No.

IN THE SUPREME COURT OF THE UNITED STATES

PARENTS FOR PRIVACY; JON GOLLY; KRIS GOLLY; NICOLE LILLIE; AND PARENTS RIGHTS IN EDUCATION;

Petitioners,

v.

WILLIAM P. BARR, ATTORNEY GENERAL; BETSY DEVOS; U.S. DEPARTMENT OF EDUCATION; U.S. DEPARTMENT OF JUSTICE; DALLAS SCHOOL DISTRICT NO. 2,

Respondents,

BASIC RIGHTS OREGON, Respondent-Intervenor

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Petition for a Writ of Certiorari

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QUESTIONS PRESENTED

1. Whether parents surrender their fundamental right to direct the upbringing of their children by enrolling them in public school so that a school district can compel children to disregard biological reality by requiring that they expose their bodies to classmates of the opposite sex and affirm that a child is the sex with which he or she self-identifies.

2. Whether schoolchildren's rights to bodily privacy are violated when they are compelled to undress and engage in intimate bodily functions in the presence of members of the opposite sex who self-identify as something other than their sex while using privacy facilities.

3. Whether a school district can compel children to violate sincerely held religious beliefs that sex is based on biological reality by being forced to affirm that members of one biological sex are members of the opposite sex if they self-identify as that sex.

4. Whether a school district violates Title IX when it compels children to accept into sex-separate privacy facilities members of the opposite sex who self-identify as something other than their sex and to affirm that students are members of whatever sex with which they self-identify.

PARTIES TO THE PROCEEDING

Petitioner Parents for Privacy is an unincorporated association in the State of Oregon. Petitioners Jon Golly, Kris Golly, and Nicole Lillie are individuals and parents of students and former students in Dallas School District No. 2. Petitioner Parents Rights in Education is a nonprofit corporation located in Oregon.

Respondent William P. Barr is the Attorney General of the United States. Respondent Betsy DeVos is the Secretary of Education of the United States. The U.S Departments of Justice and Education are government agencies in the Executive Branch of the United States (collectively "Federal Respondents").[1] Respondent Dallas School District No. 2 ("District") is a public school district located in Dallas, Polk County, Oregon organized under the laws of the State of Oregon. Intervenor-Respondent Basic Rights Oregon is a nonprofit organization in the state of Oregon.

CORPORATE DISCLOSURE STATEMENT

Petitioner Parents Rights in Education is a nonprofit corporation in the State of Oregon. It does not have any parent companies, and no entity or other person has any ownership interest in it.

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[1] The Federal Defendants were dismissed for lack of standing by the District Court. Petitioners did not challenge that ruling at the Ninth Circuit and are not challenging it in this Petition.

STATEMENT OF RELATED CASES

Petitioners state that the following are cases related to this case: *Parents for Privacy, et. al v. William Barr, et. al.* Ninth Circuit Court of Appeals Case No. 18-35708, decided February 12, 2020, and *Parents for Privacy, et. al. v. Dallas School District et. al.,* Oregon District Court Case No. 3:17-cv-01813-HZ, decided July 24, 2018.

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INTRODUCTION

This Court has the opportunity to untie a Gordian knot of conflicting constitutional and statutory rights and provide critically needed guidance to lower courts grappling with public school policies that seek to accommodate privacy facilities[2] use requests by children who self-identify as something other than their biological sex. When, as occurred here, a school district responds to such requests by directing that access to sex-separate privacy facilities shall be based on children's self-identity instead of biological sex, it affects constitutional and statutory rights of all district parents and students. In this case, the constitutional impacts are exacerbated because the district: 1) prohibits students from objecting to the presence of opposite sex classmates in privacy facilities under threat of disciplinary action and 2) sends the message to students and parents that those who object are intolerant and bigoted.

The District's directive interferes with parents' rights to direct the upbringing of their children, schoolchildren's rights to bodily privacy, parents' and children's rights to free exercise of religion, and children's rights to be free from hostile educational environments under Title IX.

Because of the wide-ranging effect of the District's policy, this case presents an ideal vehicle

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[2] Petitioners are using the term "privacy facilities" to refer to sex-separated facilities used for intimate bodily functions and changing clothes, including bathrooms, locker rooms, and showers.

for this Court to provide clarity on multiple interrelated constitutional issues at one time. Also, this case presents this Court with the opportunity to immediately provide guidance regarding some of the questions left unanswered by its decision in *Bostock v. Clayton County,* No. 17-1618, __ S.Ct. __, 2020 WL 3146686 (June 15, 2020). Specifically, this case presents the opportunity to clarify whether Title IX is violated when public schools re-label sex-separate privacy facilities as based on how a child identifies instead of biological sex, thus requiring children to expose themselves and be exposed in secluded spaces to members of the opposite sex in states of full and partial undress.

The stakes in this case are significant for public school parents and children throughout the country. This case asks whether public schools can require that parents surrender all rights to direct the education and upbringing of their children as the price for a public education, for which all parents are compelled to pay. It also asks whether public schools can compel students to surrender their right to privacy and to affirm biological reality. It also asks whether public schools can require that children and parents surrender their right to exercise religious beliefs about the nature of the human body. Finally, it asks whether public schools can compel children to accept an educational environment that is hostile to their concept of biological sex.

As schools continue to wrestle with how to accommodate privacy facilities use requests from children who self-identify as something other than their biological sex, this Court's guidance is critically

needed in order to strike the proper balance between the rights of the requesting students and the rest of the school community.

DECISIONS BELOW

The decision of the Ninth Circuit Court of Appeals is published at 949 F.3d 1210 and reproduced in the Appendix at 1a-77a.

The decision of the U.S. District Court for the District of Oregon is reported at 326 F.Supp.3d 1075 and is reproduced in the Appendix at 78a-172a.

STATEMENT OF JURISDICTION

The Ninth Circuit Court of Appeals entered its decision on February 12, 2020. Pursuant to this Court's Order dated March 19, 2020, "the deadline to file any petition for a writ of certiorari due on or after the date of this order is extended to 150 days from the date of the lower court judgment, order denying discretionary review, or order denying a timely petition for rehearing." Petitioners timely filed this Petition on July 10, 2020.

This Court has jurisdiction under 28 U.S.C. § 1254(1).

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

The text of the First and Fourteenth Amendments to the United States Constitution is found at Appx. 173a-175a. The relevant portion of

the text of Title IX of the Education Amendments of 1972 is reprinted at Appx. 175a.

STATEMENT OF THE CASE

A. Factual Background

Respondent Dallas School District (the "District") enacted a Transgender Student Access to Locker Room Student Safety Plan (the "Plan") that fundamentally changed the educational environment throughout the district. Appx. 259a. Under the Plan and policy statements made by administrators, privacy facilities that had been designated for use by girls and boys were opened for use by anyone who self-identified as the subject sex regardless of their biological sex. Complaint,[3] Appx. 205a-208a. The District enacted the Plan in response to a request from Student A, a biological girl who in her[4] senior year publicly stated that she identified as a boy and wanted to use the boys' locker room. Appx. 205a-206a. Student A's parent and legal guardian rejected the request. Appx. 206a. The District disregarded the parent's decision and instituted the Plan. *Id.*

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[3] Because the appeal was taken from the dismissal of Petitioners' Complaint, the Ninth Circuit was to "draw the facts from the complaint's well-pleaded factual allegations and from the exhibits attached to the complaint. *See Outdoor Media Grp., Inc. v. City of Beaumont,* 506 F.3d 895, 899–900 (9th Cir. 2007)." Appx. 10a n.2. Since the lower courts omitted and misstated some of the Complaint's factual allegations, Petitioners are including and citing to the full text of the Complaint and Exhibit A in the Appendix. Appx. 176a-262a.

[4] Petitioners will refer to Student A with pronouns that correspond to her biological sex.

Under the Plan Student A could use any privacy facility that she believed matched her identity. Appx. 205a-206a. Throughout the school year she used the boys' locker room, shower, and bathrooms. She undressed in the presence of male classmates. *Id.* Some male classmates reported embarrassment, humiliation, anxiety, intimidation, fear, apprehension, and stress produced by having to use these privacy facilities with a classmate of the opposite sex. Appx. 207a. Petitioners alleged that the stress and anxiety some students experienced over having to use privacy facilities with biologically opposite-sex students was an ever-present distraction throughout the school day, including during classroom instruction time. Appx. 208a.

The high school principal expanded the Plan to provide that all restroom facilities may be utilized by any student regardless of their biological sex. Appx. 208a. The high school principal further told students that they could not object to students of the opposite sex utilizing the same facilities that they used. *Id.* When students attempted to object by circulating petitions, the principal confiscated the petitions and told students that any further efforts to object to the Plan would be met with disciplinary action. Appx. 209a. District officials also conveyed the message to Petitioners and others that any objection to the Plan would be viewed by the District as intolerance and bigotry. Appx. 215a.

Students are forced to interact with opposite sex students in locker rooms because physical education ("PE") is mandatory. Appx. 212a. Moreover, it is mandatory that all students in PE

class change into clothing appropriate for PE class, and all must change their clothes at the beginning and end of each PE class. *Id.* This means that students are compelled to disrobe in the presence of opposite sex classmates who claim a different gender identity and observe those classmates disrobe without objection or risk disciplinary action. *Id.*

The District's governing board ratified the Plan as implemented by District officials. Appx. 210a.

B. Procedural Background

1. District Court Decision

Petitioners filed a lawsuit in the District Court for the District of Oregon alleging violation of their Fourteenth Amendment rights of privacy and to direct the upbringing of their children, their First Amendment right to freedom of religion, Title IX and several state law provisions. Appx. 176a-262a. The district court dismissed the entire complaint without leave to amend, stating that there was no legal theory under which Petitioners could seek relief so that granting leave to amend would be futile. Appx. 78a-172a. In dismissing the case, the district court recast the nature of the rights underlying Petitioners' claims and then found that there were no such rights protected under the Constitution. Appx 78a-172a.

Petitioners alleged that the Plan violates students' fundamental right to privacy in their unclothed bodies, as well as their fundamental right to be free from government-compelled risk of

intimate exposure to the opposite sex, without any compelling justification. Appx. 237a. The district court did not like the Petitioner's description of the relevant right and recast it as "do high school students have a constitutional right not to share restrooms or locker rooms with transgender students whose sex assigned at birth is different than theirs?" Appx. 116a. The court then concluded that there is no such cognizable right of privacy. Appx. 136a-140a.

Petitioners alleged that the Plan infringes and undermines the right of parents to direct the upbringing and education of their children, including the right to determine whether and when their minor children endure the risk of being exposed to members of the opposite sex in intimate, unsupervised, vulnerable settings like restrooms, locker rooms, and showers. Appx. 239a-241a. The district court decided that Petitioners were really trying to interfere with the District's decision-making authority in contravention of the Ninth Circuit's decision in *Fields v. Palmdale Sch. Dist.*, 427 F.3d 1197, 1207 (9th Cir. 2005). "As the Ninth Circuit explained in *Fields*, Parent Plaintiffs' Fourteenth Amendment liberty interest in the education and upbringing of their children 'does not extend beyond the threshold of the school door.' *Id.* At 1207. Accordingly, the Court dismisses this claim." Appx. 165a.

For the Title IX claim, Petitioners alleged that the Plan created unwelcome sexual harassment and a hostile environment on the basis of sex by exposing students to risks that their partially or fully

unclothed bodies will be exposed to students of the opposite sex and that they will be exposed to opposite-sex nudity. Appx. 242a-243a. The district court concluded that use of a restroom designated for use by biological males by a biological female who identifies as a "transgender male" did not state a claim for a hostile educational environment. Appx. 148a-150a.

Petitioners alleged that the Plan violated their rights to free exercise of religion. Appx. 250a-251a. In particular, they alleged that the Plan as implemented by the District compelled them to violate their sincere religious beliefs that they must not undress in the presence of a member of the opposite biological sex and must not be in the presence of the opposite biological sex while the opposite biological sex is undressing. *Id.* The district court dismissed the claim, saying "[t]here are no allegations that District forced any Plaintiff to embrace a religious belief, nor does the Plan punish anyone for expressing their religious beliefs." Appx. 169a.

2. Ninth Circuit Decision

The Ninth Circuit affirmed the district court's dismissal of Petitioners Complaint without leave to amend. Appx. 10a-77a. The Ninth Circuit adopted the District Court's redefinition of the relevant rights asserted by Petitioners so as to affirm the District Court's conclusion that Petitioners could not state any cognizable legal claims against the District. Appx. 10a-77a.

The Ninth Circuit adopted the District Court's recasting of the underlying right of bodily privacy as a "fundamental privacy right to avoid all risk of intimate exposure to or by a transgender person who was assigned the opposite biological sex at birth." Appx. 9a. Not surprisingly, the panel affirmed that Petitioners could not state a claim for that novel right. Appx. 35a.

In affirming the dismissal of the Title IX claim, the Ninth Circuit said that Petitioners were complaining about "the normal use of privacy facilities." Appx. 43a. "The use of facilities for their intended purpose, without more, does not constitute an act of harassment simply because a person is transgender." *Id.* The panel also claimed that "just because the … Plan implicitly addresses the topics of sex and gender by seeking to accommodate a transgender student's gender identity, or because it segregates facilities by gender identity, does not mean that the Plan harasses other students on the basis of their sex." Appx. 41a. Instead, the Ninth Circuit said, "the Student Safety Plan treats all students—male and female—the same." *Id.*

The Ninth Circuit also affirmed dismissal of the parental rights claim, saying that "the Fourteenth Amendment does not provide a fundamental parental right to determine the bathroom policies of the public schools to which parents may send their children, either independent of the parental right to direct the upbringing and education of their children or encompassed by it." Appx. 9a. The court acknowledged that Petitioners were not asserting a right to control information, as

was the case in *Fields,* but that *Fields* nonetheless controlled because the parents' complaint "similarly involves students being exposed to things of which their parents disapprove." Appx. 51a.

The Ninth Circuit also affirmed dismissal of Petitioners' Free Exercise claims on the grounds that "the school district's policy is rationally related to a legitimate state purpose, and does not infringe Plaintiffs' First Amendment free exercise rights because it does not target religious conduct." Appx. 10a.

REASONS TO GRANT THE PETITION

This Court should grant the Petition for four reasons. First, this Court should grant review to resolve the conflict between this Court's precedents and the Ninth Circuit's determination that parents surrender their fundamental right to direct the education and upbringing of their children at the threshold of the public school. Second, this Court should grant review to resolve the conflict between the Ninth Circuit's determination that children forfeit their right to bodily privacy when they attend public school and precedents from this Court and other circuits. Third, this Court should grant review to resolve the conflict between the Ninth Circuit's dismissal of Petitioners' Free Exercise claim and this Court's precedents. Finally, this Court should grant review to answer an important question left unanswered in *Bostock, i.e.,* whether re-labeling sex-separate privacy facilities in public schools as based on a student's self-identity instead of biological sex violates Title IX.

I. This Court Should Grant The Petition To Resolve The Conflict Between The Ninth Circuit's Ruling That Parents Surrender All Right To Direct The Education And Upbringing Of Their Children When They Enroll Them In Public School And This Court's Precedents Invalidating Public Schools' Infringement of The Rightful Authority Of Parents.

According to the Ninth Circuit, children **are** "mere creature[s] of the state," and "those who nurture [them] and direct [their] destiny have [ceded] the right, coupled with the high duty, to recognize and prepare [them] for additional obligations" to public schools. *Contra, Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925). The Ninth Circuit did not explicitly add that language to *Pierce*, but it might as well have. That is the effect of its derogation of decades of this Court's precedents establishing parents' fundamental right to direct the upbringing and education of their children. *Id. See also, Meyer v. Nebraska*, 262 U.S. 390 (1923).

Instead of recognizing, as this Court has established, that the state's broad authority to prescribe and enforce standards of conduct in its schools "must be exercised consistently with constitutional safeguards," *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 507 (1969), the Ninth Circuit continues to assert that parents' "Fourteenth Amendment liberty interest in the education and upbringing of their children 'does not extend beyond the threshold of the school door.'"

Appx 47a-48a, (citing *Fields*, 427 F.3d at 1207).[5] The court's conclusion conflicts with decades of this Court's precedents that have balanced the state's right to establish educational policies with parents' fundamental right to direct the education and upbringing of their children, a right that "has endured as one of the liberty rights protected by the Due Process Clause." *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997).

In dismissing Petitioners' Complaint based on its effective erasure of parental rights in *Fields,* the Ninth Circuit panel is flouting this Court's directive that:

> The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures—Boards of Education not excepted. These have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights.

West Virginia State Board of Education v. Barnette, 319 U.S. 624, 637 (1943). In *Barnette* and *Tinker*, this Court found that the school boards had exceeded their constitutional authority and invaded the "sphere of intellect and spirit which it is the purpose

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[5] The Ninth Circuit noted that it deleted the phrase "do[ ] not extend beyond the threshold of the school door" from the *Fields* opinion upon denial of rehearing. *See Fields v. Palmdale Sch. Dist.*, 447 F.3d 1187 (9th Cir. 2006), but that the deletion did not affect the Ninth Circuit's application of *Fields* to this case or the merits of Plaintiffs' substantive argument.

of the First Amendment to our Constitution to reserve from all official control." *Id.* at 642; *Tinker*, 393 U.S. at 507.

As was true of the compulsory flag salute policy in *Barnette*, the Policy in this case collides head-on with fundamental constitutional rights. In *Barnette*, the policy collided with freedom of speech, while in this case the Policy collides with parents' fundamental right to direct the education and upbringing of their children. In both cases, the challenged policy is compelling children to affirm a belief and engage in conduct that conflicts with their parents' core beliefs about the essential nature of human beings. In *Barnette,* compelling students to recite the Pledge of Allegiance and salute the flag conflicted with the tenets of the faith of Jehovah's Witnesses. 319 U.S. at 633. "The State asserts power to condition access to public education on making a prescribed sign and profession and at the same time to coerce attendance by punishing both parent and child." *Id.* at 630-31.

The same is true here. The District asserts power to condition access to public education on parents and students surrendering their rights to object to a student who is a biological female using privacy facilities designated for males (and vice versa). Students here are compelled to disregard the physiological differences between the sexes and affirm the belief that biological males can be females and biological females can be males. The compelled affirmation of these beliefs and worldview conflicts with the parents' right to direct the upbringing of their children by imparting values and standards of

conduct based on the physiological differences between the sexes. As this Court said in *Barnette,* such an intrusion in the private sphere of the family exceeds the state's legitimate authority to regulate public education. 319 U.S. at 642. The Ninth Circuit's contrary conclusion based on its decision that parents have surrendered their right to impart those standards to their children by enrolling them in public school is irreconcilable with *Barnette* and should be reviewed by this Court.

The Ninth Circuit's conclusion also conflicts with this Court's decision in *Wisconsin v. Yoder*, 406 U.S. 205 (1972). In *Yoder*, this Court affirmed that:

> There is no doubt as to the power of a State, having a high responsibility for education of its citizens, to impose reasonable regulations for the control and duration of basic education. *See, e.g., Pierce v. Society of Sisters*, 268 U.S. 510, 534, 45 S.Ct. 571, 573, 69 L.Ed. 1070 (1925). Providing public schools ranks at the very apex of the function of a State.

Id. at 213. At the same time, "[t]he values of parental direction of the religious upbringing and education of their children in their early and formative years have a high place in our society." *Id.*

> Thus, a State's interest in universal education, however highly we rank it, is not totally free from a balancing process when it impinges on fundamental rights and interests, such

> as those specifically protected by the Free Exercise Clause of the First Amendment, and the traditional interest of parents with respect to the religious upbringing of their children....

Id. at 214. As it did in *Barnette*, this Court applied the balancing process and found that the state's interest in requiring that children attend school until age 16 had to yield to the Amish parents' fundamental right to educate their children at home after eighth grade in keeping with the tenets of their faith. *Id.* at 218. As was true in *Barnette*, in *Yoder*, this Court found that the state could not compel parents to forfeit their fundamental rights when they enroll their children in public school. *Id.* However, as the Ninth Circuit concedes, that is exactly what it is requiring parents here, and all parents of students in the Ninth Circuit, to do. That irreconcilable conflict with decades of this Court's precedents should be reviewed and resolved by this Court.

The Ninth Circuit's dismissal of Petitioners' parental rights claims based on *Fields'* conclusion that parents abandon their constitutional rights when they enroll their children in public school also conflicts with this Court's precedents that fit parents retain the right to make decisions regarding their children's mental and physical health and well-being. *Parham v. J.R.*, 442 U.S. 584, 604 (1979); *Troxel v. Granville*, 530 U.S. 57, 66 (2000). The District adopted its Policy in response to Student A's declaration that she identified as a boy. Appx. 205a-206a. That declaration was not related to Student

A's academic or athletic status but was a statement regarding her state of mind. As such, it is related to Student A's mental health and within the purview of her parent, not the school.

Student A's parent exercised her right to make decisions related to Student A's mental health when she rejected her daughter's request that she use the boys' privacy facilities. Appx. 206a. That was in keeping with the centuries-old "canon of the common law that parents speak for their minor children." *Parham,* 442 U.S. at 621 (Stewart, J. concurring). "Most children, even in adolescence, simply are not able to make sound judgments concerning many decisions, including their need for medical care or treatment. Parents can and must make those judgments." *Id.* at 603. "We conclude that our precedents permit the parents to retain a substantial, if not the dominant, role in the decision, absent a finding of neglect or abuse, and that the traditional presumption that the parents act in the best interests of their child should apply." *Id.* at 604.

Similarly, in *Troxel* this Court restated, "In light of this extensive precedent, it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental rights of parents to make decisions concerning the care, custody, and control of their children." 530 U.S. at 65. "Accordingly, so long as a parent adequately cares for his or her children (*i.e.*, is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best

decisions concerning the rearing of that parent's children." *Id.* at 68-69.

Student A's parent was denied that presumption and her corresponding parental right when the District adopted the Plan in contravention of her decision concerning her own child's mental health and well-being. Appx. 205a-206a. Contrary to this Court's determination regarding parent's rights in *Parham* and *Troxel*, the Ninth Circuit concluded that Student A's parent (and the other Petitioner parents) no longer had such rights because she had enrolled her child in public school. That contravention of this Court's precedents should be reviewed.

The Ninth Circuit's decision irreconcilably conflicts with decades of precedent affirming that parents retain the right to direct the education and upbringing of their children in the public school setting, especially when schools overstep their legitimate authority. It similarly conflicts with this Court's precedent authorizing parents to direct decisions pertaining to their children's mental health and well-being. This Court should grant review to resolve the conflicts and restore the proper balance between state and parental authority.

II. This Court Should Grant The Petition To Resolve The Question Of Whether Children Can Be Compelled To Forfeit Their Right To Bodily Privacy In Order To Attend Public School.

As this Court has recognized, students have a lower expectation of privacy in school than they do

elsewhere because of the unique aspects of the school environment and the need to maintain order and discipline. *Bd. of Educ. of Indep. School Dist. No. 92 v. Earls*, 536 U.S. 822, 830-31 (2002). That means that students can be restricted to a greater degree than can adults. *Id.* While students' expectations of privacy might be diminished, they are not extinguished. *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 374-75 (2009). Even in the public school setting, this Court and courts of appeal recognize students' need for protection from compelled exposure of their unclothed bodies. *Id.; Brannum v. Overton County School Bd.*, 516 F.3d 489, 494 (6th Cir. 2008); *Cornfield by Lewis v. Consol. High Sch. Dist. No. 230*, 991 F.2d 1316 (7th Cir. 1993).

The Ninth Circuit's dismissal of Petitioners' bodily privacy claims conflicts with those precedents and with other circuit decisions affirming that even prisoners retain a right of privacy from exposure of their unclothed bodies to members of the opposite physical sex. *See e.g., Fortner v. Thomas*, 983 F.2d 1024 (11th Cir. 1993).

A. The Ninth Circuit Decision Conflicts with This Court's Decisions Recognizing That Bodily Privacy Is A Protected Constitutional Right Even In Institutional Settings.

The Ninth Circuit's decision conflicts with this Court's precedents that affirm the continuing

importance of recognizing the physical differences between males and females and the associated privacy required in communal living arrangements and privacy facilities. Physical differences between males and females are enduring: "[T]he two sexes are not fungible; a community made up exclusively of one [sex] is different from a community composed of both." *United States v. Virginia*, 518 U.S. 515, 533 (1996) (citing *Ballard v. United States*, 329 U.S. 187, 193 (1946)).

In *Virginia*, this Court specifically noted that admitting women to the Virginia Military Institute would "undoubtedly require alterations necessary to **afford members of each sex privacy from the other sex** in living arrangements." 518 U.S. at 550 n.19 (emphasis added). The Court recognized that mandating separate facilities based on generalizations about females' capabilities vis-a-vis males in training, discipline, and academics was incompatible with the Constitution. *Id.* However, the enduring physical differences between the sexes meant that separate privacy facilities were not only compatible with the Constitution, but necessary to protect bodily privacy. *Id.* That remains true regardless of how an individual psychologically identifies.

In *Vernonia School District v. Acton*, 515 U.S. 646 (1995), this Court upheld a minimally intrusive athlete drug testing policy while upholding students' rights to privacy in their unclothed or partially clothed bodies. Notably, in *Vernonia*, students were voluntarily participating in athletics which involved using communal facilities designated for athletes of

the same sex. *Id.* at 657. This Court noted that these locker rooms used by members of the same sex "were not for the bashful" since they required dressing, undressing, and showering together. *Id.* The drug testing policy involved staff members of the same sex accompanying the student athletes into the bathroom designated for that sex. *Id.* at 658. The students remained fully clothed with their backs to the staff members or in a stall with the door closed while providing urine samples. *Id.* Since the protocol was no more intrusive than what the students would encounter in any public sex-separate restroom, it was not an unreasonable invasion of privacy. *Id.* That was particularly true in light of the district's need to address known drug use by student athletes. *Id.* In addition, except for two plaintiff parents, "the primary guardians of Vernonia's schoolchildren," *i.e.,* their parents, did not object to the drug testing program. *Id.* at 665. Therefore "[w]e find insufficient basis to contradict the judgment of Vernonia's parents, its school board, and the District Court, as to what was reasonably in the interest of these children under the circumstances." *Id.*

In *Earls* this Court found that a similar drug testing policy for students in non-athletic extracurricular activities did not violate the students' right to bodily privacy. 536 U.S. at 834. As was true in *Vernonia*, in *Earls* the students remained fully clothed and were monitored by a same-sex staff member who stood outside a closed bathroom stall while the students provided a urine sample. *Id.* This Court found that the policy was even less problematic with regard to students'

privacy interests than was the policy in *Vernonia*. *Id.*

By contrast, in this case, students are compelled to fully undress and perform bodily functions in the presence of a student of the opposite sex without objection. Student A said that she identified as a male, but she remained physiologically and anatomically a female. Appx. 205a-206a. Unlike the students in *Vernonia* and *Earls* who voluntarily participated in athletics or extracurricular activities involving changing in the presence of students of the same sex, students here are compelled to take PE classes and to change clothes for those classes in the presence of students of the opposite sex. Appx. 212a. Unlike the circumstances in *Vernonia* and *Earls*, there is no allegation of misconduct that justifies subjecting students to even a minimal intrusion on their privacy such as the fully clothed drug tests, let alone the greater intrusion of disrobing in front of a member of the opposite sex. Furthermore, unlike the circumstances in *Vernonia* and *Earls,* the primary guardians of the students, including of the student for whom the Policy was developed, object to the policy. Appx. 206a.

Nevertheless, the Ninth Circuit not only decided that there was no violation of bodily privacy, but also that there could never be a cognizable claim for invasion of bodily privacy. That conclusion contradicts not only *Vernonia* and *Earls,* but also *Safford*.

In *Safford,* this Court found that a school violated a student's right to bodily privacy when it compelled her to expose her private parts to two female staff members as part of a search for contraband prescription drugs. *Safford,* 557 U.S. at 374-75. The Court emphasized the difference between procedures such as the urine testing in *Vernonia* and *Earls* and the intrusive search in *Safford*. Female staff members directed the female student to remove her clothes down to her underwear, and then "pull out" her bra and the elastic band on her underpants while standing in front of them in the nurse's office. *Id.* at 374.

> The very fact of Savana's pulling her underwear away from her body in the presence of the two officials who were able to see her necessarily exposed her breasts and pelvic area to some degree, and both subjective and reasonable societal expectations of personal privacy support the treatment of such a search as categorically distinct, requiring distinct elements of justification on the part of school authorities for going beyond a search of outer clothing and belongings. Savana's subjective expectation of privacy against such a search is inherent in her account of it as embarrassing, frightening, and humiliating.

Id. This Court went on the note that the student's reaction was consistent with experience by other children subject to similar exposure. *Id.* The Court noted that "adolescent vulnerability intensifies the patent intrusiveness of the exposure." *Id.* If that is true of a search by same-sex staff members, it is much more true of daily viewing by opposite sex peers such as is the case here.

Under *Safford* a single incident of an adolescent girl being compelled to briefly expose her private parts to female teachers in the privacy of the nurse's office violates the child's right to bodily privacy. *Id*. at 376-77. In this case, the children in Dallas School District are compelled to expose their bodies to **opposite sex students in a public locker room regularly throughout their tenure at school**. Such ongoing exposure is even more intrusive than the one-time exposure in *Safford.* Therefore, under this Court's precedents, compelling children to disrobe and engage in intimate bodily functions on a daily basis in the presence of opposite sex peers violates the students' rights to bodily privacy. The Ninth Circuit's conclusion that no such violation is legally cognizable cannot be reconciled with *Safford, Vernonia,* and *Earls*, and should be reviewed by this Court.

B. The Ninth Circuit Decision Conflicts With Decisions From Other Circuits Affirming A Constitutional Right of Bodily Privacy Even When The Expectation of Privacy Is Diminished.

1. The Ninth Circuit's Dismissal of Plaintiffs' Privacy Claims Conflicts with Decisions in the Fourth, Sixth, and Seventh Circuits Upholding Students' Right of Privacy Even in the Context of Suspected Misconduct.

Echoing this Court's ruling in *U.S. v. Virginia,* the Fourth Circuit emphasized that the need for privacy justifies separation of the sexes in privacy facilities as it upheld a woman's request to enroll at The Citadel. *Faulkner v. Jones*, 10 F.3d 226, 232 (4th Cir. 1993). The Court contrasted classifications based on race, which do not justify "separate but equal" facilities, with classifications based on sex. *Id.*

> When, however, a gender classification is justified by acknowledged differences, identical facilities are not necessarily mandated. Rather, the nature of the difference dictates the type of facility permissible for each gender. The point is illustrated by

> society's undisputed approval of separate public rest rooms for men and women based on privacy concerns. The need for privacy justifies separation and the differences between the genders demand a facility for each gender that is different.

Id. In the end, distinctions in any separate facilities provided for males and females may be based on real differences between the sexes, both in quality and quantity, so long as the distinctions are not based on stereotyped or generalized perceptions of differences. *Id.* at 232.

The Sixth Circuit confirmed that the constitutional right to privacy includes students' rights to shield their bodies from exposure to viewing by the opposite sex. *Brannum*, 516 F.3d at 494. The court found that right was violated when school officials filmed students changing clothes in locker rooms via surveillance cameras. *Id.*

> Perhaps it is merely an abundance of common experience that leads inexorably to the conclusion that there must be a fundamental constitutional right to be free from forced exposure of one's person to strangers of the opposite sex when not reasonably necessary for some legitimate, overriding reason, for the obverse would be repugnant to notions of human decency and personal integrity.

Id. at 495. "We recognize, of course, that this is not a case of 'naked bodies' being viewed by the

surveillance cameras, but rather underwear clad teen and pre-teen boys and girls. However, the difference is one of degree, rather than of kind." *Id.*

> Given the universal understanding among middle school age children in this country that a school locker room is a place of heightened privacy, we believe placing cameras in such a way so as to view the children dressing and undressing in a locker room is incongruent to any demonstrated necessity, and wholly disproportionate to the claimed policy goal of assuring increased school security, especially when there is no history of any threat to security in the locker rooms.

Id. at 498.

In *Beard v. Whitmore Lake School Dist.,* 402 F.3d 598, 605 (6th Cir. 2005), the Sixth Circuit affirmed that "[s]tudents of course have a significant privacy interest in their unclothed bodies." Consequently, the school's strip searches of students for alleged stolen money violated even the more limited privacy expectation of a locker room *Id.* at 604-05. "The students here were attending gym class as part of a general school curriculum." *Id.* at 605. "They accordingly did not voluntarily consent to be regulated more closely than the general student population, as do student athletes who choose to go out for school sports teams." *Id.* Therefore, according to the Sixth Circuit, students' rights of bodily privacy are violated when they are compelled to

expose their bodies to members of the same sex as part of an investigation into alleged misconduct. *Id.*

The Seventh Circuit has similarly held that students have a constitutionally protected right to not have their unclothed bodies exposed to same-sex third parties, even when misconduct is alleged. *Cornfield by Lewis v. Consol. High Sch. Dist. No. 230*, 991 F.2d 1316 (7th Cir. 1993). "Subjecting a student to a nude search is more than just the mild inconvenience of a pocket search, rather it is an intrusion into an individual's basic justifiable expectation of privacy." *Id.* at 1320. "It does not require a constitutional scholar to conclude that a nude search of a thirteen-year-old child is an invasion of constitutional rights of some magnitude. More than that: it is a violation of any known principle of human decency." *Id.* at 1320-21. The Court noted that the effect of a nude search will vary with the age of a student. "As children go through puberty, they become more conscious of their bodies and self-conscious about them. Consequently, the potential for a search to cause embarrassment and humiliation increases as children grow older." *Id.* at 1321 n.1. That is true regardless of the reasons for the search. In other words, from the child's perspective, exposing their bodies to others is embarrassing and humiliating regardless of whether it is for an investigation or preparing for gym class.

In this case, there are no allegations of misconduct, meaning there is even less justification for district interference with student privacy than was present in *Beard* or *Cornfield*—or in *Safford.*

Furthermore, here, students are compelled to expose their bodies to members of the opposite sex, not the same sex. *Brannum* specifically involved exposure of children's partially clothed bodies to the opposite sex, which the Court found "repugnant to notions of human decency and personal integrity." 516 F.3d at 495. The Ninth Circuit's conclusion that compelling elementary and secondary students to undress in front of peers of the opposite physical sex cannot state a claim for invasion of bodily privacy is irreconcilable with this precedent.

It is critical for this Court to resolve this conflict between the circuits. Public schools are continuing to address how to accommodate requests from children who, like Student A, psychologically identify as a gender other than their biological sex. Lower courts need clear guidance from this Court regarding student privacy rights in the context of such requests and in light of this Court's affirmation that enduring physical differences between the sexes justify separate privacy facilities. *U.S. v. Virginia,* 518 U.S. at 550, n.19. *See also, Faulkner v. Jones*, 10 F.3d at 232.

2. The Ninth Circuit's Dismissal of Plaintiffs' Privacy Claim Conflicts with Other Circuits' Decisions Finding that Even Prisoners Retain Privacy Interests in their Unclothed Bodies.

The critical need for this Court's review of the Ninth Circuit's decision is even more apparent in light of the fact that the Ninth Circuit's decision affords school children a lower expectation of privacy than that afforded to prisoners. *Fortner v. Thomas*, 983 F.2d 1024 (11th Cir. 1993), *Canedy v. Boardman*, 16 F.3d 183 (7th Cir. 1994).

In *Fortner,* the Eleventh Circuit recognized that prisoners have a right to bodily privacy against being viewed by correctional officers of the opposite sex. 983 F.2d at 1030. "We are persuaded to join other circuits in recognizing a prisoner's constitutional right to bodily privacy because most people have 'a special sense of privacy in their genitals, and involuntary exposure of them in the presence of people of the other sex may be especially demeaning and humiliating.'" *Id.*

In *Canedy,* the Seventh Circuit held that a male inmate was entitled to a reasonable accommodation to prevent unnecessary observations of his naked body by female guards. 16 F.3d at 188. "The right to privacy is now firmly ensconced among the individual liberties protected by our Constitution." *Id.* at 185 (citing *Planned*

Parenthood v. Casey, 505 U.S. 833, 845-853 (1992)). "Moreover, '[o]ne of the clearest forms of degradation in Western Society is to strip a person of his clothes. The right to be free from strip searches and degrading body inspections is thus basic to the concept of privacy.'" *Id.* (citing 3 George B. Trubow, ed., *Privacy Law and Practice*, ¶ 25.02[1] (1991)). The Court acknowledged that "Inmates surely do not enjoy the full sweep of constitutional rights afforded other members of society," but "do not surrender all of their constitutional rights." *Id.* "There is no iron curtain drawn between the Constitution and the prisons of this country." *Id.* at 185-86.

According to the Ninth Circuit, there is such an iron curtain drawn between the Constitution and public schools. The Constitution requires that prisons accommodate the bodily privacy needs of prisoners to not be viewed by correctional officers of the opposite sex. However, according to the Ninth Circuit, the Constitution does not require that public schools accommodate the bodily privacy needs of children to not be viewed by classmates of the opposite sex. That disparity between rights afforded to prisoners and rights afforded to schoolchildren should be reviewed and resolved by this Court.

III. This Court Should Grant The Petition To Resolve The Conflict Between The Ninth Circuit's Decision And This Court's Free Exercise Precedents, Which Provide That Schools Cannot Compel Parents and Students To Embrace Beliefs or Engage in Conduct That Is Undeniably At Odds With Fundamental Tenets Of Their Religious Beliefs.

The lower courts' conclusion that Petitioners cannot state a cognizable claim under the Free Exercise clause of the First Amendment is irreconcilable with this Court's precedents. The Plan as implemented by the District compels students, under threat of disciplinary sanction, to perform acts and accept beliefs undeniably at odds with fundamental tenets of their religious beliefs. Appx 208a-215a. That being the case, the Plan has the same constitutional infirmity as did the compulsory attendance law struck down in in *Yoder*, 406 U.S. at 218-220, and the compulsory flag salute invalidated in *Barnette.* 319 U.S. at 642. The Plan also represents the kind of "subtle departure from neutrality" and "masked hostility" toward religion that this Court invalidated in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993). *See also, Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719, 1731 (2018).

In *Yoder,* this Court found that Wisconsin's interest in universal education to age 16 did not supersede Amish parents' Free Exercise rights. 406 U.S. at 218. This Court found that compelling Amish

children to attend public school beyond eighth grade and be exposed to worldly influences instead of being integrated into the Amish community "contravenes the basic religious tenets and practice of the Amish faith, both as to the parent and the child." *Id.* at 218. Those compelled acts that were antithetical to the plaintiffs' beliefs violated their Free Exercise rights. *Id.* at 219-20. This Court rejected the state's assertion that actions, even though religiously grounded, are outside the protection of the First Amendment. *Id.* at 219.

Similarly, in *Barnette*, this Court found that the state's authority to regulate education did not extend to compelling Jehovah's Witnesses to act contrary to their faith. 319 U.S. at 642. "We think the action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power...." *Id.*

The Ninth Circuit's dismissal of Petitioners' Free Exercise claim contravenes these authorities in at least two significant respects. First, because it continues to assert that parents have ceded their parental rights to public schools, the Ninth Circuit did not engage in the balancing process prescribed in *Yoder*, 406 U.S. at 214.

Second, the Ninth Circuit refused to recognize that the District Plan compels actions and beliefs antithetical to Petitioners' sincerely held religious beliefs. Petitioners alleged that District officials directed students that they could not object to the presence of an opposite sex person in their privacy facilities, something which is antithetical to their

religious beliefs. Appx. 215a-217a. Nor could they object to being compelled to accept, in effect, that a female who self-identifies as a male is "created" male, and vice-versa, thus disqualifying all objections to undressing or attending to bodily needs with opposite-sexed classmates. The students were informed that any objection to the Plan would result in disciplinary action. Appx. 208a-209a. In addition, students are required to take PE and to change clothes before and after. Appx 212a-213a. Therefore, students are compelled to expose their bodies and be exposed to bodies of opposite sex classmates, acts which are contrary to their religious beliefs, and to accept such acts as normative. Under *Yoder* and *Barnette,* those compelled acts and acceptance of beliefs violate Free Exercise and exceed the state's legitimate authority to regulate education. The Ninth Circuit's conclusion that there is no possible cognizable Free Exercise claim conflicts with those precedents and should be reviewed.

The Ninth Circuit's decision also conflicts with this Court's precedents that proscribe state action that subtly departs from neutrality and covertly suppresses particular religious beliefs. *Church of the Lukumi Babalu Aye,* 508 U.S. at 534. In a case substantially similar to this case, the Plaintiffs alleged, as Petitioners do here (Appx. 215a), that school officials said that any objection to the presence of opposite sex students in privacy facilities would be viewed by the district as intolerance and bigotry. *Students and Parents for Privacy v. School Directors of Township High School District 211*, 377 F.Supp.3d 891, 907 (N.D. Ill. 2019). The district court denied a motion to dismiss

plaintiffs' Free Exercise claim because the allegations "sound[] like the sort of 'subtle departure' from neutrality that might support a claim under the Free Exercise Clause." By contrast, because of the Ninth Circuit's presumption that all rights are ceded to public schools, the lower courts here determined that there is no cognizable claim under the Free Exercise Clause.

That conclusion is in conflict with this Court's recent explication of the Free Exercise Clause in *Masterpiece Cakeshop*.

> In *Church of the Lukumi Babalu Aye, supra,* this Court made clear that the government, if it is to respect the Constitution's guarantee of free exercise, cannot impose regulations that are hostile to the religious beliefs of affected citizens and cannot act in a manner that passes judgment upon or presupposes the illegitimacy of religious beliefs and practices.
>
> The Free Exercise Clause bars even "subtle departures from neutrality" on matters of religion. *Id.,* at 534. Here, that means the Commission was obliged under the Free Exercise Clause to proceed in a manner neutral toward and tolerant of Phillips' religious beliefs. The Constitution "commits government itself to religious tolerance, and upon even slight suspicion that proposals for state

> intervention stem from animosity to religion or distrust of its practices, all officials must pause to remember their own high duty to the Constitution and to the rights it secures. *Id.* at 547.

138 S. Ct. at 1731.

In this case, the District was obliged under the Free Exercise Clause to proceed in a manner neutral toward and tolerant of Petitioners' religious beliefs. The Constitution requires that the District be committed to religious tolerance and its officials must remember their own high duty to the rights secured by the Constitution. The District's actions belied that obligation, yet the Ninth Circuit found that there was not and could not be a cognizable claim under the Free Exercise Clause. That conclusion and the court's continued assertion that parents cede their rights to public school officials contravene this Court's precedent. Because the court's conclusion impinges on fundamental First Amendment rights, it is critical that this Court grant the Petition.

IV. This Court Should Grant The Petition To Resolve The Critical Question Of Whether Schools Violate Title IX When They Require That Students Accept That Sex-Separate Privacy Facilities Will Be Used By Any Student Who Self-Identifies As A Particular Sex.

This case presents a question of profound importance left unanswered by the decision in

Bostock that will be the subject of speculation and judicial confusion if not answered by this Court. Justice Alito referenced the question and the uncertainty raised by the majority's decision in *Bostock*:

> "[B]athrooms, locker rooms, [and other things] of [that] kind." The Court may wish to avoid this subject, but it is a matter of concern to many people who are reticent about disrobing or using toilet facilities in the presence of individuals whom they regard as members of the opposite sex. For some, this may simply be a question of modesty, but for others, there is more at stake. For women who have been victimized by sexual assault or abuse, the experience of seeing an unclothed person with the anatomy of a male in a confined and sensitive location such as a bathroom or locker room can cause serious psychological harm....
>
> [A] person who has not undertaken any physical transitioning may claim the right to use the bathroom or locker room assigned to the sex with which the individual identifies at that particular time. **The Court provides no clue why a transgender person's claim to such bathroom or locker room access might not succeed. A similar issue has arisen under Title IX, which prohibits sex discrimination by**

> **any elementary or secondary school and any college or university that receives federal financial assistance.**

Bostock v. Clayton County, 2020 WL 3146686 at *40 (Alito, J., dissenting) (emphasis added).

The Ninth Circuit's decision here involves the precise issue identified by Justice Alito. This case involves a female, Student A, who had not undergone any physical transition but was granted access to bathrooms and locker rooms assigned to males. Appx. 205a-206a. Petitioners raised the very concerns raised by Justice Alito regarding being in the presence of the opposite sex and psychological harm. Appx. 216a-217a. The Ninth Circuit ruled that such concerns can not possibly state a viable claim under Title IX. Appx. 44a.

Furthermore, the Ninth Circuit said the District's policy that biological girls identifying as boys using privacy facilities designated for boys represented "the normal use of privacy facilities." Appx. 43a. That decision conflicts with this Court's long-standing recognition that the sexes are not fungible but have enduring physical differences. *United States v. Virginia*, 518 U.S. at 533 (citing *Ballard* 329 U.S. at 193). Those enduring physical differences mean that providing separate privacy facilities designated by biological sex does not constitute sex discrimination. *See id.* at 550, n.19. Recognizing the physiological differences between the sexes in the context of privacy facilities created for the sole purpose of accommodating those physical

differences is not sex "stereotyping." While the dress, appearance, preferences, and identification of each sex may be subject to stereotypes, the physiological differences between them are not–they are biological reality.

The District's Plan erases the enduring physical differences between the sexes by basing access on students' self-identity not biological sex. Appx. 259a-261a. Student A, a biological female, is permitted to use the male privacy facilities if she self-identifies as a male. Appx. 205a-206a. That means that members of each sex are not accorded privacy from the other sex, which is the essential purpose of sex-separate privacy facilities. *U.S. v. Virginia*, 518 U.S. at 550 n.19. Under this Court's precedents that is not, as the Ninth Circuit concluded, the "normal use" of privacy facilities. Appx. 43a.

The District's forced interaction between biological males and biological females in privacy facilities contravenes the privacy-protective intent that has justified sex-separate facilities under Title IX prior to *Bostock*. As Justice Alito indicated, it is not clear whether designating privacy facilities for use by biological sex in public schools remains permissible after *Bostock*. That issue is foundational for analyzing requests for accommodations by students who identify as something other than their biological sex and should be resolved quickly by this Court to avert an epidemic of legal confusion. This case offers the Court the opportunity to do that.

The Ninth Circuit's decision also conflicts with this Court's affirmation in *Bostock* that the determination of whether a policy discriminates on the basis of sex is based on individuals, not groups. 2020 WL 3146686 at *11. According to the Ninth Circuit, the District's Plan does not discriminate on the basis of sex because it "treats all students—male and female—the same." Appx. 41a. Even if that were true, it would not follow that the Plan does not discriminate against individuals on the basis of sex. In fact, by definition, the Plan does discriminate against individuals on the basis of sex. A female who self-identifies as a girl can only access privacy facilities designated for females. A female, like Student A, who self-identifies as a male can use either the female's or male's privacy facilities. The first student's privacy facilities choices are limited while Student A's are not based purely on her sex.

The Ninth Circuit's conclusion that Petitioners cannot state a cognizable claim for sex discrimination under Title IX conflicts with this Court's precedents, including *U.S. v. Virginia.* It also raises critical questions raised but unanswered in *Bostock*. The Court should accept review to resolve the conflict and provide guidance on the questions that are critical for lower courts' adjudication of school district privacy facilities policies across the country.

CONCLUSION

This case is an ideal vehicle for resolving multiple constitutional and statutory rights related to schools' efforts to accommodate requests from students who self-identity as another sex. This case involves pure questions of law. The case presents questions related to parental rights under the Fourteenth Amendment, privacy rights under various constitutional provisions, First Amendment rights and Title IX protections. Resolution of this case will provide clarity on four critical issues lower courts are addressing when analyzing public schools' policies regarding privacy facilities use requests by students who self-identify as something other than their biological sex, vis-a-vis the rights of others.

This is critically needed guidance for parents and students across the nation. For these reasons, the Petition for a Writ of Certiorari to the Ninth Circuit Court of Appeals should be granted.

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