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Molly C. Dwyer, Clerk of Court
Office of the Clerk
U.S. Court of Appeals for the Ninth Circuit
P.O. Box 193939
San Francisco, CA 94119-3939

April 23, 2024

Re: *Roe v. Critchfield*, Case No. 23-2807
Notice of Supplemental Authority Pursuant to Fed. R. App. P. 28(j) and Circuit Rule 28-6

Dear Ms. Dwyer:

On April 19, 2024, the Department of Education released new Title IX regulations, available at https://www2.ed.gov/about/offices/list/ocr/docs/t9-unofficial-final-rule-2024.pdf. Relevant excerpts are attached. The regulations take effect August 1, 2024, thus governing the 2024-25 academic year.

Defendants' argument that Title IX permits S.B.1100 is already meritless under current law. A new regulation confirms that conclusion and conclusively forecloses Defendants' argument. Defendants relied on 34 C.F.R. § 106.33, which permits sex separation in facilities. But language added to 34 C.F.R. § 106.31(a)(2) confirms that even where regulations permit sex separation, schools "must not" carry out such separation in a manner that subjects a person to more than de minimis harm. Attachment A at 1524. This language further specifies that

preventing participation "consistent with the person's gender identity subjects a person to more than de minimis harm on the basis of sex." *Id.*

As the Department explains, schools can "separate students on the basis of sex in contexts where separation is generally not harmful, and § 106.31(a)(2) does not change that." *Id.* at 1270. But where separation causes more than de minimis harm, "such as when it denies a transgender student access to a sex-separate facility … consistent with that student's gender identity," it violates Title IX's nondiscrimination mandate. *Id.* at 1268. That holds true "even if 'sex' under Title IX were to mean only sex assigned at birth." *Id.* at 1277.

The Department's accompanying discussion is also relevant to several issues addressed by Plaintiffs:

- the substantial harm to transgender students from being excluded from facilities matching their gender identity (Attachment B at 1268 and 1272-73; Pls.Opening.Br.54-59);
- the import of *United States v. Virginia* (Attachment B at 1269-70; Pls.Reply.Br.13-14);
- schools' ability to protect safety and privacy without discriminating against transgender students (Attachment B at 1274-75; Pls.Reply.Br.10-18);

- the statute governing "living facilities" such as university dormitory housing, 20 U.S.C. § 1686, is not the statutory authority for the restroom regulation (Attachment B at 1276-77; Pls.Reply.Br.22 n.10);
- a regulation cannot override Title IX's statutory nondiscrimination mandate (Attachment B at 1278; Pls.Opening.Br.49 n.9); and
- Title IX itself provides notice under the Spending Clause (Attachment C at 1218-19; Pls.Reply.Br.25).

Respectfully submitted,

s/ Peter C. Renn

Peter C. Renn
Counsel for Plaintiffs-Appellants

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate ACMS system on April 23, 2024. I certify that all participants in the case are registered ACMS users and that service will be accomplished by the appellate ACMS system.

s/ Peter C. Renn
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