12-11074

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

JON TIMOTHY CARMICHAEL, Individually and in their representative capacities in the Estate of JTC, deceased; TAMI CARMICHAEL, Individually and in their representative capacities in the Estate of JTC, deceased,

Plaintiffs-Appellants

v.

RONNIE GALBRAITH, President of the School Board of the Joshua Independent School District, in his Official Capacity; RAY DANE, Superintendent of the Joshua Independent School District, in his Official Capacity; KENNETH RANDALL WATTS, Individually; DAYTON BARRONE, Individually; WALTER STRICKLAND, Individually; ELIZABETH ROSATELLI, Inidividually; DAYTON BARONE, Individually,

Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PLAINTIFFS-APPELLANTS AND URGING REVERSAL

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IN THE UNITED STATES COURT OF APPEALS
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No. 12-11074

JON and TAMI CARMICHAEL, on behalf of their son J.T.C.,

Plaintiffs-Appellants

v.

RONNIE GALBRAITH, *et al.*,

Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PLAINTIFFS-APPELLANTS AND URGING REVERSAL

INTEREST OF THE UNITED STATES

Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq.* (Title IX), prohibits sex discrimination in educational programs and activities receiving federal financial assistance. The United States Department of Education (D. Ed.) provides federal funding to those programs and activities, and oversees their compliance with Title IX. 20 U.S.C. 1682. Through its Office for Civil Rights (OCR), D. Ed. promulgates regulations effectuating Title IX, 34 C.F.R. Pt. 106, and policy guidance regarding the statute's prohibition against sexual

harassment. See Sexual Harassment Guidance, 62 Fed. Reg. 12,034 (Mar. 13, 1997), amended by D. Ed., OCR, Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties (Jan. 19, 2001) (OCR 2001 Revised Sexual Harassment Guidance), *available at* http://www2.ed.gov/offices/OCR/archives/pdf/shguide.pdf; OCR "Dear Colleague" Letter: Harassment and Bullying (Oct. 26, 2010) (OCR 2010 Dear Colleague Letter), *available at* http://www.ed.gov/ocr/letters/colleague-201010.pdf.

The Department of Justice (DOJ), through its Civil Rights Division, coordinates D. Ed.'s and other executive agencies' implementation and enforcement of Title IX. Exec. Order No. 12,250, 45 Fed. Reg. 72,995 (Nov. 2, 1980); 28 C.F.R. 0.51. While DOJ may file federal actions in Title IX cases referred by D. Ed. and may independently file sex discrimination claims under Title IV of the Civil Rights Act of 1964, 42 U.S.C. 2000c *et seq.*, private plaintiffs have an implied right of action and play a critical role in enforcing Title IX. See *Gebser* v. *Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998) (citing *Cannon* v. *University of Chi.*, 441 U.S. 677 (1979), and *Franklin* v. *Gwinnett Cnty. Pub. Sch.*, 503 U.S. 60 (1992)). Thus, to facilitate Title IX's effective enforcement, the United States has an interest in ensuring that an individual's right to sue and obtain relief under the statute is properly recognized and protected.

STATEMENT OF THE ISSUE

Whether the district court erred in dismissing plaintiffs' Second Amended Complaint on the ground that it failed to state a plausible claim of sex discrimination in violation of Title IX of the Education Amendments of 1972.

STATEMENT OF THE CASE

1. Facts And Prior Proceedings

This case arises out of student-on-student, same-sex sexual harassment that culminated in the suicide of Jon Carmichael, a 13-year-old eighth grader. His parents sued officials of the Joshua Independent School District (JISD), a recipient of federal financial assistance, and sought damages under Title IX.[1] The district court dismissed plaintiffs' First and Second Amended Complaints in separate written decisions, the latter with prejudice, on the ground that each failed, *inter alia*, to allege discrimination on the basis of sex, as required to establish a Title IX violation. R 132, 292.[2]

The Second Amended Complaint (complaint) alleges that JISD violated Title IX when school personnel failed to respond to student-on-student, same-sex

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[1] Plaintiffs also filed claims under 42 U.S.C. 1983 and Texas law against various school personnel. We take no position with respect to those claims.

[2] "R _" refers to the Bates Stamped "USCA5" page number of the Record on Appeal filed with this Court.

harassment on the basis of sex and "gender-based stereotypes" that occurred over the course of an academic school year. See R 167. The complaint asserts that "[o]ver the course of [the 2009-2010] school year," members of the boys' middle school football team "[o]n numerous occasions" "accosted" Jon in the boys' locker room and "oftentimes" removed his underwear. R 159-160, 162. It further states that the same students physically assaulted, bullied, harassed, and verbally attacked Jon on "an almost daily basis," "thr[e]w him into the trash can * * * a few times a week," "place[d] [him] into a school dumpster upside down," and "forced his head into the toilet bowl, and flushed the toilet" "on a number of occasions." R 159-160.

The complaint also describes an incident that occurred a few days before Jon took his life. R 162-163. On the Friday before spring break, the same harassers stripped Jon naked, tied him up, "parade[d]" him before a group of boys while yelling "fag," "queer," "homo," and "douche," and placed him in a trash can. R 162-163. Afterwards, they publicly exposed Jon's naked body by uploading a video of the attack onto YouTube. R 163. According to the complaint, other students stated that Jon was harassed "because he was 'short,' apparently a metaphor for [his] not being strong enough or masculine enough." R 164. In addition, the complaint avers that sometime after Jon's suicide, school officials "destroyed, withheld, or purposely hid[]" a daily journal that Jon was required to

keep for class, and that contained numerous specific references to his "cries for help." R 165.

2. The District Court's Decision

The district court held that plaintiffs' complaint failed to state a plausible Title IX claim of sex discrimination because it included "just one incident" with "sexual overtones" "amid numerous ones that contain no hint of gender-based animus." R 305-306. The court explained that "[i]t is not plausible to infer from one incident – regardless how egregious – that all of the numerous instances of harassment and bullying alleged in the * * * complaint were based on Jon's male sex," rather than "personal animus" or the harassers' belief that Jon "was an easy target, regardless of his sex." R 306. According to the court, because plaintiffs' complaint "essentially paints a picture of a middle school boy who was constantly harassed and bullied regardless of his gender rather than based on his gender," it fails to plead sex discrimination in violation of Title IX. R 305.

The court also concluded that the offenders' sexual epithets during the final incident did not "enable [it] to draw the reasonable inference that the harassment and bullying [were] based on [Jon's] male sex." R 304 (internal quotation marks omitted). The court reasoned that while the assailants' words "might reveal an animus based on [Jon's] male gender, they may also simply represent more generally a characteristic of the perpetrator's sociopathic behavior" because

"[e]xperience and common sense teach that bullies and harassers of this age are not particular about what they say when bullying and harassing their victims." R 304. The court concluded that plaintiffs' complaint failed to state a plausible Title IX claim of sex discrimination, because it must "must do more than allege that [Jon] was the victim of constant harassment and bullying based on unspecified reasons," and because it "includes just one incident in which the predators used words that could suggest a gender-based animus rather than a personal animus." R 305-306.

ARGUMENT

THE DISTRICT ERRED IN DISMISSING PLAINTIFFS' TITLE IX CLAIM

This case presents an egregious set of alleged facts and a district court decision that fails to properly apply the standards for assessing the adequacy of a complaint. In our view, the district court erred in dismissing this complaint on the ground that plaintiffs failed to allege sufficient facts to support a plausible claim that Jon was subjected to discrimination on the basis of sex.

A. Standard Of Review And Pleading Requirements

An appellate court reviews *de novo* a district court's dismissal of a complaint for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). See *Gibson* v. *Texas Dep't of Ins.*, 700 F.3d 227, 233 (5th Cir. 2012). It must "accept[] all well-pleaded facts as true and view[] those facts in the light most

favorable to the plaintiff." *Bowlby* v. *City of Aberdeen*, 681 F.3d 215, 219 (5th Cir. 2012) (quoting *Bustos* v. *Martini Club Inc.*, 599 F.3d 458, 461 (5th Cir. 2010)).

Federal Rule of Civil Procedure 8(a)(2) requires a complaint to contain "a short and plain statement of the claim showing that the pleader is entitled to relief." A complaint satisfies that standard and "will survive a motion to dismiss if its facts * * * 'state a claim to relief that is plausible on its face.'" *Wilson* v. *Birnberg*, 667 F.3d 591, 595 (5th Cir.) (quoting *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 570 (2007)), cert. denied, 133 S. Ct. 32 (2012). "A claim has facial plausibility when the plaintiff pleads fact[s] * * * that allow[] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Hale* v. *King*, 642 F.3d 492, 499 (5th Cir. 2011) (quoting *Ashcroft* v. *Iqbal*, 556 U.S. 662, 678 (2009)). As a result, "[t]he plausibility standard * * * is not akin to a 'probability requirement.'" *Wilson*, 667 F.3d at 600 (quoting *Iqbal*, 556 U.S. at 678, and *Twombly*, 550 U.S. at 556). Rather, it merely requires a plaintiff to allege facts sufficient to "nudge[] * * * claims across the line from conceivable to plausible." *Twombly*, 550 U.S. at 570.

It is well-settled that a plaintiff alleging discrimination need not plead "specific facts establishing a prima case of discrimination" to state a plausible claim and avoid dismissal. *Swierkiewicz* v. *Sorema N.A.*, 534 U.S. 506, 508, 511 (2002) (reversing dismissal of Title VII complaint). See also *Twombly*, 550 U.S. at

570; *Flores* v. *Select Energy Servs., LLC*, No. 11-11024, 2012 WL 3530911, at *3 (5th Cir. Aug. 16, 2012) (applying *Swierkiewicz* to reverse dismissal of complaint for failure to state age discrimination claim). After all, a complaint need not include sufficient facts to succeed on the merits, see *Lormand* v. *US Unwired, Inc.*, 565 F.3d 228, 257 (5th Cir. 2009); *Ackerson* v. *Bean Dredging LLC*, 589 F.3d 196, 209 (5th Cir. 2009), and the fact that it leaves "material facts * * * unresolved" or "in dispute" does not justify its dismissal, *Miles* v. *Beckworth*, No. 11-40407, 2011 WL 6792770, at *5 (5th Cir. Dec. 28, 2011). Rather, a complaint must merely allege "enough facts to give rise to a reasonable hope or expectation that discovery will reveal evidence" of the claims or "elements." *Lormand*, 565 F.3d at 258 (citing *Twombly*, 550 U.S. at 556). See also *Morgan* v. *Hubert*, 335 F. App'x 466, 470 (5th Cir. 2009).

Thus, this Circuit has cautioned that courts "must take care not to recast evidentiary standards as pleading requirements," *Briscoe* v. *Jefferson County.*, No. 12-40053, 2012 WL 6082694, at *7 n.15 (5th Cir. Dec. 7, 2012) (citing *Twombly*, 550 U.S. at 586 (Stevens, J., dissenting)), particularly when the denial of discovery may prevent a plaintiff from obtaining crucial evidence that "can support an

inference that [defendant] purposefully engaged in discrimination," *Johnson* v. *Johnson*, 385 F.3d 503, 531 (5th Cir. 2004).[3]

Consequently, "Rule 12(b)(6) does not permit * * * affirm[ance] [of a] district court's dismissal of [a] claim unless * * * 'it is beyond a doubt' that [a plaintiff] 'cannot prove a plausible set of facts' to support his allegations" of discrimination on the basis of sex. *Wilson*, 667 F.3d at 600 (quoting *Lane* v. *Halliburton*, 529 F.3d 548, 557 (5th Cir. 2008)).

B. Elements Of A Title IX Claim Alleging Student-On-Student Sexual Harassment

Title IX prohibits educational institutions that receive federal financial assistance from discriminating on the basis of sex. 20 U.S.C. 1681(a). It provides, in pertinent part, that "[n]o person * * * shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination

[3] Thus, appellate courts have often reversed grants of summary judgment for defendants in cases in which there was conflicting evidence as to whether the harassment was because of sex. See, *e.g.*, *La Day* v. *Catalyst Tech.*, 302 F.3d 474, 480 (5th Cir. 2005) (reversing grant of summary judgment to defendants when there was conflicting evidence as to whether pat on the buttocks and comment about victim's girlfriend was because of sex); *Hoyle* v. *Freightliner, LLC*, 650 F.3d 321, 331-332 (4th Cir. 2011) (reversing grant of summary judgment to defendant because juror "could reasonably find" that placement of photos of nude women or women in sexually provocative dress and poses "satisfies the 'because of sex' requirement" of Title VII); *Prowel* v. *Wise Bus. Forms*, 579 F.3d 285, 291-292 (3d Cir. 2009) (reversing grant of summary judgment to defendant because record was ambiguous as to whether harassment was because of victim's failure to conform to gender stereotypes).

under any education program or activity receiving Federal financial assistance." *Ibid.* Its purpose is to protect students from and to "eliminate * * * discrimination on the basis of sex" in any education program or activity receiving federal funding. 34 C.F.R. 106.1; *Franklin* v. *Gwinnett Cnty. Pub. Sch.*, 503 U.S. 60, 75 (1992).

It is well-settled that student-on-student, same-sex sexual harassment is actionable under Title IX. See, *e.g.*, *Sanches* v. *Carrollton-Farmers Branch Indep. Sch. Dist.*, 647 F.3d 156, 165 (5th Cir. 2011); *Doe* v. *Dallas Indep. Sch. Dist.*, 153 F.3d 211, 220 (5th Cir. 1988). A recipient of federal funds may be liable for monetary relief for same-sex, student-on-student sexual harassment under Title IX if: "(1) [it] had actual knowledge of the harassment, (2) the harasser was under [its] control, (3) the harassment was based on the victim's sex, (4) the harassment was 'so severe, pervasive, and objectively offensive that it effectively bar[red] the victim's access to an educational opportunity or benefit', and (5) [it] was deliberately indifferent to the harassment." *Sanches*, 647 F.3d at 165 (quoting *Davis* v. *Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 650 (1999)). In determining whether discrimination is "based on sex" in violation of Title IX – the only element at issue in this appeal – courts routinely rely on precedent interpreting Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq*. See, *e.g.*, *Davis*, 526 U.S. at 647; *Franklin*, 503 U.S. at 73-75; *Doe*, 153 F.3d at 219 (relying on

Title VII precedent to conclude that same-sex sexual harassment is actionable under Title IX).

C. Plaintiffs' Complaint Plausibly Alleges Discrimination On The Basis Of Sex, Within The Meaning Of Title IX

In dismissing the complaint, the district court ruled that it failed to allege facts sufficient to demonstrate a plausible claim that the harassment Jon endured was on the basis of his sex. The facts alleged in the complaint – viewed in the light most favorable to the plaintiffs, as they must be at this stage – state a plausible claim of harassment based on sex on at least two separate legal theories: harassment that focuses on and publicly exposes a victim's sexual anatomy, and gender stereotyping.

1. Harassment That Focuses On And Publicly Exposes A Victim's Sexual Anatomy

According to the complaint, Jon's harassers often removed his underwear in the locker room, exposing his genitalia. During the incident that immediately preceded Jon's death, his harassers not only stripped him naked, but also did so while yelling sexually charged epithets. They further exposed his sexual anatomy by posting a video of the attack on the internet. The allegations that the harassment focused on and publicly exposed the victim's genitalia are sufficient under these circumstances to support an inference that the harassment was sex-based. Indeed, in that portion of its opinion holding that Jon's harassment was not

based on sex (R 303-307), the district court failed to mention – much less analyze – the complaint's allegations that the harassers "oftentimes" stripped Jon naked in the locker room (R 160) and posted a video of the final attack on the internet (R 163).

These allegations state a plausible claim of harassment because of sex. In *Oncale* v. *Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998), the Supreme Court held that harassment may be actionable under Title VII in cases in which the harassers and victim are of the same sex, where the harassment can be said to constitute discrimination because of sex. In *Oncale*, the Court provided three examples of how a plaintiff could establish such a claim (proposals of sexual activity, evidence of general hostility towards one sex, and evidence of disparate treatment). 523 U.S. at 80-81. The Court also noted that a Title VII sexual harassment claim is actionable only if the plaintiff can prove that the conduct at issue was not merely tinged with "sexual * * * connotations," but actually constituted discrimination because of sex. 523 U.S. at 80. See also *La Day*, 302 F.3d at 478; *E.E.O.C.* v. *Boh Bros. Constr. Co.*, 689 F.3d 458, 461 (5th Cir. 2012).

In this case, a factfinder could reasonably infer that the harassment Jon is alleged to have endured constituted discrimination because of sex within the meaning of *Oncale*. In the first place, *Oncale's* text supports this conclusion. The Court used the phrase "for example" before describing two scenarios when same-

sex harassment need not be motivated by sexual desire. *Oncale*, 523 U.S. at 80. By stating that the gender-based requirement is satisfied, *for example*, and then offering the two scenarios, the Court indicated those were two among a variety of circumstances that would establish sex discrimination. *Ibid.* Thus, *Oncale* does not specify, much less imply, that there are only three ways to prove that same-sex sexual harassment violates Title VII.[4]

Nor can it fairly be said that the harassment Jon suffered was merely tinged with sexual connotations. *Oncale*, 523 U.S. at 80. Targeting and publicly exposing a victim's sexual anatomy goes well beyond anyone's notion of conduct with sexual overtones. The allegations that Jon's harassers paraded him in front a group of boys while yelling sex-based epithets – later posting a video of the event on YouTube – remove any possible doubt that Jon's harassment constituted

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[4] *E.E.O.C.* v. *Boh Bros. Constr. Co.*, 689 F.3d at 461, is not to the contrary. In *Boh Bros.*, the Court raised in dicta – but ultimately declined to decide – the question whether *Oncale* may have limited the ways in which a plaintiff may prove a claim of same-sex harassment. Other courts of appeals have held that the three examples of same-sex harassment offered in *Oncale* were illustrative, not exhaustive. See *Pedroza* v. *Cintas Corp.*, 397 F.3d 1063, 1068 (8th Cir. 2005); *James* v. *Platte River Steel Co.*, 113 F. App'x 864, 867 (10th Cir. 2004); *Rene* v. *MGM Grand*, 305 F.3d 1061, 1075 (9th Cir. 2002) (en banc); *Bibby* v. *Philadelphia Coca Cola Bottling Co.*, 260 F.3d 257, 264 (3d Cir. 2001); *Shepherd* v. *Slater Steels Co.*, 168 F.3d 998, 1009 (7th Cir. 1999). But cf. *McBride* v. *Peak Wellness Center, Inc.*, 688 F.3d 698, 712 (10th Cir. 2012). See also pp. 17-24, *infra* (explaining that *Oncale* permits same-sex harassment based on gender stereotyping).

"simple teasing or roughhousing among members of the same sex." *Oncale*, 523 U.S. at 82.

As several courts of appeals have recognized, same-sex harassment that targets or relates to a victim's sexual anatomy, particularly when accompanied by an offender's sexually derogatory remarks, can constitute sexual harassment and thus be actionable sex discrimination.[5] Moreover, two of this Court's decisions – although not involving same-sex harassment – establish that the publication of sexually explicit material that targets a victim can constitute discrimination based on sex. See *Bennett* v. *Corroon* & *Black Corp.*, 845 F.2d 104, 106 (5th Cir. 1988) (holding that the posting of an obscene cartoon in the public men's room depicting the plaintiff engaged in sexual activity constituted harassment based on sex within the meaning of Title VII); *Waltman* v. *International Paper Co.*, 875 F.2d 468, 478 (5th Cir. 1989) (concluding that sexual graffiti referring to the victim, along with

[5] See, *e.g.*, *Rene* v. *MGM Grand Hotel*, 305 F.3d 1061 (9th Cir. 2002) (en banc) (same-sex harassment including grabbing male worker's crotch and poking his anus was because of sex and justified reversing grant of summary judgment for defendant); *Schmedding* v. *Tnemec Co.*, 187 F.3d 862 (8th Cir. 1999) (same-sex harassment, including patting male employee on buttocks, sending derogatory notes referring to his anatomy, and calling him "homo" and "jerk off," stated a claim of discrimination because of sex); *Quick* v. *Donaldson Co.*, 90 F.3d 1372, 1379 (8th Cir. 1996) (same-sex harassment that included "bagging" employee's testicles, which was accompanied by "verbal[] taunt[s] [and] * * * names such as 'queer' and 'pocket lizard licker,'" raised "genuine issue of material fact for trial" as to whether misconduct was because of sex).

sexual touching and sexual comments, sufficient to allow jury to find harassment on the basis of sex). That is so, regardless of the gender or sexual motivation of those involved.

Indeed, harassment that targets and publicly exposes a victim's sexual anatomy is sexually explicit, sexually humiliating, and fundamentally invades a victim's sexual privacy, regardless of the gender or sexual motivation of those involved. See *Andrews* v. *City of Philadelphia*, 895 F.2d 1469, 1482 n.2 (3d Cir. 1990). It not only publicly demeans the victim's sexuality, but it suggests a perpetrator's "general hostility" towards members of the victim's sex who share the same sexual characteristics (*e.g.*, large breasts, large hips, small male genitalia, etc.). See *Oncale*, 523 U.S. at 80.[6] Further, since individuals who are the opposite sex from the victim necessarily do not share those same traits, such misconduct implies that they will not be targeted and that the victim "would not have been subjected to [the harassment] but for being" the sex that he or she is. *Quick* v. *Donaldson Co.*, 90 F.3d 1372, 1379 (8th Cir. 1996). See also *Hoyle* v.

[6] See also *Petrosino* v. *Bell Atlantic*, 385 F.3d 210, 222 (2d Cir. 2004) ("the depiction of women in * * * offensive jokes and graphics was uniformly sexually demeaning and communicated * * * message [to] women as a group"); *Steiner* v. *Showboat Operating Co.*, 25 F.3d 1459, 1463-1464 (9th Cir. 1994) (when abuse directed at women "center[s] on the fact they[are] females," a jury may infer discrimination based on gender).

Freightliner, LLC, 630 F.3d 321, 331 (4th Cir. 2011); *Patane* v. *Clark*, 508 F.3d 106, 114 (2d Cir. 2007); *Winsor* v. *Hinckley Dodge, Inc.*, 79 F.3d 996, 1000 (10th Cir. 1996). Consequently, harassment that targets and publicly exposes a victim's sexual anatomy "speaks for itself," and can constitute sex discrimination. *Bales* v. *Wal-Mart Stores, Inc.*, 143 F.3d 1103, 1106-1107 (8th Cir. 1998).

The district court, however, dismissed the complaint because, in its view, it reflected but a single incident with "sexual overtones," amid many incidents that contained "no hint of gender based animus." R 305-306. This reading of the complaint is incorrect, for several reasons. Most significantly, it fails to read the complaint in the light most favorable to the plaintiffs. For example, it fails to draw the reasonable inference that, if the most serious instance of harassment was sex-based, other instances of harassment by the same group of perpetrators against the same victim were likely sex-based as well.[7] The district court also failed to recognize that a single act of harassment, if sufficiently serious (as this one was), can be actionable under Title IX. See, *e.g.*, *Cherry* v. *Shaw Coastal, Inc.*, 668 F.3d 182, 189 (5th Cir.), cert. denied, 133 S. Ct. 162 (2012); see also OCR 2001

[7] See, *e.g.*, *E.E.O.C.* v. *PVNF, LLC*, 487 F.3d 790, 799 (10th Cir. 2007) ("[I]f it could reasonably be inferred that [seemingly gender-neutral conduct] was [actually] related to gender or arose out of a context in which admittedly sex and gender-related conduct occurred, then it is for the fact finder to decide whether such an inference should be drawn.") (quoting *O'Shea* v. *Yellow Tech. Servs., Inc.*, 185 F.3d 1093, 1097 (10th Cir. 1999)).

Revised Sexual Harassment Guidance at 6 (explaining that "a single or isolated incident of sexual harassment may, if sufficiently severe, create a hostile environment," in violation of Title IX). In addition, the district court was not entitled to resolve a dispute as to the motivation for Jon's harassment at the pleading stage. Accordingly, the district court erred in dismissing the complaint on the ground that it failed to plausibly allege discrimination on the basis of sex, given the allegations that the harassers targeted and publicly exposed Jon's sexual anatomy.

2. Gender Stereotyping

a. Gender stereotyping has long been recognized as actionable under Title VII. Nearly 25 years ago, the Supreme Court established that gender stereotyping is an impermissible form of sex discrimination under Title VII. See *Price Waterhouse* v. *Hopkins*, 490 U.S. 228 (1989). The Court held that a national accounting firm discriminated "because of * * * sex" and violated Title VII when it passed over a successful female executive for partnership because she was too masculine and aggressive and failed to conform to stereotypical gender norms. 490 U.S. at 250-251 (plurality opinion of four justices); *id.* at 258-261 (White, J., concurring in judgment); *id.* at 272-273 (O'Connor, J., concurring in judgment).

The Court explained that Title VII's "because of" sex language prohibits employers from "tak[ing] gender into account in making employment decisions"

and "discriminat[ing] against individuals [based on] * * * sex stereotypes." *Id.* at 230, 251 (plurality opinion). It emphasized that "we are beyond the day when an employer can evaluate employees by assuming or insisting that they match the stereotype associated with their group, [because] '[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.'" *Id.* at 251 (plurality opinion) (quoting *Los Angeles Dep't of Water & Power* v. *Manhart*, 435 U.S. 702, 707 n.13 (1978)) (internal quotation marks omitted).

Consequently, under *Price Waterhouse*, discrimination based on gender nonconformity constitutes sex discrimination and violates Title VII. Applying *Price Waterhouse*, six circuit courts have ruled that discrimination based on gender stereotyping violates Title VII,[8] and no court of appeals has held otherwise. The only two courts of appeals to have considered the issue under Title IX have recognized that same-sex gender stereotyping is actionable. See *Wolfe* v.

[8] See *Higgins* v. *New Balance Athletic Shoe*, 194 F.3d 252, 261 n.4 (1st Cir. 1999); *Simonton* v. *Runyon*, 232 F.3d 33, 38 (2d Cir. 2000); *Bibby*, 260 F.3d at 262-264; *Barnes* v. *City of Cincinnati*, 401 F.3d 729, 737, 741 (6th Cir.), cert. denied, 546 U.S. 1003 (2005); *Nichols* v. *Azteca Rest. Enters., Inc.*, 256 F.3d 864, 874 (9th Cir. 2001). Cf. *Rosa* v. *Park W. Bank & Trust Co.*, 214 F.3d 213, 215-216 (1st Cir. 2000); *Schwenk* v. *Hartford*, 204 F.3d 1187, 1201-1202 (9th Cir. 2000).

Fayettville, Ark. Sch. Dist., 648 F.3d 860, 867 (8th Cir. 2011); *Doe* v. *East Haven Bd. of Educ.*, 200 F. App'x 46 (2d Cir. 2006).

This Court and the Tenth Circuit, however, have declined to decide the issue under Title VII. See *E.E.O.C.* v. *Boh Bros. Constr. Co.*, 689 F.3d at 461; *Etsitty* v. *Utah Transit Auth.*, 502 F.3d 1215, 1224 (10th Cir. 2007). In *Boh Bros.*, this Court noted in dicta that it had "not before been presented the question" whether *Oncale's* enumerating * * * three forms of same-sex harassment excludes other possible forms, such as alleged sex stereotyping" from coverage. The Court, however, ultimately declined to decide this issue. 689 F.3d at 461; see also n.4, *supra*.

b. This Court should align itself with the other circuits holding that same-sex harassment based on gender stereotyping is discrimination based on sex within the meaning of Title VII and Title IX. See n.4, *supra.* That interpretation is consistent with Supreme Court precedent, the language and goals of both Title VII and IX, and guidance from the Department of Education.

First, *Price Waterhouse* makes clear that discrimination based on gender stereotyping violates Title VII, without regard to whether the victim and offender are the same sex. While the plaintiff and unlawful decision-makers in *Price Waterhouse* were different sexes, the Court's holding was not conditioned or circumscribed in any respect. The opinion is also written in gender neutral terms,

and emphasizes that Congress intended Title VII to prohibit the "entire spectrum of disparate treatment of men and women resulting from sex stereotyping." *Price Waterhouse*, 490 U.S. at 251 (plurality opinion). See *Id.* at 258 (White, J., concurring in judgment); *id.* at 272 (O'Connor, J., concurring in judgment and characterizing "failure to conform to [sex] stereotypes" as an actionable form of sex discrimination). Because Title VII and Title IX are similarly construed, *Price Waterhouse*'s holding means that discrimination on the basis of gender stereotyping is discrimination on the basis of sex within the meaning of Title IX as well.

Moreover, *Oncale* did not overrule or limit *Price Waterhouse* in any way. The Court in *Oncale* did not mention *Price Waterhouse* or gender stereotyping, and the Supreme Court "does not normally overturn * * * or dramatically limit earlier authority *sub silentio.*" *Shalala* v. *Council on Long Term Care, Inc.*, 529 U.S. 1, 18 (2000). See also *Hohn* v. *United States*, 524 U.S. 236, 252 (1992) (explaining that even when "subsequent * * * cases * * * raise[] doubts about the[] continuing vitality" of precedent "our decisions remain binding precedent until * * * reconsider[ed]"). Thus, *Oncale* had no effect upon *Price Waterhouse*'s holding regarding gender stereotyping.

To conclude otherwise would also be inconsistent with this Court's precedent. Recently, the Court emphasized that *Oncale* held that "[s]exual

harassment is a form of discriminatory treatment [that] applies in *any* situation where there is [sex] discrimination whether it be between members of the same or opposite sexes." *Cherry*, 668 F.3d at 188 (emphasis added). The Court likewise has acknowledged that *Oncale* "focus[ed] * * * on what [a] plaintiff must ultimately prove rather than the methods of doing so." *La Day*, 302 F.3d at 478. This Court has also acknowledged that circumstantial evidence, including the type mentioned in *Oncale*, may be unnecessary – at least when there is direct evidence of discrimination. *Johnson* v. *Johnson*, 385 F.3d 503, 530 (5th Cir. 2004).

In addition, the Supreme Court has made clear that proof of discrimination is not subject to a rigid formula. *O'Connor* v. *Consolidated Coin Caterers Corp.*, 517 U.S. 308, 311-313 (1996); *Furnco Constr. Corp.* v. *Waters*, 438 U.S. 567, 577 (1978). To conclude that *Oncale* excluded harassment based on gender stereotyping from Title VII's (and thus Title IX's) coverage is at odds with this precedent.

A contrary conclusion would also be inconsistent with the terms and purposes of both Title IX and Title VII. Title IX states that "*no person* * * * shall be subjected to discrimination" on "the basis of sex," 20 U.S.C. 1681(a) (emphasis added), while Title VII bars discrimination against "*any* individual" "because of" sex. 42 U.S.C. 2000e-2(a)(1) & (2) (emphasis added). Both prohibitions are broadly stated and are intended to prohibit all forms of sex discrimination. To

exclude gender stereotyping, or fail to protect a victim merely because he or she is the same sex as the offender, would be contrary to the language and goals of both statutes.

Moreover, citing to *Price Waterhouse*, the Department of Education has issued policy guidance stating that harassment based on gender stereotyping falls within the scope of Title IX:

> [G]ender-based harassment, including that predicated on sex-stereotyping, is covered by Title IX if it is sufficiently serious to deny or limit a student's ability to participate in or benefit from the program. Thus, it can be discrimination on the basis of sex to harass a student on the basis of the victim's failure to conform to stereotyped notions of masculinity and femininity.

OCR 2001 Revised Sexual Harassment Guidance at 3. See also OCR 2010 Dear Colleague Letter at 7-8 ("[I]t can be sex discrimination if students are harassed either for exhibiting what is perceived as stereotypical characteristic for their sex, or for failing to conform to stereotypical notions of masculinity and femininity."). This guidance is entitled to judicial deference. See, *e.g.*, *Biediger* v. *Quinnipiac Univ.*, 691 F.3d 85, 96-97 (2d Cir. 2012).

For these reasons, this Court should conclude that harassment based on gender stereotyping is actionable under both Title VII and Title IX.

c. Based on the authority discussed above, the district court erred in dismissing the complaint insofar as it alleged that Jon was harassed on the basis of

gender stereotyping. The complaint alleges that Jon was a victim of harassment based on "gender[] stereotypes." R 167. The district court dismissed plaintiffs' complaint without even addressing that claim. For this reason alone, the court erred, and its order dismissing the complaint should be reversed. See, *e.g.*, *Smith* v. *City of Salem*, 378 F.3d 566, 574 (6th Cir. 2004) (reversing dismissal of complaint due to district court's failure to adequately consider plaintiff's sex stereotyping claim).

In any event, the complaint sufficiently pleads facts that plausibly support plaintiffs' gender stereotyping claim. The complaint includes allegations that Jon's harassers often removed his underwear in the locker room, thus repeatedly exposing his genitalia. The complaint also alleges that a few days prior to Jon's suicide, his offenders stripped him naked and paraded him in front of a group of boys while yelling epithets such as "fag" and "queer" – insults that reasonably could be interpreted as expressing his attackers' opinion that Jon failed to conform to their stereotypical views of masculinity. This inference is bolstered by the allegation in the complaint that some students had stated that Jon was "bullied because he was 'short,' apparently a metaphor for not being strong enough or masculine enough." R 164. Allegations of this nature have routinely been found sufficient to state a claim of harassment based on gender stereotypes under Title

VII.[9] Accordingly, the complaint in this case adequately alleged a plausible claim of gender stereotyping under Title IX. The district court thus committed reversible error in dismissing the complaint without even addressing plaintiffs' claim that Jon's harassment was based on gender stereotypes.

* * * * *

In sum, the district court erred in dismissing the complaint on the ground that it failed to allege a plausible claim that Jon's harassment was based on sex. Indeed, the district court's dismissal of the complaint is particularly inappropriate in this case, given (1) the complaint's allegation that school officials "destroyed, withheld, or purposely hid" Jon's daily school journal (R 165), and (2) the fact that Jon is no longer alive to provide more detailed information concerning the allegations in the complaint. Accordingly, the order of dismissal should be reversed, and the case remanded for further proceedings, including an opportunity for plaintiffs to conduct discovery.

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[9] See, *e.g.*, *Smith*, 378 F.3d at 572 (allegation that plaintiff was harassed for "*not being masculine enough*" stated a claim of discrimination on the basis of sex stereotyping) (emphasis added); *Nichols*, 256 F.3d at 874 (harassment based upon the perception that "[plaintiff] is *effeminate [and] * * * failed to conform to a male stereotype*" established discrimination because of sex) (emphasis added); *Higgins*, 194 F.3d at 261 n.4(allegation that male offenders "discriminated against [male victim] because he *did not meet stereotyped expectations of masculinity*" states claim of discrimination based on "gender-based stereotypes") (emphasis added).

CONCLUSION

The district court's order dismissing plaintiffs' Title IX claim should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 1, 2013, I electronically filed the foregoing BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PLAINTIFFS-APPELLANTS AND URGING REVERSAL with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system.

I further certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Dennis J. Dimsey
DENNIS J. DIMSEY
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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B) and Federal Rule of Appellate Procedure 29(d), because it contains 5762 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5), and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6), because it has been prepared in a proportionally spaced typeface using Word 2007 in 14-point Times New Roman font.

s/ Dennis J. Dimsey
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Date: April 1, 2013