

23-2807

**United States Court of Appeals
for the Ninth Circuit**

REBECCA ROE, by and through her parents and next friends;
RYAN ROE; RACHEL ROE; SEXUALITY AND GENDER ALLIANCE, an association,

Plaintiffs-Appellants,

v.

DEBBIE CRITCHFIELD, in her official capacity as
Idaho State Superintendent of Public Instruction, et al.,

Defendants-Appellees.

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

**BRIEF FOR STATES OF NEW YORK, WASHINGTON, CALIFORNIA,
COLORADO, CONNECTICUT, DELAWARE, HAWAII, ILLINOIS,
MAINE, MARYLAND, MASSACHUSETTS, MICHIGAN, MINNESOTA,
NEVADA, NEW JERSEY, NORTH CAROLINA, OREGON,
PENNSYLVANIA, RHODE ISLAND, AND VERMONT, AND THE
DISTRICT OF COLUMBIA AS AMICI CURIAE
IN SUPPORT OF APPELLANTS AND REVERSAL**

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INTERESTS OF THE AMICI STATES

In this case, plaintiffs-appellants Rebecca Roe, a transgender girl in seventh grade, and Sexuality and Gender Alliance at Boise High School (“SAGA”), a student organization with transgender members, seek an injunction against enforcement of Idaho Senate Bill 1100. The Act categorically bars transgender students from using sex-separated school facilities consistent with their gender identity. The district court erroneously denied a preliminary injunction, concluding that the Act likely comports with the Equal Protection Clause and Title IX of the Education Amendments of 1972. This Court has stayed enforcement of the Act pending resolution of this appeal. Pursuant to Federal Rule of Appellate Procedure 29(a)(2), the States of New York, Washington, California, Colorado, Connecticut, Delaware, Hawai‘i, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, North Carolina, Oregon, Pennsylvania, Rhode Island, and Vermont, and the District of Columbia, file this brief as amici curiae in support of Roe and SAGA.

Amici States strongly support the right of transgender people to live with dignity, be free from discrimination, and have equal access to

education, government-sponsored opportunities, and other incidents of life, including equal access to school restrooms. Discrimination on the basis of one's transgender status causes tangible economic, educational, emotional, and health harms. To prevent these injuries, many amici States have adopted policies aimed at combatting discrimination against transgender people. Amici submit this brief to describe their experiences with administering such policies—including policies that maintain gender-separated restrooms while allowing transgender students to use such restrooms on an equal basis with other students of the same sex. As amici's experiences show, ensuring transgender people have access to public facilities consistent with their gender identity—including access to common restrooms—benefits all, without compromising safety or privacy, or imposing significant costs.

The amici States also share a strong interest in seeing that federal law is properly applied to protect transgender people from discrimination. This appeal does not challenge the authority of a State or a local school district to assign bathrooms based on sex, although that is how the district court mischaracterized the issue. *See Roe v. Critchfield*, No. 1:23-cv-315, 2023 WL 6690596, at *14-15 (D. Idaho Oct. 12, 2023). Rather, this case

challenges an Idaho statute that excludes a transgender female student, Rebecca Roe, from the girls' bathroom and a transgender male student, A.J. (SAGA's president), from the boys' bathroom based on their sex assigned at birth. The Act violates Title IX by denying transgender girls and boys access to the same common restrooms that other girls and boys may use. Further, because the Act fails to advance any legitimate interest, such as protecting public safety or personal privacy, its only function is to stigmatize a particular group, which violates equal protection.

ARGUMENT

I. PROTECTING TRANSGENDER PEOPLE FROM DISCRIMINATION CONFERS WIDE SOCIETAL BENEFITS WITHOUT COMPROMISING THE PRIVACY OR SAFETY OF OTHERS

Over 1.6 million people in the United States—including approximately 300,000 youth between the ages of thirteen and seventeen—identify as transgender.¹ Transgender people have been part of cultures worldwide “from antiquity until the present day.”² They contribute to our communities in myriad ways, including as students, teachers, essential workers, firefighters, police officers, lawyers, nurses, and doctors.

Unfortunately, transgender people often experience discrimination that impairs their physical and mental health, curtails their economic prospects, and ultimately limits their ability to realize their potential and participate fully in society. To combat such discrimination, States began

¹ Jody L. Herman et al., Williams Inst., *How Many Adults and Youth Identify as Transgender in the United States?* 1 (2022). (For authorities available online, full URLs appear in the table of authorities. All URLs were last visited on November 29, 2023.)

² American Psych. Ass’n (APA), *Answers to Your Questions About Transgender People, Gender Identity, and Gender Expression* (last updated June 2023); see also APA, *Guidelines for Psychological Practice with Transgender and Gender Nonconforming People*, 70 Am. Psych. 832, 834 (2015).

providing civil rights protections for transgender people over a quarter century ago. At least twenty-two States and the District of Columbia,³

³ **California:** Cal. Civ. Code § 51(b), (e)(5) (public accommodations); Cal. Educ. Code §§ 220 (education), 221.5(f) (education and school athletic participation); Cal. Gov’t Code §§ 12926(o), (r)(2), 12940(a), 12949 (employment); *id.* § 12955 (housing); Cal. Penal Code §§ 422.55, 422.56(c) (hate crimes). **Colorado:** Colo. Rev. Stat. § 24-34-301(7) (definition); *id.* § 24-34-402 (employment); *id.* § 24-34-502 (housing); *id.* § 24-34-601 (public accommodations). **Connecticut:** Conn. Gen. Stat. § 10-15c (schools); *id.* § 46a-51(21) (definition); *id.* § 46a-60 (employment); *id.* § 46a-64 (public accommodations); *id.* § 46a-64c (housing). **Delaware:** Del. Code Ann. tit. 6, § 4501 (public accommodations); *id.* tit. 6, § 4603(b) (housing); *id.* tit. 19, § 711 (employment). **Hawai‘i:** Haw. Rev. Stat. § 489-2 (definition); *id.* § 489-3 (public accommodations); *id.* § 515-2 (definition); *id.* § 515-3 (housing). **Illinois:** 775 Ill. Comp. Stat. 5/1-102(A) (housing, employment, access to financial credit, public accommodations); *id.* 5/1-103(O-1) (definition). **Iowa:** Iowa Code § 216.2(10) (definition); *id.* § 216.6 (employment); *id.* § 216.7 (public accommodations); *id.* § 216.8 (housing); *id.* § 216.9 (education). **Kansas:** Kansas Hum. Rts. Comm’n, *Kansas Human Rights Commission Concurs with the U.S. Supreme Court’s Bostock Decision* (Aug. 21, 2020) (advising that Kansas laws prohibiting discrimination based on “sex” in “employment, housing, and public accommodation” contexts “are inclusive of LGBTQ and all derivatives of ‘sex’”). **Maine:** Me. Rev. Stat. Ann. tit. 5, § 4553(9-C) (definition); *id.* § 4571 (employment); *id.* § 4581 (housing); *id.* § 4591 (public accommodations); *id.* § 4601 (education). **Maryland:** Md. Code Ann., State Gov’t § 20-304 (public accommodations); *id.* § 20-606 (employment); *id.* § 20-705 (housing); Md. Code Ann., Educ. § 26-704 (schools). **Massachusetts:** Mass. Gen. Laws ch. 4, § 7, fifty-ninth (definition); *id.* ch. 76, § 5 (education); *id.* ch. 151B, § 4 (employment, housing, credit); *id.* ch. 272, §§ 92A, 98 (public accommodations) (as amended by Ch. 134, 2016 Mass. Acts). **Michigan:** Mich. Comp. Laws § 37.2102(1). **Minnesota:** Minn. Stat. § 363A.03(44) (definition); *id.* § 363A.08 (employment); *id.* § 363A.09 (housing); *id.* § 363A.11 (public accommodations); *id.* § 363A.13 (education).

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Nevada: Nev. Rev. Stat. §§ 118.075, 118.100 (housing); *id.* §§ 613.310(4), 613.330 (employment); *id.* §§ 651.050(2), 651.070 (public accommodations). **New Hampshire:** N.H. Rev. Stat. Ann. § 354-A:2(XIV-e) (definition); *id.* § 354-A:6 (employment); *id.* § 354-A:8 (housing); *id.* § 354-A:16 (public accommodations); *id.* § 354-A:27 (education). **New Jersey:** N.J. Stat. Ann. § 10:5-5(rr) (definition); *id.* § 10:5-12 (public accommodations, housing, employment); *id.* § 18A:36-41 (directing issuance of guidance to school districts permitting transgender students “to participate in gender-segregated school activities in accordance with the student’s gender identity”). **New Mexico:** N.M. Stat. Ann. § 28-1-2(Q) (definition); *id.* § 28-1-7(A) (employment); *id.* § 28-1-7(F) (public accommodations); *id.* § 28-1-7(G) (housing). **New York:** N.Y. Exec. Law §§ 291, 296 (education, employment, public accommodations, housing). **Oregon:** Or. Rev. Stat. § 174.100(4) (definition); *id.* § 659.850 (education); *id.* § 659A.006 (employment, housing, public accommodations). **Pennsylvania:** 43 Pa. Stat. § 953; 16 Pa. Code § 41.206 (employment, housing, public accommodations). **Rhode Island:** 11 R.I. Gen. Laws § 11-24-2 (public accommodations); 28 R.I. Gen. Laws §§ 28-5-6(11), 28-5-7 (employment); 34 R.I. Gen. Laws §§ 34-37-3(9), 34-37-4 (housing). **Utah:** Utah Code Ann. § 34A-5-106 (employment); *id.* § 57-21-5 (housing). **Vermont:** Vt. Stat. Ann. tit. 1, § 144 (definition); *id.* tit. 9, § 4502 (public accommodations); *id.* tit. 9, § 4503 (housing); *id.* tit. 21, § 495 (employment). **Washington:** Wash. Rev. Code Ann. § 28A.642.010 (education); *id.* § 49.60.030(1)(a)-(e) (employment, public accommodations, real estate transactions, credit transactions, and insurance transactions); *id.* § 49.60.040(27) (definition); *id.* § 49.60.180 (employment); *id.* § 49.60.215 (public accommodations); *id.* § 49.60.222 (housing). **District of Columbia:** D.C. Code § 2-1401.02(12A) (definition); *id.* § 2-1402.11 (employment); *id.* § 2-1402.21 (housing); *id.* § 2-1402.31 (public accommodations); *id.* § 2-1402.41 (education).

and at least 374 municipalities,⁴ now offer express protections against discrimination based on gender identity in areas such as education, housing, public accommodations, and employment.⁵

The experiences of amici States and other jurisdictions show that policies and practices that ensure equal access to public facilities for transgender people—including access to common restrooms consistent with their gender identity—promote safe and inclusive school environments that benefit all.

⁴ Movement Advancement Project, *Local Nondiscrimination Ordinances* (current as of Oct. 26, 2023).

⁵ The U.S. Supreme Court has confirmed that longstanding federal law similarly prohibits employment discrimination based on gender identity. *See Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1742-43 (2020).

A. Transgender Youth Face Pervasive and Harmful Discrimination That Causes Them Serious Health and Academic Harms.

Transgender youth experience levels of discrimination, violence, and harassment that exceed those experienced by their cisgender counterparts.⁶ In the 2015 U.S. Transgender Survey (USTS), the largest survey of transgender people to date, over three quarters (77%) of respondents who were known or perceived as transgender in grades K-12 reported negative experiences at school, including being harassed or attacked.⁷ More than half of transgender students (54%) reported verbal harassment, almost a quarter (24%) reported suffering a physical attack, and approximately one in eight (13%) reported being sexually assaulted.⁸

In a 2022 survey of LGBTQ teenagers, nearly two in three (62.6%) transgender and gender-expansive youth respondents reported being “teased, bullied, or treated badly” at school in the prior year, and more

⁶ Joseph G. Kosciw et al., GLSEN, *The 2021 National School Climate Survey: The Experiences of LGBTQ+ Youth in Our Nation’s Schools* xxvii, 84 (2022); see also GLSEN, *Improving School Climate for Transgender and Nonbinary Youth: Research Brief 1* (2021); Michelle M. Johns et al., *Transgender Identity and Experiences of Violence Victimization, Substance Use, Suicide Risk, and Sexual Risk Behaviors Among High School Students — 19 States and Large Urban School Districts, 2017*, 68 *Morbidity & Mortality Wkly. Rep.* 67, 67-70 (2019).

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than half (55.6%) of such youth reported being victimized specifically due to their sexual identity, gender identity, and/or gender expression.⁹ In the same survey, nearly six in ten (56.9%) of LGBTQ+ youth respondents reported being verbally or physically harassed at least once in the past thirty days.¹⁰ In another 2022 survey, nearly two in three (64%) transgender and nonbinary youth respondents similarly reported being discriminated against because of their gender identity.¹¹ Students subject to such discrimination, violence, and harassment have reported feeling less connected to their schools, and less of a sense of belonging, than other students.¹² Transgender youth of color, in particular, face

⁷ [Sandy E. James et al., Nat'l Ctr. for Transgender Equal., *The Report of the 2015 U.S. Transgender Survey* 131-35 \(2016\).](#)

⁸ [*Id.* at 132-33.](#)

⁹ [Human Rts. Campaign Found., *2023 LGBTQ+ Youth Report* \(2023\).](#)

¹⁰ [*Id.*](#)

¹¹ [The Trevor Project, *2023 U.S. National Survey on the Mental Health of LGBTQ Young People* 16 \(2022\).](#)

¹² [Kosciw et al., *The 2021 National School Climate Survey*, *supra*, at 88.](#)

unique difficulties as a result of their intersecting marginalized identities.¹³

Discrimination against transgender youth—including denial of access to appropriate restroom facilities—can have serious health consequences. Research has demonstrated that discrimination against LGBTQ people—including discriminatory policies and the denial of opportunities—“increases the risks of poor mental and physical health” for LGBTQ people.¹⁴ For example, LGBTQ students who experienced discriminatory policies or practices in school were found to have lower self-esteem and higher levels of depression than students who had not encountered such discrimination.¹⁵ Respondents to the 2015 USTS who reported negative experiences in grades K-12 were more likely than other

¹³ Nhan L. Truong et al., GLSEN, *Erasure and Resilience: The Experiences of LGBTQ Students of Color* 3 (2020).

¹⁴ What We Know Project, Cornell Univ., *What Does the Scholarly Research Say About the Effects of Discrimination on the Health of LGBT People?* (2019).

¹⁵ Kosciw et al., *The 2021 National School Climate Survey*, *supra*, at 43; see also April J. Ancheta et al., *The Impact of Positive School Climate on Suicidality and Mental Health Among LGBTQ Adolescents: A Systematic Review*, 37 J. Sch. Nursing 75, 76 (2021).

respondents to be under serious psychological distress, to have experienced homelessness, and to have attempted suicide.¹⁶ Transgender people attempt suicide at a rate nearly nine times that of the general population, and half of transgender and nonbinary youth in a 2022 mental health survey reported having seriously considered attempting suicide in the past twelve months.¹⁷ And a 2016 study found that transgender people who had been denied access to bathroom facilities were approximately 40% more likely to have attempted suicide than were other transgender people.¹⁸ Similarly, a 2021 study found that denial of access to bathroom facilities significantly increased the odds of transgender and/or nonbinary youth reporting depressive mood and attempting suicide—one in three youths who faced bathroom discrimination reported a suicide attempt in

¹⁶ James et al., 2015 U.S. Transgender Survey, supra, at 132.

¹⁷ See id. at 114; The Trevor Project, 2023 U.S. National Survey on the Mental Health of LGBTQ Young People, supra, at 5.

¹⁸ Kristie L. Seelman, Transgender Adults' Access to College Bathrooms and Housing and the Relationship to Suicidality, 63 J. of Homosexuality 1378, 1388 tbl. 2 (2016).

the past year.¹⁹ Positive school climates, on the other hand, have been linked to lower suicidality in LGBTQ youth.²⁰

Discriminatory bathroom policies also bring severe physical health risks for transgender youth. Almost three in four (72.9%) of the transgender students surveyed in one study had avoided school restrooms because they felt unsafe or uncomfortable.²¹ And more than half (54%) of respondents in another study of transgender people reported negative health effects from avoiding public restrooms, such as kidney infections and other kidney-related problems.²²

¹⁹ Myeshia Price-Feeney et al., *Impact of Bathroom Discrimination on Mental Health Among Transgender and Nonbinary Youth*, 68 J. of Adolescent Health 1142 (2021).

²⁰ Ancheta et al., *The Impact of Positive School Climate*, supra, at 80; see also Cady Stanton, *As ‘Don’t Say Gay’ and Similar Bills Take Hold, LGBTQ Youths Feel They’re ‘Getting Crushed’*, USA Today (updated May 11, 2022) (noting that LGBTQ youths in affirming schools were nearly 40% less likely to attempt suicide than LGBTQ youths in nonaffirming schools).

²¹ Kosciw et al., *The 2021 National School Climate Survey*, supra, at 89 fig. 3.13.

²² Jody L. Herman, *Gendered Restrooms and Minority Stress: The Public Regulation of Gender and Its Impact on Transgender People’s Lives*, 19 J. Pub. Mgmt. & Soc. Pol’y 65, 75 (2013); see also *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 600, 603, 617 (4th Cir. 2020) (transgender boy suffered painful urinary tract infection after being denied access to

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Discrimination in school settings also negatively affects educational outcomes. A 2021 survey showed that LGBTQ students who had experienced discriminatory policies and practices had lower levels of educational achievement, lower grade point averages, and lower levels of educational aspiration than other students.²³ Discriminatory school climates have also been found to exacerbate absenteeism. A 2021 survey found that LGBTQ students who had experienced discrimination in their schools were almost three times as likely (43.3% versus 16.4%) to have missed school because they felt unsafe or uncomfortable.²⁴

boys' restrooms at school), *reh'r'g en banc denied*, 976 F.3d 399 (4th Cir. 2020), *cert. denied*, 141 S. Ct. 2878 (2021).

²³ Kosciw et al., *The 2021 National School Climate Survey*, *supra*, at 36-37; *see also* Emily A. Greytak et al., GLSEN, *Harsh Realities: The Experiences of Transgender Youth in Our Nation's Schools* 25, 27 fig. 15 (2009) (showing that more-frequently harassed transgender students had significantly lower grade point averages than other transgender students).

²⁴ Kosciw et al., *The 2021 National School Climate Survey*, *supra*, at 36.

B. The Amici States’ Experiences Confirm That Protecting Transgender People from Discrimination Yields Broad Benefits Without Compromising Privacy or Safety, or Imposing Significant Costs.

Policies that allow transgender students to access facilities and activities consistent with their gender identity create school climates that enhance students’ well-being and facilitate their ability to learn.²⁵ For example, transgender students permitted to live consistently with their gender identity have mental health outcomes comparable to their cis-gender peers.²⁶ These benefits redound to society as a whole because education advances not only the private interests of students, but also prepares them to contribute to society—socially, culturally, and economically. *See, e.g., Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954).

As noted above, at least twenty-two States and 374 municipalities expressly provide civil rights protections to transgender people, and

²⁵ *See, e.g., Br. of Amici Curiae Sch. Adm’rs from Thirty-One States & D.C. in Supp. of Resp’t (Br. of Amici Curiae Sch. Adm’rs) at 3-4, Gloucester Cnty. Sch. Bd. v. G.G. ex rel. Grimm*, 137 S. Ct. 1239 (2017) (No. 16-273), 2017 WL 930055; [Office of Elementary & Secondary Educ., U.S. Dep’t of Educ., Safe & Supportive Schools](#) (May 30, 2023).

²⁶ *See Kristina R. Olson et al., Mental Health of Transgender Children Who Are Supported in Their Identities*, 137 Pediatrics e20153223, at 5-7 (Mar. 2016); *Br. of Amici Curiae Sch. Adm’rs at 4, Gloucester Cnty. Sch. Bd.*, 137 S. Ct. 1239 (No. 16-273), 2017 WL 930055.

those protections often include requirements that transgender people be allowed to use restrooms consistent with their gender identity. These protections wholly comply with laws, such as Title IX, that allow separating restrooms by sex, *see* 20 U.S.C. § 1686. These policies maintain sex-separated spaces while allowing transgender people to use a facility that aligns with their gender identity—thus helping to ease the stigma transgender people often experience, with positive effects for their educational and health outcomes. Such policies promote compelling interests in “removing the barriers to economic advancement and political and social integration that have historically plagued certain disadvantaged groups.” *Roberts v. United States Jaycees*, 468 U.S. 609, 626 (1984). And those policies do so without threatening individual safety or privacy, or imposing significant costs.

1. Nondiscriminatory restroom policies produce important benefits and pose no safety concerns.

Supportive educational environments increase success rates for transgender students. Data from national surveys show that more-frequently harassed transgender teenagers had significantly lower grade-point averages than other transgender students.²⁷

Policies supporting transgender students, including by allowing them to use common restrooms consistent with their gender identity, also can reduce the health risks facing those students. For example, California adopted protections against gender-identity discrimination in schools to address harms suffered by transgender students, including students not drinking and eating during the school day to avoid restroom use.²⁸

In States allowing transgender students to use bathrooms corresponding to their gender identity, public schools have reported no instances of transgender students harassing others in restrooms or locker

²⁷ Kosciw et al., *The 2021 National School Climate Survey*, supra, at 36-37; see Greytak et al., *Harsh Realities*, supra, at 27 fig. 15.

²⁸ See Assemb. B. 1266, 2013-2014 Sess. (Cal. 2013); Assemb. Comm. on Educ., Bill Analysis for Assemb. B. 1266, supra, at 5-6, 7; see also Alexa Ura, *For Transgender Boy, Bathroom Fight Just Silly*, Texas Trib. (June 14, 2016).

rooms.²⁹ Indeed, the experiences of school administrators in thirty-one States and the District of Columbia show that public safety concerns are unfounded, as are concerns that students will pose as transgender simply to gain improper restroom access.³⁰

2. Nondiscriminatory restroom policies neither compromise personal privacy nor require significant expenditures.

The amici States' experiences show that nondiscriminatory policies have not generated privacy issues. The risk that students will see others' intimate body parts, or have their intimate body parts seen by others, is not presented by ordinary restroom use. And in any event, concerns about the presence of others (whether or not transgender) can be addressed—

²⁹ Alberto Arenas et al., 7 Reasons for Accommodating Transgender Students at School, Phi Delta Kappan (Sept. 1, 2016); see Beatriz Pagliarini Bagagli et al., Trans Women and Public Restrooms: The Legal Discourse and Its Violence, 6 *Frontiers Socio.* 1, 8 (Mar. 31, 2021); see also Amira Hasenbush et al., Gender Identity Nondiscrimination Laws in Public Accommodations: a Review of Evidence Regarding Safety and Privacy in Public Restrooms, Locker Rooms, and Changing Rooms, 16 *Sexuality Rsch. & Soc. Pol'y* 70 (2019) (comparing criminal incident reports in localities with and without gender identity inclusive public accommodations nondiscrimination laws in Massachusetts).

³⁰ Br. of Amici Curiae Sch. Adm'rs at 14-16, *Gloucester Cnty. Sch. Bd.*, 137 S. Ct. 1239 (2017) (No. 16-273), 2017 WL 930055.

and are being addressed—by increasing privacy options for all students, without singling out transgender people for stigmatizing differential treatment.

School districts in the amici States have identified a variety of cost-effective options to maximize privacy for all users of restrooms and changing facilities while avoiding discrimination. In Washington State, where school districts are required to “allow students to use the restroom that is consistent with their gender identity consistently asserted at school,” schools must provide “[a]ny student—transgender or not—who has a need or desire for increased privacy, regardless of the underlying reason,” with “access to an alternative restroom (e.g., staff restroom, health office restroom).”³¹ This gives all students with privacy concerns

³¹ [Susanne Beauchaine et al., *Prohibiting Discrimination in Washington Public Schools* 30 \(Wash. Off. of Superintendent of Pub. Instruction 2012\); see also Washington State Hum. Rts. Comm’n, *Frequently Asked Questions Regarding WAC 162-32-060 Gender-Segregated Facilities* 3 \(2016\)](#) (businesses need not “make any [structural] changes” or “add additional facilities,” but “are encouraged to provide private areas for changing or showering whenever feasible” and “may wish to explore installing partitions or curtains for persons desiring privacy”); Wash. Rev. Code Ann. § 28A.642.080 (requiring implementation by January 31, 2020).

“the option to make use of a separate restroom and have their concerns addressed without stigmatizing any individual student.”³²

Similar provisions apply to locker rooms. Students in Washington are allowed to participate in physical education and athletic activities “in a manner that is consistent with their gender identity.”³³ But rather than segregating transgender students, additional privacy is provided for any student who desires it, regardless of the underlying reason, by providing “a reasonable alternative changing area, such as the use of a private area (e.g., a nearby restroom stall with a door), or a separate changing schedule.”³⁴

At least twelve other States and the District of Columbia offer similar guidance to help schools maximize privacy while complying with laws prohibiting gender-identity discrimination—for instance, by offering

³² Beauchaine et al., *Prohibiting Discrimination*, supra, at 30.

³³ Id.; Washington Interscholastic Activities Ass’n, *2023-2024 Handbook*, at 36-37 (Oct. 10, 2023).

³⁴ Beauchaine et al., *Prohibiting Discrimination*, supra, at 30-31; see also Providence Pub. Sch. Dist., *Nondiscrimination Policy: Transgender and Gender Expansive Students* 4 (n.d.) (student uncomfortable with gender-segregated facility may use “a safe and non-stigmatizing alternative,” such as a privacy partition or separate changing schedule).

privacy curtains and separate restroom and changing spaces to all who desire them.³⁵ None of these solutions requires remodeling or restructuring

³⁵ **California:** California Sch. Bds. Ass’n, *Final Guidance: AB 1266, Transgender and Gender Nonconforming Students, Privacy, Programs, Activities & Facilities* 2 (2014). **Colorado:** Colorado Ass’n of Sch. Bds. et al., *Guidance for Educators Working with Transgender and Gender Nonconforming Students* 4-5 (n.d.). **Connecticut:** Connecticut Safe Sch. Coal., *Guidelines for Connecticut Schools to Comply with Gender Identity and Expression Non-Discrimination Laws* 9-10 (2012). **Illinois:** Illinois Dep’t of Hum. Rts., *Non-Regulatory Guidance: Relating to Protection of Transgender, Nonbinary, and Gender Nonconforming Students Under the Illinois Human Rights Act* 6-7 (2021); Illinois State Bd. of Educ., *Non-Regulatory Guidance: Supporting Transgender, Nonbinary and Gender Nonconforming Students* 10-11 (2020); Affirming & Inclusive Schs. Task Force, *Strengthening Inclusion in Illinois Schools* 19-21 (2020). **Maryland:** Maryland State Dep’t of Educ., *Providing Safe Spaces for Transgender and Gender Non-Conforming Youth: Guidelines for Gender Identity Non-Discrimination* 13-14 (2015). **Massachusetts:** Massachusetts Dep’t of Elementary & Secondary Educ., *Guidance for Massachusetts Public Schools: Creating a Safe and Supportive School Environment* (Oct. 28, 2021). **Michigan:** Michigan Dep’t of Educ., *State Board of Education Statement and Guidance on Safe and Supportive Learning Environments for Lesbian, Gay, Bisexual, Transgender, and Questioning (LGBTQ) Students* 5-6 (2016). **Minnesota:** Minnesota Dep’t of Educ., *A Toolkit for Ensuring Safe and Supportive Schools for Transgender and Gender Nonconforming Students* 10 (2017). **New Jersey:** New Jersey State Dep’t of Educ., *Transgender Student Guidance for School Districts* 7 (2018). **New York:** New York State Educ. Dep’t, *Creating a Safe, Supportive, and Affirming School Environment for Transgender and Gender Expansive Students: 2023 Legal Update and Best Practices* 22-24 (June 2023). **Oregon:** Oregon Dep’t of Educ., *Supporting Gender Expansive Students: Guidance for Schools* 24-26 (2023). **Rhode Island:** Rhode Island Dep’t of Educ., *Guidance for Rhode Island Schools on Transgender and Gender Nonconforming Students* 8-9 (2016). **Vermont:** Vermont

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restrooms, or otherwise investing in costly facility upgrades. As a spokeswoman for Texas’s Clear Creek Independent School District confirmed, that district, like many others, “ha[s] been successful in balancing the rights of all students without issue and offer[s] restrooms, showers and changing areas for students seeking privacy, regardless of their gender or gender identity.”³⁶ The experiences of school administrators in dozens of States across the country confirm that such policies can be implemented fairly, simply, and effectively.³⁷

Inclusive policies such as these maintain gender-separated spaces. For example, the District of Columbia expressly requires that businesses “provide access to and the safe use of facilities that are segregated by gender” where nudity in the presence of others is customary, while also making accommodations for transgender individuals to use the facility

Agency of Educ., *Continuing Best Practices for Schools Regarding Transgender and Gender Nonconforming Students* 6, 8 (2017). **District of Columbia:** District of Columbia Pub. Schs., *Transgender and Gender-Nonconforming Policy Guidance* 9 (2015).

³⁶ Ura, *For Transgender Boy*, *supra* (quotation marks omitted).

³⁷ See School Adm’rs Br. at 17-21, *Gloucester Cnty. Sch. Bd.*, 137 S. Ct. 1239 (No. 16-273), 2017 WL 930055.

“that is consistent with that individual’s gender identity or expression.”³⁸ And New York’s guidance for school districts explains how schools may accommodate transgender youth while maintaining sex-separated spaces.³⁹ Inclusive policies are thus entirely consistent with the provisions of Title IX permitting schools to maintain sex-separated facilities.⁴⁰

In fact, it is discriminatory restroom policies rather than inclusive ones that raise privacy concerns. Such policies are more likely to create a needless risk of violence against transgender people, whose physical appearance may diverge from their sex assigned at birth and who therefore are likely to be perceived as using the “wrong” restroom.⁴¹ In short, policies like the one at issue here, which bar transgender individuals from using a restroom that aligns with their gender identity, are more likely to pose safety and privacy concerns than inclusive policies.

³⁸ D.C. Mun. Regs. tit. 4, § 805.

³⁹ New York State Educ. Dep’t, *Creating a Safe, Supportive, and Affirming School Environment for Transgender and Gender Expansive Students*, supra, at 22-24.

⁴⁰ See 20 U.S.C. § 1686; 34 C.F.R. § 106.33 (2022).

⁴¹ See James et al., 2015 U.S. Transgender Survey, supra, at 225-27; see also Matt Pearce, *What It’s Like to Live Under North Carolina’s Bathroom Law If You’re Transgender*, L.A. Times (June 12, 2016).

II. TITLE IX AND THE EQUAL PROTECTION CLAUSE PROHIBIT THE GENDER-IDENTITY DISCRIMINATION IN THIS CASE

Idaho Senate Bill 1100 operates as a blanket prohibition on transgender students’ use of restroom facilities consistent with their gender identity. The Act requires schools to designate every restroom accessible by multiple persons as (a) “for use by male persons only or female persons only; and (b) [u]sed only by members of that sex.” Idaho Code § 33-6603(1)(a)-(b) [33-6703]. The Act further defines “sex” as “the immutable biological and physiological characteristics, specifically the chromosomes and internal and external reproductive anatomy, genetically determined at conception and generally recognizable at birth, that define an individual as male or female.” *Id.* § 33-6602(3) [33-6702]. The Act has no effect on the ability of cisgender students to use restrooms consistent with their gender identity. Rather, the “text, structure, purpose, and effect all demonstrate that the Act categorically bans” transgender students from restrooms “that correspond with their gender identity.” *See Hecox v. Little*, 79 F.4th 1009, 1022 (9th Cir. 2023) (interpreting Idaho statute governing gender-separate sports teams).

Such a categorical ban violates Title IX and the Equal Protection Clause. Consistent with amici’s collective State experience (see *supra* at

14-22), there is no evidence that allowing students to use the bathroom or other facilities corresponding to their gender identity jeopardizes student safety or privacy, or fails to maintain the sex-separated bathrooms allowed by Title IX. In fact, it is undisputed that “there is no evidence of transgender students engaging in behaviors that infringe upon the privacy of others,” including during the entire school year that A.J. used the bathroom corresponding to his gender identity. *Critchfield*, 2023 WL 6690596, at *10; see 3-ER-382-383. In sum, the Act discriminates based on sex in violation of Title IX and the Equal Protection Clause because it forbids Rebecca from using the girls’ bathroom and A.J. from using the boys’ bathroom simply because they are transgender.

A. Title IX Prohibits the Gender-Identity Discrimination in This Case.

In *Bostock v. Clayton County*, the Supreme Court concluded that gender identity discrimination is necessarily sex discrimination under Title VII of the Civil Rights Act of 1964, see 140 S. Ct. 1731, 1741-42, 1745-47 (2020), and this Court has held that *Bostock* applies in the Title IX context as well, see *Grabowski v. Arizona Bd. of Regents*, 69 F.4th

1110, 1116 (9th Cir. 2023).⁴² As the Supreme Court explained in *Bostock*, discriminating against a person for being transgender is sex discrimination because “it is *impossible* to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex.” *Bostock*, 140 S. Ct. at 1741 (emphasis added). For example, a person who is discriminated against for identifying as female simply because she was identified as male at birth is necessarily being discriminated against based on sex—i.e., she would not be treated differently than other females if not for the fact that her designated sex at birth was male. *Id.* In reaching its conclusion, the Supreme Court acknowledged that “transgender status” is a distinct concept from “sex,” but observed that sexual harassment and discrimination based on motherhood are also distinct concepts that, unquestionably, still qualify as sex discrimination. *Id.* at 1742, 1746-47.

⁴² When determining whether conduct constitutes discrimination based on sex under Title IX, courts routinely look to and apply case law interpreting Title VII. *See, e.g., Davis ex rel. LaShonda D. v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 636, 651 (1999); *Franklin v. Gwinnett Cnty. Pub. Schs.*, 503 U.S. 60, 75 (1992).

Applying much the same reasoning as in *Bostock*, courts have repeatedly and correctly recognized that Title IX's bar against sex discrimination prohibits local school districts from implementing policies that, like the Act, bar transgender students from using the bathroom that aligns with their gender identity. As these courts have correctly explained, the discriminator is necessarily referring to an individual's sex assigned at birth to deny access to a bathroom or other facility that aligns with their gender identity in violation of Title IX. *See A.C. ex rel. M.C. v. Metropolitan Sch. Dist. of Martinsville*, 75 F.4th 760, 764 (7th Cir. 2023); *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 616-19 (4th Cir. 2020); *Whitaker ex rel. Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1046-50 (7th Cir. 2017); *Dodds v. United States Dep't of Educ.*, 845 F.3d 217, 221-22 (6th Cir. 2016); *see also Parents for Privacy v. Barr*, 949 F.3d 1210, 1228-29 (9th Cir. 2020) (transgender students' use of sex-separated spaces that align with their gender identity does not violate Title IX rights of cisgender students), *cert. denied*, 141 S. Ct. 894

(2020); *Doe ex rel. Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518, 534-35 (3d Cir. 2018), *cert. denied*, 139 S. Ct. 2636 (2019).⁴³

In reaching the contrary result, the district court here erred by relying on the Eleventh Circuit’s nonbinding and incorrect decision in *Adams ex rel. Kasper v. School Board of St. John’s County*, 57 F.4th 791 (11th Cir. 2022) (en banc). See *Critchfield*, 2023 WL 6690596, at *7, *15 n.25. According to the district court and *Adams*, *Bostock*’s construction of Title VII is not applicable to Title IX. *Id.* at *15; see *Adams*, 57 F.4th at 811-15. But this Court has already held otherwise. See *Grabowski*, 69 F.4th at 1116.

The district court and *Adams* also erred in concluding that laws and policies that separate bathrooms and other facilities based on “biological” sex do not target transgender students. *Critchfield*, 2023 WL 6690596, at *7, *10; see *Adams*, 57 F.4th at 810-11. Separating facilities based on “biological” sex necessarily targets transgender students for worse treatment than their cisgender peers because, by definition, only transgender

⁴³ See also *N.H. v. Anoka-Hennepin Sch. Dist. No. 11*, 950 N.W.2d 553, 563-64 (Minn. Ct. App. 2020) (considering Title IX precedents to interpret Minnesota anti-discrimination statute).

students are barred from using the restroom that aligns with their gender identity. As this Court recently explained, the Act's classification based on "biological" sex is a form of proxy discrimination: the Act is "written with seemingly neutral criteria that are so closely associated with the disfavored group that discrimination on the basis of such criteria is, constructively, facial discrimination against the disfavored group." *Hecox*, 79 F.4th at 1024 (quotation marks omitted). Under precedent established by the Supreme Court and this Court, such discrimination on the basis of gender identity is discrimination on the basis of sex. *See Bostock*, 140 S. Ct. at 1741; *Grabowski*, 69 F.4th at 1116. Indeed, Idaho does not and cannot explain its reasons for excluding transgender students from using the bathrooms that align with their gender identity without referencing the students' "sex" or conformity with it. *See* Idaho Code § 33-6602(3) [33-6702]. The Act thus violates Title IX for largely the same reason as the policies considered by the Fourth and Seventh Circuits. *See A.C.*, 75 F.4th at 769; *Grimm*, 972 F.3d at 616-19.

Idaho needlessly denies Rebecca Roe and A.J. something most people take for granted: the ability to use a public restroom consistent with one's lived experience of one's own gender. The Act singles out transgender

students and forces them either to forgo restroom use or to choose between two other detrimental options: using common restrooms that do not align with their gender or using special single-user restrooms (i.e., those with no specific gender designation). The first option contravenes a core aspect of transgender people’s identities, subjects them to potential harassment and violence, and violates medical treatment protocols. The second option stigmatizes the person—like “outing” individuals as transgender in settings where they could be exposed to danger or prefer to keep that information private—assuming that single-user restrooms are even available and equally convenient.⁴⁴ By treating transgender students worse than similarly situated cisgender students, Idaho “discriminat[es] on the basis of transgender status[, which] is a form of sex-based discrimination,” *Hecox*, 79 F.4th at 1026; *see Bostock*, 140 S. Ct. at 1741, and impermissible under Title IX, *see Grabowski*, 69 F.4th at 1116.

⁴⁴ The same concerns are not posed by the privacy-enhancing measures described above (see *supra* at 18-21), which are available to all students who desire additional privacy. Such measures do not single out or stigmatize transgender students, and thus do not force students into the untenable choice presented by the kind of policy at issue here.

Contrary to the district court’s conclusion, *see Critchfield*, 2023 WL 6690596, at *14-15, there is no regulatory basis for such stigmatizing discrimination. In permitting “separate toilet, locker room, and shower facilities on the basis of sex,” 34 C.F.R. § 106.33, Title IX’s implementing regulation does not require separation of the enumerated facilities exclusively on “chromosomes and internal and external reproductive anatomy.” Idaho Code § 33-6602(3) [33-6702]. Neither Title IX nor its implementing regulations define “sex” in such terms. Title IX’s statutory language broadly prohibits discrimination on the basis of sex, 20 U.S.C. § 1681(a), and courts—including the U.S. Supreme Court—have uniformly recognized that discrimination based on gender identity is sex discrimination (see *supra* at 26-27). Idaho’s interpretation of 34 C.F.R. § 106.33 is accordingly unreasonable and must fail. *See United States v. Larionoff*, 431 U.S. 864, 873 (1977) (“[R]egulations, in order to be valid must be consistent with the statute under which they are promulgated.”); *Manhattan Gen. Equip. Co. v. Commissioner*, 297 U.S. 129, 134 (1936) (a regulation that “operates to create a rule out of harmony with the statute” is “a mere nullity”).

Title IX and its implementing regulations require Idaho not to discriminate against students based on transgender status, regardless of whether they are in a classroom, bathroom, or other location at school. As the amici States’ successful experiences demonstrate (see *supra* at 21-22), schools may continue to have sex-separated restrooms while permitting transgender students to use the bathroom that matches their gender identity. And under those circumstances, female students still use the girls’ restrooms and male students still use the boys’ restrooms.

B. The Equal Protection Clause Prohibits the Gender-Identity Discrimination in This Case.

For similar reasons, the Act contravenes the Equal Protection Clause. The Supreme Court has long made clear that equal protection prohibits government policies that serve only to express “negative attitudes” “or fear” toward people viewed as “different.” *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448 (1985); *see also Nguyen v. Immigration & Naturalization Serv.*, 533 U.S. 53, 68 (2001) (the Equal Protection Clause bars a decision built on stereotypes and a “frame of mind resulting from irrational or uncritical analysis”). Classifications based on “archaic and overbroad generalizations” similarly do not pass

constitutional muster. *See Clark ex rel. Clark v. Arizona Interscholastic Ass’n*, 695 F.2d 1126, 1131 (9th Cir. 1982) (quotation marks omitted).

The Act falls squarely into this category. As the district court noted, “there is no evidence of transgender students engaging in behaviors that infringe upon the privacy of others.” *Critchfield*, 2023 WL 6690596, at *10. Nor has Idaho identified any evidence that students will pose as transgender to gain improper restroom access or that inclusive policies will result in the end of gender-separated facilities in public schools.

Despite this lack of evidence, the district court mistakenly found that cisgender students would be harmed by an injunction because they would purportedly “be forced to change (or undertake other private duties) in the presence of someone of the opposite [‘biological’] sex—even if the person of the opposite [‘biological’] sex is doing nothing invasive, dangerous, or threatening.” *Id.* But gender-inclusive policies do not “force” anyone to use facilities in the presence of members of the opposite sex, “biological” or otherwise. As noted above at 18-21, States and other jurisdictions with gender-inclusive policies provide solutions that *increase* privacy options for *all* students—e.g., separate bathroom or changing facilities, privacy curtains, or different use schedules—without singling

out transgender people for stigmatizing differential treatment. In any case, this Court already rejected the district court's view: cisgender students do not have a fundamental privacy right to avoid sharing restrooms and locker rooms with transgender students. *Parents for Privacy*, 949 F.3d at 1222-26.

The district court's decision is particularly harmful because it purportedly protects speculative "harm" over actual harm. There is no evidence in the records of actual harm to cisgender students or complaints by cisgender students about gender-inclusive facility policies. As this Court recently explained, categorical prohibitions that, like the Act, are untethered from evidence and the legislation's purported goals improperly "perpetuate[] historic discrimination" against transgender individuals and "serve[] to ratify and perpetuate invidious, archaic, and overbroad stereotypes." *Hecox*, 79 F.4th at 1029, 1033 (quotation marks omitted).

In contrast, the full evidentiary record shows that the harm the Act causes to transgender students like Rebecca Roe and A.J. is real and irreparable. Roe struggled socially at school when her gender expression (male) did not match her gender identity (female). 2-ER-272-275 (Decl. of Rebecca Roe). She was bullied, showed signs of depression, and, according

to her mother, “seemed generally ‘checked out,’” such that she began falling behind in her coursework. 2-ER-272 (Decl. of Rebecca Roe), 2-ER-277 (Decl. of Rachel Roe). Since the fifth grade, Roe has consistently and persistently dressed and otherwise presented as a girl, is perceived by others as a girl, and is “thriving.” 2-ER-272-274 (Decl. of Rebecca Roe). Forcing her to use the boys’ restroom or locker room would stigmatize her, invalidate her as a person, “out” her to her classmates at her new school, and have serious health consequences: she would limit her fluid intake and suppress her urge to avoid using the restroom, which would physically and mentally distract her from focusing in class. 2-ER-274-275 (Decl. of Rebecca Roe).

Similarly, for A.J., a transgender male who has used the boys’ restroom for the past year, the thought of having to use the girl’s restroom makes him “feel ill.” 2-ER-285 (Decl. of A.J.). The past year “has been the happiest” in his life because he has been able to live fully as a male at school. 2-ER-285. Forcing A.J. to go back to using the girls’ bathroom with students who know him and interact with him as a male student, would be “painful and exhausting.” 2-ER-285.

Not least, S.B. 1100 would deprive Roe and A.J. of their constitutional rights to be treated equally under the law. Courts, including this one, have found these types of emotional, psychological, educational and constitutional harms may be irreparable. *See, e.g., Porretti v. Dzurenda*, 11 F.4th 1037, 1050 (9th Cir. 2021); *A.C.*, 75 F.4th at 774; *Dodds*, 845 F.3d at 221-22; *see also Hecox*, 79 F.4th at 1035-36. Under well-established constitutional analysis, such discrimination cannot withstand any level of equal protection scrutiny.

CONCLUSION

This Court should reverse the decision below.

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November 29, 2023

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