. (Id. ¶ 25). Barring M.A.B. from accessing the boys' locker room interferes with his social transitioning. Second, Defendants' argument overlooks the very existence of the Policy. It requires M.A.B. to change

his clothes in the designated restrooms, against his doctor's medical advice, and M.A.B. risks discipline if he does not comply. Conversely, boys who have privacy concerns have the option of changing clothes in a single-use restroom or stall if they want greater privacy.

Third, their argument further overlooks the entire context surrounding the Policy. It singles M.A.B. out, quite literally because it does not apply to anyone else at the High School, and marks him as different for being transgender. On the contrary, a boy who makes the personal choice to change clothes in a single-use restroom or stall does not experience any such singling out at the hands of his school. See Grimm I, 822 F.3d at 729 (Davis, J., concurring) ("For other students, using the single-stall restrooms carries no stigma whatsoever, whereas for [the transgender plaintiff], using those same restrooms is tantamount to humiliation and a continuing mark of difference among his fellow students."). Fourth, even if some boys feel humiliated, embarrassed, or alienated for deciding to change clothes in a single-use restroom or stall, changing there still serves Defendants' privacy concerns because those boys still enjoy greater privacy. Defendants do not explain how preventing such ill feelings further the privacy rights of any students.

Because Defendants contend that they may bar M.A.B. from the boys' locker room completely—despite the presence of single-use restrooms or stalls—by implication, Defendants are arguing that the presence of M.A.B. in the boys' locker room—itself—is what infringes on the privacy rights of other boys.[16] Defendants do not provide any explanation for why completely barring M.A.B. from the boys' locker room protects the privacy of other boys changing there, while the availability of single-use restrooms or locker room stalls does not. Nor does the Court find any. M.A.B.'s presence in the boys' locker room "provides no more of a risk to other students' privacy rights than the presence of an overly curious student of the same biological sex who decides to sneak glances at his or her classmates" while they change their clothes. See Whitaker, 858 F.3d at 1052. So, as in Whitaker, preventing M.A.B. from changing clothes in the boys' locker room "does nothing to protect the privacy rights" of students at the High School. See id.

Finally, just as in Whitaker, if Defendants were concerned that children with different-looking anatomies were changing clothes in the locker room together, "then it would seem that separate [locker rooms] also would be appropriate for pre-pubescent and post-pubescent children who do not look alike anatomically." Id. at 1052–53. But Defendants have not separated locker rooms in that manner.

The Court, therefore, concludes that the Policy, as alleged, is not "substantially related" to protecting the privacy rights of students at the High School. See Virginia, 518 U.S. at 524, 116 S.Ct. 2264.[17]

16. Defendants also dispute whether there are partitioned stalls for changing clothes in the boys' locker room. Because the Court is considering a motion to dismiss, the Court assumes as true M.A.B's allegation that such stalls are present.

17. For the aforementioned reasons, the Court will deny the Motion as to M.A.B.'s claims under Articles 24 and 46 of the Maryland Declaration of Rights. Generally, Article 24 claims are read in pari materia with equal protection claims, except in limited circumstances when Article 24 may be interpreted more broadly. Ross v. Cecil Cty. Dep't of Soc. Servs., 878 F.Supp.2d 606, 622 (D.Md. 2012) (citing Koshko v. Haining, 398 Md. 404, 921 A.2d 171, 194 n.22 (2007)). Because the Court denies the Motion as to M.A.B.'s equal protection claim, it necessarily follows that the Court will deny the Motion as to his Article 24 claim, which offers greater protections.

To conclude, M.A.B.'s claims come down to "a boy asking his school to treat him just like any other boy." Grimm III, 853 F.3d at 730 (Davis, J., concurring). The Court finds that Title IX and the Equal Protection Clause provide M.A.B. grounds to do so. Accordingly, the Court will deny Defendants' Motion to Dismiss.

C. Rule 65 Standard of Review

Having considered Defendants' Motion to Dismiss, the Court will now consider M.A.B.'s Motion for Preliminary Injunction.

[19, 20] The Court may grant a preliminary injunction if "specific facts . . . clearly show that immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition." Fed.R.Civ.P. 65(b). The purpose of a preliminary injunction is to "protect the status quo and to prevent irreparable harm during the pendency of a lawsuit ultimately to preserve the court's ability to render a meaningful judgment on the merits." United States v. South Carolina, 720 F.3d 518, 524 (4th Cir. 2013) (quoting In re Microsoft Corp. Antitrust Litig., 333 F.3d 517, 525 (4th Cir. 2003)). A plaintiff seeking a preliminary injunction must demonstrate: (1) likelihood of success on the merits; (2) likelihood of suffering irreparable harm in the absence of preliminary relief; (3) the balance of equities favors preliminary relief; and (4) an injunction is in the public interest. Di Biase v. SPX Corp., 872 F.3d 224, 230 (4th Cir. 2017).

D. Rule 65 Analysis

In brief, the Court concludes that M.A.B. has not sufficiently shown that he faces irreparable harm without preliminary relief before the Court issues a decision on the merits.

[21] To demonstrate a clear likelihood of suffering irreparable harm, a plaintiff seeking a preliminary injunction "must demonstrate more than just a 'possibility' " of the harm. Id. The irreparable harm to be suffered cannot be "remote" or "speculative." De Simone v. VSL Pharm., Inc., 133 F.Supp.3d 776, 799 (D.Md. 2015) (quoting Direx Israel, Ltd. v. Breakthrough Med. Corp., 952 F.2d 802, 812 (4th Cir. 1991)). Instead, the harm to be suffered must be "actual and imminent." Id. (quoting Direx, 952 F.2d at 812). A plaintiff must be likely to suffer the harm "before a decision on the merits can be rendered." Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 22, 129 S.Ct. 365, 172 L.Ed.2d 249 (2008) (quoting 11 Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, Federal Practice and Procedure § 2810.1 (2d ed. 1995)).

[22] Here, M.A.B. submits that he has demonstrated a clear likelihood of suffering irreparable harm. He is enrolled in physical education class for the 2018–2019 school year, which requires M.A.B. to change in a locker room when classes begin on September 4, 2018. (ECF No. 52). Defendants do not dispute that M.A.B. is enrolled in physical education for 2018–2019, but maintain that M.A.B. is not enrolled in that class for the current school year.

Article 46 "flatly prohibits gender based classifications, absent substantial justification." Giffin v. Crane, 351 Md. 133, 716 A.2d 1029, 1037 (1998). For the same reasons that Defendants fail to show that the Policy, as alleged, has an exceedingly persuasive justification, the Court concludes that Defendants fail to demonstrate that there is "substantial justification" for the Policy. Accordingly, the Court will deny the Motion as to M.A.B.'s Article 46 claim.

The Court agrees with Defendants. Because M.A.B. is not enrolled in physical education for the current school year, the harm he asserts is not "actual and imminent." De Simone, 133 F.Supp.3d at 799 (quoting Direx, 952 F.2d at 812). What is more, the parties do not dispute that M.A.B. will not need to use a locker room for any other purpose, such as participation in interscholastic athletics. Of course, it is certain M.A.B. will take physical education class when the following school year begins this September. Still, it is "speculative" whether the school year will begin before the Court will issue a decision on the merits. Id. (quoting Direx, 952 F.2d at 812); see Winter, 555 U.S. at 22, 129 S.Ct. 365 (citation omitted). Accordingly, aware that the parties likely hope for a resolution to this case before the following school year, the Court will order the parties to confer and submit to the Court a joint proposed scheduling order.

The Court will, therefore, deny the Motion for Preliminary Injunction without prejudice. M.A.B. may refile his Motion if there is a change in circumstances, and the Court would then set-in preliminary injunction hearing dates scheduled to conclude before September 4, 2018.

III. CONCLUSION

For the foregoing reasons, the Court will deny Defendants' Motion to Dismiss for Failure to State a Claim (ECF No. 36) and deny without prejudice M.A.B.'s Motion for Preliminary Injunction (ECF No. 41). A separate order follows. Entered this 12th day of March, 2018

IN RE HATTERAS FINANCIAL, INC., SHAREHOLDER LITIGATION

This Document Relates to: All Actions

Lead Case No. 1:16cv445

United States District Court,
M.D. North Carolina.

Signed 12/19/2017

Background: Shareholders filed multiple class actions against corporation seeking to enjoin proposed merger for failure to provide material disclosures. Following consolidation and court's preliminary approval of proposed settlement, the parties moved for final approval of settlement.

Holdings: The District Court, Thomas D. Schroeder, J., held that:

(1) proposed settlement was fair, reasonable, and adequate, but

(2) lack of documentation of fees requested required reduction in fee award.

Motion granted.

1. Compromise and Settlement ⚿63

Proposed settlement of consolidated class actions brought against corporation by its shareholders, which set forth that corporation would provide to its shareholders material disclosures prior to a scheduled merger, was fair, reasonable, and adequate, as required for final approval; although settlement did not involve monetary compensation to shareholders, the disclosures they sought were arguably material in evaluating proposed merger, no shareholders opposed the settlement, there were no signs of collusion between class counsel and the corporation, and there was only a single objector, who disputed fairness of attorney fee award. Fed. R. Civ. P. 23.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Newport News Division

GAVIN GRIMM,

Plaintiff,

v.

GLOUCESTER COUNTY SCHOOL BOARD,

Defendant.

Civil No. 4:15cv54

ORDER

Pending before the Court is an Amended Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) (ECF No. 135) filed by Defendant Gloucester County School Board ("Defendant" or "the Board"). For reasons set forth herein, the Motion is DENIED.

I. FACTUAL AND PROCEDURAL BACKGROUND

When ruling on a motion to dismiss for failure to state a claim, courts accept a complaint's well-pled factual allegations as true, and draw any reasonable inferences in favor of the plaintiff. *See Wag More Dogs, LLC v. Cozart*, 680 F.3d 359, 365 (4th Cir. 2012). Accordingly, the Court reviews the facts as alleged by Plaintiff Gavin Grimm ("Plaintiff" or "Mr. Grimm"). *See* Am. Compl., ECF No. 113.

Mr. Grimm is an eighteen-year-old man who attended Gloucester High School, a public school in Gloucester County, Virginia, from September 2013 through his graduation in June 2017. *Id.* ¶¶ 1, 79. When Mr. Grimm was born, hospital staff identified him as female. *Id.* ¶ 17. However, Mr. Grimm has known from a young age that he has a male gender identity—that is, he has a "deeply felt, inherent sense of being a boy, a man, or male," rather than a sense of being

"a girl, a woman, or a female." *Id.* ¶ 18. Because his gender identity differs from the sex assigned to him at birth, he is transgender. *Id.* ¶¶ 17–19.

Like many of his transgender peers, after the onset of puberty, Mr. Grimm began suffering from "debilitating levels of distress" as the result of gender dysphoria, "a condition in which transgender individuals experience persistent and clinically significant distress caused by the incongruence between their gender identity and the sex assigned to them at birth." *Id.* ¶ 19. There is a medical and scientific consensus that treatment for gender dysphoria includes allowing transgender individuals to live in accordance with their gender identity, including "use of names and pronouns consistent with their identity, grooming and dressing in a manner typically associated with that gender, and using restrooms and other sex-separated facilities that match their gender identity."[1] *Id.* ¶¶ 20–21. Furthermore, when medically appropriate, treatment also includes hormone therapy and surgery so that transgender individuals "may develop physical sex characteristics typical of their gender identity."[2] *Id.* ¶¶ 20, 25. In addition, under widely accepted standards of care, "boys who are transgender may undergo medically necessary chest-reconstruction surgery after they turn [sixteen years old]." *Id.* ¶ 27.

In 2014, by the end of his freshman year of high school, Mr. Grimm experienced such distress from his untreated gender dysphoria that he was unable to attend class. *Id.* ¶ 36. At this

[1] The consensus within medical and mental health communities is that excluding transgender individuals from using restrooms consistent with their gender identity "is harmful to their health and wellbeing. When excluded from the common restrooms, transgender [individuals] often avoid using the restroom entirely, either because the separate restrooms are too stigmatizing or too difficult to access." *Id.* ¶ 28. As a result, they suffer from physical consequences, and their risk of depression and self-harm is increased. *Id*; *see also id.* ¶ 29.

[2] "Hormone therapy affects bone and muscle structure, alters the appearance of a person's genitals, and produces secondary sex characteristics such as facial and body hair in boys and breasts in girls." *Id.* ¶ 25; *see also* Tim C. van de Grift et al., *Effects of Medical Interventions on Gender Dysphoria and Body Image: A Follow-Up Study*, 79:7 PSYCHOSOMATIC MED. 815 (2017) ("Overall, the levels of gender dysphoria . . . were significantly lower at follow-up [after medical intervention such as hormone therapy and genital or chest surgery] compared with clinical entry.").

time, he informed his parents of his male gender identity. *Id.* He began treatment with a psychologist experienced in counseling transgender youth and, as part of the medically-necessary treatment for his gender dysphoria, commenced the process of transitioning to live in accordance with his male identity. *Id.* ¶¶ 1, 36–37. By the time he began his sophomore year, Mr. Grimm had legally changed his first name to Gavin and had begun using male pronouns. He wore clothing and a hairstyle in a manner consistent with other males, and used men's restrooms in public venues without incident. *Id.* ¶¶ 2, 38. He also obtained a treatment documentation letter from his medical providers confirming that he was receiving treatment for gender dysphoria and was to be treated as a male in all respects—including restroom use. *Id.* ¶ 2.

In August 2014, prior to the beginning of his sophomore year, Mr. Grimm and his mother met with the Gloucester High School Principal and the Guidance Counselor, explaining that Mr. Grimm is a transgender boy and would be attending school as a boy. Mr. Grimm and his mother also provided the Principal and Counselor with the treatment documentation letter. *Id.* ¶ 39. At the time of the meeting, the Board lacked a policy addressing the restrooms that transgender students would use. *Id.* ¶ 41. Mr. Grimm initially requested the use of the restroom in the nurse's office. However, that restroom was located remotely, and using it left Mr. Grimm feeling stigmatized and isolated. That restroom was also far from many of his classrooms, causing Mr. Grimm to be late for class when he used it. After a few weeks, Mr. Grimm sought permission to use the boys' restrooms. With the Principal's support, he began using the boys' restrooms on October 20, 2014, and did so without incident for approximately seven weeks.[3] *Id.* ¶¶ 42–47.

[3] He also requested permission to complete his physical education requirements through a homebound program, bypassing any need to use the locker rooms at the school. *Id.* ¶ 45.

The Principal and Superintendent informed the Board that they had authorized Mr. Grimm to use the boys' restrooms, but otherwise kept the matter confidential. *Id.* ¶ 47. However, several adults in the community learned of a transgender student's use of the boys' restrooms. They contacted the Board, demanding that the transgender student be barred from the boys' restrooms. *Id.* The Board considered the matter in a private meeting and took no action for several weeks. However, one Board member proposed a policy regarding the use of restrooms by transgender students and submitted the policy for public debate at a Board meeting scheduled for November 11, 2014. In pertinent part, the policy proposed that "[i]t shall be the practice of the [Gloucester County Public Schools ("GCPS")] to provide male and female restroom and locker room facilities in its schools, and the use of said facilities shall be limited to the corresponding biological genders, and students with gender identity issues shall be provided an alternative appropriate private facility."[4] *Id.* ¶ 51.

At the meeting, Mr. Grimm decided to address the issue publicly, describing how he sought to use the restrooms "in peace" and had experienced "no problems from students" when using the boys' restrooms, "only from adults." *Id.* ¶ 55. The School Board deferred a vote on the proposed policy until its December 9, 2014 meeting. *Id.* ¶ 56. Before the next meeting, the

[4] The entirety of the policy stated:

> Whereas the GCPS recognizes that some students question their gender identities, and
>
> Whereas the GCPS encourages such students to seek support, advice, and guidance from parents, professionals and other trusted adults, and
>
> Whereas the GCPS seeks to provide a safe learning environment for all students and to protect the privacy of all students, therefore
>
> It shall be the practice of the GCPS to provide male and female restroom and locker room facilities in its schools, and the use of said facilities shall be limited to the corresponding biological genders, and students with gender identity issues shall be provided an alternative appropriate private facility.

Id. ¶ 51.

Board announced plans to add or expand partitions between urinals in the male restrooms, add privacy strips to the doors of stalls in all restrooms, and to designate single-stall, unisex restrooms "to give all students the option for even greater privacy." *Id.* ¶ 57.

Despite the announced plans, speakers at the December 9, 2014 meeting continued to demand that Mr. Grimm be excluded from using the boys' restrooms immediately. *Id.* ¶ 59. The Board then passed the policy at the meeting by a six-to-one vote. The following day, Mr. Grimm was informed by the principal that he could no longer use the boys' restrooms. *Id.* ¶¶ 61–62. The Board then installed three single-user restrooms, none of which was located near Mr. Grimm's classes. Although any student was allowed to use them, no student besides Mr. Grimm did. *Id.* ¶¶ 65–66.

Because using the single-user restrooms underscored his exclusion and left him physically isolated, Mr. Grimm refrained from using any restroom at school. He developed a painful urinary tract infection and had difficulty concentrating in class because of his physical discomfort. *Id.* ¶¶ 67–70. When he attended school football games, no restroom was available for Mr. Grimm's use. As a result, Mr. Grimm was forced to have his mother pick him up from games early. *Id.* ¶ 71.

Throughout his sophomore, junior, and senior years of high school, Mr. Grimm continued the process of transitioning to live in accordance with his male identity. In December 2014, the middle of his sophomore year, he had begun hormone therapy, which altered his bone and muscle structure, deepened his voice, and caused him to grow facial hair. *Id.* ¶¶ 72–73. In June 2015, prior to the beginning of his junior year, the Virginia Department of Motor Vehicles issued Mr. Grimm a state identification card designating his gender as male. *Id.* ¶ 74. A year later, prior to the beginning of his senior year, Mr. Grimm underwent chest-reconstruction

surgery, in accordance with the medical standards of care for treating gender dysphoria. *Id.* ¶ 75; *see id.* ¶ 27. Later that year, in September 2016, the Gloucester County Circuit Court issued an order changing his sex under Virginia state law and directing the Virginia Department of Health to issue Mr. Grimm a birth certificate listing his sex as male; this certificate was issued in October 2016. *Id.* ¶¶ 76–77. Throughout the process of these changes—up through Mr. Grimm's graduation in June 2017—the School Board maintained that Mr. Grimm's "biological gender" was female and prohibited administrators from permitting Mr. Grimm to use the boys' restrooms. *Id.* ¶¶ 78–79.

Mr. Grimm commenced this action against the Gloucester County School Board in July 2015, alleging that the Board's policy of assigning students to restrooms based on their biological sex violated Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a), as well as the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. In September 2015, another judge of this Court issued a Memorandum Opinion and Order (1) dismissing Mr. Grimm's claim under Title IX for failure to state a claim and (2) denying his Motion for a Preliminary Injunction based on the alleged Title IX and Equal Protection Clause violations. *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 132 F. Supp. 3d 736, 753 (E.D. Va. 2015), *rev'd in part and vacated in part*, 822 F.3d 709 (4th Cir. 2016). An interlocutory appeal of those decisions followed, leading to appellate review by the United States Court of Appeals for the Fourth Circuit and by the United States Supreme Court. *See infra* III.A; *see also* ECF No. at 132 at 1–2. During this time, the district court suit was re-assigned to the undersigned. The case was remanded to this Court for consideration of the Title IX claim. The Equal Protection Claim also remains pending before this Court.

Following the filing of Mr. Grimm's Amended Complaint (ECF No. 113), the School Board filed the instant Motion to Dismiss (ECF No. 135). With respect to the Title IX claim (Count II, ECF No. 113 ¶¶ 90–92), the School Board argues that its policy of separating restrooms by physiological sex is valid under Title IX because (1) Title IX only allows for claims on the basis of sex, rather than gender identity, and (2) gender identity and sex, as addressed in Title IX, are not equivalent. *See* ECF No. 136 at 6, 12–26. With respect to the Equal Protection claim (Count I, ECF No. 113 ¶¶ 81–89), the School Board argues that its policy does not violate the Equal Protection Clause because transgender individuals are not members of a suspect class entitled to heightened scrutiny, and the Policy should be viewed as presumptively constitutional under both rational basis review and intermediate scrutiny. *Id.* at 28–36.

II. LEGAL STANDARD

A motion to dismiss under Rule 12(b)(6) tests the sufficiency of a complaint. "To survive a Rule 12(b)(6) motion to dismiss, a complaint must 'state a claim to relief that is plausible on its face.'" *United States ex rel. Nathan v. Takeda Pharm. N. Am., Inc.*, 707 F.3d 451, 455 (4th Cir. 2013) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007)). "Facts that are 'merely consistent with' liability do not establish a plausible claim to relief." *Takeda Pharm.*, 707 F.3d at 455 (quoting *Iqbal*, 556 U.S. at 678). Rather, the "'[f]actual allegations must be enough to raise a right to relief above the speculative level,' thereby 'nudg[ing] [the plaintiff's] claims across the line from conceivable to

plausible.'" *Vitol, S.A. v. Primerose Shipping Co.*, 708 F.3d 527, 543 (4th Cir. 2013) (quoting *Twombly,* 550 U.S. at 555) (first and second alteration in original).

At this stage, "(1) the complaint is construed in the light most favorable to the plaintiff, (2) its allegations are taken as true, and (3) all reasonable inferences that can be drawn from the pleading are drawn in favor of the pleader." 5B CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 1357 & n.11 (3d ed.) (collecting cases); *accord Wag More Dogs*, 680 F.3d at 365.

However, courts "will not accept 'legal conclusions couched as facts or unwarranted inferences, unreasonable conclusions, or arguments.'" *Takeda Pharm.*, 707 F.3d at 455 (quoting *Wag More Dogs*, 680 F.3d at 365). Additionally, a threadbare recitation of the "elements of a cause of action, and bare assertions devoid of further factual enhancement fail to constitute well-pled facts for Rule 12(b)(6) purposes." *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 255 (4th Cir. 2009); *Iqbal*, 556 U.S. at 678 (noting that "the tenet that a court must accept a complaint's allegations as true is inapplicable to threadbare recitals of a cause of action's elements, supported by mere conclusory statements").

III. ANALYSIS

A. Reconsideration of the Interlocutory Order

As a preliminary matter, this Court must consider whether it is bound by the previous dismissal of the Title IX claim. *See* ECF No. 57. Following Mr. Grimm's interlocutory appeal of the dismissal, the Fourth Circuit reversed the dismissal. The reversal was based on the Fourth Circuit's conclusion that deference should be given to a guidance letter issued by the Department of Education's Office of Civil Rights that construed a Title IX regulation as generally requiring schools to treat transgender students consistent with their gender identity when electing to separate students on the basis of sex. *G.G. ex rel. Grimm v. Gloucester County Sch. Bd.* (*Grimm*

I), 822 F.3d 709, 718–22 (4th Cir. 2016) (citing *Auer v. Robbins*, 519 U.S. 452 (1997)), *vacated and remanded*, 137 S. Ct. 1239 (2017). The United States Supreme Court granted a stay of the Fourth Circuit's mandate and granted the Board's writ of certiorari. After the guidance letter was rescinded as the result of a change in administration, the Supreme Court vacated the Fourth Circuit's decision and remanded for reconsideration of the Title IX claim. ECF No. 91. The Fourth Circuit dismissed the appeal, and Mr. Grimm filed an Amended Complaint with this Court. ECF Nos. 113, 114.

The Board argues that this Court remains bound by the previous dismissal of the Title IX claim. In support of this position, the Board contends that because Mr. Grimm's "current Title IX claim is virtually identical to the claim that [the previous judge] already dismissed, [Mr. Grimm] is essentially asking the Court to reconsider" the original decision. ECF No. 136 at 7. The Board contends that this Court need not reevaluate the previous dismissal of the Title IX claim because the prior decision analyzed the Title IX claim thoroughly without applying *Auer* deference to the letter and instead based its conclusion that Mr. Grimm had failed to state a Title IX claim on "valid precedent." *Id.* at 6–7.

Such reconsiderations are governed by Federal Rule of Civil Procedure 54(b), which provides that:

> any order or other decision, however designated, that adjudicates fewer than all the claims or rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities.

Both parties acknowledge that district courts retain the discretion to revise an interlocutory order at any time before the entry of a judgment adjudicating all the claims. *Carlson v. Boston Scientific Corp.*, 856 F.3d 320, 325 (4th Cir. 2017) (citing Fed. R. Civ. P. 54(b)).

Although courts have concluded that a successor judge should hesitate to overrule the earlier determination, *id.* (internal citation omitted), "whether rulings by one district judge become binding as 'law of the case' upon subsequent district judges is not a matter of rigid legal rule, but more a matter of proper judicial administration which can vary with the circumstances." *Hill v. BASF Wyandotte Corp.*, 696 F.2d 287, 290 n.3 (4th Cir. 1982); *see also Stoffels ex rel. SBC Tel. Concession Plan v. SBC Commc'ns, Inc.*, 677 F.3d 720, 727 n.3 (5th Cir. 2012) ("When a successor judge is reviewing another judge's interlocutory order, the law of the case doctrine requires only that the successor judge respect principles of comity when considering issues that have already been decided."); *Am. Canoe Ass'n v. Murphy Farms, Inc.*, 326 F.3d 505, 515 (4th Cir. 2003) (noting that reconsideration of interlocutory orders "is committed to the discretion of the district court," and that related doctrines such as law of the case "have evolved as a means of guiding that discretion" but "cannot limit the power of a court to reconsider an earlier ruling"). This Court's primary responsibility—the responsibility of all federal courts—"is to reach the correct judgment under law." *Am. Canoe Ass'n*, 326 F.3d at 515.

The Fourth Circuit has "cabined revision pursuant to Rule 54(b) by treating interlocutory rulings as law of the case." *Carlson*, 856 F.3d at 325 (internal citations omitted). Accordingly, a "court may review an interlocutory order under the same circumstances in which it may depart from the law of the case: (1) a subsequent trial producing substantially different evidence; (2) a change in applicable law; or (3) clear error causing manifest injustice." *Id.* (internal quotations and citations omitted). The Board argues that none of these requirements has been met, and that this Court should not depart from the previous adjudication of the Title IX claim. ECF No. 136 at 8.

This Court disagrees. First, there has been a significant change in the applicable law since the Motion to Dismiss the Title IX claim was initially considered in 2015. *See Carlson*, 856 F.3d at 325; *see also Bridger Coal Co. v. Dir., Office of Workers' Comp. Programs, U.S. Dep't of Labor*, 669 F.3d 1183, 1192 (10th Cir. 2012) (noting that the emergence of a circuit split can justify reconsideration). The Sixth and Seventh Circuits have since held that excluding boys and girls who are transgender from the restrooms that align with their gender identity may subject them to discrimination on the basis of sex under Title IX, the Equal Protection Clause, or both. *See Whitaker v. Kenosha Unified School Dist. No. 1 Board of Education*, 858 F.3d 1034, 1049–51 (7th Cir. 2017); *Dodds v. United States Dep't of Educ.*, 845 F.3d 217, 221 (6th Cir. 2016).

A number of district courts have also reached the same conclusion. *See A.H. by Handling v. Minersville Area Sch. Dist.*, No. 3:17cv391, 2017 WL 5632662, at *1, *3–*7 (M.D. Pa. Nov. 22, 2017) (denying school district's motion to dismiss a transgender student's Title IX and Equal Protection Claims based on school district's bathroom policy "dictating that children must use the bathroom corresponding to the sex listed on the student's birth certificate"); *Evancho v. Pine-Richland Sch. Dist.*, 237 F. Supp. 3d 267, 288, 295 (W.D. Pa. 2017); *Bd. of Educ. of the Highland Local Sch. Dist. v. U.S. Dep't of Educ.*, 208 F. Supp. 3d 850, 865, 869, 871 (S.D. Ohio 2016).

Recently, the District of Maryland denied a strikingly similar Motion to Dismiss a transgender student's Title IX and Equal Protection claims stemming from his school's policy of barring him from using the boys' locker room. *M.A.B. v. Bd. of Educ. of Talbot Cty.*, 286 F. Supp. 3d 704, 711 (D. Md. 2018). Although these precedents are not binding upon this Court, the thorough analyses of analogous questions provided by the rulings proves persuasive.

Moreover, to the extent that the Fourth Circuit's consideration of the Title IX claim provides meaningful guidance for this Court's analysis of the Title IX regulation, the earlier dismissal of the Title IX claim lacked such guidance. *See infra* p. 15 and note 6.

Second, a number of factual developments warrant reconsideration of the original decision to dismiss the Title IX claim. When Mr. Grimm filed his initial complaint in 2015, he alleged that the Board's policy violated his rights under Title IX on the day the policy was first issued, which occurred in the middle of his sophomore year. The Amended Complaint alleges that the Board violated his rights under Title IX when the policy was issued, and also throughout the remainder of his time as a student at Gloucester High School. Am. Compl., ECF No. 113 ¶ A. Since the previous dismissal of the Title IX claim, Mr. Grimm has received chest reconstruction surgery, obtained an order from Gloucester County Circuit Court legally changing his sex under Virginia law, and has received a new birth certificate from the Virginia Department of Health listing his sex as male. *Id.* ¶¶ 75–77. The previous decision was rendered without any opportunity to consider whether the Board's policy violated Title IX throughout the remainder of Mr. Grimm's time at Gloucester High School, and in light of these factual developments.

For these reasons, the Court concludes that revisiting the question of whether Mr. Grimm has stated a plausible Title IX claim is warranted. The Court now examines the claim's merits. *See* ECF No. 113 ¶¶ 90–92.

B. Title IX Claim

Title IX provides that no person "shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving Federal financial assistance . . . ." 20 U.S.C. § 1681(a); *see also* 34 C.F.R. § 106.31. A covered institution may not, on the basis of sex, (1)

provide different aid, benefits, or services; (2) deny aid, benefits, or service, or (3) subject any person to separate or different rules, sanctions, or treatment. 34 C.F.R. § 106.31(b)(2)–(4).

However, "[n]ot all distinctions on the basis of sex are impermissible under Title IX." *Grimm I*, 822 F.3d at 718. The statute's regulations permit an institution to provide separate bathroom, shower, and locker facilities by sex, so long as the facilities are comparable. 34 C.F.R. § 106.33; *see also Whitaker*, 858 F.3d at 1047–48.

1. A Plaintiff's Claim of Discrimination on the Basis of Transgender Status Constitutes a Claim of Sex Discrimination Under Title IX

The parties dispute whether a transgender student's allegation of discrimination based on his or her transgender status can constitute a claim of sex discrimination under Title IX. Neither Title IX nor its regulations defines the term "sex." The Fourth Circuit has noted that because 34 C.F.R. § 106.33 permits separate toilets, locker rooms, and shower facilities on the basis of sex, "[b]y implication, the regulation also permits schools to exclude males from the female facilities and vice-versa." *Grimm I*, 822 F.3d at 720.

The Board notes that § 106.33 permits schools to establish separate facilities on the basis of sex. The Board also contends that the term "sex" "at a minimum *includes* the physiological distinction between men and women." ECF No. 136 at 13. Therefore, the Board argues, this Court must interpret Title IX as applying only to discrimination on the basis of physiological sex, rather than gender identity. *See id.* at 12–26.

Before evaluating whether discrimination on the basis of a plaintiff's transgender status constitutes sex discrimination under Title IX, the Court must address the difficulties inherent in the Board's view of "sex" under Title IX. That construction may be an appealingly simple way of interpreting the term "sex." However, the Board argues that the Policy "distinguishes boys and girls based on physical sex characteristics alone," ECF No. 136 at 21, but fails to

acknowledge that there are individuals who possess both male and female physical sex characteristics. As Mr. Grimm contends, attempting to draw lines based on physiological and anatomical characteristics proves unmanageable: how would the Board's policy apply to individuals who have had genital surgery, individuals whose genitals were injured in an accident, or those with intersex traits who have genital characteristics that are neither typically male nor female? *See Grimm I*, 822 F.3d at 720–21;[5] *Evancho*, 237 F. Supp. 3d at 279 ("[T]he Board has adopted a student bathroom policy that turns exclusively on the then-existing presence of a determinate external sex organ, no matter what other biological or gender markers may exist . . . ."). In Mr. Grimm's situation, how would the Board have continued to implement the Policy after Mr. Grimm's medical procedures? Mr. Grimm had attained some secondary male physical sex characteristics after hormone therapy and chest reconstruction surgery. Accordingly, acts of discrimination on the basis of physiological sex certainly could have occurred.

The Policy in question assigned restrooms based on "biological gender," not physiological characteristics. This term has not been accepted by the medical community, because "sex"—the "attributes that characterize biological maleness or femaleness" (such as sex-determining genes, sex chromosomes, internal and external genitalia, and secondary sex characteristics)—is distinct from "gender," or the "internal, deeply held sense" of being a man or a woman. *See* Wylie C. Hembree et al., *Endocrine Treatment of Gender-dysphoric/Gender-Incongruent Persons: An Endocrine Society Clinical Practice Guideline*, 102(11) J. CLIN.

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[5] *Grimm I* specifically noted:

> It is not clear to us how the regulation would apply in a number of situations—even under the Board's own "biological gender" formulation. For example, which restroom would a transgender individual who had undergone sex reassignment surgery use? What about an intersex individual? What about an individual born with X-X-Y sex chromosomes? What about an individual who lost external genitalia in an accident?

822 F.3d at 720–21.

ENDOCRINOLOGY & METABOLISM 3869, 3875 (2017) (noting that the terms "biological male or female" should be avoided because not all individuals have physical attributes that align perfectly with biological maleness or femaleness, such as individuals with XY chromosomes who may have female-appearing genitalia). Given the Policy's disregard for these distinctions, its use of the term "biological gender" functioned as a proxy for physiological characteristics that a student may or may not have had. The term allowed the Board to isolate, distinguish, and subject to differential treatment any student who deviated from what the Board viewed a male or female student *should* be, and from the physiological characteristics the Board believed that a male or female student *should* have.

The Court next turns to consideration of § 106.33. As the Fourth Circuit noted, the "inquiry is not ended" by § 106.33's reference to males and females. *Grimm I*, 822 F.3d at 720.[6] "Although the regulation may refer unambiguously to males and females, it 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." *Id.* The Fourth Circuit initially determined that § 106.33 was ambiguous "as applied to transgender students," and granted *Auer* deference to the guidance letter interpreting § 106.33 to generally require access to sex-segregated facilities on the basis of gender identity. *Id.* at 721–23. Following remand from the Supreme Court as the result of the withdrawal of the letter, the Fourth Circuit vacated its decision. Accordingly, *Grimm I* fails to

[6] The District of Maryland recognized that although the Supreme Court vacated the Fourth Circuit's judgment in *Grimm I* in light of the withdrawal of the guidance letter, the remainder of that decision remains binding law because (1) it has not overruled by a subsequent en banc opinion of the Fourth Circuit and (2) there has been no superseding contrary decision from the Supreme Court. *See United States v. Giddens*, 858 F.3d 870, 886 n.12 (4th Cir. 2017) (citing *United States v. Collins*, 415 F.3d 304, 311 (4th Cir. 2005)). "Thus, the Court will rely on [the Fourth Circuit's previous *Grimm I* judgment] to the extent it offers guidance for deciding the Motions present." *M.A.B.*, 286 F. Supp. 3d at 712 n.5.

inform this Court how § 106.33 is to be interpreted with respect to transgender students. The Fourth Circuit has not addressed this issue or Title IX's application to transgender students since.

The Board asks this Court to resolve this issue by cabining the definition of sex to the "then-universal understanding of 'sex' as a binary term encompassing the physiological distinctions between men and women," as understood during the passage of Title IX and the promulgation of § 106.33. *See* ECF No. 136 at 16. However, as noted above, this fails to address the question of how § 106.33 is to be interpreted regarding transgender students or other individuals with physiological characteristics associated with both sexes.

The Court has some guidance in resolving § 106.33's ambiguity. Courts may "look to case law interpreting Title VII of the Civil Rights Act of 1964," *as amended*, 42 U.S.C. §§ 2000e *et seq.* (2018)—which prohibits employment discrimination on the basis of, among other qualities, sex—"for guidance in evaluating a claim brought under Title IX." *Id.* at 718 (citing *Jennings v. Univ. of N.C.*, 482 F.3d 686, 695 (4th Cir. 2007)); *see also M.A.B.*, 286 F. Supp. 3d at 713 ("[T]he Court turns to Title VII precedent for guidance [in interpreting a Title IX claim].").

Neither the Fourth Circuit nor the Supreme Court has addressed how Title VII applies to transgender individuals. *See M.A.B.*, 286 F. Supp. 3d at 713. However, the Supreme Court has constructed a framework for addressing sex discrimination claims brought by individuals who fail to conform to social expectations for their gender group. In *Price Waterhouse v. Hopkins*, 490 U.S. 228, 235 (1989), the Supreme Court considered whether the plaintiff, a woman who was denied partnership in an accounting firm, had an actionable Title VII claim against the firm because the firm had allegedly denied her a promotion because she failed to conform to certain gender stereotypes related to women. *Id.* at 235, 250–53 (summarizing how firm partners

described the plaintiff as "macho" and a "tough-talking somewhat masculine hard-nosed manager"). Firm partners advised the plaintiff that her partnership chances would improve if she were to "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." *Id.* at 235. Six Justices of the *Price Waterhouse* Court agreed that Title VII barred discrimination not only based on the plaintiff's gender, but based on "sex stereotyping" because the plaintiff had failed to act in accordance with gender stereotypes associated with women. *Id.* at 250–51; *id.* at 258–61 (White, J., concurring); *id.* at 272–73 (O'Connor, J., concurring). In noting that "we are beyond the day when an employer could evaluate employees by assuming or insisting that they match[] the stereotype associated with their group," the *Price Waterhouse* Court recognized that Title VII's prohibition on sex discrimination necessarily includes a prohibition on gender stereotyping. *Id.* at 251.

Price Waterhouse, by its own terms, took an expansive view as to the forms of sex discrimination that Title VII was meant to reach, expressly leaving open the possibility of other forms of gender stereotyping. "By focusing on [gender stereotypes associated with appearance and behavior], however, we do not suggest a limitation on the possible ways of proving that stereotyping played a motivating role in an employment decision . . . ." *Id.* at 251–52.

The Supreme Court's expansion recognizes that the prohibition on sex discrimination pursuant to Title VII also includes same-sex harassment claims. *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 79 (1998) (noting that same-sex "sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII," but that "statutory prohibitions often go beyond the principal evil to cover reasonably comparable

evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed").[7]

The First, Second, Third, Seventh, and Ninth Circuits have all recognized that based on the logic of *Price Waterhouse*, a gender stereotyping allegation generally is actionable sex discrimination under Title VII. *Hively v. Ivy Tech Cmty. Coll.*, 854 F.3d 339, 351–52 (7th Cir. 2017 (en banc) (holding that a lesbian plaintiff could state a Title VII claim under a sex stereotyping theory); *Christiansen v. Omnicom Grp., Inc.*, 852 F.3d 195, 200–01 (2d Cir. 2017) (per curiam) (holding that a plaintiff had stated a plausible Title VII claim based on a gender stereotyping theory); *Prowel v. Wise Bus. Forms., Inc.*, 579 F.3d 285, 290 (3d Cir. 2009); *Nichols v. Azteca Rest. Enters., Inc.*, 256 F.3d 864, 874–75 (9th Cir. 2001); *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 261 n.4 (1st Cir. 1999).

Although the Fourth Circuit has yet to apply *Price Waterhouse* expressly to Title VII claims brought by transgender individuals,[8] this Court joins the District of Maryland in concluding that "discrimination on the basis of transgender status constitutes gender stereotyping because 'by definition, transgender persons do not conform to gender stereotypes.'" *M.A.B.*, 286 F. Supp. 3d at 714 (quoting *Finkle v. Howard Cty.*, 12 F. Supp. 3d 780, 787–88 (D. Md. 2014)). The Court also concludes that, pursuant to the logic of *Price Waterhouse*, transgender

[7] For these reasons, the Court rejects the Board's argument that Title IX should be cabined to its expressed purpose: ending discrimination against women in university admissions and appointments. *See* ECF No. 136 at 9, 24–25. The Court also finds unpersuasive the Board's argument that other students' privacy concerns—mentioned in the legislative history of Title IX regulations, *id.* at 10–12—should prevail in this context. *See infra* pp. 27–30 (rejecting such privacy concerns as a rationale for the Board's Policy).

Relatedly, the Board also objects to this interpretation of Title IX because of hypothetical privacy concerns (rather than those found in legislative history). ECF No. 136 at 22–24. For the reasons discussed below, the Court finds these concerns—although worthy of consideration—are conjectural and abstract and fail to provide a basis for interpreting Title IX in the manner sought by the Board.

[8] The Fourth Circuit also has not applied *Price Waterhouse* expressly to gender stereotyping claims brought under Title VII. *M.A.B.*, 286 F. Supp. 3d at 714.

discrimination is per se actionable sex discrimination under Title VII. *Id; see also G.G. ex rel. Grimm* (*Grimm II*), 654 Fed. App'x 606, 606–07 (4th Cir. 2016) (Davis, J., concurring) (internal citations omitted) (noting that "the Supreme Court has expressly recognized that claims based on an individual's failure to conform to societal expectations based on that person's gender constitute discrimination 'because of sex' under Title VII," and noting that the First, Sixth, Ninth, and Eleventh Circuits have held that based on the logic of *Price Waterhouse*, discrimination against transgender individuals based on their transgender status is discrimination because of sex under federal civil rights statutes and the Equal Protection Clause).

This conclusion comports with decisions from the First, Sixth, Ninth, and Eleventh Circuits, all of which recognize that based on the gender-stereotyping theory from *Price Waterhouse*, claims of discrimination on the basis of transgender status are per se sex discrimination under Title VII or other federal civil rights laws. *See EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 574–75 (6th Cir. 2018) (confirming that claims of discrimination on the basis of transgender status is per se sex discrimination under Title VII);[9] *Glenn v. Brumby*, 663 F.3d 1312, 1316–19 (11th Cir. 2011) (recognizing that a "person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes," and holding that terminating an employee because she is transgender violates the prohibition on sex-based discrimination under the Title VII and the Equal Protection Clause following the reasoning of *Price Waterhouse*);[10] *Smith v. City of Salem, Ohio*, 378 F.3d 566, 573–75 (6th Cir. 2004) (recognizing that discrimination against a transgender individual

[9] The Sixth Circuit also reasoned (1) that "it is analytically impossible to fire an employee based on that employee's status as a transgender person without being motivated, at least in part, by the employee's sex," 884 F. 3d at 575, and (2) that "discrimination against transgender persons necessarily implicates Title VII's proscriptions against sex stereotyping," *id.* at 576–77.

[10] *Glenn* also held that "discrimination against a transgender individual because of her gender-nonconformity is sex discrimination, whether it's described as being on the basis of sex or gender." 663 F.3d at 1317.

because of his or her gender non-conformity amounts to gender stereotyping prohibited by Title VII and the Equal Protection Clause, and holding that a transgender employee had stated a claim under Title VII); *Rosa v. Park W. Bank & Trust Co.*, 214 F.3d 213, 215–16 (1st Cir. 2000) (holding that a transgender individual could state a claim for sex discrimination under the Equal Credit Opportunity Act based on *Price Waterhouse*); *Schwenk v. Hartford*, 204 F.3d 1187, 1201–03 (9th Cir. 2000) (holding that a transgender individual could state a claim under the Gender Motivated Violence Act under the reasoning of *Price Waterhouse*).

Numerous district courts have also concluded that a transgender individual can state a claim under Title VII for sex discrimination on the basis of a sex or gender-stereotyping theory. *See Roberts v. Clark Cty. Sch. Dist.*, 215 F. Supp. 3d 1001, 1014 (D. Nev. 2016), *reconsideration denied*, No. 2:15-cv-00388-JAD-PAL, 2016 WL 6986346 (D. Nev. Nov. 28, 2016); *Fabian v. Hosp. of Cent. Conn.*, 172 F. Supp. 3d 509, 527 (D. Conn. 2016); *Lopez v. River Oaks Imaging & Diagnostic Grp., Inc.*, 542 F. Supp. 2d 653, 660 (S.D. Tex. 2008); *Schroer v. Billington*, 577 F. Supp. 2d 293, 305 (D.D.C. 2008).

Accordingly, allegations of gender stereotyping are cognizable Title VII sex discrimination claims and, by extension, cognizable Title IX sex discrimination claims.[11] This Court joins the District of Maryland and several other appellate courts in concluding that "claims of discrimination on the basis of transgender status are per se actionable under a gender stereotyping theory" under Title IX, *M.A.B.*, 286 F. Supp. 3d at 715. Mr. Grimm has properly

[11] The Board's argument that Title IX must explicitly refer to discrimination against transgender students to fulfill the notice requirements under *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1 (1981), ECF No. 136 at 25–27, is unavailing. Title IX funding recipients "have been on notice that they could be subjected to private suits for intentional sex discrimination under Title IX since 1979," when the Supreme Court decided *Cannon v. University of Chicago*, 441 U.S. 677, 691 (1979), and "have been put on notice by the fact that . . . cases since *Cannon* . . . have consistently interpreted Title IX's private cause of action broadly to encompass diverse forms of intentional sex discrimination." *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 182 (2005); *see also West Virginia Dep't of Health & Human Resources v. Sebelius*, 649 F.3d 217, 223 (4th Cir. 2011).

brought a Title IX claim of discrimination "on the basis of sex"—that is, based on his transgender status.

2. Mr. Grimm Has Sufficiently Pled a Title IX Claim

Having concluded that Mr. Grimm may bring a Title IX claim based on his transgender status, this Court next turns to the question of whether he has pled his claim of discrimination on the basis of sex sufficiently. To state a claim under Title IX, a plaintiff must allege: (1) that he or she was excluded from participation in an education program because of his or her sex; (2) that the educational institution was receiving federal financial assistance at the time of his or exclusion; and (3) that the improper discrimination caused the plaintiff harm. *Grimm I*, 822 F.3d at 718 (citing *Preston v. Virginia ex rel. New River Cmty. Coll.*, 31 F.3d 203, 206 (4th Cir. 1994)); *but cf. M.A.B.*, 286 F. Supp. 3d at 716–17 (finding plaintiff had stated a Title IX claim under a gender stereotyping theory because he had alleged that he was denied access to the boys' locker room on the basis of sex—that is, his transgender status); *Evancho*, 237 F. Supp. at 295 (describing the three requirements for stating a Title IX claim as (1) discrimination in an educational program that (2) receives federal assistance in which (3) such discrimination was on the basis of sex).

Before considering whether Mr. Grimm has stated a plausible Title IX claim, the Court recognizes the similarities between this case and *Whitaker*, in which a transgender male teenager was also subjected to a school policy in which he could use only the girls' restrooms or gender-neutral restrooms that were far from his classrooms. 858 F.3d at 1040, 1041–42. This limitation was imposed despite the undisputed facts that the plaintiff had begun socially transitioning to life as a male during his freshman year, including changing his legal name and pronouns, and had been diagnosed with gender dysphoria by a therapist. As a result of the school policy, the plaintiff suffered from depression and anxiety; avoided water intake to avoid needing to use the

restroom, thereby exacerbating medical issues; and contemplated suicide. He also attempted to use the boys' restrooms in violation of the administration's decision. In response, administrators removed him from class on several occasions and instructed security guards to monitor his restroom use. *Id.* at 1040–41. Eventually, the school permitted him to use the boys' restrooms after a surgical transition. *Id.* at 1041. In reviewing the facts as alleged by the plaintiff, the Seventh Circuit concluded that the plaintiff had established a likelihood of success on the merits of his Title IX, and affirmed the district court's granting of a preliminary injunction on behalf of the plaintiff. *Id.* at 1050.

The Court now considers the first prong in determining if the Title IX claim is pled sufficiently: whether Mr. Grimm has sufficiently alleged that he was improperly discriminated against on the basis of his sex—that is, his transgender status. The Seventh Circuit concluded that a policy that requires transgender students to use bathrooms not in conformity with their gender identity subjects "a transgender student . . . to different rules, sanctions, and treatment than non-transgender students," and amounts to discrimination on the basis of transgender status in violation of Title IX. *Whitaker*, 858 F.3d at 1049–50. This conclusion is sound. Furthermore, the provision of a gender-neutral alternative is insufficient to relieve a school board of liability, "as it is the policy itself which violates [Title IX]." *See id.* at 1050. Offering restroom alternatives that impose hardships like unreasonable distances to a student's classroom and increased stigma on a student is inadequate. *See id.*

In *M.A.B.*, the District of Maryland recognized that because the plaintiff had alleged that the school board had denied him access to the boys' locker rooms because of his transgender status, the policy subjected him to sex discrimination under a gender stereotyping theory. *M.A.B.* concluded that the plaintiff had sufficiently alleged discrimination under Title IX. 286 F. Supp.

3d at 716. Given the persuasive reasoning in *Whitaker* and *M.A.B.*, the Court concludes that Mr. Grimm has sufficiently pled that the Policy subjected him to sex discrimination under a gender stereotyping theory.

Having concluded that Mr. Grimm has properly alleged discrimination on the basis of sex, and finding the second pleading requirement is met because GCPS and Gloucester High School "are education programs receiving Federal financial assistance," ECF No. 113 ¶ 91, the Court now turns to determining whether Mr. Grimm has sufficiently alleged that the discrimination harmed him. The location of the bathrooms, coupled with the stigmatization and physical and mental anguish inflicted upon Mr. Grimm, caused harm. "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; *see also id.* at 1041 (noting that, among other harms, the plaintiff suffered from depression and anxiety because of the bathroom policy, and restricted his water intake to avoid restroom use, exacerbating his medical problems); *M.A.B.*, 286 F. Supp. 3d at 716–17 (applying *Whitaker* to conclude that the plaintiff had sufficiently pled a Title IX claim based on the school's policy of excluding him from use of the boys' locker room because of his transgender status). After full consideration of the facts presented and the compelling scope of relevant legal analyses, the Court concludes that Mr. Grimm has sufficiently pled a Title IX claim of sex discrimination under a gender stereotyping theory.

C. Equal Protection Claim

Mr. Grimm also brings a claim under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution (ECF No. 113 ¶¶ 81–89), which provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV § 1. As *Whitaker* recognized, the Equal Protection Clause "is

essentially a directive that all persons similarly situated should be treated alike." 858 F.3d at 1050 (quoting *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985)). Under "rational basis review," state action will generally be presumed to be lawful and upheld if the classification drawn by the statute is rationally related to a legitimate state interest. *City of Cleburne*, 473 U.S. at 440. However, a state must not distinguish between classes of people in an "arbitrary or irrational" manner or out of a "bare . . . desire to harm a politically unpopular group." *Id.* at 446–47 (internal citation omitted).

Under "rational basis review," if a state classification of a group of people is rationally related to a legitimate state interest, courts will uphold the classifications. *Id.* at 440. However, when a state classifies a "suspect" or "quasi-suspect" group of people, courts will apply "heightened scrutiny." *Id.* at 440–41.

Sex-based classifications are subject to heightened scrutiny. The state bears the burden of demonstrating that its proffered justification for the use of a sex-based classification is "exceedingly persuasive." *United States v. Virginia*, 518 U.S. 515, 533 (1996). That is, the state is required to demonstrate that the classification "serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives." *Id.* at 524 (internal citation omitted). Hypothesized or *post hoc* justifications created in response to litigation are insufficient to meet this burden, as are justifications based on overbroad generalizations about sex. *Id.* at 533. Furthermore, "[i[f a state actor cannot defend a sex-based classification by relying upon overbroad generalizations, it follows that sex-based stereotypes are also insufficient sustain a classification." *Kenosha*, 858 F.3d at 1051 (internal citation omitted).

1. The Board's Policy Warrants Intermediate Scrutiny

The parties dispute which level of scrutiny is warranted. The Board contends that rational basis review should apply because transgender individuals do not constitute a quasi-suspect class under the Equal Protection Clause. ECF No. 136 at 28. Mr. Grimm contends that classification based upon transgender status amounts to classification based on sex, and so warrants heightened scrutiny. ECF No. 139 at 37–38.

The Fourth Circuit has not considered the question of whether transgender classifications are sex-based. *See M.A.B.*, 286 F. Supp. 3d at 718. The Seventh and Eleventh Circuits have considered the issue and have concluded that heightened scrutiny applies. *See Whitaker*, 858 F.3d at 1051; *Glenn*, 663 F.3d at 1321. This Court agrees and concludes that intermediate scrutiny is warranted for at least two reasons.

First, transgender individuals constitute at least a quasi-suspect class, and the Policy classified Mr. Grimm on the basis of his transgender status. *See M.A.B.*, 286 F. Supp. 3d at 718–20. Four factors are used to determine whether a group of people who have been classified by a state amount to a suspect or quasi-suspect class: (1) whether the class has historically been subject to discrimination, *Bowen v. Gilliard*, 483 U.S. 587, 602 (1987); (2) whether the class has a defining characteristic that bears a relation to ability to perform or contribute to society, *Cleburne*, 473 U.S. at 440–41; (3) whether the class exhibits obvious, immutable, or distinguishing characteristics that define the class as a discrete group, *Bowen*, 483 U.S. at 602; and (4) whether the class is a minority or politically powerless. *Id.* This Court joins the District of Maryland in concluding that transgender individuals meet all four factors and constitute at least a quasi-suspect class.

As to the first factor, there is no doubt that transgender individuals historically have been subjected to discrimination on the basis of their gender identity, including high rates of violence

and discrimination in education, employment, housing, and healthcare access. *See Whitaker*, 858 F.3d at 1051; *M.A.B.*, 286 F. Supp. 3d at 720; *see also Evancho*, 237 F. Supp. 3d at 288; *Highland*, 208 F. Supp. 3d at 874; *Adkins v. City of New York*, 143 F. Supp. 3d 134, 139 (S.D.N.Y. 2015).

The second factor is also met because transgender status has no bearing on a transgender individual's ability to contribute to society. *See M.A.B.*, 286 F. Supp. 3d at 720.

As to the third factor, "transgender status is immutable." *Id.* at 720–21. Furthermore, transgender individuals have distinguishing characteristics—the disparity between the gender they were assigned at birth and the gender they identify with—that define them as a discrete group. *Id.* at 721.

As to the fourth factor, there can be no doubt that transgender individuals are a minority and are politically powerless, comprising just a fraction of the population and frequently subjected to discriminatory federal policies and state laws. *Id.* at 721. This Court joins the District of Maryland, as well as a host of other district courts, in concluding that because transgender individuals are part of a quasi-suspect class, classifications based on transgender status are per se entitled to heightened scrutiny. *Id.* at 720–22; *see also Doe 1 v. Trump*, 275 F. Supp. 3d 167, 208–09 (D.D.C. 2017); *Evancho*, 237 F. Supp. 3d at 288; *Highland*, 208 F. Supp. 3d at 874; *Adkins*, 143 F. Supp. 3d at 139–40; *Norsworthy v. Beard*, 87 F. Supp. 3d 1104, 1119 (N.D. Cal. 2015).

Second, intermediate scrutiny is also warranted because, as Mr. Grimm has pled the matter, the Board Policy at issue relies on sex stereotypes. Accordingly, Mr. Grimm's claims amount to an allegation of a sex-based classification and, therefore, an allegation of sex-based

discrimination in violation of the Equal Protection Clause. *See M.A.B.*, 286 F. Supp. 3d at 718–19.

In *Whitaker*, the Seventh Circuit declined to conclude whether "transgender status is per se entitled to heightened scrutiny," but recognized that "it is enough to say that, just as in *Price Waterhouse*," that the record demonstrated that the plaintiff had been subject to sex stereotyping and therefore had experienced sex discrimination. *Whitaker*, 858 F.3d at 1051. The court reasoned that because "the School District decides which bathroom a student may use based upon the sex listed on the student's birth certificate," the policy could not be stated without referencing sex. *Id.* Accordingly, *Whitaker* concluded, "[t]his policy is inherently based upon a sex-classification," and "heightened review applies." *Id.*; *see also Glenn*, 663 F.3d at 1319–20 (recognizing that the consistent purpose of applying intermediate scrutiny to sex-based classifications has been to eliminate discrimination on the basis of gender stereotypes, and concluding that discrimination against a transgender individual because of his or her gender non-conformity constitutes sex discrimination under the Equal Protection Clause).

This Court joins other courts that have concluded that because the Policy relies on sex-based stereotypes, it is a sex-based classification. *See M.A.B.*, 286 F. Supp. 3d at 718–19. The Policy classified Mr. Grimm differently on the basis of his transgender status and, accordingly, subjected him to sex stereotyping. The Equal Protection Clause protects Mr. Grimm from impermissible sex stereotypes—just as Title IX does, for the reasons articulated previously—and the Court need only find that the Board's Policy demonstrated sex stereotyping under the Equal Protection Clause. *Cf. Price Waterhouse*, 490 U.S. 250–52. Mr. Grimm was subjected to sex discrimination because he was viewed as failing to conform to the sex stereotype propagated by

the Policy. Because the Policy relies on sex-based stereotypes, the Court finds that review of the Policy is subject to intermediate scrutiny.

2. As Pled by Mr. Grimm, the Policy was Not Substantially Related to Achieving an Important Governmental Objective

The Court next turns to whether the Policy survives review under heightened scrutiny. To survive, the Board must demonstrate that the classification serves an important governmental objective, and that the discriminatory means employed are substantially related to the achievement of those objectives. *Virginia*, 518 U.S. at 533 (internal citation omitted).

The Board argues that the Policy is substantially related to an important governmental objective: protecting the privacy rights of its students. *See* ECF No. 136 at 35–37. The Board expands this argument by contending that concerns over student privacy extend to protecting students like Mr. Grimm who, for whatever reason, may be uncomfortable using a restroom corresponding with their physiological sex. The Board argues that by permitting such students to use a single-user restroom, the Board is also protecting the privacy of students like Mr. Grimm. *Id.* at 36.

The Board's argument rings hollow. In *Whitaker*, the Seventh Circuit concluded that although the school's privacy justification may be a legitimate and important interest, the policy was not genuine because it is "based upon sheer conjecture and abstraction." *Whitaker*, 858 F.3d at 1052; *see also Grimm I*, 822 F.3d at 723.

Such conjecture is obvious. First, the plaintiff in *Whitaker*—like Mr. Grimm—used the boys' bathrooms for *weeks* without incident before *other adults in the community—not students*—complained of this use. Second, as the Seventh Circuit observed, a "transgender student's presence in a restroom provides no more of a risk to other students' privacy rights than the presence of an overly curious student of the same biological sex who decides to sneak

glances at his or her classmates performing their bodily functions." *Whitaker*, 858 F.3d at 1052. Third, if school districts were genuinely concerned with protecting the privacy of students who have different-looking anatomies, "then it would seem that separate bathrooms also would be appropriate for pre-pubescent and post-pubescent children who do not look alike anatomically," which the school district had not provided. *Id.* at 1052–53. This Court declines to further evaluate the legitimacy of the purported privacy concerns. The record here is less developed than it was in *Whitaker*. However, the Court underscores that, as pled by Mr. Grimm, Mr. Grimm used the boys' bathrooms for weeks without incident.

The Court concludes that, as pled by Mr. Grimm, the policy at issue was not substantially related to protecting other students' privacy rights. *See M.A.B.*, 286 F. Supp. 3d at 724–26.[12] There were many other ways to protect privacy interests in a non-discriminatory and more effective manner than barring Mr. Grimm from using the boys' restrooms. For example, the Board had taken steps "to give all students the option for even greater privacy" by installing partitions between urinals and privacy strips for stall doors. ECF No. 113 ¶ 57. Additionally, students who wanted greater privacy for any reason could have used one of the new single-stall restrooms made available upon implementation of the policy. *See Grimm I*, 822 F.3d at 728–29 (Davis, J., concurring). Furthermore, as the *M.A.B.* court recognized, it is significant when a

[12] The Court emphasizes that *M.A.B.* rejected the defendants' argument that single-use restrooms and stalls in the boys' locker room would be insufficient to assuage privacy concerns, because "if M.A.B. changing clothes in the designated restrooms makes him feel humiliated and embarrassed . . . then students who use those restrooms for greater privacy will feel the same way." 286 F. Supp. 3d at 724.

M.A.B. rejected that argument for four reasons: (1) the policy interfered with M.A.B.'s health and well-being because it prevented him from social transitioning, as required for treating his gender dysphoria; (2) M.A.B. was *required* to use the designated restrooms, unlike the students who had the *option* to do so if they desired greater privacy; (3) the policy singled out M.A.B. "and marks him as different for being transgender," again in contrast to students for whom using a single-stall restroom carried no stigma; and (4) "even if some boys feel humiliated, embarrassed, or alienated for deciding to change clothes in a single-use restroom or stall, changing there still serves [the defendants'] privacy concerns because those boys still enjoy greater privacy." *Id.* at 724–25. The Court agrees with *M.A.B.*'s reasoning.

school board fails to provide "any explanation for why completely barring [the transgender student] from the boys' [segregated facility] protects the privacy of other boys," "while the availability of single-use restrooms or locker stalls does not." *M.A.B.*, 286 F. Supp. 3d at 725. As in *Whitaker* and *M.A.B.*, preventing Mr. Grimm from using the boys' restrooms did nothing to protect the privacy rights of other students, but certainly singled out and stigmatized Mr. Grimm. *Id.*

Similarly, the Board's argument that the policy should not be construed as violating the Equal Protection Clause because the policy treated all boys and girls the same is unavailing. ECF No. 136 at 26–37. The Policy singled out Mr. Grimm for differing treatment because it "treat[ed] transgender students . . . who fail to conform to the sex-based stereotypes associated with their assigned sex at birth[] differently," whereas a boy making the personal choice to change clothes in or use a single-stall restroom would not have been singled out by the school policy. *Whitaker*, 858 F.3d at 1051; *see also Grimm 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.").

For these reasons, the Court concludes that Mr. Grimm has sufficiently pled that the Policy was not substantially related to protecting other students' privacy rights, because there were many other ways to protect privacy interests in a non-discriminatory and more effective manner than barring Mr. Grimm from using the boys' restrooms. The Board's argument that the policy did not discriminate against any one class of students is resoundingly unpersuasive. Accordingly, the Court declines to dismiss his Equal Protection Claim.

IV. CONCLUSION

For the reasons set forth herein, the Amended Motion to Dismiss (ECF No. 135) is DENIED. The Motion to Dismiss (ECF No. 118) is DISMISSED as moot.

Counsel for the parties are DIRECTED to contact the Courtroom Deputy for the United States Magistrate Judges at (757) 222-7222 within thirty days of entry of this Order to schedule a settlement conference.

IT IS SO ORDERED.

/s/
Arenda L. Wright Allen
United States District Judge

May 22nd, 2018
Norfolk, Virginia

panel's decision." *Burge v. Par. of St. Tammany*, 187 F.3d 452, 466 (5th Cir. 1999). We are bound by our precedent, and Carlile's second claim fails, as well.

V.

Accordingly, because Carlile's first argument fails under prong two, and assuming it satisfies that prong as well as the third, fails under prong four of plain-error review, and because Carlile's second argument is foreclosed by our precedent, we AFFIRM Carlile's sentence.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff-Appellant,

Aimee Stephens, Intervenor,

v.

R.G. &. G.R. HARRIS FUNERAL HOMES, INC., Defendant-Appellee.

No. 16-2424

United States Court of Appeals, Sixth Circuit.

Argued: October 4, 2017

Decided and Filed: March 7, 2018

Background: Equal Employment Opportunity Commission (EEOC) brought Title VII action against employer alleging that employer fired transitioning, transgender employee based on gender stereotypes and that employer administered discriminatory clothing allowance policy. The United States District Court for the Eastern District of Michigan, No. 2:14-cv-13710, Sean F. Cox, J., 201 F.Supp.3d 837, entered summary judgment in favor of employer. EEOC appealed and employee intervened on appeal.

Holdings: The Court of Appeals, Karen Nelson Moore, Circuit Judge, held that:

(1) employer's decision to fire employee was based on gender stereotyping in violation of Title VII;

(2) EEOC was entitled to bring Title VII claim on ground that employer discriminated against employee on basis of her transgender and transitioning status;

(3) ministerial exception to Title VII did not bar EEOC's claims;

(4) requiring employer to comply with Title VII did not substantially burden his religious practice of operating funeral homes, precluding RFRA defense to Title VII claims; and

(5) requiring employer to comply with Title VII satisfied EEOC's compelling interest in eliminating workplace discrimination, precluding RFRA defense to Title VII claims;

(6) requiring employer to comply with Title VII was least restrictive way to further EEOC's interests, precluding RFRA defense to Title VII claims;

(7) EEOC was authorized to bring Title VII discriminatory clothing-allowance claim against employer.

Affirmed in part, reversed in part, and remanded.

1. Federal Courts ⚿3604(4)

An appellate court reviews a district court's grant of summary judgment de novo.

2. Federal Courts ⚿3675

In reviewing a grant of summary judgment, an appellate court views all

facts and any inferences in the light most favorable to the nonmoving party.

3. Federal Courts ⚿3604(4)

An appellate court reviews all legal conclusions supporting a district court's grant of summary judgment de novo.

4. Civil Rights ⚿1545

A plaintiff can establish a prima facie case of unlawful discrimination under Title VII by presenting direct evidence of discriminatory intent. Civil Rights Act of 1964 § 703, 42 U.S.C.A. § 2000e-2(a)(1).

5. Civil Rights ⚿1545

For purposes of a plaintiff's prima facie case of unlawful discrimination under Title VII, a facially discriminatory employment policy or a corporate decision maker's express statement of a desire to remove employees in the protected group is direct evidence of discriminatory intent. Civil Rights Act of 1964 § 703, 42 U.S.C.A. § 2000e-2(a)(1).

6. Civil Rights ⚿1536

Once a Title VII plaintiff establishes that the prohibited classification played a motivating part in the adverse employment decision, the employer then bears the burden of proving that it would have terminated the plaintiff even if it had not been motivated by impermissible discrimination. Civil Rights Act of 1964 § 703, 42 U.S.C.A. § 2000e-2(a)(1).

7. Civil Rights ⚿1166

Discrimination based on a failure to conform to stereotypical gender norms is no less prohibited under Title VII than discrimination based on the biological differences between men and women. Civil Rights Act of 1964 § 703, 42 U.S.C.A. § 2000e-2(a)(1).

8. Civil Rights ⚿1166

Sex stereotyping based on a person's gender non-conforming behavior is impermissible discrimination under Title VII. Civil Rights Act of 1964 § 703, 42 U.S.C.A. § 2000e-2(a)(1).

9. Civil Rights ⚿1193

Employer's decision to fire transitioning, transgender employee was based on gender stereotyping in violation of Title VII, where employer decided to fire employee because she was "no longer going to represent himself as a man" and "wanted to dress as a woman," and employer admitted that employee was not fired for any performance-related issues. Civil Rights Act of 1964 § 703, 42 U.S.C.A. § 2000e-2(a)(1).

10. Civil Rights ⚿1166, 1179

An employer engages in unlawful gender-stereotyping discrimination under Title VII even if it expects both biologically male and female employees to conform to certain notions of how each should behave. Civil Rights Act of 1964 § 703, 42 U.S.C.A. § 2000e-2(a)(1).

11. Civil Rights ⚿1192

Discrimination on the basis of transgender and transitioning status violates Title VII. Civil Rights Act of 1964 § 703, 42 U.S.C.A. § 2000e-2(a)(1).

12. Civil Rights ⚿1193

Equal Employment Opportunity Commission (EEOC) was entitled to bring claim against employer under Title VII on ground that employer discriminated against transgender employee on basis of her transgender and transitioning status, since employer's decision to fire employee was motivated, at least in part, by employee's sex, and discrimination on basis of transgender status necessarily implicated Title VII's proscriptions against sex stereotyping, given that a transgender person was someone who was inherently gender

non-conforming. Civil Rights Act of 1964 § 703, 42 U.S.C.A. § 2000e-2(a)(1).

13. Civil Rights ⇐1192

Under Title VII, discrimination "because of sex" inherently includes discrimination against employees because of a change in their sex. Civil Rights Act of 1964 § 703, 42 U.S.C.A. § 2000e-2(a)(1).

14. Civil Rights ⇐1192

Discrimination because of a person's transgender, intersex, or sexually indeterminate status is no less actionable under Title VII than discrimination because of a person's identification with two religions, an unorthodox religion, or no religion at all. Civil Rights Act of 1964 § 703, 42 U.S.C.A. § 2000e-2(a)(1).

15. Civil Rights ⇐1192

Under Title VII, gender is not being treated as irrelevant to employment decisions if an employee's attempt or desire to change his or her sex leads to an adverse employment decision. Civil Rights Act of 1964 § 703, 42 U.S.C.A. § 2000e-2(a)(1).

16. Civil Rights ⇐1192

Under Title VII's proscription against sex-stereotyping discrimination, an employer cannot discriminate on the basis of transgender status without imposing its stereotypical notions of how sexual organs and gender identity ought to align. Civil Rights Act of 1964 § 703, 42 U.S.C.A. § 2000e-2(a)(1).

17. Civil Rights ⇐1192

Title VII protects transgender persons because of their transgender or transitioning status, because transgender or transitioning status constitutes an inherently gender non-conforming trait. Civil Rights Act of 1964 § 703, 42 U.S.C.A. § 2000e-2(a)(1).

18. Civil Rights ⇐1166

Under Title VII's proscription against sex discrimination, a trait need not be exclusive to one sex to nevertheless be a function of sex. Civil Rights Act of 1964 § 703, 42 U.S.C.A. § 2000e-2(a)(1).

19. Civil Rights ⇐1166

Title VII does not ask whether a particular sex is discriminated against; it asks whether a particular individual is discriminated against because of such individual's sex. Civil Rights Act of 1964 § 703, 42 U.S.C.A. § 2000e-2(a)(1).

20. Civil Rights ⇐1166, 1179

Under Title VII's proscription against sex discrimination, the question is not whether discrimination is borne only by men or only by women or even by both men and women; instead, the question is whether an individual is discriminated against because of his or her sex. Civil Rights Act of 1964 § 703, 42 U.S.C.A. § 2000e-2(a)(1).

21. Civil Rights ⇐1166, 1179

An employer need not discriminate based on a trait common to all men or women to violate Title VII's proscription against sex discrimination. Civil Rights Act of 1964 § 703, 42 U.S.C.A. § 2000e-2(a)(1).

22. Civil Rights ⇐1166

A plaintiff may state a claim under Title VII for discrimination based on gender nonconformance that is expressed outside of work. Civil Rights Act of 1964 § 703, 42 U.S.C.A. § 2000e-2(a)(1).

23. Civil Rights ⇐1114

Constitutional Law ⇐1340(2, 3)

The ministerial exception to Title VII is rooted in the First Amendment's religious protections and precludes application of employment discrimination laws such as Title VII to claims concerning the employ-

ment relationship between a religious institution and its ministers. U.S. Const. Amend. 1; Civil Rights Act of 1964 § 703, 42 U.S.C.A. § 2000e-2(a)(1).

24. Civil Rights ⚿1114

In order for the ministerial exception to bar an employment discrimination claim under Title VII, the employer must be a religious institution and the employee must have been a ministerial employee. Civil Rights Act of 1964 § 703, 42 U.S.C.A. § 2000e-2(a)(1).

25. Civil Rights ⚿1114

Funeral home was not religious institution, and, thus, ministerial exception to Title VII did not bar claims by Equal Employment Opportunity Commission (EEOC) alleging that employer, who operated funeral homes, violated Title VII by firing transitioning, transgender funeral director, even though funeral home's mission statement declared that "its highest priority is to honor God in all that we do as a company and as individuals," where funeral home did not purport or seek to establish and advance any Christian values, it was not affiliated with any church, its articles of incorporation did not avow any religious purpose, its employees were not required to hold any particular religious views, and it employed and served individuals of all religions. Civil Rights Act of 1964 § 703, 42 U.S.C.A. § 2000e-2(a)(1).

26. Civil Rights ⚿1114

Funeral director was not ministerial employee, and, thus, ministerial exception to Title VII did not bar claims by Equal Employment Opportunity Commission (EEOC) alleging that employer, who operated funeral homes, violated Title VII by firing transitioning, transgender funeral director, since job title of "funeral director" conveyed purely secular function, funeral director did not have any religious training, she was not ambassador of any faith, and she did not perform important religious functions. Civil Rights Act of 1964 § 703, 42 U.S.C.A. § 2000e-2(a)(1).

27. Civil Rights ⚿1406

Under RFRA's burden-shifting analysis, first, a claimant must demonstrate that complying with a generally applicable law would substantially burden his religious exercise, and upon such a showing, the government must then establish that applying the law to the burdened individual is the least restrictive means of furthering a compelling government interest. Religious Freedom Restoration Act of 1993 § 3, 42 U.S.C.A. § 2000bb-1.

28. Federal Courts ⚿3403, 3544

Court of Appeals would not consider argument by intervening employee that action by Equal Employment Opportunity Commission (EEOC) against employer alleging that employer violated Title VII by firing transitioning, transgender employee should be remanded to District Court with instructions barring employer from asserting RFRA as defense to her individual claims, since employee's intervention on appeal was granted, in part, on her assurances that she would only raise arguments already within scope of appeal, and such argument was not briefed by parties at district-court level. Civil Rights Act of 1964 § 703, 42 U.S.C.A. § 2000e-2(a)(1).

29. Federal Courts ⚿3391

An appellate court typically will not consider issues raised for the first time on appeal unless they are presented with sufficient clarity and completeness and their resolution will materially advance the process of the litigation.

30. Civil Rights ⚿1371

To assert a viable defense under RFRA, a religious claimant must demonstrate that the government action at issue

would (1) substantially burden (2) a sincere (3) religious exercise. Religious Freedom Restoration Act of 1993 § 3, 42 U.S.C.A. § 2000bb-1.

31. Civil Rights ⇐1010, 1032

In reviewing a claim under RFRA, a court must not evaluate whether the asserted religious beliefs are mistaken or insubstantial; rather, the court must assess whether the line drawn reflects an honest conviction. Religious Freedom Restoration Act of 1993 § 3, 42 U.S.C.A. § 2000bb-1.

32. Civil Rights ⇐1193, 1529

Requiring employer to comply with Title VII's proscriptions on sex discrimination did not substantially burden his religious practice of operating funeral homes, precluding RFRA defense to claims by Equal Employment Opportunity Commission (EEOC) alleging that employer violated Title VII by firing transitioning, transgender funeral director, since employer could not rely on customers' presumed bias, that they would be disturbed by employee's appearance during and after her transition to point that their healing from their loved ones' deaths would be hindered, to establish substantial burden, and tolerating employee's understanding of her sex and gender identity was not tantamount to supporting it in violation of employer's religious beliefs. Civil Rights Act of 1964 § 703, 42 U.S.C.A. § 2000e-2(a)(1); Religious Freedom Restoration Act of 1993 § 3, 42 U.S.C.A. § 2000bb-1(b).

33. Civil Rights ⇐1406

A claimant trying to demonstrate that complying with a generally applicable law would substantially burden his religious exercise of operating a business cannot rely on customers' presumed biases to establish a substantial burden under RFRA. Religious Freedom Restoration Act of 1993 § 3, 42 U.S.C.A. § 2000bb-1.

34. Civil Rights ⇐1032

A government action that puts a religious practitioner to the choice of engaging in conduct that seriously violates his religious beliefs or facing serious consequences constitutes a substantial burden for the purposes of RFRA. Religious Freedom Restoration Act of 1993 § 3, 42 U.S.C.A. § 2000bb-1.

35. Civil Rights ⇐1032

If a claimant under the RFRA demonstrates that complying with a generally applicable law would substantially burden his sincere exercise of religion, the government must demonstrate that its compelling interest is satisfied through application of the challenged law to the particular claimant. Religious Freedom Restoration Act of 1993 § 3, 42 U.S.C.A. § 2000bb-1(b).

36. Civil Rights ⇐1032

For the government to demonstrate under RFRA that its compelling interest is satisfied through application of the challenged law to the particular claimant whose sincere exercise of religion is being substantially burdened, it requires looking beyond broadly formulated interests justifying the general applicability of government mandates and scrutinizing the asserted harm of granting specific exemptions to particular religious claimants. Religious Freedom Restoration Act of 1993 § 3, 42 U.S.C.A. § 2000bb-1(b).

37. Civil Rights ⇐1193, 1529

Requiring employer to comply with Title VII's proscriptions on sex discrimination, even if it substantially burdened employer's religious belief in operating funeral home, satisfied compelling interest of Equal Employment Opportunity Commission (EEOC) in eliminating workplace discrimination, precluding employer's RFRA defense to EEOC's claims alleging that employer violated Title VII by firing tran-

sitioning, transgender funeral director, since failing to enforce Title VII against employer meant that EEOC would be allowing a particular person to suffer discrimination, even if harm suffered by employee was not unique from generic harm always suffered in employment discrimination cases, such as deprivation of livelihood and harm to sense of self-worth. Civil Rights Act of 1964 § 703, 42 U.S.C.A. § 2000e-2(a)(1); Religious Freedom Restoration Act of 1993 § 3, 42 U.S.C.A. § 2000bb-1(b).

38. Civil Rights ⚿1172

The stigmatizing injury of discrimination in violation of Title VII, and the denial of equal opportunities that accompanies it, is surely felt as strongly by persons suffering discrimination on the basis of their sex as by those treated differently because of their race. Civil Rights Act of 1964 § 703, 42 U.S.C.A. § 2000e-2(a)(1).

39. Civil Rights ⚿1406

The final inquiry under RFRA's burden-shifting analysis is whether there exist other means of achieving the government's desired goal without imposing a substantial burden on the exercise of religion by the objecting party. Religious Freedom Restoration Act of 1993 § 3, 42 U.S.C.A. §§ 2000bb-1(a), 2000bb-1(b).

40. Civil Rights ⚿1032

The least-restrictive-means standard under RFRA, in determining whether requiring a claimant to comply with a generally applicable law that substantially burdens the claimant's religious exercise is the least restrictive means of furthering a compelling government interest, is exceptionally demanding. Religious Freedom Restoration Act of 1993 § 3, 42 U.S.C.A. §§ 2000bb-1(a), 2000bb-1(b).

41. Civil Rights ⚿1032

Under RFRA's least-restrictive-means standard, where an alternative option exists that furthers the government's interest equally well, the government must use it. Religious Freedom Restoration Act of 1993 § 3, 42 U.S.C.A. §§ 2000bb-1(a), 2000bb-1(b).

42. Civil Rights ⚿1529

Requiring employer to comply with Title VII's proscriptions on sex discrimination, even if it substantially burdened employer's religious belief in operating funeral home, was least restrictive way to further interest of Equal Employment Opportunity Commission (EEOC) in eliminating workplace discrimination based on sex stereotypes, precluding employer's RFRA defense to EEOC's claims alleging that employer violated Title VII by firing transitioning, transgender funeral director; Title VII did not include any exemptions for discrimination on basis of sex, and only way to achieve Title VII's objectives was through its enforcement. Religious Freedom Restoration Act of 1993 § 3, 42 U.S.C.A. §§ 2000bb-1(a), 2000bb-1(b).

43. Civil Rights ⚿1516

Equal Employment Opportunity Commission (EEOC) was authorized to bring Title VII discriminatory clothing-allowance claim against employer based on employer's policy to provide suits or stipends to male funeral directors but not to female funeral directors, since transgender employee's charge that she was fired because of her planned change in appearance and presentation contained implicit allegation that employer required its male and female funeral directors to look a particular way, and such allegation could reasonably prompt EEOC to investigate whether such appearance requirements imposed unequal burdens, including fiscal, on male and fe-

male employees. Civil Rights Act of 1964 § 703, 42 U.S.C.A. § 2000e-2(a)(1).

Appeal from the United States District Court for the Eastern District of Michigan at Detroit. No. 2:14-cv-13710—Sean F. Cox, District Judge.

ARGUED: Anne Noel Occhialino, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Washington, D.C., for Appellant. John A. Knight, AMERICAN CIVIL LIBERTIES UNION FOUNDATION, Chicago, Illinois, for Intervenor. Douglas G. Wardlow, ALLIANCE DEFENDING FREEDOM, Scottsdale, Arizona, for Appellee. ON BRIEF: Anne Noel Occhialino, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Washington, D.C., for Appellant. John A. Knight, AMERICAN CIVIL LIBERTIES UNION FOUNDATION, Chicago, Illinois, Jay D. Kaplan, Daniel S. Korobkin, AMERICAN CIVIL LIBERTIES UNION FUND OF MICHIGAN, Detroit, Michigan, for Intervenor. Douglas G. Wardlow, Gary S. McCaleb, ALLIANCE DEFENDING FREEDOM, Scottsdale, Arizona, for Appellee. Jennifer C. Pizer, Nancy C. Marcus, LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC., Los Angeles, California, Gregory R. Nevins, LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC., Atlanta, Georgia, Richard B. Katskee, AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, Washington, D.C., Doron M. Kalir, CLEVELAND-MARSHALL COLLEGE OF LAW, Cleveland, Ohio, Elizabeth Reiner Platt, Katherine Franke, PRIVATE RIGHTS / PUBLIC CONSCIENCE PROJECT, New York, New York, Mary Jane Eaton, Wesley R. Powell, Sameer Advani, WILLKIE FARR & GALLAGHER, LLP, New York, New York, Eric Alan Isaacson, LAW OFFICE OF ERIC ALAN ISAACSON, La Jolla, California, William J. Olson, WILLIAM J. OLSON, P.C., Vienna, Virginia, for Amici Curiae.

Before: MOORE, WHITE, and DONALD, Circuit Judges.

OPINION

KAREN NELSON MOORE, Circuit Judge.

Aimee Stephens (formerly known as Anthony Stephens) was born biologically male.[1] While living and presenting as a man, she worked as a funeral director at R.G. & G.R. Harris Funeral Homes, Inc. ("the Funeral Home"), a closely held for-profit corporation that operates three funeral homes in Michigan. Stephens was terminated from the Funeral Home by its owner and operator, Thomas Rost, shortly after Stephens informed Rost that she intended to transition from male to female and would represent herself and dress as a woman while at work. Stephens filed a complaint with the Equal Employment Opportunity Commission ("EEOC"), which investigated Stephens's allegations that she had been terminated as a result of unlawful sex discrimination. During the course of its investigation, the EEOC learned that the Funeral Home provided its male public-facing employees with clothing that complied with the company's dress code while female public-facing employees received no such allowance. The EEOC subsequently brought suit against the Funeral Home in which the EEOC charged the Funeral Home with violating Title VII of the Civil Rights Act of 1964 ("Title VII") by (1) terminating Stephens's employment on the basis of her transgen-

1. We refer to Stephens using female pronouns, in accordance with the preference she has expressed through her briefing to this court.

der or transitioning status and her refusal to conform to sex-based stereotypes; and (2) administering a discriminatory-clothing-allowance policy.

The parties submitted dueling motions for summary judgment. The EEOC argued that it was entitled to judgment as a matter of law on both of its claims. For its part, the Funeral Home argued that it did not violate Title VII by requiring Stephens to comply with a sex-specific dress code that it asserts equally burdens male and female employees, and, in the alternative, that Title VII should not be enforced against the Funeral Home because requiring the Funeral Home to employ Stephens while she dresses and represents herself as a woman would constitute an unjustified substantial burden upon Rost's (and thereby the Funeral Home's) sincerely held religious beliefs, in violation of the Religious Freedom Restoration Act ("RFRA"). As to the EEOC's discriminatory-clothing-allowance claim, the Funeral Home argued that Sixth Circuit case law precludes the EEOC from bringing this claim in a complaint that arose out of Stephens's original charge of discrimination because the Funeral Home could not reasonably expect a clothing-allowance claim to emerge from an investigation into Stephens's termination.

The district court granted summary judgment in favor of the Funeral Home on both claims. For the reasons set forth below, we hold that (1) the Funeral Home engaged in unlawful discrimination against Stephens on the basis of her sex; (2) the Funeral Home has not established that applying Title VII's proscriptions against sex discrimination to the Funeral Home would substantially burden Rost's religious exercise, and therefore the Funeral Home is not entitled to a defense under RFRA; (3) even if Rost's religious exercise were substantially burdened, the EEOC has established that enforcing Title VII is the least restrictive means of furthering the government's compelling interest in eradicating workplace discrimination against Stephens; and (4) the EEOC may bring a discriminatory-clothing-allowance claim in this case because such an investigation into the Funeral Home's clothing-allowance policy was reasonably expected to grow out of the original charge of sex discrimination that Stephens submitted to the EEOC. Accordingly, we **REVERSE** the district court's grant of summary judgment on both the unlawful-termination and discriminatory-clothing-allowance claims, **GRANT** summary judgment to the EEOC on its unlawful-termination claim, and **REMAND** the case to the district court for further proceedings consistent with this opinion.

I. BACKGROUND

Aimee Stephens, a transgender woman who was "assigned male at birth," joined the Funeral Home as an apprentice on October 1, 2007 and served as a Funeral Director/Embalmer at the Funeral Home from April 2008 until August 2013. R. 51-18 (Stephens Dep. at 49–51) (Page ID #817); R. 61 (Def.'s Counter Statement of Disputed Facts ¶ 10) (Page ID #1828). During the course of her employment at the Funeral Home, Stephens presented as a man and used her then-legal name, William Anthony Beasley Stephens. R. 51-18 (Stephens Dep. at 47) (Page ID #816); R. 61 (Def.'s Counter Statement of Disputed Facts ¶ 15) (Page ID #1829).

The Funeral Home is a closely held for-profit corporation. R. 55 (Def.'s Statement of Facts ¶ 1) (Page ID #1683).[2] Thomas

2. All facts drawn from Def.'s Statement of Facts (R. 55) are undisputed. *See* R. 64 (Pl.'s Counter Statement of Disputed Facts) (Page ID #2066–88).

Rost ("Rost"), who has been a Christian for over sixty-five years, owns 95.4% of the company and operates its three funeral home locations. *Id.* ¶¶ 4, 8, 17 (Page ID #1684–85); R. 54-2 (Rost Aff. ¶ 2) (Page ID #1326). Rost proclaims "that God has called him to serve grieving people" and "that his purpose in life is to minister to the grieving." R. 55 (Def.'s Statement of Facts ¶ 31) (Page ID #1688). To that end, the Funeral Home's website contains a mission statement that states that the Funeral Home's "highest priority is to honor God in all that we do as a company and as individuals" and includes a verse of scripture on the bottom of the mission statement webpage. *Id.* ¶¶ 21–22 (Page ID #1686). The Funeral Home itself, however, is not affiliated with a church; it does not claim to have a religious purpose in its articles of incorporation; it is open every day, including Christian holidays; and it serves clients of all faiths. R. 61 (Def.'s Counter Statement of Facts ¶¶ 25–27; 29–30) (Page ID #1832–34). "Employees have worn Jewish head coverings when holding a Jewish funeral service." *Id.* ¶ 31 (Page ID #1834). Although the Funeral Home places the Bible, "Daily Bread" devotionals, and "Jesus Cards" in public places within the funeral homes, the Funeral Home does not decorate its rooms with "visible religious figures . . . to avoid offending people of different religions." *Id.* ¶¶ 33–34 (Page ID #1834). Rost hires employees belonging to any faith or no faith to work at the Funeral Home, and he "does not endorse or consider himself to endorse his employees' beliefs or non-employment-related activities." *Id.* ¶¶ 37–38 (Page ID #1835).

The Funeral Home requires its public-facing male employees to wear suits and ties and its public-facing female employees to wear skirts and business jackets. R. 55 (Def.'s Statement of Facts at ¶ 51) (Page ID #1691). The Funeral Home provides all male employees who interact with clients, including funeral directors, with free suits and ties, and the Funeral Home replaces suits as needed. R. 61 (Def.'s Counter Statement of Disputed Facts ¶¶ 42, 48) (Page ID #1836–37). All told, the Funeral Home spends approximately $470 per full-time employee per year and $235 per part-time employee per year on clothing for male employees. *Id.* ¶ 55 (Page ID #1839).

Until October 2014—after the EEOC filed this suit—the Funeral Home did not provide its female employees with any sort of clothing or clothing allowance. *Id.* ¶ 54 (Page ID #1838–39). Beginning in October 2014, the Funeral Home began providing its public-facing female employees with an annual clothing stipend ranging from $75 for part-time employees to $150 for full-time employees. *Id.* ¶ 54 (Page ID #1838–39). Rost contends that the Funeral Home would provide suits to all funeral directors, regardless of their sex, *id.*, but it has not employed a female funeral director since Rost's grandmother ceased working for the organization around 1950, R. 54-2 (Rost Aff. ¶¶ 52, 54) (Page ID #1336–37). According to Rost, the Funeral Home has received only one application from a woman for a funeral director position in the thirty-five years that Rost has operated the Funeral Home, and the female applicant was deemed not qualified. *Id.* ¶¶ 2, 53 (Page ID #1326, 1336).

On July 31, 2013, Stephens provided Rost with a letter stating that she has struggled with "a gender identity disorder" her "entire life," and informing Rost that she has "decided to become the person that [her] mind already is." R. 51-2 (Stephens Letter at 1) (Page ID #643). The letter stated that Stephens "intend[ed] to have sex reassignment surgery," and explained that "[t]he first step [she] must take is to live and work full-time as a woman for one year." *Id.* To that end,

Stephens stated that she would return from her vacation on August 26, 2013, "as [her] true self, Amiee [sic] Australia Stephens, in appropriate business attire." *Id.* After presenting the letter to Rost, Stephens postponed her vacation and continued to work for the next two weeks. R. 68 (Reply to Def.'s Counter Statement of Material Facts Not in Dispute at 1) (Page ID #2122). Then, just before Stephens left for her intended vacation, Rost fired her. R. 61 (Def.'s Counter Statement of Disputed Facts ¶¶ 10–11) (Page ID #1828). Rost said, "this is not going to work out," and offered Stephens a severance agreement if she "agreed not to say anything or do anything." R. 54-15 (Stephens Dep. at 75–76) Page ID #1455; R. 63-5 (Rost Dep. at 126–27) Page ID #1974. Stephens refused. *Id.* Rost testified that he fired Stephens because "he was no longer going to represent himself as a man. He wanted to dress as a woman." R. 51-3 (Rost 30(b)(6) Dep. at 135–36) (Page ID #667).

Rost avers that he "sincerely believe[s] that the Bible teaches that a person's sex is an immutable God-given gift," and that he would be "violating God's commands if [he] were to permit one of [the Funeral Home's] funeral directors to deny their sex while acting as a representative of [the] organization" or if he were to "permit one of [the Funeral Home's] male funeral directors to wear the uniform for female funeral directors while at work." R. 54-2 (Rost Aff. ¶¶ 42–43, 45) (Page ID #1334–35). In particular, Rost believes that authorizing or paying for a male funeral director to wear the uniform for female funeral directors would render him complicit "in supporting the idea that sex is a changeable social construct rather than an immutable God-given gift." *Id.* ¶¶ 43, 45 (Page ID #1334–35).

After her employment was terminated, Stephens filed a sex-discrimination charge with the EEOC, alleging that "[t]he only explanation" she received from "management" for her termination was that "the public would [not] be accepting of [her] transition." R. 63-2 (Charge of Discrimination at 1) (Page ID #1952). She further noted that throughout her "entire employment" at the Funeral Home, there were "no other female Funeral Director/Embalmers." *Id.* During the course of investigating Stephens's allegations, the EEOC learned from another employee that the Funeral Home did not provide its public-facing female employees with suits or a clothing stipend. R. 54-24 (Memo for File at 9) (Page ID #1513).

The EEOC issued a letter of determination on June 5, 2014, in which the EEOC stated that there was reasonable cause to believe that the Funeral Home "discharged [Stephens] due to her sex and gender identity, female, in violation of Title VII" and "discriminated against its female employees by providing male employees with a clothing benefit which was denied to females, in violation of Title VII." R. 63-4 (Determination at 1) (Page ID #1968). The EEOC and the Funeral Home were unable to resolve this dispute through an informal conciliation process, and the EEOC filed a complaint against the Funeral Home in the district court on September 25, 2014. R. 1 (Complaint) (Page ID #1–9).

The Funeral Home moved to dismiss the EEOC's action for failure to state a claim. The district court denied the Funeral Home's motion, but it narrowed the basis upon which the EEOC could pursue its unlawful-termination claim. *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 100 F.Supp.3d 594, 599, 603 (E.D. Mich. 2015). In particular, the district court agreed with the Funeral Home that transgender status is not a protected trait under Title VII, and therefore held that the EEOC

could not sue for alleged discrimination against Stephens based solely on her transgender and/or transitioning status. *See id.* at 598–99. Nevertheless, the district court determined that the EEOC had adequately stated a claim for discrimination against Stephens based on the claim that she was fired because of her failure to conform to the Funeral Home's "sex- or gender-based preferences, expectations, or stereotypes." *Id.* at 599 (quoting R. 1 (Compl. ¶ 15) (Page ID #4–5)).

The parties then cross-moved for summary judgment. *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 201 F.Supp.3d 837, 840 (E.D. Mich. 2016). With regard to the Funeral Home's decision to terminate Stephens's employment, the district court determined that there was "direct evidence to support a claim of employment discrimination" against Stephens on the basis of her sex, in violation of Title VII. *Id.* at 850. However, the court nevertheless found in the Funeral Home's favor because it concluded that the Religious Freedom Restoration Act ("RFRA") precludes the EEOC from enforcing Title VII against the Funeral Home, as doing so would substantially burden Rost and the Funeral Home's religious exercise and the EEOC had failed to demonstrate that enforcing Title VII was the least restrictive way to achieve its presumably compelling interest "in ensuring that Stephens is not subject to gender stereotypes in the workplace in terms of required clothing at the Funeral home." *Id.* at 862–63. Based on its narrow conception of the EEOC's compelling interest in bringing the claim, the district court concluded that the EEOC could have achieved its goals by proposing that the Funeral Home impose a gender-neutral dress code. *Id.* The EEOC's failure to consider such an accommodation was, according to the district court, fatal to its case. *Id.* at 863. Separately, the district court held that it lacked jurisdiction to consider the EEOC's discriminatory-clothing-allowance claim because, under long-standing Sixth Circuit precedent, the EEOC may pursue in a Title VII lawsuit only claims that are reasonably expected to grow out of the complaining party's—in this case, Stephens's—original charge. *Id.* at 864–70. The district court entered final judgment on all counts in the Funeral Home's favor on August 18, 2016, R. 77 (J.) (Page ID #2235), and the EEOC filed a timely notice of appeal shortly thereafter, *see* R. 78 (Notice of Appeal) (Page ID #2236–37).

Stephens moved to intervene in this appeal on January 26, 2017, after expressing concern that changes in policy priorities within the U.S. government might prevent the EEOC from fully representing Stephens's interests in this case. *See* D.E. 19 (Mot. to Intervene as Plaintiff-Appellant at 5–7). The Funeral Home opposed Stephens's motion on the grounds that the motion was untimely and Stephens had failed to show that the EEOC would not represent her interests adequately. D.E. 21 (Mem. in Opp'n at 2–11). We determined that Stephens's request was timely given that she previously "had no reason to question whether the EEOC would continue to adequately represent her interests" and granted Stephens's motion to intervene on March 27, 2017. D.E. 28-2 (Order at 2). We further determined that Stephens's intervention would not prejudice the Funeral Home because Stephens stated in her briefing that she did not intend to raise new issues. *Id.* Six groups of amici curiae also submitted briefing in this case.

II. DISCUSSION

A. Standard of Review

[1–3] "We review a district court's grant of summary judgment de novo."

Risch v. Royal Oak Police Dep't, 581 F.3d 383, 390 (6th Cir. 2009) (quoting *CenTra, Inc. v. Estrin*, 538 F.3d 402, 412 (6th Cir. 2008)). Summary judgment is warranted when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). In reviewing a grant of summary judgment, "we view all facts and any inferences in the light most favorable to the nonmoving party." *Risch*, 581 F.3d at 390 (citation omitted). We also review all "legal conclusions supporting [the district court's] grant of summary judgment *de novo*." *Doe v. Salvation Army in U.S.*, 531 F.3d 355, 357 (6th Cir. 2008) (citation omitted).

B. Unlawful Termination Claim

[4–6] Title VII prohibits employers from "discriminat[ing] against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). "[A] plaintiff can establish a *prima facie* case [of unlawful discrimination] by presenting direct evidence of discriminatory intent." *Nguyen v. City of Cleveland*, 229 F.3d 559, 563 (6th Cir. 2000) (citing *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989) (plurality opinion)). "[A] facially discriminatory employment policy or a corporate decision maker's express statement of a desire to remove employees in the protected group is direct evidence of discriminatory intent." *Id.* (citation omitted). Once a plaintiff establishes that "the prohibited classification played a motivating part in the [adverse] employment decision," the employer then bears the burden of proving that it would have terminated the plaintiff "even if it had not been motivated by impermissible discrimination." *Id.* (citing, *inter alia*, *Price Waterhouse*, 490 U.S. at 244–45, 109 S.Ct. 1775).

Here, the district court correctly determined that Stephens was fired because of her failure to conform to sex stereotypes, in violation of Title VII. *R.G. & G.R. Harris Funeral Homes, Inc.*, 201 F.Supp.3d at 850 ("[W]hile this Court does not often see cases where there is direct evidence to support a claim of employment discrimination, it appears to exist here."). The district court erred, however, in finding that Stephens could not alternatively pursue a claim that she was discriminated against on the basis of her transgender and transitioning status. Discrimination on the basis of transgender and transitioning status is necessarily discrimination on the basis of sex, and thus the EEOC should have had the opportunity to prove that the Funeral Home violated Title VII by firing Stephens because she is transgender and transitioning from male to female.

1. Discrimination on the Basis of Sex Stereotypes

In *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989), a plurality of the Supreme Court explained that Title VII's proscription of discrimination "'*because of* . . . sex' . . . mean[s] that gender must be irrelevant to employment decisions." *Id.* at 240, 109 S.Ct. 1775 (emphasis in original). In enacting Title VII, the plurality reasoned, "Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes." *Id.* at 251, 109 S.Ct. 1775 (quoting *Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702, 707 n.13, 98 S.Ct. 1370, 55 L.Ed.2d 657 (1978)). The *Price Waterhouse* plurality, along with two concurring Justices, therefore determined that a female employee who faced an adverse employment decision because she failed to "walk . . . femininely, talk . . . femininely, dress . . . femininely, wear make-up, have

her hair styled, [or] wear jewelry," could properly state a claim for sex discrimination under Title VII—even though she was not discriminated against for being a woman *per se*, but instead for failing to be womanly enough. *See id.* at 235, 109 S.Ct. 1775 (plurality opinion) (quoting *Hopkins v. Price Waterhouse*, 618 F.Supp. 1109, 1117 (D.D.C. 1985)); *id.* at 259, 109 S.Ct. 1775 (White, J., concurring); *id.* at 272, 109 S.Ct. 1775 (O'Connor, J., concurring).

[7, 8] Based on *Price Waterhouse*, we determined that "discrimination based on a failure to conform to stereotypical gender norms" was no less prohibited under Title VII than discrimination based on "the biological differences between men and women." *Smith v. City of Salem*, 378 F.3d 566, 573 (6th Cir. 2004). And we found no "reason to exclude Title VII coverage for non sex-stereotypical behavior simply because the person is a transsexual." *Id.* at 575. Thus, in *Smith*, we held that a transgender plaintiff (born male) who suffered adverse employment consequences after "he began to express a more feminine appearance and manner on a regular basis" could file an employment discrimination suit under Title VII, *id.* at 572, because such "discrimination would not [have] occur[red] but for the victim's sex," *id.* at 574. As we reasoned in *Smith*, Title VII proscribes discrimination both against women who "do not wear dresses or makeup" and men who do. *Id.* Under any circumstances, "[s]ex stereotyping based on a person's gender non-conforming behavior is impermissible discrimination." *Id.* at 575.

[9] Here, Rost's decision to fire Stephens because Stephens was "no longer going to represent himself as a man" and "wanted to dress as a woman," *see* R. 51-3 (Rost 30(b)(6) Dep. at 135–36) (Page ID #667), falls squarely within the ambit of sex-based discrimination that *Price Waterhouse* and *Smith* forbid. For its part, the Funeral Home has failed to establish a non-discriminatory basis for Stephens's termination, and Rost admitted that he did not fire Stephens for any performance-related issues. *See* R. 51-3 (Rost 30(b)(6) Dep. at 109, 136) (Page ID #663, 667). We therefore agree with the district court that the Funeral Home discriminated against Stephens on the basis of her sex, in violation of Title VII.

The Funeral Home nevertheless argues that it has not violated Title VII because sex stereotyping is barred only when "the employer's reliance on stereotypes . . . result[s] in disparate treatment of employees because they are either male or female." Appellee Br. at 31. According to the Funeral Home, an employer does not engage in impermissible sex stereotyping when it requires its employees to conform to a sex-specific dress code—as it purportedly did here by requiring Stephens to abide by the dress code designated for the Funeral Home's male employees—because such a policy "impose[s] equal burdens on men and women," and thus does not single out an employee for disparate treatment based on that employee's sex. *Id.* at 12. In support of its position, the Funeral Home relies principally on *Jespersen v. Harrah's Operating Co.*, 444 F.3d 1104 (9th Cir. 2006) (en banc), and *Barker v. Taft Broadcasting Co.*, 549 F.2d 400 (6th Cir. 1977). *Jespersen* held that a sex-specific grooming code that imposed different but equally burdensome requirements on male and female employees would not violate Title VII. *See* 444 F.3d at 1109–11 (holding that the plaintiff failed to demonstrate how a grooming code that required women to wear makeup and banned men from wearing makeup was a violation of Title VII because the plaintiff failed to produce evidence showing that this sex-specific makeup policy was "more burdensome for women than for men"). *Barker*, for its part,

held that a sex-specific grooming code that was enforced equally as to male and female employees would not violate Title VII. *See* 549 F.2d at 401 (holding that a grooming code that established different hair-length limits for male and female employees did not violate Title VII because failure to comply with the code resulted in the same consequences for men and women). For three reasons, the Funeral Home's reliance on these cases is misplaced.

First, the central issue in *Jespersen* and Barker—whether certain sex-specific appearance requirements violate Title VII—is not before this court. We are not considering, in this case, whether the Funeral Home violated Title VII by requiring men to wear pant suits and women to wear skirt suits. Our question is instead whether the Funeral Home could legally terminate Stephens, notwithstanding that she fully intended to comply with the company's sex-specific dress code, simply because she refused to conform to the Funeral Home's notion of her sex. When the Funeral Home's actions are viewed in the proper context, no reasonable jury could believe that Stephens was not "target[ed] . . . for disparate treatment" and that "no sex stereotype factored into [the Funeral Home's] employment decision." *See* Appellee Br. at 19–20.

Second, even if we would permit certain sex-specific dress codes in a case where the issue was properly raised, we would not rely on either *Jespersen* or *Barker* to do so. *Barker* was decided before *Price Waterhouse*, and it in no way anticipated the Court's recognition that Title VII "strike[s] at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes." *Price Waterhouse*, 490 U.S. at 251, 109 S.Ct. 1775 (plurality) (quoting *Manhart*, 435 U.S. at 707 n.13, 98 S.Ct. 1370). Rather, according to *Barker*, "[w]hen Congress makes it unlawful for an employer to 'discriminate . . . on the basis of . . . sex . . .', without further explanation of its meaning, we should not readily infer that it meant something different than what the concept of discrimination has traditionally meant." 549 F.2d at 401–02 (quoting *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 145, 97 S.Ct. 401, 50 L.Ed.2d 343 (1976), *superseded by statute*, Pregnancy Discrimination Act of 1978, Pub. L. 95-555, 92 Stat. 2076, 52 U.S.C. § 2000e(k), *as recognized in Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 89, 103 S.Ct. 2890, 77 L.Ed.2d 490 (1983)). Of course, this is precisely the sentiment that *Price Waterhouse* "eviscerated" when it recognized that "Title VII's reference to 'sex' encompasses both the biological differences between men and women, and gender discrimination, that is, discrimination based on a failure to conform to stereotypical gender norms." *Smith*, 378 F.3d at 573 (citing *Price Waterhouse*, 490 U.S. at 251, 109 S.Ct. 1775). Indeed, *Barker*'s incompatibility with *Price Waterhouse* may explain why this court has not cited *Barker* since *Price Waterhouse* was decided.

As for *Jespersen*, that Ninth Circuit case is irreconcilable with our decision in *Smith*. Critical to *Jespersen*'s holding was the notion that the employer's "grooming standards," which required all female bartenders to wear makeup (and prohibited males from doing so), did not on their face violate Title VII because they did "not require [the plaintiff] to conform to a stereotypical image that would objectively impede her ability to perform her job." 444 F.3d at 1113. We reached the exact opposite conclusion in *Smith*, as we explained that requiring women to wear makeup does, in fact, constitute improper sex stereotyping. 378 F.3d at 574 ("After *Price Waterhouse*, an employer who discriminates against women because, for instance, they do not wear dresses or makeup, is engaging in sex discrimination because the

discrimination would not occur but for the victim's sex."). And more broadly, our decision in *Smith* forecloses the *Jespersen* court's suggestion that sex stereotyping is permissible so long as the required conformity does not "impede [an employee's] ability to perform her job," *Jespersen*, 444 F.3d at 1113, as the *Smith* plaintiff did not and was not required to allege that being expected to adopt a more masculine appearance and manner interfered with his job performance. *Jespersen*'s incompatibility with *Smith* may explain why it has never been endorsed (or even cited) by this circuit—and why it should not be followed now.

[10] Finally, the Funeral Home misreads binding precedent when it suggests that sex stereotyping violates Title VII *only* when "the employer's sex stereotyping resulted in 'disparate treatment of men and women.' " Appellee Br. at 18 (quoting *Price Waterhouse*, 490 U.S. at 251, 109 S.Ct. 1775).[3] This interpretation of Title VII cannot be squared with our holding in *Smith*. There, we did not ask whether transgender persons transitioning from male to female were treated differently than transgender persons transitioning from female to male. Rather, we considered whether a transgender person was being discriminated against based on "his failure to conform to sex stereotypes concerning how a man should look and behave." *Smith*, 378 F.3d at 572. It is apparent from both *Price Waterhouse* and *Smith* that an employer engages in unlawful discrimination even if it expects both biologically male and female employees to conform to certain notions of how each should behave. *See Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 123, No. 15-3775, 2018 WL 1040820 (2d Cir. Feb. 26, 2018) (en banc) (plurality) ("[T]he employer in *Price Waterhouse* could not have defended itself by claiming that it fired a gender-nonconforming man as well as a gender-non-conforming woman any more than it could persuasively argue that two wrongs make a right.").

In short, the Funeral Home's sex-specific dress code does not preclude liability under Title VII. Even if the Funeral Home's dress code does not itself violate Title VII—an issue that is not before this court—the Funeral Home may not rely on its policy to combat the charge that it engaged in improper sex stereotyping when it fired Stephens for wishing to appear or behave in a manner that contradicts the Funeral Home's perception of how she should appear or behave based on her sex. Because the EEOC has presented unrefuted evidence that unlawful sex stereotyping was "at least a motivating factor in the [Funeral Home's] actions," *see White v. Columbus Metro. Hous. Auth.*, 429 F.3d 232, 238 (6th Cir. 2005) (quoting *Jacklyn v. Schering-Plough Healthcare Prods. Sales Corp.*, 176 F.3d 921, 926 (6th Cir. 1999)), and because we reject the Funeral Home's affirmative defenses (*see* Section II.B.3, *infra*), we **GRANT** summary judgment to the EEOC on its sex discrimination claim.

2. Discrimination on the Basis of Transgender/Transitioning Status

[11, 12] We also hold that discrimination on the basis of transgender and tran-

3. *See also* Appellee Br. at 16 ("It is a helpful exercise to think about *Price Waterhouse* and imagine that there was a dress code imposed which obligated Ms. Hopkins to wear a skirt while her male colleagues were obliged to wear pants. Had she simply been fired for wearing pants rather than a skirt, the case would have ended there—both sexes would have been equally burdened by the requirement to comply with their respective sex-specific standard. But what the firm could not do was fire her for being aggressive or macho when it was tolerating or rewarding the behavior among men—and when it did, it relied on a stereotype to treat her disparately from the men in the firm.").

sitioning status violates Title VII. The district court rejected this theory of liability at the motion-to-dismiss stage, holding that "transgender or transsexual status is currently not a protected class under Title VII." *R.G. & G.R. Harris Funeral Homes, Inc.*, 100 F.Supp.3d at 598. The EEOC and Stephens argue that the district court's determination was erroneous because Title VII protects against sex stereotyping and "transgender discrimination is based on the non-conformance of an individual's gender identity and appearance with sex-based norms or expectations"; therefore, "discrimination because of an individual's transgender status is *always* based on gender-stereotypes: the stereotype that individuals will conform their appearance and behavior—whether their dress, the name they use, or other ways they present themselves—to the sex assigned them at birth." Appellant Br. at 24; *see also* Intervenor Br. at 10–15. The Funeral Home, in turn, argues that Title VII does not prohibit discrimination based on a person's transgender or transitioning status because "sex," for the purposes of Title VII, "refers to a binary characteristic for which there are only two classifications, male and female," and "which classification arises in a person based on their chromosomally driven physiology and reproductive function." Appellee Br. at 26. According to the Funeral Home, transgender status refers to "a person's self-assigned 'gender identity' " rather than a person's sex, and therefore such a status is not protected under Title VII. *Id.* at 26–27.

For two reasons, the EEOC and Stephens have the better argument. First, it is analytically impossible to fire an employee based on that employee's status as a transgender person without being motivated, at least in part, by the employee's sex. The Seventh Circuit's method of "isolat[ing] the significance of the plaintiff's sex to the employer's decision" to determine whether Title VII has been triggered illustrates this point. *See Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339, 345 (7th Cir. 2017). In *Hively*, the Seventh Circuit determined that Title VII prohibits discrimination on the basis of sexual orientation—a different question than the issue before this court—by asking whether the plaintiff, a self-described lesbian, would have been fired "if she had been a man married to a woman (or living with a woman, or dating a woman) and everything else had stayed the same." *Id.* If the answer to that question is no, then the plaintiff has stated a "paradigmatic sex discrimination" claim. *See id.* Here, we ask whether Stephens would have been fired if Stephens had been a woman who sought to comply with the women's dress code. The answer quite obviously is no. This, in and of itself, confirms that Stephens's sex impermissibly affected Rost's decision to fire Stephens.

[13, 14] The court's analysis in *Schroer v. Billington*, 577 F.Supp.2d 293 (D.D.C. 2008), provides another useful way of framing the inquiry. There, the court noted that an employer who fires an employee because the employee converted from Christianity to Judaism has discriminated against the employee "because of religion," regardless of whether the employer feels any animus against either Christianity or Judaism, because "[d]iscrimination 'because of religion' easily encompasses discrimination because of a *change* of religion.'" *Id.* at 306 (emphasis in original). By the same token, discrimination "because of sex" inherently includes discrimination against employees because of a change in their sex. *See id.* at 307–08.[4] Here, there is

4. Moreover, discrimination because of a person's transgender, intersex, or sexually inde-

evidence that Rost at least partially based his employment decision on Stephens's desire to change her sex: Rost justified firing Stephens by explaining that Rost "sincerely believes that 'the Bible teaches that a person's sex (whether male or female) is an immutable God-given gift and that it is wrong for a person to deny his or her God-given sex,' " and "the Bible teaches that it is wrong for a biological male to deny his sex by dressing as a woman." [5] *R.G. & G.R. Harris Funeral Homes, Inc.*, 201 F.Supp.3d at 848 (quoting R. 55 (Def.'s Statement of Facts ¶ 28) (Page ID #1687); R. 53-3 (Rost 30(b)(6) Dep. ¶ 44) (Page ID #936)). As amici point out in their briefing, such statements demonstrate that "Ms. Stephens's sex necessarily factored into the decision to fire her." Equality Ohio Br. at 12; *cf. Hively*, 853 F.3d at 359 (Flaum, J., concurring) (arguing discrimination against a female employee because she is a lesbian is necessarily "motivated, in part, by . . . the employee's sex" because the employer is discriminating against the employee "because she is (A) a woman who is (B) sexually attracted to women").

[15] The Funeral Home argues that *Schroer*'s analogy is "structurally flawed" because, unlike religion, a person's sex cannot be changed; it is, instead, a biologically immutable trait. Appellee Br. at 30. We need not decide that issue; even if true, the Funeral Home's point is immaterial. As noted above, the Supreme Court made clear in *Price Waterhouse* that Title VII requires "gender [to] be irrelevant to employment decisions." 490 U.S. at 240, 109 S.Ct. 1775. Gender (or sex) is not being treated as "irrelevant to employment decisions" if an employee's attempt or desire to change his or her sex leads to an adverse employment decision.

[16] Second, discrimination against transgender persons necessarily implicates Title VII's proscriptions against sex stereotyping. As we recognized in *Smith*, a transgender person is someone who "fails to act and/or identify with his or her gender"—i.e., someone who is inherently "gender non-conforming." 378 F.3d at 575; *see also id.* at 568 (explaining that transgender status is characterized by the American Psychiatric Association as "a disjunction between an individual's sexual organs and sexual identity"). Thus, an employer cannot discriminate on the basis of transgender status without imposing its stereotypical notions of how sexual organs and gender identity ought to align. There

terminate status is no less actionable than discrimination because of a person's identification with two religions, an unorthodox religion, or no religion at all. And ''religious identity'' can be just as fluid, variable, and difficult to define as ''gender identity''; after all, both have ''a deeply personal, internal genesis that lacks a fixed external referent.'' Sue Landsittel, *Strange Bedfellows? Sex, Religion, and Transgender Identity Under Title VII*, 104 NW. U. L. REV. 1147, 1172 (2010) (advocating for ''[t]he application of tests for religious identity to the problem of gender identity [because it] produces a more realistic, and therefore more appropriate, authentication framework than the current reliance on medical diagnoses and conformity with the gender binary'').

5. On the other hand, there is also evidence that Stephens was fired only because of her nonconforming appearance and behavior at work, and not because of her transgender identity. *See* R. 53-6 (Rost Dep. at 136–37) (Page ID #974) (At his deposition, when asked whether ''the reason you fired [Stephens], was it because [Stephens] claimed that he was really a woman; is that why you fired [Stephens] or was it because he claimed – or that he would no longer dress as a man,'' Rost answered: ''That he would no longer dress as a man,'' and when asked, ''if Stephens had told you that he believed that he was a woman, but would only present as a woman outside of work, would you have terminated him,'' Rost answered: ''No.'').

is no way to disaggregate discrimination on the basis of transgender status from discrimination on the basis of gender nonconformity, and we see no reason to try.

[17] We did not expressly hold in *Smith* that discrimination on the basis of transgender status is unlawful, though the opinion has been read to say as much—both by this circuit and others. In *G.G. v. Gloucester County School Board*, 654 Fed. Appx. 606 (4th Cir. 2016), for instance, the Fourth Circuit described *Smith* as holding "that discrimination against a transgender individual based on that person's transgender status is discrimination because of sex under federal civil rights statutes." *Id.* at 607. And in *Dodds v. United States Department of Education*, 845 F.3d 217 (6th Cir. 2016), we refused to stay "a preliminary injunction ordering the school district to treat an eleven-year old transgender girl as a female and permit her to use the girls' restroom" because, among other things, the school district failed to show that it would likely succeed on the merits. *Id.* at 220–21. In so holding, we cited *Smith* as evidence that this circuit's "settled law" prohibits "[s]ex stereotyping based on a person's gender non-conforming behavior," *id.* at 221 (second quote quoting *Smith*, 378 F.3d at 575), and then pointed to out-of-circuit cases for the propositions that "[a] person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes," *id.* (citing *Glenn v. Brumby*, 663 F.3d 1312, 1316 (11th Cir. 2011)), and "[t]he weight of authority establishes that discrimination based on transgender status is already prohibited by the language of federal civil rights statutes," *id.* (quoting *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 729 (4th Cir.) (Davis, J., concurring), *cert. granted in part*, —— U.S. ——, 137 S.Ct. 369, 196 L.Ed.2d 283 (2016), *and vacated and remanded*, —— U.S. ——, 137 S.Ct. 1239, 197 L.Ed.2d 460 (2017)).[6] Such references support what we now directly hold: Title VII protects transgender persons because of their transgender or transitioning status, because transgender or transitioning status constitutes an inherently gender non-conforming trait.

The Funeral Home raises several arguments against this interpretation of Title VII, none of which we find persuasive. First, the Funeral Home contends that the Congress enacting Title VII understood "sex" to refer only to a person's "physiology and reproductive role," and not a person's "self-assigned 'gender identity.' " Appellee Br. at 25–26. But the drafters' failure to anticipate that Title VII would cover transgender status is of little interpretive value, because "statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79, 118 S.Ct. 998, 140 L.Ed.2d 201 (1998); *see also Zarda*, 883 F.3d at 113–16 (majority opinion) (rejecting the argument that Title VII was not originally intended to protect employees against discrimination on the basis of sexual orientation, in part because the same argument "could also be said of multiple forms of discrimination that are [now] in-

6. We acknowledge that *Barnes v. City of Cincinnati*, 401 F.3d 729 (6th Cir. 2005), read *Smith* as focusing on "look and behav[ior]." *Id.* at 737 ("By alleging that his failure to conform to sex stereotypes concerning how a man should look and behave was the driving force behind defendant's actions, Smith stated a claim for relief pursuant to Title VII's prohibition of sex discrimination."). That is not surprising, however, given that only "look and behavior," not status, were at issue in *Barnes*.

disputably prohibited by Title VII ... [but] were initially believed to fall outside the scope of Title VII's prohibition," such as "sexual harassment and hostile work environment claims"). And in any event, *Smith* and *Price Waterhouse* preclude an interpretation of Title VII that reads "sex" to mean only individuals' "chromosomally driven physiology and reproductive function." *See* Appellee Br. at 26. Indeed, we criticized the district court in *Smith* for "relying on a series of pre-*Price Waterhouse* cases from other federal appellate courts holding that transsexuals, as a class, are not entitled to Title VII protection because 'Congress had a narrow view of sex in mind' and 'never considered nor intended that [Title VII] apply to anything other than the traditional concept of sex.' " 378 F.3d at 572 (quoting *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1085 (7th Cir. 1984)) (alteration in original). According to *Smith*, such a limited view of Title VII's protections had been "eviscerated by *Price Waterhouse*." *Id.* at 573, 109 S.Ct. 1775. The Funeral Home's attempt to resurrect the reasoning of these earlier cases thus runs directly counter to *Smith*'s holding.

[18–21] In a related argument, the Funeral Home notes that both biologically male and biologically female persons may consider themselves transgender, such that transgender status is not unique to one biological sex. Appellee Br. at 27–28. It is true, of course, that an individual's biological sex does not dictate her transgender status; the two traits are not coterminous. But a trait need not be exclusive to one sex to nevertheless be a function of sex. As the Second Circuit explained in *Zarda*,

> Title VII does not ask whether a particular sex is discriminated against; it asks whether a particular "*individual*" is discriminated against "because of such *individual's* ... sex." Taking individuals as the unit of analysis, the question is not whether discrimination is borne only by men or only by women or even by both men and women; instead, the question is whether an individual is discriminated against because of his or her sex.

883 F.3d at 123 n.23 (plurality opinion) (emphasis in original) (quoting 42 U.S.C. § 2000e-2(a)(1)). Because an employer cannot discriminate against an employee for being transgender without considering that employee's biological sex, discrimination on the basis of transgender status necessarily entails discrimination on the basis of sex—no matter what sex the employee was born or wishes to be. By the same token, an employer need not discriminate based on a trait common to all men or women to violate Title VII. After all, a subset of both women and men decline to wear dresses or makeup, but discrimination against any woman on this basis would constitute sex discrimination under *Price Waterhouse*. *See Hively*, 853 F.3d at 346 n.3 ("[T]he Supreme Court has made it clear that a policy need not affect *every* woman [or every man] to constitute sex discrimination. ... A failure to discriminate against all women does not mean that an employer has not discriminated against one woman on the basis of sex.").

Nor can much be gleaned from the fact that later statutes, such as the Violence Against Women Act, expressly prohibit discrimination on the basis of "gender identity," while Title VII does not, *see* Appellee Br. at 28, because "Congress may certainly choose to use both a belt and suspenders to achieve its objectives," *Hively*, 853 F.3d at 344; *see also Yates v. United States*, —— U.S. ——, 135 S.Ct. 1074, 1096, 191 L.Ed.2d 64 (2015) (Kagan, J., dissenting) (noting presence of two overlapping provisions in a statute "may

have reflected belt-and-suspenders caution"). We have, in fact, already read Title VII to provide redundant statutory protections in a different context. In *In re Rodriguez*, 487 F.3d 1001 (6th Cir. 2007), for instance, we recognized that claims alleging discrimination on the basis of ethnicity may fall within Title VII's prohibition on discrimination on the basis of national origin, *see id.* at 1006 n.1, even though at least one other federal statute treats "national origin" and "ethnicity" as separate traits, *see* 20 U.S.C. § 1092(f)(1)(F)(ii). Moreover, Congress's failure to modify Title VII to include expressly gender identity "lacks 'persuasive significance' because 'several equally tenable inferences' may be drawn from such inaction, 'including the inference that the existing legislation already incorporated the offered change.'" *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650, 110 S.Ct. 2668, 110 L.Ed.2d 579 (1990) (quoting *United States v. Wise*, 370 U.S. 405, 411, 82 S.Ct. 1354, 8 L.Ed.2d 590 (1962)). In short, nothing precludes discrimination based on transgender status from being viewed both as discrimination based on "gender identity" for certain statutes and, for the purposes of Title VII, discrimination on the basis of sex.

The Funeral Home places great emphasis on the fact that our published decision in *Smith* superseded an earlier decision that stated explicitly, as opposed to obliquely, that a plaintiff who "alleges discrimination based solely on his identification as a transsexual ... has alleged a claim of sex stereotyping pursuant to Title VII." *Smith v. City of Salem*, 369 F.3d 912, 922 (6th Cir.), *opinion amended and superseded*, 378 F.3d 566 (6th Cir. 2004). But such an amendment does not mean, as the Funeral Home contends, that the now-binding *Smith* opinion "directly rejected" the notion that Title VII prohibits discrimination on the basis of transgender status. *See* Appellee Br. at 31. The elimination of the language, which was not necessary to the decision, simply means that *Smith* did not expressly recognize Title VII protections for transgender persons based on identity. But *Smith*'s reasoning still leads us to the same conclusion.

We are also unpersuaded that our decision in *Vickers v. Fairfield Medical Center*, 453 F.3d 757 (6th Cir. 2006), precludes the holding we issue today. We held in *Vickers* that a plaintiff cannot pursue a claim for impermissible sex stereotyping on the ground that his perceived sexual orientation fails to conform to gender norms unless he alleges that he was discriminated against for failing to "conform to traditional gender stereotypes in any observable way at work." *Id.* at 764. *Vickers* thus rejected the notion that "the act of identification with a particular group, in itself, is sufficiently gender non-conforming such that an employee who so identifies would, by this very identification, engage in conduct that would enable him to assert a successful sex stereotyping claim." *Id.* The *Vickers* court reasoned that recognizing such a claim would impermissibly "bootstrap protection for sexual orientation into Title VII." *Id.* (quoting *Dawson v. Bumble & Bumble*, 398 F.3d 211, 218 (2d Cir. 2005)). The Funeral Home insists that, under *Vickers*, Stephens's sex-stereotyping claim survives only to the extent that it concerns her "appearance or mannerisms on the job," *see id.* at 763, but not as it pertains to her underlying status as a transgender person.

The Funeral Home is wrong. First, *Vickers* does not control this case because *Vickers* concerned a different legal question. As the EEOC and amici Equality Ohio note, *Vickers* "addressed only whether Title VII forbids sexual orientation discrimination, not discrimination against a transgender individual." Appellant Br. at

30; *see also* Equality Ohio Br. at 16 n.7. While it is indisputable that "[a] panel of this Court cannot overrule the decision of another panel" when the "prior decision [constitutes] controlling authority," *Darrah v. City of Oak Park*, 255 F.3d 301, 309 (6th Cir. 2001) (quoting *Salmi v. Sec'y of Health & Human Servs.*, 774 F.2d 685, 689 (6th Cir. 1985)), one case is not "controlling authority" over another if the two address substantially different legal issues, *cf. Int'l Ins. Co. v. Stonewall Ins. Co.*, 86 F.3d 601, 608 (6th Cir. 1996) (noting two panel decisions that "on the surface may appear contradictory" were reconcilable because "the result [in both cases wa]s heavily fact driven"). After all, we do not overrule a case by distinguishing it.

[22] Second, we are not bound by *Vickers* to the extent that it contravenes *Smith*. *See Darrah*, 255 F.3d at 310 ("[W]hen a later decision of this court conflicts with one of our prior published decisions, we are still bound by the holding of the earlier case."). As noted above, *Vickers* indicated that a sex-stereotyping claim is viable under Title VII only if a plaintiff alleges that he was discriminated against for failing to "conform to traditional gender stereotypes *in any observable way at work*." 453 F.3d at 764 (emphasis added). The *Vickers* court's new "observable-at-work" requirement is at odds with the holding in *Smith*, which did not limit sex-stereotyping claims to traits that are observable in the workplace. The "observable-at-work" requirement also contravenes our reasoning in *Barnes v. City of Cincinnati*, 401 F.3d 729 (6th Cir. 2005)—a binding decision that predated *Vickers* by more than a year—in which we held that a reasonable jury could conclude that a transgender plaintiff was discriminated against on the basis of his sex when, among other factors, his "ambiguous sexuality and his practice of dressing as a woman *outside of work* were well-known within the [workplace]." *Id.* at 738 (emphasis added).[7] From *Smith* and *Barnes*, it is clear that a plaintiff may state a claim under Title VII for discrimination based on gender nonconformance that is expressed outside of work. The *Vickers* court's efforts to develop a narrower rule are therefore not binding in this circuit.

Therefore, for the reasons set forth above, we hold that the EEOC could pursue a claim under Title VII on the ground that the Funeral Home discriminated against Stephens on the basis of her transgender status and transitioning identity. The EEOC should have had the opportunity, either through a motion for summary judgment or at trial, to establish that the Funeral Home violated Title VII's prohibition on discrimination on the basis of sex by firing Stephens because she was trans-

7. Oddly, the *Vickers* court appears to have recognized that its new "observable-at-work" requirement cannot be squared with earlier precedent. Immediately after announcing this new requirement, the *Vickers* court cited *Smith* for the proposition that "a plaintiff hoping to succeed on a claim of sex stereotyping [must] show that he 'fails to act *and/or identify with* his or her gender' "—a proposition that is necessarily broader than the narrow rule *Vickers* sought to announce. 453 F.3d at 764 (citing *Smith*, 378 F.3d at 575) (emphasis added). The *Vickers* court also seemingly recognized *Barnes* as binding authority, *see id.* (citing *Barnes*), but portrayed the decision as "affirming [the] district court's denial of defendant's motion for summary judgment as a matter of law on discrimination claim where pre-operative male-to-female transsexual was demoted based on his 'ambiguous sexuality and his practice of dressing as a woman' and his co-workers' assertions that he was 'not sufficiently masculine.' " *Id.* This summary is accurate as far as it goes, but it entirely omits the discussion in *Barnes* of discrimination against the plaintiff based on "his practice of dressing as a woman *outside of work*." 401 F.3d at 738 (emphasis added).

gender and transitioning from male to female.

3. Defenses to Title VII Liability

Having determined that the Funeral Home violated Title VII's prohibition on sex discrimination, we must now consider whether any defenses preclude enforcement of Title VII in this case. As noted above, the district court held that the EEOC's enforcement efforts must give way to the Religious Freedom Restoration Act ("RFRA"), which prohibits the government from enforcing a religiously neutral law against an individual if that law substantially burdens the individual's religious exercise and is not the least restrictive way to further a compelling government interest. *R.G. & G.R. Harris Funeral Homes, Inc.*, 201 F.Supp.3d at 857–64. The EEOC seeks reversal of this decision; the Funeral Home urges affirmance. In addition, certain amici ask us to affirm the district court's grant of summary judgment on different grounds—namely that Stephens falls within the "ministerial exception" to Title VII and is therefore not protected under the Act. *See* Public Advocate Br. at 20–24.

We hold that the Funeral Home does not qualify for the ministerial exception to Title VII; the Funeral Home's religious exercise would not be substantially burdened by continuing to employ Stephens without discriminating against her on the basis of sex stereotypes; the EEOC has established that it has a compelling interest in ensuring the Funeral Home complies with Title VII; and enforcement of Title VII is necessarily the least restrictive way to achieve that compelling interest. We therefore **REVERSE** the district court's grant of summary judgment in the Funeral Home's favor and **GRANT** summary judgment to the EEOC on the unlawful-termination claim.

a. Ministerial Exception

[23, 24] We turn first to the "ministerial exception" to Title VII, which is rooted in the First Amendment's religious protections, and which "preclude[s] application of [employment discrimination laws such as Title VII] to claims concerning the employment relationship between a religious institution and its ministers." *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 188, 132 S.Ct. 694, 181 L.Ed.2d 650 (2012). "[I]n order for the ministerial exception to bar an employment discrimination claim, the employer must be a religious institution and the employee must have been a ministerial employee." *Conlon v. InterVarsity Christian Fellowship/USA*, 777 F.3d 829, 833 (6th Cir. 2015) (quoting *Hollins v. Methodist Healthcare, Inc.*, 474 F.3d 223, 225 (6th Cir. 2007)). "The ministerial exception is a highly circumscribed doctrine. It grew out of the special considerations raised by the employment claims of clergy, which 'concern[ ] internal church discipline, faith, and organization, all of which are governed by ecclesiastical rule, custom, and law.' " *Gen. Conf. Corp. of Seventh-Day Adventists v. McGill*, 617 F.3d 402, 409 (6th Cir. 2010) (quoting *Hutchison v. Thomas*, 789 F.2d 392, 396 (6th Cir. 1986)) (alteration in original).

[25] Public Advocate of the United States and its fellow amici argue that the ministerial exception applies in this case because (1) the exception applies both to religious and non-religious entities, and (2) Stephens is a ministerial employee. Public Advocate Br. at 20–24. Tellingly, however, the Funeral Home contends that the Funeral Home "is not a religious organization" and therefore, "the ministerial exception has no application" to this case. Appellee Br. at 35. Although the Funeral Home has not waived the ministerial-ex-

ception defense by failing to raise it, *see Conlon*, 777 F.3d at 836 (holding that private parties may not "waive the First Amendment's ministerial exception" because "[t]his constitutional protection is . . . structural"), we agree with the Funeral Home that the exception is inapplicable here.

As we made clear in *Conlon*, the ministerial exception applies only to "religious institution[s]." *Id.* at 833. While an institution need not be "a church, diocese, or synagogue, or an entity operated by a traditional religious organization," *id.* at 834 (quoting *Hollins*, 474 F.3d at 225), to qualify for the exception, the institution must be "marked by clear or obvious religious characteristics," *id.* at 834 (quoting *Shaliehsabou v. Hebrew Home of Greater Wash., Inc.*, 363 F.3d 299, 310 (4th Cir. 2004)). In accordance with these principles, we have previously determined that the InterVarsity Christian Fellowship/USA ("IVCF"), "an evangelical campus mission," constituted a religious organization for the purposes of the ministerial exception. *See id.* at 831, 833. IVCF described itself on its website as "faith-based religious organization" whose "purpose 'is to establish and advance at colleges and universities witnessing communities of students and faculty who follow Jesus as Savior and Lord.' " *Id.* at 831 (citation omitted). In addition, IVCF's website notified potential employees that it has the right to "hir[e] staff based on their religious beliefs so that all staff share the same religious commitment." *Id.* (citation omitted). Finally, IVCF required all employees "annually [to] reaffirm their agreement with IVCF's Purpose Statement and Doctrinal Basis." *Id.*

The Funeral Home, by comparison, has virtually no "religious characteristics." Unlike the campus mission in *Conlon*, the Funeral Home does not purport or seek to "establish and advance" Christian values. *See id.* As the EEOC notes, the Funeral Home "is not affiliated with any church; its articles of incorporation do not avow any religious purpose; its employees are not required to hold any particular religious views; and it employs and serves individuals of all religions." Appellant Reply Br. at 33–34 (citing R. 61 (Def.'s Counter Statement of Disputed Facts ¶¶ 25–27, 30, 37) (Page ID #1832–35)). Though the Funeral Home's mission statement declares that "its highest priority is to honor God in all that we do as a company and as individuals," R. 55 (Def.'s Statement of Facts ¶ 21) (Page ID #1686), the Funeral Home's sole public displays of faith, according to Rost, amount to placing "Daily Bread" devotionals and "Jesus Cards" with scriptural references in public places in the funeral homes, which clients may pick up if they wish, *see* R. 51-3 (Rost 30(b)(6) Dep. at 39–40) (Page ID #652). The Funeral Home does not decorate its rooms with "religious figures" because it does not want to "offend[ ] people of different religions." R. 61 (Def.'s Counter Statement of Disputed Facts ¶ 33) (Page ID # 1834). The Funeral Home is open every day, including on Christian holidays. *Id.* at 88–89 (Page ID #659–60). And while the employees are paid for federally recognized holidays, Easter is not a paid holiday. *Id.* at 89 (Page ID #660).

[26] Nor is Stephens a "ministerial employee" under *Hosanna-Tabor*. Following *Hosanna-Tabor*, we have identified four factors to assist courts in assessing whether an employee is a minister covered by the exception: (1) whether the employee's title "conveys a religious—as opposed to secular—meaning"; (2) whether the title reflects "a significant degree of religious training" that sets the employee "apart from laypersons"; (3) whether the employee serves "as an ambassador of the faith"

and serves a "leadership role within [the] church, school, and community"; and (4) whether the employee performs "important religious functions . . . for the religious organization." *Conlon*, 777 F.3d at 834–35. Stephens's title—"Funeral Director"—conveys a purely secular function. The record does not reflect that Stephens has any religious training. Though Stephens has a public-facing role within the funeral home, she was not an "ambassador of [any] faith," and she did not perform "important religious functions," *see id.* at 835; rather, Rost's description of funeral directors' work identifies mostly secular tasks—making initial contact with the deceased's families, handling the removal of the remains to the funeral home, introducing other staff to the families, coaching the families through the first viewing, greeting the guests, and coordinating the families' "final farewell," R. 53-3 (Rost Aff. ¶¶ 14–33) (Page ID #930–35). The only responsibilities assigned to Stephens that could be construed as religious in nature were, "on limited occasions," to "facilitate" a family's clergy selection, "facilitate the first meeting of clergy and family members," and "play a role in building the family's confidence around the role the clergy will play, clarifying what type of religious message is desired, and integrating the clergy into the experience." *Id.* ¶ 20 (Page ID #932–33). Such responsibilities are a far cry from the duties ascribed to the employee in *Conlon*, which "included assisting others to cultivate 'intimacy with God and growth in Christ-like character through personal and corporate spiritual disciplines.' " 777 F.3d at 832. In short, Stephens was not a ministerial employee and the Funeral Home is not a religious institution, and therefore the ministerial exception plays no role in this case.

b. Religious Freedom Restoration Act

[27] Congress enacted RFRA in 1993 to resurrect and broaden the Free Exercise Clause jurisprudence that existed before the Supreme Court's decision in *Employment Division v. Smith*, 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990), which overruled the approach to analyzing Free Exercise Clause claims set forth by *Sherbert v. Verner*, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963). *See City of Boerne v. Flores*, 521 U.S. 507, 511–15, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997). To that end, RFRA precludes the government from "substantially burden[ing] a person's exercise of religion even if the burden results from a rule of general applicability," unless the government "demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb–1. RFRA thus contemplates a two-step burden-shifting analysis: First, a claimant must demonstrate that complying with a generally applicable law would substantially burden his religious exercise. Upon such a showing, the government must then establish that applying the law to the burdened individual is the least restrictive means of furthering a compelling government interest.

The questions now before us are whether (1) we ought to remand this case and preclude the Funeral Home from asserting a RFRA-based defense in the proceedings below because Stephens, a non-governmental party, joined this action as an intervenor on appeal; (2) if not, whether the Funeral Home adequately demonstrated that it would be substantially burdened by the application of Title VII in this case; (3) if so, whether the EEOC nevertheless demonstrated that application of a such a burden to the Funeral Home furthers a compelling governmental interest; and (4) if so, whether the application of such a

burden constitutes the least restrictive means of furthering that compelling interest. We address each inquiry in turn.

i. Applicability of the Religious Freedom Restoration Act

[28] We have previously made clear that "Congress intended RFRA to apply only to suits in which the government is a party." *Seventh-Day Adventists*, 617 F.3d at 410. Thus, if Stephens had initiated a private lawsuit against the Funeral Home to vindicate her rights under Title VII, the Funeral Home would be unable to invoke RFRA as a defense because the government would not have been party to the suit. *See id.* Now that Stephens has intervened in this suit, she argues that the case should be remanded to the district court with instructions barring the Funeral Home from asserting a RFRA defense to her individual claims. Intervenor Br. at 15. The EEOC supports Stephens's argument. EEOC Reply Br. at 31.

The Funeral Home, in turn, argues that the question of RFRA's applicability to Title VII suits between private parties "is a new and complicated issue that has never been a part of this case and has never been briefed by the parties." Appellee Br. at 34. Because Stephens's intervention on appeal was granted, in part, on her assurances that she "seeks only to raise arguments already within the scope of this appeal," D.E. 23 (Stephens Reply in Support of Mot. to Intervene at 8); *see also* D.E. 28-2 (March 27, 2017 Order at 2), the Funeral Home insists that permitting Stephens to argue now in favor of remand "would immensely prejudice the Funeral Home and undermine the Court's reasons for allowing Stephens's intervention in the first place," Appellee Br. at 34–35 (citing *Illinois Bell Tel. v. FCC*, 911 F.2d 776, 786 (D.C. Cir. 1990)).

The Funeral Home is correct. Stephens's reply brief in support of her motion to intervene insists that "no party to an appeal may broaden the scope of litigation beyond the issues raised before the district court." D.E. 23 (Stephens Reply in Support of Mot. to Intervene at 8) (citing *Thomas v. Arn*, 474 U.S. 140, 148, 106 S.Ct. 466, 88 L.Ed.2d 435 (1985)). Though the district court noted in a footnote that "the Funeral Home could not assert a RFRA defense if Stephens had filed a Title VII suit on Stephens's own behalf," *R.G. & G.R. Harris Funeral Homes, Inc.*, 201 F.Supp.3d at 864 n.23, this argument was not briefed by the parties at the district-court level. Thus, in accordance with Stephens's own brief, she should not be permitted to argue for remand before this court.

Stephens nevertheless insists that "intervenors ... are permitted to present different arguments related to the principal parties' claims." Intervenor Reply Br. at 14 (citing *Grutter v. Bollinger*, 188 F.3d 394, 400–01 (6th Cir. 1999)). But in *Grutter*, this court determined that proposed intervenors ought to be able to present particular "defenses of affirmative action" that the principal party to the case (a university) might be disinclined to raise because of "internal and external institutional pressures." 188 F.3d at 400. Allowing intervenors to present particular defenses on the merits to judiciable claims is different than allowing intervenors to change the procedural course of litigation by virtue of their intervention.

[29] Moreover, we typically will not consider issues raised for the first time on appeal unless they are "presented with sufficient clarity and completeness and [their] resolution will materially advance the process of th[e] ... litigation." *Pinney Dock & Transp. Co. v. Penn Cent. Corp.*, 838 F.2d 1445, 1461 (6th Cir. 1988) (cita-

tion omitted). The merits of a remand have been addressed only in passing by the parties, and thus have not been discussed with "sufficient clarity and completeness" to enable us to entertain Stephens's claim.[8]

ii. Prima Facie Case Under RFRA

[30, 31] To assert a viable defense under RFRA, a religious claimant must demonstrate that the government action at issue "would (1) substantially burden (2) a sincere (3) religious exercise." *Gonzales v. O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418, 428, 126 S.Ct. 1211, 163 L.Ed.2d 1017 (2006). In reviewing such a claim, courts must not evaluate whether asserted "religious beliefs are mistaken or insubstantial." *Burwell v. Hobby Lobby Stores, Inc.*, —— U.S. ——, 134 S.Ct. 2751, 2779, 189 L.Ed.2d 675 (2014). Rather, courts must assess "whether the line drawn reflects 'an honest conviction.' " *Id.* (quoting *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 716, 101 S.Ct. 1425, 67 L.Ed.2d 624 (1981)). In addition, RFRA, as amended by the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), protects "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000cc-5(7)(A).

[32] The EEOC argues that the Funeral Home's RFRA defense must fail because "RFRA protects religious exercise, not religious beliefs," Appellant Br. at 41, and the Funeral Home has failed to "identif[y] how continuing to employ Stephens after, or during, her transition would interfere with any religious 'action or practice,' " *id.* at 43 (quoting *Kaemmerling v. Lappin*, 553 F.3d 669, 679 (D.C. Cir. 2008)). The Funeral Home, in turn, contends that the "very operation of [the Funeral Home] constitutes protected religious exercise" because Rost feels compelled by his faith to "serve grieving people" through the funeral home, and thus "[r]equiring [the Funeral Home] to authorize a male funeral director to wear the uniform for female funeral directors would directly interfere with—and thus impose a substantial burden on—[the Funeral Home's] ability to carry out Rost's religious exercise of caring for the grieving." Appellee Br. at 38.

If we take Rost's assertions regarding his religious beliefs as sincere, which all parties urge us to do, then we must treat Rost's running of the funeral home as a religious exercise—even though Rost does not suggest that ministering to grieving mourners by operating a funeral home is a tenet of his religion, more broadly. *See United States v. Sterling*, 75 M.J. 407, 415 (C.A.A.F. 2016) (noting that conduct that "was claimed to be religiously motivated at least in part ... falls within RFRA's expansive definition of 'religious exercise' "), *cert. denied*, —— U.S. ——, 137 S.Ct. 2212, 198 L.Ed.2d 657 (2017). The question then

8. For a similar reason, we decline to consider the argument raised by several amici that reading RFRA to "permit a religious accommodation that imposes material costs on third parties or interferes with the exercise of rights held by others" would violate the Establishment Clause of the First Amendment. *See* Private Rights/Public Conscience Br. at 15; *see also id.* at 5–15; Americans United Br. at 6–15. Amici may not raise "issues or arguments [that] ... 'exceed those properly raised by the parties.' " *Shoemaker v. City of Howell*, 795 F.3d 553, 562 (6th Cir. 2015) (quoting *Cellnet Commc'ns, Inc. v. FCC*, 149 F.3d 429, 433 (6th Cir. 1998)). Although Stephens notes that the Establishment Clause "requires the government and courts to account for the harms a religious exemption to Title VII would impose on employees," Intervenor Br. at 26, no party to this action presses the broad constitutional argument that amici seek to present. We therefore will not address the merits of amici's position.

becomes whether the Funeral Home has identified any way in which continuing to employ Stephens would substantially burden Rost's ability to serve mourners. The Funeral Home purports to identify two burdens. "First, allowing a funeral director to wear the uniform for members of the opposite sex would often create distractions for the deceased's loved ones and thereby hinder their healing process (and [the Funeral Home's] ministry)," and second, "forcing [the Funeral Home] to violate Rost's faith ... would significantly pressure Rost to leave the funeral industry and end his ministry to grieving people." Appellee Br. at 38. Neither alleged burden is "substantial" within the meaning of RFRA.

The Funeral Home's first alleged burden—that Stephens will present a distraction that will obstruct Rost's ability to serve grieving families—is premised on presumed biases. As the EEOC observes, the Funeral Home's argument is based on "a view that Stephens is a 'man' and would be perceived as such even after her gender transition," as well as on the "assumption that a transgender funeral director would so disturb clients as to 'hinder healing.'" Appellant Reply Br. at 19. The factual premises underlying this purported burden are wholly unsupported in the record. Rost testified that he has never seen Stephens in anything other than a suit and tie and does not know how Stephens would have looked when presenting as a woman. R. 54-5 (Rost 30(b)(6) Dep. at 60–61) (Page ID #1362). Rost's assertion that he believes his clients would be disturbed by Stephens's appearance during and after her transition to the point that their healing from their loved ones' deaths would be hindered, *see* R. 55 (Def.'s Statement of Facts ¶ 78) (Page ID #1697), at the very least raises a material question of fact as to whether his clients would actually be distracted, which cannot be resolved in the Funeral Home's favor at the summary-judgment stage. *See Tree of Life Christian Sch. v. City of Upper Arlington*, 823 F.3d 365, 371–72 (6th Cir. 2016) (holding that this court "cannot *assume* ... a fact" at the summary judgment stage); *see also Guess? Inc. v. United States*, 944 F.2d 855, 858 (Fed. Cir. 1991) (in case where manufacturer's eligibility for certain statutory refund on import tariffs turned on whether foreign customers preferred U.S.-made jeans more than foreign-made jeans, court held that the manufacturer's averred *belief* regarding foreign customers' preferences was not conclusive; instead, there remained a genuine dispute of material fact as to foreign customers' *actual* preferences). Thus, even if we were to find the Funeral Home's argument legally cognizable, we would not affirm a finding of substantial burden based on a contested and unsupported assertion of fact.

[33] But more to the point, we hold as a matter of law that a religious claimant cannot rely on customers' presumed biases to establish a substantial burden under RFRA. Though we have seemingly not had occasion to address the issue, other circuits have considered whether and when to account for customer biases in justifying discriminatory employment practices. In particular, courts asked to determine whether customers' biases may render sex a "bona fide occupational qualification" under Title VII have held that "it would be totally anomalous ... to allow the preferences and prejudices of the customers to determine whether the sex discrimination was valid." *Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d 385, 389 (5th Cir. 1971); *see also Bradley v. Pizzaco of Nebraska, Inc.*, 7 F.3d 795, 799 (8th Cir. 1993) (holding grooming policy for pizza deliverymen that had disparate impact on African-American employees was not justified by customer preferences for clean-

shaven deliverymen because "[t]he existence of a beard on the face of a delivery man does not affect in any manner Domino's ability to make or deliver pizzas to their customers"); *Fernandez v. Wynn Oil Co.*, 653 F.2d 1273, 1276 (9th Cir. 1981) (rejecting claim that promoting a female employee would " 'destroy the essence' of [the defendant's] business"—a theory based on the premise that South American clients would not want to work with a female vice-president—because biased customer preferences did not make being a man a "bona fide occupational qualification" for the position at issue). District courts within this circuit have endorsed these out-of-circuit opinions. *See, e.g.*, *Local 567 Am. Fed'n of State, Cty., & Mun. Emps. v. Mich. Council 25, Am. Fed'n of State, Cty., & Mun. Emps.*, 635 F.Supp. 1010, 1012 (E.D. Mich. 1986) (citing *Diaz*, 442 F.2d 385, and *Weeks v. Southern Bell Telephone & Telegraph Co.*, 408 F.2d 228 (5th Cir. 1969), for the proposition that "[a]ssertions of sex-based employee classification cannot be made on the basis of stereotypes or customer preferences").

Of course, cases like *Diaz*, *Fernandez*, and *Bradley* concern a different situation than the one at hand. We could agree that courts should not credit customers' prejudicial notions of what men and women can do when considering whether sex constitutes a "bona fide occupational qualification" for a given position while nonetheless recognizing that those same prejudices have practical effects that would substantially burden Rost's religious practice (i.e., the operation of his business) in this case. But the Ninth Circuit rejected similar reasoning in *Fernandez*, and we reject it here. In *Fernandez*, the Ninth Circuit held that customer preferences could not transform a person's gender into a relevant consideration for a particular position *even if* the record supported the idea that the employer's business would suffer from promoting a woman because a large swath of clients would refuse to work with a female vice-president. *See* 653 F.2d at 1276–77. Just as the *Fernandez* court refused to treat discriminatory promotion practices as critical to an employer's business, notwithstanding any evidence to that effect in the record, so too we refuse to treat discriminatory policies as essential to Rost's business—or, by association, his religious exercise.

[34] The Funeral Home's second alleged burden also fails. Under *Holt v. Hobbs*, —— U.S. ——, 135 S.Ct. 853, 190 L.Ed.2d 747 (2015), a government action that "puts [a religious practitioner] to th[e] choice" of " 'engag[ing] in conduct that seriously violates [his] religious beliefs' [or] . . . fac[ing] serious" consequences constitutes a substantial burden for the purposes of RFRA. *See id.* at 862 (quoting *Hobby Lobby*, 134 S.Ct. at 2775). Here, Rost contends that he is being put to such a choice, as he either must "purchase female attire" for Stephens or authorize her "to dress in female attire *while representing* [the Funeral Home] and serving the bereaved," which purportedly violates Rost's religious beliefs, or else face "significant[ ] pressure . . . to leave the funeral industry and end his ministry to grieving people." Appellee Br. at 38–39 (emphasis in original). Neither of these purported choices can be considered a "substantial burden" under RFRA.

First, though Rost currently provides his male employees with suits and his female employees with stipends to pay for clothing, this benefit is not legally required and Rost does not suggest that the benefit is religiously compelled. *See* Appellant Br. at 49 ("[T]he EEOC's suit would require only that *if* Rost provides a clothing benefit to his male employees, he provide a comparable benefit (which could be in-kind, or in cash) to his female employ-

ees."); R. 54-2 (Rost Aff.) (Page ID 1326–37) (no suggestion that clothing benefit is religiously motivated). In this regard, Rost is unlike the employers in *Hobby Lobby*, who rejected the idea that they could simply refuse to provide health care altogether and pay the associated penalty (which would allow them to avoid providing access to contraceptives in violation of their beliefs) because they felt religiously compelled to provide their employees with health insurance. *See* 134 S.Ct. at 2776. And while "it is predictable that the companies [in *Hobby Lobby*] would face a competitive disadvantage in retaining and attracting skilled workers" if they failed to provide health insurance, *id.* at 2777, the record here does not indicate that the Funeral Home's clothing benefit is necessary to attract workers; in fact, until the EEOC commenced the present action, the Funeral Home did not provide any sort of clothing benefit to its female employees. Thus, Rost is not being forced to choose between providing Stephens with clothing or else leaving the business; this is a predicament of Rost's own making.

Second, simply permitting Stephens to wear attire that reflects a conception of gender that is at odds with Rost's religious beliefs is not a substantial burden under RFRA. We presume that the "line [Rost] draw[s]"—namely, that permitting Stephens to represent herself as a woman would cause him to "violate God's commands" because it would make him "directly involved in supporting the idea that sex is a changeable social construct rather than an immutable God-given gift," R. 54-2 (Rost Aff. ¶¶ 43, 45) (Page ID #1334–35)—constitutes "an honest conviction." *See Hobby Lobby*, 134 S.Ct. at 2779 (quoting *Thomas*, 450 U.S. at 716, 101 S.Ct. 1425). But we hold that, as a matter of law, tolerating Stephens's understanding of her sex and gender identity is not tantamount to supporting it.

Most circuits, including this one, have recognized that a party can sincerely believe that he is being coerced into engaging in conduct that violates his religious convictions without actually, as a matter of law, being so engaged. Courts have recently confronted this issue when non-profit organizations whose religious beliefs prohibit them "from paying for, providing, or facilitating the distribution of contraceptives," or in any way "be[ing] complicit in the provision of contraception" argued that the Affordable Care Act's opt-out procedure—which enables organizations with religious objections to the contraceptive mandate to avoid providing such coverage by either filling out a form certifying that they have a religious objection to providing contraceptive coverage or directly notifying the Department of Health and Human Services of the religious objection—substantially burdens their religious practice. *See Eternal Word Television Network, Inc. v. Sec'y of U.S. Dep't of Health & Human Servs.*, 818 F.3d 1122, 1132–33, 1143 (11th Cir. 2016).

Eight of the nine circuits to review the issue, including this court, have determined that the opt-out process does not constitute a substantial burden. *See id.* at 1141 (collecting cases); *see also Mich. Catholic Conf. & Catholic Family Servs. v. Burwell*, 807 F.3d 738 (6th Cir. 2015), *cert. granted, judgment vacated sub nom. Mich. Catholic Conf. v. Burwell*, —— U.S. ——, 136 S.Ct. 2450, 195 L.Ed.2d 261 (2016).[9] The courts reached this conclusion by examining the Affordable Care Act's provisions and determining that it was the statute—and not the employer's act of opting out—that "entitle[d] plan participants and

9. Though a number of these decisions have been vacated on grounds that are not relevant to this case, their reasoning remains useful here.

beneficiaries to contraceptive coverage." *See, e.g.*, *Eternal Word*, 818 F.3d at 1148–49. As a result, the employers' engagement with the opt-out process, though legally significant in that it leads the government to provide the organizations' employees with access to contraceptive coverage through an alternative route, does not mean the employers are facilitating the provision of contraceptives in a way that violates their religious practice. *See id.*

We view the Funeral Home's compliance with antidiscrimination laws in much the same light. Rost may sincerely believe that, by retaining Stephens as an employee, he is supporting and endorsing Stephens's views regarding the mutability of sex. But as a matter of law, bare compliance with Title VII—without actually assisting or facilitating Stephens's transition efforts—does not amount to an endorsement of Stephens's views. As much is clear from the Supreme Court's Free Speech jurisprudence, in which the Court has held that a statute requiring law schools to provide military and nonmilitary recruiters an equal opportunity to recruit students on campus was not improperly compelling schools to endorse the military's policies because "[n]othing about recruiting suggests that law schools agree with any speech by recruiters," and "students can appreciate the difference between speech a school sponsors and speech the school permits because legally required to do so, pursuant to an equal access policy." *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 65, 126 S.Ct. 1297, 164 L.Ed.2d 156 (2006) (citing *Bd. of Ed. of Westside Cmty. Schs. (Dist. 66) v. Mergens*, 496 U.S. 226, 250, 110 S.Ct. 2356, 110 L.Ed.2d 191 (1990) (plurality opinion)); *see also Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 841–42, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995) (being required to provide funds on an equal basis to religious as well as secular student publications does not constitute state university's support for students' religious messages). Similarly, here, requiring the Funeral Home to refrain from firing an employee with different religious views from Rost does not, as a matter of law, mean that Rost is endorsing or supporting those views. Indeed, Rost's own behavior suggests that he sees the difference between employment and endorsement, as he employs individuals of any or no faith, "permits employees to wear Jewish head coverings for Jewish services," and "even testified that he is *not* endorsing his employee's religious beliefs by employing them." Appellant Reply Br. at 18–19 (citing R. 61 (Def.'s Counter Statement of Disputed Facts ¶¶ 31, 37, 38) (Page ID #1834–36); R. 51-3 (Rost Dep. at 41–42) (Page ID #653)).[10]

At bottom, the fact that Rost sincerely believes that he is being compelled to make such an endorsement does not make it so. *Cf. Eternal Word*, 818 F.3d at 1145 ("We reject a framework that takes away from courts the responsibility to decide what action the government requires and leaves that answer entirely to the religious adherent. Such a framework improperly substitutes religious belief for legal analysis regarding the operation of federal law."). Accordingly, requiring Rost to comply with Title VII's proscriptions on dis-

10. Even ignoring any adverse inferences that might be drawn from the incongruity between Rost's earlier deposition testimony and the Funeral Home's current litigation position, as we must do when considering whether summary judgment is appropriate in the EEOC's favor, we conclude as a matter of law that Rost does not express "support[ ] [for] the idea that sex is a changeable social construct rather than an immutable God-given gift" by continuing to hire Stephens, *see* R. 54-2 (Rost Aff. ¶¶ 43, 45) (Page ID #1334–35)—even if Rost sincerely believes otherwise.

crimination does not substantially burden his religious practice. The district court therefore erred in granting summary judgment to the Funeral Home on the basis of its RFRA defense, and we **REVERSE** the district court's decision on this ground. As Rost's purported burdens are insufficient as a matter of law, we **GRANT** summary judgment to the EEOC with respect to the Funeral Home's RFRA defense.

iii. Strict Scrutiny Test

Because the Funeral Home has not established that Rost's religious exercise would be substantially burdened by requiring the Funeral Home to comply with Title VII, we do not need to consider whether the EEOC has adequately demonstrated that enforcing Title VII in this case is the least restrictive means of furthering a compelling government interest. However, in the interest of completeness, we reach this issue and conclude that the EEOC has satisfied its burden. We therefore **GRANT** summary judgment to the EEOC with regard to the Funeral Home's RFRA defense on the alternative grounds that the EEOC's enforcement action in this case survives strict scrutiny.

(a) Compelling Government Interest

[35, 36] Under the "to the person" test, the EEOC must demonstrate that its compelling interest "is satisfied through application of the challenged law [to] ... the particular claimant whose sincere exercise of religion is being substantially burdened." *Gonzales*, 546 U.S. at 430–31, 126 S.Ct. 1211 (citing 42 U.S.C. § 2000bb–1(b)). This requires "look[ing] beyond broadly formulated interests justifying the general applicability of government mandates and scrutiniz[ing] the asserted harm of granting specific exemptions to particular religious claimants." *Id.* at 431, 126 S.Ct. 1211.

[37] As an initial matter, the Funeral Home does not seem to dispute that the EEOC "has a compelling interest in the 'elimination of workplace discrimination, including sex discrimination.' " Appellee Br. at 41 (quoting Appellant Br. at 51).[11] However, the Funeral Home criticizes the EEOC for "cit[ing] a general, broadly formulated interest" to support enforcing Title VII in this case. *Id.* According to the Funeral Home, the relevant inquiry is whether the EEOC has a "specific interest in forcing [the Funeral Home] to allow its male funeral directors to wear the uniform for female funeral directors while on the job." *Id.* The EEOC instead asks whether its interest in "eradicating employment discrimination" is furthered by ensuring that Stephens does not suffer discrimination (either on the basis of sex-stereotyping or her transgender status), lose her livelihood, or face the emotional pain and suffering of being effectively told "that as a transgender woman she is not valued or able to make workplace contributions." Appellant Br. at 52, 54 (citing *Lusardi v. McHugh*, EEOC DOC 0120133395, 2015 WL 1607756, at *1 (E.E.O.C. Apr. 1, 2015)). Stephens similarly argues that "Title VII serves a compelling interest in eradicating all the forms of invidious employment discrimination proscribed by the statute," and points to studies demonstrating that transgender people have experienced particularly high rates of "bodily harm, violence, and discrimination because of their transgender status." Intervenor Br. at 21, 23–25.

11. While the district court did not hold that the EEOC had conclusively established the "compelling interest" element of its opposition to the Funeral Home's RFRA defense, it assumed so arguendo. *See R.G. & G.R. Harris Funeral Homes, Inc.*, 201 F.Supp.3d at 857–59.

The Funeral Home's construction of the compelling-interest test is off-base. Rather than focusing on the EEOC's claim—that the Funeral Home terminated Stephens because of her proposed gender nonconforming behavior—the Funeral Home's test focuses instead on its defense (discussed above) that the Funeral Home merely wishes to enforce an appropriate workplace uniform. But the Funeral Home has not identified any cases where the government's compelling interest was framed as its interest in disturbing a company's workplace policies. For instance, in *Hobby Lobby*, the issue, which the Court ultimately declined to adjudicate, was whether the government's "interest in guaranteeing cost-free access to the four challenged contraceptive methods" was compelling—not whether the government had a compelling interest in requiring closely held organizations to act in a way that conflicted with their religious practice. *See* 134 S.Ct. at 2780.

The Supreme Court's analysis in cases like *Wisconsin v. Yoder*, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972), and *Holt* guides our approach. In those cases, the Court ultimately determined that the interests *generally* served by a given government policy or statute would not be "compromised" by granting an exemption to a particular individual or group. *See Holt*, 135 S.Ct. at 863. Thus, in *Yoder*, the Court held that the interests furthered by the government's requirement of compulsory education for children through the age of sixteen (i.e., "to prepare citizens to participate effectively and intelligently in our open political system" and to "prepare[ ] individuals to be self-reliant and self-sufficient participants in society") were not harmed by granting an exemption to the Amish, who do not need to be prepared "for life in modern society" and whose own traditions adequately ensure self-sufficiency. 406 U.S. at 221–22, 92 S.Ct. 1526. Similarly, in *Holt*, the Court recognized that the Department of Corrections has a compelling interest in preventing prisoners from hiding contraband on their persons, which is generally effectuated by requiring prisoners to adhere to a strict grooming policy, but the Court failed to see how the Department's "compelling interest in staunching the flow of contraband into and within its facilities . . . would be seriously compromised by allowing an inmate to grow a ½-inch beard." 135 S.Ct. at 863.

[38] Here, the same framework leads to the opposite conclusion. Failing to enforce Title VII against the Funeral Home means the EEOC would be allowing a particular person—Stephens—to suffer discrimination, and such an outcome is directly contrary to the EEOC's compelling interest in combating discrimination in the workforce. *See, e.g.*, *United States v. Burke*, 504 U.S. 229, 238, 112 S.Ct. 1867, 119 L.Ed.2d 34 (1992) ("[I]t is beyond question that discrimination in employment on the basis of sex . . . is, as . . . this Court consistently has held, an invidious practice that causes grave harm to its victims.").[12] In this regard, this case is

12. Courts have repeatedly acknowledged that Title VII serves a compelling interest in eradicating all forms of invidious employment discrimination proscribed by the statute. *See, e.g., EEOC v. Miss. Coll.*, 626 F.2d 477, 488–89 (5th Cir. 1980). As the Supreme Court stated, the "stigmatizing injury" of discrimination, "and the denial of equal opportunities that accompanies it, is surely felt as strongly by persons suffering discrimination on the basis of their sex as by those treated differently because of their race." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 625, 104 S.Ct. 3244, 82 L.Ed.2d 462 (1984); *see also EEOC v. Pac. Press Publ'g Ass'n*, 676 F.2d 1272, 1280 (9th Cir. 1982) ("By enacting Title VII, Congress clearly targeted the elimination of all forms of discrimination as a 'highest priority.' Con-

analogous to *Eternal Word*, in which the Eleventh Circuit determined that the government had a compelling interest in requiring a particular nonprofit organization with religious objections to the Affordable Care Act's contraceptive mandate to follow the procedures associated with obtaining an accommodation to the Act because

> applying the accommodation procedure *to the plaintiffs in these cases* furthers [the government's] interests because the accommodation ensures that the plaintiffs' female plan participants and beneficiaries—who may or may not share the same religious beliefs as their employer—have access to contraception without cost sharing or additional administrative burdens as the ACA requires.

818 F.3d at 1155 (emphasis added). The *Eternal Word* court reasoned that "[u]nlike the exception made in *Yoder* for Amish children," who would be adequately prepared for adulthood even without compulsory education, the "poor health outcomes related to unintended or poorly timed pregnancies apply to the plaintiffs' female plan participants or beneficiaries and their children just as they do to the general population." *Id.* Similarly, here, the EEOC's compelling interest in eradicating discrimination applies with as much force to Stephens as to any other employee discriminated against based on sex.

It is true, of course, that the specific harms the EEOC identifies in this case, such as depriving Stephens of her livelihood and harming her sense of self-worth, are simply permutations of the generic harm that is always suffered in employment discrimination cases. But *O Centro*'s "to the person" test does not mean that the government has a compelling interest in enforcing the laws only when the failure to enforce would lead to uniquely harmful consequences. Rather, the question is whether "the asserted harm of granting specific exemptions to particular religious claimants" is sufficiently great to require compliance with the law. *O Centro*, 546 U.S. at 431, 126 S.Ct. 1211. Here, for the reasons stated above, the EEOC has adequately demonstrated that Stephens has and would suffer substantial harm if we exempted the Funeral Home from Title VII's requirements.

Finally, we reject the Funeral Home's claim that it should receive an exemption, notwithstanding any harm to Stephens or the EEOC's interest in eradicating discrimination, because "the constitutional guarantee of free exercise[,] effectuated here via RFRA ... [,] is a higher-order right that necessarily supersedes a conflicting statutory right," Appellee Br. at 42. This point warrants little discussion. The Supreme Court has already determined that RFRA does not, in fact, "effectuate ... the First Amendment's guarantee of free exercise," *id.*, because it sweeps more broadly than the Constitution demands. *See Boerne*, 521 U.S. at 532, 117 S.Ct. 2157. And in any event, the Supreme Court has expressly recognized that compelling interests can, at times, override religious beliefs—even those that are squarely protected by the Free Exercise Clause. *See Cutter v. Wilkinson*, 544 U.S. 709, 722, 125 S.Ct. 2113, 161 L.Ed.2d 1020 (2005) ("We do not read RLUIPA to elevate accommodation of religious observances over an institution's need to maintain order and safety. Our decisions indicate that an accommodation must be measured so that it does not override oth-

gress' purpose to end discrimination is equally if not more compelling than other interests that have been held to justify legislation that burdened the exercise of religious convictions."), *abrogation on other grounds recognized by Am. Friends Serv. Comm. Corp. v. Thornburgh*, 951 F.2d 957, 960 (9th Cir. 1991).

er significant interests."). We therefore decline to hoist automatically Rost's religious interests above other compelling governmental concerns. The undisputed record demonstrates that Stephens has been and would be harmed by the Funeral Home's discriminatory practices in this case, and the EEOC has a compelling interest in eradicating and remedying such discrimination.

(b) Least Restrictive Means

[39–41] The final inquiry under RFRA is whether there exist "other means of achieving [the government's] desired goal without imposing a substantial burden on the exercise of religion by the objecting part[y]." *Hobby Lobby*, 134 S.Ct. at 2780 (citing 42 U.S.C. §§ 2000bb-1(a), (b)). "The least-restrictive-means standard is exceptionally demanding," *id.* (citing *Boerne*, 521 U.S. at 532, 117 S.Ct. 2157), and the EEOC bears the burden of showing that burdening the Funeral Home's religious exercise constitutes the least restrictive means of furthering its compelling interests, *see id.* at 2779. Where an alternative option exists that furthers the government's interest "equally well," *see id.* at 2782, the government "must use it," *Holt*, 135 S.Ct. at 864 (quoting *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 815, 120 S.Ct. 1878, 146 L.Ed.2d 865 (2000)). In conducting the least-restrictive-alternative analysis, "courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries." *Hobby Lobby*, 134 S.Ct. at 2781 n.37 (quoting *Cutter*, 544 U.S. at 720, 125 S.Ct. 2113). Cost to the government may also be "an important factor in the least-restrictive-means analysis." *Id.* at 2781.

[42] The district court found that requiring the Funeral Home to adopt a gender-neutral dress code would constitute a less restrictive alternative to enforcing Title VII in this case, and granted the Funeral Home summary judgment on this ground. According to the district court, the Funeral Home engaged in illegal sex stereotyping only with respect to "the clothing Stephens [c]ould wear at work," and therefore a gender-neutral dress code would resolve the case because Stephens would not be forced to dress in a way that conforms to Rost's conception of Stephens's sex and Rost would not be compelled to authorize Stephens to dress in a way that violates Rost's religious beliefs. *R.G. & G.R. Harris Funeral Homes, Inc.*, 201 F.Supp.3d at 861, 863.

Neither party endorses the district court's proposed alternative, and for good reason. The district court's suggestion, although appealing in its tidiness, is tenable only if we excise from the case evidence of sex stereotyping in areas other than attire. Though Rost does repeatedly say that he terminated Stephens because she "wanted to *dress* as a woman" and "would no longer *dress* as a man," *see* R. 54-5 (Rost 30(b)(6) Dep. at 136–37) (Page ID #1372) (emphasis added), the record also contains uncontroverted evidence that Rost's reasons for terminating Stephens extended to other aspects of Stephens's intended presentation. For instance, Rost stated that he fired Stephens because Stephens "was no longer going to *represent himself* as a man," *id.* at 136 (Page ID #1372) (emphasis added), and Rost insisted that Stephens presenting as a female would disrupt clients' healing process because female clients would have to "share a bathroom with a man dressed up as a woman," *id.* at 74, 138–39 (Page ID #1365, 1373). The record thus compels the finding that Rost's concerns extended beyond Stephens's attire and reached Stephens's appearance and behavior more generally.

At the summary-judgment stage, where a court may not "make credibility determi-

nations, weigh the evidence, or draw [adverse] inferences from the facts," *Terry Barr Sales Agency, Inc. v. All-Lock Co.*, 96 F.3d 174, 178 (6th Cir. 1996) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)), the district court was required to account for the evidence of Rost's non-clothing-based sex stereotyping in determining whether a proposed less restrictive alternative furthered the government's "stated interests equally [as] well," *Hobby Lobby*, 134 S.Ct. at 2782. Here, as the evidence above shows, merely altering the Funeral Home's dress code would not address the discrimination Stephens faced because of her broader desire "to represent [her]self as a [wo]man." R. 54-5 (Rost 30(b)(6) Dep. at 136) (Page ID #1372). Indeed, the Funeral Home's counsel conceded at oral argument that Rost would have objected to Stephens's coming "to work presenting clearly as a woman and acting as a woman," regardless of whether Stephens wore a man's suit, because that "would contradict [Rost's] sincerely held religious beliefs." *See* Oral Arg. at 46:50–47:46.

The Funeral Home's proposed alternative—to "permit businesses to allow the enforcement of sex-specific dress codes for employees who are public-facing representatives of their employer, so long as the dress code imposes equal burdens on the sexes and does not affect employee dress outside of work," Appellee Br. at 44–45—is equally flawed. The Funeral Home's suggestion would do nothing to advance the government's compelling interest in preventing and remedying discrimination against Stephens based on her refusal to conform at work to stereotypical notions of how biologically male persons should dress, appear, behave, and identify. Regardless of whether the EEOC has a compelling interest in combating sex-specific dress codes—a point that is not at issue in this case—the EEOC does have a compelling interest in ensuring that the Funeral Home does not discriminate against its employees on the basis of their sex. The Funeral Home's proposed alternative sidelines this interest entirely.[13]

The EEOC, Stephens, and several amici argue that searching for an alternative to Title VII is futile because enforcing Title VII is itself the least restrictive way to further EEOC's interest in eradicating discrimination based on sex stereotypes from the workplace. *See, e.g.*, Appellant Br. at 55–61; Intervenor Br. at 27–33. We agree.

To start, the Supreme Court has previously acknowledged that "there may be instances in which a need for uniformity precludes the recognition of exceptions to generally applicable laws under RFRA." *O Centro*, 546 U.S. at 436, 126 S.Ct. 1211. The Court highlighted *Braunfeld v. Brown*, 366 U.S. 599, 81 S.Ct. 1144, 6 L.Ed.2d 563 (1961), as an example of a case where the "need for uniformity" trumped "claims for religious exemptions."

13. In its district court briefing, the Funeral Home proposed three additional purportedly less restrictive alternatives: the government could hire Stephens; the government could pay Stephens a full salary and benefits until she secures comparable employment; or the government could provide incentives to other employers to hire Stephens and allow her to dress as she pleases. R. 67 (Def.'s Reply Mem. of Law in Support of Def.'s Mot. for Summ. J. at 17–18) (Page ID #2117–18). Not only do these proposals fail to further the EEOC's interest enabling Stephens to work for the Funeral Home without facing discrimination, but they also fail to consider the cost to the government, which is "an important factor in the least-restrictive-means analysis." *Hobby Lobby*, 134 S.Ct. at 2781. We agree with the EEOC that the Funeral Home's suggestions—which it no longer pushes on appeal—are not viable alternatives to enforcing Title VII in this case, as they do not serve the EEOC's interest in eradicating discrimination "equally well." *See id.* at 2782.

O Centro, 546 U.S. at 435, 126 S.Ct. 1211. In *Braunfeld*, the plurality "denied a claimed exception to Sunday closing laws, in part because . . . [t]he whole point of a 'uniform day of rest for all workers' would have been defeated by exceptions." *O Centro*, 546 U.S. at 435, 126 S.Ct. 1211 (quoting *Sherbert*, 374 U.S. at 408, 83 S.Ct. 1790 (discussing *Braunfeld*)). *Braunfeld* thus serves as a particularly apt case to consider here, as it too concerned an attempt by an employer to seek an exemption that would elevate its religious practices above a government policy designed to benefit employees. If the government's interest in a "uniform day of rest for all workers" is sufficiently weighty to preclude exemptions, *see O Centro*, 546 U.S. at 435, 126 S.Ct. 1211, then surely the government's interest in uniformly eradicating discrimination against employees exerts just as much force.

The Court seemingly recognized Title VII's ability to override RFRA in *Hobby Lobby*, as the majority opinion stated that its decision should not be read as providing a "shield" to those who seek to "cloak[ ] as religious practice" their efforts to engage in "discrimination in hiring, for example on the basis of race." 134 S.Ct. at 2783. As the *Hobby Lobby* Court explained, "[t]he Government has a compelling interest in providing an equal opportunity to participate in the workforce without regard to race, and prohibitions on racial discrimination are precisely tailored to achieve that critical goal." *Id.* We understand this to mean that enforcement actions brought under Title VII, which aims to "provid[e] an equal opportunity to participate in the workforce without regard to race" and an array of other protected traits, *see id.*, will necessarily defeat RFRA defenses to discrimination made illegal by Title VII. The district court reached the opposite conclusion, reasoning that *Hobby Lobby* did not suggest that "a RFRA defense can never prevail as a defense to Title VII" because "[i]f that were the case, the majority would presumably have said so." *R.G. & G.R. Harris Funeral Homes, Inc.*, 201 F.Supp.3d at 857. But the majority *did* say that anti-discrimination laws are "precisely tailored" to achieving the government's "compelling interest in providing an equal opportunity to participate in the workforce" without facing discrimination. *Hobby Lobby*, 134 S.Ct. at 2783.

As Stephens notes, at least two district-level federal courts have also concluded that Title VII constitutes the least restrictive means for eradicating discrimination in the workforce. *See Redhead v. Conf. of Seventh-Day Adventists*, 440 F.Supp.2d 211, 222 (E.D.N.Y. 2006) (holding that "the Title VII framework is the least restrictive means of furthering" the government's interest in avoiding discrimination against non-ministerial employees of religious organization), *adhered to on reconsideration*, 566 F.Supp.2d 125 (E.D.N.Y. 2008); *EEOC v. Preferred Mgmt. Corp.*, 216 F.Supp.2d 763, 810–11 (S.D. Ind. 2002) ("[I]n addition to finding that the EEOC's intrusion into [the defendant's] religious practices is pursuant to a compelling government interest,"—i.e., "the eradication of employment discrimination based on the criteria identified in Title VII"—"we also find that the intrusion is the least restrictive means that Congress could have used to effectuate its purpose.").

We also find meaningful Congress's decision not to include exemptions within Title VII to the prohibition on sex-based discrimination. As both the Supreme Court and other circuits have recognized, "[t]he very existence of a government-sanctioned exception to a regulatory scheme that is purported to be the least restrictive means can, in fact, demonstrate that other, less-restrictive alternatives could exist." *McAllen Grace Brethren Church v. Salazar*, 764

F.3d 465, 475 (5th Cir. 2014) (citing *Hobby Lobby*, 134 S.Ct. at 2781–82); *see also Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 547, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993) ("It is established in our strict scrutiny jurisprudence that 'a law cannot be regarded as protecting an interest of the highest order . . . when it leaves appreciable damage to that supposedly vital interest unprohibited.' " (omission in original) (quoting *Fla. Star v. B.J.F.*, 491 U.S. 524, 541–42, 109 S.Ct. 2603, 105 L.Ed.2d 443 (1989) (Scalia, J., concurring))). Indeed, a driving force in the *Hobby Lobby* Court's determination that the government had failed the least-restrictive-means test was the fact that the Affordable Care Act, which the government sought to enforce in that case against a closely held organization, "already established an accommodation for nonprofit organizations with religious objections." *See* 134 S.Ct. at 2782. Title VII, by contrast, does not contemplate any exemptions for discrimination on the basis of sex. Sex may be taken into account only if a person's sex "is a bona fide occupational qualification reasonably necessary to the normal operation of [a] particular business or enterprise," 42 U.S.C. § 2000e-2(e)(1)—and in that case, the preference is no longer discriminatory in a malicious sense. Where the government has developed a comprehensive scheme to effectuate its goal of eradicating discrimination based on sex, including sex stereotypes, it makes sense that the only way to achieve the scheme's objectives is through its enforcement.

State courts' treatment of RFRA-like challenges to their own antidiscrimination laws is also telling. In several instances, state courts have concluded that their respective antidiscrimination laws survive strict scrutiny, such that religious claimants are not entitled to exemptions to enforcement of the state prohibitions on discrimination with regard to housing, employment, medical care, and education. *See State v. Arlene's Flowers, Inc.*, 187 Wash.2d 804, 389 P.3d 543, 565–66 (2017) (collecting cases), *petition for cert. filed Arlene's Flowers, Inc. v. Washington*, 86 U.S.L.W. 3047(July14017)). These holdings support the notion that antidiscrimination laws allow for fewer exceptions than other generally applicable laws.

As a final point, we reject the Funeral Home's suggestion that enforcing Title VII in this case would undermine, rather than advance, the EEOC's interest in combating sex stereotypes. According to the Funeral Home, the EEOC's requested relief reinforces sex stereotypes because the agency essentially asks that Stephens "be able to dress in a stereotypical feminine manner." *R.G. & G.R. Funeral Homes, Inc.*, 201 F.Supp.3d at 863 (emphasis omitted). This argument misses the mark. Nothing in Title VII or this court's jurisprudence requires employees to reject their employer's stereotypical notions of masculinity or femininity; rather, employees simply may not be discriminated against for a failure to conform. *See Smith*, 378 F.3d at 572 (holding that a plaintiff makes out a prima facie case for discrimination under Title VII when he pleads that "his *failure to conform* to sex stereotypes concerning how a man should look and behave was the driving force behind" an adverse employment action (emphasis added)). Title VII protects both the right of male employees "to c[o]me to work with makeup or lipstick on [their] face[s]," *Barnes*, 401 F.3d at 734, and the right of female employees to refuse to "wear dresses or makeup," *Smith*, 378 F.3d at 574, without any internal contradiction.

In short, the district court erred in finding that EEOC had failed to adopt the least restrictive means of furthering its compelling interest in eradicating discrimination in the workplace. Thus, even if we

agreed with the Funeral Home that Rost's religious exercise would be substantially burdened by enforcing Title VII in this case, we would nevertheless **REVERSE** the district court's grant of summary judgment to the Funeral Home and hold instead that requiring the Funeral Home to comply with Title VII constitutes the least restrictive means of furthering the government's compelling interest in eradicating discrimination against Stephens on the basis of sex. Thus, even assuming Rost's religious exercise is substantially burdened by the EEOC's enforcement action in this case, we **GRANT** summary judgment to the EEOC on the Funeral Home's RFRA defense on this alternative ground.

C. Clothing-Benefit Discrimination Claim

[43] The district court erred in granting summary judgment in favor of the Funeral Home on the EEOC's discriminatory clothing-allowance claim. We long ago held that the scope of the complaint the EEOC may file in federal court in its efforts to enforce Title VII is "limited to the scope of the EEOC investigation reasonably expected to grow out of the charge of discrimination." *EEOC v. Bailey Co.*, 563 F.2d 439, 446 (6th Cir. 1977) (quoting inter alia, *Tipler v. E. I. duPont deNemours & Co.*, 443 F.2d 125, 131 (6th Cir. 1971)), *disapproved of on other grounds by Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 98 S.Ct. 694, 54 L.Ed.2d 648 (1978). The EEOC now urges us to hold that *Bailey* is incompatible with subsequent Supreme Court precedent and therefore no longer binding on this court. Because we believe that the EEOC may properly bring a clothing-allowance claim under *Bailey*, we need not decide whether *Bailey* has been rendered obsolete.

In *Bailey*, a white female employee charged that her employer failed to promote her on account of her sex, generally failed to promote women because of their sex, failed to pay equally qualified women as well as men, and failed to recruit and hire black women because of their race. *Id.* at 442. While investigating these claims, the EEOC found there was no evidence to support the complainant's charges of sex discrimination, but there was reasonable cause to believe the company had racially discriminatory hiring and promotion practices. In addition, the EEOC learned that the employer had seemingly refused to hire one applicant on the basis of his religion. After failed efforts at conciliation, the EEOC initiated a lawsuit against the employer alleging both racial and religious discrimination. We held that the EEOC lacked authority to bring an enforcement action regarding alleged religious discrimination because "[t]he portion of the EEOC's complaint incorporating allegations of religious discrimination exceeded the scope of the EEOC investigation of [the defendant employer] reasonably expected to grow out of [the original] charge of sex and race discrimination." *Id.* at 446. We determined, however, that the EEOC was authorized to bring race discrimination claims against the employer because the original charge alleged racial discrimination against black applicants and employees and the charging party—a white woman—had standing under Title VII to file such a charge with the EEOC because she "may have suffered from the loss of benefits from the lack of association with racial minorities at work." *Id.* at 452 (citations omitted).

As we explained in *Bailey*, the EEOC may sue for matters beyond those raised directly in the EEOC's administrative charge for two reasons. First, limiting the EEOC complaint to the precise grounds listed in the charge of discrimination would undercut Title VII's "effective functioning" because laypersons "who are unfamiliar

with the niceties of pleading and are acting without the assistance of counsel" submit the original charge. *Id.* at 446 (quoting *Tipler*, 443 F.2d at 131). Second, an initial charge of discrimination does not trigger a lawsuit; it instead triggers an EEOC investigation. The matter evolves into a lawsuit only if the EEOC is unable "to obtain voluntary compliance with the law. . . . Thus it is obvious that the civil action is much more intimately related to the EEOC investigation than to the words of the charge which originally triggered the investigation." *Id.* at 447 (quoting *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455, 466 (5th Cir. 1970)).

At the same time, however, we concluded in *Bailey* that allowing the EEOC to sue for matters beyond those reasonably expected to arise from the original charge would undermine Title VII's enforcement process. In particular, we understood that an original charge provided an employer with "notice of the allegation, an opportunity to participate in a complete investigation of such allegation, and an opportunity to participate in meaningful conciliation discussions should reasonable cause be found following the EEOC investigation." *Id.* at 448. We believed that the full investigatory process would be short-circuited, and the conciliation process thereby threatened, if the EEOC did not file a separate charge and undertake a separate investigation when facts are learned suggesting an employer may have engaged in "discrimination of a type other than that raised by the individual party's charge and unrelated to the individual party." *Id.*

The EEOC now insists that *Bailey* is no longer good law after the Supreme Court's decision in *General Telephone Company of the Northwest, Inc. v. EEOC*, 446 U.S. 318, 100 S.Ct. 1698, 64 L.Ed.2d 319 (1980). In *General Telephone*, the Supreme Court held that Rule 23 of the Federal Rules of Civil Procedure, which governs class actions, does not apply to enforcement actions initiated by the EEOC. *Id.* at 331, 100 S.Ct. 1698. As part of its reasoning, the Court found that various requirements of Rule 23—such as the requirement that "the claims or defenses of the representative parties [must be] typical of the claims or defenses of the class," FED. R. CIV. P. 23(a)(3)—are incompatible with the EEOC's enforcement responsibilities under Title VII:

> The typicality requirement is said to limit the class claims to those fairly encompassed by the named plaintiff's claims. If Rule 23 were applicable to EEOC enforcement actions, it would seem that the Title VII counterpart to the Rule 23 named plaintiff would be the charging party, with the EEOC serving in the charging party's stead as the representative of the class. Yet the Courts of Appeals have held that EEOC enforcement actions are not limited to the claims presented by the charging parties. Any violations that the EEOC ascertains in the course of a reasonable investigation of the charging party's complaint are actionable. The latter approach is far more consistent with the EEOC's role in the enforcement of Title VII than is imposing the strictures of Rule 23, which would limit the EEOC action to claims typified by those of the charging party.

Gen. Tel., 446 U.S. at 330–31, 100 S.Ct. 1698 (internal citations omitted). The EEOC argues that this passage directly contradicts the holding in *Bailey*, in which we rejected the EEOC's argument that it "can investigate evidence of any other discrimination called to its attention during the course of an investigation." *See* 563 F.2d at 446.

Though there may be merit to the EEOC's argument, *see EEOC v. Kronos*

Inc., 620 F.3d 287, 297 (3d Cir. 2010) (citing *General Telephone* for the proposition that "[o]nce the EEOC begins an investigation, it is not required to ignore facts that support additional claims of discrimination if it uncovers such evidence during the course of a reasonable investigation of the charge" (citing *Gen. Tel.*, 446 U.S. at 331, 100 S.Ct. 1698)), we need not resolve *Bailey*'s compatibility with *General Telephone* at this time because our holding in *Bailey* does not preclude the EEOC from bringing a clothing-allowance-discrimination claim in this case.

First, the present case is factually distinguishable from *Bailey*. In *Bailey*, the court determined that allegations of religious discrimination were outside the scope of an investigation "reasonably related" to the original charge of sex and race discrimination because, in part, "[t]he evidence presented at trial by the EEOC to support its allegations of religious discrimination did not involve practices affecting [the original charger]." 563 F.2d at 447. Here, by contrast, Stephens would have been directly affected by the Funeral Home's allegedly discriminatory clothing-allowance policy had she not been terminated, as the Funeral Home's current practice indicates that she would have received either no clothing allowance or a less valuable clothing allowance once she began working at the Funeral Home as a woman.[14] And, unlike the EEOC's investigation of religious discrimination in *Bailey*, the EEOC's investigation into the Funeral Home's discriminatory clothing-allowance policy concerns precisely the same type of discrimination—discrimination on the basis of sex—that Stephens raised in her initial charge.

Second, we have developed a broad conception of the sorts of claims that can be "reasonably expected to grow out of the initial charge of discrimination." *See Bailey*, 563 F.2d at 446. As we explained in *Davis v. Sodexho*, 157 F.3d 460 (6th Cir. 1998), "where facts related with respect to the charged claim would prompt the EEOC to investigate a different, uncharged claim, the plaintiff is not precluded from bringing suit on that claim." *Id.* at 463. And we have also cautioned that "EEOC charges must be liberally construed to determine whether . . . there was information given in the charge that reasonably should have prompted an EEOC investigation of [a] separate type of discrimination." *Leigh v. Bur. of State Lottery*, 1989 WL 62509, at *3 (6th Cir. June 13, 1989) (Table) (citing *Bailey*, 563 F.2d at 447). Here, Stephens alleged that she was fired after she shared her intention to present and dress as a woman because the Funeral Home "management [told her that it] did not believe the public would be accepting of [her] transition" from male to female. R. 63-2 (Charge of Discrimination at 1) (Page ID #1952). It was reasonable to expect, in light of this allegation, that the EEOC would investigate the Funeral Home's employee-appearance requirements and expectations, would learn about the Funeral Home's sex-specific dress code, and would thereby uncover the Funeral Home's seemingly discriminatory clothing-allowance policy. As much is clear from our decision in *Farmer v. ARA Services, Inc.*, 660 F.2d 1096 (6th Cir. 1981), in which "we held that the plaintiffs could bring equal pay claims alleging that their union discriminated in negotiating pay scales for different job designations, despite the fact that the plaintiffs' EEOC charge alleged only that the union failed to

14. The Funeral Home insists that it would provide female funeral directors with a company-issued suit if it had any female Funeral Directors. *See* R. 53-3 (Rost Aff. ¶ 54) (Page ID #939). This is a factual claim that we cannot credit at the summary-judgment stage.

represent them in securing the higher paying job designations." *Weigel v. Baptist Hosp. of E. Tenn.*, 302 F.3d 367, 380 (6th Cir. 2002) (citing *Farmer*, 660 F.2d at 1105). As we recognized then, underlying the *Farmer* plaintiffs' claim was an implicit allegation that the plaintiffs were as qualified and responsible as the higher-paid employees, and this fact "could reasonably be expected to lead the EEOC to investigate why different job designations that required the same qualifications and responsibilities used disparate pay scales." *Id.* By the same token, Stephens's claim that she was fired because of her planned change in appearance and presentation contains an implicit allegation that the Funeral Home requires its male and female employees to look a particular way, and this fact could (and did) reasonably prompt the EEOC to investigate whether these appearance requirements imposed unequal burdens—in this case, fiscal burdens—on its male and female employees.

We therefore **REVERSE** the district court's grant of summary judgment to the Funeral Home on the EEOC's discriminatory-clothing-allowance claim and **REMAND** with instructions to consider the merits of the EEOC's claim.

III. CONCLUSION

Discrimination against employees, either because of their failure to conform to sex stereotypes or their transgender and transitioning status, is illegal under Title VII. The unrefuted facts show that the Funeral Home fired Stephens because she refused to abide by her employer's stereotypical conception of her sex, and therefore the EEOC is entitled to summary judgment as to its unlawful-termination claim. RFRA provides the Funeral Home with no relief because continuing to employ Stephens would not, as a matter of law, substantially burden Rost's religious exercise, and even if it did, the EEOC has shown that enforcing Title VII here is the least restrictive means of furthering its compelling interest in combating and eradicating sex discrimination. We therefore **REVERSE** the district court's grant of summary judgment in favor of the Funeral Home and **GRANT** summary judgment to the EEOC on its unlawful-termination claim. We also **REVERSE** the district court's grant of summary judgment on the EEOC's discriminatory-clothing-allowance claim, as the district court erred in failing to consider the EEOC's claim on the merits. We **REMAND** this case to the district court for further proceedings consistent with this opinion.

SPA RENTAL, LLC, dba MSI Aviation, Petitioner,

v.

SOMERSET–PULASKI COUNTY AIRPORT BOARD; Federal Aviation Administration, Respondents.

No. 16-3989

United States Court of Appeals, Sixth Circuit.

Argued: January 31, 2018

Decided and Filed: March 7, 2018

Background: Limited fixed-based operator, which occupied two hangars at federally-funded airport and engaged in business of refurbishing and reselling aircraft, petitioned for review of Federal Aviation Administration (FAA) determination, 2015 WL 5308076, finding that county airport board did not unjustly discriminate against

Noia, 372 U.S. 391, 402, 83 S.Ct. 822, 9 L.Ed.2d 837, (1963), *overruled in part on other grounds by Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977). Although the writ of habeas corpus is not readily or regularly granted, it remains an essential, time-tested tool that "enabl[es] an inquiry into the legality of an individual's confinement," thereby "safeguard[ing] the integrity of the criminal justice process." Limin Zheng, *Actual Innocence as A Gateway Through the Statute-of-Limitations Bar on the Filing of Federal Habeas Corpus Petitions*, 90 Cal. L. Rev. 2101, 2109 (2002) (citing *Ex parte Watkins*, 28 U.S. 193, 3 Pet. 193, 7 L.Ed. 650 (1830)). After a lengthy period of careful scrutiny of this case, this Court has come to the conclusion that the decisions of the state courts described at length herein do not withstand the scrutiny of a habeas corpus lens. It is beyond argument that the prosecutor was required to discover and disclose material impeachment evidence—that C.W.'s eyes may have been removed after the body was released to the funeral home and embalmed. That did not happen. Therefore, due process was not afforded to Petitioner, and he is entitled to habeas relief on his *Brady* claim.

CONCLUSION

For the foregoing reasons, the Court concludes that the Idaho Court of Appeals' decision on Petitioner's *Brady* claim constitutes an unreasonable application of clearly-established Supreme Court precedent and that the lower post-conviction court's factual finding of pre-release and pre-embalming removal of the victim's eyes was unreasonable and, therefore, not entitled to a presumption of correctness. The Court also concludes, on de novo review, that the State prosecution team did not disclose favorable material evidence to the defense in violation of the settled law of *Brady v. Maryland.*

Therefore, the Court finds in favor of Petitioner on Claim 1 of the Petition.

ORDER

IT IS ORDERED that Claim 1 of the Petition for Writ of Habeas Corpus (Dkt. 1) is GRANTED, and the Court issues a conditional writ of habeas corpus. The State must release Petitioner or begin new trial proceedings against him within 120 days.

F.V. and Dani Martin, Plaintiffs,

v.

Russell BARRON,[1] in his official capacity as Director of the Idaho Department of Health and Welfare; Elke Shaw–Tulloch, in her official capacity as Administrator of the Division of Public Health for the Idaho Department of Health and Welfare; and James Aydelotte, in his official capacity as State Registrar and Chief of the Bureau of Vital Records and Health Statistics, Defendants.

Case No. 1:17–CV–00170–CWD

United States District Court,
D. Idaho.

Signed 03/05/2018

Background: Transgender individuals brought action against Idaho state employ-

1. Russell Barron is now the Director of the Idaho Department of Health and Welfare. Pursuant to Rule 25(d) of the Federal Rules of Civil Procedure, Russell Barron is substituted for Richard Armstrong as a defendant in this suit.

ees seeking declaration and permanent injunction and alleging that state policy of categorically denying transgender individuals' applications to change the sexes listed on their birth certificates to reflect their gender identities violated Fourteenth Amendment Due Process and Equal Protection Clauses, and that state law requiring amended birth certificates be marked as "amended" would, as applied to transgender individuals seeking to change the sexes listed on their birth certificates to reflect their gender identities, compel speech in violation of First Amendment. Transgender individuals moved for summary judgment.

Holdings: The District Court, Candy W. Dale, United States Magistrate Judge, held that:

(1) District Court would not consider Due Process Clause claim;

(2) District Court would not consider First Amendment claim;

(3) policy lacked rational basis, and thus violated Equal Protection Clause;

(4) heightened scrutiny applied to policy; and

(5) permanent injunction of policy was warranted.

Motion granted in part and denied in part.

1. Constitutional Law ⚿4450

District Court would not consider transgender individuals' claim that Idaho state policy of categorically denying transgender individuals' applications to change the sexes listed on their birth certificates to reflect their gender identities violated Fourteenth Amendment Due Process Clause, in action where the individuals also claimed that policy violated Fourteenth Amendment Equal Protection Clause; Equal Protection Clause claim captured essence of alleged right in more accurate and comprehensive way than Due Process Clause claim. U.S. Const. Amend. 14.

2. Constitutional Law ⚿1564

District Court would not consider transgender individuals' claim that Idaho state law requiring amended birth certificates be marked as "amended" would, as applied to transgender individuals seeking to change the sexes listed on their birth certificates to reflect their gender identities, compel speech in violation of First Amendment, in action where Court found that state policy of categorically denying transgender individuals' applications to change the sexes listed on their birth certificates to reflect their gender identities violated Fourteenth Amendment Equal Protection Clause, permanently enjoined state employees from enforcing policy, and ordered that any birth certificates reissued to reflect gender identities or concurrent name changes of transgender individuals not be marked as "amended." U.S. Const. Amends. 1, 14; Idaho Code Ann. § 39-250; Idaho Admin. Code r. 16.02.08.201.

3. Federal Civil Procedure ⚿2461

Summary judgment is not a disfavored procedural shortcut, but is instead a tool to prevent factually insufficient claims or defenses from going to trial with the attendant unwarranted consumption of public and private resources. Fed. R. Civ. P. 56(a).

4. Injunction ⚿1016

When a court grants injunctive relief, it must tailor the remedy to the specific harm shown by the plaintiffs; the scope of the remedy fashioned by the court is dictated by the extent of the violation established by the plaintiffs.

5. Constitutional Law ⚿3441
Health ⚿397

No rational basis supported Idaho state policy of categorically denying transgender individuals' applications to change the sexes listed on their birth certificates to reflect their gender identities while per-

mitting other classes of people to make other amendments to birth certificates, and thus policy violated Fourteenth Amendment Equal Protection Clause; state law not only provided process for amending information on birth certificates, but also provided that certain amendments, such as voluntary acknowledgments of paternity and changes to name and paternal and maternal information in cases of adoption, were kept confidential. U.S. Const. Amend. 14; Idaho Code Ann. §§ 39-250, 39-258, 39-259; Idaho Admin. Code r. 16.02.08.201.

6. Constitutional Law ⚿3041

The Equal Protection Clause of the Fourteenth Amendment requires that all similarly situated people be treated alike. U.S. Const. Amend. 14.

7. Constitutional Law ⚿3040, 3041

An equal protection claim is established when plaintiffs show they were treated differently than other similarly situated people; yet, because states are given significant leeway to establish laws to effectively govern citizens and remedy societal ills, successful equal protection claims additionally require plaintiffs to show the difference in treatment was the result of intentional or purposeful discrimination. U.S. Const. Amend. 14.

8. Constitutional Law ⚿1054

The purpose of intermediate scrutiny is to ensure quasi-suspect classifications do not perpetuate unfounded stereotypes or second-class treatment.

9. Constitutional Law ⚿3441

Heightened scrutiny applied to Idaho state policy regarding applications by transgender individuals to change the sexes listed on their birth certificates to reflect their gender identities and concurrent applications to change the names listed on the certificates under Fourteenth Amendment Equal Protection Clause; transgender people bore all the characteristics of quasi-suspect class. U.S. Const. Amend. 14.

10. Civil Rights ⚿1451

Permanent injunction was warranted of Idaho state policy of categorically denying transgender individuals' applications to change the sexes listed on their birth certificates to reflect their gender identities, in action against state employees, where court found that policy violated Fourteenth Amendment Equal Protection Clause; Idaho law did not require that policy, state employees already had existing procedures for amending birth certificates, permitting transgender individuals to obtain amended certificates would promote their health, well-being, and safety without impacting others' rights, and, according to the state employees, they needed court order to create new policy. U.S. Const. Amend. 14; Idaho Code Ann. § 39-250; Idaho Admin. Code r. 16.02.08.201.

Kara N. Ingelhart, Lambda Legal Defense and Education Fund, Inc., Chicago, IL, Peter C. Renn, Pro Hac Vice, Lambda Legal Defense and Education Fund, Inc., Los Angeles, CA, Monica G. Cockerille, Cockerille Law Office, PLLC, Boise, ID, for Plaintiffs.

W. Scott Zanzig, Office of the Idaho Attorney General, Civil Litigation, Boise, ID, for Defendants.

MEMORANDUM DECISION AND ORDER

(DKT. 28)

Candy W. Dale, U.S. Magistrate Judge

INTRODUCTION

Transgender individuals born in Idaho cannot obtain a birth certificate with the

listed sex matching their gender identity. The Idaho Department of Health and Welfare (IDHW) interprets state law to bar changes to the listed sex unless an applicant can show there was an error of identification at birth. Therefore, as a policy, IDHW categorically and automatically denies applications to change the listed sex for any other reason. The questions presented to the Court are whether IDHW's interpretation, as applied, violates the Equal Protection and Due Process clauses of the Fourteenth Amendment to the Constitution of the United States, and whether it impermissibly compels speech in violation of the First Amendment.

As a preliminary matter, the Court notes the rare posture of the case. Plaintiffs, two transgender women born in Idaho, bring this action under 42 U.S.C. § 1983, asking the Court for a declaration that IDHW's policy violates their constitutional rights and the rights of others similarly situated. Plaintiffs request that the Court apply heightened scrutiny review, and declare that IDHW's policy violates the Equal Protection Clause. They also seek a ruling that the policy infringes upon due process rights to informational privacy, individual liberty, autonomy, and dignity. Plaintiffs request further that the Court find that IDHW's policy impermissibly compels speech in violation of the First Amendment to the Constitution. Plaintiffs ask the Court to enjoin Defendants, and others subject to the injunction, from enforcing the policy.

In turn, Defendants do not defend the constitutionality of the policy. Instead, *they admit* it is unconstitutional. Specifically, that it violates the Equal Protection Clause, failing minimum scrutiny review because "a prohibition against changing the sex designation on the birth certificate of a transgender individual who has undergone clinically appropriate treatment to permanently change his or her sex" bears no rational relationship to a conceivable government interest. (Ans. to First Am. Compl., Dkt. 19 at 2–3 ¶ 5.) Defendants assert that, once they have an order from the Court in hand, they will create a new rule permitting transgender individuals to change the sex listed on their birth certificates. (Oral Argument at 9:50, *F.V. v. Armstrong et al.*, No. 1:17–CV–00170–CWD (February 1, 2018).) Defendants indicate also that the new rule will include a provision that any revision history related to changes to the listed sex or name changes will not be marked on the reissued birth certificates of transgender individuals. Defendants further indicate they cannot proceed to create a rule until they receive a court order (Oral Argument at 9:51, *F.V. v. Armstrong et al.*, No. 1:17–CV–00170–CWD (February 1, 2018).)

Defendants assert that, because they have made these concessions, the Court should exercise judicial restraint and decide the Plaintiffs' motion on the narrowest ground—that the current policy, as applied, is not rationally related to a legitimate government interest, violates the Plaintiffs' equal protection rights, and is thus unconstitutional under minimum scrutiny review.

Plaintiffs counter that, in the face of pervasive government discrimination against transgender individuals, the Court has a constitutional duty and inherent authority to define the level of scrutiny that should be applied to their equal protection claim, and should determine favorable judgment is warranted on the basis of the other constitutional claims—in addition to fashioning a remedy mandating equal treatment.

[1, 2] The Court will not reach Plaintiffs' Due Process or First Amendment claims for the following reasons. First, the Court finds resolution of the Equal Protection Clause claim captures "the essence of

the right in a more accurate and comprehensive way" than the Due Process Clause, "even as the two Clauses may converge in the identification and definition of the right." *Obergefell v. Hodges*, —— U.S. ——, 135 S.Ct. 2584, 2603, 192 L.Ed.2d 609 (2015). The substance of Plaintiffs' First Amendment claim is that if a birth certificate is reissued to a transgender individual, and the reissued birth certificate includes the revision history, it will impermissibly compel speech—i.e. it will force an individual to disclose their transgender status when they would not ordinarily do so. Given Defendants' concession and agreement, the compelled speech concern falls away, and the merits of this claim need not be addressed by the Court.

After careful consideration, the Court finds IDHW's policy of categorically and automatically denying applications submitted by transgender individuals to change the sex listed on their birth certificates is unconstitutional under the Equal Protection Clause of the Fourteenth Amendment. The Court finds further that any constitutionally sound rule must not include the revision history as to sex or name to avoid impermissibly compelling speech and furthering the harms at issue. The Court notes also that the new rule should withstand heightened scrutiny review to fall within the contours of equal protection law. To reasonably assure the rule and remedy comply with such existing law, the Court will discuss the same after presenting the background, introducing the parties, and outlining the standard of review.

BACKGROUND

1. Idaho Vital Statistics Laws

States are responsible for the development and implementation of laws related to vital events such as recording births and deaths. However, most states, including Idaho, use the Model State Vital Statistics Act published by the Centers for Disease Control and Prevention as a basis for state law.[2] The Idaho Vital Statistics Act (Act), Title 39, Chapter 2 of the Idaho Code, authorizes the Idaho Board of Health and Welfare (Board) to propose rules to carry out its provisions related to vital statistics—the Vital Statistics Rules (Rules). IDAPA 16.02.08.000. IDHW is the state agency responsible for enforcement of the Act and the Rules, (together, vital statistics laws) for providing the official interpretation of such laws, and for developing temporary and final proposed rules. State legislative approval is necessary to enact final proposed rules into law.

Idaho's vital statistics laws require that all amended birth certificates be marked as "amended," including a record of the nature of the change, unless the change is made under one of the following circumstances: (1) minor corrections made within one year after the date of the event necessitating the correction; (2) voluntary acknowledgements of paternity and non-paternity; and (3) for changes to name and paternal and maternal information in instances of adoption. Idaho Code §§ 39–250, 39–258–59; IDAPA 16.02.08.201. In these circumstances, the vital statistics laws require the amendments not be marked or noted on the birth certificate.[3]

2. *See Model State Vital Statistics Act and Model State Vital Statistics Regulations*, 2011 Revision, Centers for Disease Control and Prevention. Idaho's Vital Statistic Act is based in large part on the 1992 Revision of the model rules.

3. For example: Idaho Code § 7–1106 allows a biological father to establish paternity via an affidavit of paternity. The affidavit must be signed by both the father and the birth mother. IDAPA 16.02.08.201.05.a. If the child's birth certificate lists a different person as the father, a court order is required to change the father's name. IDAPA 16.02.08.201.05.b. The reissued, amended birth certificate must not be marked amended or include any record of the paternity change. I.C. § 39–250(2), (3); IDAPA 16.02.08.201.05.c.

A catch-all provision applies to any amendment not specifically provided for in the vital statistics laws. IDAPA 16.02.08.201.08. Notably, amendments made under the catch-all provision must be described on the birth certificate.

All applications to amend birth certificates are reviewed by the state registrar. The registrar's determination must serve the objectives of the vital statistics laws and the best interests of the public. IDAPA 16.02.08.201(e). When applications are denied, an individual has a right to petition a court for an order requiring the registrar make the requested amendment. Idaho Code § 39–250(5).

As explained above, IDHW interprets Idaho vital statistics law to prohibit changes to the listed sex unless there was an error in recording the sex at birth. Notably, IDHW asserts that Idaho birth certificates reflect the "sex" of a person at birth and do not contain a "gender marker" designation. (Ans. to First Am. Compl., Dkt. 23 at 2 ¶¶ 3–4.) From this interpretation comes IDHW's policy of automatically and categorically denying applications made by transgender individuals for the purpose of changing the listed sex to reflect their gender identity.[4]

2. Biological Sex, Gender Identity, Transition

There is scientific consensus that biological sex is determined by numerous elements, which can include chromosomal composition, internal reproductive organs, external genitalia, hormone prevalence, and brain structure.[5] Sex determinations made at birth are most often based on the observation of external genitalia alone. World Professional Association for Transgender Health, *Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People* at 97 (7th Version, 2011) (hereinafter "WPATH *Standards of Care*"). For most people, this determination aligns with gender identity and gender expression. *Id.* Of importance here, however, are instances where it does not.

Gender identity, also known as core gender, is the intrinsic sense of being male, female, or an alternative gender. WPATH *Standards of Care* at 96. Transgender is an adjective used to designate "a person whose identity does not confirm unambiguously to conventional notions of male or female gender." [6] Put another way, transgender is an adjective used to describe a person who has a gender identity that differs, in varying degrees, from the sex observed and assigned at birth. WPATH *Standards of Care* at 97.

Transgender individuals often suffer emotional distress in the process of recognizing and responding to the complex social and personal scenarios that result because their gender identity does not align with birth-assigned sex. (Dkt. 28–5 at 8; *See* e.g., American Medical Association Resolution 122 (A–08) at 1 (2008)). A clini-

4. Idaho counts as one of only four remaining states that do not permit transgender individuals to change the sex listed on their birth certificate. The other three states are Kansas, Ohio, and Tennessee. (Pl.s' Mem. of Law in Support of Mot. for Summ. Jgmt., Dkt. 28–1 at 19 n. 4.)

5. The American Psychology Association defines sex as ''one's biological status as either male or female'' that ''is associated primarily with physical attributes such as chromosomes, hormone prevalence, and external and internal anatomy.'' Transgender People, Gender Identity and Gender Expression, American Psychological Association (2018), http://www.apa.org/topics/lgbt/transgender.aspx (last visited Mar. 3, 2018).

6. *Transgender*, OXFORD ENGLISH DICTIONARY, http://www.oed.com/view/Entry/247649?redirectedFrom=transgender#eid (last visited Feb. 7. 2018).

cal medical condition, known as gender dysphoria, can result from such distress.[7] *Id.* Symptoms include anxiety and depression, suicidality, and other serious mental health issues. *Id.*; WPATH *Standards of Care* at 25.

Transgender individuals, especially those suffering from gender dysphoria, often proceed through a process known as transition, defined as follows:

> Transition is a period of time when individuals change from the gender role associated with their sex assigned at birth to a different gender role. For many people, this involves learning how to live socially in another gender role; for others this means finding a gender role and expression that is most comfortable for them. Transition may or may not include feminization or masculinization of the body through hormones or other medical procedures. The nature and duration of transition is variable and individualized.

WPATH *Standards of Care* at 97.

In other words, transition is the process where a person works to bring their lived experience and outer appearance into alignment with their gender identity. Transition can include medical treatments, such as hormone therapy and surgery, but is often limited to social transition. WPATH *Standards of Care* at 71, 97. Not all transgender people choose to undergo surgery as a part of the transition process. This is due to numerous potential factors, including whether surgery is medically necessary, and personal and financial factors such as lack of insurance coverage. (*See* First Am. Compl., Dkt. 19 at 6 ¶ 24; *see also* Ans. to First Am. Compl., Dkt. 19 at 5 ¶ 24.)

Social transition includes changes in clothing, name, pronouns, hairstyle, and identity documents to reflect one's gender identity. *Id.* at 9–10. "A complete transition is one in which a person attains a sense of lasting personal comfort with their gendered self, thus maximizing overall health, well-being, and personal safety." (Decl. of Dr. Randi Ettner, Dkt. 28–5 at 10.)

3. Discrimination Against Transgender Individuals

Mismatches between identification documents and outward gender presentation can create risks to the health and safety of transgender people. Transgender people who present mismatched identification are verbally harassed, physically assaulted, denied service or benefits, or asked to leave the premises. James et al., *The Report of the 2015 U.S. Transgender Survey*, Washington D.C., National Center for Transgender Equality at 7 (2016) (hereinafter *Transgender Survey*).[8] According to the

7. The American Psychiatric Association describes gender dysphoria as follows:

> People with gender dysphoria may often experience significant distress and/or problems functioning associated with this conflict between the way they feel and think of themselves (referred to as experienced or expressed gender) and their physical or assigned gender.
>
> The gender conflict affects people in different ways. It can change the way a person wants to express their gender and can influence behavior, dress and self-image. Some people may cross-dress, some may want to socially transition, others may want to medically transition with sex-change surgery and/or hormone treatment. Socially transitioning primarily involves transitioning into the affirmed gender's pronouns and bathrooms.

Gender Dysphoria, American Psychiatric Association, Physician review by Ranna Parekh, M.D., M.P.H. (February 2016), https://www.psychiatry.org/patients-families/gender-dysphoria/what-is-gender-dysphoria (last visited Mar. 5, 2018).

8. Defendants note the survey "acknowledges that respondents in the study 'were not randomly sampled and the actual population characteristics of transgender people in the U.S. are not known. Therefore, it is not appropriate to generalize the findings in this study to all transgender people.' " (Dkt. 19–6).

Federal Bureau of Investigation, 1.7 percent of all hate crimes reported by law enforcement agencies in the United States in 2015 were motivated by gender-identity bias. *2015 Hate Crime Statistics*, FBI, Criminal Justice Information Services Division, https://ucr.fbi.gov/hate-crime/2015/topic-pages/victims_final.pdf (last visited Mar. 5, 2018).

Statistics regarding the ongoing discrimination transgender individuals face highlight why involuntary disclosure of transgender status creates these risks. For instance, nearly twenty-five percent of surveyed college students, when perceived as a transgender person, were verbally, physically, or sexually assaulted in 2015. *Transgender Survey* at 9. This figure tracks the percentage of workers reporting mistreatment in the workplace due to gender identity. *Id.* at 10. More than seventy-five percent of transgender workers take steps to avoid such mistreatment at work by hiding or delaying their gender transition, or by quitting their job. *Id.* at 11.

Across all environments, almost fifty percent of transgender people surveyed for the 2015 report responded that they had been verbally harassed due to their gender identity. *Id.* at 13. Nearly one in ten reported being physically assaulted because of their gender identity. *Id.* Notably, the reported lifetime suicide attempt rate for transgender people is nearly nine times the rate of the United States population on average. *Id.* at 8.

The Court similarly acknowledges the limitations of the survey. Yet, the survey is also "the largest survey examining the experiences of transgender people in the United States, with 27,715 respondents from all fifty states . . ." (*Transgender Survey* at 4.) Thus, the Court views the statistics presented in the report as a reliable indicator of harassment and violence across the population.

4. The Plaintiffs

Plaintiffs are two transgender women who were born in Idaho. Each Plaintiff has undergone the process of transition but is unable to obtain a birth certificate that reflects her gender identity.

F.V. is a 28–year-old woman born in Idaho. She is a transgender person who was assigned the sex of male at birth. Although F.V. states that she knew from approximately age 6 she was female, she began to live openly as a female when she was 15 years old. She has lived as a woman since that time, and asserts that doing so has been essential to her sense of self. F.V. relates that she "cannot imagine living life as a man" because she is not a man, and would be living a lie to try to do so. (Decl. of F.V., Dkt. 28–3 at 2.)

F.V. has taken steps, both medically and socially, to bring her body and expression of gender in line with her female gender identity.[9] Her social transition has included legally changing her name from a traditionally male name to a traditionally female one, and changing her name and gender on her driver's license, passport, and in her social security records. On March 17, 2017, F.V. contacted the Idaho Bureau of Vital Records and Health Statistics to inquire about changing the sex listed on her birth certificate. She was informed that IDHW does not consider such applications.

F.V. asserts that living with a birth certificate declaring she is male is a perma-

9. Defendants "admit that they are aware of no rational basis justifying a prohibition against changing the sex designation on the birth certificate of a transgender person who has undergone clinically appropriate treatment to permanently change his or her sex." (Ans. to First Am. Compl., Dkt. 23 at 2–3.) Defendants concede also, "that no rational basis justifies treating transgender persons like Plaintiffs differently than other persons." (Dkt. 23 ¶ 5.)

nent and painful reminder that Idaho does not recognize her as she is—as a woman. Beyond this, she states that presenting an identity document that conflicts with her gender identity is both humiliating and dangerous: it puts her at risk of violence by disclosing against her will and intentions that she is a transgender individual.

Dani Martin (Dani) is a 31–year-old woman born in Idaho. Dani is a transgender person who was assigned the sex of male at birth. Like F.V., Dani states that she knew from a young age she was female. However, fear of rejection and bullying prevented her from coming out when she was younger. With the support of her spouse and her family, Dani began to transition in 2014. She has lived her life openly as a woman since that time.

Like F.V., Dani has taken steps, both medically and socially, to bring her body and expression of gender in line with her female identity. Her social transition has included legally changing her name from a traditionally male name to a traditionally female one, and changing her name and gender on her driver's license and in her social security records. Like F.V., Dani has been unable to change the gender on her birth certificate due to Idaho's prohibitory policy.

The mismatch between Dani's gender identity and the sex listed on her birth certificate has exposed her to harassment and embarrassment. She asserts the mismatch has also prevented her from making the change in other important records—perpetuating instances where she is forced to disclose her transgender status, face embarrassment, harassment, and potential physical violence.

5. The Defendants

The three Defendants are employees of IDHW. As supervisors and custodians of records, they are each variously responsible for the implementation, enforcement, development, and interpretation of Idaho's vital statistics laws.

Defendant Russell Barron is the Director of IDHW. He supervises the activities of IDHW, including the enforcement of the Vital Statistics Act, Vital Statistics Rules, and the agency's policies and interpretations of such laws.

Defendant Elke Shaw–Tullock is the Administrator of IDHW's Division of Public Health. The division includes the Bureau of Vital Records and Health Statistics. She supervises activities of the division, including enforcement of the Vital Statistics Act, Vital Statistics Rules, and the agency's policies and interpretations of such laws.

Defendant James Aydelotte is the State Registrar and Bureau Chief of the Bureau of Vital Records and Health Statistics at IDHW. He is the official custodian of vital records for the State of Idaho and also enforces the Vital Statistics Act, Vital Statistics Rules, and the agency's policies and interpretations of such laws.

STANDARD OF REVIEW

1. Standard of Review for Summary Judgment Motions

[3] Summary judgment is appropriate where a party can show, as to any claim or defense, "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). One of the principal purposes of summary judgment "is to isolate and dispose of factually unsupported claims . . . ." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323–24, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). It is "not a disfavored procedural shortcut," but is instead a tool to prevent factually insufficient claims or defenses "from going to trial with the attendant unwarranted consumption of public and private resources." *Id.* at 327, 106 S.Ct. 2548.

"The moving party is entitled to summary judgment if that party shows that each issue of material fact is not or cannot be disputed. To show the material facts are not in dispute, a party may cite to particular parts of materials in the record, or show that the materials cited do not establish the presence of a genuine dispute, or that the adverse party is unable to produce admissible evidence to support the fact." *Ransier v. United States*, No. 2:12-CV-00538-EJL, 2014 WL 5305852, at *2 (D. Idaho Oct. 15, 2014); Fed. R. Civ. P. 56(c)(1)(A) & (B).

Federal Rule of Civil Procedure 56(e)(3) authorizes a court to grant summary judgment for the moving party "if the motion and supporting materials—including the facts considered undisputed—show that the movant is entitled to it. The existence of a scintilla of evidence in support of the non-moving party's position is insufficient. Rather, 'there must be evidence on which the jury could reasonably find for the [non-moving party].'" *Ransier* at *2, (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)).

2. Standard for Permanent Injunction

To prevail on a motion for a permanent injunction, plaintiffs must demonstrate: (1) they have suffered an irreparable injury or harm; (2) remedies available at law are inadequate to compensate for such injury or harm; (3) considering the balance of hardships between the parties, an equitable remedy is warranted; and (4) public interest is not disserved by a permanent injunction. *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391, 126 S.Ct. 1837, 164 L.Ed.2d 641 (2006).

[4] When a court grants injunctive relief, it must tailor the remedy to the specific harm shown by plaintiffs. *Hawaii v. Trump*, 859 F.3d 741, 785 (9th Cir.), *cert. granted sub nom. Trump v. Int'l Refugee Assistance Project*, —— U.S. ——, 137 S.Ct. 2080, 198 L.Ed. 2d 643 (2017), *and cert. granted, judgment vacated*, —— U.S. ——, 138 S.Ct. 377, 199 L.Ed.2d 275 (2017), *and vacated*, 874 F.3d 1112 (9th Cir. 2017); *Califano v. Yamasaki*, 442 U.S. 682, 702, 99 S.Ct. 2545, 61 L.Ed.2d 176 (1979). The scope of the remedy fashioned by a court is dictated by the extent of the violation established by the plaintiffs. 859 F.3d 741, 785. Aside from these parameters, a court has significant discretion in fashioning an appropriate and proportionate remedy. *Id.*

LEGAL FRAMEWORK

1. The Equal Protection Clause

[5–7] The Equal Protection Clause of the Fourteenth Amendment requires that all similarly situated people be treated alike. *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985). Equal protection requirements restrict state legislative action that is inconsistent with bedrock constitutional guarantees, such as equality in treatment. *See Obergefell v. Hodges*, —— U.S. ——, 135 S.Ct. 2584, 2603, 192 L.Ed.2d 609 (2015). An equal protection claim is established when plaintiffs show they were treated differently than other similarly situated people. *City of Cleburne* at 439–440, 105 S.Ct. 3249. Yet, states are given significant leeway to establish laws to effectively govern citizens and remedy societal ills. *Romer v. Evans*, 517 U.S. 620, 631, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996). Because of this, successful equal protection claims additionally require plaintiffs to show the difference in treatment was the result of intentional or purposeful discrimination. *Stone v. Trump*, No. CV MJG-17-2459, 280 F.Supp.3d 747, 767–68, 2017 WL 5589122, at *15 (D. Md. Nov. 21, 2017).

In this matter, Plaintiffs, transgender individuals born in Idaho, have adequately

alleged they were treated differently from non-transgender people born in Idaho. IDHW practices a policy of automatically and categorically denying applications made by transgender people to amend the birth-assigned sex on their birth certificates to align with their gender identity. Plaintiff F.V. contacted IDHW to inquire about amending her birth certificate to align with her gender identity. IDHW informed F.V., consistent with its policy, that it does not consider applications made on that basis. Plaintiff Dani Martin's experience was the same. The IDHW Defendants provide no justification for the policy.

Yet, in turn, IDHW permits some classes of people, adoptive parents for instance, to make amendments to birth certificates without record of the amendment on the reissued certificate. IDHW has similar laws and policies related to the change of paternal information. These laws give certain people access to birth certificates that accurately reflect who they are, while denying transgender people, as a class, access to birth certificates that accurately reflect their gender identity. Therefore, as Defendants concede, Plaintiffs' equal protection claims are valid.

The Supreme Court of the United States has set forth a framework of tiered review for equal protection claims. *Latta v. Otter*, 19 F.Supp.3d 1054, 1073 (D. Idaho), *aff'd*, 771 F.3d 456 (9th Cir. 2014). Each tier of scrutiny requires a different level of justification for the challenged law. *Id.* The level of scrutiny applied to the law is determined by the type of classification at issue. *Id.* If a law classifies on the basis of a suspect class or a quasi-suspect class, it is subject to heightened scrutiny review—and, depending on the type of suspect classification, such laws are subject to either strict scrutiny review or intermediate scrutiny review. If a law does not classify on the basis of a suspect or quasi-suspect class, it is subject to minimum scrutiny—commonly called rational basis review. *Heller v. Doe*, 509 U.S. 312, 319–21, 113 S.Ct. 2637, 125 L.Ed.2d 257 (1993).

Therefore, the most stringent level of review is strict scrutiny. The Supreme Court has carefully defined the limits of this level of review. It is applied when laws impermissibly interfere with fundamental rights or to the disadvantage of a suspect class. *Latta*, 19 F.Supp.3d at 1073. Strict scrutiny applies to classifications based on race, alienage, and national origin. IDWH's policy makes a classification based on transgender status. Therefore, under clear Supreme Court precedent, it does not trigger strict scrutiny review.

In contrast, the most lenient level of scrutiny is rational basis review. This level of review is applied to laws that impose a difference in treatment between groups but do not infringe upon a fundamental right, or target a suspect or quasi-suspect class. *Heller* at 319–21, 113 S.Ct. 2637. In such instances, if a court can identify any rational basis supportive of the government's need for the law, it is upheld. *Id.* In this matter, IDHW Defendants concede no rational basis exists to support the categorical denial of requests to amend sex-assigned birth on the basis of correcting it to match one's gender identity.

The Court notes the importance and potential implications of restrictions and restraints IDHW may place on the ability of transgender people to apply for and receive approval of applications to change the sex listed on their birth certificates. Because the Court does not have a proposed rule before it, it will not extrapolate on the potential legal ramifications of such restrictions—such topics are not ripe for its consideration. However, any new rule must not subject one class of people to any more onerous burdens than the burdens placed on others without constitutionally-

appropriate justification—for instance, to apply for a change in paternity information the applicant is not required to submit medical evidence, such as DNA confirmation, to prove paternity or non-paternity. Yet, all applicants for name changes are required to obtain a court order—regardless of the reason for the change. (*See supra* note 3 and accompanying text.)

The Court agrees there is no rational basis to support IDHW's policy. The following facts make this conclusion apparent: (1) IDHW already has a process in place for making amendments to birth certificates, as is evidenced by Idaho's vital statistics laws; (2) the vital statistics laws make certain that amendments or corrections are kept confidential when they pertain to sensitive personal and potentially private information, such as paternity or adoptive status; and (3) the laws make room for the amendment of any other information on the birth certificate with the proper form of application and evidence.

Thus, under an alternative, constitutionally-sound reading of Idaho's vital statistics laws, amendments to the listed sex are not only possible, but procedures are in place to facilitate such amendments—and the Act allows the Board to draft a rule that does just that.[10] As such, there is no rational basis for denying transgender individuals birth certificates that reflect their gender identity and IDHW's policy, as applied, violates the Equal Protection Clause.

[8] Yet, as explained above, Plaintiffs ask the Court to take a step further to find that IDHW's policy similarly fails to withstand heightened scrutiny, which includes the mid-tier of equal protection review—intermediate scrutiny. Historically, intermediate scrutiny applies to quasi-suspect classifications based on sex and illegitimacy. *Clark v. Jeter*, 486 U.S. 456, 461, 108 S.Ct. 1910, 100 L.Ed.2d 465 (1988). For quasi-suspect classifications to be upheld, the state must show the classification is substantially related to an important governmental objective. "The purpose of this heightened level of scrutiny is to ensure quasi-suspect classifications do not perpetuate unfounded stereotypes or second-class treatment." *Latta v. Otter*, 19 F.Supp.3d 1054, 1073 (D. Idaho), *aff'd*, 771 F.3d 456 (9th Cir. 2014) (citing *United States v. Virginia*, 518 U.S. 515, 534, 116 S.Ct. 2264, 135 L.Ed.2d 735 (1996)).

Plaintiffs argue that IDHW's refusal to treat transgender people like others of the same sex, i.e. other males or females, requires intermediate review because such treatment discriminates on the basis of sex or otherwise employs another quasi-suspect classification—transgender status. In other words, Plaintiffs suggest two ways for the Court to conclude that heightened scrutiny applies to government classifications based on transgender status. The first—the Court could find that discrimination based on transgender status is discrimination based on sex or gender. The second—the Court could conclude that transgender status is a suspect classification in and of itself. In either case, Plaintiffs contend IDHW's policy is not substantially related to an important governmental objective and fails intermediate scrutiny review. The merits of both prongs of the Plaintiffs' argument will be discussed in turn.

A. Discrimination Based on Sex and Gender

In 1977, the United States Court of Appeals for the Ninth Circuit held rational basis review appropriately applied to classifications based on "transsexual" status, because sex-based discrimination in the context of Title VII included only discrimination based on one's anatomical gender—

10. Idaho Code §§ 39–241(3); 39–250.

not a change in one's gender or gender identity. *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659 (9th Cir. 1977). Although the Ninth Circuit has not revisited the question, the reasoning employed in *Holloway* relies on markedly outdated notions of sex and gender that strongly indicate, that should it be presented today, the same holding would not issue.[11]

The Supreme Court's decision in *Price Waterhouse* is particularly important to the development of a more robust understanding of sex-based gender discrimination in the law. *Price Waterhouse*, 490 U.S. 228, 240, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989). There, the Court held that Title VII bars discrimination based on the fact that a person is a woman or a man, *and* based on the fact that a person fails to act like a woman or a man—i.e. it protects people from discrimination based on their failure to adhere to society's expectations of traditional gender roles. *Id.*

In 2000, the Ninth Circuit employed the reasoning from *Price Waterhouse* in a new statutory context. *Schwenk v. Hartford*, 204 F.3d 1187, 1202 (9th Cir. 2000). In *Schwenk*, the Ninth Circuit held that violence perpetrated against a transgender person, because they presented as a certain gender, was violence motivated by gender for purposes of the Gender Motivated Violence Act. *Id.* Since *Schwenk*, at least one court in the Ninth Circuit has held *Schwenk's* reasoning supports the follow-on conclusion that discrimination against transgender people is a form of sex discrimination subject to intermediate scrutiny review. *Norsworthy v. Beard*, 87 F.Supp.3d 1104, 1121 (N.D. Cal. 2015) (where the court found that *Schwenk* overruled the specific conclusions on which the *Holloway* decision relied); *see also Olive v. Harrington*, 2016 WL 4899177, at *5 (E.D. Cal. Sept. 14, 2016) and *Marlett v. Harrington*, No. 115CV01382MJSPC, 2015 WL 6123613, at *4 (E.D. Cal. Oct. 16, 2015) (*pro se* screening orders citing *Norsworthy*, stating discrimination on the basis of transgender status is subject to intermediate scrutiny).

Of particular importance, significant changes in the medical understanding of gender identity call for a reexamination of its place in the equal protection context in relation to sex-based discrimination. *Duronslet v. Cty. of Los Angeles*, 266 F.Supp.3d 1213, 1223 (C.D. Cal. 2017) (discussing advances since *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659 (9th Cir. 1977). "[I]t would not be inconsistent with *Holloway* . . . to conclude, based on an adequately developed factual record, that our current understanding of transgenderism requires the application of heightened scrutiny." *Id.*

Indeed, our medical understanding of biological sex and gender has advanced significantly in the forty-one years since *Holloway.* For instance, it is universally acknowledged in leading medical guidance that not all individuals identify as the sex they are assigned at birth.[12] Despite the ongoing study to more fully understand

11. At that time, the court found that "transsexuals" were not an insular minority, and found also that transsexuality was not a "immutable characteristic determined solely by accident of birth." *Id.* at 663–64. The court remarked: "[T]he complexities involved merely in defining the term 'transsexual' would prohibit a determination of suspect classification for transsexuals." *Holloway* at 663, (footnote omitted).

12. As set forth in WPATH *Standards of Care* protocols for the care of transgender and gender nonconforming people, including individuals with gender dysphoria. The WPATH protocols are endorsed by the following medical associations: The *American Medical Association*, the *Endocrine Society*, the *American Psychological Association*, the *American Psychiatric Association*, the *World Health Organization*, the *American Academy of Family Physicians*, the *National Commission of Cor-*

the impact of differences in chromosomes, brain structure and chemistry, there is medical consensus that gender identity plays a role in an individual's determination of their own sex. Therefore, to conclude discrimination based on gender identity or transsexual status is not discrimination based on sex is to depart from advanced medical understanding in favor of archaic reasoning.

B. Defining New Suspect Qualifications—Transgender Status

In the equal protection context, the Supreme Court "has recognized that new insights and societal understandings can reveal unjustified inequality [. . .] that once passed unnoticed and unchallenged." [13] *Obergefell v. Hodges*, —— U.S. ——, 135 S.Ct. 2584, 2603, 192 L.Ed.2d 609 (2015). The Supreme Court employs a four-factor test to determine whether a class qualifies as suspect or quasi-suspect. *United States v. Windsor*, 570 U.S. 744, 133 S.Ct. 2675, 186 L.Ed.2d 808 (2013). Heightened scrutiny is warranted where the state discriminates against a class that (1) has been "historically subjected to discrimination," (2) has a defining characteristic bearing no "relation to ability to perform or contribute to society," (3) has "obvious, immutable, or distinguishing characteristics," and (4) is "a minority or is politically powerless." *United States v. Windsor*, 570 U.S. 744, 133 S.Ct. 2675, 186 L.Ed.2d 808 (2013).

Courts have applied this test and have found that government discrimination based on transgender status is discrimination against a quasi-suspect class and thus is subject to intermediate scrutiny. *Adkins v. City of New York*, 143 F.Supp.3d 134 (S.D.N.Y. 2015).[14] For example, in *Adkins*, a transgender person who had been arrested and imprisoned sued New York City and its officials, alleging equal protection violations based on discriminatory confinement conditions. *Id.* The court employed the test and found transgender people are a quasi-suspect class:

> (1) Transgender people have suffered a history of persecution and discrimination (moreover this history of persecution and discrimination is not yet history); (2) Transgender status bears no relation to ability to contribute to society—i.e. simply by virtue of their status they are not any less productive than any member of society; (3) Transgender status is a sufficiently discernible characteristic to define a discrete minority class; (4) Transgender people are a politically powerless minority.

Id.

Similarly, in *Evancho v. Pine–Richland School Dist.*, the court concluded interme-

rectional Health Care, the *American Public Health Association*, the *National Association of Social Workers*, the *American College of Obstetrics and Gynecology*, the *American Society of Plastic Surgeons*, and *The American Society of Gender Surgeons*. (*See* Dkt. 28–5 at 8.)

13. Responding to such insights and societal understandings, the Supreme Court has invalidated laws that imposed sex-based inequality in marriage, and inequalities in the institution of marriage arising from sex-based prohibitions. *See Obergefell v. Hodges*, —— U.S. ——, 135 S.Ct. 2584, 2604, 192 L.Ed.2d 609 (2015).

14. *See Stone v. Trump*, No. CV MJG-17-2459, 280 F.Supp.3d 747, 2017 WL 5589122 (D. Md. Nov. 21, 2017) (finding transgender individuals appear to satisfy the criteria of at least a quasi-suspect classification, and that the classification at issue was a form of discrimination on the basis of gender); *A.H. v. Minersville Area School District*, No. 3:17-CV-391, 290 F.Supp.3d 321, 331–32, 2017 WL 5632662, at *7 (M.D. Pa. Nov. 22, 2017) (both the parties and the court agreed heightened scrutiny applied to a transgender girl's equal protection claims when she was excluded from using the girl's bathroom at school because the sex listed on her birth certificate was male).

diate scrutiny applies to classifications based on transgender status. 237 F.Supp.3d 267 (W.D. Pa. 2017). There, pursuant to a school board resolution, transgender high school students were limited to using either single-user bathrooms or bathrooms matching their birth-assigned sex. The court acknowledged that the transgender students' gender identity was:

> . . . deeply ingrained and inherent in their very beings. Like "sex," [. . .] gender identity is neither transitory nor temporary. Further, what buttresses that conclusion is the fact that the school community as a whole treats these Plaintiffs in all other regards consistently with their stated gender identities, along with the reality that these Plaintiffs live all facets of their lives in a fashion consistent with their stated and experienced gender identities.

Id. at 289.

The findings in *Adkins* and *Evancho* echo findings made regarding homosexual people as a class and recognized by this Court in *Latta*, the Ninth Circuit in *SmithKline*, and the Supreme Court in *Windsor* and *Obergefell*. Applying the four factor analysis, the cases found: (1) homosexual people have endured persecution and discrimination; (2) sexual orientation has no relation to aptitude or ability to contribute to society; (3) homosexual people are a discernable group with non-obvious distinguishing characteristics; and (4) the class is a politically weakened minority.

[9] The pervasive and extensive similarities in the discrimination faced by transgender people and homosexual people are hard to ignore: (1) transgender people have been the subject of a long history of discrimination that continues to this day; (2) transgender status as a defining characteristic bears no "relation to ability to perform or contribute to society; (3) transgender status and gender identity have been found to be "obvious, immutable, or distinguishing characteristic[s];" and (4) transgender people are unarguably a politically vulnerable minority. *Norsworthy*, 87 F.Supp.3d at 1119 n.8; *Adkins*, 143 F.Supp.3d at 140; *See generally, SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 481–84 (9th Cir. 2014). This is especially true in Idaho where transgender people have no state constitutional protections from discrimination based on their transgender status in relation to employment decisions, housing, and other services. Therefore, transgender people bear all of the characteristics of a quasi-suspect class and any rule developed and implemented by IDHW should withstand heightened scrutiny review to be constitutionally sound.

CONCLUSION

[10] Defendants, as conceded, violate the Equal Protection Clause by failing to provide an avenue for transgender people to amend the sex listed on their birth certificates. Plaintiffs have sufficiently demonstrated that they have suffered irreparable injury and harm that cannot be remedied by ordinary remedies at law—and by Defendants' acknowledgment, IDHW cannot proceed to create a new rule to remedy the harm without a court order. Furthermore, the balance of the hardships warrants an equitable remedy, because allowing such amendments would pose no new burden on Defendants: Idaho vital statistics laws allow IDHW to create and implement a constitutionally-sound rule, and IDHW already has in place processes and procedures to facilitate the amendment of birth certificates in the ordinary course of its everyday activities. Finally, the public interest is not disserved by a permanent injunction. A rule providing an avenue to obtain a birth certificate with a listed sex that aligns with an individual's gender identity promotes the health, well-

being, and safety of transgender people without impacting the rights of others.

ORDER

NOW THEREFORE IT IS HEREBY ORDERED:

1) The Court **GRANTS in part** and **DENIES in part** Plaintiff's Motion for Summary Judgment. (Dkt. 28.)
2) The Court **PERMANENTLY ENJOINS** the IDHW Defendants and their officers, employees, and agents from practicing or enforcing the policy of automatically rejecting applications from transgender people to change the sex listed on their birth certificates.
3) IDHW Defendants and their officers, employees, and agents must begin accepting applications made by transgender people to change the sex listed on their birth certificates **on or before April 6, 2018**; such applications must be reviewed and considered through a constitutionally-sound approval process; upon approval, any reissued birth certificate must not include record of amendment to the listed sex; and where a concurrent application for a name change is submitted by a transgender individual, any reissued birth certificate must not include record of the name change.

IT IS SO ORDERED.

Attachment

Victims

In the Uniform Crime Reporting (UCR) Program, the victim of a hate crime may be an individual, a business, an institution, or society as a whole. In 2015, the nation's law enforcement agencies reported that there were 7,173 victims of hate crimes. Of these victims, 52 were victimized in separate multiple-bias incidents.

Attachment—Continued

The Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act of 2009, 18 U.S.C. § 249 required the FBI to collect data concerning hate crimes committed by or directed against juveniles. Beginning in 2013, law enforcement began reporting the number of victims who are 18 years of age or older and the number of victims under the age of 18 in addition to reporting the number of individual victims. Of the 4,198 individuals for which victim age data were reported in 2015, 3,702 hate crime victims were adults, and 496 hate crime victims were juveniles.

In 2013, the national UCR Program began collecting revised race and ethnicity data in accordance with a directive from the U.S. Government's Office of Management and Budget. The race categories were expanded from four (White, Black, American Indian or Alaska Native, and Asian or Other Pacific Islander) to five (White, Black or African American, American Indian or Alaska Native, Asian, and Native Hawaiian or Other Pacific Islander). The ethnicity categories changed from "Hispanic" and "Non–Hispanic" to "Hispanic or Latino" and "Not Hispanic or Latino." (See the Methodology for more information about this program change as well as others.)

By bias motivation (Based on Table 1.)

An analysis of data for victims of single-bias hate crime incidents showed that:

- 59.2 percent of the victims were targeted because of the offenders' bias against race/ethnicity/ancestry.
- 19.7 percent were victimized because of bias against religion.
- 17.7 percent were targeted because of bias against sexual orientation.
- 1.7 percent were victims of gender-identity bias.
- 1.2 percent were targeted because of bias against disability.

Attachment—Continued

- 0.4 percent (30 individuals) were victims of gender bias.

Further examination of these bias categories showed the following details:

Racial/Ethnicity/Ancestry bias (Based on Table 1.)

Among single-bias hate crime incidents in 2015, there were 4,216 victims of race/ethnicity/ancestry motivated hate crime.

- 52.2 percent were victims of crimes motivated by their offenders' anti-Black or African American bias.
- 18.7 percent were victims of anti-White bias.
- 9.3 percent were victims of anti-Hispanic or Latino bias.
- 3.8 percent were victims of bias against a group of individuals in which more than one race was represented (anti-multiple races, group).
- 3.3 percent were victims of anti-American Indian or Alaska Native bias.
- 3.2 percent were victims of anti-Asian bias.
- 1.1 percent were victims of anti-Arab bias.
- 0.1 percent (6 individuals) were victims of anti-Native Hawaiian or Other Pacific Islander bias.
- 8.1 percent were victims of anti-Other Race/Ethnicity/Ancestry bias.

Sexual-orientation bias (Based on Table 1.)

Of the 1,263 victims targeted due to sexual-orientation bias:

- 62.2 percent were victims of crimes motivated by their offenders' anti-gay (male) bias.
- 19.6 percent were victims of anti-lesbian, gay, bisexual, or transgender (mixed group) bias.

Attachment—Continued

- 13.5 percent were victims of anti-lesbian bias.
- 2.8 percent were victims of anti-bisexual bias.
- 1.9 percent were victims of anti-heterosexual bias.

Religious bias (Based on Table 1.)

Of the 1,402 victims of anti-religious hate crimes:

- 52.1 percent were victims of crimes motivated by their offenders' anti-Jewish bias.
- 21.9 percent were victims of anti-Islamic (Muslim) bias.
- 4.3 percent were victims of anti-Catholic bias.
- 4.1 percent were victims of bias against groups of individuals of varying religions (anti-multiple religions, group).
- 3.6 percent were victims of anti-Eastern Orthodox (Russian, Greek, Other) bias.
- 3.4 percent were victims of anti-Protestant bias.
- 1.3 percent were victims of anti-Other Christian bias.
- 0.6 percent were victims of anti-Mormon bias.
- 0.4 percent were victims of anti-Hindu bias.
- 0.4 percent were victims of anti-Sikh bias.
- 0.1 percent were victims of anti-Jehovah's Witness bias.
- 0.1 percent were victims of anti-Buddhist bias.
- 0.1 percent were victims of anti-Atheist/Agnostic bias.
- 7.6 percent were victims of bias against other religions (anti-other religion).

Attachment—Continued

Disability bias (See Table 1.)

Of the 88 victims of hate crimes due to the offenders' biases against disabilities:

- 52 were victims of anti-physical disability bias.
- 36 were targets of anti-mental disability bias.

Gender bias (See Table 1.)

Of the 30 victims of hate crime motivated by offenders' biases toward gender:

- 22 were categorized as anti-female.
- 8 were anti-male.

Gender-identity bias (See Table 1.)

Of the 122 victims of gender-identity bias:

- 76 were victims of anti-transgender bias.
- 46 were victims of anti-gender nonconforming bias.

By crime category (Based on Table 2.)

Of the 7,173 victims of hate crime, 62.5 percent were victims of crimes against persons, and 36.6 percent were victims of crimes against property. The remaining 0.9 percent were victims of crimes against society.

By offense type

Crimes against persons (Based on Table 2.)

In 2015, 4,482 victims of hate crimes were victims of crimes against persons. Regarding these victims and the crimes committed against them:

- 18 persons were murdered, and 13 were raped. (Concerning rape, data for 12 rapes were submitted under the UCR Program's revised definition; 1 rape was submitted under the legacy definition. See the Methodology for more information about this and other program changes.)
- 41.3 percent of the victims were intimidated.
- 37.8 percent were victims of simple assault.
- 19.7 percent were victims of aggravated assault.
- 0.4 percent (20) were victims of other types of offenses, which are collected only in the National Incident–Based Reporting System (NIBRS).

Crimes against property (Based on Table 2.)

In 2015, 2,626 victims of hate crimes were victims of crimes against property. Of these:

- 72.2 percent were victims of destruction/damage/vandalism.
- 10.4 percent were victims of larceny-theft.
- 6.6 percent were victims of burglary.
- 5.6 percent were victims of robbery.
- 1.4 percent were victims of arson.
- 0.9 percent (24) were victims of motor vehicle theft.
- 2.8 percent were victims of other types of hate crime offenses, which are collected only in NIBRS.

Crimes against society (See Table 2.)

There were 65 victims of hate crimes categorized as crimes against society. Crimes against society (e.g., weapon law violations, drug/narcotic offenses, gambling offenses) represent society's prohibition against engaging in certain types of activity; they are typically victimless crimes in which property is not the object.

Attachment—Continued

Answers to Your Questions About Transgender People, Gender Identity, and Gender Expression

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Transgender People, Gender Identity and Gender Expression

What does transgender mean?

Transgender is an umbrella term for persons whose gender identity, gender expression or behavior does not conform to that typically associated with the sex to which they were assigned at birth. Gender identity refers to a person's internal sense of being male, female or something else; gender expression refers to the way a person communicates gender identity to others through behavior, clothing, hairstyles, voice or body characteristics. "Trans" is sometimes used as shorthand for "transgender." While transgender is generally a good term to use, not everyone whose appearance or behavior is gender-nonconforming will identify as a transgender person. The ways that transgender people are talked about in popular culture, academia and science are constantly changing, particularly as individuals' awareness, knowledge and openness about transgender people and their experiences grow.

This pamphlet also is available in the following languages:

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- What is the difference between sex and gender?
- Have transgender people always existed?
- What are some categories or types of transgender people?

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Answers to Your Questions About Transgender People, Gender Identity, and Gender Expression

- How prevalent are transgender people?
- What is the relationship between gender identity and sexual orientation?
- How does someone know that they are transgender?
- What should parents do if their child appears to be transgender or gender nonconforming?
- How do transsexuals make a gender transition?
- Is being transgender a mental disorder?
- What kinds of discrimination do transgender people face?
- How can I be supportive of transgender family members, friends, or significant others?
- Where can I find more information about transgender health, advocacy and human rights?
- References

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Related Resources

- Transgender Identity Issues in Psychology
- Guidelines for Psychological Practice with Transgender and Gender Nonconforming People (PDF, 472KB)
- Sexual orientation and gender identity
- APA LGBT Resources and Publications
- Answers to Your Questions For a Better Understanding of Sexual Orientation and Homosexuality

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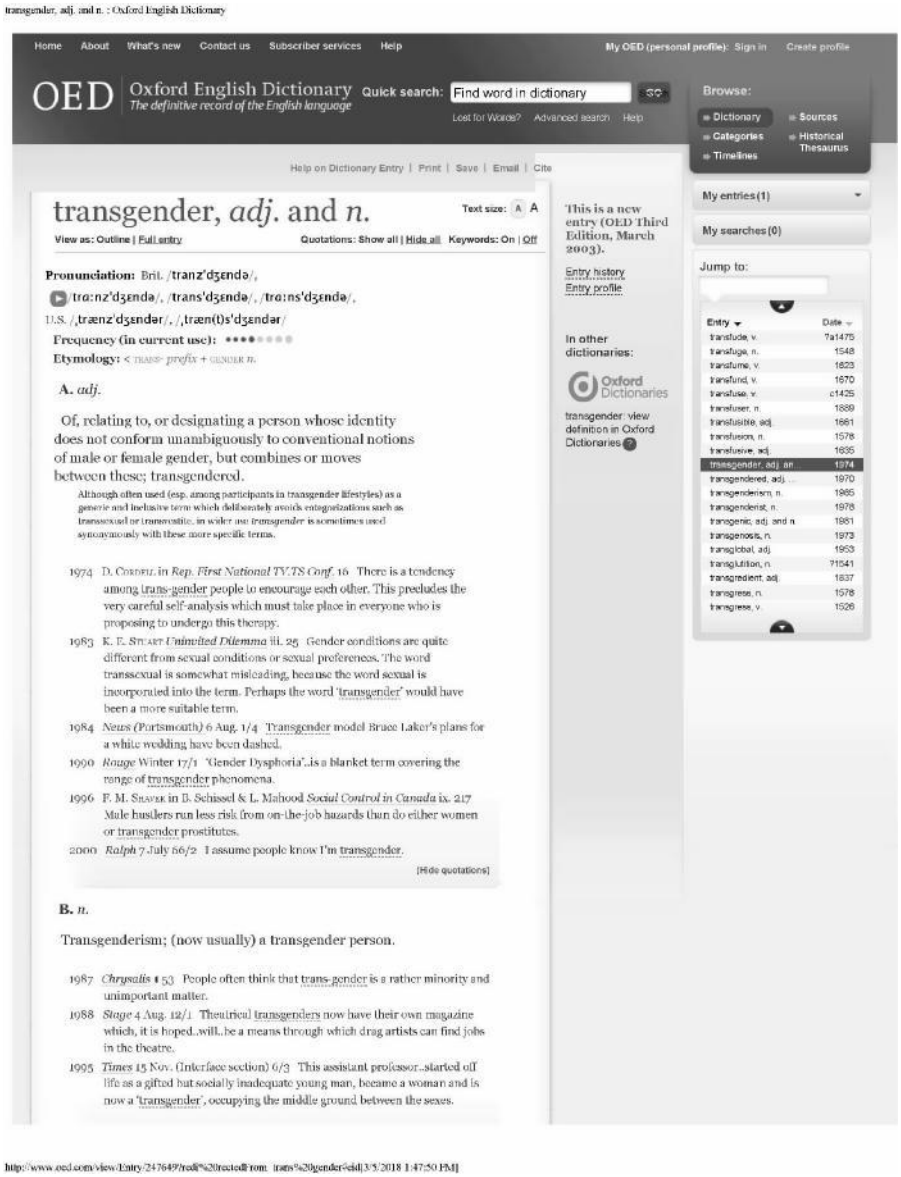

transgender, adj. and n. : Oxford English Dictionary

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transgender, *adj.* and *n.* Text size: A A

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Pronunciation: Brit. /tranz'dʒɛndə/, /tra:nz'dʒɛndə/, /trans'dʒɛndə/, /tra:ns'dʒɛndə/, U.S. /ˌtrænz'dʒɛndər/, /ˌtræn(t)s'dʒɛndər/

Frequency (in current use):

Etymology: < TRANS- *prefix* + GENDER *n.*

A. *adj.*

Of, relating to, or designating a person whose identity does not conform unambiguously to conventional notions of male or female gender, but combines or moves between these; transgendered.

Although often used (esp. among participants in transgender lifestyles) as a generic and inclusive term which deliberately avoids categorizations such as transsexual or transvestite, in wider use *transgender* is sometimes used synonymously with these more specific terms.

1974 D. CORNELL in *Rep. First National TV.TS Conf.* 16 There is a tendency among trans-gender people to encourage each other. This precludes the very careful self-analysis which must take place in everyone who is proposing to undergo this therapy.

1983 K. E. STUART *Uninvited Dilemma* iii. 25 Gender conditions are quite different from sexual conditions or sexual preferences. The word transsexual is somewhat misleading, because the word sexual is incorporated into the term. Perhaps the word 'transgender' would have been a more suitable term.

1984 *News* (Portsmouth) 6 Aug. 1/4 Transgender model Bruce Laker's plans for a white wedding have been dashed.

1990 *Rouge* Winter 17/1 'Gender Dysphoria'..is a blanket term covering the range of transgender phenomena.

1996 F. M. SHAVER in B. Schissel & L. Mahood *Social Control in Canada* ix. 217 Male hustlers run less risk from on-the-job hazards than do either women or transgender prostitutes.

2000 *Ralph* 7 July 66/2 I assume people know I'm transgender.

[Hide quotations]

B. *n.*

Transgenderism; (now usually) a transgender person.

1987 *Chrysalis* 1 53 People often think that trans-gender is a rather minority and unimportant matter.

1988 *Stage* 4 Aug. 12/1 Theatrical transgenders now have their own magazine which, it is hoped..will..be a means through which drag artists can find jobs in the theatre.

1995 *Times* 15 Nov. (Interface section) 6/3 This assistant professor..started off life as a gifted but socially inadequate young man, became a woman and is now a 'transgender', occupying the middle ground between the sexes.

This is a new entry (OED Third Edition, March 2003).

Entry history Entry profile

In other dictionaries: Oxford Dictionaries

transgender: view definition in Oxford Dictionaries

My entries (1) My searches (0)

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Entry	Date
transfuse, v.	?a1475
transfuge, n.	1548
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transfuse, v.	c1425
transfuser, n.	1889
transfusible, adj.	1661
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transgender, adj. an...	1974
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transgenderism, n.	1985
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transgenic, adj. and n.	1981
transgenosis, n.	1973
transglobal, adj.	1953
transglutition, n.	?1541
transgredient, adj.	1837
transgrese, n.	1578
transgrese, v.	1526

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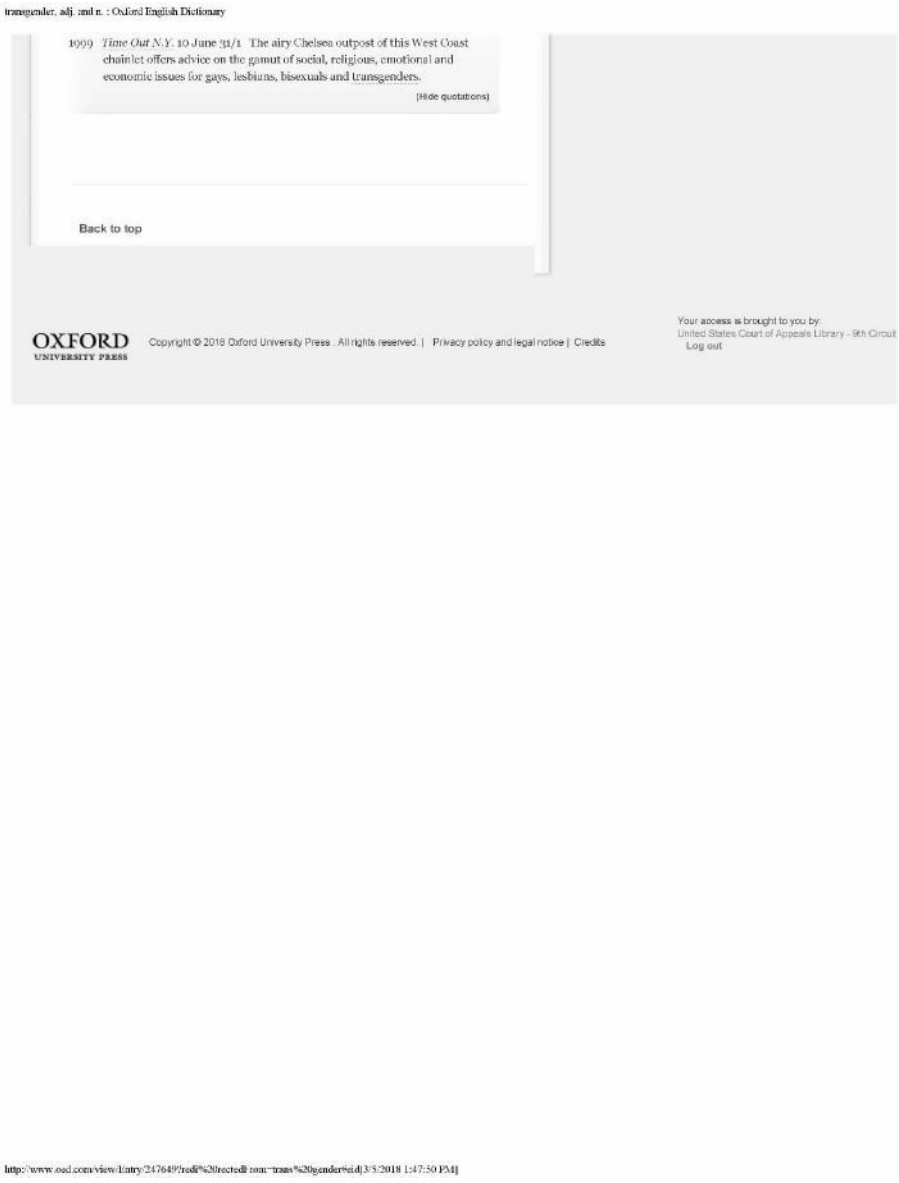

Attachment—Continued

What Is Gender Dysphoria?

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Gender Dysphoria

What Is Gender Dysphoria?

Gender dysphoria involves a conflict between a person's physical or assigned gender and the gender with which he/she/they identify. People with gender dysphoria may be very uncomfortable with the gender they were assigned, sometimes described as being uncomfortable with their body (particularly developments during puberty) or being uncomfortable with the expected roles of their assigned gender.

People with gender dysphoria may often experience significant distress and/or problems functioning associated with this conflict between the way they feel and think of themselves (referred to as experienced or expressed gender) and their physical or assigned gender.

The gender conflict affects people in different ways. It can change the way a person wants to express their gender and can influence behavior, dress and self-image. Some people may cross-dress, some may want to socially transition, others may want to medically transition with sex-change surgery and/or hormone treatment. Socially transitioning primarily involves transitioning into the affirmed gender's pronouns and bathrooms.

People with gender dysphoria may allow themselves to express their true selves and may openly want to be affirmed in their gender identity. They may use clothes and hairstyles and adopt a new first name of their experienced gender. Similarly children with gender dysphoria may express the wish to be of the opposite gender and may assert they are (or will grow up to be) of the opposite gender. They prefer, or demand, clothing, hairstyles and to be called a name of the opposite gender. (Medical transition is only relevant at and after the onset of puberty.)

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What Is Gender Dysphoria?

Gender dysphoria is not the same as gender nonconformity, which refers to behaviors not matching the gender norms or stereotypes of the gender assigned at birth. Examples of gender nonconformity (also referred to as gender expansiveness or gender creativity) include girls behaving and dressing in ways more socially expected of boys or occasional cross-dressing in adult men. Gender nonconformity is not a mental disorder. Gender dysphoria is also not the same being gay/lesbian.

While some children express feelings and behaviors relating to gender dysphoria at 4 years old or younger, many may not express feelings and behaviors until puberty or much later. For some children, when they experience puberty, they suddenly find themselves unable to identify with their own body. Some adolescents become unable to shower or wear a bathing suit and/or undertake self-harm behaviors.

Diagnosis | Treatment | Challenges/Complications

Diagnosis

The *Diagnostic and Statistical Manual of Mental Disorders* (DSM-5) provides for one overarching diagnosis of gender dysphoria with separate specific criteria for children and for adolescents and adults.

In adolescents and adults gender dysphoria diagnosis involves a difference between one's experienced/expressed gender and assigned gender, and significant distress or problems functioning. It lasts at least six months and is shown by at least two of the following:

1. A marked incongruence between one's experienced/expressed gender and primary and/or secondary sex characteristics
2. A strong desire to be rid of one's primary and/or secondary sex characteristics
3. A strong desire for the primary and/or secondary sex characteristics of the other gender
4. A strong desire to be of the other gender
5. A strong desire to be treated as the other gender
6. A strong conviction that one has the typical feelings and reactions of the other gender

In children, gender dysphoria diagnosis involves at least six of the following and an associated significant distress or impairment in function, lasting at least six months.

1. A strong desire to be of the other gender or an insistence that one is the other gender
2. A strong preference for wearing clothes typical of the opposite gender
3. A strong preference for cross-gender roles in make-believe play or fantasy play

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Attachment—Continued

What Is Gender Dysphoria?

4. A strong preference for the toys, games or activities stereotypically used or engaged in by the other gender
5. A strong preference for playmates of the other gender
6. A strong rejection of toys, games and activities typical of one's assigned gender
7. A strong dislike of one's sexual anatomy
8. A strong desire for the physical sex characteristics that match one's experienced gender

For children, cross-gender behaviors may start between ages 2 and 4, the same age at which most typically developing children begin showing gendered behaviors and interests. Gender atypical behavior is common among young children and may be part of normal development. Children who meet the criteria for gender dysphoria may or may not continue to experience it into adolescence and adulthood. Some research shows that children who had more intense symptoms and distress, who were more persistent, insistent and consistent in their cross-gender statements and behaviors, and who used more declarative statements ("I am a boy (or girl)" rather than "I want to be a boy (or girl)") were more likely to become transgender adults. [3, 4]

Definitions and Pronouns

Definitions [1, 5, 6]

- Gender - denotes the public (and usually legally recognized) lived role as boy or girl, man or woman. Biological factors combined with social and psychological factors contribute to gender development.
- Assigned gender - refers to a person's initial assignment as male or female at birth. It is based on the child's genitalia and other visible physical sex characteristics.
- Gender-atypical - refers to physical features or behaviors that are not typical of individuals of the same assigned gender in a given society.
- Gender-nonconforming - refers to behaviors that are not typical of individuals with the same assigned gender in a given society.
- Gender reassignment - denotes an official (and usually legal) change of gender.
- Gender identity - is a category of social identity and refers to an individual's identification as male, female or, occasionally, some category other than male or female. It is one's deeply held core sense of being male, female, some of both or neither, and does not always correspond to biological sex.
- Gender dysphoria - as a general descriptive term refers to an individual's discontent with the assigned gender. It is more specifically defined when used as a diagnosis.

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What Is Gender Dysphoria?

- Transgender - refers to the broad spectrum of individuals who transiently or persistently identify with a gender different from their gender at birth. (Note: the term transgendered is not generally used.)
- Transsexual - refers to an individual who seeks, or has undergone, a social transition from male to female or female to male. In many, but not all, cases this also involves a physical transition through cross-sex hormone treatment and genital surgery (sex reassignment surgery).
- Genderqueer - blurring the lines around gender identity and sexual orientation. Genderqueer individuals typically embrace a fluidity of gender identity and sometimes sexual orientation.
- Gender fluidity - having different gender identities at different times.
- Agendered - 'without gender,' individuals identifying as having no gender identity.
- Cisgender - describes individuals whose gender identity or expression aligns with the sex assigned to them at birth.
- Gender expansiveness - conveys a wider, more flexible range of gender identity and/or expression than typically associated with the binary gender system.
- Gender expression - the manner in which a person communicates about gender to others through external means such as clothing, appearance, or mannerisms. This communication may be conscious or subconscious and may or may not reflect their gender identity or sexual orientation.

Preferred Gender Pronouns

Some transgender and gender-nonconforming people may prefer gender-neutral or gender-inclusive pronouns when talking to or about them. "They" and "their" are sometimes used as gender-neutral singular pronouns. Singular gender-neutral pronouns also include "ze" (or "zie") and "hir."

+ References

Physician Review By:

Ranna Parekh, M.D., M.P.H.
February 2016

Expert Q & A: Gender Dysphoria

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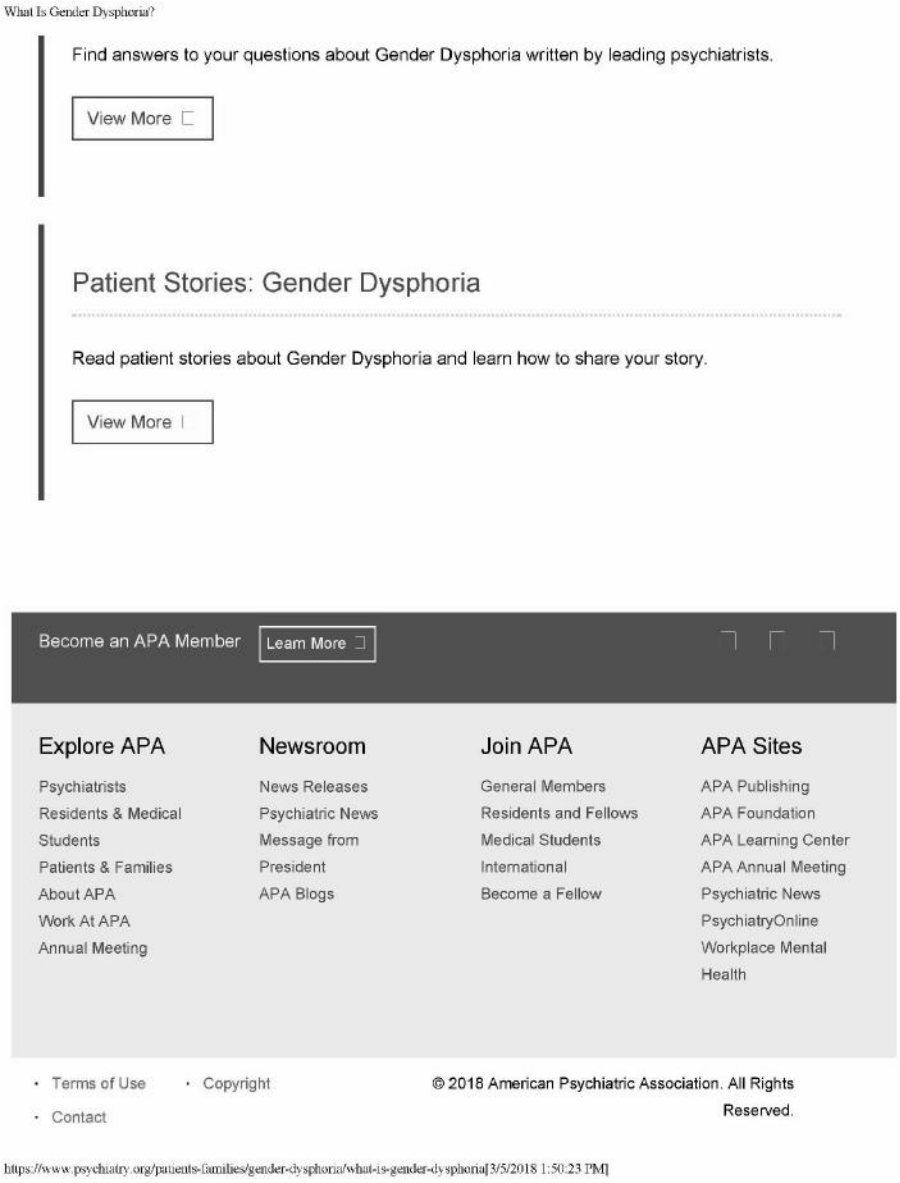

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UPTOWN MARKET, LLC, Plaintiff,

v.

OHIO SECURITY INSURANCE COMPANY, Defendant.

3:16–cv–01961–BR

United States District Court,
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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

RYAN KARNOSKI, et al., Plaintiffs, v. DONALD J. TRUMP, et al., Defendants.	CASE NO. C17-1297-MJP ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFFS' AND WASHINGTON'S MOTIONS FOR SUMMARY JUDGMENT; GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT

THIS MATTER comes before the Court on Plaintiffs' Motion for Summary Judgment (Dkt. No. 129); the State of Washington's Motion for Summary Judgment (Dkt. No. 150); and Defendants' Cross-Motion for Partial Summary Judgment (Dkt. No. 194.) Having reviewed the Motions, the Responses (Dkt. Nos. 194, 207, 209), the Replies (Dkt. Nos. 201, 202, 212) and all related papers, and having considered arguments made in proceedings before the Court, the Court rules as follows: The Court GRANTS IN PART and DENIES IN PART Plaintiffs' and

Washington's Motions and GRANTS IN PART and DENIES IN PART Defendants' Cross-Motion.

ORDER SUMMARY

In July 2017, President Donald J. Trump announced on Twitter a ban on military service by openly transgender people (the "Ban"). Plaintiffs and the State of Washington ("Washington") challenged the constitutionality of the Ban, and moved for a preliminary injunction to prevent it from being carried out.

In December 2017, the Court—along with three other federal judges—entered a nationwide preliminary injunction preventing the military from implementing the Ban. The effect of the order was to maintain the status quo, allowing transgender people to join and serve in the military and receive transition-related medical care. For the past few months, they have done just that.

In March 2018, President Trump announced a plan to implement the Ban. With few exceptions, the plan excludes from military service people "with a history or diagnosis of gender dysphoria" and people who "require or have undergone gender transition." The plan provides that transgender people may serve in the military only if they serve in their "biological sex." Defendants claim that this plan resolves the constitutional issues raised by Plaintiffs and Washington.

In the following order, the Court concludes otherwise, and rules that the preliminary injunction will remain in effect. Each of the claims raised by Plaintiffs and Washington remains viable. The Court also rules that, because transgender people have long been subjected to systemic oppression and forced to live in silence, they are a protected class. Therefore, any attempt to exclude them from military service will be looked at with the highest level of care,

and will be subject to the Court's "strict scrutiny." This means that before Defendants can implement the Ban, they must show that it was sincerely motivated by compelling interests, rather than by prejudice or stereotype, and that it is narrowly tailored to achieve those interests.

The case continues forward on the issue of whether the Ban is well-supported by evidence and entitled to deference, or whether it fails as an impermissible violation of constitutional rights. The Court declines to dismiss President Trump from the case and allows Plaintiffs' and Washington's claims for declaratory relief to go forward against him.

BACKGROUND

I. The Ban on Military Service by Openly Transgender People[1]

***President Trump's Announcement on Twitter*:** On July 26, 2017, President Donald J. Trump (@realDonaldTrump) announced over Twitter that the United States would no longer "accept or allow" transgender people "to serve in any capacity in the U.S. military" (the "Twitter Announcement"):

(Dkt. No. 149, Ex. 1.)

[1] As used throughout this Order, and as explained in greater detail in this section, the "Ban" refers to Defendants' policy generally prohibiting military service by openly transgender people, as announced in President Trump's Twitter Announcement and 2017 Memorandum and as further detailed in the Implementation Plan and 2018 Memorandum.

***The 2017 Memorandum*:** On August 25, 2017, President Trump issued a Presidential Memorandum (the "2017 Memorandum") formalizing his Twitter Announcement, and directing the Secretaries of Defense and Homeland Security to "return" to an earlier policy excluding transgender service members. (Dkt. No. 149, Ex. 2.) The 2017 Memorandum authorized the discharge of openly transgender service members (the "Retention Directive"); prohibited the accession of openly transgender service members (the "Accession Directive"); and prohibited the use of Department of Defense ("DoD") and Department of Homeland Security ("DHS") resources to fund "sex reassignment" surgical procedures (the "Medical Care Directive"). (Id. at §§ 1-3.) The Accession Directive was to take effect on January 1, 2018; the Retention and Medical Care Directives on March 23, 2018. (Id. at § 3.) The 2017 Memorandum also ordered the Secretary of Defense to "submit to [President Trump] a plan for implementing both [its] general policy . . . and [its] specific directives . . ." no later than February 21, 2018. (Id.)

***Secretary Mattis' Press Release and Interim Guidance*:** On August 29, 2017, Secretary of Defense James N. Mattis issued a press release confirming that the DoD had received the 2017 Memorandum and, as directed, would "carry out" its policy direction. (Dkt. No. 197, Ex. 2.) The press release explained that Secretary Mattis would "develop a study and implementation plan" and "establish a panel of experts . . . to provide advice and recommendation on the implementation of the [P]resident's direction." (Id.)

On September 14, 2017, Secretary Mattis issued interim guidance regarding President Trump's Twitter Announcement and 2017 Memorandum to the military (the "Interim Guidance"). (Dkt. No. 149, Ex. 3.) The Interim Guidance again identified the DoD's intent to "carry out the President's policy and directives" and "present the President with a plan to implement the policy and directives in the [2017] Memorandum." (Id. at 2.) The Interim

Guidance provided (1) that transgender people would be prohibited from accession effective immediately; (2) that service members diagnosed with gender dysphoria would be provided "treatment," however, "no new sex reassignment surgical procedures for military personnel [would] be permitted after March 22, 2018"; and (3) that no action would be taken "to involuntarily separate or discharge an otherwise qualified Service member solely on the basis of a gender dysphoria diagnosis or transgender status." (Id. at 3.)

***The Implementation Plan*:** On February 22, 2018, as directed, Secretary Mattis delivered to President Trump a plan for carrying out the policies set forth in his Twitter Announcement and 2017 Memorandum (Dkt. No. 224, Ex. 1) along with a "Report and Recommendations on Military Service by Transgender Persons" (Dkt. No. 224, Ex. 2) (collectively, the "Implementation Plan"). The Implementation Plan recommended the following policies:

- Transgender persons with a history or diagnosis of gender dysphoria are disqualified from military service, except under the following limited circumstances: (1) if they have been stable for 36 consecutive months in their biological sex prior to accession; (2) Service members diagnosed with gender dysphoria after entering into service may be retained if they do not require a change of gender and remain deployable within applicable retention standards; and (3) currently serving Service members who have been diagnosed with gender dysphoria since the previous administration's policy took effect and prior to the effective date of this new policy, may continue to serve in their preferred gender and receive medically necessary treatment for gender dysphoria.

- Transgender persons who require or have undergone gender transition are disqualified from military service.

- Transgender persons without a history or diagnosis of gender dysphoria, who are otherwise qualified for service, may serve, like all other Service members, in their biological sex.

(Dkt. No. 224, Ex. 1 at 3-4.)

***The 2018 Memorandum*:** On March 23, 2018, President Trump issued another Presidential Memorandum (the "2018 Memorandum"). (Dkt. No. 224, Ex. 3.) The 2018 Memorandum confirms his receipt of the Implementation Plan, purports to "revoke" the 2017 Memorandum and "any other directive [he] may have made with respect to military service by transgender individuals," and directs the Secretaries of Defense and Homeland Security to "exercise their authority to implement any appropriate policies concerning military service by transgender individuals." (Id. at 2-3.)

II. The Carter Policy

In 2010, Congress repealed the "Don't Ask, Don't Tell" policy that had previously prevented gay, lesbian, and bisexual people from serving openly in the military. (Dkt. No. 145 at ¶ 10.) The repeal of "Don't Ask, Don't Tell" raised questions about the military's policy on transgender service members, as commanders became increasingly aware that there were capable and experienced transgender service members in every branch of the military. (Id. at ¶ 11; Dkt. No. 146 at ¶ 7.) In August 2014, the DoD eliminated its categorical ban on retention of transgender service members, enabling each branch of military service to reassess its own policies. (Dkt. No. 145 at ¶ 12; Dkt. No. 146 at ¶ 8.) In July 2015, then-Secretary of Defense Ashton Carter convened a group to evaluate policy options regarding openly transgender service members (the "Working Group"). (Dkt. No. 142 at ¶ 8.) The Working Group included senior uniformed officials from each branch, a senior civilian official, and various staff members. (Id. at ¶ 9.) It sought to "identify and address all relevant issues relating to service by openly transgender persons." (Id. at ¶ 22.) To do so, it consulted with medical experts, personnel experts, readiness experts, and commanders whose units included transgender service members, and commissioned an independent study by the RAND Corporation to assess the implications of

allowing transgender people to serve openly (the "RAND Study"). (Id. at ¶¶ 10-11, 22-27.) In particular, the RAND Study focused on: (1) the health care needs of transgender service members and the likely costs of providing coverage for transition-related care; (2) the readiness implications of allowing transgender service members to serve openly; and (3) the experiences of foreign militaries that allow for open service. (Dkt. No. 144, Ex. B at 4.) The RAND Study found "no evidence" that allowing transgender people to serve openly would adversely impact military effectiveness, readiness, or unit cohesion. (Dkt. No. 144 at ¶ 14.) Instead, the RAND Study found that discharging transgender service members would reduce productivity and result in "significant costs" associated with replacing skilled and qualified personnel. (Dkt. No. 142 at ¶ 21.) The results of the RAND Study were published in a 113-page report titled "Assessing the Implications of Allowing Transgender Personnel to Serve Openly." (See Dkt. No. 144, Ex. B.)

After reviewing the results of the RAND Study and other evidence, the Working Group unanimously agreed that (1) transgender people should be allowed to serve openly and (2) excluding them from service based on a characteristic unrelated to their fitness to serve would undermine military efficacy. (Dkt. No. 142 at ¶¶ 26-27.) On June 30, 2016, Secretary Carter accepted the recommendations of the Working Group and issued Directive-type Memorandum 16-005 (the "Carter Policy"), which affirmed that "service in the United States military should be open to all who can meet the rigorous standards for military service and readiness." (Dkt. No. 144, Ex. C.) The Carter Policy provided that "[e]ffective immediately, no otherwise qualified service member may be involuntarily separated, discharged or denied reenlistment or continuation of service, solely on the basis of their gender identity," and further provided that

transgender people would be allowed to accede into the military not later than July 1, 2017.[2] (Id. at 5.) Consistent with the Carter Policy, each branch of military service issued detailed instructions, policies, and regulations regarding separation and retention, accession, in-service transition, and medical care. (Dkt. No. 144 at ¶¶ 24-36, Exs. D, E, F; Dkt. No. 145 at ¶¶ 41-50, Exs. A, B; Dkt. No. 146 at ¶¶ 27-34, Ex. A.)

In reliance upon the Carter Policy and the DoD's assurances that it would not discharge them for being transgender, many service members came out to the military and had been serving openly for more than a year when President Trump issued his Twitter Announcement and 2017 Memorandum. (Dkt. No. 144, ¶ 37; Dkt. No. 145 at ¶ 51; Dkt. No. 146 at ¶ 35.)

III. Procedural History

On August 28, 2017, Plaintiffs filed this lawsuit challenging the constitutionality of the Ban, as set forth in the Twitter Announcement and the 2017 Memorandum. (See Dkt. No. 1.) Plaintiffs include nine transgender individuals (the "Individual Plaintiffs") and three organizations (the "Organizational Plaintiffs"). (Dkt. No. 30 at ¶¶ 7-18.) Individual Plaintiffs Ryan Karnoski, D.L., and Connor Callahan aspire to enlist in the military; Staff Sergeant Cathrine Schmid, Chief Warrant Officer Lindsey Muller, Petty Officer First Class Terece Lewis, Petty Officer Second Class Phillip Stephens, and Petty Officer Second Class Megan Winters currently serve openly in the military. (Id. at ¶¶ 7-13.) Individual Plaintiff Jane Doe currently serves in the military, but does not serve openly. (Id. at ¶ 14.) Organizational Plaintiffs include the Human Rights Campaign ("HRC"), the Gender Justice League ("GJL"), and the American

[2] On June 30, 2017, Secretary Mattis extended the effective date for accepting transgender recruits to January 1, 2018. (Dkt. No. 197, Ex. 3.)

Military Partner Association ("AMPA"). (Id. at ¶¶ 16-18.) Defendants include President Trump, Secretary Mattis, the United States, and the DoD. (Id. at ¶¶ 19-22.)

On November 27, 2017, the Court granted intervention to Washington, which joined to protect its sovereign and quasi-sovereign interests in its natural resources and in the health and physical and economic well-being of its residents. (See Dkt. No. 101.)

On December 11, 2017, the Court issued a nationwide preliminary injunction barring Defendants from "taking any action relative to transgender individuals that is inconsistent with the status quo that existed prior to President Trump's July 26, 2017 announcement."[3] (Dkt. No. 103 at 23.) The Court found that Plaintiffs and Washington had standing to challenge the Ban and were likely to succeed on the merits of their claims for violation of equal protection, substantive due process, and the First Amendment. (Id. at 6-12, 15-20.)

On January 25, 2018, Plaintiffs and Washington filed separate motions for summary judgment.[4] (Dkt. Nos. 129, 150.) Both seek an order declaring the Ban unconstitutional and permanently enjoining its implementation. (Dkt. No. 129 at 28-29; Dkt. No. 150-1.)

On February 28, 2018, Defendants filed an opposition and cross-motion for partial summary judgment seeking dismissal of all claims brought against President Trump. (Dkt. No. 194.)

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[3] Three other district courts also entered preliminary injunctions against the Ban. See Doe 1 v. Trump, 275 F. Supp. 3d 167 (D.D.C. 2017); Stone v. Trump, 280 F. Supp. 3d 747 (D. Md. 2017); Stockman v. Trump, No. 17-cv-1799-JGB-KK, Dkt. No. 79 (C.D. Cal. Dec. 22, 2017).

[4] Plaintiffs are joined by amici the Constitutional Accountability Center (Dkt. No. 163, Ex. 1); Legal Voice (Dkt. No. 169); Retired Military Officers and Former National Security Officials (Dkt. No. 152, Ex. A); and the Commonwealths of Massachusetts and Pennsylvania, the States of California, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maryland, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, and the District of Columbia (Dkt. No. 170, Ex. A.)

On March 23, 2018, as these motions were pending and only days before the Court was set to hear oral argument, President Trump issued the 2018 Memorandum. (Dkt. No. 214, Ex. 1.) On March 27, the Court ordered the parties to present supplemental briefing on the effect of the 2018 Memorandum and the Implementation Plan. (Dkt. No. 221.) That briefing has now been completed and this matter is ready for ruling. (See Dkt. Nos. 226, 227, 228.)

DISCUSSION

I. Legal Standard

Summary judgment is proper if "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). To defeat a motion for summary judgment, the non-movant must point to facts supported by the record which demonstrate a genuine issue of material fact. Lujan v. National Wildlife Federation, 497 U.S. 871, 888 (1990). Conclusory, non-specific statements are not sufficient. Id. Similarly, "a party cannot manufacture a genuine issue of material fact merely by making assertions in its legal memoranda." S.A. Empresa de Viacao Aerea Rio Grandense v. Walter Kidde & Co., Inc., 690 F.2d 1235, 1238 (9th Cir. 1982).

II. Plaintiffs' and Washington's Motions for Summary Judgment

Plaintiffs and Washington contend that summary judgment is proper because the Ban is unsupported by any constitutionally adequate government interest as a matter of law, and therefore violates equal protection, substantive due process, and the First Amendment. (Dkt. No. 129 at 15-28; Dkt. No. 150 at 13-23.) Defendants respond that disputes of material fact preclude summary judgment, including disputes as to (1) whether Plaintiffs' and Washington's challenges

are moot as a result of the 2018 Memorandum; (2) whether Plaintiffs and Washington have standing; and (3) whether the Ban satisfies the applicable level of scrutiny. (Dkt. No. 194 at 5-24; Dkt. No. 226 at 3-11.) The Court addresses each of these issues in turn:

A. Mootness

Defendants claim that Plaintiffs' and Washington's challenges are now moot, as the policy set forth in the 2017 Memorandum has been "revoked" and replaced by that in the 2018 Memorandum. (Dkt. No. 226 at 3-7.) Defendants claim the "new policy" has "changed substantially," such that it presents a "substantially different controversy." (Id. at 6 (citations omitted.)) Plaintiffs and Washington respond that there is no "new policy" at all, as the 2018 Memorandum and the Implementation Plan merely implement the directives of the 2017 Memorandum. (Dkt. No. 227 at 2; Dkt. No. 228 at 7-8.)

"The burden of demonstrating mootness 'is a heavy one.'" Los Angeles County v. Davis, 440 U.S. 625, 631 (1979) (quoting United States v. W.T. Grant Co., 345 U.S. 629, 632-33 (1953)). The Ninth Circuit has explained that a case is not moot unless "subsequent events make it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur," McCormack v. Herzog, 788 F.3d 1017, 1024 (9th Cir. 2015) (quoting Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 189 (2000)), such that "the litigant no longer ha[s] any need of the judicial protection that is sought." Jacobus v. Alaska, 338 F.3d 1095, 1102-03 (9th Cir. 2003) (quoting Adarand Constructors, Inc. v. Slater, 528 U.S. 216, 224 (2000)). Accordingly, courts find cases moot only where the challenged policy has been completely revoked or rescinded, not merely voluntarily ceased. See Davis, 440 U.S. at 631 (holding that a case is moot only where "there can be no reasonable expectation" that the alleged violation will recur and "interim relief or events have completely and irrevocably

eradicated the effects of the alleged violation"); City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283, 289 (1982) (holding that "a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice"); see also McCormack, 788 F.3d at 1025 (noting that a case is not moot where the government never "repudiated . . . as unconstitutional" the challenged policy).

The Court finds that the 2018 Memorandum and the Implementation Plan do not substantively rescind or revoke the Ban, but instead threaten the very same violations that caused it and other courts to enjoin the Ban in the first place. The 2017 Memorandum prohibited the accession and authorized the discharge of openly transgender service members (the Accession and Retention Directives); prohibited the use of DoD and DHS resources to fund transition-related surgical procedures (the Medical Care Directive); and directed Secretary Mattis to submit "a plan for implementing" both its "general policy" and its "specific directives" no later than February 21, 2018. (Dkt. No. 149, Ex. 2 at §§ 1-3.) The 2017 Memorandum did not direct Secretary Mattis to determine *whether* or not the directives should be implemented, but instead ordered the directives to be implemented by specific dates and requested a plan for *how* to do so.

The Implementation Plan adheres to the policy and directives set forth in the 2017 Memorandum with few exceptions: With regard to the Accession and Retention Directives, the Implementation Plan excludes from military service and authorizes the discharge of transgender people who "require or have undergone gender transition" and those "with a history or diagnosis of gender dysphoria" unless they have been "stable for 36 consecutive months in their biological sex prior to accession." (Dkt. No. 224, Ex. 1 at 3-4.) With regard to the Medical Care Directive, the Implementation Plan provides that the military will, with few exceptions, no longer provide

transition-related surgical care (as people who "require . . . gender transition" will no longer be permitted to serve and those who are currently serving will be subject to discharge). (Id.)

Defendants claim that the 2018 Memorandum and the Implementation Plan differ from the 2017 Memorandum in that they do not mandate a "categorical" prohibition on service by openly transgender people and "contain[] several exceptions allowing some transgender individuals to serve." (Dkt. No. 226 at 6-7). The Court is not persuaded. The Implementation Plan prohibits transgender people—including those who have neither transitioned nor been diagnosed with gender dysphoria—from serving, unless they are "willing and able to adhere to all standards associated with their biological sex." (Dkt. No. 224, Ex. 1 at 4, Ex. 2 at 7.) Requiring transgender people to serve in their "biological sex" [5] does not constitute "open" service in any meaningful way, and cannot reasonably be considered an "exception" to the Ban. Rather, it would force transgender service members to suppress the very characteristic that defines them as transgender in the first place.[6] (See Dkt. No. 143 at ¶ 19 ("The term 'transgender' is used to describe someone who experiences any significant degree of

[5] The Court notes that the Implementation Plan uses the term "biological sex," apparently to refer to the sex one is assigned at birth. This is somewhat misleading, as the record indicates that gender identity—"a person's internalized, inherent sense of who they are as a particular gender (i.e., male or female)"—is also widely understood to have a "biological component." (See Dkt. No. 143 at ¶¶ 20-21.)

[6] While the Implementation Plan contains an exception that allows current service members to serve openly and in their preferred gender and receive "medically necessary" treatment for gender dysphoria, the exception is narrow, and applies only to those service members who "were diagnosed with gender dysphoria by a military medical provider after the effective date of the Carter [P]olicy" (i.e., June 30, 2016) but "before the effective date" of the policy set forth in the Implementation Plan. (Dkt. No. 224, Ex. 2 at 7-8.) Further, this exception is severable from the remainder of the Implementation Plan. (Id. at 7 ("[S]hould [the DoD]'s decision to exempt these Service members be used by a court as a basis for invalidating the entire policy, this exemption is and should be deemed severable from the rest of the policy.").)

misalignment between their gender identity and their assigned sex at birth."); Dkt. No. 224, Ex. 2 at 9 n.10 ("[T]ransgender" is "an umbrella term used for individuals who have sexual identity or gender expression that differs from their assigned sex at birth.")

Therefore, the Court concludes that the 2018 Memorandum and the Implementation Plan do not moot Plaintiffs' and Washington's existing challenges.

B. Standing

Defendants claim that Plaintiffs and Washington lack standing to challenge the Ban, and that the 2018 Memorandum and Implementation Plan "have significantly changed the analysis." (Dkt. No. 194 at 6-12; Dkt. No. 226 at 7.)

Standing requires (1) an "injury in fact"; (2) a "causal connection between the injury and the conduct complained of"; and (3) a likelihood "that the injury will be redressed by a favorable decision." Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992) (internal quotation marks and citations omitted). An "injury in fact" exists where there is an invasion of a legally protected interest that is both "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." Id. at 560 (internal quotation marks and citations omitted).

While the Court previously concluded that both Plaintiffs and Washington established standing at the preliminary injunction stage (Dkt. No. 103 at 7-12), their burden for doing so on summary judgment is more exacting and requires them to set forth "by affidavit or other evidence 'specific facts'" such that a "fair-minded jury" could find they have standing. Id. at 561; see also Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986).

The Court considers standing for the Individual Plaintiffs, the Organizational Plaintiffs, and Washington in turn:

1. Individual Plaintiffs

Each of the Individual Plaintiffs has submitted an affidavit detailing the ways in which they have already been harmed by the Ban, and would be further harmed were it to be implemented. (See Dkt. Nos. 130-138.) While Defendants claim that "Plaintiffs are obviously not suffering any harm from the revoked 2017 Memorandum," and "would neither sustain an actual injury nor face an imminent threat of future injury" as a result of the 2018 Memorandum, the Court disagrees and concludes that each of the Individual Plaintiffs has standing to challenge the Ban.

Karnoski, D.L, and Callahan have "taken clinically appropriate steps to transition" and would be excluded from acceding under the Implementation Plan. (Dkt. No. 130 at ¶ 10; Dkt. No. 132 at ¶ 8; Dkt. No. 137 at ¶ 8.) Whether they could have acceded under the Carter Policy and whether they might be able to obtain "waivers," as Defendants suggest, are irrelevant. (See Dkt. No. 226 at 8.) As the Court previously found, their injury "lies in the denial of an equal *opportunity* to compete, not the denial of the job itself," and the Court need not "inquire into the plaintiff's qualifications (or lack thereof) when assessing standing." (Dkt. No. 103 at 10 n.3 (citing Shea v. Kerry, 796 F.3d 42, 50 (D.C. Cir. 2015)) (emphasis in original).)

Doe does not currently serve openly, but was intending to come out and to transition surgically before President Trump's Twitter Announcement. (Dkt. No. 138 at ¶¶ 8-11.) The Ban unambiguously subjects her to discharge should she seek to do either. (See Dkt. No. 224, Ex. 1.) Schmid, Muller, Lewis, Stephens, and Winters have been diagnosed with gender dysphoria, and likewise would be subject to discharge under the Ban.[7] (Dkt. No. 131 at ¶ 9; Dkt. No. 133 at

[7] Defendants claim that the currently serving Plaintiffs were "diagnosed with gender dysphoria within the relevant time period" and "therefore would be able to continue serving in their preferred gender, change their gender marker, and receive all medically necessary

¶ 15; Dkt. No. 134 at ¶ 10; Dkt. No. 135 at ¶ 10; Dkt. No. 136 at ¶ 10.) The threat of discharge facing Doe, Schmid, Muller, Lewis, Stephens, and Winters is "actual or imminent, not conjectural or hypothetical," and clearly gives rise to standing. See Lujan, 504 U.S. at 560 (internal quotation marks and citation omitted).

Importantly, even if each of the Individual Plaintiffs were granted waivers or otherwise not excluded, discharged, or denied medical care, there can be no dispute that they would nevertheless have standing to challenge the Ban. This is because the Ban already has denied them the opportunity to serve in the military on the same terms as others; has deprived them of dignity; and has subjected them to stigmatization. (See Dkt. No. 103 at 8.) Policies that "stigmatiz[e] members of [a] disfavored group as 'innately inferior' . . . can cause serious non-economic injuries to those persons who are personally denied equal treatment solely because of their membership in a disfavored group." Heckler v. Mathews, 465 U.S. 728, 737-740 (1984) (citation omitted). Such stigmatic injury, when identified in specific terms, is "one of the most serious consequences of discriminatory government action and is sufficient in some circumstances to support standing." Allen v. Wright, 468 U.S. 737, 755 (1984), abrogated on other grounds, 134 S. Ct. 1377 (2014).

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treatment" under the Implementation Plan's narrow exception. (Dkt. No. 226 at 8.) The record does not support this claim. As noted previously, the exception applies only to current service members who "were diagnosed with gender dysphoria by a military medical provider *after* the effective date of the Carter [P]olicy" (i.e., June 30, 2016) but "before the effective date" of the policy set forth in the Implementation Plan. (See supra, n.6; Dkt. No. 224, Ex. 2 at 7-8 (emphasis added).) The record suggests that many, if not all, of the currently serving Plaintiffs were diagnosed *before* June 30, 2016. For example, Schmid was diagnosed "approximately four years ago." (Dkt. No. 131 at ¶ 9.) Muller was diagnosed "approximately six years ago." (Dkt. No. 133 at ¶ 15.) Lewis, Stephens, and Winters were diagnosed "approximately three years ago," "approximately two and a half years ago," and "approximately two years ago" respectively. (Dkt. No. 134 at ¶ 10; Dkt. No. 135 at ¶ 10; Dkt. No. 136 at ¶ 10.) There is also no indication that any of the currently serving Plaintiffs received their diagnosis from a "military medical provider."

Each of the Individual Plaintiffs has detailed the stigmatic injuries they have suffered through affidavits. For example, Karnoski has explained that the Ban has caused him "great distress, discomfort, and pain." (Dkt. No. 130 at ¶ 21.) Schmid has explained that the Ban's "abrupt change in policy and implicit commentary on [her] value to the military and competency to serve has caused [her] to feel tremendous anguish," and that since it was announced, she has lost sleep and suffered "an immense amount of anxiety." (Dkt. No. 131 at ¶¶ 23-24, 26.) Muller has explained that the Ban was "devastating" and "wounded [her] more than any combat injury could." (Dkt. No. 133 at ¶¶ 30-31.) Doe has explained that the Ban precludes her from expressing her authentic gender identity, and that as a result, she has not come out. (Dkt. No. 138 at ¶¶ 10-11.) Doe's self-censorship alone is a "constitutionally sufficient injury," as it is based on her "actual and well-founded fear" of discharge. See Cal. Pro-Life Council, Inc. v. Getman, 328 F.3d 1088, 1095 (9th Cir. 2003) (holding that a person's "actual and well-founded fear that [a] law will be enforced against him or her" may give rise to standing to bring pre-enforcement claims under the First Amendment and that "self-censorship is 'a harm that can be realized even without an actual prosecution'") (quoting Virginia v. Am. Booksellers Ass'n, 484 U.S. 383, 393 (1988)).

Therefore, the Court concludes that each of the Individual Plaintiffs has standing.

2. Organizational Plaintiffs

As each of the Individual Plaintiffs has standing, so too do the organizations they represent. An organization has standing where "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." Hunt v. Wash. State Apple Advert. Comm'n, 432 U.S. 333,

343 (1977). Each of the Organizational Plaintiffs satisfies these requirements. Karnoski and Schmid are members of HRC, GJL, and AMPA, and Muller, Stephens, and Winters are also members of AMPA. (Dkt. No. 130 at ¶ 3; Dkt. No. 131 at ¶ 5; Dkt. No. 133 at ¶ 5; Dkt. No. 135 at ¶ 4; Dkt. No. 136 at ¶ 4; Dkt. No. 140 at ¶ 3.) The interests each Organizational Plaintiff seeks to protect are germane to their organizational purposes, which include ending discrimination against lesbian, gay, bisexual, transgender and queer ("LGBTQ") individuals (HRC and GJL) and supporting families and allies of LGBT service members and veterans (AMPA). (Dkt. No. 139 at ¶ 2; Dkt. No. 140 at ¶ 2; Dkt. No. 141 at ¶ 2.)

Therefore, the Court concludes that each of the Organizational Plaintiffs has standing.

3. Washington

Defendants claim that "Washington has not even attempted to satisfy its burden to demonstrate standing," and that "in granting Washington's motion to intervene, the Court expressly declined to decide whether Washington possessed standing to sue." (Dkt. No. 194 at 12.) To the contrary, the Court explicitly found that Washington had standing in its own right, and not merely as an intervenor. (Dkt. No. 103 at 11-12.)

A state has standing to sue the federal government to vindicate its sovereign and quasi-sovereign interests. See Massachusetts v. E.P.A., 549 U.S. 497, 518-520 (2007). Sovereign interests include a state's interest in protecting the natural resources within its boundaries. Id. at 518-19. Quasi-sovereign interests include its interest in "the health and well-being—both physical and economic—of its residents," and in "securing residents from the harmful effects of discrimination." Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez, 458 U.S. 592, 607, 609 (1982).

Washington contends that the Ban will impede its ability to protect its residents and natural resources and will undermine the efficacy of its National Guard. (Dkt. No. 150 at 9-10.) Washington is home to approximately 60,000 active, reserve, and National Guard members, and the military is the second largest public employer in the state. (Id. at 9.) Washington is also home to approximately 32,850 transgender adults, and its laws protect these residents against discrimination on the basis of sex, gender, and gender identity. (Id. at 9-10); RCW §§ 49.60.030; 49.60.040(25)-(26).

Washington relies on the National Guard to assist with emergency preparedness and disaster recovery planning, and to protect the state's residents and natural resources from wildfires, landslides, flooding, and earthquakes. (Dkt. No. 150 at 9.) When the Governor deploys the National Guard for state active duty, Washington pays its members' wages and provides disability and life insurance benefits for injuries they may sustain while serving the state. (Id.); RCW § 38.24.050. The state also oversees recruitment efforts and exercises day-to-day command over Guard members in training and most forms of active duty. (Dkt. No. 170, Ex. A at 20.) Further, the Governor must ensure that the Guard conforms to both federal and state laws and regulations, including the state's anti-discrimination laws and, were the Ban to be implemented, conflicting DoD policies regarding accession and retention. (Dkt. No. 150 at 9-10; Dkt. No. 170, Ex. A at 21-22.) Thus, in addition to diminishing the number of eligible members for the National Guard, the Ban threatens Washington's ability to (1) protect its residents and natural resources in times of emergency and (2) "assur[e] its residents that it will act" to protect them from "the political, social, and moral damage of discrimination." See Snapp, 458 U.S. at 609. Defendants have not offered any contrary evidence with respect to

Washington's sovereign and quasi-sovereign interests. Therefore, the Court concludes that Washington has standing.

C. Constitutional Violations

Plaintiffs contend that the Ban violates equal protection, substantive due process, and the First Amendment. (Dkt. No. 129 at 15-28.) Washington contends that the Ban violates equal protection and substantive due process. (Dkt. No. 150 at 13-23.) Before it can reach the merits of these constitutional claims, the Court must determine (1) the applicable level of scrutiny and (2) the applicable level of deference owed to the Ban, if any. The Court addresses each of these issues in turn:

1. Level of Scrutiny

At the preliminary injunction stage, the Court found that transgender people were, at minimum, a quasi-suspect class. (Dkt. No. 103 at 15-16.) In light of additional evidence before it at this stage, the Court today concludes that they are a suspect class, such that the Ban must satisfy the most exacting level of scrutiny if it is to survive.

In determining whether a classification is suspect or quasi-suspect, the Supreme Court has observed that relevant factors include: (1) whether the class has been "[a]s a historical matter . . . subjected to discrimination," Bowen v. Gilliard, 483 U.S. 587, 602 (1987); (2) whether the class has a defining characteristic that "frequently bears [a] relation to ability to perform or contribute to society," City of Cleburne, Tex. v. Cleburne Living Ctr., 473 U.S. 432, 440-41 (1985); (3) whether the class exhibits "obvious, immutable, or distinguishing characteristics that define [it] as a discrete group," Bowen, 483 U.S. at 602; and (4) whether the class is "a minority or politically powerless." Id.; see also Windsor v. U.S., 699 F.3d 169, 181 (2d Cir. 2012), aff'd on other grounds, 570 U.S. 744 (2013). While "[t]he presence of any of the

factors is a signal that the particular classification is 'more likely than others to reflect deep-seated prejudice rather than legislative rationality in pursuit of some legitimate objective,'" the first two factors alone may be dispositive. Golinski v. U.S. Office of Pers. Mgmt., 824 F. Supp. 2d 968, 983 (N.D. Cal. 2012) (quoting Pyler v. Doe, 457 U.S. 202, 216 n.14 (1982)).

The Court considers each of these factors in turn:

i. History of Discrimination

The history of discrimination and systemic oppression of transgender people in this country is long and well-recognized. Transgender people have suffered and continue to suffer endemic levels of physical and sexual violence, harassment, and discrimination in employment, education, housing, criminal justice, and access to health care. (See Dkt. No. 169, Ex. A at 9-12.) According to a nationwide survey conducted by the National Center for Transgender Equality in 2015, 48 percent of transgender respondents reported being "denied equal treatment, verbally harassed, and/or physically attacked in the past year because of being transgender" and 47 percent reported being "sexually assaulted at some point in their lifetime." (Id. at 10.) Seventy-seven (77) percent report being "verbally harassed, prohibited from dressing according to their gender identity, or physically or sexually assaulted" in grades K-12. (Id. at 10-11.) Thirty (30) percent reported being "fired, denied a promotion, or experiencing some other form of mistreatment in the workplace related to their gender identity or expression, such as being harassed or attacked." (Id. at 11.) Finally, "it is generally estimated that transgender women face *4.3 times the risk* of becoming homicide victims than the general population." (Id. at 10 (emphasis in original).)

ii. Contributions to Society

Discrimination against transgender people clearly is unrelated to their ability to perform and contribute to society. See Doe 1, 275 F. Supp. 3d at 209 (noting the absence of any "argument or evidence suggesting that being transgender in any way limits one's ability to contribute to society"); Adkins v. City of New York, 143 F. Supp. 3d 134, 139 (S.D.N.Y. 2015) (noting the absence of "any data or argument suggesting that a transgender person, simply by virtue of transgender status, is any less productive than any other member of society"). Indeed, the Individual Plaintiffs in this case contribute not only to society as a whole, but to the military specifically. For years, they have risked their lives serving in combat and non-combat roles, fighting terrorism around the world, and working to secure the safety and security of our forces overseas. (See, e.g., Dkt. No. 133 at ¶¶ 7-9; Dkt. No. 134 at ¶¶ 5-6; Dkt. No. 135 at ¶¶ 6-7; Dkt. No. 136 at ¶¶ 6-7.) Their exemplary service has been recognized by the military itself, with many having received awards and distinctions. (See Dkt. No. 131 at ¶ 15; Dkt. No. 133 at ¶ 12; Dkt. No. 134 at ¶ 7.)

iii. Immutability

Transgender people clearly have "immutable" and "distinguishing characteristics that define them as a discrete group." Bd. of Educ. of the Highland Local Sch. Dist. v. U.S. Dep't of Educ., 208 F. Supp. 3d 850, 874 (S.D Ohio 2016) (quoting Lyng v. Castillo, 477 U.S. 635, 638 (1986)). Experts agree that gender identity has a "biological component," and there is a "medical consensus that gender identity is deep-seated, set early in life, and *impervious to external influences*." (Dkt. No. 143 at ¶¶ 21-22 (emphasis added).) In other contexts, the Ninth Circuit has held that "[s]exual orientation and sexual identity" are "immutable" and are "so fundamental to one's identity that a person should not be required to abandon them."

Hernandez-Montiel v. I.N.S., 225 F.3d 1087, 1093 (9th Cir. 2000), overruled on other grounds, 409 F.3d 1177 (9th Cir. 2005).

iv. Political Power

Despite increased visibility in recent years, transgender people as a group lack the relative political power to protect themselves from wrongful discrimination. While the exact number is unknown, transgender people make up less than 1 percent of the nation's adult population. (Dkt. No. 143, Ex. B at 3 (estimating 0.3 percent)); see also Doe 1, 275 F. Supp. 3d at 209 (estimating 0.6 percent). Fewer than half of the states have laws that explicitly prohibit discrimination against transgender people. (Dkt. No. 169, Ex. A at 12.) Further, recent actions by President Trump's administration have removed many of the limited protections afforded by federal law. (Id. at 12-13.) Finally, openly transgender people are vastly underrepresented in and have been "systematically excluded from the most important institutions of self-governance." SmithKline Beecham Corp. v. Abbott Labs., 740 F.3d 471, 484 (9th Cir. 2014). There are no openly transgender members of the United States Congress or the federal judiciary, and only one out of more than 7,000 state legislators is openly transgender. (Dkt. No. 169, Ex. A at 14); see also Adkins, 143 F. Supp. 3d at 140.

Recognizing these factors, courts have consistently found that transgender people constitute, at minimum, a quasi-suspect class.[8] See, e.g., Doe 1, 275 F. Supp. 3d at 208-10;

[8] The Ninth Circuit applies heightened scrutiny to equal protection claims involving discrimination based on sexual orientation. SmithKline, 740 F.3d at 484; Latta v. Otter, 771 F.3d 456, 468 (9th Cir. 2014). This reasoning further supports the Court's conclusion as to the applicable level of scrutiny, as discrimination based on transgender status burdens a group that has in many ways "experienced even greater levels of societal discrimination and marginalization." Norsworthy, 87 F. Supp. 3d at 1119 n.8; see also Adkins, 143 F. Supp. 3d at 140 ("Particularly in comparison to gay people . . . transgender people lack the political strength to protect themselves. . . . [A]lthough there are and were gay members of the United States

Stone, 280 F. Supp. 3d at 768; Adkins, 143 F. Supp. 3d at 139-40; Highland, 208 F. Supp. 3d at 873-74; Norsworthy v. Beard, 87 F. Supp. 3d 1104, 1119 (N.D. Cal. 2015). Today, the Court concludes that transgender people constitute a suspect class. Transgender people have long been forced to live in silence, or to come out and face the threat of overwhelming discrimination.

Therefore, the Court GRANTS summary judgment in Plaintiffs' and Washington's favor as to the applicable level of scrutiny. The Ban specifically targets one of the most vulnerable groups in our society, and must satisfy strict scrutiny if it is to survive.

2. Level of Deference

Defendants claim that "considerable deference is owed to the President and the DoD in making military personnel decisions," and that for this reason, Plaintiffs' and Washington's constitutional claims necessarily fail. (Dkt. No. 194 at 16.)

The Court previously found that the Ban—as set forth in President Trump's Twitter Announcement and 2017 Memorandum—was not owed deference, as it was not supported by "any evidence of considered reason or deliberation." (Dkt. No. 103 at 17-18.) Indeed, at the time he announced the Ban, "all of the reasons proffered by the President for excluding transgender individuals from the military were not merely unsupported, but were actually *contradicted* by the studies, conclusions, and judgment of the military itself." Doe 1, 275 F. Supp. 3d at 212 (emphasis in original); see also Rostker v. Goldberg, 453 U.S. 57, 67-72 (1981) (concluding that deference is owed to well-reasoned policies that are not adopted "unthinkingly" or "reflexively and not for any considered reason"); Goldman v. Weinberger, 475 U.S. 503, 507-08 (1986) (concluding that deference is owed where a policy results from the "professional

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Congress . . . as well as gay federal judges, there is no indication that there have ever been any transgender members of the United States Congress or federal judiciary.")

judgment of military authorities concerning the relative importance of a particular military interest"); compare Owens v. Brown, 455 F. Supp. 291, 305 (D.D.C. 1978) (concluding that deference is not owed where a policy is adopted "casually, over the military's objections and without significant deliberation").

Now that the specifics of the Ban have been further defined in the 2018 Memorandum and the Implementation Plan, whether the Court owes deference to the Ban presents a more complicated question. Any justification for the Ban must be "genuine, not hypothesized or invented post hoc in response to litigation." United States v. Virginia, 518 U.S. 515, 533 (1996). However, the Court is mindful that "complex[,] subtle, and professional decisions as to the composition . . . and control of a military force are essentially professional military judgments," reserved for the Legislative and Executive Branches. Gilligan v. Morgan, 413 U.S. 1, 10 (1973). The Court's entry of a preliminary injunction was not intended to prevent the military from continuing to review the implications of open service by transgender people, nor to preclude it from *ever* modifying the Carter Policy.

Defendants claim that the military has done just that, and that the Ban—as set forth in the 2018 Memorandum and the Implementation Plan—is now the product of a deliberative review. In particular, Defendants claim the Ban has been subjected to "an exhaustive study" and is consistent with the recommendations of a "Panel of Experts" convened by Secretary Mattis to study "military service by transgender individuals, focusing on military readiness, lethality, and unit cohesion," and tasked with "conduct[ing] an independent multi-disciplinary review and study of relevant data and information pertaining to transgender Service members." (See Dkt. No. 226 at 9-10; Dkt. No. 224, Ex. 2 at 19.) Defendants claim that the Panel was comprised of senior military leaders who received "support from medical and personnel experts from across

the [DoD] and [DHS]," and considered "input from transgender Service members, commanders of transgender Service members, military medical professionals, and civilian medical professionals with experience in the care and treatment of individuals with gender dysphoria." (Dkt. No. 224, Ex. 2 at 20.) "Unlike previous reviews on military service by transgender individuals," Defendants claim that the Panel's analysis was "informed by the [DoD]'s own data obtained since the new policy began to take effect last year." (Dkt. No. 224, Ex. 1 at 3.) The Panel's findings are set forth in a 44-page "Report and Recommendations on Military Service by Transgender Persons," which concludes that "the realities associated with service by transgender individuals are far more complicated than the prior administration or RAND had assumed," and that because gender transition "would impede readiness, limit deployability, and burden the military with additional costs . . . the risks associated with maintaining the Carter [P]olicy . . . counsel in favor of" the Ban. (Dkt. No. 224, Ex. 2 at 46.)

Having carefully considered the Implementation Plan—including the content of the DoD's "Report and Recommendations on Military Service by Transgender Persons"—the Court concludes that whether the Ban is entitled to deference raises an unresolved question of fact. The Implementation Plan was not disclosed until March 29, 2018. (See Dkt. No. 224, Exs. 1, 2.) As Defendants' claims and evidence regarding their justifications for the Ban were presented to the Court only recently, Plaintiffs and Washington have not yet had an opportunity to test or respond to these claims. On the present record, the Court cannot determine whether the DoD's deliberative process—including the timing and thoroughness of its study and the soundness of the medical and other evidence it relied upon—is of the type to which Courts typically should defer. See Fed. R. Civ. P. 56(e)(1).

Accordingly, the Court DENIES summary judgment as to the level of deference due. The Court notes that, even in the event it were to conclude that deference is owed, it would not be rendered powerless to address Plaintiffs' and Washington's constitutional claims, as Defendants seem to suggest. "'The military has not been exempted from constitutional provisions that protect the rights of individuals' and, indeed, '[i]t is precisely the role of the courts to determine whether those rights have been violated.'" Doe 1, 275 F. Supp. 3d at 210 (quoting Emory v. Sec'y of Navy, 819 F.2d 291, 294 (D.C. Cir. 1987)); Chappell v. Wallace, 462 U.S. 296, 304 (1983) ("This Court has never held, nor do we now hold, that military personnel are barred from all redress in civilian courts for constitutional wrongs suffered in the course of military service."); Rostker, 453 U.S. at 70 ("[D]eference does not mean abdication."). Indeed, the Court notes that Defendants' claimed justifications for the Ban—to promote "military lethality and readiness" and avoid "disrupt[ing] unit cohesion, or tax[ing] military resources"— are strikingly similar to justifications offered in the past to support the military's exclusion and segregation of African American service members, its "Don't Ask, Don't Tell" policy, and its policy preventing women from serving in combat roles. (Dkt. No. 224, Ex. 1 at 2-4; see also Dkt. No. 163, Ex. 1 at 8-16.)

3. Equal Protection, Due Process, and First Amendment Claims

A policy will survive strict scrutiny only where it is motivated by a "compelling state interest" and "the means chosen 'fit' the compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate . . . prejudice or stereotype." Grutter v. Bollinger, 539 U.S. 306, 333 (2003) (citation omitted). In making this determination, the Court must carefully evaluate "the importance and the sincerity of the reasons advanced" by the government for the use of a particular classification in a particular context. Id. at 327.

Whether Defendants have satisfied their burden of showing that the Ban is constitutionally adequate (i.e., that it was sincerely motivated by compelling state interests, rather than by prejudice or stereotype) necessarily turns on facts related to Defendants' deliberative process. As discussed previously, these facts are not yet before the Court. (See supra, § II.C.2.) Further, Defendants' responsive briefing addresses only the constitutionality of the Interim Guidance, a document that has never been, and is not now, the applicable policy before the Court. (See Dkt. No. 194 at 19-24.)

For the same reasons it cannot grant summary judgment as to the level of deference due at this stage, the Court cannot reach the merits of the alleged constitutional violations. Accordingly, the Court DENIES summary judgment as to Plaintiffs' and Washington's equal protection, due process, and First Amendment claims.

IV. Defendants' Motion for Partial Summary Judgment

Defendants contend that the Court is without jurisdiction to impose injunctive or declaratory relief against President Trump in his official capacity, and move for partial summary judgment on all claims against him individually. (Dkt. No. 194 at 25-27.) Plaintiffs and Washington do not oppose summary judgment as to injunctive relief, but respond that declaratory relief against President Trump is proper. (Dkt. No. 207 at 8-10; Dkt. No. 209 at 6-8.)

The Court is aware of no case holding that the President is immune from declaratory relief—Rather, the Supreme Court has explicitly affirmed the entry of such relief. See Clinton v. City of New York, 524 U.S. 417, 425 n.9 (1998) (affirming entry of declaratory judgment against President Clinton stating that Line Item Veto Act was unconstitutional); NTEU v. Nixon, 492 F.2d 587, 609 (1974) ("[N]o immunity established under any case known to this Court bars every suit against the president for injunctive, declaratory or mandamus relief."); see also Hawaii

v. Trump, 859 F.3d 741, 788 (9th Cir. 2017) (vacating injunctive relief against President Trump, but not dismissing him in suit for declaratory relief), vacated as moot, 874 F.3d 1112 (9th Cir. 2017).

The Court concludes that, not only does it have jurisdiction to issue declaratory relief against the President, but that this case presents a "most appropriate instance" for such relief. See NTEU, 492 F.2d at 616. The Ban was announced by President Trump (@realDonaldTrump) on Twitter, and was memorialized in the 2017 and 2018 Presidential Memorandums, which were each signed by President Trump. (Dkt. No. 149, Exs. 1, 2; Dkt. No. 224, Ex. 3.) While President Trump's Twitter Announcement suggests he authorized the Ban "[a]fter consultation with [his] Generals and military experts" (Dkt. No. 149, Ex. 1), Defendants to date have failed to identify even one General or military expert he consulted, despite having been ordered to do so repeatedly. (See Dkt. Nos. 204, 210, 211.) Indeed, the *only* evidence concerning the lead-up to his Twitter Announcement reveals that military officials were entirely unaware of the Ban, and that the abrupt change in policy was "unexpected." (See Dkt. No. 208, Ex. 1 at 9 (General Joseph F. Dunford, Chairman of the Joint Chiefs of Staff stating on July 27, 2017 "Chiefs, I know yesterday's announcement was unexpected . . ."); Dkt. No. 152, Ex. A at 11-12 ("The Joint Chiefs of Staff were not consulted at all on the decision . . . The decision was announced so abruptly that White House and Pentagon officials were unable to explain the most basic of details about how it would be carried out.").) Even Secretary Mattis was given only one day's notice before President Trump's Twitter Announcement. (Id.; Dkt. No. 163, Ex. 1 at 26.) As no other persons have ever been identified by Defendants—despite repeated Court orders to do so—the Court is led to conclude that the Ban was devised by the President, and the President alone.

Therefore, the Court GRANTS Defendants' motion for partial summary judgment with regard to injunctive relief and DENIES the motion with regard to declaratory relief.

CONCLUSION

The Court concludes that all Plaintiffs and Washington have standing; that the 2018 Memorandum and Implementation Plan do not moot their claims; and that transgender people constitute a suspect class necessitating a strict scrutiny standard of review. The Court concludes that questions of fact remain as to whether, and to what extent, deference is owed to the Ban, and whether the Ban, when held to strict scrutiny, survives constitutional review.

Accordingly, the Court rules as follows:

1. The Court GRANTS Plaintiffs' and Washington's motions for summary judgment with respect to the applicable level of scrutiny, which is strict scrutiny;

2. The Court DENIES Plaintiffs' and Washington's motions for summary judgment with respect to the applicable level of deference;

3. The Court DENIES Plaintiffs' and Washington's motions for summary judgment with respect to violations of equal protection, due process, and the First Amendment;

4. The Court GRANTS Defendants' cross-motion for summary judgment with respect to injunctive relief against President Trump and DENIES the cross-motion with respect to declarative relief against President Trump.

5. The preliminary injunction previously entered otherwise remains in full force and effect. Defendants (with the exception of President Trump), their officers, agents, servants, employees, and attorneys, and any other person or entity subject to their control or acting directly or indirectly in concert or participation with Defendants are enjoined from taking any action

relative to transgender people that is inconsistent with the status quo that existed prior to President Trump's July 26, 2017 announcement.

6. The Court's ruling today eliminates the need for Plaintiffs and Washington to respond to Defendants' Motion to Dissolve the Preliminary Injunction (Dkt. No. 223), which is hereby STRICKEN.

7. The parties are directed to proceed with discovery and prepare for trial on the issues of whether, and to what extent, deference is owed to the Ban and whether the Ban violates equal protection, substantive due process, and the First Amendment.

The clerk is ordered to provide copies of this order to all counsel.

Dated April 13, 2018.

Marsha J. Pechman
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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, *CHLOE JOHNSON, A minor
by and through her Parent Jane Johnson; *JAMES 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

PENNSYLVANIA YOUTH CONGRESS FOUNDATION (Intervenor in D.C.)

*(Pursuant to Court Order dated 04/06/18)

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(E.D. Pa. No. 5-17-cv-01249)
District Judge: Honorable Edward G. Smith

Argued May 24, 2017

Before: MCKEE, SHWARTZ and NYGAARD, Circuit Judges

JUDGMENT

We agree Plaintiffs have not demonstrated a likelihood of success on the merits and that they have not established that they will be irreparably harmed if their Motion to Enjoin the Boyertown School District's policy is denied.

We therefore Affirm the District Court's denial of a preliminary injunction substantially for the reasons that the Court explained in its exceptionally well reasoned Opinion of August 25, 2017.

A formal Opinion will follow. The mandate shall issue forthwith. The time for filing a petition for rehearing will run from the date that the Court's formal opinion is entered on the docket.

For the Court,

Theodore A. McKee
Circuit Judge

ATTEST:

s/ Patricia S. Dodszuweit
Clerk

DATED: May 24, 2018

OFFICE OF THE CLERK

PATRICIA S. DODSZUWEIT

CLERK

UNITED STATES COURT OF APPEALS

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May 24, 2018

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RE: Joel Doe, et al v. Boyertown Area School District, et al
Case Number: 17-3113
District Court Case Number: 5-17-cv-01249

ENTRY OF JUDGMENT

Today, **May 24, 2018** the Court issued a case dispositive order in the above-captioned matter which serves as this Court's judgment. Fed. R. App. P. 36.

If you wish to seek review of the Court's decision, you may file a petition for rehearing. The procedures for filing a petition for rehearing are set forth in Fed. R. App. P. 35 and 40, 3rd Cir. LAR 35 and 40, and summarized below.

Time for Filing:
14 days after entry of judgment.
45 days after entry of judgment in a civil case if the United States is a party.

Form Limits:
3900 words if produced by a computer, with a certificate of compliance pursuant to Fed. R. App. P. 32(g).
15 pages if hand or type written.

Attachments:
A copy of the panel's opinion and judgment only.
Certificate of service.
Certificate of compliance if petition is produced by a computer.
No other attachments are permitted without first obtaining leave from the Court.

Unless the petition specifies that the petition seeks only panel rehearing, the petition will be construed as requesting both panel and en banc rehearing. Pursuant to Fed. R. App. P. 35(b)(3), if separate petitions for panel rehearing and rehearing en banc are submitted, they will be treated as a single document and will be subject to the form limits as set forth in Fed. R. App. P. 35(b)(2). If only panel rehearing is sought, the Court's rules do not provide for the subsequent filing of a petition for rehearing en banc in the event that the petition seeking only panel rehearing is denied.

Please consult the Rules of the Supreme Court of the United States regarding the timing and requirements for filing a petition for writ of certiorari.

Very truly yours,
Patricia S. Dodszuweit, Clerk

By: s/ Carmella/cjg
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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

PARENTS FOR PRIVACY; KRIS GOLLY and JON GOLLY, individually [and as guardians ad litem for A.G.]; LINDSAY GOLLY; NICOLE LILLIE; MELISSA GREGORY, individually and as guardian ad litem for T.F.; and PARENTS RIGHTS IN EDUCATION, an Oregon nonprofit corporation,

Plaintiffs,

v.

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

Defendants.

Case No. 3:17-cv-01813-HZ

STIPULATION OF DISMISSAL OF ACTION AS TO STATE DEFENDANTS PURSUANT TO FRCP 41(A)(1)(A)(II)

Plaintiffs in this action, the Oregon Department of Education, and Oregon Governor Kate Brown stipulate and agree that:

1. Pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(ii), this Action should be dismissed without further proceedings with respect to the Oregon Department of Education and Oregon Governor Kate Brown (collectively, "State Defendants").

2. This dismissal will be with prejudice as to the single claim alleged against State Defendants in the Complaint.

3. Plaintiffs agree they will not pursue the claim described in paragraph 2 of this stipulation against State Defendants in State Court.

4. State Defendants waive any right to seek fees or costs from Plaintiffs in connection with this action.

5. State Defendants do not waive their rights to seek the Court's leave to appear amicus in this proceeding at a future point.

6. In light of this stipulation, which will result in dismissal of this action as to State Defendants, State Defendants' pending Motion to Dismiss (ECF No. 9) may be denied as moot.

DATED December 15, 2017.

Respectfully submitted,

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APPEAL,TERMINATED

U.S. District Court
District of Oregon (Portland (3))
CIVIL DOCKET FOR CASE #: 3:17-cv-01813-HZ

Parents for Privacy et al v. Sessions et al
Assigned to: Judge Marco A. Hernandez
Demand: $100,000
Case in other court: 9th Circuit Court of Appeals, 18-35708
Cause: 42:1983 Civil Rights Act

Date Filed: 11/13/2017
Date Terminated: 07/24/2018
Jury Demand: Plaintiff
Nature of Suit: 448 Civil Rights: Education
Jurisdiction: Federal Question

Plaintiff

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TERMINATED: 01/08/2018

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Date Filed	#	Docket Text

11/13/2017	1	Complaint. Filing fee in the amount of $400 collected. Agency Tracking ID: 0979-5218170 Filer is subject to the requirements of Fed. R. Civ. P. 7.1. Jury Trial Requested: Yes. Filed by PARENTS RIGHTS IN EDUCATION, JON GOLLY, NICOLE LILLIE, MELISSA GREGORY, PARENTS FOR PRIVACY, KRIS GOLLY against All Defendants (Attachments: # 1 Exhibits A-H, # 2 Exhibits I-J, # 3 Exhibits k-p, # 4 Petition for appointment of guardian ad litem). (Grey, Herbert) (Entered: 11/13/2017)
11/13/2017	2	Civil Cover Sheet regarding Complaint, 1 . Filed by All Plaintiffs. (Grey, Herbert) (Entered: 11/13/2017)
11/14/2017	3	Notice of Case Assignment to Judge ~~Michael J. McShane~~ and Discovery and Pretrial Scheduling Order. **NOTICE: Counsel shall print and serve the summonses and all documents issued by the Clerk at the time of filing upon all named parties in accordance with Local Rule 3-5.** Discovery is to be completed by 3/14/2018. Joint Alternate Dispute Resolution Report is due by 4/13/2018. Pretrial Order is due by 4/13/2018. Ordered by Judge ~~Michael J. McShane~~. (joha) Modified on 11/14/2017 per Order for Administrative Correction of the Record 4 (joha). (Entered: 11/14/2017)
11/14/2017	4	Order for Administrative Correction of the Record pursuant to Fed. R. Civ. P. 60(a) regarding Discovery Order 3 . A Clerical error has been discovered in the case record. The Clerk is directed to make the following administrative corrections to the record and regenerate the Notice of Electronic Filing to all parties: The judge initially selected for this case assignment was incorrect. A new case assignment with the corrected judge will be issued. The document is sealed. (joha) (Entered: 11/14/2017)
11/14/2017	5	Notice of Case Assignment to Judge Marco A. Hernandez and Discovery and Pretrial Scheduling Order. **NOTICE: Counsel shall print and serve the summonses and all documents issued by the Clerk at the time of filing upon all named parties in accordance with Local Rule 3-5.** Discovery is to be completed by 3/14/2018. Joint Alternate Dispute Resolution Report is due by 4/13/2018. Pretrial Order is due by 4/13/2018. Ordered by Judge Marco A. Hernandez. (joha) (Entered: 11/14/2017)
11/16/2017	6	Proposed Summons Filed by All Plaintiffs. (Grey, Herbert) (Entered: 11/16/2017)
11/16/2017	7	Notice to Counsel: Judge Hernandez expects the vast majority of civil cases in which all parties are represented by counsel, to be tried within 18 months of the date of filing. Additional information about case scheduling and guidelines for civil cases assigned to Judge Hernandez may be found on his page on the U.S. District Court for the District of Oregon website: https://ord.uscourts.gov /index.php/court-info/judges/judge-hernandez. (jp) (Entered: 11/16/2017)
11/17/2017	8	Summons Issued Electronically as to Kate Brown, Dallas School District No. 2, Betsy DeVos, Oregon Department of Education, Jeff Sessions, United States Department of Education, United States Department of Justice. **NOTICE: Counsel shall print and serve the summonses and all documents issued by the Clerk at the time of filing upon all named parties in accordance with Local Rule 3-5.** (joha) (Entered: 11/17/2017)

12/13/2017	9	Motion to Dismiss . Filed by Oregon Department of Education, Kate Brown. (Weston, Sarah) (Entered: 12/13/2017)
12/13/2017	10	Memorandum in Support *of Motion to Dismiss*. Filed by Kate Brown, Oregon Department of Education. (Related document(s): Motion to Dismiss 9 .) (Weston, Sarah) (Entered: 12/13/2017)
12/15/2017	11	Stipulated Notice of Dismissal of Party *State Defendants* Filed by Kate Brown, Oregon Department of Education. (Weston, Sarah) (Entered: 12/15/2017)
12/21/2017	12	Petition for Appointment of Guardian ad Litem for T.F. Filing fee in the amount of $400 collected. Agency Tracking ID: 0979-5259712. Filed by Melissa Gregory against All Defendants. (Grey, Herbert) Modified Docket Text and Modified Event Type from Petition to Motion on 12/21/2017 (joha). (Entered: 12/21/2017)
12/22/2017	13	Request for Refund of Fees Paid Electronically regarding Motion for Appointment of Counsel 12 . Filed by Melissa Gregory. (Grey, Herbert) (Entered: 12/22/2017)
01/03/2018	14	Clerk's Notice of Pay.gov Refund regarding Agency Tracking ID: 0979-5259712. The request has been granted and the amount of $400.00 will be refunded to Herbert Grey Related Doc 13 Request for Refund of Fees Paid Electronically. (nd) (Entered: 01/03/2018)
01/03/2018	15	Proposed Summons Filed by All Plaintiffs. (Grey, Herbert) (Entered: 01/03/2018)
01/08/2018	16	**ORDER:** Finding as Moot: State Defendants Motion to Dismiss 9 as the parties filed a Stipulated Notice of Dismissal 11 of claims against the State Defendants. Ordered by Judge Marco A. Hernandez. (jp) (Entered: 01/08/2018)
01/08/2018	17	**ORDER:** Granting Motion for Appointment of of Guardian Ad Litem for T.F. 12 . Ordered by Judge Marco A. Hernandez. (jp) (Entered: 01/08/2018)
01/08/2018	18	Summons Issued Electronically as to United States Department of Education and United States Department of Justice. **NOTICE: Counsel shall print and serve the summonses and all documents issued by the Clerk at the time of filing upon all named parties in accordance with Local Rule 3-5.** (joha) (Entered: 01/08/2018)
01/17/2018	19	Unopposed Motion for Extension of Time to Answer Complaint, 1 . Filed by Dallas School District No. 2. (Mersereau, Peter) (Entered: 01/17/2018)
01/17/2018	20	Declaration of Peter R. Mersereau . Filed by Dallas School District No. 2. (Related document(s): Motion for Extension of Time to Answer a Complaint/Petition 19 .) (Mersereau, Peter) (Entered: 01/17/2018)
01/23/2018	21	**ORDER:** Granting Motion for Extension of Time to Answer 19 . Answer/Response is due by 2/20/2018. Ordered by Judge Marco A. Hernandez. (jp) (Entered: 01/23/2018)
02/08/2018	22	Waiver of Service of Summons Returned Executed by Dallas School District No. 2 waiver sent on 11/21/2017. Filed by All Plaintiffs. (Grey, Herbert) (Entered: 02/08/2018)

02/08/2018	23	Affidavit of Service upon Betsy DeVos served on 1/16/2018; Jeff Sessions served on 1/17/2018; United States Department of Education served on 1/17/2018; United States Department of Justice served on 1/17/2018 Filed by All Plaintiffs. (Grey, Herbert) (Entered: 02/08/2018)
02/20/2018	24	Motion to Intervene . Oral Argument requested. Filed by Basic Rights Oregon. (Sands, Darin) (Entered: 02/20/2018)
02/20/2018	25	Declaration of Amy Herzfeld-Copple . Filed by Basic Rights Oregon. (Related document(s): Motion to intervene 24 .) (Sands, Darin) (Entered: 02/20/2018)
02/20/2018	26	Declaration of Colleen Yeager . Filed by Basic Rights Oregon. (Related document(s): Motion to intervene 24 .) (Sands, Darin) (Entered: 02/20/2018)
02/20/2018	27	Declaration of Christine Staub . Filed by Basic Rights Oregon. (Related document(s): Motion to intervene 24 .) (Sands, Darin) (Entered: 02/20/2018)
02/20/2018	28	Motion for Leave to Appear Pro Hac Vice *for Attorney Gabriel Arkles* . Filing fee in the amount of $300 collected; Agency Tracking ID: 0979-5317093. Filed by Basic Rights Oregon. (Sands, Darin) (Entered: 02/20/2018)
02/20/2018	29	Motion for Leave to Appear Pro Hac Vice *for Attorney Shayna Medley-Warsoff* . Filing fee in the amount of $300 collected; Agency Tracking ID: 0979-5317122. Filed by Basic Rights Oregon. (Sands, Darin) (Entered: 02/20/2018)
02/20/2018	30	Motion to Dismiss for Failure to State a Claim . Oral Argument requested. Filed by Basic Rights Oregon. (Sands, Darin) (Entered: 02/20/2018)
02/20/2018	31	Motion to Dismiss for Failure to State a Claim . Oral Argument requested. Filed by Dallas School District No. 2. (Mersereau, Peter) (Entered: 02/20/2018)
02/21/2018	32	Request for Refund of Fees Paid Electronically regarding Motion for Leave to Appear Pro Hac Vice *for Attorney Gabriel Arkles* . Filing fee in the amount of $300 collected; Agency Tracking ID: 0979-5317093 28 . Filed by Basic Rights Oregon. (Sands, Darin) (Entered: 02/21/2018)
02/21/2018	33	Notice of Appearance of Caleb Leonard appearing on behalf of All Plaintiffs Filed by on behalf of All Plaintiffs. (Leonard, Caleb) (Entered: 02/21/2018)
02/22/2018	34	**ORDER:** Granting Application for Special Admission *Pro Hac Vice* of Gabriel Arkles for Basic Rights Oregon. Application Fee in amount of $300 collected. Receipt No. 0979-5317093 issued. Signed on 2/22/2018 by Judge Marco A. Hernandez. (ecp) (Entered: 02/22/2018)
02/22/2018	35	Notification of CM/ECF Account for Gabriel Arkles (*Pro Hac Vice* admission). Your login is: **garkles**. Go to the CM/ECF login page to set your password. (ecp) (Entered: 02/22/2018)
02/22/2018	36	**ORDER:** Granting Application for Special Admission *Pro Hac Vice* of Shayna Medley-Warsoff for Basic Rights Oregon. Application Fee in amount of $300 collected. Receipt No. 0979-5317122 issued. Signed on 2/22/2018 by Judge Marco A. Hernandez. (ecp) (Entered: 02/22/2018)

02/22/2018	37	Notification of CM/ECF Account for Shayna Medley-Warsoff (*Pro Hac Vice* admission). Your login is: **smedleywarsoff**. Go to the CM/ECF login page to set your password. (ecp) (Entered: 02/22/2018)
02/23/2018	38	Notice of Appearance of Kelly K. Simon appearing on behalf of Basic Rights Oregon Filed by on behalf of Basic Rights Oregon. (Simon, Kelly) (Entered: 02/23/2018)
02/23/2018	39	Notice of Appearance of Mathew W. dos Santos appearing on behalf of Basic Rights Oregon Filed by on behalf of Basic Rights Oregon. (dos Santos, Mathew) (Entered: 02/23/2018)
03/02/2018	40	Clerk's Notice of Pay.gov Refund regarding Agency Tracking ID: 0979-5317115. The request has been granted and the amount of $300.00 will be refunded to Legal Services PDX Acct Related Doc 32 Request for Refund of Fees Paid Electronically,. (nd) (Entered: 03/02/2018)
03/06/2018	41	Response in Opposition to Motion to Dismiss for Failure to State a Claim 31 Oral Argument requested. Filed by All Plaintiffs. (Grey, Herbert) (Entered: 03/06/2018)
03/06/2018	42	Response in Opposition to Motion to Intervene 24 Oral argument requested. Filed by All Plaintiffs. (Grey, Herbert) (Entered: 03/06/2018)
03/06/2018	43	Response in Opposition to Motion to Dismiss for Failure to State a Claim 30 , Motion to Intervene 24 Oral argument requested. Filed by All Plaintiffs. (Grey, Herbert) (Entered: 03/06/2018)
03/09/2018	44	Notice of Appearance of James O. Bickford appearing on behalf of Betsy DeVos, Jeff Sessions, United States Department of Education, United States Department of Justice Filed by on behalf of Betsy DeVos, Jeff Sessions, United States Department of Education, United States Department of Justice. (Bickford, James) (Entered: 03/09/2018)
03/09/2018	45	Unopposed Motion for Extension of Time to Answer . Expedited Hearing requested. Filed by Betsy DeVos, United States Department of Education, Jeff Sessions, United States Department of Justice. (Attachments: # 1 Proposed Order) (Bickford, James) (Entered: 03/09/2018)
03/12/2018	46	**ORDER:** Granting Motion for Extension of Time to Answer 45 . Answer is due by 3/15/2018. Ordered by Judge Marco A. Hernandez. (jp) (Entered: 03/12/2018)
03/14/2018	47	Joint Motion for Extension of Discovery & PTO Deadlines . Expedited Hearing requested. Filed by Betsy DeVos, Jeff Sessions, United States Department of Education, United States Department of Justice. (Attachments: # 1 Proposed Order) (Bickford, James) (Entered: 03/14/2018)
03/15/2018	48	**ORDER:** Granting Motion for Extension of Discovery & PTO Deadlines 47 . Plaintiff's amended complaint, if any, will be due 30 days after the Court rules on Defendants' motions to dismiss; responses are due 30 days filing of any amended complaint. The parties shall submit a joint proposed scheduling order 15 days after Defendants; file their answers, if any. Ordered by Judge Marco A. Hernandez. (jp) (Entered: 03/15/2018)

03/15/2018	49	Motion to Dismiss for Failure to State a Claim , Motion to Dismiss for Lack of Jurisdiction . Filed by Betsy DeVos, United States Department of Education, Jeff Sessions, United States Department of Justice. (Attachments: # 1 Proposed Order) (Bickford, James) (Entered: 03/15/2018)
03/19/2018	50	Unopposed Motion to Appear as Amicus Curiae . Filed by Kate Brown, Oregon Department of Education. (Attachments: # 1 Proposed Document Brief in Support of Motion to Dismiss) (Scott, Carla) (Attachment 1 replaced on 3/19/2018) (cw). (Main Document 50 replaced on 3/19/2018) (cw). (Entered: 03/19/2018)
03/19/2018	51	Clerk's Notice of Docket Correction regarding 50 Motion to appear as amicus curiae. A corrected PDF has been uploaded and has replaced the incorrect attachment #1 (added "Amicus" to the title of the document). The Notice of Electronic Filing will be regenerated to all parties. (cw) (Entered: 03/19/2018)
03/19/2018	52	Clerk's Notice of Docket Correction regarding 50 Motion to appear as amicus curiae. A corrected PDF has been uploaded and has replaced the incorrect attachment (Main Document - changed title from Amici to "Amicus".) The Notice of Electronic Filing will be regenerated to all parties. (cw) (Entered: 03/19/2018)
03/19/2018	53	Unopposed Motion for Extension of Time to File a Response/Reply to Motion to Dismiss for Failure to State a Claim 31 . Filed by Dallas School District No. 2. (Mersereau, Peter) (Entered: 03/19/2018)
03/19/2018	54	Declaration of Peter R. Mersereau . Filed by Dallas School District No. 2. (Related document(s): Motion for Extension of Time to File Response/Reply to a Motion 53 .) (Mersereau, Peter) (Entered: 03/19/2018)
03/20/2018	55	Reply to Motion to Intervene 24 Oral Argument requested. Filed by Basic Rights Oregon. (Sands, Darin) (Entered: 03/20/2018)
03/20/2018	56	Reply to Motion to Dismiss for Failure to State a Claim 30 Oral Argument requested. Filed by Basic Rights Oregon. (Sands, Darin) (Entered: 03/20/2018)
03/20/2018	57	**ORDER:** Granting Motion for Extension of Time to File Response/Reply to Motion to Dismiss for Failure to State a Claim 31 filed by Dallas School District No. 2. Reply is due by 3/26/2018. Ordered by Judge Marco A. Hernandez. (jp) (Entered: 03/20/2018)
03/26/2018	58	Reply to Motion to Dismiss for Failure to State a Claim 31 . Filed by Dallas School District No. 2. (Mersereau, Peter) (Entered: 03/26/2018)
03/29/2018	59	Response in Opposition to Motion to Dismiss for Failure to State a Claim Motion to Dismiss for Lack of Jurisdiction 49 Oral Argument Requested requested. Filed by All Plaintiffs. (Grey, Herbert) (Entered: 03/29/2018)
03/29/2018	60	Declaration of CAROLINE JANZEN . Filed by All Plaintiffs. (Related document(s): Response in Opposition to Motion 59 .) (Attachments: # 1 Exhibit Exs 1-10 to Janzen Decl, # 2 Exhibit Ex. 11 to Janzen Decl) (Grey, Herbert) (Entered: 03/29/2018)
03/29/2018	61	Response in Opposition to Unopposed Motion to Appear as Amicus Curiae 50 Oral Argument Requested requested. Filed by All Plaintiffs. (Grey, Herbert)

		(Entered: 03/29/2018)
04/06/2018	62	Unopposed Motion for Extension of Time to File a Response/Reply to Motion to Dismiss for Failure to State a Claim Motion to Dismiss for Lack of Jurisdiction 49 . Expedited Hearing requested. Filed by Betsy DeVos, Jeff Sessions, United States Department of Education, United States Department of Justice. (Attachments: # 1 Proposed Order) (Bickford, James) (Entered: 04/06/2018)
04/10/2018	63	**ORDER:** Granting Motion for Extension of Time to File Response/Reply to Motion to Dismiss for Failure to State a Claim and Motion to Dismiss for Lack of Jurisdiction 49 filed by Betsy DeVos, United States Department of Justice, Jeff Sessions, United States Department of Education. Federal Defendants' Reply is due by 4/19/2018. Ordered by Judge Marco A. Hernandez. (jp) (Entered: 04/10/2018)
04/19/2018	64	Reply to Motion to Dismiss for Failure to State a Claim Motion to Dismiss for Lack of Jurisdiction 49 . Filed by Betsy DeVos, Jeff Sessions, United States Department of Education, United States Department of Justice. (Attachments: # 1 Exhibit) (Bickford, James) (Entered: 04/19/2018)
04/19/2018	65	**ORDER:** On April 19, 2018, Federal Defendants filed their reply in support of their motion to dismiss 64 . There are three fully-briefed motions to dismiss before the Court 30 , 31 and 49 . Accordingly, the Court will take the motions to dismiss under advisement as of April 19, 2018. Additionally, the Court GRANTS Governor Kate Brown and Oregon Department of Education's motion for leave to appear as amicus curiae 50 . Lastly, regarding Basic Right Oregon's (BRO) motion to intervene as defendant 24 , the Court considers the following requirements for determining whether permissive intervention is appropriate. Under Federal Rule of Civil Procedure 24(b)(1)(B) as applied in the Ninth Circuit, there must be: (1) independent grounds for jurisdiction; (2) the motion must be timely; and (3) there must be a common question of law and fact between the movant's claim or defense and the main action. *Freedom from Religion Found., Inc. v. Geithner* , 644 F.3d 836, 843 (9th Cir. 2011). The Court concludes that BRO has satisfied each requirement outlined above and its proposed permissive intervention in this case is appropriate. Therefore, the Court exercises its discretion to GRANT BRO's motion 24 . Ordered by Judge Marco A. Hernandez. (jp) (Entered: 04/19/2018)
04/26/2018	66	**Scheduling Order by Judge Marco A. Hernandez.** Oral Argument on the parties' motions to dismiss is set for 5/23/2018 at 01:30PM in Portland Courtroom 14B before Judge Marco A. Hernandez. Ordered by Judge Marco A. Hernandez. (jp) (Entered: 04/26/2018)
05/23/2018	67	**MINUTES of Proceedings:** Oral Argument Held on (1) Basic Rights Oregon's Motion to Dismiss for Failure to State a Claim 30 (2) Dallas School District No. 2's Motion to Dismiss for Failure to State a Claim 31 , and (3) Federal Defendants' Motion to Dismiss for Failure to State a Claim and Lack of Jurisdiction 49 . ORDER: The parties' motions are taken under advisement as of 5/23/2018. Herbert G. Grey, J. Ryan Adams, and Caleb Leonard present as counsel for plaintiff(s). James O. Bickford (Federal Defendants), Beth Plass and Peter R. Mersereau (Dallas School District), Carla Scott (State Defendants), and

		Gabriel Arkles, Darin M. Sands, Kelsey M. Benedick, Shayna Medley-Warsoff and Kelly K. Simon (Basic Rights of Oregon) present as counsel for defendant(s). Court Reporter: Nancy Walker. Judge Marco A. Hernandez presiding. (jp) (Entered: 05/23/2018)
05/31/2018	68	Notice *of Supplemental Authority* Filed by Basic Rights Oregon. (Attachments: # 1 Attachment Opinions) (Benedick, Kelsey) (Entered: 05/31/2018)
07/24/2018	69	**OPINION & ORDER:** Dallas School District No. 2, Federal Defendants, and Basic Rights Oregon's motions to dismiss 30 31 49 are GRANTED. The Court finds that Plaintiffs cannot plausibly re-allege their claims and that any amendment would be futile. For the reasons discussed above, the Court dismisses with prejudice all of Plaintiffs' claims. Accordingly, Plaintiffs' motion for a preliminary injunction is DENIED as moot. Signed on 7/24/2018 by Judge Marco A. Hernandez. (jp) (Entered: 07/24/2018)
07/24/2018	70	**JUDGMENT.** This case is dismissed with prejudice. Signed on 7/24/2018 by Judge Marco A. Hernandez. (jp) (Entered: 07/24/2018)
08/21/2018	71	Notice of Appeal to the 9th Circuit Filing fee $505 collected; Agency Tracking ID 0979-5525932: *includes representation statement*. Filed by All Plaintiffs. (Grey, Herbert) (Entered: 08/21/2018)
08/27/2018		USCA Case Number and Notice confirming Docketing Record on Appeal re Notice of Appeal 71 . **Case Appealed to 9th Circuit Court of Appeals Case Number 18-35708** assigned. (jtj) (Entered: 08/27/2018)
09/20/2018	72	Transcript Designation and Order Form for the hearing held on 7/24/2018 before Judge HERNANDEZ. Court Reporter: NANCY M. WALKER. . Filed by Parents for Privacy. Transcript is due by 10/22/2018. (Grey, Herbert) (Entered: 09/20/2018)
10/09/2018	73	OFFICIAL COURT TRANSCRIPT OF PROCEEDINGS FILED Motion hearing held on May 23, 2018 before Judge Marco A. Hernandez, Court Reporter Nancy M. Walker, telephone number 503-326-8186 or e-mail nancy_walker@ord.uscourts.gov. Transcript may be viewed at Court's public terminal or purchased from the Court Reporter before the deadline for Release of Transcript Restriction. Afterwards it may be obtained from the Court Reporter (503-326-8186 or nancy_walker@ord.uscourts.gov) or through PACER-See Policy at ord.uscourts.gov. Notice of Intent to Redact Transcript is due by 10/16/2018. Redaction Request due 10/30/2018. Redacted Transcript Deadline set for 11/9/2018. Release of Transcript Restriction set for 1/7/2019. (Walker, Nancy) (Entered: 10/09/2018)

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Billable Pages:	11	**Cost:**	1.10