IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JOHN DOE, through his mother and next friend JANE DOE,

Plaintiffs-Appellants;

v.

ROCKY MOUNTAIN CLASSICAL ACADEMY, NICOLE BLANC, individually and in her official capacity as Dean of Students of Rocky Mountain Classical Academy; and CULLEN McDOWELL, individually and in his official capacity as Executive Principal of Rocky Mountain Classical Academy,

Defendants-Appellees.

Case No. 22-1369

(1:19-cv-03530-DDD-STV)
(D. Colo.)

APPELLEES' ANSWER BRIEF

Oral Argument is Requested

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STATEMENT OF RELATED CASES

There are no prior or related appeals.

STATEMENT OF THE ISSUES

I. Did the district court properly dismiss the sex discrimination claim under the Equal Protection Clause?

II. Did the district court properly dismiss the sex discrimination and retaliation claims under Title IX?

STATEMENT OF THE CASE

This appeal asks whether it is illegal sex discrimination for a public school to have a dress code that prohibits boys from wearing earrings but not girls. The district court correctly held that it is not. *See* Order Granting Motion to Dismiss (hereinafter, "Order").[1]

The court grounded its analysis in the decades-old recognition that "[b]y and large, public education in our Nation is committed to the control of state and local authorities. Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values." Order at 5-6 (quoting *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968)). More specifically, it held that because "the prohibition

[1] In accordance with Tenth Circuit Rule 28.2(A)(1), Appellants attached the Order to their Opening Brief. It can also be found at Appendix 144-163. It will be cited herein directly to its own page numbers, e.g., "Order at 18."

on earrings for male students at RMCA is simply one component of a comprehensive uniform policy that imposes comparable, though not identical[,] demands on male and female students," it "do[es] not constitute sex discrimination under the Fourteenth Amendment and Title IX." *Id.* at 18; *see also id.* at 10, 13. This decision was correct and should be affirmed.

A. Factual Background

In August 2019, John Doe's parents enrolled him as a kindergarten student at Rocky Mountain Classical Academy. App. 34.[2] He was five years old. *Id.* Prior to his enrollment, they had pierced his ears. App. 35.

RMCA is a public charter school that serves students in grades K-8 and operates in Colorado Springs School District 49. Order at 2; App. 34. It has a comprehensive dress code that applies to all its students. App. 118-121. One component of the two-and-a-half page uniform policy is that boys cannot wear earrings but girls can. App. 120. That is the focus of this case.

1. RMCA's Dress Code Policy

Under Colorado law, all public schools – including charter schools – must institute a dress code policy as one part of their Safe School Plan. C.R.S. § 22-32-

[2] The Appendix has two different page numbers: a green number in the upper-right corner that corresponds with the page number for the PDF, and a black number in the lower-right corner. For ease of navigation with the PDF, Appellees cite to the green number in the upper-right corner.

109.1(2)(a)(J). The statutorily-mandated dress code policy must "prohibit[] students from wearing apparel that is deemed disruptive to the classroom environment or to the maintenance of a safe and orderly school. The dress code policy may require students to wear a school uniform or may establish minimum standards of dress." *Id.*

RMCA's uniform policy requires that "[a]ll clothing must be properly fitting and conservative in nature." App. 118. It is designed to contribute to the "high standard of excellence" that RMCA expects from all its students. *Id.* It ensures that all students "are properly dressed and ready to learn when they come to school." *Id.*

The earring policy is one component of a larger paragraph about tattoos, body piercings, and jewelry, which reads, in full:

> Tattoos and body piercings, other than girls' earrings, are not allowed. Earrings must be limited to one earring per ear. Large, dangling, or hoop-type earrings are not allowed. Jewelry other than watches for boys or girls, and small earrings on girls, may not be worn. This includes bracelets. Bracelets are not allowed. Official RMCA bracelets are allowed to be worn.

App. 120.

Almost all of RMCA's uniform policy applies equally to both sexes. App. 118-121. For instance, it prescribes:

- Pants must not be too tight…. Pants and jeans must proper fitting and conservative in nature. Such jeans as skinny, jeggings, and any other jeans that are deemed too tight or have holes or rips are not allowed.

- Shorts…should be no shorter than two inches above the knee when sitting.

- Acceptable shirt styles…are: Short sleeve polos[,] Long sleeve polos[, and] Turtlenecks.

- Students in grade K-4 must have shirts tucked in at all times. Students in grades 5-8 may leave their shirts untucked.

- Shoes should have closed toe and closed heel. The shoes must have no lights. All tennis, athletic, or running shoes may be any color…. Shoelaces must be solid in color and match an accent color in the shoe. No heels greater than one inch. No slippers or slipper like shoes. No shoes will go above the height of the standard high top athletic shoe…. No clogs or slides. No sandals or flip flops.

- Students must wear socks or tights at all times. Socks should be solid in color and should coordinate with uniform pants or shirts…. Socks must match one another.

- Belts are required for all students 2nd-8th grade. They must be solid black or brown, leather or similar material. Belts must be worn with all pants, shorts, capris, and any skirt that has belt loops.

- RMCA spirit wear hoodies…as well as cardigan, fleece, zip-up, or pullover sweaters in approved uniform colors are allowed in the classroom. All other outer wear must remain in lockers or designated storage areas during the school day.

- Appropriate undergarments must be worn and not visible.

- Bracelets are not allowed.

- Necklaces may be worn but should be inside the shirt.

- Hairstyle and hair color must be conservative in nature…. Mohawk, faux hawk, no symbols, shapes, or designs of any kind shaved into the head or anything that inhibits the learning environment as determined by the campus administration. Hair may not be spiked. Large hair decorations may not be

worn. Bandanas may not be worn. Highlights must be two tones lighter or darker than the student's natural hair color. No highlights that are not a natural hair color.

- Students who choose not to be in compliance with these guidelines will be sent home for a change of clothing.

App. 118-120.

A few parts of the dress code are sex-specific, including the earring policy:

- Boys may wear classic navy or khaki colored pants or shorts. Girls may wear classic navy or khaki colored pants, shorts, capris, skirts or jumpers…. Girls in grades K-5 may wear polo style dresses.

- Girls may wear tights or leggings under their skirts…. Tights and leggings must be solid in color.

- Camis for girls and undershirts for boys are allowed, but not required, and must not show.

- Tattoos and body piercings, other than girls' earrings, are not allowed…. Jewelry other than watches for boys or girls, and small earrings on girls, may not be worn.

- Boys' hair must not extend below the top of the shirt collar in the back, the bottom of the ears on the sides or the eyebrows in front.

Id. The district court observed that, in essence, there are only three rules that differ for male and female students: "[1] girls may wear capris, skirts, jumpers, or polo style dresses while boys may not; [2] girls may wear earrings while boys may not; and [3] girls' hair may be kept long while boys' hair may not." Order at 16.

In addition to differences based on sex, the dress code also prescribes different rules based on grade-level:

- Girls in grades K-5 may wear polo-style dresses but girls in grades 6-8 may not.

- Students in grades K-7 may wear shirts of certain colors only, but 8th grade students may wear any color solid shirt (no stripes or plaids).

- Students in grade K-4 must have their shirts tucked in at all times, while those in grades 5-8 may leave their shirts untucked.

- Belts are not required for students in grades K-1 but are for those in grades 2-8.

- Make-up is permitted only for students in grades 7-8, and it must be "conservative in nature."

App. 118-120.

The district court summarized that RMCA's "uniform policy places the same essential burden on both boys and girls: they must limit their individuality and adhere generally to a traditional, conservative appearance." Order at 16-17.

2. The Does' Objection to the Earring Policy and Internal Appeal

John Doe's parents received a copy of the RMCA Parent-Student Handbook that contains the dress code. App. 35. The Does sent John to school wearing earrings. *Id.* On August 27, 2019, John's kindergarten teacher notified Ms. Doe that "per our dress code, boys [cannot] wear earrings at school." *Id.* Ms. Doe replied that she considered RMCA's earring policy to be discriminatory and requested a formal meeting with the principal. Order at 3; App. 36. On August 28,

Ms. Doe emailed RMCA's board of directors to express her view that the earring policy was discriminatory. App. 36.

On August 30, Ms. Doe met with John's kindergarten teacher and Defendant Cullen McDowell, the Executive Principal at RMCA. *Id.* That meeting failed to resolve the issue. *Id.* Throughout the next several months, Ms. Doe moved through the School's conflict resolution process, but the issue was never resolved. App. 36-37. During this time, when John's parents were appealing the policy up to the board, John continued to wear earrings at school. App. 37.

At the end of this process, Ms. Doe was invited to address her concerns to RMCA's board of directors at its meeting on December 3, 2019. *Id.* Ms. Doe attended the meeting but, apparently due to a miscommunication or procedural confusion, did not end up speaking to the board. Order at 3; App. 37. The board maintained the dress code unchanged, including the earring policy. *Id.* Two days later, on December 5, Mr. McDowell informed Ms. Doe that John would be required to comply with the policy by Monday, December 9. *Id.*

John's parents sent him to school wearing earrings during the week of December 9. Order at 3; App. 38. He was suspended and sent home for one day on December 11, and then again on December 12. *Id.* The School informed Ms. Doe that it would begin the process of disenrolling John. *Id.* She was told that he would

be able to attend RMCA until the end of the semester, Friday, December 20. Order at 4; App. 38.

B. Procedural History

On December 13, 2019, Ms. Doe and John filed suit in federal district court. App. 12-27. They alleged violations of the Equal Protection Clause and Title IX. *Id.* The Does did not assert any First Amendment right to wear earrings as a matter of freedom of speech, expression, or religion. Order at 4; App. 41-47. Neither did they assert that John's wearing earrings was a liberty interest protected by substantive due process or any other constitutional provision. *Id.* They did not contend that John is a transgender girl; rather, he was simply a five-year-old kindergarten boy who wanted to wear earrings at school as a matter of personal preference. *Id.*

On December 18, the Does filed a motion for preliminary injunction. Order at 4. The court held a hearing on January 14, 2020. App. 7. Six days later, on January 20, the court denied the motion, finding that they were unlikely to succeed on the merits. Order at 4.

On February 14, 2020, the School[3] filed a motion to dismiss. App. 50-64. The Does responded and the School replied. App. 65-77 (response); 134-143

[3] Consistent with Federal Rule of Appellate Procedure 28(d), Defendants-Appellees are collectively referred to herein as "the School" or "RMCA," unless the context requires otherwise.

(reply). On September 30, 2022, the court granted the motion. App. 144-163. This appeal followed.

SUMMARY OF THE ARGUMENT

This appeal presents a matter of first impression for this Circuit. It asks the Court to determine the appropriate test when a K-12 student challenges one component of a public school dress code as sex discrimination. This Court should adopt the comparable burdens test advanced by the Seventh Circuit in *Hayden v. Greensburg Community School Corporation*, 743 F.3d 569 (7th Cir. 2014). It should do so for three reasons. First, this test strikes the appropriate balance between judicial deference to local school officials and judicial oversight of serious constitutional violations. Second, the comparable burdens test has been well-developed over several decades, so it would provide substantial guidance to lower courts. Third, it aligns most closely with the most analogous case law from this Circuit, three boy-hair-length cases from the 1970s.

The district court properly adopted and applied the comparable burdens test in this case, holding that RMCA's earring policy does not constitute sex discrimination because that policy is one component of a larger dress code that imposes comparable, though not identical, demands on male and female RMCA students.

This conclusion finds further support in the text and precedent of Title IX. Under Title IX, like under equal protection, gender differences do not necessarily constitute gender discrimination. Given Title IX's broad language, this Court should give *Chevron* deference to the United States Department of Education's interpretation, which in 1982 repealed a Title IX regulation on dress codes and instead instructed that such decisions should be left to local school officials. Given this interpretation, it cannot reasonably be contended that Congress unambiguously indicated that gender-specific uniform policies would be proscribed by Title IX.

Lastly, the district court also correctly dismissed the Does' retaliation claim because they did not plausibly allege that the School's disciplinary action was caused by Ms. Doe's objections. Rather, the Does' allegations clearly indicate that John was disciplined because he chose to wear earrings to school in violation of RMCA's policy.

At the end of the day, John's personal preference to wear earrings to school should not overturn the considered judgments of RMCA's board of directors and administration. They decided years before John enrolled in kindergarten – actually before John was even born – that this policy, as one part of the overall school dress code, contributes to creating a positive educational environment for all students. By and large, federal courts should not second-guess local school officials on pedagogical issues that arise in the daily operation of our country's public schools.

This Court should affirm the prudent and well-considered judgment of the court below.

ARGUMENT

I. STANDARD OF REVIEW

This Court reviews *de novo* the district court's decision to dismiss the Does' complaint under Rule 12(b)(6). *Teigen v. Renfrow*, 511 F.3d 1072, 1078 (10th Cir. 2007). *Accord* Opening Br. at 9. A complaint survives dismissal under the *Iqbal/Twombly* standard if it contains "enough allegations of fact, taken as true, to state a claim to relief that is plausible on its face." *Khalik v. United Air Lines*, 671 F.3d 1188, 1190 (10th Cir. 2012). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Courts need not accept legal conclusions as true. *Khalik*, 671 F.3d at 1190. "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. at 678.

II. RMCA'S EARRING POLICY DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE

The Does asserted one claim of sex discrimination under the Equal Protection Clause. App. 43-45. The district court dismissed it on the ground that the earring policy is one component of a comprehensive uniform policy that imposes comparable demands on male and female students, and therefore does not

constitute sex discrimination under equal protection. Order at 18. This decision was correct, especially given the extensive case law directing courts to tread carefully when considering a challenge to educational policies used by schools on a day-to-day basis.

A. Courts Modify the Application of Constitutional Provisions to the Special Characteristics of the School Environment

The United States Supreme Court has cautioned lower courts repeatedly that judicial involvement in the operation of public schools "raises problems requiring care and restraint." *Epperson*, 393 U.S. at 104. "The Court has long recognized that local school boards have broad discretion in the management of school affairs." *Bd. of Educ. v. Pico*, 457 U.S. 853, 863 (1982) (Brennan, J.) (plurality opinion) (citing cases). "[F]ederal courts should not ordinarily 'intervene in the resolution of conflicts which arise in the daily operation of school systems.'" *Id.* (quoting *Epperson*, 393 U.S. at 104)).

Relatedly, the Supreme Court has explained that "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings, and that the rights of students must be applied in light of the special characteristics of the school environment." *Morse v. Frederick*, 551 U.S. 393, 396-97 (2007) (internal quotation marks omitted) (citing *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S.

260, 266 (1988)). Courts often modify constitutional standards for "the special characteristics of the school environment" due to the students' young ages and the school's need to maintain a positive educational climate. *Id.* As a result, the Supreme Court has held that conduct that might be constitutionally-protected for adults may be legally regulated by schools. *Id.* at 405 ("Had Fraser delivered the same speech in a public forum outside the school context, it would have been protected.").

For instance, in the First Amendment speech context, the Supreme Court has explained that in general "the determination of what manner of [student] speech… is inappropriate properly rests with the school board, rather than with federal courts." *Kuhlmeier*, 484 U.S. at 267. In the Fourteenth Amendment due process context, the Court has recognized that when a student challenges a disciplinary suspension, "[i]n the great majority of cases" the school need only "informally discuss the alleged misconduct with the student minutes after it has occurred." *Goss v. Lopez*, 419 U.S. 565, 581-82 (1975). In certain circumstances, such as when a student "poses a continuing danger to persons or property or an ongoing threat of disrupting the academic process," then the school may immediately remove the student from school and provide the required due process of notice and a "rudimentary hearing" later – "as soon as practicable." *Id.* at 582-83.

Similarly, the Supreme Court has made clear that "Fourth Amendment rights, no less than First and Fourteenth Amendment rights, are different in public schools than elsewhere; the 'reasonableness' inquiry cannot disregard the schools' custodial and tutelary responsibility for children." *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 656 (1995). Because "'special needs'…exist in the public school context," the Court has dispensed with the Fourth Amendment's warrant requirement on the grounds that it "would unduly interfere with the maintenance of the swift and informal disciplinary procedures that are needed" to permit teachers to "maintain order in the schools." *Id.* at 653 (internal quotation marks and brackets omitted) (quoting *New Jersey v. T. L. O.*, 469 U.S. 325, 340, 341 (1985)). As a result, the Court generally permits public school officials to search students' possessions based upon the lower standard of "individualized suspicion" of illegality or violation of school rules. *T.L.O.*, 469 U.S. at 341-42. In addition, the Court has allowed suspicionless drug testing of student athletes, *Vernonia Sch. Dist.*, 515 U.S. at 665, and students who participate in competitive extracurricular activities, *Bd. of Educ. v. Earls*, 536 U.S. 822, 830-38 (2002). The Court noted that the "most significant element" in these suspicionless drug testing cases was the fact that the policies were "undertaken in furtherance of the government's responsibilities, under a public school system, as guardian and tutor of children

entrusted to its care." *Vernonia Sch. Dist.*, 515 U.S. at 665; *see also Earls*, 536 U.S. at 837-38 (same).

It is well known that the Supreme Court has recognized that students do not "shed their constitutional rights…at the schoolhouse gate." *Tinker*, 393 U.S. at 506. However, the *Tinker* Court also "emphasized the need for affirming the comprehensive authority of the States and of school officials…to prescribe and control conduct in the schools." *Id.* at 507. In fact, the *Tinker* Court contrasted the "pure speech" of the student-protesters' black arm bands – that merited First Amendment protection – to "regulation of the length of skirts or the type of clothing, …hair style, or deportment" of students – which was committed to local educators' reasonable discretion. *Id.* at 507-08 (citing cases). The Supreme Court summarized this area of the law in *Vernonia School District*, writing that "the nature of th[e] rights [of students]" is tailored to "what is appropriate for children in school." 515 U.S. at 656 (citing cases).

The district court in this case properly acknowledged the deference courts typically afford to local school officials. Order at 5-7. The Doe family, however, overlooks this essential area of the law in its Opening Brief, never once mentioning *Tinker*, *Epperson*, *Goss*, *T.L.O.*, *Vernonia*, *Morse*, or any of the numerous Supreme Court cases that discuss "the special characteristics of the school environment." Moreover, it improperly criticizes the district court for taking a "deferential

approach to school dress codes," Opening Br. at 11, in light of the three Tenth Circuit cases from the 1970s, discussed *infra*. Their criticism is mistaken, however, given Supreme Court and Tenth Circuit precedent directly to the contrary.

B. The Comparable Burdens Test Provides a Workable Framework to Address Gender Differences in School Dress Codes

1. The Tenth Circuit's Deferential Approach from the 1970s

For over sixty years, court have grappled with student challenges to school dress codes. Jeremiah Newhall, *Sex-Based Dress Codes and Equal Protection in Public Schools*, 12 APPALACHIAN J.L. 209, 210 (2013) ("For decades, schools have faced legal challenges to dress codes…."). The first wave of challenges came in the late 1960s and early 1970s when boys wanted to wear their hair long – as was permitted for girls – but many school policies forbade it. *See e.g.*, Deborah Ahrens & Andrew Siegel, *Of Dress and Redress: Student Dress Restrictions in Constitutional Law and Culture*, 54 HARVARD C.R.-C.L. L. REV. 49, 55-56 (2019); Jillian Friedmann, *A Girl's Right to Bare Arms: An Equal Protection Analysis of Public-School Dress Codes*, 60 B.C. L. REV. 2547, 2556-61 (2019).

The federal circuit courts split evenly over these boy-hair-length cases with the First, Second, Third, Fourth, Seventh, and Eighth Circuits generally favoring student-plaintiffs, while the Fifth, Sixth, Ninth, Tenth, D.C. Circuits generally favored the local school authorities. *See Zeller v. Donegal Sch. Dist. Bd. of Educ.*, 517 F.2d 600, 602-03 (3d Cir. 1975) (en banc) (plurality opinion) (carefully

documenting this split).[4] The *Zeller* plurality noted, "On nine occasions now, the Supreme Court has denied certiorari to hair cases, and on three of these, strong dissents have been filed." *Id.* at 603 & nn.13-14.

During this period, this Court rebuffed three challenges by male students who wanted to wear their hair long in violation of their schools' dress codes. *Freeman v. Flake*, 448 F.2d 258 (10th Cir. 1971); *New Rider v. Bd. of Educ.*, 480 F.2d 693 (10th Cir. 1973); *Hatch v. Goerke*, 502 F.2d 1189 (10th Cir. 1974). In these cases, the boys and their parents argued that the schools' grooming policies infringed upon their free exercise of religion; freedom of speech; equal protection of the law in regards to race, national origin, and cultural heritage; and substantive due process of law, both in terms of the students' personal liberty interest to be "let alone" and their parents' interest to "raise their children according to their own religious, cultural and moral values." *Freeman*, 448 F.2d at 261; *New Rider*, 480 F.2d at 695, 698, 700; *Hatch*, 502 F.2d at 1191-92. This Court rejected each of these arguments, holding in each case that local school officials, not federal courts, were the proper authorities for resolving such questions involving the effective

[4] Since the Eleventh Circuit was not created from the Fifth until 1981, its position was not captured by the *Zeller* court in 1975. Once established, it followed Fifth Circuit precedent in holding "there is a per se rule that grooming regulations are constitutionally valid." *Davenport v. Randolph Cty. Bd. of Educ.*, 730 F.2d 1395, 1397 (11th Cir. 1984) (brackets omitted) (quoting *Karr v. Schmidt*, 460 F.2d 609, 617 (5th Cir. 1972)).

day-to-day operations of public schools. *Freeman*, 448 F.2d at 262; *New Rider*, 480 F.2d at 695; *Hatch*, 502 F.2d at 1192.[5]

The district court in this case noted that these cases were "useful and important in expressing the deference with which federal courts should approach school decision-making." Order at 8. However, it also recognized that they predate the modern equal protection jurisprudence reflected in *Craig v. Boren*, *United States v. Virginia*, and their progeny. *Id.* at 7 (citing, among others, *Boren*, 429 U.S. 190 (1976) and *Virginia*, 518 U.S. 515 (1996) [hereinafter *VMI*]).

2. Equal Protection Principles Permit Gender Differences

In the seminal *VMI* case, the Supreme Court reiterated that "neither federal nor state government acts compatibly with the equal protection principle when a law or official policy denies to women, simply because they are women, full citizenship stature—equal opportunity to aspire, achieve, participate in and contribute to society based on their individual talents and capacities." 518 U.S. at 532. It directed courts analyzing equal protection claims to "carefully inspect[] official action that closes a door or denies opportunity to women (or to men)." *Id.*

[5] In Colorado today, these cases would almost certainly come out differently due to the fact that in 2020 the General Assembly enacted the CROWN Act, which prohibits schools from preventing students from wearing hairstyles that are commonly or historically associated with race. Colo. House Bill 20-1048, codified, *inter alia*, at C.R.S. § 22-30.5-104(3)(b).

However, the Court also instructed that "[t]he heightened review standard our precedent establishes does not make sex a proscribed classification." *Id.* at 533. It continued, "Physical differences between men and women…are enduring. The two sexes are not fungible; a community made up exclusively of one sex is different from a community composed of both." *Id.* (internal quotation marks and brackets omitted) (quoting *Ballard v. United States*, 329 U.S. 187, 193 (1946)). "Inherent differences between men and women…remain cause for celebration…." *Id.* Thus, the Court recognized that "treating the sexes equally does not require treating them identically." Newhall, *supra*, at 211. *See also Nguyen v. I.N.S.*, 533 U.S. 53, 68 (2001) (explaining that the difference in the ability to conclusively determine parentage "at the moment of birth" is "not a stereotype" but an enduring physical difference between women and men). In other words, not every gender difference, in dress codes or elsewhere, is an equal protection violation. *Rostker v. Goldberg*, 453 U.S. 57, 69 n.7 (1981) ("It is clear that gender has never been rejected as an impermissible classification in all instances.") (citation and alterations omitted). *See also* Newhall, *supra*, at 221 ("The Court's language [in *VMI*] strongly implies that where differing sex-based treatment does not impact a legal, social, or economic interest, it should not trigger intermediate scrutiny.").

3. The Comparable Burdens Test Strikes the Right Balance

When considering a male student's equal protection challenge to a school dress code, the Seventh Circuit wrote, "Whether and when the adoption of differential grooming standards for males and females amounts to sex discrimination is the subject of a discrete subset of judicial and scholarly analysis." *Hayden*, 743 F.3d at 577. "This line of authority…is most developed in the employment context, but it has a parallel in the school context as well." *Id.* (citing cases).

For instance, in the Title VII context the Ninth Circuit has "long recognized that companies may differentiate between men and women in appearance and grooming policies, and so have other circuits." *Jespersen v. Harrah's Operating Co.*, 444 F.3d 1104, 1110 (9th Cir. 2006) (en banc) (citing cases from the Second, Fourth, Fifth, Sixth, Eighth, Ninth, and D.C. Circuits). "An appearance standard that imposes different but essentially equal burdens on men and women is not disparate treatment [that violates Title VII]." *Frank v. United Airlines, Inc.*, 216 F.3d 845, 854 (9th Cir. 2000). In 2015, a federal district court found that "every federal court of appeals that has addressed the issue has similarly found that prescribing gender differentiated hair length standards does not create an actionable claim under Title VII." *Viscecchia v. Alrose Allegria*, 117 F.Supp.3d 243, 250 (E.D.N.Y. 2015) (collecting cases). *See also* Newhall, *supra*, at 221 &

n.87 ("every circuit court of appeals to consider this issue found that it is not a Title VII violation to require short hair on men but not women"). In an analogous physical fitness case, the Fourth Circuit held that "an employer does not contravene Title VII when it utilizes physical fitness standards that distinguish between the sexes on the basis of their physiological differences but impose an equal burden of compliance on both men and women, requiring the same level of physical fitness of each." *Bauer v. Lynch*, 812 F.3d 340, 351 (4th Cir. 2016).

The Seventh Circuit in *Hayden* collected grooming code cases from around the country, 743 F.3d at 577-78, and concluded that a policy that "applies only to male [students], but which is just one component of a set of grooming standards that impose comparable, although not identical, responsibilities on male and female [students] does not constitute sex discrimination," *id.* at 579-80; *see also id.* at 579-82. The *Hayden* court found this test appropriate, in part, because it agreed "that the pedagogical and caretaking responsibilities of schools give school officials substantial leeway in establishing grooming codes for their students generally and for their interscholastic athletes in particular." *Id.* at 582.

The district court in this case correctly adopted the comparable burdens test from *Hayden*. Order at 13. In their Opening Brief (at 12-13), the Doe family disagrees with this decision for two reasons. Neither has merit.

a. The Does' Mechanistic Approach to Equal Protection Should be Rejected

First, the Does argue that all "sex-based classifications [must] be subjected to heightened scrutiny." Opening Br. at 12; *see also id.* at 13. This is incorrect. Such a flat, mechanistic approach to equal protection is a misreading of Supreme Court precedent. As noted, the *VMI* Court expressly recognized that "physical" and "inherent" differences between men and women are "enduring" and a "cause of celebration." 518 U.S. at 533. Part of what we celebrate is that these differences manifest themselves in how people dress. "[A] community made up exclusively of one [sex]" would not just be "different," as the Court said, *id.*, but stylistically and aesthetically poorer, precisely because women and men, girls and boys, look and dress differently. "[T]he two sexes are not fungible," *id.*, a fact we should and do celebrate in each sex's sartorial choices.

The Supreme Court also acknowledged that "women's admission [to VMI] would require accommodations, primarily in arranging housing assignments and physical training programs for female cadets," *id.* at 540. *See also id.* at 550 n.19 ("Admitting women to VMI would undoubtedly require alterations necessary to afford members of each sex privacy from the other sex in living arrangements, and to adjust aspects of the physical training programs.") (citing 10 U.S.C. § 4342 (requiring different standards for those admitted to the military academies "because of physiological differences between male and female individuals")).

Thus, the Supreme Court clearly understood that some gender differences are not gender discrimination. Rather, sex discrimination may occur when "a law or official policy denies to women…equal opportunity to aspire, achieve, participate in and contribute to society based on their individual talents and capacities." *Id.* at 532. As applied here, gender differences regarding hair-length or earring-wearing in school dress codes generally do not deny boys or girls the opportunity to aspire, achieve, and fully participate in school activities. *See Knott v. Missouri Pac. R. Co*., 527 F.2d 1249, 1252 (8th Cir. 1975) ("Where [uniform] policies are reasonable and are imposed in an evenhanded manner on all employees, slight differences in the appearance requirements for males and females have only a negligible effect on employment opportunities."). Moreover, the Supreme Court has condemned "[m]echanistic classification of all our [gender] differences as stereotypes" because such an approach does a disservice to equal protection principles. *Nguyen*, 533 U.S. at 73.

In addition, the mechanistic approach advocated by the Does ignores "the special characteristics of the school environment."[6] The comparable burdens test,

[6] For similar reasons, the Does' citation to *Free the Nipple-Fort Collins v. City of Fort Collins*, 916 F.3d 792 (10th Cir. 2019) is misplaced. *See* Opening Br. at 10. That case involved a challenge by adult women to a public indecency ordinance that would have imposed criminal penalties on women, but not men, if they went topless in public. *Id.* at 795. Factually and legally, that case is far removed from this one involving a male kindergarten student's personal preference to wear earrings at a charter school in violation of its uniform policy. *Cf. id.* at 811 (Hartz,

in contrast, strikes the appropriate balance between judicial deference to educators and judicial oversight of serious constitutional violations. "Public schools have an interest of constitutional dignity in being allowed to manage their affairs and shape their destiny free of minute supervision by federal judges and juries." *Brandt v. Bd. of Educ. of Cty. of Chicago*, 480 F.3d 460, 467 (7th Cir. 2007) (rejecting 8th grade student's challenge to school's selection of class t-shirt).

The Third Circuit provides an object lesson. After several years of granting students' claims in the early 1970s, the Circuit, en banc, reversed course, dismissing a § 1983 claim by a male soccer player who chose not to comply with the school's athletic code requiring boys to have "neatly trimmed" hair. *Zeller*, 517 F.2d at 606, 608. A four-member plurality of the court explained that "the federal court system is ill-equipped to make value judgments on hair lengths in terms of the Constitution – whether an athletic code requiring that hair be 'neatly trimmed' would not pass muster, whether one putting the limit on hair twelve inches below the collar would pass, or whether one drawing the line at four inches below the collar would be more difficult of solution." *Id.* at 606-07.

This Court expressed the flip-side of this concern, worried that it "would create a veritable quagmire" for school administrators and teachers if federal

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J., dissenting) ("The 'exceedingly persuasive justification' standard is a poor tool, probably an unworkable one, for assessing the propriety, the constitutionality, of public-indecency laws.").

judges tried to draw constitutional lines related to jewelry-wearing, hair-length, and clothing-appropriateness in K-12 schools. *New Rider*, 480 F.2d at 700. *See e.g.*, *Bar-Navon v. Brevard Cty. Sch. Dist.*, 290 Fed. Appx. 273, 275 (11th Cir. 2008) (10th grade girl objected to "earring only" policy because she wanted to wear her piercings in her tongue, nasal septum, lip, navel, and chest); *Olesen v. Bd. of Educ.*, 676 F.Supp. 820, 821 (N.D. Ill. 1987) (boy challenged male earring ban that the school had imposed to quell gang activity); Friedmann, *supra*, at 2547-48 (school disciplined 17 year old girl for violating its dress code by coming to school without wearing a bra, allegedly causing male classmates to be distracted).

b. This Court Should Follow *Hayden*, not *Peltier*

Second, the Does ask this Court to follow the Fourth Circuit's recent school dress code decision, which chose not to adopt the comparable burdens test. *Peltier v. Charter Day Sch.*, 37 F.4th 104, 125 n.13 (4th Cir. 2022) (acknowledging its disagreement with the Seventh (*Hayden*) and Ninth (*Jespersen*) Circuits). This Court should decline this invitation for two reasons. First, in contrast to *Hayden*'s extensive analysis, 743 F.3d at 576-82, the *Peltier* court merely brushed off the comparable burdens test in a footnote, remarking: "These cases [*Hayden* and *Jespersen*] rely heavily on precedent from the 1970s affirming the validity of dress codes based on 'traditional' notions of appropriate gender norms." *Peltier*, 37 F.4th at 125 n.13. This facile, conclusory sentence is hardly a persuasive way to dismiss

good law from seven sister circuits and several other jurisdictions which was painstakingly reviewed by the *Hayden* court for seven pages. 743 F.3d at 576-82. *See also Eline v. Town of Ocean City*, 7 F.4th 214, 221-22 (4th Cir. 2021) (rejecting a request to overrule binding precedent from 1991 on the ground that it was purportedly "outdated"). Second, not only did the *Peltier* court fail to substantively evaluate the "discrete subset of judicial and scholarly analysis" related to dress code challenges, *Hayden*, 743 F.3d at 577, it also entirely overlooked the even more extensive case law that mandates "care and restraint" when courts address "the special characteristics of the school environment." *See Epperson*, 393 U.S. at 104; *Tinker* 393 U.S. at 506. Never once does the majority in *Peltier* grapple with this long line of Supreme Court precedent.

These deficiencies in *Peltier* are further regrettable because, had the Fourth Circuit adopted the comparable burdens test, the outcome (which was correct) would have been the same. The evidence in *Peltier* cataloged the "tangible and intangible harms" girls suffered due to the school's "skirts-only requirement." 37 F.4th at 114. For instance, it inhibited the girls' ability to fully participate in "numerous physical activities, including climbing, using the swings, and playing soccer," as well as prevented them from comfortably "crawl[ing] and kneel[ing] on the floor, fearing that boys will tease them or look up their skirts." *Id.* In addition, it conveyed a message that "girls simply weren't worth as much as boys" and that

"girls should be less active than boys and that they are more delicate than boys." *Id.* These substantial burdens were not at all comparable to the boys' relatively mild inability to have long hair or wear jewelry.[7] *Id.* at 124. *Cf. Frank*, 216 F.3d at 854-55 (applying comparable burdens test and finding discrimination because the airline's grooming code imposed a heavier burden on women than men); *Carroll v. Talman Fed. Sav. & Loan Ass'n of Chicago*, 604 F.2d 1028 (7th Cir. 1979) (same because only women had to wear uniforms); *Laffey v. Northwest Airlines, Inc*., 366 F.Supp. 763 (D.D.C. 1973) (same because only women required to wear contact lenses instead of glasses).

In sum, this Court should follow *Hayden*, not *Peltier*, and affirm the district court's choice of employing the comparable burdens test to evaluate RMCA's earring policy.

C. The District Court Correctly Found that RMCA's Dress Code Imposes Comparable Burdens on Boys and Girls and thus Does Not Constitute Sex Discrimination

The district court carefully applied the comparable burdens test to RMCA's uniform policy. Order at 14-18. After surveying the dress code, *id.* at 14-16, it concluded that "the policy imposes comparable burdens on students of both sexes.

[7] The district court in this case also suggested that *Peltier* would have failed the comparable burdens test because "the skirts requirement impose[d] a tangible burden on girls [and] was inconsistent with community norms for even traditionally conservative settings." Order at 17 n.5.

The uniform policy is comprehensive and thorough, and all students are subject to numerous restrictions designed to ensure a certain level of modest and conservative dress," *id.* at 16. It continued, "Ultimately, the uniform policy places the same essential burden on both boys and girls: they must limit their individuality and adhere generally to a traditional, conservative appearance." *Id.* at 16-17.[8]

The Does argue the court erred in dismissing their complaint because they had made sufficient allegations to survive a motion to dismiss. Opening Br. at 13-15. This is incorrect. The only two allegations they made on this issue were wholly conclusory; they said it "does not impose comparable burdens on the sexes," and it "imposes greater burdens on male students." App. 41. *See also* Opening Br. at 14. This is clearly insufficient under the *Iqbal/Twombly* standard. *Iqbal*, 556 U.S. at 678 ("Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice."); *Khalik*, 671 F.3d at 1190 (same).

In addition, the district court's decision is consistent with every equal protection challenge by male students to similar earring policies throughout the country; they have all been rejected by the courts. *See Barber v. Colo. Indep. Sch.*

[8] *Hayden*'s outcome is distinguishable for precisely this reason. As the Seventh Circuit wrote, it was "dispositive" that the extensive "line of precedent" related to school and workplace dress codes had been "ignored entirely in this appeal," and that "[t]he parties [had] litigated the hair-length policy in isolation rather than as an aspect of any broader grooming standards…." 743 F.3d at 578. That has not occurred in this case.

Dist., 901 S.W.2d 447, 450 (Tex. 1995); *Hines v. Caston Sch. Corp.*, 651 N.E.2d 330, 335-36 (Ind. App. 1995); *Jones v. W.T. Henning Elem. Sch.*, 721 So.2d 530, 532 (La. App. 1998); *Olesen*, 676 F.Supp. at 823.

III. RMCA'S EARRING POLICY DOES NOT VIOLATE TITLE IX

The Does alleged two violations of Title IX: (1) sex discrimination and (2) retaliation. App. 41-43. The district court properly dismissed both claims. Order at 11, 13, 18-19.

A. The District Court Correctly Dismissed the Sex Discrimination Claim under Title IX

There are two reasons to affirm the district court's decision to dismiss the sex discrimination claim under Title IX. First, this Court, like others, analyzes sex discrimination under the same framework for both Title IX and the Equal Protection Clause. Thus, the analysis above applies. Second, Title IX's text and precedent provide additional reasons for dismissal.

1. The Same Analysis Applies under both Title IX and the Equal Protection Clause

The Tenth Circuit applies the same analytical framework to claims of gender discrimination under Title VII, Title IX, and the Equal Protection Clause. *English v. Colorado Dep't of Corr.*, 248 F.3d 1002, 1007 (10th Cir. 2001) (applying same framework to Title VII and equal protection claims); *Hiatt v. Colo. Seminary*, 858 F.3d 1307, 1315 n.8 (10th Cir. 2017) (same for claims under Titles VII and IX);

Roberts v. Colo. State Bd., 998 F.2d 824, 832 (10th Cir. 1993) (Title VII is "the most appropriate analogue when defining Title IX's substantive standards"). *See also Morris v. Oldham Cty. Fiscal Court*, 201 F.3d 784, 794 (6th Cir. 2000) (Title VII showing "mirrors" that for §1983 equal protection claim).

The district court noted that "the parties agree that the standard for evaluating sex discrimination under Title IX mirrors that for evaluating sex discrimination under the Equal Protection Clause." Order at 11; *see also id.* at 13. The Does do not contest this in their Opening Brief. Accordingly, for the same reasons given above, the Title IX sex discrimination claim was properly dismissed by the trial court.

2. Title IX's Text and Precedent also Support Dismissal

Title IX's operative provision, 20 U.S.C. § 1681(a), is written in very general terms: "No 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…." Courts have often noted that not all distinctions on the basis of sex are impermissible under Title IX. *Biediger v. Quinnipiac Univ.*, 691 F.3d 85, 98 (2d Cir. 2012) ("not every decision to maintain separate sports programs for male and female students constitutes proscribed discrimination" under Title IX). Indeed, Title IX itself explicitly permits sex-based distinctions related to admissions to

elementary and secondary schools, and it "exempts military service schools and traditionally single-sex public colleges from all of its provisions." *Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 257 (2009) (citing 20 U.S.C. §1681(a)(1) and §§1681(a)(4)-(5)). Title IX expressly permits "maintaining separate living facilities for the different sexes." 20 U.S.C. §1686. It also permits distinctions on the basis of sex for voluntary youth service organizations, such as Girl and Boy Scouts; secondary school leadership conferences, such as Boys and Girls State/Nation; father-son and mother-daughter activities at schools; and college scholarships awarded by "beauty pageants." 20 U.S.C. §§1681(a)(6)(B), (7)-(9).

Given both its operative provision's generality and its numerous sex-based exceptions, it is hardly surprising that courts have long deferred to U.S. Department of Education regulations to determine the precise contours of Title IX's substantive reach. *See Biediger*, 691 F.3d at 96-98 (giving a "particularly high" degree of *Chevron* deference to the DOE's regulations regarding Title IX compliance for university sports programs). Indeed, "Congress has expressly delegated to the Department of Education the authority 'to effectuate the provisions of section 1681...by issuing [regulations].'" *Conley v. Nw. Fla. State Coll.*, 145 F.Supp.3d 1073, 1080 (N.D. Fla. 2015) (quoting 20 U.S.C. § 1682). *See Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 288 (1998) ("[Title IX]

entitles agencies who disburse education funding to enforce their rules implementing the nondiscrimination mandate…") (citing 20 U.S.C. §1682).

In 1982, the Department of Education revoked a prior Title IX regulation, 34 C.F.R. § 106.31(b)(5), that had "prohibit[ed] discrimination in the application of codes of personal appearance." Nondiscrimination Regulation, 47 Fed. Reg. 32,526, 1982 WL 148413 (July 28, 1982). The DOE decided that the "[d]evelopment and enforcement of appearance codes is an issue for local determination." *Id.* For forty years, Congress has never overridden the DOE's interpretation of Title IX deferring decisions about dress codes to local school officials. Thus, the district court's decision was also proper as a matter of *Chevron* deference. *Hernandez-Carrera v. Carlson*, 547 F.3d 1237, 1256 (10th Cir. 2008) (applying *Chevron* in a similar circumstance).

Finally, Title IX "invokes Congress's power under the Spending Clause." *Barnes v. Gorman*, 536 U.S. 181, 185 (2002); *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 640 (1999). Like other Spending Clause legislation, it is "much in the nature of a contract: in return for federal funds, the [recipients] agree to comply with federally imposed conditions." *Pennhurst State Sch. and Hosp. v. Halderman*, 451 U.S. 1, 17 (1981). Accordingly, a court's "central concern" must be to "ensur[e] that the receiving entity of federal funds has notice" of the conditions to which it will be held. *Gebser*, 524 U.S. at 287; *see also Davis*, 526 U.S. at 640.

"[I]f Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously." *Pennhurst*, 451 U.S. at 17. Here, it cannot be claimed that Title IX unambiguously imposed a duty on RMCA to not enact a sex-specific earring policy as one component of its overall uniform policy, given that for the past forty years the Department of Education has explicitly deferred this issue under Title IX to local school officials. Thus, this is yet another reason the district court's decision to dismiss the Title IX claim was correct.

B. The Does Failed to Allege a Plausible Claim of Retaliation

The district court dismissed the Does' retaliation claim because they failed to plausibly allege that the School retaliated against John because of Ms. Doe's complaints about the earring policy. Order at 19. In other words, they failed to plausibly allege causation. *Id.* The court noted that "[t]his is not a case…where the complaint is silent about how and why an adverse action was taken…." *Id.* To the contrary, the "complaint itself alleges that [John] repeatedly violated RMCA's rules" by wearing earrings at school throughout the fall 2019 semester, despite knowing that was a violation of RMCA's dress code. *Id. See also* App. 35, 37-38, 42-43, 45 ¶ 98 ("[RMCA's] written dress and grooming policy was the moving force behind [John's] injuries"). The district court explained that the complaint "contains no allegations, other than the conclusory one that Defendants retaliated against Ms. Doe, that the true justification for John's suspension was his mother's

complaints as opposed to his repeated dress code infractions." Order at 19. This is an accurate reading of the complaint. App. 35, 37-38, 42-43, 45.

On appeal, the Does make the same argument they made below. Opening Br. at 15-16. Namely, they contend that it was "reasonable to infer" that Ms. Doe's complaints about the dress code were what caused the disciplinary actions against John, rather than the fact that he wore earrings each day in violation of the policy. *Id.* at 16. Such an inference is not reasonable or plausible. The district court correctly concluded that the Does failed to state a plausible claim of retaliation. Order at 19. This Court should affirm.

CONCLUSION

During the height of the boys-hair-length cases in the mid-1970s, the Supreme Court refused nine times to grant certiorari, including in this Court's decision in *Freeman v. Flake*. *See Zeller*, 517 F.2d at 603 & nn.13-14. However, at this same time the Supreme Court agreed to hear a similar school discipline case involving a challenge by high school students to their expulsion because "as a prank" they had secretly spiked the punch at an extracurricular event. *Wood v. Strickland*, 420 U.S. 308, 311 (1975), *abrogated on other grounds by Harlow v. Fitzgerald*, 457 U.S. 800 (1982). The Court in *Wood* concluded its analysis by again reiterating that federal courts should generally defer to the judgment of local school officials, writing:

> It is not the role of the federal courts to set aside decisions of school administrators which the court may view as lacking a basis in wisdom or compassion…. [Citations omitted.] [Section] 1983 does not extend the right to relitigate in federal court evidentiary questions arising in school disciplinary proceedings or the proper construction of school regulations. The system of public education that has evolved in this Nation relies necessarily upon the discretion and judgment of school administrators and school board members, and § 1983 was not intended to be a vehicle for federal-court corrections of errors in the exercise of that discretion which do not rise to the level of violations of specific constitutional guarantees. [Citations omitted.]

Id. at 326 (citing, *inter alia*, *Tinker*, *Goss*, *Epperson*). Reasonable people might disagree as to the wisdom or efficacy of various school uniform rules. However, in all but the most egregious of cases, federal courts should not be become deeply involved. Accordingly, this Court should adopt the comparable burdens test and affirm the district court.

STATEMENT REGARDING ORAL ARGUMENT

The School requests oral argument because it believes it will aid the Court in deciding the complex legal arguments presented by this case.

Date: January 30, 2023

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CERTIFICATE OF SERVICE

I hereby certify that on the 30th of January 2023 I electronically filed the foregoing using the court's CM/ECF system which will send notification of such filing to the following:

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