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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

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

Plaintiffs,

v.

DALLAS SCHOOL DISTRICT NO.2; OREGON DEPARTMENT OF EDUCATION; GOVERNOR KATE BROWN, in her official capacity as the Superintendent of Public Instruction; and UNITED STATES DEPARTMENT OF EDUCATION; BETSY DEVOS, in her official capacity as United States Secretary of Education as successor to JOHN B. KING, JR.; UNITED STATES DEPARTMENT OF JUSTICE; JEFF SESSIONS, in his official capacity as United States Attorney General, as successor to LORETTA F. LYNCH,

Defendants.

Case No. 3:17-cv-01813-HZ

STATE DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

I. Introduction

This case, brought on behalf of various students and parents, challenges the Dallas School District's actions and policies, dating back to 2015,[1] of allowing transgender students to use the bathroom and locker rooms that match their gender identity, and the various Federal and State policies or guidance that support those actions. Put another way, Plaintiffs in this case attack the Dallas School District for, in simplest terms, respecting and treating a transgender boy like any other boy. They further challenge the District, State and Federal Defendants' policies and written guidance that support such equal treatment of transgender students generally. As part of this challenge, Plaintiffs raise a wide array of claims against the various defendants, but against the Oregon Department of Education ("ODE") and Oregon Governor Kate Brown (collectively, "State Defendants" or "the State"), they raise just one claim: asserting that State Defendants have "aided and abetted" in a violation of Oregon law, specifically the State's prohibition on discrimination in place of public accommodation. *See* Compl. ¶¶ 265-71.

The State wholeheartedly supports the Dallas School District in recognizing and treating transgender students consistent with their gender identity, and consistent with principles of equality. Plaintiffs clearly have a different view than the State regarding what state (and indeed federal) law requires in this area. *Compare* Compl., *with* Compl. Ex. M-1 (Oregon Department of Education Guidance to School Districts: Creating a Safe and Supportive School Environment for Transgender Students). It is also clear that plaintiffs disagree with the State regarding what constitutes best practices for creating an educational environment safe and free from discrimination and harassment, and how best to ensure that every student – including transgender students – has equal access to educational programs and activities. These are important policy and legal disagreements that should, in an appropriate venue, be addressed and resolved. But this federal court case is not the right place to resolve the single state law claim against the State.

[1] The alleged timeline of when certain district policies went into effect is not entirely clear from the complaint. *Compare* Compl. ¶¶ 82, 75, *with* Compl. ¶ 79.

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The State, its agencies, and its officials in their official capacities cannot be sued for a state law violation in Federal Court without the State's consent. The State does not consent to suit on the sole claim against it. Accordingly, the State asks this Court to dismiss the State as a defendant pursuant to the State's Sovereign Immunity. Novel questions of state law can and should be resolved, if necessary, in state court.

II. Standards for a Motion to Dismiss

A sovereign immunity defense is "quasi-jurisdictional" in nature and may be raised in either a Rule 12(b)(1) or 12(b)(6) motion. *Sato v. Orange Cnty. Dep't of Educ.*, 861 F.3d 923, 927 n.2 (9th Cir. 2017), *cert. denied*, No. 17-460, 2017 WL 4337073 (U.S. Nov. 13, 2017). On a motion to dismiss for failure to state a claim, courts presume the truth of allegations in the complaint, and construes them in the light most favorable to the nonmoving party. Fed. R. Civ. P. 12(b)(6). However, the Court is "not bound to accept as true a legal conclusion couched as a factual allegation." *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 555 (2007) (quoting *Papasan v. Allain*, 478 U.S. 265, 286 (1986)). The complaint "must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks and citation omitted).

III. Factual and Legal Background Relevant to the Claim Against the State

Although the bulk of the claims in the case are directed at federal and/or district defendants only, one claim, for violation of ORS 659A.400 et seq and ORS 659A.885, is asserted against the Oregon Department of Education and Governor Brown. As the Complaint notes, ODE is the state agency "responsible for the administration and funding of K-12 public education in the state of Oregon, as well as enforcement of Title IX, 20 U.S.C. §§ 1681-1688, and its implementing regulation at 34 C.F.R. part 106 for schools under its jurisdiction," and the Governor is "the Superintendent of Public Instruction and highest ranking executive official at Oregon Department of Education" and the "final policymaker responsible for the operation and management of the ODE, including the issuance of [the ODE guidance]." Compl. ¶¶ 24-25.

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The state law in question requires places of public accommodation in Oregon to provide "full and equal accommodations, advantages, facilities and privileges of any place of public accommodation, without any distinction, discrimination or restriction on account of race, color, religion, sex, sexual orientation, national origin, marital status or [except in certain cases] age." ORS 659A.403(1). State law defines "sexual orientation" to mean, in relevant part, "an individual's actual or perceived . . . gender identity, regardless of whether the individual's gender identity, appearance, expression or behavior differs from that traditionally associated with the individual's sex at birth." ORS 174.100(7).

Plaintiffs assert that plaintiffs have been "deprived of the right to utilize restrooms, locker rooms and showers without encountering persons of the opposite biological sex," and that this amounts to state law public accommodation discrimination under ORS 659A.400 et seq. on the basis of sex, sexual orientation, and religion. Compl. ¶¶ 267-68. The State is accused of "aiding and abetting" such discrimination. *See* ORS 659A.406 (prohibiting any person from aiding and abetting public accommodation discrimination). As far as factual allegations regarding the State's alleged discriminatory actions, the Complaint points out that "On or about May 5, 2016 ODE issued its 'Guidance to School Districts: Creating a Safe and Supportive School Environment for Transgender Students.'" Compl. ¶ 24 (hereinafter "ODE Transgender Guidance").

The ODE transgender guidance, a copy of which is attached to the complaint, affirms the State's policy and legal position that "[o]ne's gender identity is an innate characteristic of each individual's personality" that must be respected. Compl. Ex. M-1 at 4. It further states that, at bottom, transgender students should be treated consistent with their gender identity and the same as any other boy or girl:

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

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Id. With respect to bathroom and locker-room use, the ODE transgender guidance recommends that "alternative accommodations, such as a single 'unisex' bathroom or private changing space, should be made available to students who request them, but should not be forced upon students, or presented as the only option," and that transgender students should be allowed to use a bathroom consistent with their gender identity. *Id*. at 10-11.

The ODE transgender guidance explains that the purpose of the document is to "suggest best practices and to provide a foundation for the educational community to build safe and supportive school cultures," and is designed to "be used by school boards, administrators and other members of the educational community to guide development of school procedures and district policies related to transgender and gender nonconforming students." *Id*. at 2.

IV. Argument

In their lone claim against State Defendants, Plaintiffs ask this Court to declare that the Oregon Department of Education and the Oregon Governor acting in her official capacity have violated state law, and to potentially award additional injunctive relief. This claim is barred by the State's Sovereign Immunity, sometimes referred to as Eleventh Amendment Immunity,[2] and the State should be dismissed as a defendant.

As a sovereign in our constitutional system, an unconsenting state and its departments are absolutely immune from suit in federal court, regardless of the relief sought. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100 (1984).[3] The Oregon Department of Education is

[2] As the Ninth Circuit has explained, "Courts have often 'referred to the States' immunity from suit as "Eleventh Amendment immunity." The phrase is convenient shorthand but something of a misnomer, for the sovereign immunity of the States neither derives from nor is limited by the terms of the Eleventh Amendment.'" *Stanley v. Trustees of Cal. State Univ.*, 433 F.3d 1129, 1133 (9th Cir. 2006) (citing *Alden v. Maine*, 527 U.S. 706, 713 (1999)).

[3] State sovereign immunity can be overcome in cases where Congress has explicitly abrogated that immunity in a federal statute, pursuant to Congress' powers under the Fourteenth Amendment. *Stanley*, 433 F.3d at 1133. The complaint does not assert that has occurred in connection with the state law claim at issue here. To the extent the complaint's reference to the court's supplemental jurisdiction authority could be construed as such an assertion, it fails, because the Ninth Circuit has held the supplemental jurisdiction statute does not abrogate state sovereign immunity. *See Id*. at 1133-34 ("The exercise of supplemental jurisdiction is governed

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a department of the State, there has been no consent to suit, and the claim against it must thus be dismissed. *See C. O. v. Portland Pub. Sch.*, 406 F. Supp. 2d 1157, 1175-76 (D. Or. 2005), *adhered to on reconsideration sub nom. Oman v. Portland Pub. Sch.*, No. CV05-1715-HU, 2009 WL 5167996 (D. Or. Dec. 18, 2009) (dismissing claim against ODE under ORS 659A.403 for failure to state a claim, and "additionally . . . on Eleventh Amendment grounds").

The State's absolute sovereign immunity from suit generally also extends to state officials sued in their official capacities, as "the state is the real, substantial party in interest" in such suits. *Pennhurst*, 465 U.S. at 101 (internal quotation marks and citation omitted). The Claim against Governor Brown is thus barred as well.

The so-called "*Ex parte Young*" exception does not save plaintiff's claim against Governor Brown. The "*Ex parte Young*" exception is a well-recognized – but limited – exception to this general rule barring official capacity suits against state officials. *Id.* at 102 (citing *Ex parte Young*, 209 U.S. 123 (1908)). Under this exception, a state official may be sued in federal court in her official capacity if the relief sought is "prospective injunctive relief to prevent a continuing violation of *federal* law." *Green v. Mansour*, 474 U.S. 64, 68 (1985) (emphasis added). This exception is premised on the proposition that federal court authority to enjoin "continuing violation of federal law [is] necessary to vindicate the federal interest in assuring the supremacy of that law." *Id.* Here, however, the only thing plaintiffs ask the federal court to do with respect to Governor Brown is to find and enjoin an alleged violation of *state* law. Such claims do not fit within the *Ex parte Young* exception, and are barred. *See Hale v. State of Ariz.*, 967 F.2d 1356, 1369 (9th Cir. 1992), *on reh'g*, 993 F.2d 1387 (9th Cir. 1993) ("the Eleventh Amendment deprives federal courts of jurisdiction to order state actors to comply with state law"). That is because "a federal court's grant of relief against state officials on the basis of

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by 28 U.S.C. § 1367 . . . [which] *does not abrogate state sovereign immunity* for supplemental state law claims." (Emphasis added.)).

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state law does not vindicate the supreme authority of federal law." *Seldovia Native Ass'n, Inc. v. Lujan*, 904 F.2d 1335, 1349-50 (9th Cir. 1990) (internal quotation marks omitted). As the Supreme Court put it in *Pennhurst*, "it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law. Such a result conflicts directly with the principles of federalism that underlie the Eleventh Amendment." 465 U.S. at 106.

IV. Conclusion

As the foregoing demonstrates, the single claim against the State Defendants is barred by the State's sovereign immunity, and fails as a matter of law. State Defendants respectfully request that the Court dismiss them as parties.

The State takes seriously its responsibility to support equity for every Oregon student. Equity includes an educational environment safe and free from discrimination and harassment, and ensuring that every student – including transgender students – has equal access to educational programs and activities. The State's role is to support local districts in their day-to-day work of carrying these policies forward, and in promoting compliance with state and federal law. The State has supported and continues to support The Dallas School District's efforts in creating a safe, supportive and nondiscriminatory environment for its students, including transgender students.

Although the State moves to be dismissed as a party at this time, the State intends to continue to follow these proceedings closely. The State may also, at a later point, seek the

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Court's leave to appear and be heard in an amicus capacity, particularly to the extent the Court opts to exercise supplemental jurisdiction over the remaining state law claims.

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Respectfully submitted,

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