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SUPERIOR COURT OF CALIFORNIA

COUNTY OF SACRAMENTO

CALIFORNIA EDUCATION COMMITTEE, LLC and PRISCILLA SCHREIBER,

Plaintiffs,

v.

JACK O'CONNELL in his official capacity as California Superintendent of Public Instruction; and DOES 1 through 20 inclusive,

Defendants.

Case No. 34-2008-00026507

[PROPOSED] MEMORANDUM OF POINTS AND AUTHORITIES OF AMICI CURIAE EQUALITY CALIFORNIA AND GAY-STRAIGHT ALLIANCE NETWORK IN SUPPORT OF DEFENDANT'S DEMURRER

Date: April 14, 2009
Time: 9:00 a.m.
Dept: 54
Judge: The Honorable Shelleyanne W.L. Chang

Action Filed: November 6, 2008

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MEMORANDUM OF POINTS AND AUTHORITIES

Equality California and Gay-Straight Alliance Network respectfully submit the following proposed Memorandum of Points and Authorities as Amici Curiae in support of the Demurrer filed on January 8, 2009 by Defendant Jack O'Connell.

I. INTRODUCTION

Plaintiffs California Education Committee, LLC and Patricia Schreiber challenge California's statutory ban on discrimination and harassment in public schools, Education Code section 220, and in particular its prohibition of discrimination against transgender students, Education Code section 210.7. (Complaint for Declaratory and Injunctive Relief ("Complaint"), ¶ ¶ 28, 32.) Plaintiffs allege that these code sections are void for vagueness under the due process provisions of the federal and California Constitutions and that they violate the privacy and safety provisions of article 1, section 1 of the California Constitution. (Complaint, ¶ ¶ 27-38.)

This lawsuit should be dismissed for failure to state facts sufficient to constitute a cause of action, pursuant to Code of Civil Procedure section 430.10, subdivision (e). Far from contravening the federal and state Constitutions, the challenged statutes affirmatively enforce the state's core constitutional obligation to provide equal protection for all regardless of sexual orientation or gender identity.

The non-discrimination statutes, in relevant part, prohibit discrimination in schools based on a student's "gender identity and gender related appearance and behavior whether or not stereotypically associated with the person's assigned sex at birth." (Ed. Code § 210.7.) The California Supreme Court has recognized that, like sexual orientation, gender identity is a core individual characteristic. (*In re Marriage Cases* (2008) 43 Cal.4th 757, 839 fn. 59 (hereafter *Marriage Cases*) [quoting amicus curiae brief of the American Psychological Association and American Psychiatric Association].) In most cases, a person's gender identity matches the gender he or she was assigned at birth. Transgender individuals, however, have a gender identity that is different from their birth gender. California's statutory provisions prohibiting gender-identity discrimination require schools to recognize the consistently expressed gender identity of transgender students, which includes providing transgender students non-discriminatory access to restrooms and other gender-segregated facilities based on that consistently expressed gender identity.

Here, the non-discrimination statutes challenged by Plaintiffs protect the safety and privacy

of all students, including those who are lesbian, gay, bisexual, or transgender ("LGBT"). Those statutes are not unconstitutionally vague, and they do not infringe any privacy rights. In fact, although the non-discrimination laws have been in place for several years, Plaintiffs can point to no instance in which the challenged statutes have been enforced in a way that violates any person's constitutional rights. Therefore, Defendant's Demurrer should be granted and the Complaint should be dismissed for failure to state facts sufficient to constitute a cause of action.

II. ARGUMENT

A. The Challenged Statutes Enforce The Constitutional Mandate Of Equal Protection For All In California Public Schools.

The Legislature properly enacted the non-discrimination statutes at issue to enforce the core constitutional principles of eradicating discrimination and ensuring equal protection of the law, regardless of sexual orientation or gender identity. The California Supreme Court has expressly held that government discrimination based on sexual orientation is subject to strict scrutiny under the California Constitution's equal protection guarantee. (*Marriage Cases*, *supra*, 43 Cal.4th at p. 844.) Likewise, it has long been established that official discrimination based on sex, which the Legislature has defined to include a person's gender identity (see, e.g., Pen. Code § 422.56, subd. (c)), is subject to strict scrutiny under the California Constitution's equal protection clause. (See *Catholic Charities of Sacramento, Inc. v. Super. Ct.* (2004) 32 Cal.4th 527, 564 [state has a compelling interest in eradicating sex discrimination]; *Sail'er Inn, Inc. v. Kirby* (1971) 5 Cal.3d 1, 17-18 [government-sponsored sex discrimination violates equal protection]; see also *Marriage Cases*, at p. 839, fn. 59 [noting that "gender identity" is a personal characteristic, like sexual orientation].) The Legislature has the authority, and indeed the responsibility, to enact laws ensuring equal protection of the law and furthering the state's compelling interest in ending discrimination based on sexual orientation and gender identity.

California, like other states, has enacted numerous laws over the years to advance its compelling interest in preventing discrimination and violence based on attributes likely to subject individuals to invidious discrimination, including sexual orientation and gender identity. These include the state's hate crimes law (Pen. Code § 422.55 et seq.), which prohibits violence or threats directed at a person based on, among other traits, the person's sexual orientation or gender identity; the Fair Employment and Housing Act (Gov. Code § 12900 et seq.), which prohibits discrimination based on those factors in employment and housing; the Unruh Civil Rights Act (Civ. Code § 51),

which prohibits such discrimination in business establishments; Health and Safety Code section 1365.5, which prohibits such discrimination by health plans; and Government Code section 11135, which prohibits such discrimination in state-sponsored activities. Those and other similar statutes appropriately promote compelling state interests rooted in the basic constitutional value of ensuring equal treatment for all. (*In re Michael M.* (2001) 86 Cal.App.4th 718, 725 [California appropriately adopted hate crimes statutes "'to afford greater protection to disfavored minority groups'" who were facing an increasing number of attacks based on their minority status (quoting *In re M.S.* (1995) 10 Cal.4th 698, 711)]; cf. *Wisconsin v. Mitchell* (1993) 508 U.S. 476, 487-88 [noting that state appropriately singled out "bias-inspired conduct because this conduct is thought to inflict greater individual and societal harm"].)

The laws challenged by Plaintiffs protect some of our state's most vulnerable individuals – LGBT youth and those perceived to be LGBT. These statutes simply provide that no one should be subjected to discrimination or harassment because of his or her sexual orientation or gender identity in California public schools. The state has a compelling interest in ensuring that all youth enjoy the equal opportunity to learn free from discrimination or harassment. Contrary to Plaintiffs' claims, the laws that Plaintiffs challenge protect the constitutional rights of all students.

B. Plaintiffs' First And Second Causes Of Action Should Be Dismissed Because Plaintiffs Do Not State A Valid Facial Cause Of Action And Because The Challenged Statutes Are Clear.

Plaintiffs' First and Second Causes of Action – which allege that the challenged statutes violate the due process clause of the Fourteenth Amendment to the U.S. Constitution and the due process provision of the California Constitution because they are facially void for vagueness[1] (Complaint, ¶ ¶ 27-34) – fail to state a valid cause of action under Code of Civil Procedure section 430.10, subdivision (e).

A statute must be upheld on a facial challenge unless it "clearly, positively, and unmistakably" appears unconstitutionally vague from its text alone. (*People v. Morgan*, *supra*, 42 Cal.4th at p. 605.) Plaintiffs bear the heavy burden of showing "that the act's provisions inevitably pose a total and fatal conflict" with the due process provisions of the state and federal Constitutions. (*Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1084 (hereafter *Tobe*).) To succeed on a facial

[1] California courts apply the same standard to claims alleging vagueness in violation of due process under the state and federal constitutions. (See, e.g., *People v. Morgan* (2007) 42 Cal.4th 593, 605 [describing standard for evaluating vagueness claims under both the California Constitution and the federal Constitution, without distinction]; *People v. Heitzman* (1994) 9 Cal.4th 189, 199 [same].)

challenge claiming that a statute is unconstitutionally vague, "a party must do more than identify some instances in which the application of the statute may be uncertain or ambiguous; he must demonstrate that 'the law is impermissibly vague *in all of its applications*.'" (*Evangelatos v. Super. Ct.* (1988) 44 Cal.3d 1188, 1201 [quoting *Hoffman Estates v. Flipside, Hoffman Estates* (1982) 455 U.S. 489, 497].) Plaintiffs have not alleged (and could not credibly allege) that the challenged statutes are impermissibly vague in all of their applications. Accordingly, Plaintiffs' attempt to challenge these provisions through a facial attack is improper.

The constitutional prohibition against excessive vagueness does not invalidate every statute that could have been crafted with greater precision, for in "most English words and phrases there lurk uncertainties." (*Rose v. Locke* (1975) 423 U.S. 48, 50.) Due process does not "require 'impossible standards' of clarity." (*Kolender v. Lawson* (1983) 461 U.S. 352, 356; see also *In re M.S.*, *supra*, 10 Cal.4th at 718 ["Inasmuch as '[w]ords inevitably contain germs of uncertainty,' mathematical precision . . . is not a sine qua non of constitutionality" (quoting *United States v. Gilbert* (9th Cir. 1987) 813 F.2d 1523, 1530)]; *Hill v. Colorado* (2000) 530 U.S. 703, 733 ["'[c]ondemned to the use of words, we can never expect mathematical certainty from our language'" (quoting *Grayned v. City of Rockford* (1972) 408 U.S. 104, 110)].) A statute "cannot be held void for uncertainty if any reasonable and practical construction can be given to its language." (*Tobe*, *supra*, 9 Cal.4th at 1107.) Plaintiffs cannot meet their burden to overcome the presumption of constitutionality, because all of the challenged statutes are reasonably clear.

Although Plaintiffs' First and Second Causes of Action do not identify the specific statutory language they allege to be impermissibly vague, it appears from other portions of the Complaint that Plaintiffs regard the terms "sexual orientation" and "gender" as defined or incorporated in the challenged provisions to be impermissibly vague. As explained below, Plaintiffs have failed to state a cause of action under any such theory.

1. Sexual orientation and gender (including gender identity) are words of common usage and understanding.

The statutory references to sexual orientation and gender are not impermissibly vague. Both terms are expressly defined in the statutes, and they are also words of common usage that are used and understood across a large body of legal, academic and popular sources. (See *People v. Musovich* (2006) 138 Cal.App.4th 983, 991 [statute will not be held void "'if any reasonable and practical construction can be given its language or if its terms may be made reasonably certain by reference to other definable sources.'" (quoting *People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th

1090, 1117)].)

"Sexual orientation" is defined by Education Code section 212.6 as "heterosexuality, homosexuality, or bisexuality." "Gender" is defined by Education Code section 210.7, which provides that "gender" means "sex, and includes a person's gender identity and gender related appearance and behavior whether or not stereotypically associated with the person's assigned sex at birth." The definitions set forth in these statutes are consistent with similar definitions that have existed in other California statutes for many years. Identical definitions for sexual orientation are included expressly or by incorporation in the Unruh Civil Rights Act (Civ. Code § 51, subd. (e)(6)), which uses the definition first established in 1985 by the former Civil Code section 51.7, subdivision (b) (Stats. 1984, ch. 1437, § 1), the Fair Employment and Housing Act (Gov. Code § 12926, subd. (q)), which has used a similar definition since 1999 (Stats. 1999, ch. 592, § 3.7), Government Code section 11135, subdivision (e), and the state's hate crimes law (Penal Code § 422.56, subd. (h)). Identical definitions for gender are included expressly or by reference in the Fair Employment and Housing Act (Gov. Code § 12926, subd. (p)), Health & Safety Code section 1365.5, subdivision (e), Government Code section 11135, subdivision (e), and Penal Code section 422.56, subdivision (c). A similar definition of gender had previously been in the Penal Code since 1999. (See Stats. 1998, ch. 933, § 3.) The terms sexual orientation and gender identity have been incorporated with similar definitions in statutes and ordinances in jurisdictions across the country.[2]

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[2] At least seven other states and the District of Columbia have adopted laws similar to the statutes that Plaintiffs challenge here that prohibit discrimination or harassment in schools based on both sexual orientation and gender identity. (See, e.g., Colo. Rev. Stat. §§ 22-32-109, 24-34-401(7.5); Iowa Code § 216.9; 5 Me. Rev. Stat. §§ 4552, 4553(9-C); Minn. Stat. §§ 363A.02, subd. 1(5), 363A.03(44), 363A.13; N.J. Stat. Ann. § 18A:37-14; Or. Rev. Stat. §§ 174.100, subd. 6, 659.850; 16 Vt. Stat. Ann. § 11(26); D.C. Code § 2-1402.41.) An additional four states prohibit discrimination or harassment in schools based on sexual orientation. (Conn. Gen. Stat § 10-15c; Mass. Gen. Laws Ann. ch. 76, § 5; Wash. Rev. Code §§ 9A.36.080, 28A.300.285; Wis. Stat. § 118.13.)

A number of other states have also adopted laws that prohibit discrimination based on "gender" or "gender identity" in other contexts, such as employment or public accommodations, defining those terms with language that is similar to the challenged California nondiscrimination statutes. (See, e.g., Hawaii Rev. Stat. §§ 489-2, 489-3, 515-3, 846-51 [prohibiting discrimination in real property transactions and public accommodations based on "a person's actual or perceived gender, as well as a person's gender identity, gender-related self-image, gender-related appearance, or gender-related expression, regardless of whether that gender-related expression is different from that traditionally associated with the person's sex at birth"]; Iowa Code Ann. §§ 216.2(10), 216.6-216.10 [prohibiting discrimination in employment, public accommodations, housing, education, and credit based on the "gender-related identity of a person, regardless of the person's assigned sex at birth"];

California courts and courts around the country have decided scores of cases involving sexual orientation[3] and gender identity.[4] For instance, in its recent decision holding that

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N.J. Stat. Ann. §§ 10:5-4, 10:5-5(rr) [barring discrimination in employment, public accommodations, housing and other real property based on gender identity or expression, defined as "having or being perceived as having a gender related identity or expression whether or not stereotypically associated with a person's assigned sex at birth"]; N.M. Stat. Ann. §§ 28-1-2(Q), 28-1-7 [banning discrimination in employment, housing and public accommodations based on "a person's self-perception, or perception of that person by another, of the person's identity as a male or female based upon the person's appearance, behavior or physical characteristics that are in accord with or opposed to the person's physical anatomy, chromosomal sex or sex at birth"]; R.I. Gen. Laws §§ 28-5-6(10), 34-37-3(17), 34-37-4 [prohibiting discrimination in employment and housing based on "'[g]ender identity or expression'[which] includes a person's actual or perceived gender, as well as a person's gender identity, gender-related self image, gender-related appearance, or gender-related expression; whether or not that gender identity, gender-related self image, gender-related appearance, or gender-related expression is different from that traditionally associated with the person's sex at birth"]; Wash. Rev. Code §§ 49.60.030, 49.60.040(15) [barring discrimination in employment, credit and insurance transactions, public accommodations, and real property transactions based on gender expression or identity, defined as "having or being perceived as having a gender identity, self-image, appearance, behavior or expression, whether or not that gender identity, self-image, appearance, behavior or expression is different from that traditionally associated with the sex assigned to that person at birth"].)

[3] See, e.g., *North Coast Women's Care Medical Group v. San Diego County Super. Ct.* (2008) 44 Cal.4th 1145, 1150 (under California's prohibition of sexual orientation discrimination in public accommodations, doctor could not refuse to provide fertility treatment to lesbian patient); *Evans v. City of Berkeley* (2006) 38 Cal.4th 1, 14 (ordinance prohibiting discrimination based on sexual orientation did not unconstitutionally infringe speech or associational rights of scouting group); *Lawrence v. Texas* (2003) 539 U.S. 558, 581 (conc. opn. of O'Connor, J.) describing invalidated Texas sodomy statute as criminalizing only sodomy engaged in by those with a "same-sex sexual orientation"); *Romer v. Evans* (1996) 517 U.S. 620, 623 (overturning a state constitutional amendment that repealed and banned all local anti-discrimination ordinances based on sexual orientation).

[4] See, e.g., *Cruzan v. Special School Dist. # 1* (8th Cir. 2002) 294 F.3d 981, 983 (discussing Minnesota law that prohibits discrimination on the basis of a person's "self-image or identity not traditionally associated with one's biological maleness or femaleness"); *Schwenk v. Hartford* (9th Cir. 2000) 204 F.3d 1187, 1201-02 (holding that Title VII protects transgender people and prohibits discrimination based on "gender," which includes a person's "inward identity" as female or male, as well as on biological "sex"); *Schroer v. Billington* (D.D.C. 2006) 424 F.Supp.2d 203, 205 (describing gender identity as "a person's internal psychological identification as a man or a woman"); *R.G. v. Koller* (D. Hawaii 2006) 415 F.Supp.2d 1129, 1142-43 (describing discrimination against youth in juvenile justice facilities based on actual or perceived "gender identity"); *Manago v. Barnhart* (E.D.N.Y. 2004) 321 F.Supp.2d 559, 561-562 (reviewing expanding case law and statutory protections based on gender identity); *Rush v. Johnson* (N.D.Ga. 1983) 565 F.Supp 856, 863 (describing gender identity as "the sense of knowing to which sex one belongs, that is, the awareness that 'I am a male' or 'I am a female'" and "gender role" as the public expression of

distinctions based on sexual orientation are subject to strict scrutiny under the equal protection clause of the state Constitution, the California Supreme Court noted that sexual orientation is commonly understood to be "a characteristic of the *individual*, like biological sex, *gender identity*, or age." (*Marriage Cases*, *supra*, 43 Cal.4th at p. 839, fn. 59, second emphasis added.) Legal scholarship[5] and popular discourse[6] also routinely use these terms.

2. Other courts have rejected vagueness challenges to the terms sexual orientation and gender identity.

To the best of Amici's knowledge, every federal and state court that has considered the issue has rejected arguments that either the term "sexual orientation" or the term "gender identity" is impermissibly vague. In one such challenge a federal district court in Kentucky considered the validity of ordinances prohibiting discrimination "because of . . . sexual orientation and gender identity." (*Hyman v. City of Louisville* (W.D.Ky. 2001) 132 F.Supp.2d 528, 530 (hereafter *Hyman*), omission in original, judg. vacated on other grounds (6th Cir. 2002) 53 Fed.Appx. 740.) The court noted that "[s]everal courts have been faced with, and discussed, 'sexual orientation' as it is used in various statutes and regulations" and that "[n]one have found either the term, or a phrase which uses the term, vague in the face of a Due Process Clause challenge." (*Id.* at p. 546 [citing *State v. Palermo* (La.Ct.App. 2000) 765 So.2d 1139, 1153, revd. on other grounds (La. 2002) 818 So.2d 745 ("The phrase, 'because of actual or perceived race, age, gender, religion, color, creed, disability, sexual orientation, national origin, or ancestry,' is such that a person of ordinary intelligence would be given fair notice of what conduct is subject to a Hate Crime"); and *State v.*

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gender identity"); *Doe v. Yunits* (Mass.Super.Ct. Feb. 26, 2001) No. 001060A, 2001 WL 664947, at p. *1 (describing eighth grade student as "ha[ving] a female gender identity and prefer[ring] to be referred to as a female"); *M.T. v. J.T.* (N.J.Super.Ct. 1976) 355 A.2d 204, 205 (expert witness's definition of gender identity as "a total sense of self as being masculine or female").

[5] Sexual orientation and gender identity are the focus of much legal scholarship, including casebooks used in many law schools. (See, e.g., Rubinstein, *Cases and Materials on Sexual Orientation and the Law* (2d ed. 1996); Eskridge & Hunter, *Sexuality, Gender and the Law* (2d ed. 2003).)

[6] The concepts of sexual orientation and gender identity have appeared pervasively in the media and popular literature for many years. For example, major weekly news magazines have featured numerous stories about sexual orientation and gender identity, including a May 21, 2007 Newsweek Magazine cover story dedicated to gender and gender identity. (See *Newsweek Cover: The Mystery of Gender* (May 13, 2007) <http://www.prnewswire.com/cgi-bin/stories.pl?ACCT=104&STORY=/www/story/05-13-2007/0004587007&EDATE=> [as of March 18, 2009].)

Mortimer (N.J. 1994) 641 A.2d 257, 265 (holding that a prohibition against committing a criminal offense with a purpose to intimidate because of sexual orientation or other characteristics "describes the conduct prohibited with sufficient clarity to survive a 'vagueness' challenge")]; see also *State v. Plowman* (Or. 1992) 838 P.2d 558, 560 [holding that the language "because of their perception of [the victims'] race, color, religion, national origin or sexual orientation" was not unconstitutionally vague under the Oregon and federal Constitutions].) The *Hyman* court also noted that "[w]hile 'gender identity' is less commonly addressed by courts, those that have attempted to define the term have done so consistently." (*Hyman*, at p. 546 [listing authorities providing similar definitions for gender identity].) The same result is appropriate here. The terms sexual orientation and gender identity are not unconstitutionally vague.

C. Plaintiffs' Third Cause Of Action Should Be Dismissed For Failure To State A Valid Cause Of Action.

Plaintiffs' Third Cause of Action, which alleges that the challenged non-discrimination statutes violate Plaintiffs' rights to privacy and safety under article 1, section 1 of the California Constitution (Complaint, ¶ ¶ 36-38), also fails to state a valid cause of action under Code of Civil Procedure section 430.10, subdivision (e). The statutory provisions prohibiting gender-identity discrimination require schools to protect transgender students from discrimination, including providing such students with non-discriminatory access to school activities and facilities. Those statutes advance the state's compelling interests in protecting the safety, equality, and privacy of all students, including those who are transgender, and they do not infringe any recognized privacy or safety right. Plaintiffs' Third Cause of Action should be dismissed.

1. The State's Strong Countervailing Interests Outweigh Any Interest Asserted By Plaintiffs.

As a threshold matter, even if Plaintiffs could show that the non-discrimination statutes somehow infringe upon Plaintiffs' protected privacy interests, which they have not shown, any such purported infringement would be minimal and far outweighed by the state's compelling interests in protecting the privacy and safety interests of transgender students, preventing discrimination, and ensuring equal treatment for all students. Under the California Constitution, an invasion of privacy is justified if it "substantively furthers one or more countervailing interests." (*Hill v. Nat. Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 40 (hereafter *Hill*).) Where the challenged action "involves an obvious invasion of an interest fundamental to personal autonomy"– such as control over one's own procreation – the defendant must show a "compelling interest" to overcome the

privacy interest. (*Id.* at p. 34; see also *American Academy of Pediatrics v. Lungren* (1997) 16 Cal.4th 307, 329-30 (hereafter *Pediatrics*).) But where, as here, "the privacy interest is less central, or in bona fide dispute" – such as, in *Hill*, observation of students producing urine samples for drug testing – a general balancing test is used. (*Hill*, at p. 34; see also *Pediatrics*, at p. 329.) In this case the general balancing test is appropriate because the alleged privacy interest in avoiding sharing public facilities with transgender individuals of the same gender could not plausibly be considered "fundamental to personal autonomy." Plaintiffs' claim should be dismissed because the non-discrimination statutes promote substantial state interests that outweigh the minimal privacy interest asserted by Plaintiffs.

a. The non-discrimination statutes protect transgender students from serious physical and psychological harm.

Plaintiffs' claim that the non-discrimination statutes threaten their safety (Complaint, ¶ ¶ 41-41) is precisely backwards: transgender students face a far greater risk of harassment and physical violence than other students. (See Kosciw, The 2003 National School Climate Survey: The School-Related Experiences of Our Nation's Lesbian, Gay, Bisexual and Transgender Youth (2004) pp. 19, 27-28, <http://www.glsen.org/binary-data/GLSEN_ATTACHMENTS/file/300-3.PDF> [as of March 18, 2009].) That risk is significantly reduced by protecting transgender students from discrimination and integrating them into school activities and facilities, including permitting such students to use facilities consistent with their gender identity. For example, a transgender girl, who consistently identifies and presents herself as female, would be at serious risk of harm in facilities designated for boys. Conversely, the safety of a non-transgender student like B.B. is not compromised by the presence of a transgender boy. (See Complaint, ¶ 37.) The state's interest in protecting the safety of vulnerable transgender students far outweighs Plaintiffs' unsupported fear of being harmed by those students.

The non-discrimination statutes also ensure that transgender students are protected from the psychological injury that can result from being compelled to suppress one's gender identity, a fundamental aspect of personhood. (See *Marriage Cases*, *supra*, 43 Cal.4th, at p. 839 fn. 59 [describing gender identity and sexual orientation as characteristics of the individual]; *Doe v. Yunits* (Mass.Super.Ct. Oct. 11, 2000), No. 001060A, 2000 WL 33162199, at p. *7 (hereafter *Yunits*) [school's discrimination against transgender girl "essentially prohibit[ed] the plaintiff from expressing her gender identity, and thus, her quintessence"].) The medical community today generally views attempts to change a transgender person's core gender identity by forcing them to

live as a member of the sex they were assigned at birth as futile and unethical. (See Mallon, Social Services With Transgendered Youth (1999) pp. 55-58; Israel & Tarver, Transgender Care: Recommended Guidelines, Practical Information & Personal Accounts (1997) pp. 134-135.) Requiring that a transgender student use the facilities designated for the gender with which he or she does not identify could be psychologically damaging as well as demeaning. (See Wilber et al., Child Welfare League of America Best Practice Guidelines: Serving Lesbian, Gay, Bisexual, & Transgender Youth in Out-Of-Home Care (2006) pp. 49-50; cf. *Doe v. Bell* (N.Y.Sup.Ct. 2003) 754 N.Y.S.2d 846, 853 [noting that transgender teenage girl experiences serious "psychological distress" when forced to wear boys' clothing]; *Yunits*, at p. *1 [transgender girl's doctor determined that being denied the right to wear girls' clothing "could cause harm to [her] mental health"].)

The non-discrimination statutes effectively promote the compelling interest of the state and of local school districts in safeguarding the well-being of the vulnerable population of transgender students by protecting them from the risk of serious physical or psychological harm. That interest is much stronger than Plaintiffs' alleged interest in not sharing facilities with transgender students.

b. The non-discrimination statutes ensure that transgender students are treated equally.

As discussed above, California's public policy strongly favors protecting the right of transgender individuals to equal treatment. Non-discrimination laws in addition to the ones challenged here by Plaintiffs prohibit gender-identity discrimination in employment and housing (Gov. Code §§ 12940, subd. (a), 12926, subd. (p); Pen. Code § 422.56), public accommodations (Civ. Code § 51, subds. (b), (e)(4)), and other areas of public life, as well as in the foster care (Welf. & Inst. Code § 16001.9, subd. (a)(23)) and juvenile justice systems (Welf. & Inst. Code §§ 224.71, subd. (i), 224.73). A reasonable accommodation of the interests of all students in privacy and equal treatment, determined for individual students on a case-by-case basis, can easily avert any conceivable conflicts between those interests.[7] Since the threat to Plaintiffs' privacy is minimal, the equality interest the statute was enacted to promote plainly outweighs that asserted privacy interest.

[7] For example, gender discrimination cases from California and elsewhere have made clear that privacy interests do not outweigh interests in equal opportunity based on gender where those interests can reasonably be accommodated. (See, e.g., *Bohemian Club v. Fair Employment & Housing Commission* (1987) 187 Cal.App.3d 1, 22-23 [male-only club could not lawfully exclude female employees, even though many shower and bathroom facilities were unenclosed and members often walked around undressed, because enclosed shower and bathroom facilities were available]; *Ludtke v. Kuhn* (S.D.N.Y. 1978) 461 F.Supp. 86, 97-98 [excluding female reporters from professional baseball players' locker rooms was unlawful discrimination, where players could wear towels and take other steps to protect their privacy].)

c. The non-discrimination statutes protect the important privacy interests of transgender students.

The non-discrimination statutes also protect the privacy interests of transgender students, which are at far greater risk of infringement than the privacy interests alleged by Plaintiffs. Additionally, courts in California and elsewhere have held that transgender individuals have a legally protected privacy interest in maintaining the confidentiality of their transgender status. For instance, a California appeals court held that a transsexual woman had a valid tort claim for invasion of privacy against a newspaper that revealed her transsexuality. (*Diaz v. Oakland Tribune* (1983) 139 Cal.App.3d 118, 132; see also *Powell v. Schriver* (2d Cir. 1999) 175 F.3d 107, 111-12 [prison officials violated inmate's privacy by revealing her transsexuality to other inmates]; *Kastl v. Maricopa Community College Dist.* (D. Ariz. June 3, 2004), No. Civ. 02-1531PHX-SRB, 2004 WL 2008954, at pp. *5-6 (hereafter *Kastl*) [public employer violated privacy of transgender employee by demanding details about her medical history before she could use the women's restroom]; *Doe v. Blue Cross & Blue Shield of R.I.* (D.R.I. 1992) 794 F.Supp. 72, 74 [same].) In recognizing the right of a transsexual prisoner to maintain the confidentiality of her medical history, the Second Circuit noted that the "excruciatingly private and intimate nature of transsexualism . . . is really beyond debate." (*Powell v. Schriver*, at p. 111.) The court therefore found that the interest of transgender individuals in "conduct[ing] their affairs as if such a transition was never necessary . . . . is particularly compelling." (*Ibid.*) The non-discrimination statutes at issue here protect that same interest in confidentiality by ensuring that transgender students are able to live fully as members of the gender with which they identify, without having their birth sex involuntarily revealed.

In sum, the non-discrimination statutes are justified in light of the compelling need to protect the safety, privacy, and equality of transgender students. Those interests dramatically outweigh any *de minimis* intrusion on the privacy of objecting non-transgender students.

2. The Non-Discrimination Statutes Do Not Infringe Plaintiffs' Legal Privacy Interests.

In any event, Plaintiffs' privacy claim fails as a matter of law, because they cannot meet their heavy burden of establishing "(1) a legally protected privacy interest; (2) a reasonable expectation of privacy in the circumstances; and (3) conduct by [the state] constituting a serious invasion of privacy." (*Hill, supra*, 7 Cal.4th at pp. 39-40; see also *Pediatrics, supra*, 16 Cal.4th at p. 330.) No legally protected privacy interest is implicated when schools permit transgender students to use gender-segregated facilities consistent with their gender identity. Furthermore, even

assuming for the sake of argument that some privacy interest could be imperiled by the non-discrimination statutes, the statutes can reasonably be implemented in a way that avoids infringing that privacy interest.

a. The non-discrimination statutes implicate no legally protected privacy right.

There is no recognized legal right, in California or any other jurisdiction, for non-transgender individuals to exclude transgender persons from gender-segregated facilities. For example, the Eighth Circuit rejected a claim brought by an employee who objected to sharing the women's restroom with a female transgender co-worker. (*Cruzan v. Special School Dist., #1*, *supra*, 294 F.3d 981.) The court held that the objecting employee had no legal right that justified excluding her co-worker from the regular faculty women's restroom. (*Id.* at p. 984.) Similarly, in a sex-discrimination case brought by a transgender employee, a federal district court held that a community college's policy prohibiting transgender employees from using the restroom appropriate for their gender identity bore no rational relationship to any privacy interest. (*Kastl*, *supra*, 2004 WL 2008954, at p. *8.) The court rejected as "baseless" the employer's suggestions that transsexuals pose a risk to the safety of others and that the presence of a transgender woman in the women's restroom would invade the privacy of other women. (*Ibid.*) Another federal court rejected a claim by a female prisoner that her privacy rights were invaded when the prison placed a transsexual woman among the female population. (*Crosby v. Reynolds* (D.Me. 1991) 763 F.Supp. 666, 670.) The court noted that "expert medical opinion" had informed the prison officials' decision, since the transsexual woman would be "in severe jeopardy" if housed among the male population, placement among the female population would best meet her psychological needs, and she would pose no risk to the other female inmates. (*Id.* at p. 669.)

More broadly, California courts have held that in public facilities, such as public restrooms and fitting rooms, privacy rights are sufficiently protected so long as individuals are shielded from exposure behind cubicle doors. The California Court of Appeals has held that an ordinance requiring restroom attendants in certain business establishments did not raise any constitutional privacy issues. (*Tily B., Inc. v. City of Newport Beach* (1998) 69 Cal.App.4th 1, 22 [noting that "[w]hatever individual sensibilities, there is no constitutional right to privacy in the restrooms of a place of public accommodation that [plaintiff] is able to point to, nor that we are able to find or imagine"]; accord *Vo v. City of Garden Grove* (2004) 115 Cal.Appp.4th 425, 448, fn. 14 [quoting same in dicta].) The California Supreme Court also found no privacy violation when a store

security guard observed a minor's shoplifting activity through the open space below the dressing-room door. (*In re Deborah C.* (1981) 30 Cal.3d 125, 139.) The court held that one who uses a dressing room is entitled only to "the modicum of privacy it appears to afford." (*Ibid.*)

Moreover, in *Hill*, the California Supreme Court rejected a privacy challenge to school drug-testing procedures, noting that although "[i]n our culture, urination is generally regarded as private," in doctor's offices "'urine samples of both men and women are generally taken by female nurses or technicians'" from behind the seclusion of a closed door without objection. (*Hill*, *supra*, at p. 41, fn. 12. [quoting *Dimeo v. Griffin* (7th Cir. 1991) 943 F.2d 679, 682]; see also *Bd. of Education of Independent School Dist. No. 92 of Pottawatomie County v. Earls* (2002) 536 U.S. 822, 832-34 [upholding school drug testing procedure against privacy claim].) While locker rooms with unavoidable nudity could present a closer question, those are not at issue in this case, as Plaintiffs have not alleged that K.S., B.B., or any other students have been required to remove their clothes in view of other classmates.

b. Subjective discomfort around transgender people does not give rise to a legally cognizable privacy claim.

Subjective discomfort in the presence of transgender individuals does not create a protected privacy interest. Claims of discomfort in the presence of a minority group propped up decades of racial segregation in housing, education, and access to public facilities like restrooms and drinking fountains. (See, e.g., *Wyatt v. Adair* (Ala. 1926) 110 So. 801, 803-804 [permitting white tenant to recover for mental anguish after being required to share bathroom with black family, calling the situation "strange and deplorable" and clearly "unbearable by reason of humiliation"]; *Norfolk & W. Ry. Co. v. Stone* (Va. 1911) 69 S.E. 927, 928 [white woman could recover for emotional distress for "the discomforts, mortification, and humiliation suffered by her" when she was placed on a train car reserved for "colored" people].) However, it is plain today that such discomfort does not provide a privacy-based justification for discrimination. In one discrimination case brought by a transgender student, a Massachusetts court held that school officials discriminated based on gender when they applied the school's dress code to forbid the plaintiff, who had a female gender identity, from wearing girls' clothes. (*Yunits*, *supra*, 2000 WL 33162199, at pp. *6-7.) The court wrote that it could not "allow the stifling of plaintiff's selfhood merely because it causes some members of the community discomfort." (*Id.* at *7.) The court concluded that the school could not place restrictions on the transgender student that were not placed on other female students. (*Ibid.*)

c. Any conceivable implication of privacy interests resulting from the application of the non-discrimination statutes would be minimal at best.

A non-discriminatory policy permitting transgender students to use the facilities that correspond to their consistently expressed gender identity would have little or no effect on the privacy interests of other students, because schools can easily provide reasonable accommodations to balance the privacy interests of all students. For instance, a school could provide a transgender student a private area in which to change, or permit that student to use the locker room at a different time than the rest of the class. (See San Francisco Unified School District Board of Education Administrative Regulation Article 5: Non-Discrimination for Students and Employees (undated), <http://www.casafeschools.org/SFUSDgenderregs.pdf> [as of March 18, 2009]; Los Angeles Unified School District, Reference Guide No. REF-1557: Transgender and Gender Nonconforming Students—Ensuring Equity and Nondiscrimination (Feb. 15, 2005), <http://www.casafeschools.org/TransgenderLAUSD.pdf> [as of March 18, 2009]; San Francisco Human Rights Commission Compliance Guidelines to Prohibit Gender Identity Discrimination (Dec. 10, 2003), <http://www.ci.sf.ca.us/site/sfhumanrights_page.asp?id=6274> [as of March 18, 2009].) The school could also provide such accommodations to any student who, like B.B., desires additional privacy. Because the law leaves room for schools to fashion such solutions, any privacy interest implicated by the application of the non-discrimination statutes is plainly *de minimis* at best. Plaintiffs' Third Cause of Action should be dismissed for failure to state a valid claim under the privacy and safety provisions of the California Constitution.

III. CONCLUSION

For the foregoing reasons, Amici request that this Court grant Defendant's Demurrer.

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Respectfully submitted,

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