

No. 18-35708

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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

Plaintiffs-Appellants,

v.

WILLIAM P. BARR, Attorney General; BETSY DEVOS; UNITED STATES DEPARTMENT OF EDUCATION; UNITED STATES DEPARTMENT OF JUSTICE; DALLAS SCHOOL DISTRICT NO. 2,

Defendants – Appellees.

BASIC RIGHTS OREGON,

Intervenor-Defendant - Appellee.

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AMICUS BRIEF OF THE STATE OF OREGON, BY AND THROUGH THE OFFICE OF THE GOVERNOR AND OREGON DEPARTMENT OF EDUCATION, IN SUPPORT OF APPELLEES DALLAS SCHOOL DISTRICT AND BASIC RIGHTS OREGON

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Appeal from the United States District Court  
for the District of Oregon

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**Amicus Brief of the State of Oregon, by and through the Office of the  
Governor and Oregon Department of Education, in Support of Appellees  
Dallas School District and Basic Rights Oregon**

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**INTRODUCTION**

Oregon Governor Kate Brown and the Oregon Department of Education (ODOE) submit this amicus brief pursuant to Federal Rule of Appellate Procedure 29(a)(2) in support of affirmance of the district court’s judgment.

Historically, local governments and states have controlled education policy. Governor Brown and ODOE have a strong interest in protecting all schoolchildren—including children who are transgender. The State’s interest in protecting this population is particularly acute given that group’s vulnerability to victimization: transgender students experience a heightened incidence of harassment and assault in schools and, as a result, tend to underperform academically and miss school more often. For this reason, and given the protected legal status of transgender people under both Oregon and federal laws, the State strongly supports the School District in recognizing and treating transgender students consistent with their gender identity, and consistent with the law and principles of equality.

As set out in official ODOE guidance to schools throughout Oregon, the State categorically disagrees with plaintiffs regarding what constitutes best

practices for creating an educational environment safe and free from discrimination and harassment, and how best to ensure that *every* student—including transgender students—has equal access to educational programs and activities. Transgender students should be able to use bathrooms and locker rooms consistent with their gender identity. The School District’s policies and practices treat all students equally by allowing them to use restrooms and locker rooms consistent with their gender identity and permitting all students—regardless of gender—to use private facilities if they so choose.

The district court correctly rejected plaintiffs’ request for an injunction prohibiting transgender students from using restrooms and locker room consistent with their gender identity. Such an injunction would unlawfully discriminate against transgender students. The School District’s policies are not only consistent with, but are required by, Oregon and federal law.

Governor Brown and ODOE, as overseers of Oregon public schools and state education policies, have a strong and manifest interest in the correct application of law to the issues presented in this case. As they did at the district court, they submit this *amicus* brief to offer additional factual and legal context to assist the court.

## STATEMENT OF INTEREST OF AMICUS

This case implicates the interests of Oregon Governor Brown and ODOE because the outcome of this case will affect Oregon school districts and students beyond those directly involved in this case.<sup>1</sup> The Dallas School District adopted a Student Safety Plan and underlying policies that, consistent with guidance from ODOE, allowed transgender students to use bathrooms, locker rooms, and showers that match their gender identity rather than their biological sex assigned at birth. Plaintiffs challenged those policies under state and federal law and sought a permanent injunction to preclude the School District from enforcing the policies and ordering them instead to “permit only biological females to enter and use [the] district’s girls’ restrooms, locker rooms and showers, and permit only biological males to enter and use [the] district’s boys’ restrooms, locker rooms and showers.” (E.R. 127–28). The district court determined that the School District’s Student Safety Plan and underlying policies on restrooms and locker rooms did not violate plaintiffs’ rights under

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<sup>1</sup> Governor Brown and ODOE were originally defendants in this matter. (E.R. 66–67, 78–79). The district court dismissed both based on the parties’ stipulation. (E.R. 13, 826–27). After being dismissed, Governor Brown and ODOE filed an *amicus* brief in the district court in support of the School District’s motion to dismiss. (E.R. 638–49). As identified in the notice of appeal, Governor Brown and ODOE are *amici*, and not parties, as listed on plaintiffs’ brief cover. (See E.R. 5).

federal or state law and accordingly dismissed plaintiffs' claims. Governor Brown and ODOE believe the district court framed and resolved the issues correctly and have a strong interest in this court affirming that decision.

**A. Governor Brown and ODOE are responsible for ensuring equal treatment of Oregon students.**

Governor Brown is the “Superintendent of Public Instruction.” Oregon Constitution Article VIII, §1; O.R.S. 326.300. ODOE is the state agency “responsible for the administration and funding of K-12 public education in the state of Oregon, as well as enforcement of Title IX, §§ 1681–1688, and its implementing regulations at 34 C.F.R. Part 106 for schools under its jurisdiction.” (E.R. 74). In those capacities, Governor Brown and ODOE have an important interest and responsibility to ensure that all students in Oregon are treated equally, particularly those who are most at risk of discrimination.

**B. Transgender students—including in Oregon schools—face serious risks.**

Nationwide, transgender youth face extreme harassment and discrimination, particularly within the school environment.<sup>2</sup> Most often,

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<sup>2</sup> Joseph G. Kosciw, et al., *The 2017 National School Climate Survey: The Experiences of Lesbian, Gay, Bisexual, Transgender, and Queer Youth in Our Nation's Schools*, New York: Gay, Lesbian and Straight Educ. Network, xviii–xx (2018) (*2017 National School Climate Survey*), <https://www.glsen.org/sites/default/files/GLSEN%202017%20National%20School%20Climate%20Survey%20%28NSCS%29%20-%20Full%20Report.pdf>.

schools are where gender-nonconforming youth first experience victimization and harassment.<sup>3</sup> Between 2013 and 2017, there was a steady increase in harassment of transgender students.<sup>4</sup>

An estimated 1,700 transgender youth (ages 13 to 17) live in Oregon.<sup>5</sup> Unfortunately, transgender students in Oregon also suffer from harassment and discrimination. Transgender students in Oregon have consistently reported experiencing a high degree of harassment and assault in schools due to their gender expression.<sup>6</sup>

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<sup>3</sup> Russell B. Toomey et al., *Gender-Nonconforming Lesbian, Gay, Bisexual, and Transgender Youth: School Victimization and Young Adult Psychological Adjustment*, 46 *Developmental Psychol.* 1580, 1582 (2010), [https://familyproject.sfsu.edu/sites/default/files/FAP\\_School%20Victimization%20of%20Gender-nonconforming%20LGBT%20Youth.pdf](https://familyproject.sfsu.edu/sites/default/files/FAP_School%20Victimization%20of%20Gender-nonconforming%20LGBT%20Youth.pdf).

<sup>4</sup> *2017 National School Climate Survey* at xxiv.

<sup>5</sup> Jody L. Herman, et al., *Age of Individuals Who Identify as Transgender in the United States*, Williams Institute, 5 (2017), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/TransAgeReport.pdf>.

<sup>6</sup> Gay, Lesbian and Straight Educ. Network, *School Climate in Oregon: 2017 State Snapshot*, at 1 (2018), [https://www.glsen.org/sites/default/files/Oregon%20State%20Snapshot%20-%202017%20NSCS\\_0.pdf](https://www.glsen.org/sites/default/files/Oregon%20State%20Snapshot%20-%202017%20NSCS_0.pdf) (indicating that 62% of Oregon LBGTQ students report experiencing verbal harassment, 28% report experiencing physical harassment, and 12% report experiencing physical assault due to their gender expression); Nat'l Ctr. for Transgender Equality and Nat'l Gay and Lesbian Task Force, *2015 U.S. Transgender Survey: Oregon State Report*, <http://www.transequality.org/sites/default/files/docs/usts/USTSORStateReport%281017%29.pdf> (indicating that 83% of K-12 students in Oregon reported harassment, 25% reported physical assault, and 15% reported sexual violence);

*Footnote continued...*

Harassment of this kind results in lower academic achievement among transgender students, as well as reduced educational aspirations.<sup>7</sup> In particular, students who experience high levels of in-school victimization and discrimination have lower grade point averages, are more likely to miss school due to safety concerns, have higher levels of depression, and are less likely to feel a sense of belonging.<sup>8</sup>

In addition to such mistreatment and discrimination being detrimental to students while they are in school, it can also have long-lasting effects. For instance, a survey of transgender adults revealed that people who experienced discrimination because of their transgender status in K-12 schools were more likely to experience negative outcomes as adults.<sup>9</sup> In particular, transgender

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Oregon Safe Schs. & Communities Coal., *Sixth Annual State of Safe Schools Report*, 2

[https://education.uoregon.edu/sites/default/files/2017\\_safe\\_schools\\_reportfinal.pdf](https://education.uoregon.edu/sites/default/files/2017_safe_schools_reportfinal.pdf).

<sup>7</sup> 2017 *National School Climate Survey* at xx; Emily A. Greytak et al., *Harsh Realities: The Experiences of Transgender Youth in Our Nation's Schools*, Gay, Lesbian and Straight Educ. Network, 25-26 (2009), <https://files.eric.ed.gov/fulltext/ED505687.pdf>.

<sup>8</sup> 2017 *National School Climate Survey* at xxi.

<sup>9</sup> See *Separation and Stigma: Transgender Youth & School Facilities*, at 4; Sandy E. James et al., *The Report of the 2015 U.S. Transgender Survey*, Nat'l Ctr. for Transgender Equality, 132 (2016),

*Footnote continued...*

adults who had suffered at least one negative experience in school were more likely to have attempted suicide, experienced homelessness, suffered from serious psychological distress, and were more likely to have engaged in sex work or drug sales than those who did not have a negative experience in school.<sup>10</sup>

Because transgender youth face greater challenges and discrimination, it is imperative that schools and educators be equipped with the necessary resources to provide a safe and healthy learning environment. For instance, the Centers for Disease Control and Prevention has stated that, “[b]ecause some LGBT youth are more likely than their heterosexual peers to experience bullying or other aggression in school, it is important that educators, counselors, and school administrators have access to resources and support to create a safe, healthy learning environment for all students.”<sup>11</sup> Indeed, the federal government’s anti-bullying website recognizes that to make all students feel physically and emotionally safe, it is important to establish safe school

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(...continued)

<https://www.transequality.org/sites/default/files/docs/USTS-Full-Report-FINAL.PDF>.

<sup>10</sup> *The Report of the 2015 U.S. Transgender Survey*, at 132.

<sup>11</sup> Ctrs. for Disease Control and Prevention, *LGBT Youth Resources*, <https://www.cdc.gov/lgbthealth/youth-resources.htm> (last visited March 11, 2019).

environments.<sup>12</sup> It specifically proposes that schools “add sexual orientation and gender identity protection to school anti-discrimination policies.”<sup>13</sup>

One of the most fundamental ways in which schools can provide a safe and welcoming environment for all students is by allowing transgender students to access restrooms that match their gender identity.<sup>14</sup> In Oregon, about 51% of transgender students report that they have been unable to use a school restroom that aligns with their gender identity.<sup>15</sup> Nationwide, the numbers are similar.<sup>16</sup> Further, nationwide 70% of transgender students report actually avoiding bathrooms, which can lead to significant health problems and interfere with

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<sup>12</sup> U.S. Dep’t of Health and Human Servs., *LGBTQ Youth*, <https://www.stopbullying.gov/at-risk/groups/lgbt/index.html> (last visited Mar. 11, 2019);

<sup>13</sup> U.S. Dep’t of Health and Human Servs., *LGBTQ Youth*, Tip Sheet, <https://www.stopbullying.gov/sites/default/files/2017-09/lgbtyouthtipsheet.pdf>.

<sup>14</sup> Movement Advancement Project & Gay, Lesbian and Straight Educ. Network, *Separation and Stigma: Transgender Youth & School Facilities*, 2–5 (2017), <http://lgbtmap.org/file/transgender-youth-school.pdf>; Asaf Orr et.al, *Schools in Transition: A Guide for Supporting Transgender Students in K-12 Schools*, 24–25 (2015), <http://assets2.hrc.org/files/assets/resources/Schools-In-Transition.pdf>.

<sup>15</sup> *School Climate in Oregon: 2017 State Snapshot*, at 1.

<sup>16</sup> *The 2017 National School Climate Survey* at xx.

their ability to learn and focus in class.<sup>17</sup> *See Whitaker v. Kenosha Unified School District No. 1*, 858 F.3d 1034, 1045 (7th Cir. 2017), *cert. dismissed*, 138 S. Ct. 1260 (2018) (recognizing that transgender boy who was not allowed to use the boys’ restroom “was faced with the unenviable choice between using a bathroom that would further stigmatize him and cause him to miss class time, or to avoid use of the bathroom altogether at the expense of his health”).

Thus, it is critical that schools implement policies, like allowing transgender students equal access to restrooms and other facilities, to help create a safer and more inclusive environment for all students.

**C. Governor Brown and ODOE have taken steps to protect transgender students in Oregon and have a strong interest in this court upholding those protections.**

One of the primary ways in which ODOE has played a role in protecting the rights of transgender students is by issuing its “Guidance to School Districts: Creating a Safe and Supportive School Environment for Transgender Students” (ODOE Guidance). (E.R. 299–313). The guidance recognizes that “[m]any transgender people experience discrimination and some experience violence due to their identity,” and “academic success depends on a safe school environment.” (E.R. 299, 302). The guidance further acknowledges that state

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<sup>17</sup> *Separation and Stigma: Transgender Youth & School Facilities*, at 4.

law prohibits discrimination in any public school, including discrimination based on gender identity, and that federal law likely prohibits the same. (E.R. 299).

The purpose of the ODOE Guidance is to “suggest best practices and to provide a foundation for the educational community to build safe and supportive cultures,” and it is designed to “be used by school boards, administrators and other members of the educational community to guide development of school procedures and district policies related to transgender and gender nonconforming students.” (E.R. 300).

The ODOE Guidance affirms the State’s policy and legal position that “[o]ne’s gender identity is an innate characteristic of each individual’s personality” that must be respected. (E.R. 302). It further recognizes that the “person best situated to determine a student’s gender identity is the individual student” and that schools should “accept a student’s assertion of his/her/their own gender identity.” (E.R. 302). It directs that transgender students should be treated consistent with their gender identity:

A student who says she is a girl and wishes to be regarded that way throughout the school day should be respected and treated like any other girl. So too with a student who says he is a boy and wishes to be affirmed that way throughout the school day. Such a student should be respected and treated like any other boy.

(E.R. 302).

With respect to bathroom and locker room use, the ODOE Guidance recommends that “alternative accommodations, such as single ‘unisex’ bathroom or private changing space, should be made available to students who request them, but should not be forced upon students, or presented as the only option,” and that transgender students should be allowed to use bathrooms and locker rooms consistent with their gender identity. (E.R. 308–09).

The Dallas School District followed the State’s guidance. This case, brought on behalf of various students and parents, challenges the School District’s actions and policies of allowing transgender students to use the bathroom and locker rooms that match their gender identity while making a private changing space available. Among other things, plaintiffs sought an injunction that would restrain the School District from enforcing its Student Safety Plan and order it to permit only biological females to use the girls’ restrooms and locker room and only biological males to use the boys’ restrooms and locker room. (E.R. 127–28). Plaintiffs’ demand would require the School District to discriminate against Oregon schoolchildren based on their sexual orientation, in violation of state and federal law.

Governor Brown and ODOE strongly support the School District in its approach to providing a safe and fair environment for *all* students, which is consistent with ODOE’s Guidance. The ruling from this court will impact the

State's goal of providing a foundation for students to be treated in a safe and nondiscriminatory way in Oregon public schools. Thus, Governor Brown and ODOE have an interest in providing their position to this court, and as explained below, strongly urge this court to affirm the district court's well-reasoned decision.

### **SUMMARY OF ARGUMENT**

Governor Brown and ODOE submit this brief primarily to emphasize the importance of treating transgender students consistent with their gender identity. Such treatment is not only important for safe schools and successful students, the law also compels it.

Plaintiffs claim that the School District's Safety Plan and policies violate their rights. But there is no constitutional right to exclude students from using the bathroom or restroom associated with their gender identity. And allowing transgender students to use the bathroom or locker room associated with their gender identity does not discriminate against any students on the basis of sex, interfere with any parents' rights to direct the education of their children, or infringe on other students ability to practice their religion. Rather, prohibiting transgender students from using the facilities associated with their gender identity would discriminate against transgender students on the basis of sex in

violation of state and federal law. Thus, this court should affirm the district court's decision dismissing plaintiffs' claims.

### **ARGUMENT**

Plaintiffs asserted eight claims for relief, based on both state and federal law. (E.R. 66–130). The district court dismissed all eight claims. (E.R. 9, 65). On appeal, plaintiffs only challenge dismissal of four of the claims, all based on federal law: violation of Title IX (Fourth Claim), violation of the fundamental right to privacy under the Fourteenth Amendment (Second Claim), violation of parents' fundamental right to direct the education and upbringing of their children (Third Claim), and violation of the right to free exercise of religion under the First Amendment (Sixth Claim). (*See* E.R. 111–125).

Governor Brown and ODOE agree with the district court's opinion and with arguments made by Basic Rights Oregon and the School District on appeal. Governor Brown and ODOE provide a brief argument in support of the district court's decision, but primarily rely on the briefing of the appellees.

#### **A. The district court correctly dismissed plaintiffs' Title IX claim.**

- 1. The School District's Safety Plan and policies do not discriminate on the basis of sex; rather, they treat students the same.**

Title IX prohibits schools from discriminating "on the basis of sex," including by creating a sexually harassing environment. 20 U.S.C. § 1681(a).

The School District's Safety Plan and policies do not discriminate on the basis

of sex by creating a sexually harassing environment. (*See* E.R. 48–49; Basic Rights Oregon Br. 22–25; Dallas School District Br. 39–43). Rather, the School District’s plan and policies treat all students the same by allowing them to use the facilities that correspond to their gender identity. And plaintiffs did not allege that anyone was sexually harassed. The mere presence of transgender students in the locker room associated with their gender identity is not harassment.

Further, the district court correctly concluded that granting plaintiffs the relief they seek would discriminate *against* transgender students in violation of Title IX. (E.R. 52–55). As noted, the ODOE Guidance on bathroom and locker rooms in Oregon schools was based on recognizing that gender identity is an innate characteristic and complying with Title IX. (E.R. 308–09). This court has recognized that discrimination against a transgender person because of their gender identity is sex discrimination. *See Kastl v. Maricopa Cty. Community College*, 325 F. App’x 492, 493 (9th Cir. 2009) (“it is unlawful to discriminate against a transgender (or any other) person because he or she does not behave in accordance with an employer’s expectation for men or women”). Prohibiting transgender students from using the bathroom associated with their gender identity is discrimination. *Whitaker*, 858 F.3d at 1049 (“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.”).

**2. Education is historically controlled at a local level, and the relief plaintiffs sought would violate state law.**

Even if plaintiffs could state a claim for relief under Title IX, the relief requested would violate Oregon law. And because education is traditionally controlled by the states, that state law is informative of the issues.

Education policy is generally determined at a state and local level. *See Bennett v. New Jersey*, 470 U.S. 632, 635 (1985) (recognizing “the deeply rooted tradition of state and local control over education”); *Hooks v. Clark Cty. School Dist.*, 228 F.3d 1036, 1043 (9th Cir. 2000) (same). Oregon has a state law prohibiting discrimination in education, O.R.S. 659.850, and a robust public accommodation law, O.R.S. 659A.403. Those laws preclude a school from discriminating against transgender students. To the extent the court finds any inconsistency between state protections for students and Title IX, the court should defer to the state law. *See e.g. Windsor v. United States*, 570 U.S. 744, 768 (2013) (striking down the Defense of Marriage Act and recognizing that the federal government historically “deferred to state-law policy decisions with respect to domestic relations”); *Amanda J. ex rel. Annette J. v. Clark Cty. School Dist.*, 267 F.3d 877, 888 (9th Cir. 2001) (deferring to state

administrative decision because states have the “primary responsibility of formulating each individual child’s education”).

Oregon law explicitly protects members of the public from discrimination on the basis of gender identity and that includes within schools. In 2007, then-Senate Majority Leader Kate Brown introduced and the state legislature passed the Oregon Equality Act in an effort to expand protections for all Oregonians. *See* S.B. 2, 74<sup>th</sup> Legis. Assemb., Reg. Sess. (Or. 2007). The Act expanded the scope of Oregon’s public accommodation statute, O.R.S. 659A.403, specifically to prohibit discrimination on the basis of sexual orientation, and it amended the statutory definition of “sexual orientation” to include gender identity. *See* S.B. 2 §§ 1, 5 (Or. 2007).

Specifically, O.R.S. 659A.403(1) now requires places of public accommodation in Oregon to provide “full and equal accommodations, advantages, facilities and privileges of any place of public accommodation, without any distinction, discrimination or restriction on account of race, color, religion, sex, sexual orientation, national origin, marital status or [except in certain cases] age[.]” “Sexual orientation” is now defined, in relevant part, as “an individual’s actual or perceived \* \* \* *gender identity*, regardless of whether the individual’s gender identity, appearance, expression or behavior differs

from that traditionally associated with the individual's sex at birth.” O.R.S. 174.100(7) (emphasis added).

The School District's plan and policies require equal access for all. Consistent with the ODOE Guidance, it provides that all students regardless of their sex, sexual orientation, or religion may use facilities in accordance with their gender identity. (E.R. 132–35; 308). Ordering the School District to treat transgender students differently based on those students' gender identity would violate Oregon's public accommodation law. *See* O.R.S. 659A.403(1); O.R.S. 174.100(7). Oregon courts have previously indicated that a place of public accommodation violates O.R.S. 659A.403 when it excludes transgender people based on other peoples' desire not to share the same space. *See Blachana, LLC v. BOLI*, 273 Or. App. 806, 816–19, *adh'd to as modified on recons.*, 275 Or. App. 46 (2015) (bar violated O.R.S. 659A.403 by asking a social group including transgender people not return due to other patrons' perceptions and discomfort).

Further, as the Oregon district court has recognized, the “purpose of Oregon's discrimination law is to remove ‘arbitrary standards’ and to ‘ensure the human dignity of all people within this state and protect their health, safety, and morals from the consequences of intergroup hostility, tensions, and practices.” *Richardson v. Nw. Christian Univ.*, 242 F. Supp. 3d 1132, 1152 (D.

Or. 2017) (quoting O.R.S. 659A.003). Plaintiffs' requested relief is plainly inconsistent with that stated purpose.

**B. The district court properly dismissed plaintiffs' right-to-privacy claim.**

The district court properly framed the issue for plaintiffs' right-to-privacy claim as whether "students have a constitutional right not to share restrooms or locker rooms with transgender students whose sex assigned at birth is different than theirs." (*See* E.R. 32). In resolving that issue, the district court correctly concluded that because the School Districts' Safety Plan and policies do not compel any students to share restrooms or locker rooms with students who have a different assigned sex than theirs, they do not violate any students' right to privacy. (*See* E.R. 31–41).

Plaintiffs argue that the Fourteenth Amendment protects students from having their unclothed or partially clothed bodies viewed by members of the opposite sex in facilities like bathrooms and locker rooms. (Opening Br. 13–17). But as the district court explained and as *Basic Rights Oregon* and the Dallas School District argue, the federal constitution protects against the government unreasonably *compelling* a person to expose their body to another. Here the school district did not compel students to expose their bodies. Students were not required to undress in front of anyone. Students did not have to use the common area of the locker room. Rather, students had options such

as changing in a private area provided by the school. (*See* E.R. 31–44; Basic Rights Oregon Br. 8–18; Dallas School Dist. Br. 15–21).

Plaintiffs assert that Oregon law “recognizes a privacy interest in privacy facilities.” (Opening Br. 15). But plaintiffs’ claim was that their rights were violated under the *federal constitution*, not state law.

In any event, Oregon cases and statutes cited do not establish a privacy right to avoid transgender students in a school bathroom or locker room. Rather, as explained above, state law prohibits the School District from discriminating against transgender students by *requiring* them to use facilities associated with their sex assigned at birth.

Plaintiffs rely on Oregon cases involving warrantless searches by law enforcement officers within a bathroom and searches of inmates. (Opening Br 15–16); *See State v. Holiday*, 258 Or. App. 601 (2013) (unlawful for police to engage in warrantless search of locked single-user bathroom when they knew the defendant was inside); *State v. Casconi*, 94 Or. App. 457 (1988) (unlawful for police to engage in warrantless surveillance of public toilet stall with a concealed camera); *Sterling v. Cupp*, 290 Or. 611 (1981) (injunction generally precluding female correction officers from touching genital area of male inmates). Those cases all involve government intrusion. Here, there is no government intrusion associated with the Safety Plan and restroom/locker room

policies. Again the School District is not compelling the students to do anything, and certainly not subjecting them to any searches. Where law enforcement may lawfully search and how prison guards may touch inmates, does not control where a public school may *permit* students to change their clothes or use the bathroom.<sup>18</sup>

Plaintiffs, in a footnote, also cite to a number of Oregon statutes relating to invasion of privacy. (Opening Br. 15 n. 7). Those state statutes fail to demonstrate that there is a privacy right in restrooms and locker rooms that would preclude permitting transgender students to use the facility that corresponds to their gender identity. The statutes make no distinction between conduct involving people of the same sex or different sex and relate only to conduct done for sexual arousal. For example, O.R.S. 163.467 criminalizes exposing one's genitals to another in order to arouse sexual desire, where the conduct is unwelcome and that other person "has a reasonable expectation of privacy." Notably, the examples of where a person has a "reasonable expectation of privacy" are "residences, yards of residences, working areas and

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<sup>18</sup> The out-of-district cases plaintiffs rely on to establish their asserted privacy interest are similarly inapplicable because they involve government intrusion or compelled action. (*See* Opening Br. 16–17).

offices.” O.R.S. 163.467(4). The interest protected by that statute—to be free from unwanted sexual conduct—is very distinct to the privacy interest plaintiffs argue requires the School District to preclude transgender students from using the facilities associated with their gender identity. In another statute plaintiffs cite, O.R.S. 30.865, the state legislature created a civil cause of action for a person who is recorded naked, or watched naked for a sexual purpose, in a bathroom or locker room. Like the criminal statute, that civil statute does not demonstrate that a person who voluntarily uses a communal locker room or restroom has any fundamental interest in keeping transgender people out of that space. Instead, it reasonably restricts offensive contact in those areas.

Ultimately, the federal constitution does not protect the privacy interest plaintiffs’ assert. And, while it does not matter to the resolution of this case, nor does state law. Rather, both federal and state laws prohibit discriminating against transgender students by precluding them from using the facilities associated with their gender identity.

**C. The district court correctly dismissed plaintiffs’ right-to-direct-education-and-upbringing claim.**

The district court correctly dismissed parent plaintiffs’ claim for violation of their right to direct and the education and upbringing of their children as well. Allowing transgender students to use the bathroom or locker room associated with their gender identity does interfere with parents’ fundamental

right to direct the education and upbringing of their children. (*See* E.R. 59–60; Basic Rights Oregon Br. 30–33; Dallas School District Br. 28–31). As this court explained in *Fields v. Palmdale Sch. Dist.*, 427 F.3d 1197, 1204 (9th Cir. 2005), parents’ liberty interests in this context are not “beyond regulation” “in the public interest.” Further, “once parents make the choice as to which school their children will attend, their fundamental right to control the education of their children is, at the least, substantially diminished.” *Id.* So, “while parents may have a fundamental right to decide *whether* to send their child to a public school, they do not have a fundamental right generally to direct *how* the public school teaches their child.” *Id.* (quoting *Blau v. Fort Thomas Public Sch. Dist.*, 401 F.3d 381, 395–96 (6th Cir. 2005)). Here, parent plaintiffs are seeking to control *how* the Dallas School District educates the district’s students. But their right to direct the education and upbringing of their children entitles them to no such control.

**D. The district court correctly dismissed plaintiffs’ free exercise claim.**

Allowing transgender students to use the bathroom or locker room associated with their gender identity does not burden plaintiffs’ religious beliefs. (*See* E.R. 62–63; Basic Rights Oregon Br. 33–35; Dallas School District Br. 31–38). The Safety Plan and policies are neutral and generally

applicable—they do not restrict any religiously motivated practices or require anyone to embrace a particular religious belief.

**CONCLUSION**

This court should affirm the district court’s decision to dismiss plaintiffs’ complaint.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7), Federal Rules of Appellate Procedure, I certify that the Amicus Brief of the State Of Oregon is proportionately spaced, has a typeface of 14 points or more and contains 4,708 words.

DATED: March 11, 2019

/s/ Jona J. Maukonen

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IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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

Plaintiffs-Appellants,

v.

WILLIAM P. BARR, Attorney  
General; BETSY DEVOS; UNITED  
STATES DEPARTMENT OF  
EDUCATION; UNITED STATES  
DEPARTMENT OF JUSTICE;  
DALLAS SCHOOL DISTRICT NO.  
2,

Defendants – Appellees,

BASIC RIGHTS OREGON,

Intervenor-Defendant -  
Appellee.

U.S.C.A. No. 18-35708

STATEMENT OF RELATED CASES

Pursuant to Rule 28-2.6, Circuit Rules of the United States Court of  
Appeals for the Ninth Circuit, the undersigned, counsel of record for amicus

curiae State of Oregon, certifies that she has no knowledge of any related cases pending in this court.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that on March 11, 2019, I directed the Amicus Brief of the State of Oregon to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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