No. 18-35708

UNITED STATES COURT OF APPEALS
for the
NINTH CIRCUIT

PARENTS FOR PRIVACY, *et al.*,
Plaintiffs-Appellants,
v.
DALLAS SCHOOL DISTRICT NO. 2, *et al.*,
Defendants-Appellees,
BASIC RIGHTS OREGON,
Intervenor-Defendant-Appellee.

On Appeal from the United States District Court
for the
District of Oregon
(Case No. 3:17-cv-01813-HZ)

Defendant and Appellee Dallas School District's Answering Brief

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INTRODUCTION

A transgender student asked his high school to allow him to use the bathroom he preferred. The school agreed, so the student began using the bathroom that matched his gender identity instead of the bathroom that matched the gender typically associated with his sex at birth.

The appellants are some of the student's classmates and their parents who sued as an organization called Parents for Privacy. They object that the school allowed the transgender boy, biologically a female, to use the boys' bathroom. Parents for Privacy's suit therefore sought an order forcing him and any other transgender student into the bathrooms corresponding to their sex rather than their gender.

As their name suggests, Parents for Privacy are for privacy, or modesty. To preserve their view of what modesty requires, they believe that children of the opposite sexes must observe the privacy norm under which the sexes usually do not attend to bodily functions near each other. Parents for Privacy claim that due process secures how they think privacy norms on bathroom use must operate. Thus they claim that the Constitution directs public schools to keep their multi-user bathrooms absolutely segregated by sex. And they claim that schools must enforce this segregation regardless of whether a student identifies themself as belonging to a gender that does not match the typical gender associated with their sex.

The district court dismissed Parents for Privacy's claims, finding that the Constitution cannot be used to impose someone's beliefs on how privacy norms should apply to bathroom use, especially if it were to come at the expense of transgender students. The dismissal should be affirmed for the reasons set out below.

STATEMENT OF ISSUE PRESENTED FOR REVIEW

Whether a public school must force transgender students to use the bathroom that matches the typical gender of their sex at birth to avoid violating any constitutional privacy right belonging to cisgender students or their parents.

STATEMENT OF JURISDICTION

The appellee relies on the appellants' statement of jurisdiction.

STATEMENT OF THE CASE

1 Background to the suit

This appeal comes from the district court's grant of the defendant-appellee's motion to dismiss a complaint for failure to state claims for relief. The alleged facts are therefore taken from the complaint and any attachments to it.

Dallas High School, in Dallas, Oregon, is operated by the appellee school district. In September 2015, a senior at Dallas High School who had been born and who remained biologically female publicly identified as a boy, and asked school officials to allow him[1] to use the boys' bathroom and locker room. (ER 88–89.)

The Dallas School District responded by creating and implementing a "Safety Plan" for the transgender boy and any other transgender student who might make a similar request in the future. Among other things, the Safety Plan allowed the transgender boy[2] and other transgender students to use the bathrooms or locker rooms

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1 A transgender person is referred to by the pronouns that match the gender they identify with. *See Schwenk v. Hartford*, 204 F.3d 1187, 1192 n. 1 (9th Cir. 2000).

2 Sex is based on a biological determination, gender by a cultural one. Someone

that matched their gender identity. The district also planned to spend between $200,000 and $500,000 upgrading the high school's bathrooms and locker rooms to better accommodate their use by transgender students. (ER 88–90, 132–33.)

The transgender boy began using the boys' bathroom "while male students were present." The bathroom's privacy stalls did not alleviate the cisgender boys' "fear" of being in the transgender boy's "presence" in the bathroom. While anyone with privacy concerns could use the stalls, they still had gaps through which "partially unclothed bodies" could "inadvertently" be seen. And an available single-user bathroom was often too inconvenient.

To avoid the "risk" of "exposing themselves to the opposite biological sex," the cisgender boys used the bathroom "as little as possible," or they used the available single-user bathroom. (ER 89–91.) And because some of the cisgender boys had a physical education class with the transgender boy, they could not "escape forced interactions" with him in the locker room.

Despite the objections raised by the plaintiffs-appellants, the Dallas School District continued to allow the transgender boy to use the bathroom and locker room that matched the gender he identified with. (ER 92–93.)

2 The suit's procedural history

The plaintiffs-appellants filed their complaint on November 11, 2017, making

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who is cisgender identifies with the gender that is typically associated with their sex at birth. Someone who is transgender does not. A transgender boy is someone who identifies as being a boy despite being determined to be of the female sex at birth. *Doe v. Boyertown Area School District*, 897 F.3d 518, 522 (3d Cir. 2018).

the allegations described above. The complaint was filed on behalf of Parents for Privacy, Parents' Rights in Education, and five individually-named plaintiffs.

Parents for Privacy is an "unincorporated association" that nominally includes the parents of current and former students at Dallas High School, current and former students, and "other concerned" people who live in Dallas. Parents' Rights in Education is an Oregon non-profit that objects to sexual education in schools. The individual plaintiffs comprise the parents of either future, current, or former Dallas High School students suing for themselves or their children, and one former student—a female student—who attended Dallas High School with the transgender boy. (ER 69–71.) For ease of reference, the appellants will be referred to collectively from here on as Parents for Privacy.

The defendants named in the complaint include Dallas School District No. 2, the school district that operates Dallas High School. They also include the Oregon Department of Education, the U.S. Department of Education, the U.S. Department of Justice, and a number of state and federal government officials. Last, the defendants include Basic Rights Oregon, a non-profit organization the district court allowed to intervene as a party. (ER 13, 839 (Docket No. 65).)

The complaint made eight claims. Two claims were brought against the U.S. departments of Education and Justice and related federal officials. One of these was brought under the federal Administrative Procedures Act, the other under the Religious Freedom Restoration Act. (ER 101–110, 122–23.) In general, Parents for Privacy based these claims on allegations that the federal defendants violated the APA and the RFRA by interpreting Title IX to prohibit discrimination against transgender

students. And this eventually led to the school district's decision allowing the transgender boy to use the boys' bathroom against Parents for Privacy's religious beliefs.

Parents for Privacy brought three constitutional claims against both the school district and all the federal defendants. Two of these claims were made under the Due Process Clause of the Fourteenth Amendment. The appellants who are students made one of these claims, alleging a violation of their "fundamental right to privacy." The appellants who are parents of students made the other due process claim, alleging a violation of their "fundamental right to direct the education and upbringing of their children." (ER 111–17.)

The third constitutional claim was made under the Free Exercise Clause. Again, Parents for Privacy based this claim on allegations that allowing the transgender boy to use the boys' bathroom went against their religious beliefs, thus infringing on their free exercise rights. (ER 123–25.)

Parents for Privacy brought two of their claims against the school district only. One was made under Title IX. Parents for Privacy supported this claim by alleging that the transgender boy's use of the boys' bathroom created an unlawful, sexually harassing environment. (ER 117–22.) The other claim was made under a state law which prohibits discrimination in education. (ER 125–26.)

Last, Parents for Privacy brought a claim against the school district and the Oregon state defendants under a state law prohibiting discrimination in places of public accommodation. (ER 126–27.) They based both this and their other state-law claim on allegations that allowing the transgender boy to use the boys' bathroom discriminated against them on the basis of their sex, sexual orientation, and religion.

Parents for Privacy's prayer for relief asked the court to order the the Dallas School District "to permit only biological females to enter and use district's girls' restrooms, locker rooms and showers, and permit only biological males to enter and use district's boys' restrooms, locker rooms and showers." (ER 128–29.)

On February 20, 2018, the Dallas School District and Basic Rights Oregon filed motions to dismiss the complaint for failure to state claims for relief. (ER 836.) On March 15, the federal defendants filed a motion to dismiss. Though they had been earlier dismissed by stipulation, the state defendants filed, and the district court accepted, an amicus brief in support of the Dallas School District's motion to dismiss, (ER 835 (Docket No. 11); Docket Nos. 50-1, 65).

On July 24, 2018, the court granted the motions to dismiss in their entirety. (ER 10–65.) That same day, the court entered a judgment dismissing the case with prejudice. (ER 840 (Docket No. 70).) This appeal followed.

The district court dismissed the APA and RFRA claims after finding that the appellants lacked standing to pursue them. (ER 23–30, 64–65.) The opening brief does not challenge these claims' dismissal. The district court dismissed Parents for Privacy's two state-law discrimination claims after finding that their complaint did not allege a violation of either of those laws. (*See* ER 55–61.) The opening brief does not challenge the district court's dismissal of these claims, either.

Therefore, the claims at issue on appeal include two due process claims, one brought by the appellants who are students, another by the appellants who are their parents. The claims on appeal also include an alleged violation of the Free Exercise Clause, and a Title IX claim.

SUMMARY OF ARGUMENT

A transgender boy asked the appellee school district to allow him to use the boys' bathroom at the high school he attended. The district agreed to the request, so the transgender boy, who was born and who remained biologically female, began using the boys' bathroom at his school.

The appellees are some students and their parents who sued as an organization called Parents for Privacy. They object that the school district allowed the transgender boy to use the boys' bathroom. In their suit now on appeal, Parents for Privacy sought a court order requiring the school district to force any transgender student to use the bathroom that matches the gender typically associated with their sex at birth. The district court refused after correctly dismissing the claims Parents for Privacy made to support that order.

1 The district court correctly dismissed the students' due process claim

The Due Process Clause impliedly contains a substantive component which protects against the government from infringing certain "fundamental rights" without a strong justification.

The fundamental rights protected by so-called substantive due process include most of the rights enshrined in the Bill of Rights. They also include a handful of other carefully circumscribed rights that are likewise so elemental to "liberty" that it was hardly necessary to enumerate them in the Constitution. Because a government that infringes on these rights would render our country unrecognizable considering its founding principles.

The appellants who are cisgender boys claimed that the school district violated a fundamental liberty right to "bodily privacy" by allowing the transgender boy to use the boys' bathroom. Multi-user bathrooms are not places where one's body and its functions are very private. But Parents for Privacy claimed the right to bodily privacy guards against "opposite sex nudity." The transgender boy's "presence" in the bathroom created a "risk" that he would see them naked despite stalls.

Having identified a supposed fundamental liberty right protected by the Constitution, Parents for Privacy argue that the school district did not have a strong enough reason to overcome it so as to allow the transgender boy to use the boys' bathroom. Therefore the school district should have forced him into the girls' bathroom, or a single-user bathroom.

There is a right to bodily privacy that derives from the Fourth Amendment's guarantee of one's privacy against arbitrary governmental intrusions. But this means that government officials themselves cannot view their subjects' naked bodies without good reason. The right is intruded on regardless of the sexes of the official and the subject. Though one factor that affects whether the intrusion is justifiable are their respective sexes.

So understood, the appellant students did not state a claim for an infringement of their bodily privacy rights. The right does not guard against "opposite sex nudity." It guards against officials of either sex viewing subjects of either sex unclothed without justification. The transgender boy is not a school principal, for example, surreptitiously videotaping students he is supposed to protect as they change clothes. And he did not do anything in the boys' bathroom but discreetly attend to his needs as is

the norm. He is a student and a peer of the appellants, and he would simply like to use the bathroom of the gender he identifies with.

Most fundamentally Parents for Privacy believe that multi-user bathrooms are by convention segregated by sex to observe cultural privacy norms that typically keep the sexes from attending to bodily functions near each other. And they believe these norms should be strictly observed to keep privacy between the sexes.

They further believe that the government—in this case a school district—must impose these privacy norms in multi-user bathrooms they control by ensuring that the bathrooms remain absolutely segregated by sex. Even if it comes at the expense of transgender students who do not identify with the typical gender associated with their sex at birth. Finally they believe that the government violates their asserted constitutionally protected "privacy" norms by failing to police transgender bathroom use to their satisfaction.

Their misconstrued right to bodily privacy aside, Parents for Privacy support these beliefs by arguing that substantive due process protects any generic privacy norm because it generically protects "privacy."

The liberty interests that substantive due process protects are limited to those associated with marriage, family, and procreation. These liberty interests are sometimes described collectively as emanating from a basic right to "personal privacy," or as creating "zones of privacy." The idea being that certain areas of life should be as free as possible from governmental interference so that we can enjoy the kind of liberty the Bill of Rights presumes should exist.

Two types of interests are protected by the constitutional right to privacy: an

interest in having the personal autonomy to make important life decisions, and an interest in not having to disclose personal matters. For example, the government generally cannot prohibit couples from using birth control. Couples have a fundamental right to determine for themselves without interference from the government whether and when they will procreate. And the only way to police birth control use is to force couples to disclose a personal matter.

As can be seen, constitutionally protected privacy rights do not encompass generic privacy concerns. Much less do they require the government to force everyone to observe some group's view of how a privacy norm should operate.

Substantive due process is concerned with ensuring *liberty*. The ironies here being, one, that Parents for Privacy have asserted rights that secure the *freedom* to make personal decisions to justify a court order telling transgender kids which bathroom they must use. And two, they have asserted liberty rights to justify an order whose fulfillment would force transgender kids to disclose their sex at birth.

2 The court correctly dismissed the parents' due process claim

As explained, to ensure liberty some areas of life are generally off limits from governmental interference, at least without a strong justification. One such area of life is the manner in which parents raise and educate their children. The government cannot, for example, make parents send their children to a public school, or keep them from sending their children to a parochial school.

The appellants who are parents made their due process claim by alleging that the school district interfered with their ability to raise their children as they see fit

when it allowed a transgender boy to use the boys' bathroom. This took away their ability to control when their cisgender boys would "endure the risk of being exposed" to a transgender boy in the boys' bathroom.

Parents for Privacy recognize that the due process right parents have to decide how their children should be raised does not also give them a right to dictate what public schools will teach their children. However, they argue, that only means that they cannot challenge a public school's curriculum. Thus they can make due process challenges to any aspect of a school's operation *other* than its curriculum.

But this Court has noted how the liberty interest parents have in controlling their child's upbringing "does not extend beyond the threshold of the school door." Parents cannot, therefore, dictate any aspect of how a public school chooses to operate by invoking any familial privacy interest protected by substantive due process.

One of the reasons for this is practical. Schools would be paralyzed if parents could object to any way in which a school operates on that grounds that it goes against how they would like their children to be raised. Especially since parents are bound to have wishes that contradict those of other parents. One imagines, for example, that the parents of the transgender boy might object that it would not be best for him if the school district forced him into the girls' bathroom.

Also, we grant public schools the job of educating and safeguarding our children, and the discretion to decide how to carry it out. This mission allows schools to exercise significant control over the children entrusted to them. By sending their children to a public school that in many respects acts in lieu of parents, the appellants likewise submitted to the manner in which the school fulfills its obligations.

As the district court rightly pointed out, if the parents of the cisgender boys object to them being "exposed" to a transgender boy in the bathroom, then what they have a right to do under the Due Process Clause is send their children to the kind of parochial school that would force the transgender boy into the girls' bathroom. Or they can educate their children at home, which *is* a place with bathrooms whose access they can control.

3 The court correctly dismissed the free exercise claims

To support their claim under the Free Exercise Clause, Parents for Privacy alleged that their religious beliefs about "modesty" do not allow their children to be in the same bathroom as another student belonging to the "opposite biological sex." The school district therefore violated their free exercise rights, they allege, by allowing a transgender boy in the boys' bathroom.

The Free Exercise Clause protects against government action "prohibiting the free exercise" of religion. To state a free exercise claim, a plaintiff therefore must first allege that he is or will be subject to some regulation, proscription, or compulsion that coerces him to act, or to refrain from acting, such that it prohibits him from believing in or professing a religious doctrine, or from observing religious practices.

Here, the school district merely allowed a transgender boy to use the boys' bathroom. That decision was not a regulation, etc., that Parents for Privacy was even subject to, much less one that directed them to do or refrain from something prohibited by their religion. Where, as here, the challenged government action does not itself coerce a plaintiff into doing or refraining from something, the plaintiff's allega-

tion that it nonetheless incidentally affected his religious beliefs or practices does not properly allege that the government prohibited those beliefs or practices.

The government could not function if people were allowed to veto governmental decisions because of some religious objection untethered to an actual prohibition of religious beliefs or practices. Especially since people are likely to have religious beliefs that are contradictory. Here, for example, there are presumably students and parents in the school district who believe that forcing a transgender boy into the girl's bathroom would be frowned on by their religion.

Even if Parents for Privacy had properly alleged that the school district prohibited a religious belief or practice of theirs, the claim still fails. When the challenged government action is "neutral" and "generally applicable," those who are subject to its coercive mandate must nonetheless comply with it.

The challenged decision here is neutral with respect to religion since it did not aim to restrict or burden any religious beliefs or practices, and it is generally applicable since it did not selectively restrict or burden any religious practices. So even assuming the decision prohibited Parents for Privacy's religious practices about "modesty," the Free Exercise Clause gives them no constitutional right to force the transgender boy into the girls' bathroom.

4 The court correctly dismissed the students' Title IX claim

Title IX prohibits schools from discriminating against students "on the basis of sex" to an extent that would deprive them of their services unequally compared to the other sex. Sexual harassment is a form of discrimination. If a school knowingly

permits a student to sexually harass another student, and if the sexual harassment is severe enough, then the school will have unlawfully discriminated against the victim because it will have deprived the victim equal access to an education because of sex.

Parents for Privacy alleged that the mere "presence" of the transgender boy in the boys' bathroom amounted to unlawful, sexual harassment of any cisgender boys in the bathroom.

The mere presence of a transgender boy in the boys' bathroom is not *harassment*. And it is certainly not *sexual* harassment since sexual harassment is a kind of harassment that is perpetrated because of the victim's sex. Parents for Privacy did not allege that the transgender boy used the boys' bathroom with any motivation other than to use it for its intended purpose. They therefore failed to state a claim that the school district discriminated against the appellants who are students because of their sex in violation of Title IX.

5 The court correctly dismissed the claims with prejudice

A district court can dismiss claims with prejudice if they cannot be saved by any amendment. The district court found that Parents for Privacy's claims could not be saved by any amendment, and dismissed them with prejudice accordingly. Parents for Privacy now argues that they should have been given a chance to amend their complaint. However, they do not explain how any newly alleged facts would work to state any claim on which relief could be granted.

The claims made by Parents for Privacy fail because the legal theories underpinning them are unsound, not because the claims were unaccompanied by suffi-

cient factual allegations. The relief Parents for Privacy sought is a court order forcing transgender students to use the bathroom that matches the typical gender of the sex they were born into. There is no way Parents for Privacy could have amended their complaint so as to entitle them to that order. The district court therefore correctly dismissed the claims now on appeal with prejudice.

ARGUMENT AND AUTHORITY

An appellate court reviews a district court's grant of a motion to dismiss de novo. *Knevelbaard Dairies v. Kraft Foods, Inc.*, 232 F.3d 979, 984 (9th Cir. 2000). A district court properly grants a motion to dismiss if, assuming its well-pled facts to be true, the complaint fails to show that the plaintiff or plaintiffs would be entitled to relief. On review of a granted motion to dismiss, the appellate court therefore proceeds the same way.

The claims on appeal include constitutional claims. These claims were necessarily brought under 42 U.S.C. section 1983. Section 1983 allows rights secured by the Constitution to be vindicated in civil suits. If a plaintiff who has made a section 1983 claim does not establish that he was deprived of a right secured by the Constitution, then his section 1983 claim fails. *Albright v. Oliver*, 510 U.S. 266, 271 (1994).

1 The district court correctly dismissed the due process claim made by the appellants who are students because the school's decision to allow a transgender boy to use the boys' bathroom did not infringe any of their protected liberty rights

The Due Process Clause of the Fourteenth Amendment provides that the gov-

ernment cannot "deprive any person of life, liberty, or property, without due process of law." Parents for Privacy claimed a due process violation on behalf of the appellants who are cisgender boys by alleging that the transgender boy's presence in the boys' bathroom unlawfully infringed their due process "privacy" rights. (ER 111–14.) The district court dismissed this due process claim, finding that the complaint had not alleged an infringement of any protected right. (ER 31–46.)

1.1 *The due process right to "bodily privacy" the students invoked derives from the Fourth Amendment's safeguard of privacy against unreasonable governmental intrusion, and it would only limit school officials themselves from viewing students' naked bodies, without good reason, regardless of the sexes involved*

To support their due process claim, Parents for Privacy's complaint alleged the existence of a "fundamental right to bodily privacy" protected by the Due Process Clause. They described this right as protecting strangers born into the opposite sexes from seeing each other's naked bodies, and that the government infringes on this right if it were to create some "risk" that this would happen.

By allowing the transgender boy to use the boys' bathroom, the school district created a "risk" that he, born female, would see the cisgender boys partially or fully naked. The cisgender boys could not avoid this risk. First because the bathroom's stalls which would nominally protect their privacy if they wanted to use them had "gaps" the transgender boy could peek through. And second because it was impractical for a variety of reasons for the cisgender boys to use an available single-user bathroom.

Parents for Privacy's claimed right to "bodily privacy" rests on *York v. Story*,

324 F.2d 450 (9th Cir. 1963), and cases which followed its holding or the idea behind it. (*See* Opening Brief 10.) In *York*, a woman went to a police department to report that she had been assaulted. A police officer on duty told her that he needed to take pictures of her naked under a pretense that he was documenting her injuries, but really for no reason other than to satisfy his prurient interest. He made the woman undress over her objections, pose in lewd positions, and took pictures.

Later, some other officers made copies of the resulting photos and circulated them among the men in the police department. The woman eventually learned that the nude photos of her had been distributed and seen by many police officers. She then filed a section 1983 claim for an alleged constitutional violation.

This Court observed that the one officer's act of taking naked pictures of the woman could well have been decided under the Fourth Amendment since she had been subjected to an unreasonable police search of her person. But deciding the case strictly under the Fourth Amendment would not address whether the other officers' alleged acts of copying, distributing, and viewing the woman's nude photos was unconstitutional since those acts were not "searches." *Id*. at 454.

The Fourth Amendment is "premised upon a basic right to privacy," the woman had argued. The officer could not take pictures of her naked to satisfy his prurient interests because such a "search" arbitrarily deprived her of that right. Thus the other officers could not copy, distribute, and view the photos either, regardless of whether those acts constituted a search, since those acts too deprived her of the same privacy right. *Id*.

This Court agreed. It noted how in Fourth Amendment decisions the Supreme

Court had already decided that "the security of one's privacy against arbitrary intrusion by the police is basic to a free society and is therefore implicit in the concept of ordered liberty embraced by the Due Process Clause." *Id*. at 455 & nn. 10–11. Therefore the woman was eligible to employ the Due Process Clause—which secures so-called "fundamental rights"—to protect her asserted privacy right if two conditions were met.

First, that her asserted privacy right would have been worthy of protection under the Fourth Amendment if the acts the woman complained of had constituted a search. And second, if the infringement of that right by the officers was unreasonable, that is, not justifiable by good reasons. *Id*. at 455.

This Court found both conditions had been met: people have a privacy right to the sight of their naked body, especially from members of the opposite sex, that is as worthy of protection from unreasonable searches as their homes are. And the police had intruded on this right for no legitimate reason whatsoever when they copied, distributed, and viewed the woman's nude photos. *Id*.

Following *York*, the due process claims asserting an infringement on a right to "bodily privacy" often come from prisoners. *See Ioane v. Hodges*, 903 F.3d 929, 934–35 (9th Cir. 2018) (describing such claims). While prisoners have little privacy rights, male prisoners have nonetheless claimed that "bodily privacy" rights at least prevent female guards from watching them shower, undress, or using the bathroom. Courts typically (but not always) reject their claims, or parallel claims made under the Fourth Amendment, finding the intrusions on their bodily privacy right to be justified by security needs. *See, e.g., id*.

In *Ioane*, a woman made a Fourth Amendment claim against a female IRS agent for watching her use the toilet in her own bathroom while the IRS was in the midst of executing a search warrant of her home. Relying on *York* and its successors, this Court found that the IRS agent's intrusion of the woman's right to keep her "naked body" private was egregious, and that the IRS agent did not have a reason good enough to justify it. *Id*. at 935–37.

And in *Brannum v. Overton County School Board*, 516 F.3d 489 (6th Cir. 2008), a group of middle school girls made a Fourth Amendment claim against school officials for having installed a camera in the girls' locker room which "surreptitiously" videotaped them changing clothes. The Sixth Circuit found that this intrusion on the girls' right to "bodily privacy" was not justified by purported security concerns, and therefore that the school officials had unlawfully infringed on that right.

These cases and others—including any cited in the opening brief—demonstrate the following about the due process "bodily privacy" right claimed by Parents for Privacy.

First, the right is a limitation on the ability of officials to view their subject's naked bodies. None of these cases describe the right as being implicated if someone who is *not* a government official views someone else's naked body. Much less if there were only a "risk" that it could happen.

The Constitution secures any individual rights protected therein from being intruded on by the state *itself*. For example, the Fourth Amendment, from which the right to bodily privacy derives, secures people against unreasonable searches by the police or other officials. But it does not require that the state protects people from

having the privacy of their home or person invaded by private actors. Likewise, the Due Process Clause does not require that the state protect people's liberty interests from being infringed by anyone other than a governmental agent. *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 195–96 (1989).

Rather than creating through the Due Process Clause an affirmative obligation on the state's part to protect people's liberty interests from private actors, the "Framers were content to leave the extent of [that] governmental obligation … to the democratic political processes." *Id.* at 196. In other words, if Parents for Privacy want to force transgender kids to use the bathroom of their sex at birth, their only recourse is to try to achieve that outcome legislatively. (Though any such legislation is almost certainly unlawful.)

Second, Parents for Privacy describe the right as designed to keep strangers of the opposite sex from seeing each other naked. But as *Ioane* shows, the right to bodily privacy protects the sight of anyone's naked body from any official regardless of their respective sexes.

Whether the government can intrude on any constitutionally protected right is decided by balancing the competing interests at stake. In a Fourth Amendment analysis, for example, the nature of the privacy intrusion is balanced against the degree to which the challenged search was, legitimately, needed. In a claim deriving from the right to bodily privacy, the sexes of the plaintiff and the official is, at most, "a factor for evaluating the severity of the intrusion" and, hence, whether the articulated need for the intrusion sufficed to overcome the right. *Ioane*, 903 F.3d at 935 n. 2. But the difference in sexes is not "the mark of the intrusion itself." *Id.*

The due process claim Parents for Privacy made by invoking the right to bodily privacy therefore fails for at least two reasons.

First, the transgender boy Parents for Privacy have targeted was not a school official, much less a school official who, for example, lasciviously videotaped students while they changed clothes. He was a student who only wanted to use the bathroom that matched the gender he identified with, and he is not alleged to have done anything in the boys' bathroom but mind his own business, which is hopefully how the cisgender boys behaved, too.

Second, the right to bodily privacy is properly understood to be intruded on regardless of the sexes involved. Therefore, if Parents for Privacy were correct that the right to bodily privacy meant that schools have an affirmative obligation to keep students from glimpsing each other naked or creating a risk of it, that right would be intruded on if schools allowed students of the *same* sex to use the same bathroom.

1.2 *In fact, the students claim a due process right to impose their beliefs about how "privacy" norms between the sexes should operate through a court order directing the school to keep its multi-user bathrooms strictly segregated by sex, at the expense of the transgender boy*

In *Doe v. Boyertown Area School District*, 276 F. Supp. 3d 324 (E.D. Pa. 2017), a group of students made a due process "bodily privacy" claim identical to the one made here. A district court rejected their invocation of the bodily privacy right to keep transgender students out of the bathroom that matched their gender identity and recast it in terms that reflected what the students were really after. *Id*. at 330. The Third Circuit embraced this approach in affirming emphatically from the bench

after oral argument, and then in a written opinion. *Boyertown*, 897 F.3d at 521. The district court here, too, restated the interests in terms truer to what Parents for Privacy sought to vindicate through their suit: primarily their religious beliefs about *modesty*. (ER 36.)

Parents for Privacy have religious beliefs about what "modesty" requires. Among other things it requires that strangers of the opposite sexes not attend to bodily functions or change clothes near each other. This would include in bathrooms or locker rooms. (*See* ER 98.)

Of course, Parents for Privacy also believe that modesty between the sexes is not preserved when transgender people use the bathrooms or the locker rooms that match their gender identity. Despite perceiving their gender to match the gender of the sex typically associated with those bathrooms and locker rooms, someone who is transgender was nonetheless born into the opposite sex.

Parents for Privacy allege that multi-user bathrooms have typically by convention been segregated by sex to guarantee the "modesty norm" which keeps opposite-sex strangers from attending to bodily functions or changing near each other. (ER 112.) Multi-user bathrooms should therefore remain strictly segregated by sex, and at the expense of transgender people, to preserve Parents for Privacy's view of how "modesty" norms surrounding bathroom or locker room use should operate.

Most fundamentally Parents for Privacy are motivated to upkeep their idiosyncratic views on the demands that modesty between the sexes—or as the name of their organization suggests, *privacy* between the sexes—make on bathroom and locker room use. The question is therefore whether the Due Process Clause is a

mechanism through which Parents for Privacy can impose their views of how privacy norms should operate. And in particular whether they are entitled to a court order forcing transgender students to use the bathroom of their sex at birth rather than the bathroom that conforms to their gender identity. The answer to these questions is no.

1.3 *However, the liberty interests necessary for our freedoms and thus protected as due process "privacy" rights comprise only the interests to make important life decisions and to avoid disclosing personal information; these interests would not be served by forcing the transgender boy into the girls' bathroom*

The Due Process Clause impliedly creates a right to so-called substantive due process. Substantive due process forbids the government from infringing certain, "fundamental" liberty interests without a compelling justification. *See Washington v. Glucksberg*, 521 U.S. 702, 719–20 (1997). If a substantive due process claim is not based on the deprivation of a fundamental liberty interest that substantive due process has been held to concern itself with, then the claim necessarily fails. *C.R. v. Eugene School District 4J*, 835 F.d 1142, 1154 (9th Cir. 2016).

Liberty interests are fundamental and thus worthy of protection though substantive due process when they are necessary and "basic to our free society." *Wolf v. Colorado*, 338 U.S. 25, 27 (1949). When the country's institutions and founding principles would not survive in a meaningful way if the state were allowed to infringe on them without limitation.

Most of the rights enshrined in the Bill of Rights qualify as fundamental, though these are enforceable via the Due Process Clause of the Fourteenth Amend-

ment under whatever specific amendments secure them. But a handful of other commensurate and carefully circumscribed rights qualify, too. They qualify by being intrinsic to the kind of liberty the Bill of Rights, and the Constitution as a whole, are meant to safeguard. *See Obergefell v. Hodges*, 135 S. Ct. 2584, 2597–98 (2015).

The "Constitution does not explicitly mention any right to privacy," *Roe v. Wade*, 410 U.S. 113, 152–53 (1973), and there is no "general constitutional right to privacy," *Katz v. U.S.*, 389 U.S. 347, 350 (1967). But some of the amendments in the Bill of Rights can be seen as protecting certain privacy interests. As mentioned above, one way to characterize the Fourth Amendment, for example, is to say that it protects the *privacy* of the person, his possessions, and his home from state intrusion.

Together, such amendments and the Ninth Amendment's suggestion that the rights listed in the Bill of Rights are not exhaustive imply that the Constitution recognizes the existence of some broader privacy right. This right was famously summed up by Louis Brandeis as the right "to be let alone."

On its own, the due process guarantee that the government cannot arbitrarily deprive liberty interests that could be characterized as privacy interest since sometimes liberty and privacy are synonymous or inseparable. The broader right to be let alone that is seen to emanate from the penumbra of the Bill of Rights bolsters that interpretation. Thus the Fourteenth Amendment prohibits the government from intruding on people's right to be let alone without a compelling justification.

Most interests that could be characterized as "privacy" interests are not necessary for our conception of what a free republic should entail. Obviously a person does not have a right under the Constitution to have the government let them alone

in all aspects of their life. We accept that the government can, should, and will regulate our lives for the common good. After all, the Constitution is a charter by which we the people agreed to be governed under the terms specified therein.

So of necessity, the fundamental liberty rights—the "zones of privacy"—the Supreme Court has found to be protected in the name of "personal privacy" fall within a very narrow range. *Roe*, 410 U.S. at 152–53 (tracing some of this history). These rights have only been extended to "matters relating to marriage, family, procreation," and those related to bodily security. *Albright v. Oliver*, 510 U.S. 266, 272 (1994). Under these protected privacy interests, the government generally cannot, for example, prohibit couples from using contraceptives. *Griswold v. Connecticut*, 381 U.S. 479 (1965). But this leaves vast areas of life which can be, and are, legitimately regulated by the government without intruding on people's substantive due process right to be let alone.

The privacy interests secured by due process fall into two categories: an interest in having the autonomy to make certain kinds of important life decisions, and an interest in avoiding the disclosure of personal matters. *Whalen v. Roe,* 429 U.S. 589, 599–600 (1977) (identifying these categories). *Griswold* for example can be understood as protecting the right people inherently have to decide for themselves, free from state interference, whether and when to procreate. It can also be understood as protecting the disclosure of inherently private information. Considering how enforcing a contraception ban would allow "the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives." 381 U.S. at 485–86.

Parents for Privacy argue that the fundamental rights protected by substantive

due process are those which are "deeply rooted in this Nation's history and tradition." (Opening Brief 10–26; *see* ER 111–14.) Then they go on to argue that privacy between the sexes is "deeply rooted" in our nation's "history and tradition," and thus is protected by substantive due process.

This is shown, for example, by Title IX regulations which clarify that schools do not unlawfully discriminate on the basis of sex solely by offering different bathrooms for the different sexes. This is also shown, for example, by laws against "Peeping Toms" that date to "colonial times." Laws criminalizing videotaping someone without their consent, or stalking them. Laws criminalizing "flashing." Opinions upholding convictions under these laws. And even for some reason laws criminalizing child pornography. Never mind that none of these laws, like the bodily privacy right, are concerned with privacy between the sexes inasmuch as they are implicated regardless of the sexes involved.

Nobody doubts that ideas about what could generically be called "privacy" are old, or that prevailing norms about privacy between the sexes are at least partly why multi-user bathrooms are still largely segregated by sex in this county. But substantive due process does not protect every interest that could be placed into a box labelled "private." Rather it protects two particular and special privacies: the privacy of personal autonomy, and the privacy of one's person information.[3]

Parents for Privacy cannot use substantive due process to impose their personal beliefs on what modesty or privacy norms require of bathroom use. Substantive

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3 In fact, the Supreme Court is ambivalent about whether there is due process right to informational privacy, or what its contours would be. *See generally NASA v. Nelson*, 562 U.S. 134 (2011).

due process is meant to preserve our ability to make important "private" decisions about certain, defined areas of our life, free from unjustifiable governmental interference. It was not meant to secure anyone's perceived or received ideas about how we should change clothes or go to the bathroom, or who we should do it next to, just because those are nominally "private" activities.

And regardless of whether the interests they are asserting are only colloquially "privacy" interests, forcing a transgender boy into the girls' bathroom is unnecessary for our republic to survive as recognizably free. It would in fact be closer to the antithesis of it. Both because it would usurp transgender students' own personal autonomy in deciding for themselves which bathroom suits their gender identity. And because the only way to ultimately police whether transgender students are in the "right" bathroom is to force them, including those who are not known to be passing as transgender, to disclose to school officials, and inevitably classmates, their sex at birth.

The transgender boy's use of the boys' bathroom therefore neither intruded on, nor could not have intruded on, any due process liberty right belonging to the appellants who are students. The school district's decision allowing the transgender boy to use the boys' bathroom therefore did not either. For this reason the appellants who are students failed to state their substantive due process claim.

Accordingly, this Court should join the Third Circuit in *Boyertown*, and every other court to have faced similar claims, and reject Parents for Privacy's due process claim, asserting misguided "privacy" rights, by affirming the district court's dismissal of it.

2 The court correctly dismissed the due process claim made by the appellants who are parents because the school's decision to allow a transgender boy to use the boys' bathroom did not infringe any of their protected liberty rights

Parents for Privacy also made a substantive due process claim on behalf of the appellants who are parents. To support this claim, they alleged that by allowing the transgender boy to use the boys' bathroom that the school district took away their right as parents to decide whether their cisgender boys would be "exposed" to a transgender boy in the bathroom. (ER 114–17.) The district court dismissed the parents' due process claim, finding that the complaint had not alleged an infringement of any liberty interest protected by the Due Process Clause. (ER 59–61.)

2.1 *Parents have a due process right to generally decide how they will raise and educate their children, including a right to decide whether to send their children to a public school*

There is a due process right to familial privacy as mentioned above. It gives parents the right to make decisions on the "care, custody, and control" of their children. *Troxel v. Granville*, 530 U.S. 57, 65 (2000). It also gives parents the right to decide how to educate their children.

The right parents have to direct their children's education means either of two things. First, the state cannot compel parents to send their children to a public school. Conversely, its ability to prohibit parents from sending their children to private school, parochial school, to home-school them, and so on, is constrained. Thus, parents generally have a right to educate their children in *other* than a public school. *Fields v. Palmdale School District*, 427 F.3d 1197, 1204, 1207 (9th Cir. 2005). Second

and relatedly, the state cannot prohibit parents from teaching their children some subject without providing a good reason. *See, e.g., Meyer v. Nebraska*, 262 U.S. 390 (1923) (concerning a prohibition on teaching the German language).

The right parents have to make decisions on how they would like to raise their children is "not without limitations." *Fields*, 427 F.3d at 1204. For example, the state can obviously require that parents educate their children in some way and to an objective, acceptable standard, or that they vaccinate them, and children can be subject to special curfews. In fact, there is a "wide variety of state actions that intrude upon the liberty interest of parents in controlling the upbringing and education of their children." *Id*. at 1204–05.

2.2 *However, parents who choose to send their children to a public school have no protected right to control how the school carries out its mission to educate and safeguard students, nor a right to control any manner of a school's operation*

Parents for Privacy recognize that the familial privacy interests secured by due process do not allow parents to challenge what a public school teaches their children if the parents have decided to send them to a public school. However, they argue, that only means that they cannot challenge a school's curriculum. But every other aspect of a school's operation is subject to their wishes. (Opening Brief 41–45.) No authority supports this argument. Rather it is to the contrary.

Parents who make the choice to send their children to a public school have no due process liberty right to dictate anything about how that public school operates. *Fields,* 427 F.3d at 1206 (observing that parents do not have the power to direct how a school "will provide information to its students or what information it will pro-

vide, in its classrooms or otherwise"). Instead the manner in which a public school operates is "committed to the control of state and local authorities." *Id*.

This includes not just curriculum, but "the hours of the school day, school discipline, the timing and content of examinations, the individuals hired to teach at the school, the extracurricular activities offered at the school, [] dress code[s]" and, certainly, the school's internal bathroom policies. *Id*. In short, a parent's ability to direct their children's upbringing "does not extend beyond the threshold of the school door." *Id*. at 1207.

This is not simply the result of a system whereby the way schools are run is a subject committed to the discretion of school authorities and not parents. There are practical considerations too. "Schools cannot be expected to accommodate the personal, moral or religious concerns of every parent. Such an obligation could not only contravene the educational mission of the public schools, but would be impossible to satisfy." *Id*. at 1206. These parental concerns are impossible to accommodate because of their sheer number. But also because the personal, moral, and religious concerns of parents inevitably contradict one another.

Surely some parents would object that forcing a transgender boy into the girls' bathroom would display an example of meanness they would not want their children to see. Or surely the parents of the transgender boy would not think that it best to force him into a bathroom he does not feel he belongs in.

The Due Process Clause gives parents the right to educate their children anywhere other than a public school. The district court suggested that if Parents for Privacy cannot countenance having their cisgender boys in the same bathroom as a

transgender boy then they have a right to remove their children from Dallas High School and educate them at home. Parents for Privacy bristled at that suggestion, (Opening Brief 45), but it is correct. The seclusion of their own home is the only place they can ensure their children will not encounter beliefs that conflict with theirs, and is the only place with bathrooms they can rightly control access to.

3 The court correctly dismissed the appellants' free exercise claim because the school's decision to allow a transgender boy to use the boys' bathroom neither prohibited nor targeted any of the appellants' religious beliefs or practices

Parents for Privacy claimed a violation of the Free Exercise Clause of the First Amendment. (ER 123–25.) To support this claim, the appellants who are students alleged that they hold religious beliefs that do not allow them to be "in the presence of" a person belonging to "the opposite biological sex" when either are undressing or using the bathroom. Similarly, the appellants who are parents alleged that they hold religious beliefs that do not allow their children to be in the same room as a person belonging to "the opposite biological sex" when either are undressing or using the bathroom. By allowing the transgender boy to use the boys' bathroom, the school district kept the appellant students and parents from "practicing" their religious beliefs about "modesty." (ER 122–23.)

3.1 *The school's decision to allow a transgender boy to use the boys' bathroom did not prohibit the appellants' religious beliefs or practices because it was not a coercive regulation that directed them to take or to refrain from any act*

The Free Exercise Clause protects against government action "prohibiting the

free exercise" of religion. The "exercise of religion" involves believing in and professing a religious doctrine, and observing religious practices, including performing or abstaining from acts. *Employment Division v. Smith*, 494 U.S. 872, 877 (1990). To state a claim for a violation of the Free Exercise Clause, a plaintiff must first allege facts which demonstrate that government action "substantially burdened" his free exercise rights. *American Family Association, Inc. v. City and County of San Francisco*, 277 F.3d 1114, 1123–24 (9th Cir. 2002).

The "crucial word in the constitutional text is 'prohibit.'" *Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439, 451 (1988). Thus the Free Exercise Clause is not a general protection of religion or religious beliefs. Rather, it "recognizes the right of every person to choose among types of religious training and observance, free of state compulsion." *Grove v. Mead School District No. 354*, 753 F.2d 1528, 1533 (9th Cir. 1985).

To properly allege a substantial burden, it is therefore necessary to allege "the coercive effect of the enactment as it operates against him in the practice of his religion." *School District of Abington Township v. Schempp*, 374 U.S. 203, 223 (1963). But "when the challenged government action is neither regulatory, proscriptive or compulsory" then merely "alleging a subjective chilling effect on free exercise rights is not sufficient to constitute a substantial burden." *American Family Association*, 277 F.3d at 1124. A plaintiff making a free exercise claim must therefore first allege government action that was a coercive mandate directed against the plaintiff himself.

To illustrate, in *Lyng*, the plaintiffs were native Americans. They challenged under the Free Exercise Clause a U.S. Forest Service decision to build a road and to

permit timber harvesting in a certain wilderness. To secure an injunction, the plaintiffs alleged that it was critical to keep this wilderness pristine for their religious practices. *Lyng*, 485 U.S. at 442–43. The Supreme Court held that the plaintiffs had not stated a free exercise claim because they had not properly alleged that the Forest Service had substantially burdened—had *prohibited*—their free exercise rights.

The Supreme Court presumed that the Forest Service's decision would have a "devastating effects" on the plaintiffs' "religious practices." *Id*. at 449, 451. But that fact, standing alone, did amount to a free exercise claim. The Forest Service's decision was not any kind of regulation that "coerced" the plaintiffs to do or to refrain from some specific act that would violate their religious beliefs. *Id*. at 449. Instead the unfortunate effects the decision had on the plaintiffs' religious practices were "incidental" to the decision. *Id*. at 450. Thus the decision did not unconstitutionally *prohibit* the plaintiffs' religious practices. *Id*. at 452.

A holding otherwise would have failed to comport with the text of the Free Exercise Clause. And it would have paralyzed the government from being able to function. Considering, that is, how likely it is for people to hold religious beliefs surrounding governmental decisions, inevitably including beliefs that conflict with the beliefs of others. *Id*. Giving everyone potential "veto" power over governmental decisions to satisfy their various and at times conflicting "religious needs and desires" is unworkable. *Id*.

Parents for Privacy alleged that the decision to allow the transgender boy to use the boys' bathroom did not permit them to practice their religious beliefs about "modesty." The decision is not regulatory, proscriptive, or compulsory. It is not even

a decision the appellant students or their parents were subject to. Rather, the decision merely allowed someone else—the transgender boy—to use the bathroom that conforms to his gender identity. The decision therefore did not *prohibit* Parents for Privacy from observing their religious beliefs about modesty.

As in *Lyng*, the alleged effects of the decision on Parents for Privacy's religious practices were merely the incidental effects of the decision. The religious objections Parents for Privacy have to the transgender boy's use of the boys' bathroom, untethered to an actual prohibition of their religious practices, does not give them a claim under the Free Exercise Clause to challenge the transgender boy's use of the boys' bathroom.

Especially considering, as *Lyng* foretold, that there are surely other students and parents whose religious beliefs would be sincerely offended if the district forced transgender kids into bathrooms they do not want to be in. Resolving both of these contradictory religious beliefs is literally impossible. Which is fortunately why under the Free Exercise Clause the school district does not have to entertain religious objections to its decisions on transgender bathroom use.

3.2 *The school's decision to allow a transgender boy to use the boys' bathroom did not target religious beliefs or practices, so free exercise rights do not give the appellants any basis to challenge the decision*

Even if Parents for Privacy had properly alleged that the school district had prohibited the free exercise of their religion, they still could not use the Free Exercise Clause to challenge the transgender boy's use of the boys' bathroom.

The "right of free exercise does not relieve an individual of the obligation to

comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religious prescribes (or proscribes)." *Smith*, 494 U.S. at 879. Thus in *Smith* the Supreme Court held that the Free Exercise Clause did not prevent Oregon drug laws from applying to, and therefore prohibiting, the use of an outlawed drug in a religious ceremony.

Those drug laws were neutral with respect to religion since their aim was not to restrict or burden any religious beliefs or practices, and they were generally applicable since they did not selectively restrict or burden any religious practices. *See Stormans, Inc. v. Wiesman*, 794 F.3d 1064, 1076–82 (9th Cir. 2015) (describing what qualifies as a neutral, generally applicable law). The plaintiffs in *Smith* therefore had to comply with the drug laws even though the "incidental effect" of those laws meant that they could not use a drug necessary for a religious ceremony. *Smith*, 494 U.S. at 878. Even though in other words the law compelled them to refrain from an act their religion required.

But when the government has prohibited a religious practice through a regulation, proscription, or compulsion that is *not* neutral and generally applicable—when it *does* target religious beliefs or practices—then the action must be justified by a compelling governmental interest. *See Smith,* 494 U.S. at 882–89. If the action satisfies a compelling governmental interest then the plaintiff must comply with it even though its compulsion both substantially burdened his religion, and targeted his religious beliefs or practices. If the action does not satisfy a compelling governmental interest, then the plaintiff does not have to comply.

So in *Smith,* for example, if Oregon's drug laws had been designed to target the

plaintiffs' religious practices then the governmental defendant would have had to demonstrate that it served a compelling interest, and not merely a legitimate interest.

In view of this, Parents for Privacy argue that the school district's decision to allow the transgender boy to use the boys' bathroom is not generally applicable. (*See, e.g.*, ER 124.) And that, as a result, the district had to show that its decision served a compelling governmental interest. Then they argue that the decision does not serve a compelling interest. Therefore, Parents for Privacy conclude, they are entitled to a court order forcing the transgender boy and other transgender students to use the bathroom that matches their sex at birth. (Opening Brief 46–51.)

Parents for Privacy argue that the decision to allow the transgender boy to use the boys' bathroom is not generally applicable because it does not apply to everyone, only the transgender boy or other, future transgender students. That is, Parents for Privacy argue that the decision is not generally applicable because it does not allow *all* students to use the boys' or girls' bathrooms as it suits their whims. (ER 124.)

The district court explained the error in this reasoning. (ER 63.) In context, the phrase "generally applicable" does not mean that some governmental compulsion to act or refrain from acting must apply to everyone equally. Rather, a governmental compulsion is "generally applicable" if it does not seek, either facially or operationally, to selectively restrict or impose burdens on religious practices. So whether whether the school district allowed *everyone* to use every bathroom does not figure into the question of whether the decision was generally applicable.

It does not make sense here to ask whether the school district's decision to allow a transgender boy to use the boy's bathroom targeted any religious beliefs in order to assess whether Parents for Privacy had to "comply" with it. There was nothing for them to comply with. But regardless, Parents for Privacy do not allege that the school district made its decision in order to target their religious beliefs about "modesty." They therefore are not entitled to have a court veto the decision because they have religious objections to it.

3.3 *The school's decision to allow a transgender boy to use the boys' bathroom is not subject to any heightened scrutiny just because the appellants' complaint attempted to claim violations of constitutional rights in addition to their free exercise rights*

Most of the section of Parents for Privacy's opening brief which addresses their free exercise claim is spent arguing that the district court erred in not properly subjecting the school district's decision to allow the transgender boy to use the boys' bathroom to a heightened level of scrutiny. Namely, one that requires the school district to demonstrate that allowing the transgender boy to use the boys' bathroom served a compelling governmental interest. (Opening Brief 45–54.)

Due process requires that any action by the government must be rationally related to a legitimate government interest for it to be a valid use of government power. If a plaintiff properly alleges that government action substantially burdened his religion, the action is subject to this same rational-basis review, notwithstanding the substantial burden, as long as the action did not target religious beliefs or practices. *Stormans, Inc.*, 794 F.3d at 1084–85.

Parents for Privacy argue, however, that the school district's decision should be subject to heightened scrutiny because they claimed a substantial burden to their free exercise rights, *and* they claimed an intrusion of other fundamental liberty interests. Then Parents for Privacy argue that the decision to allow the transgender boy to use the boys' bathroom fails the heightened scrutiny they conclude the district court should have applied.

Some authority says that when government action does not target religion but does prohibit its free exercise, and the same action infringes on some other fundamental liberty right, then the action is subject to heightened scrutiny beyond rational basis. *See, e.g., Miller v. Reed*, 176 F.3d 1202, 1207 (9th Cir. 1999).

Parents for Privacy's argument fails first, however, because they did not properly allege that the school district prohibited them from exercising their religion to begin with. It fails, second, because they did not state claims for any intrusion of any other fundamental liberty right. For the reasons explained in earlier sections, Parents for Privacy's claimed deprivations of two liberty interests protected by substantive due process were meritless.

A plaintiff is not "entitled to strict scrutiny analysis merely by combining a free exercise claim with an utterly meritless claim of the violation of another alleged fundamental right or a claim of an alleged violation of a non-fundamental or non-existent right." *Miller*, 176 F.3d at 1208. Or put another way, Parents for Privacy is not entitled to the heightened scrutiny they argue should apply since they failed to state *any* claims for the violation of a fundamental, constitutional right.

4 The court correctly dismissed the Title IX claim for unlawful sex discrimination because the school's decision to allow the transgender boy to use the boys' bathroom, and his resulting mere presence in and use of that bathroom, did not amount to sexual harassment of the cisgender boys

Parents for Privacy claimed a Title IX violation. (ER 117–22.) 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 education program or activity" that receives federal funds. 20 U.S.C. § 1681(a). Public schools receive federal funds, and so are covered by Title IX.

Sexual harassment is a form of discrimination on the basis of sex. So to support their Title IX claim, Parents for Privacy's complaint alleged that the mere presence of the transgender boy in the boys' bathroom bothered the appellants who are cisgender boys. The complaint equated the cisgender boys' bother at the transgender boy's presence as continual "sexual harassment" of them. Which, as alleged, thereby subjected them to an unlawful, "sexually harassing hostile environment." (ER 118.)

The district court dismissed Parents for Privacy's Title IX claim for a few reasons. First the court observed that Title IX is a law which prohibits *discrimination* on the basis of sex, and that the school district' decision to allow the transgender boy to use the bathroom corresponding to his gender identity would apply to any transgender student in the future. Allowing transgender students of *either* sex to use whichever bathroom corresponds to their gender identity can neither discriminate on the basis of sex, nor have discriminatory effects. (ER 47–49.) Relatedly, the court noted the relief Parents for Privacy was asking for—an order forcing transgender

students to use the bathroom of their sex at birth—would itself constitute unlawful discrimination on the basis of sex. (ER 52–55.)

And second, merely being or facing the possibility of being in a bathroom at the same time as someone who is transgender does not qualify as sexual harassment, much less sexual harassment that is severe enough to effectively deprive students who are not transgender equal access to an education. (ER 49–52.)

Title IX prohibits intentional discrimination by the funding recipient itself. In other words, a funding recipient can only be liable for its own misconduct. *Davis v. Monroe County Board of Education*, 526 U.S. 629, 638–49 (1999).

In *Davis*, a fifth-grade girl alleged in support of a Title IX claim against a school that she had been the victim of prolonged physical and verbal sexual harassment by one of her male classmates at school. She alleged, for example, that her classmate tried to touch her breasts and genitals, and rubbed his body against hers, and that he said things to her like "I want to feel your boobs." This classmate was eventually charged with, and pleaded guilty to, sexual battery. *Id*. at 633–34

The girl alleged further that she and her mother had continually reported the harassment to her teachers and the principal but that they never disciplined the harassing student or otherwise did anything to stop the harassment. And finally, she alleged that her school's inaction and the resulting sexually hostile environment fostered by that inaction had "interfered with her ability to attend school and perform her studies and activities." *Id.* at 634–36.

The Supreme Court took the girl's appeal from the dismissal of her Title IX claim in order to resolve "whether, and under what circumstances," a school can be

liable under Title IX for "student-on-student" sexual harassment. *Id*. at 637–38. The Supreme Court held that when a school does not act to stop known peer sexual harassment it had the ability to control that the school itself may have engaged in the kind of misconduct prohibited by Title IX.

Therefore, to be liable under Title IX for peer sexual harassment, a school must have had actual knowledge of, and been deliberately indifferent to, in-school harassment "on the basis of sex" that was so severe, pervasive, and objectively offensive that it deprived the victim of equal access to the educational benefits provided by the school. *Id*. at 641–53.

As any dictionary will say, and as *Davis* (for example) illustrates, *harassment* means something like conduct that is intentionally and repeatedly directed at someone, and that disturbs them and serves no legitimate purpose. *Sexual* harassment, then, is harassing conduct perpetrated because of the victim's sex. To be *unlawful* sexual harassment under Title IX (or Title VII), it must be sufficiently severe, etc.

In *Boyertown*, the Third Circuit recently affirmed the dismissal of an identical Title IX claim as Parents for Privacy make here. Namely, one also supported by no *actual* "allegations of harassment," let alone sexual harassment, only allegations that amounted to nothing more than that the plaintiffs objected to "the mere presence of a transgender student" in a bathroom that did not match their sex at birth. *Boyertown*, 897 F.3d at 533–36.

As the Third Circuit found, the Title IX claim therefore failed on three fronts: it did not allege any 1) *harassment*, much less 2) *sexual* harassment, much even less 3) *unlawful* sexual harassment. That is, sexual harassment so severe, pervasive, and

objectively offensive that it denied them the "resources and opportunities" provided by the school district. *See id.*

Parents for Privacy offer no authority to support how the mere presence of a transgender boy in the boys' bathroom amounts to actionable sexual harassment of cisgender boys also in the bathroom. The best Parents for Privacy can do is cite *Lewis v. Triborough Bridge and Tunnel Authority*, 31 Fed. Appx. 746 (2d Cir. 2002), an unpublished Second Circuit opinion. (Opening Brief 38.)

The plaintiffs in *Boyertown* had relied on this case, too. As the Third Circuit noted in *Boyertown*, the plaintiffs' reliance on *Lewis* to support their argument that the mere presence of a transgender student in a bathroom amounts to sexual harassment was so "patently frivolous" that it only served to highlight the "weakness of their position." *Boyertown*, 897 F.3d at 535.

In *Lewis*, the plaintiffs were women who made Title VII claims against their employer for allowing an unlawful, sexually hostile environment. Specifically they alleged that their employer allowed men to enter a locker room while they were changing. They also alleged that the men would "leer[] at them," and would "crowd[] the entrance to the locker room, forcing [the women] to 'run the gauntlet' [while] brush[ing] up against them." When the plaintiffs informed a supervisor, he called them "cunts." *Boyertown*, 897 F.3d at 535 (citing and quoting *Lewis v. Triborough Bridge and Tunnel Authority*, 77 F. Supp. 2d 376 (S.D.N.Y. 1999)).

Here, as in *Boyertown*, Parents for Privacy did not state a Title IX claim based on the transgender boy's mere presence in the boys' bathroom for the three reasons. Namely, the complaint did not allege any 1) *harassment*, much less 2) *sexual* harass-

ment, much even less 3) *unlawful* sexual harassment. The district court was therefore correct to dismiss the claim.

5 The court correctly dismissed the appellants' claims with prejudice because the appellants could not have alleged any facts which would have entitled them to a court order forcing the transgender boy into the girls' bathroom

In response to the motions to dismiss, Parents for Privacy argued, as above, that their complaint had stated one or more claims on which relief could be granted. They did not ask the district court for leave to amend their complaint. When the court granted the motions to dismiss, it dismissed Parents for Privacy's claims with prejudice after finding that they could not "plausibly re-allege their claims and that any amendment would be futile." (ER 65.) Parents for Privacy now argues that the court erred in dismissing their claims without giving them a chance to amend. (Opening Brief 54–56.)

When dismissing a claim for failure to state a claim on which relief can be granted, a district court has discretion to dismiss that claim with prejudice if it finds that the claim could not be saved "by the the allegation of other facts." *Lopez v. Smith*, 203 F.3d 1122, 1130 (9th Cir. 2000) (en banc). In other words, when the claim or claims at issue would not survive a motion to dismiss after the amendment. *Miller v. Rykoff–Sexton, Inc.*, 845 F.2d 209, 214 (9th Cir. 1988). When a district court denies leave to amend because of the futility of any amendment, the reviewing court will uphold that denial if, after de novo review, it likewise finds that the complaint could not be saved *Carvalho v. Equifax Information Services, LLC*, 629 F.3d 876, 893 (9th Cir. 2010).

Other than simply reasserting that their complaint "clearly pleaded claims for relief," Parents for Privacy does not offer what other facts their complaint could have alleged that would have stated any claim on which relief could be granted. However, no facts or theories of liability could have been added to the complaint which would have entitled Parents for Privacy to the relief they seek. Namely, a court order forcing transgender students in the Dallas School District to use the bathroom of their sex at birth rather than the bathroom that matches the gender they identify with. The district court therefore did not err in dismissing Parents for Privacy's claims at issue on appeal without leave to amend.

CONCLUSION

For the reasons given above, the judgment of the district court dismissing the appellants' claims for relief should be affirmed.

Dated March 4, 2019

s/ *Blake H. Fry*

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Dallas School District

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1 This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B)(i) because this brief contains 12,343 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2 This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in 15-point Arno Pro, a proportionally spaced typeface.

Dated March 4, 2019

s/ *Blake H. Fry*
Blake H. Fry
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STATEMENT OF RELATED CASES

In accordance with Ninth Circuit Local Rule 28-2.6, Defendants and Appellees declare that there are no currently related cases pending in this Court.

Dated March 4, 2019

s/ *Blake H. Fry*

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CERTIFICATE OF SERVICE

I hereby certify that on March 4, 2019 I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. All participants in the case are registered CM/ECF users. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Dated March 4, 2019

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