UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA

ORLANDO DIVISION

JOHN DOE, a minor, by his parents and next friends, SUSAN AND JACK DOE,

Plaintiff,

v.

VOLUSIA COUNTY SCHOOL BOARD,

Defendant.

No. 6:18-CV-102-RBD-GJK

ORAL ARGUMENT REQUESTED

PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION AND SUPPORTING MEMORANDUM OF LAW

Plaintiff John Doe ("John"), by and through his parents and next friends, Susan and Jack Doe, respectfully moves this Court for a Preliminary Injunction against Defendant Volusia County School Board (VCSB), pursuant to Rule 65(a) of the Federal Rules of Civil Procedure and Local Rules 3.01(j) and 4.06. In support of this Motion, John relies upon the following Memorandum of Law and the supporting declarations from himself ("John Decl."), Susan Doe ("Susan Decl."), Diane Ehrensaft, Ph.D. ("Ehrensaft Decl."), and Asaf Orr ("Orr Decl.").

INTRODUCTION

John is a typical high school sophomore who is doing his best to finish his education and prepare for his future. Because he is transgender, however, VCSB treats him differently from his peers, excluding him from the restrooms and locker room that

all other boys use and preventing him from participating equally in gym class. VCSB's differential treatment of John stigmatizes and humiliates him, preventing him from obtaining an equal education and putting him at risk of serious long-term negative health consequences. VCSB's discriminatory practice places John in an impossible situation: either he must use the separate facilities VCSB has offered and experience the debilitating stigma of his peers noticing on a daily basis that he is being treated differently; or, he must attempt to avoid using restrooms and participating in gym class at all, placing his physical health at risk and causing his academics to suffer. VCSB's discrimination leaves John unable to fully participate in his education and violates Title IX and the Equal Protection Clause of the Fourteenth Amendment. The Court should preliminarily enjoin VCSB's discrimination so that John may finish high school without experiencing the irreparable harm that VCSB's conduct inflicts on him.

Pursuant to L.R. 3.01(j), Plaintiff respectfully requests oral argument and estimates that no more than an hour total, or 30 minutes for each side, is needed.

FACTUAL BACKGROUND

John is a fifteen-year-old boy and a sophomore in high school. John Decl. ¶ 1-2. Like many of his peers, he loves sports and playing video games. He is an avid reader. *Id.* ¶ 2. John is also transgender, which means that he was identified as female at birth, but his gender identity is male and he lives his life and interacts with others as a boy. Complaint, Dkt. 1, ¶ 3.

Every person has multiple sex-related characteristics, including chromosomes, hormones, gender identity (also known as neurological sex), and secondary sex

characteristics. Ehrensaft Decl. ¶ 19. Gender identity is a person's internal sense of belonging to a particular sex and is a deeply felt and core component of human identity. *Id.* ¶ 20. A person's gender identity is not a personal decision, preference, or belief. *Id.* ¶ 21. Instead, it is innate or fixed at a young age and is understood to have a biologic component. *Id.* at ¶ 24. Medical science recognizes that when there is a divergence between a person's sex-related characteristics, as there is for transgender individuals, the person's gender identity is the most important factor in determining how a person should be treated by others. *Id.* at ¶ 19. It is medically inappropriate and harmful to treat a transgender person inconsistently with their gender identity. *Id.*

In this case, in addition to having a male gender identity, John has also undergone medical treatment to bring his physical appearance in line with his male identity. As a result of that treatment, John has the same level of circulating testosterone as other boys and his appearance is similar to other boys his age.

John started recognizing that he was a boy around first grade. John Decl. ¶ 3. Several months into his first-grade year, John's parents recognized that he needed help and brought him to a therapist. John Decl. ¶ 3; Susan Decl. ¶ 3. John was eventually diagnosed with gender dysphoria, a condition that refers to the severe distress that can result from the incongruence between a person's gender identity and the sex they were assigned at birth. Susan Decl. ¶ 4; John Decl. ¶ 3.

Treatments for gender dysphoria enable a transgender youth to live in accordance with the young person's gender identity, thereby alleviating the debilitating distress caused by gender dysphoria. Ehrensaft Decl. ¶¶ 30-31. Treatment typically

includes "social transition," which involves permitting a child to be themselves in everyday life, consistently interacting with peers and the social environment in a manner that matches the child's gender identity. For a transgender child, the ability to be open about their true gender identity brings great relief and typically enables the child to feel much more comfortable and to interact with others in a much more confident and positive way. Ensuring that a transgender child is in an environment that does not undermine treatment and respects the child's gender identity is critical to the child's healthy development. *Id.* ¶ 30. When parents, caregivers, or adult authority figures deny or reject a transgender child's gender identity, the child experiences psychological distress. *Id.* ¶ 36. Rejection or disapproval can lead to serious mental health consequences for the child, including shame, low self-esteem, anxiety, depression, self-harming behaviors, and suicidal ideation. *Id.* ¶ 37.

At the recommendation of his therapist and with his family's support, John underwent his social transition the summer prior to second grade. Susan Decl. ¶¶ 4-5. By the next school year, John obtained a legal name change to a traditionally male name. *Id.* ¶ 6. Those changes resulted in John being treated consistently as a boy at school, which greatly decreased his feelings of discomfort and unhappiness. John Decl. ¶ 4. "As a result, John changed dramatically. He became a happy, comfortable, and talkative kid in a way that [his family] had not seen before." Susan Decl. ¶ 5.

John attends school as a boy and is accepted as a boy by his classmates at school, most of whom are unaware of his private medical history, but VCSB has singled him out and treated him differently from other boys by excluding him from the boys'

facilities. John Decl. ¶ 9; Susan Decl. ¶ 9. Throughout elementary and middle school, VCSB and its school personnel excluded John from facilities used by other boys. This constant differential treatment made John feel increasingly isolated and anxious. John Decl. ¶ 9. He dreaded times that he would have to use a specially designated restroom, *id.*, and his mounting psychological distress caused John to begin pulling out his eyelashes, a medical condition referred to as trichotillomania. Susan Decl. ¶ 18. The comments and questions from John's peers about why he was being treated differently than all the other boys further exacerbated his distress. John Decl. ¶¶ 12, 14-16, 19.

Since beginning his transition, John has continued to receive further medical treatment for gender dysphoria, including puberty-delaying medication and hormone replacement therapy. *Id.* ¶ 7. Those treatments masculinized his appearance in the same way that testosterone masculinized the appearance of other boys his age. *Id.* As a result, John has gained self-confidence and overcome his gender dysphoria and—except for the school's continuing refusal to treat him the same as other boys—to live happily and successfully as the boy he has long known himself to be. *Id.* ¶ 7-8; Susan Decl. ¶ 7-8. John's physical changes have made VCSB's decision to exclude him from the boys' facilities more obvious, stigmatizing, and humiliating. At this point in his medical treatment and social development, being treated differently from other boys on a daily basis at school is causing John irreparable emotional, social, physical, and educational harms.

In John's current school, he is barred from all boys' facilities and is required to use only the single-user facilities located on campus. Of those facilities, only one

remains unlocked throughout the school day. John Decl. ¶ 13. That restroom is located in the media center, a room that is regularly filled with classes of John's peers, and had a sign posted on the door indicating that the restroom was not for students.[1] *Id.* ¶ 15. In order to use that restroom, John has to walk into a room full of his peers, possibly in the midst of an ongoing class session, and use a restroom that was clearly not designated for students to use. To use the other single-user restrooms, John must ask a member of the school staff to unlock the door for him, which he has never done because of how humiliating it would be. *Id.* ¶¶ 13-14. To avoid this humiliation, John has occasionally used the boys' restroom, despite knowing that he will be punished if school staff learn that he has done so. *Id.* ¶ 17.

VCSB has also denied John access to appropriate changing facilities for physical education. During his freshman year, John was at first required to change in the coach's office located in the boys' locker room. *Id.* ¶ 19. The office has a large window that overlooks the main area of the locker room. *Id.* This proposed arrangement would have visibly separated John from the other students in his class, exacerbated John's isolation, and highlighted to his peers that VCSB was treating him differently than other boys. *Id.*

When John raised those concerns, VCSB told John that he must either take an online physical education class or change in the media center restroom. *Id.* ¶ 20. John initially chose to try the online physical education class, but quickly realized that an online course deprived him of the primary benefits of gym class, including playing

[1] VCSB removed the sign after Ms. Doe complained.

sports and interacting with others. *Id.* Not wanting to miss out on the physical activity and team-building with classmates that are vital components of physical education, John rejoined the regular gym class, even though the school continued to force him to change in the media center restroom. *Id.* Doing so caused John to be chronically late for class. *Id.* ¶ 21. On some days, the humiliation of having to change in a different facility located in a separate building was so great that John went to class but did not change at all, which contributed greatly to his receiving a "D" grade in PE his freshman year. *Id.* ¶ 23.

By treating John differently from other students and denying him equal educational opportunities, VCSB is causing John serious, irreparable harms. In hopes of mitigating his distress while at school, John tries not to use the restroom unless absolutely necessary. John Decl. ¶ 17. He restricts his fluid intake to avoid needing to use the restrooms, placing his health at risk. *Id.*; Susan Decl. ¶ 10. Since starting high school, John has experienced symptoms consistent with urinary tract infections. John Decl. ¶ 18; Susan Decl. ¶ 10. Severely restricting his restroom use also interferes with his ability to pay attention in class, resulting in a steady decline in his grades. John Decl. ¶ 18. Even though John loves sports and would very much like to participate in group PE classes now and for the rest of his high school years, John did not take PE this year to avoid the humiliation of being required to change in a separate facility. *Id.* ¶ 23.

ARGUMENT

I. Preliminary Injunction Standard

To obtain a preliminary injunction, a plaintiff must demonstrate: (1) a substantial likelihood of success on the merits; (2) that the plaintiff will suffer irreparable injury absent preliminary relief; (3) that the harms the plaintiff will likely suffer outweigh any harm that defendant will suffer as a result of an injunction; and (4) that preliminary relief is in the public interest. *Scott v. Roberts*, 612 F.3d 1279, 1290 (11th Cir. 2010). Each of those factors weighs strongly in John's favor.

II. John Is Likely To Succeed On His Title IX Claim.

Title IX provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). To succeed on a Title IX claim, the student "must show that: (1) [he] was excluded from participation in an education program because of [his] sex; (2) the educational institution received federal financial assistance at the time of the exclusion; and (3) the discrimination harmed [him]." *Bd. of Educ. of the Highland Local Sch. Dist. v. U.S. Dep't of Educ.*, 208 F. Supp. 3d 850, 865 (S.D. Ohio 2016).

As a recipient of federal financial assistance,[2] VCSB is a covered entity subject to Title IX, and "[a]ccess to the bathroom is . . . an education program or activity under

[2] *See* District School Board of Volusia County, *2017-2018 Approved Operating Budget* at 22, *available at* http://myvolusiaschools.org/budget/Documents/2017-2018%20Approved%20Operating%20Budget.pdf (noting federal funding of approximately $71 million).

Title IX." *Id.* at 865. VCSB's exclusion of John from boys' restrooms discriminates based on his sex under Title IX. Similarly, VCSB's denial to John of equal access to changing facilities for gym class and of the ability to participate in gym class on the same basis as other students deprives him of the benefit of "an education program or activity" under Title IX.

The Eleventh Circuit has held that discrimination against transgender individuals is a form of sex-based discrimination that violates Title VII of the Civil Rights Act of 1964. *Glenn v. Brumby*, 663 F.3d 1312, 1320 (11th Cir. 2011). Courts rely upon a common body of law in construing federal anti-discrimination statutes and frequently look to Title VII case law to interpret Title IX's prohibition on discrimination "because of sex." *See, e.g.*, *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. Of Educ.*, 858 F.3d 1034, 1047 (7th Cir. 2017) ("Whitaker II"); *see also Glenn*, 663 F.3d at 1315-18 (relying on Title VII cases in analyzing equal protection claim brought by transgender woman); *Shotz v. City of Plantation*, 344 F.3d 1161, 1170 n.12 (11th Cir. 2003) ("We construe Titles VI and IX *in pari materia*.").

Discrimination based on transgender status is inherently sex-based because being transgender can only be understood with regard to a person's sex. *See, e.g., Love v. Johnson*, 146 F. Supp. 3d 848, 850–51 (E.D. Mich. 2015). The definition of being transgender rests on there being a difference between a person's gender identity and the sex assigned to them at birth. *Id.* Since both of these characteristics are sex-related, differential treatment of transgender people requires consideration of a sex-related

characteristic.[3] *See Evancho v. Pine-Richland Sch. Dist.*, 237 F. Supp. 3d 267, 285 (W.D. Pa. 2017) (holding that disparate treatment of transgender students discriminates based on sex because "Plaintiffs are the only students who are not allowed to use the common restrooms consistent with their gender identities").

Settled Eleventh Circuit law also establishes that discrimination against transgender individuals constitutes sex discrimination because it is inherently rooted in sex stereotypes. *Glenn*, 663 F.3d at 1320. Sex discrimination is not limited to favoring one sex over another sex. *Id.* at 1316-17. Instead, it includes any differential treatment on the basis of a sex-based consideration. Classifications based on transgender status are "inextricably intertwined with gender classifications" because they "inherently discriminate[]" based on a person's "failure to conform to gender stereotypes." *Doe 1 v. Trump*, 275 F. Supp. 3d 167, 2017 WL 4873042, *28 (D.D.C. Oct. 30, 2017).

As the Eleventh Circuit explained,

> A person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes. The very acts that define transgender people as transgender are those that contradict stereotypes of gender-appropriate appearance and behavior. *There is thus a congruence between discriminating against transgender . . . individuals and discrimination on the basis of gender-based behavioral norms.*

Glenn, 663 F.3d at 1316 (emphasis added, and citations and quotations omitted). Since "all persons, whether transgender or not, are protected from discrimination on the basis of gender stereotype[s]," such protections "cannot be denied to a transgender

[3] In addition, discrimination because a person "changes" their sex is sex-based in the same way that discrimination because someone converts religions is religion-based. *Schroer v. Billington*, 577 F. Supp. 2d 293, 306–07 (D.D.C. 2008).

individual." *Id.* at 1318-19. This result follows from the Supreme Court's "consistent purpose" in "apply[ing] heightened scrutiny to sex-based classifications," which "has been to eliminate discrimination on the basis of gender stereotypes." *Id.* at 1318-20 (discussing cases). Characterizations based on transgender status constitute sex discrimination because they "embody 'the very stereotype the law condemns.'" *Id.* at 1319-20 (quoting *J.E.B. v. Alabama*, 511 U.S. 127, 138 (1994)).

Like the unlawful termination of a transgender employee in *Glenn,* VCSB's discriminatory conduct perpetuates sex stereotypes by denying transgender students equal use of facilities that others are permitted to use and equal access to educational opportunities that others enjoy. Echoing *Glenn*'s conclusion that an "individual cannot be punished because of his or her perceived gender-nonconformity," the Seventh Circuit has held that excluding a student from the restroom conforming to his or her gender identity "punishes that individual for his or her gender non-conformance." *Whitaker II*, 858 F.3d at 1049; *see also Evancho*, 237 F. Supp. 3d at 293; *Highland*, 208 F. Supp. 3d 850, 877 (S.D. Ohio 2016); *Roberts v. Clark Cty. Sch. Dist.*, 215 F. Supp. 3d 1001, 1016 (D. Nev. 2016); *Lusardi v. McHugh*, EEOC Appeal No. 0120133395, 2015 WL 1607756, at *9 (EEOC Apr. 1, 2015). That analysis applies with equal force here, both to VCSB's exclusion of John from boys' restrooms and its refusal to permit him to participate in gym class on equal terms with other students.

VCSB's discriminatory conduct harms John in numerous ways. John Decl. ¶¶ 12-26. The single-user restrooms that he is required to use are less accessible than the boys' restrooms that all others use. *Id.* ¶¶ 13, 16, 21. Simply to use the restroom, John is forced

to suffer the indignity and humiliation of seeking out an administrator and asking the administrator to unlock the door, or, alternatively, to go to the restroom located in the media center, where other students are usually present and may observe him entering a restroom that other students do not ordinarily use. *Id.* ¶ 13-15. Because of the fear and anxiety caused by this unwanted attention, John restricts his fluid intake in an attempt to avoid having to using the restroom at all, which exposes him to health risks including dehydration, urinary tract infections, and other consequences such as stress and difficulty focusing on classwork. *Id.* ¶ 17-18; Susan Decl. ¶ 10; Ehrensaft Decl. ¶ 40; *Whitaker II*, 858 F.3d at 1045 (noting plaintiff was forced into the "unenviable choice between using a bathroom that would further stigmatize him and cause him to miss class time, or avoid use of the bathroom altogether at the expense of his health").

Similarly, to avoid the humiliation of being required to change in the media center, John has been forced either to forgo the opportunity to participate in group physical education classes that are open to all other students or to undergo the repeated stigma and humiliation of changing separately from his classmates. John Decl. ¶¶ 19-21. Changing for class in the media center caused him to be late, further isolating him from his peers and nearly causing him to fail physical education last year. *Id.* ¶¶ 21-23. Because of the stress and anxiety caused by VCSB's discrimination, John did not take PE this year even though he wanted to, and he would very much like to do so during his junior and senior years as well. *Id.* ¶ 23.

VCSB's actions also violate Title IX by stigmatizing transgender students and branding them as unfit to be treated the same as their peers. *See Whitaker II,* 858 F.3d at

1050; *Evancho*, 237 F. Supp. at 294 (observing that Plaintiffs "are being marginalized, which is causing them genuine distress, anxiety, discomfort and humiliation"); *Highland*, 208 F. Supp. 3d at 870-71 (finding harm where student felt "stigmatized and isolated when she [wa]s forced to use a separate bathroom and otherwise not treated as a girl"). Title IX forbids such sex-based exclusion and humiliation.

III. John Is Likely To Succeed On His Equal Protection Claim

By denying John access to the boys' restrooms and locker rooms at school and the ability to participate in gym class on equal terms as other boys, VCSB also violates the constitutional guarantee of equal protection. VCSB's conduct facially discriminates against transgender students like John. Unlike other students, who are permitted full and ordinary use of restroom and locker room facilities that match their gender identity, transgender students are singled out and treated differently. Because John is transgender, VCSB bars him from boys' restroom facilities and permits him to use the boys' locker room only on the condition that he use a separate changing area in a separate building, which causes him to be chronically late and singles him out as different from his peers. Such denial of equal treatment unconstitutionally discriminates against transgender students based on their transgender identity and based on sex.

A. Strict—or at least intermediate—scrutiny applies to VCSB's decision to exclude John from the boys' restrooms

VCSB's discrimination against John triggers strict or intermediate scrutiny for two reasons. First, discrimination against transgender people bears all the indicia of a suspect classification and therefore warrants the most searching form of equal

protection review. Second, discrimination based on transgender status necessarily classifies individuals based on sex and relies on gender stereotypes, requiring application of heightened scrutiny. *Glenn*, 663 F.3d at 1319.

1. Discrimination against transgender people is subject to strict equal protection scrutiny

The Fourteenth Amendment's equal protection guarantee "is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). Certain governmental classifications are inherently suspect because they are more likely to reflect historical patterns of discrimination than to serve a legitimate governmental purpose. *Id.* at 441; *Mass. Bd. of Retirees v. Murgia*, 427 U.S. 307, 312-13 (1976); *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973). In determining whether a particular classification is suspect, the Supreme Court has considered:

1) Whether the class has been historically "subjected to discrimination," *Lyng v. Castillo*, 477 U.S. 635, 638 (1986);

2) Whether the class has a defining characteristic that "frequently bears no relation to ability to perform or contribute to society," *Cleburne,* 473 U.S. at 440–41;

3) Whether the class exhibits "obvious, immutable, or distinguishing characteristics that define them as a discrete group," *Lyng*, 477 U.S. at 638; and

4) Whether the class is "a minority or politically powerless." *Id.*

No single factor is dispositive, and each can serve as a warning sign that a particular classification "provides no sensible ground for differential treatment," *Cleburne*, 473 U.S. at 440, or is "more likely than others to reflect deep-seated prejudice

rather than legislative rationality in pursuit of some legitimate objective," *Plyler v. Doe*, 457 U.S. 202, 216 n.14 (1982). Transgender status readily satisfies all of these factors, as many federal courts have concluded. *See, e.g., Evancho,* 237 F. Supp. 3d at 288; *Highland*, 208 F. Supp. 3d at 873-74; *Adkins v. City of N.Y.*, 143 F. Supp. 3d 134, 139-40 (S.D.N.Y. 2015); *Norsworthy v. Beard*, 87 F. Supp. 3d 1104, 1119 (N.D. Cal. 2015).

History of discrimination. Courts across the country have recognized that transgender people have long "face[d] discrimination, harassment, and violence because of their gender identity." *Whitaker II*, 858 F.3d at 1051; *see also Norsworthy*, 87 F. Supp. 3d at 1119 n.8; *Doe 1 v. Trump*, 275 F. Supp. 3d 167, 2017 WL 4873042, at *27; *Adkins*, 143 F. Supp. 3d at 139; *Evancho*, 237 F. Supp. 3d at 288; *Highland*, 208 F. Supp. 3d at 874. Transgender people experience pervasive discrimination in schools: "78% of students who identify as transgender or as gender non-conform[ing] report being harassed while in grades K-12 . . . with 35% reporting physical assault and 12% reporting sexual assault." *Whitaker II*, 858 F.3d at 1051 (citation omitted). Transgender people are twice as likely to live in poverty and three times more likely to be unemployed, and nearly half (47%) of transgender people have experienced sexual assault at some point in their lifetime.[4] In recent years, transgender people have been targeted by an unprecedented wave of state legislative attempts to deny transgender people access to public accommodations, restrict the ability of counties and municipalities to pass non-

[4] Sandy E. James *et al.*, *The Report of the 2015 U.S. Transgender Survey*, Nat'l Ctr. for Transgender Equal. (Dec. 2016), at 5-6, *available at*, https://www.transequality.org/sites/default/files/docs/USTS-Full-Report-FINAL.PDF.

discrimination ordinances protecting transgender people, and exclude transgender students from protections at school.[5]

Bearing on one's ability to contribute to society. Transgender people also "have a defining characteristic that frequently bears no relation to an ability to perform or contribute to society." *Evancho*, 237 F. Supp. 3d at 288; *see also Doe 1*, 275 F. Supp. 3d 167, 2017 WL 4873042, at *1; *Highland*, 208 F. Supp. 3d at 874; *Norsworthy*, 87 F. Supp. 3d at 1119 n.8. As courts have recognized, there is "no argument or evidence suggesting that being transgender in any way limits one's ability to contribute to society." *Doe 1*, 275 F. Supp. 3d 167, 2017 WL 4873042, at *27; *see also Adkins*, 143 F. Supp. 3d at 139.

Discrete group with distinguishing characteristics. Transgender people "exhibit immutable or distinguishing characteristics that define them as a discrete group." *Evancho*, 237 F. Supp. 3d at 288; *Doe 1*, 275 F. Supp. 3d 167, 2017 WL 4873042, at *27; *see Highland*, 208 F. Supp. 3d at 874; *Norsworthy*, 87 F. Supp. 3d at 1119 n.8. Being transgender is "fundamental" and a "basic component of a person's core identity." *Hernandez-Montiel v. I.N.S.*, 225 F.3d 1084, 1093-94 (9th Cir. 2000) (internal citations omitted). Transgender people's gender identities are integral and immutable because they are "inherent in who they are as people." *Evancho*, 237 F. Supp. 3d at 288. Gender identity is a "deeply ingrained" characteristic that is not susceptible to voluntary

[5] *See, e.g.*, Nat'l Conference of State Legislatures, *2017 State Legislation*, http://www.ncsl.org/research/education/-bathroom-bill-legislative-tracking635951130.aspx (listing dozens of anti-transgender bills being actively considered by state legislatures).

change.[6] *Id*. at 289. That transgender people constitute a discrete group also is apparent from the fact that the discrimination they face often results directly from others becoming aware of their transgender status. *See Adkins*, 143 F. Supp. 3d at 139 (citing *Windsor v. U.S.*, 699 F.3d 169, 182-185 (2d Cir. 2012), *aff'd*, 570 U.S. 744 (2013)).

Relative political powerlessness. "[T]ransgender people as a group represent a very small subset of society lacking the sort of political power other groups might harness to protect themselves from discrimination." *Doe 1*, 275 F. Supp. 3d 167, 2017 WL 4873042, at *27. "[R]ecent estimates suggest that transgender individuals make up approximately 0.6 percent" of the American population. *Id.*; *see also Evancho*, 237 F. Supp. 3d at 288. "[A]s a tiny minority of the population, whose members are stigmatized for their gender non-conformity in a variety of settings," transgender people lack the strength to politically protect themselves from wrongful discrimination. *Highland*, 208 F. Supp. 3d at 874; *see also G.G. v. Gloucester Cty. Sch. Bd.*, 853 F.3d 729, 730 (4th Cir. 2017) (Davis, J., concurring); *Adkins*, 143 F. Supp. 3d at 140.

[6] The U.S. Department of Health and Human Services' Substance Abuse and Mental Health Services Administration ("SAMHSA") recognizes the overwhelming consensus of medical and mental health organizations that "efforts to change a child's or adolescent's gender identity, gender expression, or sexual orientation are not an appropriate therapeutic intervention" and that "[n]o evidence supports the efficacy of such interventions to change sexual orientation or gender identity, and such interventions are potentially harmful." SAMHSA, *Ending Conversion Therapy: Supporting and Affirming LGBTQ Youth*, at 51 (Oct. 2015), http://store.samhsa.gov/shin/content//SMA15-4928/SMA15-4928.pdf.

Accordingly, discrimination based on transgender status meets all of the Supreme Court's criteria for a suspect classification, warranting strict scrutiny under the Equal Protection Clause.

2. At a minimum, discrimination against transgender people constitutes sex discrimination subject to heightened scrutiny

The Eleventh Circuit has held that discrimination against transgender people "is a form of sex-based discrimination that is subject to heightened scrutiny under the Equal Protection Clause." *Glenn,* 663 F.3d at 1319. Numerous courts outside the Eleventh Circuit have similarly applied intermediate scrutiny to equal protection claims involving transgender people. *See, e.g.*, *Whitaker II,* 858 F.3d at 1051-52; *Smith v. City of Salem*, 378 F.3d 566, 574-75, 577 (6th Cir. 2004); *Evancho*, 237 F. Supp. 3d at 288; *Highland*, 208 F. Supp. 3d at 872–74; *Adkins*, 143 F. Supp. 3d at 140; *Doe 1*, 275 F. Supp. 3d 167, 2017 WL 4873042, at *28; *Stone v. Trump*, --- F. Supp. 3d ---, 2017 WL 5589122, at *15 (D. Md. Nov. 21, 2017); *Stockman v. Trump*, No. 5:17-cv-01799-JGB-KK, Dkt. No. 79, at 19 (C.D. Cal. Dec. 22, 2017); *Karnoski v. Trump*, No. C17-1297-MJP, 2017 WL 6311305, at *7 (W.D. Wash. Dec. 11, 2017); *Norsworthy*, 87 F. Supp. 3d at 1119. As explained below, VCSB's discriminatory conduct cannot survive even rational basis review, let alone strict or intermediate scrutiny, and John's claims are likely to succeed on the merits.

3. VCSB's conduct fails any level of equal protection scrutiny

Under strict scrutiny, a government policy survives review under the Equal Protection Clause only if it is narrowly tailored to advance compelling state interests. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995). Under the heightened scrutiny

applicable to sex-based classifications, the government must demonstrate "an exceedingly persuasive" justification for a discriminatory policy. *U.S. v. Virginia*, 518 U.S. 515, 531 (1996). "The burden of justification is demanding and rests entirely on" the government. *Id*. at 533. "The justification must be genuine, not hypothesized or invented *post hoc* in response to litigation," and "it must not rely on overbroad generalizations." *Id*. VCSB's conduct cannot satisfy strict or intermediate scrutiny. Indeed, it cannot survive even the most deferential form of review, because it lacks any rational connection to a legitimate governmental objective.

Any justification VCSB may offer for its discrimination either is not a legitimate aim of government or bears no rational connection to its exclusion of John from the same facilities and educational opportunities available to other boys. The lack of any rational connection to a legitimate purpose is particularly apparent in light of the alternative arrangements that VCSB has offered. For example, VCSB has permitted John to change in the coach's office, an area that has a window open to the rest of the locker room. John Decl. ¶ 19. That arrangement cannot possibly be related to any interest in protecting privacy or avoiding harm to John or other students. Instead, it serves only to segregate John from his peers, singling him out as different and inviting questions about why he is not using the same facilities as others. The incoherence of VCSB's treatment of John demonstrates that it cannot possibly have been intended to advance a legitimate, let alone important or compelling, interest, and any privacy-related *post hoc* rationalization VCSB may offer in response to this litigation should be disregarded. *See Virginia*, 518 U.S. at 533.

In any event, courts have rejected the argument that allowing transgender students to share multi-user restrooms invades other students' privacy. *See, e.g.*, *Whitaker II*, 858 F.3d at 1052 (holding that a policy excluding transgender students from such facilities "ignores the practical reality of how [plaintiff], as a transgender boy, uses the bathroom: by entering a stall and closing the door."); *Doe v. Boyertown Area Sch. Dist.*, 276 F. Supp. 3d 324, 2017 WL 3675418 at *56 (E.D. Pa. 2017); *Students & Parents for Privacy v. U.S. Dep't of Educ.*, 2016 WL 6134121. *2, *21-30 (N.D. Ill. Oct. 18, 2016). Here, as in other cases, there is no evidence that John ever "did, or threatened to do, anything to actually invade the physical or visual privacy of anyone else." *Evancho*, 237 F. Supp. 3d at 280; *see also Highland*, 208 F. Supp. 3d at 874. Indeed, VCSB's actions actually *undermine* privacy by singling out transgender students and drawing unwanted attention to them, raising questions in the minds of their peers about why they are using separate facilities. John Decl. ¶ 16, 19.

Courts across the country also have rejected the baseless suggestion that allowing transgender students equal access to school facilities raises any safety concerns. *See, e.g.*, *Evancho*, 237 F. Supp. 3d at 291 (noting the lack of any evidence that treating transgender students equally would encourage improper behavior in restrooms); *Highland*, 208 F. Supp. 3d at 877 n.15 (rejecting the argument that equal access to facilities by transgender students will "lead to disruption or safety incidents"). VCSB's policy therefore cannot be justified by any purported safety-related concerns.

Finally, any suggestion that relegating John to separate facilities is necessary to avoid discomfort for other students cannot justify VCSB's discrimination under any

standard of review. "Mere negative attitudes or fear" are not legitimate justifications to survive rational basis review, let alone any form of heightened scrutiny. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448 (1985). Moreover, the opposition of parents or community members to equal treatment of transgender persons cannot justify a violation of the Equal Protection Clause. "Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984).

IV. John Will Suffer Irreparable Harm If VCSB's Discrimination Is Not Enjoined

This Court has recognized that discriminating against students and separating them from their peers interferes with their education and constitutes irreparable harm meriting injunctive relief. *See Ray v. Sch. Dist. of DeSoto Cty.*, 666 F. Supp. 1524, 1535 (M.D. Fla. 1987) (holding that separating hemophiliac, HIV-positive students into a different classroom, and denying access to integrated classroom, constituted irreparable harm). This Court has likewise held that an allegation of ongoing unequal treatment in violation of Title IX demonstrates irreparable injury. *Daniels v. Sch. Bd. of Brevard Cty.*, 985 F. Supp. 1458, 1461-62 (M.D. Fla. 1997) (holding that various unequal facilities for girls' softball team versus boys' baseball team warranted preliminary injunctive relief and that "[e]qual access to restroom facilities is such a clearly established right as to merit no further discussion").

As a result of VCSB's conduct, John is forced to choose between risking his health by limiting his fluid intake to avoid using the restroom, or engaging in the humiliating and stigmatizing exercise of using a separate restroom. John Decl. ¶¶ 17-18. As other

courts have recognized, forcing John to "spend[] the [remaining years of high school] trying to avoid using the restroom, living in fear of being disciplined, feeling singled out and stigmatized" cannot be "rectified by a monetary judgment, or even an award of injunctive relief, after a trial that could take place months or years from now." *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, No. 16-CV-943-PP, 2016 WL 5239829, at *6 (E.D. Wis. Sept. 22, 2016) ("Whitaker I"). Moreover, VCSB's denial to John of the ability to use the locker room on an equal basis with his peers has driven him out of PE class entirely, negatively and irreparably affecting his educational development and opportunities. Only an injunction can remedy these harms.

Even apart from impeding John's education—which itself is irreparable harm—the stigma of separation and exclusion causes non-compensable harm. No amount of money can restore the loss of dignity or remedy the daily humiliation VCSB is inflicting on John. "Courts have long recognized that disparate treatment itself stigmatizes members of a disfavored group as innately inferior." *Evancho*, 237 F. Supp. 3d at 294; *Whitaker II*, 858 F.3d at 1045; *Highland*, 208 F. Supp. 3d at 878. Research also shows that children exposed to this type of discrimination experience negative health outcomes that last into adulthood, including academic difficulties, increased drug and alcohol use, anxiety, and suicidality. Ehrensaft Decl. ¶¶ 38-40; *see also* American Academy of Pediatrics (AAP) Statement on Protecting Transgender Youth, *available at* https://www.aap.org/en-us/about-the-aap/aap-press-room/pages/AAP-Statement-on-Protecting-Transgender-Youth.aspx ("Policies excluding transgender youth from facilities consistent with their gender identity have detrimental effects on their physical

and mental health, safety and well-being. No child deserves to feel this way, especially within the walls of their own school.").

V. The Balance Of Equities And Public Interest Weigh Heavily In Favor Of An Injunction

In contrast to the severe and irreparable harm VCSB's conduct imposes on John, granting the requested preliminary injunction would cause no harm to VCSB or any other party. It would not require the expenditure of any funds or the construction of new facilities; indeed, it would require nothing other than allowing John to use the existing facilities and participate in gym class in the same way as all other boys. *See Whitaker I*, 2016 WL 5239829, at *6. Additionally, as shown above, VCSB cannot credibly argue that there are any potential privacy violations or safety risks. There is no evidence that John invaded others' privacy or posed a safety risk to other students when using the coach's office in the boys' locker room to change for gym class, or at any other time. No one is harmed when John uses the boys' restroom or locker room; in contrast, the harms inflicted on John from being excluded from common spaces and separated from his peers are profound. John Decl. ¶¶ 12-26; Ehrensaft Decl. ¶¶ 35-40.

The "public has no interest in enforcing an unconstitutional" policy such as VCSB's treatment of John. *KH Outdoor, LLC v. City of Trussville*, 458 F.3d 1261, 1272 (11th Cir. 2006). Similarly, "the overriding public interest lay[s] in the firm enforcement of Title IX." *Cohen v. Brown Univ.*, 991 F.2d 888, 906 (1st Cir.1993); *accord Dodds v. United States Dep't of Educ.*, 845 F.3d 217, 222 (6th Cir. 2016).

The public interest also is served when public schools ensure all their students an equal opportunity to learn and prepare for their future. Treating transgender students as valued and equal members of the school community promotes a better learning environment for all. For this reason, many schools in Florida and other states allow access to facilities in accordance with gender identity, including Broward County Public Schools in Florida. Orr Decl., Exs. A-B. The Broward school district is one of the largest districts in Florida and the sixth largest school district in the United States.[7] *See also Whitaker II*, 858 F.3d at 1054-55; *Highland,* 208 F. Supp. 3d at 875 (noting *amici*, school administrators from 21 states and the District of Columbia, "agreed that although some parents opposed the policies at the outset, no disruptions in restrooms had ensued nor were there any complaints about specific violations of privacy").[8] Indeed, concerns about ensuring equitable school environments for all students led the National Association of Secondary School Principals to issue a Position Statement regarding transgender students. Orr Decl., Ex. C ("transgender students have the right to use the restroom and locker room consistent with their gender identity.").

[7] *See* http://www.browardschools.com/About-BCPS (Broward school district "is the sixth largest school district in the nation and the second largest in the state of Florida" serving "more than 271,500 students and approximately 175,000 adult students").

[8] This amicus brief has been filed in several similar cases across the country. *See, e.g.*, Brief of School Administrators from 19 States and the District of Columbia in Support of Intervenor Third-Party Plaintiff Jane Doe's Motion for Preliminary Injunction, 2016 WL 9990729, *Bd. of Educ. of the Highland Local Sch. Dist. v. U.S. Dep't of Educ.*, 208 F. Supp. 3d 850 (S.D. Ohio Sept. 15, 2016).

VI. No Bond Should Be Required

VCSB will incur no financial damage if John is afforded equal access to the boys' restroom and locker room. *See Whitaker I*, 2016 WL 5239829, at *7 (holding no bond required because defendants did not demonstrate any financial damage from allowing transgender student to use boys' restrooms). In fact, requiring no bond is "particularly appropriate" where important federal rights are involved, as here. *Cf. Complete Angler, LLC v. City of Clearwater*, 607 F. Supp. 2d 1326, 1335-36 (M.D. Fla. 2009) (involving alleged infringement of a fundamental right).

CONCLUSION

For the foregoing reasons, John respectfully requests that this Court preliminarily enjoin VCSB from denying John equal access and use of the boys' restrooms and locker room.

Date: February 22, 2018

Respectfully Submitted,

/s/ *Asaf Orr*

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished this 22th day of February, 2018, by CM/ECF electronic filing to the Clerk of Court and to the following:

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