No. 18-35708

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

Plaintiffs-Appellants,

v.

WILLIAM P. BARR, in his official capacity as U.S. Attorney General, BETSY DEVOS, in her official capacity as U.S. Secretary of Education, UNITED STATES DEPARTMENT OF EDUCATION, UNITED STATES DEPARTMENT OF JUSTICE, DALLAS SCHOOL DISTRICT NO. 2,

Defendants-Appellees,

BASIC RIGHTS OREGON,

Intervenor-Defendant-Appellee.

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

APPELLEE BRIEF FOR THE FEDERAL DEFENDANTS

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STATEMENT OF JURISDICTION

Plaintiffs' complaint invokes the district court's jurisdiction under 28 U.S.C. §§ 1331, 1343, 1367. The district court entered judgment dismissing the case on July 24, 2018. ER8. Plaintiffs filed a notice of appeal on August 21, 2018. ER1. This Court has jurisdiction over this appeal under 28 U.S.C. § 1291, but plaintiffs lack standing for the reasons stated in this brief.

STATEMENT OF THE ISSUES

Whether the district court correctly concluded that plaintiffs lack Article III standing to sue the federal defendants based on a guidance document that those defendants had withdrawn before the suit was filed, and whether plaintiffs have forfeited any challenge to that holding.

STATEMENT OF THE CASE

A. STATUTORY AND REGULATORY BACKGROUND

1. Title IX of the Education Amendments of 1972 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). The U.S. Department of Education's regulations implementing Title IX provide that recipients of Federal funds

"may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex." 34 C.F.R. § 106.33; *see* 20 U.S.C. § 1682 (authorizing regulations).

The Department of Education at times issues informal guidance on Title IX. The Department has issued guidance on sexual violence and on single-sex classes and extracurricular activities. *See* U.S. Dep't of Educ., *Questions and Answers on Title IX and Sexual Violence* (Apr. 2014), https://go.usa.gov/xP644 (2014 Sexual Violence Q&A) (ER151)[1]; U.S. Dep't of Educ., *Questions and Answers on Title IX and Single-Sex Elementary and Secondary Classes and Extracurricular Activities* (Dec. 2014), https://go.usa.gov/xP64g (2014 Single-Sex Classes Q&A) (ER204). The Department has also provided a resource guide for recipients' Title IX coordinators. *See* U.S. Dep't of Educ., *Title IX Resource Guide* (Apr. 2015), https://go.usa.gov/xP64T (2015 Title IX Resource Guide) (ER240).

[1] In September 2017, the Department of Education withdrew the 2014 Sexual Violence Q&A and replaced it with interim guidance on campus sexual misconduct. *See* U.S. Dep't of Educ., Dear Colleague Letter (Sept. 22, 2017), https://go.usa.gov/xP64r.

2. Relevant here, the Department of Education's informal guidance has in the past specifically addressed Title IX's requirements with respect to transgender students and toilet, locker room, and shower facilities. In May 2016, the U.S. Department of Justice and Department of Education together issued a "Dear Colleague Letter" that summarized the agencies' views regarding "a school's Title IX obligations regarding transgender students." U.S. Dep't of Justice & U.S. Dep't of Educ., Dear Colleague Letter 1 (May 13, 2016), https://go.usa.gov/xP64b (May 2016 Dear Colleague Letter) (ER272). That May 2016 Dear Colleague Letter discussed Title IX's requirements with respect to "sex-segregated restrooms, locker rooms, shower facilities, housing, and athletic teams." *Id.* at 3 (ER274). The guidance expressed the view that, "[w]hen a school provides sex-segregated activities and facilities, transgender students must be allowed to participate in such activities and access such facilities consistent with their gender identity." *Id.* The May 2016 Dear Colleague Letter was challenged in a number of suits against the federal government,[2] while other litigation

[2] *See, e.g.*, *Students & Parents for Privacy v. U.S. Dep't of Educ.*, No. 16-4945 (N.D. Ill. filed May 4, 2016); *North Carolinians for Privacy v. U.S. Dep't of Justice*, No. 16-845 (M.D.N.C. filed May 10, 2016); *Texas v. United States*,

proceeded against only local school districts. *E.g.*, *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709 (4th Cir. 2016); *Evancho v. Pine-Richland Sch. Dist.*, 237 F. Supp. 3d 267 (W.D. Pa. 2017).

In February 2017, the Department of Justice and Department of Education withdrew the May 2016 Dear Colleague Letter. *See* U.S. Dep't of Justice & U.S. Dep't of Educ., Dear Colleague Letter (Feb. 22, 2017), https://go.usa.gov/xP64Z (February 2017 Dear Colleague Letter). The withdrawal letter observed the presence of "significant litigation regarding school restrooms and locker rooms." *Id.* at 1 In light of that litigation, and with "due regard for the primary role of the States and local school districts in establishing educational policy," the federal government "decided to withdraw and rescind" its prior May 2016 Dear Colleague Letter. *Id.* The federal government also stated that it "will not rely on the views expressed within" the May 2016 Dear Colleague Letter. *Id.*[3]

No. 16-54 (N.D. Tex. filed May 25, 2016); *Board of Educ. of Highland Local Sch. Dist. v. U.S. Dep't of Educ.*, No. 16-524 (S.D. Ohio filed June 10, 2016); *Women's Liberation Front v. U.S. Dep't of Justice*, No. 16-915 (D.N.M. filed Aug. 11, 2016); *Privacy Matters v. U.S. Dep't of Educ.*, No. 16-3015 (D. Minn. filed Sept. 7, 2016).

[3] Following the withdrawal, claims against the federal government were dismissed. *See Students & Parents for Privacy*, No. 16-4945 (N.D. Ill.

3. Oregon law separately provides "full and equal accommodations, advantages, facilities and privileges of any place of public accommodation, without any distinction, discrimination or restriction on account of . . . sexual orientation." Or. Rev. Stat. § 659A.403(1). Oregon defines "[s]exual orientation" to include "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." *Id.* § 174.100(7).

B. FACTUAL BACKGROUND

Plaintiffs are two Oregon organizations, two students, and three of their parents. ER69-70. When this suit was filed, the student plaintiffs were current and prospective students of Dallas High School in the Dallas School District No. 2 ("Dallas School District") of Dallas, Oregon. ER71.[4]

June 20, 2017), Doc. 178; *Texas*, No. 16-54 (N.D. Tex. Mar. 3, 2017), Doc. 128; *Highland*, No. 16-524 (S.D. Ohio June 20, 2017), Doc. 131; *Women's Liberation Front*, No. 16-915 (D.N.M. Mar. 16, 2017), Doc. 20; *Privacy Matters*, No. 16-3015 (D. Minn. Apr. 13, 2017), Doc. 83. Plaintiffs in the *North Carolina for Privacy* suit voluntarily dismissed their claims prior to the February 2017 withdrawal. *See* No. 16-845 (M.D.N.C. Aug. 30, 2016), Doc. 60.

[4] Plaintiffs also include Nicole Lillie, who is not identified in the complaint as a student, a parent, or any other interested party. Plaintiff Lindsay Golly, another former student, did not appeal. ER2.

This dispute pertains to Student A, a Dallas High School student who identifies as a transgender male. ER88. In September 2015, as a sophomore, Student A requested to use the locker room and shower facilities designated for male students at Dallas High School. ER89. On November 15, 2015, Dallas High School adopted a Student Safety Plan titled "Transgender Student Access to Locker Room." ER72. That Plan "support[s] a transgender male expressing the right to access the boy[s'] locker room at Dallas High School" and permits Student A to use Student A's preferred locker room subject to certain conditions. ER132. The Plan also indicates that, while Student A had not indicated "which bathroom he feels comfortable using," Student A could "use any of the bathrooms in the building to which he identifies sexually." ER132-33.

Students at Dallas High School allegedly circulated a petition with objections, but the school's principal "confiscated the petitions." ER92. Then, at three separate school board meetings between December 2015 and February 2016, "despite public opposition from Plaintiffs and many other parents and students, [the Dallas School District] defended its policies and practices indefinitely granting Student A right of entry to and use of any and all boys' locker rooms, shower rooms and restrooms." *Id.*

These actions and the Student Safety Plan took place prior to both the federal government's May 2016 Dear Colleague Letter on transgender students and their subsequent February 2017 withdrawal of that guidance.

C. PRIOR PROCEEDINGS

1. In November 2017, plaintiffs brought this action against the Dallas School District, the Oregon Department of Education, and the Governor of Oregon. Also named as defendants were the U.S. Department of Justice, U.S. Department of Education, Attorney General, and Secretary of Education (the "federal defendants"). With respect to plaintiffs' injury, the complaint alleges that male and female students have suffered psychological and dignitary harms. ER80-81, 94-95.

Plaintiffs assert that the federal defendants issued a "new Rule" that addresses transgender students. ER85. Plaintiffs recognize that the May 2016 Dear Colleague Letter—the culmination of that "new Rule"—had already been withdrawn. ER79-80, 85. "Notwithstanding" that withdrawal, the complaint alleges that "the Rule has not been formally repealed, and it has continuing legal force and effect [that is] binding" upon the Dallas School District. ER80. The complaint also alleges that

"[d]espite" the withdrawal, the Dallas School District "has not changed its policies." ER79-80.

Plaintiffs seek to enjoin all defendants "from enforcing the Student Safety Plan." ER127-28. Plaintiffs also would enjoin the federal defendants from "taking any action" based on the "new rule," including from implementing the withdrawn May 2016 Dear Colleague Letter. ER128**.**

2. Plaintiffs stipulated to dismissal of defendants Oregon Department of Education and the Governor of Oregon, who subsequently participated as amici curiae. The district court then granted intervention to defendant Basic Rights Oregon. ER839 (April 19, 2018 Minute Order).

3. On July 24, 2018, the district court dismissed the case. ER8. The court dismissed defendants Dallas School District and Basic Rights Oregon on the merits. ER31-65. Separately, the court explained that the federal defendants had "move[d] that Plaintiffs' claims [against them] be dismissed for lack [of] standing," ER62, and concluded that two of the three requirements for Article III standing were missing. ER23-30.

As to causation, the district court concluded that "[t]he sequence of events in this case shows that [the Dallas School District's] Plan was enacted in response to Student A's accommodation requests, not [the]

Federal Defendants' actions." ER28. The court held that plaintiffs' "sole causal" theory—that the federal defendants had "influence[d]" the Dallas School District's "decision to enact and enforce the Plan"—"is merely speculative and fails to plausibly establish causation." ER24, 28. The May 2016 Dear Colleague Letter was "issued six months after the Plan was made effective" in November 2015, and no other guidance issued by the federal defendants "state[s] that Title IX requires school districts to permit transgender students to use school facilities consistent with their gender-identity." ER25 (citing 2014 Sexual Violence Q&A; 2014 Single-Sex Classes Q&A; 2015 Title IX Resource Guide). The court then found that plaintiffs had not plausibly alleged that a Department of Education investigation of an Illinois school district in November 2015 somehow caused the Student Safety Plan. ER28-29.

As to redressability, the district court concluded that the federal defendants had "unequivocally withdrawn the only guidance on the issue of transgender student access to school facilities" and had "forbidden reliance on that guidance." ER30. The Dallas School District instead "adopted its plan independent of any [federal] action" and "retains the discretion to continue enforcing the Plan," notwithstanding any relief

against the federal defendants. *Id.* The court explained that "rescission" of any guidance documents would thus provide no relief, especially against the backdrop of its view of other obligations based in Oregon law. *Id.*

SUMMARY OF ARGUMENT

The district court correctly concluded that plaintiffs lacked Article III standing to challenge the already-withdrawn May 2016 Dear Colleague Letter and properly dismissed the federal defendants. Although plaintiffs noticed an appeal from that dismissal, their opening brief never mentions the federal defendants, their challenge to any guidance documents, or even the basis for the court's dismissal of the federal defendants. This Court should treat the claims against the federal defendants as abandoned and may rest its decision on that basis alone. *See Fields v. Palmdale Sch. Dist.*, 427 F.3d 1197, 1203 n.6 (9th Cir. 2005). In any event, the district court correctly concluded that plaintiffs lack standing. Plaintiffs have neither explained how the federal defendants *caused* the Dallas School District to adopt its Student Safety Plan six months prior to the issuance of the challenged May 2016 Dear Colleague Letter. Nor have they explained what *redress* they could now obtain when the May 2016 Dear Colleague Letter and the views expressed therein have already been rescinded. This Court should affirm.

STANDARD OF REVIEW

This Court reviews de novo the dismissal for lack of Article III standing. *Novak v. United States*, 795 F.3d 1012, 1017 (9th Cir. 2015).

ARGUMENT

A. PLAINTIFFS HAVE ABANDONED THEIR CLAIMS AGAINST THE FEDERAL DEFENDANTS BY FAILING TO CHALLENGE THE DISTRICT COURT'S DISMISSAL OF THOSE DEFENDANTS

The district court dismissed the federal defendants on the basis that plaintiffs lacked Article III standing, but, despite noticing an appeal from that dismissal, the opening brief nowhere challenges the dismissal of the federal defendants. Plaintiffs fail to even mention the federal defendants, much less any challenge to the federal defendants' guidance documents or the basis for the court's dismissal of the federal defendants.

This Court "will not ordinarily consider matters on appeal that are not specifically and distinctly raised and argued in the appellant's opening brief." *Rattlesnake Coalition v. EPA*, 509 F.3d 1095, 1100 (9th Cir. 2007) (quoting *International Union of Bricklayers & Allied Craftsman v. Martin Jaska, Inc.*, 752 F.2d 1401, 1404 (9th Cir. 1985)). Even though the district court's opinion devotes eight pages to why plaintiffs lack standing to sue the federal defendants, *see* ER23-30, plaintiffs do not devote a single sentence to

arguing that the court's dismissal of the federal defendants from this suit should be reversed. Indeed, the word "standing" does not appear in plaintiffs' brief. Their argument addresses only why the remaining defendants—the Dallas School District and Basic Rights Oregon—acted unlawfully. Plaintiffs' have "abandoned [their] claim[s]" against the federal defendants "on appeal by not challenging [the] dismissal 'clearly and distinctly in the opening brief.'" *United States ex rel. Silingo v. WellPoint, Inc.*, 904 F.3d 667, 678 n.2 (9th Cir. 2018) (quoting *McKay v. Ingleson*, 558 F.3d 888, 891 n.5 (9th Cir. 2009)); *Asarco LLC v. Atlantic Richfield Co.*, 866 F.3d 1108, 1127 (9th Cir. 2017) ("deem[ing] abandoned" "any contention that the district court erred on [an] issue" where the issue is "[c]onspicuously absent from [the opening] brief")

These rules pertaining to the abandonment of issues apply when the district court has dismissed defendants on grounds of subject-matter jurisdiction. *See generally City of Oakland v. Lynch*, 798 F.3d 1159, 1163 (9th Cir. 2015) ("A suit brought by a plaintiff without Article III standing is not a 'case or controversy,' and an Article III federal court therefore lacks subject matter jurisdiction over the suit." (quoting *Cetacean Cmty. v. Bush*, 386 F.3d 1169, 1174 (9th Cir. 2004)). This Court has held that when a

district court dismisses "causes of action on jurisdictional grounds," the failure of the "opening brief [to] renew their opposition to the district court's dismissal" means that "[t]hose issues are . . . waived" on appeal. *Fields v. Palmdale Sch. Dist.*, 427 F.3d 1197, 1203 n.6 (9th Cir. 2005); *see, e.g.*, *Rodney v. Department of Veterans Affairs*, No. 16-56820, 2017 WL 6345794 (9th Cir. Oct. 12, 2017) (summary affirmance on this basis). So too here, and this Court may affirm the judgment dismissing the federal defendants on this basis.

B. THE DISTRICT COURT IS CORRECT THAT PLAINTIFFS LACK STANDING TO SUE THE FEDERAL DEFENDANTS

In any event, the district court properly concluded that plaintiffs lack standing to sue the federal defendants. ER23-30, 62, 64-65. To establish Article III standing, a person must demonstrate (1) an "injury in fact," (2) that the injury is "fairly . . . traceable to the challenged action of the defendant," and (3) that it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (quotations and alterations omitted). If an "asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of *someone else*, much more is needed,"

because "causation and redressability ordinarily hinge on the response of the regulated (or regulable) third party." *Id.* at 562. "[W]here the alleged injury in fact is caused by a third party, a plaintiff must establish that the hoped-for substantive action on the part of the government could alter the third party's conduct in a way that redresses the injury in fact." *Center for Biological Diversity v. Export-Import Bank*, 894 F.3d 1005, 1013 (9th Cir. 2018). Because plaintiffs have shown neither causation nor redressability, this Court should affirm.

To start, the district court correctly concluded that "[p]laintiffs have not alleged that their purported injuries are fairly traceable to [the] Federal Defendants' actions." ER29. The Dallas High School received a request in September 2015 from Student A for accommodations in school facilities, and the resulting school actions were "in response to Student A's accommodation request, not [the] Federal Defendants' actions." ER28. The Dallas School District formalized that response in the Student Safety Plan in November 2015. ER90. The challenged May 2016 Dear Colleague Letter on transgender students, however, was not issued until *six months later*.

Nor does the complaint plausibly allege that the federal defendants surreptitiously caused the Dallas School District to accept Student A's

request. Nothing on the face of the Student Safety Plan—or any other policy—indicates that the Dallas School District was influenced by federal actions. Further, as the district court found, nothing in preexisting guidance documents requires "school districts to permit transgender students to use school facilities consistent with their gender-identity." ER25 (citing 2014 Sexual Violence Q&A; 2014 Single-Sex Classes Q&A; 2015 Title IX Resource Guide). Even though the complaint refers to a single Department of Education investigation in *Illinois* that had taken place prior to the Student Safety Plan, earlier in November 2015, Student A's request preceded that action and the court properly found that plaintiffs had not plausibly alleged that the Dallas School District was responding to that faraway action and not Student A's request. ER28-29. At bottom, the complaint simply does not "offer facts showing" that the federal defendants' conduct was even "a substantial factor motivating" the Dallas School District's actions; rather, the complaint relies solely on "speculation or guesswork" about how the federal defendants might have played a role in the District's own decisions. *Mendia v. Garcia*, 768 F.3d 1009, 1013 (9th Cir. 2014) (quotations omitted).

For similar reasons, the district court also correctly recognized as to redressability that the federal defendants had withdrawn the challenged May 2016 Dear Colleague Letter months before plaintiffs filed suit in November 2017. ER30. The federal defendants not only completely "withdr[e]w and rescind[ed]" the May 2016 Dear Colleague Letter, but also announced that the federal government "will not rely on *the views expressed* within" that guidance. February 2017 Dear Colleague Letter 1 (emphasis added).[5] There is, thus, no meaningful relief that plaintiffs could have obtained from the federal defendants, and every court and litigant involved in challenges to the May 2016 Dear Colleague Letter has seemingly agreed that no live dispute against the federal government remains. *See supra* p.4 n.3.

Plaintiffs' sole theory has been that "[n]otwithstanding" the withdrawal of the relevant guidance, what they characterize as "the Rule" has "not been formally repealed, and it has continuing legal force and

[5] The complaint's odd request that the government remove older guidance documents from the federal government's websites, *see* ER127-28, is also without merit, especially as the February 2017 Dear Colleague Letter withdrew not only the May 2016 Dear Colleague Letter but also "the views expressed" in that letter (regardless of the original source of those views).

effect [that is] binding" on the Dallas School District. ER80. But they can identify no such binding rule. While plaintiffs might want the federal defendants to take *additional* steps beyond withdrawal of the guidance to compel the Dallas School District to maintain separate facilities, *see* ER127-28, they do not allege any legal basis requiring the Department of Education to do so.

Indeed, the complaint is clear that plaintiffs themselves believe that the Dallas School District would maintain the Student Safety Plan irrespective of any relief against the federal defendants. Plaintiffs admit that "[d]espite" the withdrawal of the May 2016 Dear Colleague Letter, the Dallas School District "has not changed its policies." ER88. The Dallas School District has thus on its own accord seized student petitions opposing the Student Safety Plan, defended the Plan at three separate school-board meetings, and conveyed its independent desire to curb what it views as "intolerance and bigotry." ER92, 96. Because those actions were taken in the complete *absence* of federal action, there can be no dispute that the Student Safety Plan represents an "unfettered choice" of the Dallas School District in the "exercise of broad and legitimate discretion." *Missouri ex rel. Koster v. Harris*, 847 F.3d 646, 654 (9th Cir. 2017) (quoting

Lujan, 504 U.S. at 562). Moreover, the district court observed that any relief against the federal defendants also "would not affect [the] District's obligations" that may exist under Oregon law, which further underscores the likelihood the Plan "would continue and Plaintiffs' injury would persist" despite any relief against the federal defendants. ER30.

CONCLUSION

For the foregoing reasons, the judgment of the district court dismissing the federal defendants should be affirmed.

Respectfully submitted,

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MARCH 2019

STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, the government states that it knows of no related case pending in this Court.

s/ Dennis Fan
DENNIS FAN

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 3,514 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5) and (6) because it was prepared using Microsoft Word 2016 in Book Antiqua 14-point font, a proportionally spaced typeface.

s/ Dennis Fan
DENNIS FAN

CERTIFICATE OF SERVICE

I hereby certify that on March 4, 2019, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

s/ Dennis Fan
DENNIS FAN