No. 23-2807

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REBECCA ROE, by and through her parents and next friends, Rachel and Ryan Roe, *et al.*,

Plaintiffs-Appellees,

v.

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

Defendants-Appellants.

On Appeal from the United States District Court for the District of Idaho
No. 1:23-cv-00315-DCN

APPELLANTS' EMERGENCY MOTION UNDER CIRCUIT RULE 27-3 FOR INJUNCTION PENDING APPEAL

RELIEF REQUESTED BY NOVEMBER 1, 2023

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INTRODUCTION

Prior to the enactment of Idaho Senate Bill 1100 ("S.B. 1100") this year, there were no state or local policies in Idaho schools that categorically excluded transgender students from using restrooms and other facilities consistent with their gender identity. If allowed to take effect, S.B. 1100 will impose a statewide ban that requires every Idaho school to exclude every transgender person from restrooms and other facilities consistent with their gender identity. As the majority of federal appellate and district courts have held—and as the Ninth Circuit has all but held in related decisions—discriminatory policies like S.B. 1100 violate the U.S. Constitution and Title IX and cause irreparable harm to transgender people.

To prevent S.B. 1100 from going into effect, Plaintiffs—transgender students in Idaho—sought a preliminary injunction. Because S.B. 1100 would radically transform the status quo in Idaho, the district court granted a temporary restraining order ("TRO") before the start of the school year pending disposition of the preliminary injunction motion. On October 12, 2023, the district court denied Plaintiffs' motion for a preliminary injunction, wrongly holding that S.B. 1100 is fully consistent with the U.S. Constitution and Title IX. Because S.B. 1100 will take effect on November 2, 2023 under the terms of the district court order, Plaintiffs respectfully request that this Court grant an injunction pending appeal of that denial by November 1, 2023.

If S.B. 1100 takes effect, the stigmatizing exclusion of transgender youth from facilities matching their gender identity will inflict profound daily psychological and physical harms, including depression, anxiety, and suicidality. It will also cause the irreversible disclosure of their transgender status—which is a bell that cannot be unrung even if a merits panel subsequently reverses the denial of the preliminary injunction. Indeed, a significant reason why the district court granted a TRO—to preserve the status quo pending a more fulsome determination on the preliminary injunction—equally supports why this Court should also grant an injunction pending appeal.

S.B. 1100 is a quintessential solution in search of a problem. For at least *seven years*, numerous schools across Idaho, like others nationwide, have adopted inclusive policies and practices that allow transgender students to access facilities consistent with their gender identity—without any evidence of harm. And *all* schools in Idaho have always functioned without the categorical ban that S.B. 1100 would mandate for them. An injunction pending appeal would merely preserve that long-standing status quo while the merits of the appeal are resolved. The record unambiguously supports Plaintiffs' likelihood of success on the merits, because Defendants failed to introduce a single piece of evidence to substantiate their privacy and safety justifications for the law. That silence is deafening.

The overwhelming majority of federal courts, including the Fourth, Sixth,

and Seventh Circuits, have all found similar policies to be unlawful discrimination at even the local level, let alone on a mandated statewide basis. *See, e.g.*, *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 608-14 (4th Cir. 2020), *cert. denied,* 141 S. Ct. 2878 (2021); *Whitaker ex rel. Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1051 (7th Cir. 2017); *Dodds v. United States Dep't of Educ.*, 845 F.3d 217, 220-22 (6th Cir. 2016); ECF 15-1 at 16 (collecting cases).[1]

The crux of the district court's decision—that S.B. 1100 survives heightened scrutiny based on a specific privacy rationale asserted by the government—also contravenes Ninth Circuit precedent. The district court admitted that physical barriers, such as restroom stall doors, already address any conceivable interest in visual privacy. Nevertheless, the court held that there was a cognizable privacy right for students objecting to the *mere presence* of transgender students in shared spaces, which purportedly competed with, and ultimately prevailed over, Plaintiffs' right to be free of discrimination. But this Court, in *Parents for Privacy v. Barr,* 949 F.3d 1210 (9th Cir. 2020), rejected that exact proposition in a challenge to an inclusive school policy brought by students claiming that the mere presence of transgender students violated their right to privacy. It held that cisgender students do not possess "a constitutional privacy right not to share restrooms or locker

[1] ECF citations are to the district court docket and any ECF pagination.

rooms with transgender students whose sex assigned at birth is different than theirs." *Id.* at 1222. Thus, there is no "competing right" at issue—only the right of transgender people to free from discrimination. This Court also explained: "Plaintiffs allegedly feel harassed by the mere presence of transgender students in locker and bathroom facilities. This cannot be enough." *Id.* at 1228-29.

An injunction pending appeal is necessary to prevent the irreparable injuries caused by S.B. 1100's violation of equal protection, Title IX, and the right to informational privacy. If this Court denies an injunction pending appeal, seventh-grade student Rebecca Roe faces being irreversibly outed to peers as transgender and ejected from the girls' restroom that she has been able to use under the TRO. Similarly, high school senior A.J., who is president of Plaintiff Sexuality and Gender Alliance at Boise High School ("SAGA"), will be ousted from the boys' restroom that he has used for more than a year now without harming anyone. Without an injunction pending appeal, he may very well graduate from high school with S.B. 1100 in force, and that experience of discrimination is how he will remember high school for the rest of his life.

Notably, the injunction pending appeal would not mandate that any schools adopt any policies, inclusive or otherwise. As with the TRO, it would merely halt the statewide mandate that S.B. 1100 seeks to impose, leaving schools to craft local policies, if any, for their own communities.

BACKGROUND

A. Plaintiffs

Rebecca Roe is a transgender seventh grader who has attended school within Boise School District since kindergarten. A.54, 60.[2] Before she began her social transition in fifth grade, Rebecca exhibited signs of depression, struggled socially, and fell behind academically; afterwards, her mental health improved. A.60-61. As she entered junior high, Rebecca wished to use the girls' restroom, like other girls. Abruptly terminating her access to those facilities will imperil her mental and physical health; jeopardize her social transition, which is critical to adequately treating gender dysphoria; and violate her right to privacy. A.56-57, 92-93, 95-96.

Plaintiff SAGA is a student organization that supports LGBTQ students at Boise High School. A.65. S.B. 1100 similarly threatens its members, including its president A.J. Pursuant to district practice in place since at least 2016, transgender students like A.J. have been able to use facilities matching their gender identity. A. 69-71, 172-73. A.J. used the boys' restroom at school without incident during his junior year, and has continued to do so during his senior year. A.66.

B. Status Quo Before S.B. 1100

In 2015, the Idaho School Boards Association (ISBA) created a model

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[2] Citations to "A." are to Plaintiffs' Addendum.

policy specifying that students should be permitted "to use the restrooms and locker rooms that correspond to the gender identity they consistently assert at school." A.144. Since its issuance, approximately 60 school districts and charter schools in Idaho have adopted it or similar practices. A.130-131, 151-171.

There is no record evidence that the adoption of inclusive policies and practices across Idaho schools has caused any harm. ISBA confirmed that schools adopting inclusive policies have had no reported incidents as a result. A.130-131, 147-150. Experts who work in Idaho schools agree. The President of the Idaho Association of School Resource Officers testified that he has not seen any evidence that the inclusive policy adopted in the school district he supports as a School Resource Officer, nor those adopted in other school districts statewide, have harmed the privacy or safety of any cisgender student. A.124-125.

The record also included unrebutted testimony from school administrators in D.C. and Kentucky who have implemented inclusive policies without any privacy or safety issues. A.101-113.

C. Enactment of S.B. 1100

S.B. 1100 took shape after a fight in early 2023 about whether Caldwell School District in Idaho should join the numerous other schools in Idaho that have adopted inclusive policies. A.151-171. Shortly thereafter, S.B. 1100 was introduced. In attempting to justify the law, legislators cited hypothetical concerns

about safety and privacy, while simultaneously conceding that there were no "documented cases of trans person violence on non-trans people." A.132-136.

In order to achieve its objective, S.B. 1100 defines "sex" based solely on chromosomes and reproductive anatomy so that transgender males are regarded as females and transgender females are regarded as males. Idaho Code § 33-6602 [33-6702]. Based on this definition, S.B. 1100 requires that every public school multiple-occupancy restroom or changing facility must be designated by sex and used only by members of that "sex." Idaho Code § 33-6603(1) [33-6703]. S.B. 1100 also applies to school-sponsored events with overnight lodging, thus requiring transgender students to "stay in different overnight accommodations." Idaho Code § 33-6603(4) [33-6703]; A.32.

In addition to this statewide mandate, S.B. 1100 creates a private right of action that places a "bounty" on the heads of transgender students. Any student who encounters someone of the "opposite sex" in covered facilities may obtain statutory damages of at least $5,000. Idaho Code § 33-6606 [33-6706].

S.B. 1100 requires that schools provide "reasonable accommodations" to anyone who is "unwilling or unable" to use the facilities designated for the person's "sex," but this does not include access to facilities "designated for use by members of the opposite sex." Idaho Code § 33-6605 [33-6705].

D. Proceedings Below

Plaintiffs filed the underlying action and a motion for a preliminary injunction on July 5, 2023. Plaintiffs also filed a motion for a TRO to preserve the status quo before the start of the school year, which the district court granted. The court agreed the injunction would merely "preserve[] the status quo" and explained that the TRO was "not mandating or requiring that school districts in Idaho do anything—including adopt policies that would allow students to use restrooms that coincide with their gender identity." A.43.

The district court subsequently denied a preliminary injunction, holding that Plaintiffs were unlikely to prevail on the merits. It ordered that the TRO would end, "and S.B. 1100 will take effect, 21 days from the date of this order," which is November 2, 2023. A.37.

STANDARD

This Court may "grant[] an injunction while an appeal is pending." Fed. R. App. P. 8. The standards for an injunction pending appeal and for a preliminary injunction are the same. *S.E. Alaska Conservation Council v. U.S. Army Corps of Eng'rs*, 472 F.3d 1097, 1100 (9th Cir. 2006). Thus, an injunction pending appeal is warranted where a party has shown (1) a likelihood of success on the merits, (2) likely irreparable harm absent relief, (3) the balance of hardships tips in its favor, and (4) an injunction serves the public interest. *Humane Soc'y of the U.S. v.*

Gutierrez, 523 F.3d 990, 991-92 (9th Cir. 2008).

Alternately, an injunction is appropriate when "serious questions going to the merits [are] raised and the balance of hardships tips sharply in the plaintiff's favor." *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134-35 (9th Cir. 2011).

This Court reviews the denial of a preliminary injunction for abuse of discretion, but legal conclusions are reviewed *de novo*. *Aircraft Serv. Int'l, Inc. v. Int'l Bhd. Of Teamsters*, 779 F.3d 1069, 1072 (9th Cir. 2015).

ARGUMENT

This Court should maintain the pre-S.B. 1100 status quo by granting an injunction pending appeal of the district court's denial of a preliminary injunction, rather than categorically oust all transgender students across the entire State of Idaho from the facilities matching their gender identity, particularly in the middle of the school year. Plaintiffs are likely to succeed on the merits of their appeal, including because the central reasoning of the district court's decision is based on a privacy rationale rejected by circuit precedent as a matter of law. At a minimum, Plaintiffs have raised "serious questions" on the merits, and an injunction pending appeal is warranted because the balance of hardships—including the irreversible outing of transgender students and their exposure to daily discrimination and stigmatization—tips sharply in Plaintiffs' favor.

I. Plaintiffs Are Likely to Succeed on Their Equal Protection Claim.

Laws that discriminate against a quasi-suspect class must satisfy heightened scrutiny under equal protection. *Karnoski v. Trump*, 926 F.3d 1180, 1200-01 (9th Cir. 2019). The court must presume that the law is unconstitutional, and the government bears the heavy burden of proving otherwise. *United States v. Virginia*, 518 U.S. 515, 533 (1996). To do so, the government must show an "exceedingly persuasive justification" in which there is a substantial relationship between the discriminatory means employed and the achievement of important government interests. *Id.* at 534. Where less intrusive means can substantially achieve those interests without discrimination, the law fails heightened scrutiny. *Karnoski*, 926 F.3d at 1200; *Latta v. Otter*, 771 F.3d 456, 472 (9th Cir. 2014).

Plaintiffs are likely to succeed because (1) S.B. 1100 discriminates based on transgender status and sex; and (2) S.B. 1100 fails to satisfy heightened scrutiny.

A. S.B. 1100 Requires Heightened Scrutiny.

Defendants concede, and the district court agreed, that S.B. 1100 requires heightened scrutiny, at the very least because (a) the law differentiates on the basis of so-called "biological sex," A.11, and (b) that differential treatment causes injury to transgender students because they are denied access to facilities consistent with their gender identity. *See Bostock v. Clayton Cnty., Ga.*, 140 S. Ct. 1731, 1740 (2020) (discrimination requires differential treatment plus injury). Accordingly,

Defendants bear the burden of justifying S.B. 1100.

The district court wrongly held, however, that S.B. 1100 does not discriminate against transgender people. That holding does not lower the level of scrutiny that S.B. 1100 must survive given that the law indisputably requires heightened scrutiny in any event. But it underscores the district court's errors in this case, and the degree to which its decision cannot be reconciled with binding Ninth Circuit precedent.

S.B. 1100 discriminates against transgender people, and thus triggers heightened scrutiny for that reason alone, *Hecox v. Little*, 79 F.4th 1009, 1026 (9th Cir. 2023), because, on the face of the law, they—and they alone—are deprived of facilities matching their gender identity. Both before and after S.B. 1100, cisgender students have access to facilities matching their gender identity; the only change the law seeks to accomplish is with respect to transgender students.

Furthermore, the "text, structure, purpose, and effect" of S.B. 1100 "all demonstrate that the Act categorically bans transgender [people]" from facilities "that correspond with their gender identity." *Hecox*, 79 F.4th at 1022 (upholding preliminary injunction against law barring transgender females from women's student athletics). The law's stated purpose is to separate facilities by "biological sex"—which is expressly defined so that transgender females are treated as males, and transgender males are treated as females. Moreover, Defendants conceded at

oral argument that "[i]t was because districts were making policies" that allowed students to access facilities based on gender identity "that the legislature passed S.B. 1100." A.51. As one lead proponent of S.B. 1100 explained: "We hear a lot of talk about how the transgender are, it's their right to use the bathroom," but "[w]e believe biological gender to be an essential characteristic of a child's identity and purpose." A.132-136; *cf. Whitaker*, 858 F.3d at 1048.

S.B. 1100 is thus subject to heightened scrutiny on the independent grounds that it discriminates against transgender people.

B. Defendants Failed to Show a Substantial Relationship Between a Statewide Categorical Ban and Protecting Privacy or Safety.

Defendants' proffered justifications for S.B. 1100 fail to satisfy their burden. Most importantly, they provided no factual support—not a single witness or document—to substantiate their privacy and safety defenses. Unsupported legislative predictions that implicate constitutional rights "have not been afforded deference" by courts. *Latta*, 771 F.3d at 469. And that absence of evidence is particularly striking given that a significant number of Idaho schools have had, for many years, inclusive policies and practices. Nevertheless, Defendants could not show how that status quo in Idaho has caused any harms.

Indeed, the district court admitted that Defendants' asserted privacy interest—which imagined that some cisgender students might object to seeing or being seen by transgender students—was already addressed through physical

barriers such as doors on restroom stalls. A.18 ("*often* people in the restroom would never know the gender identity of the person going into the stall next to them"). On its own terms, then, the district court's decision fails to justify the wholesale denial of a preliminary injunction.[3] As the Fourth Circuit explained, the government "ignores the reality of how a transgender child uses the bathroom: 'by entering a stall and closing the door.'" *Grimm*, 972 F.3d at 613. Defendants also failed to prove why less intrusive means—including options for anyone desiring greater privacy—cannot substantially achieve their interests, without also imposing a categorical ban on transgender students. *Cf. Hecox*, 69 F.3th at 1033. Privacy and equality are not in a zero-sum game.

Nevertheless, the district court imagined that cisgender students—no evidence from whom exists in the record—might object to the mere presence of a transgender student in a shared facility, even without visual exposure. It then held that these hypothetical students' right to privacy would be violated, relying heavily on the Eleventh Circuit's decision in *Adams v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791 (11th Cir. 2022).

This mode of analysis is irreconcilable with Ninth Circuit precedent. In

[3] The district court opined that changing facilities and overnight accommodations were different; but a cisgender student who objects to changing clothes in front others can do so in a restroom, whether in a locker room or overnight accommodation. Moreover, the only actual evidence in the record shows that schools have successfully implemented inclusive policies without issue. A.105.

Parents for Privacy, this Court rejected the proposition that the right to privacy encompasses a cognizable right for a cisgender student "not to share restrooms or locker rooms with transgender students whose sex assigned at birth is different than theirs." 949 F.3d at 1222. And it held that the "mere presence" of transgender students does *not* violate the rights of cisgender students. 949 F.3d at 1228-29. Other circuits are in accord. *Grimm*, 972 F.3d at 620 (finding that board was motivated by plaintiff's "mere presence—a special kind of discrimination against a child that he will no doubt carry with him for life"); *Whitaker*, 858 F.3d at 1052. The district court decision cannot be reconciled with *Parents for Privacy*.

To avoid that fundamental problem, the district court incorrectly described the holding of *Parents for Privacy*. A.17. The court stated that, in that case, "the school district's policy did not infringe on the privacy rights of petitioners because accommodations were available for any student who did not want to share facilities with a transgender student." A.17. But while *Parents for Privacy* mentioned those accommodations as reinforcing its ultimate conclusion, it only did so *after* making clear that the right to privacy itself did not include avoiding "any risk of bodily exposure to a transgender student in school facilities." 949 F.3d at 1225.

Furthermore, all of the unrebutted record evidence confirms that a preliminary injunction enjoining S.B. 1100's statewide categorical ban will not imperil privacy or safety. That evidence includes testimony from Idaho law

enforcement and other school administrators who have significant experience with inclusive policies and who confirm they do not cause any harms. A.101-113, 121-126. It also includes the testimony of A.J., who used the boys' facilities matching his gender identity for his junior year, without incident. A.66; *cf. Grimm*, 972 F.3d at 614. Defendants' justifications rest on speculation and conjecture that are empirically disproven by real-world experiences.

Finally, any justification based solely on safety fares no better than one based on privacy. There is no evidence that inclusive policies in Idaho have led to cisgender students pretending to be transgender to gain access to facilities designated for another sex. A.124-125; *cf. Hecox*, 79 F.4th at 1035. And law enforcement already possess the tools to respond to any student misconduct. A.123-124. In fact, it is transgender students, rather than their cisgender peers, who are at higher risk of harassment and violence as a result of discrimination. A.88-90, 122-123. Excluding transgender students from facilities matching their gender identity can disclose to others that the student is transgender. A.98, 122-123. That is one reason, among many, why forcing transgender students to use only "alternative" facilities is uniquely damaging and stigmatizing.[4]

[4] The unrebutted harms from that exclusion—including heightened suicidality for transgender youth, A.94—are incomparable to the potentially "less convenient" additional facilities made available to cisgender students objecting to the mere presence of transgender students in *Parents for Privacy*. 949 F.3d at 1225.

II. Plaintiffs Are Likely to Prevail on Their Title IX Claim.

The district court held Plaintiffs are unlikely to succeed in showing S.B. 1100 violates Title IX's prohibition on discrimination "on the basis of sex." 20 U.S.C. § 1681. That conclusion is at odds with the majority of federal circuits, irreconcilable with Ninth Circuit precedent, and rests on an interpretation of Title IX that would sanction unprecedented discrimination against transgender people.

A. Under Ninth Circuit Precedent, S.B. 1100 Violates Title IX's Prohibition on Sex-Based Discrimination.

Four sister circuits (the Third, Fourth, Sixth, and Seventh) have held or acknowledged that excluding transgender students from facilities matching their gender identity also violates Title IX. *See Grimm*, 972 F.3d at 619; *Whitaker*, 858 F.3d at 1050; *A.C.*, 75 F.4th at 770; *Doe v. Boyertown Area School Dist*, 897 F.3d 518, 533 (3d Cir. 2018); *Dodds*, 845 F.3d at 221. Only the Eleventh has disagreed. *See Adams*, 57 F.4th 811-12.

The Ninth Circuit has not decided this specific issue. But, citing *Grimm*, it has held that *Bostock*'s analysis—holding that discrimination against transgender people is a form of sex discrimination—applies to Title IX. *See Grabowski v. Ariz. Bd. of Regents*, 69 F.4th 1110, 1116 & n.1 (9th Cir. 2023); *accord Doe v. Snyder*, 28 F.4th 103, 114 (9th Cir. 2022).

That holding largely resolves this appeal. Every Circuit to hold that Title IX prohibits discrimination against transgender people has recognized that

transgender-exclusive facilities policies violate Title IX. *Adams*, by contrast, declined to hold that *Bostock* applies to Title IX at all. 57 F.4th at 811-14; *A.C.*, 75 F.4th at 775 (Easterbrook, J., concurring) ("My colleagues express confidence that Title VII and Title IX use 'sex' in the same way. . . . The majority in *Adams* was equally confident of the opposite proposition.") That route is foreclosed in this Circuit. The Ninth Circuit should follow the majority of federal courts of appeal to hold that S.B. 1100 violates Title IX.

B. Provisions Under Title IX Allowing Sex-Separated Facilities Do Not Sanction Discrimination Against Transgender People.

Even if S.B. 1100 were sex discrimination under Title IX, the District Court held that three provisions nevertheless authorize it: 20 U.S.C. § 1686 (schools may "separate living facilities for the different sexes"), 34 C.F.R. § 106.33 (schools may "provide separate toilet, locker room, and shower facilities on the basis of sex"), and 34 C.F.R. § 106.32(b) (schools may "provide separate housing on the basis of sex"). That conclusion, too, is at odds with the majority of federal circuits and untenable in the Ninth Circuit.

As the Fourth and Seventh Circuits have held, these provisions are "broad statement[s]" "that the act of creating sex-separated restrooms in and of itself is not discriminatory." *Grimm*, 972 F.3d at 618 n.16. They do not authorize "schools [to] act in an arbitrary or discriminatory manner when dividing students into those sex-separated facilities." *Id.; A.C.*, 75 F.4th at 770.

Although the Ninth Circuit has not directly answered this question, it has endorsed *Grimm* and *A.C's* reasoning.

As the Seventh Circuit explained, Title IX does not define "sex," let alone state that "sex" must be understood to allow excluding transgender students from facilities aligned with their gender identity. *See A.C.*, 75 F.4th at 770 ("[T]he question [here] is different: who counts as a 'boy' for the boys' rooms, and who counts as a 'girl' for the girls' rooms—essentially, how do we sort by gender? The statute says nothing on this topic.") *Adams* held the opposite: that Title IX "must" be read to allow separation based only on "biological sex." 57 F.4th at 815.

The Ninth Circuit's understanding of this text accords with *A.C.*, not *Adams*. In *Parents for Privacy*, the plaintiff relied on the same statutory and regulatory provisions. 949 F.3d at 1227. This Court first observed that these regulations at most *allow* a school to do something, not require it. But it also went further, explaining that "[j]ust because Title IX authorizes sex-segregated facilities does not mean that they are required, *let alone that they must be segregated based only on biological sex and cannot accommodate gender identity*." *Id.* (emphasis added). This statement acknowledged, in line with the Fourth and Seventh Circuits, that "sex" in the applicable provisions need not be read as "biological sex" so as to fail to "accommodate gender identity." *Id.*

Beyond the meanings of isolated words, this Court also looks to, *inter alia*,

"the broader context of [a] statute as a whole" to interpret it. *United States v. Pacheco*, 977 F.3d 764, 767-68 (9th Cir. 2020). Interpreting the provisions the district court cited not just to allow sex-separated facilities, but to specifically sanction "segregat[ion] based only on biological sex," *Parents for Privacy*, 949 F.3d at 1227, places them in direct conflict with Title IX's anti-discrimination mandate, because it would authorize sex-based harm against transgender people. *See Grimm*, 972 F.3d at 618. In light of that obvious tension, no circuit court has held *both* that Title IX protects transgender people from discrimination *and* that these statutory and regulatory provisions nevertheless authorize policies like S.B. 1100.

Finally, the district court did not grapple with key arguments made in the United States' Statement of Interest, that (1) Section 1686's reference to "living facilities" does not include restrooms and locker rooms; and (2) 34 C.F.R. § 106.33, which does, is an implementing regulation of Section 1682 (rather than Section 1686) that cannot be read to authorize discrimination prohibited by that provision. A.187-88.

III. Plaintiffs Are Likely to Succeed on Their Privacy Claim.

By excluding transgender people from facilities matching their gender identity, and consigning them to other facilities that can reveal their sex assigned at birth, S.B. 1100 exposes their transgender status to others in violation of their

constitutional right to privacy. The district court agreed: "It is true this may occur." A.30. Indeed, it also agreed Plaintiffs' legal "argument makes sense" because information about one's gender identity "is personal and private." A.31.

The *only* reason that the district court found that Plaintiffs were unlikely to prevail on their privacy claim is because it believed that there was not a fundamental liberty interest at stake. A.31. That is incorrect. "Ninth Circuit cases have uniformly recognized a constitutional right to informational privacy." *Doe v. Cnty. of San Diego*, 576 F. Supp. 3d 721, 733 (S.D. Cal. 2021); *see, e.g.*, *Tucson Woman's Clinic v. Eden*, 379 F.3d 531, 551 (9th Cir. 2004).

Furthermore, virtually every federal court to consider the issue has also held that one's transgender status is entitled to constitutional privacy protection. "The excruciatingly private and intimate nature of transsexualism, for persons who wish to preserve privacy in the matter, is really beyond debate." *Powell v. Schriver*, 175 F.3d 107, 111 (2d Cir. 1999). That is why courts have held that government actions that can involuntarily disclose that status violate transgender people's constitutional right to privacy. *See, e.g.*, *Ray v. McCloud*, 507 F. Supp. 3d 925, 931-32 (S.D. Ohio 2020); ECF 15-1 at 18 (collecting cases). The only case cited by the district court concerned whether there was a *state* constitutional privacy right in one's gender identity. A.31.

The disclosure of one's transgender status, particularly in circumstances

where one would otherwise keep that information private, can provoke intense "hostility and intolerance from others." *Powell*, 175 F.3d at 111. Given the seriousness of these harms—and the irreversible nature of a privacy violation—an injunction pending appeal is uniquely warranted here.

IV. The Remaining Factors Strongly Favor an Injunction Pending Appeal.

The district court held that both parties had shown in equal measure that "harm may result" from its decision; and that Plaintiffs' evidence was "specula[tive]." A.32. Both conclusions are demonstrably erroneous and an abuse of discretion given the record evidence.

Plaintiffs provided unrebutted evidence of irreparable harm—specifically that, should S.B. 1100 take effect, they face outing, stigma, and bullying; severe mental health risks; and impaired academic performance. A.72-100. Like the Third, Fourth, Sixth, and Seventh Circuits, this Court has acknowledged these harms. *See Parents for Privacy*, 949 F.3d at 1217 ("Defendants and many *amici* highlight the importance of the policy for creating a safe, non-discriminatory school environment for transgender students that avoids the detrimental physical and mental health effects" that result from exclusionary policies).

Plaintiffs also produced unrebutted evidence that single-occupancy restrooms do not ameliorate these harms. *See, e.g.*, A.56 (explaining that use of nurse's restroom "felt stigmatizing and isolating"); A.57; *see also* A.65, 67; A.92-

97. Courts agree. *See Whitaker*, 858 F.3d at 1045; *Grimm*, 972 F.3d at 617-18.

Although many Idaho schools have long had inclusive policies and practices, Defendants produced no evidence that they have harmed cisgender students. Plaintiffs produced unrebutted expert testimony from a leading Idaho school policing official that inclusive policies in Idaho have caused no problems and "are important to protect the safety of transgender youth." A.122.

The district court's findings were irreconcilable with this record. While the court stated "neither party was able to identify any *specific* instances of harm befalling transgender, or cisgender, students in Idaho," A.32, Plaintiffs clearly showed that Rebecca and A.J. *will* face immediate harm from S.B. 1100.

At most, Defendants questioned only one aspect of one of these harms—whether *all* transgender students have a need to socially transition—on the purported grounds that gender dysphoria may desist for *some*. But there was no dispute among the experts that transgender youth whose gender dysphoria persists have a need to transition and that interference with doing so causes serious harm. Moreover, this Court has acknowledged that "[l]iving in a manner consistent with one's gender identity is a key aspect of treatment for gender dysphoria." *Karnoski*, 926 F.3d at 1187 n.1; *see also Edmo v. Corizon, Inc.*, 935 F.3d 757, 767 (9th Cir. 2019) (relying upon standards of care for treatment of gender dysphoria). The district court's wholesale rejection of Plaintiffs' evidence was clearly erroneous

and irreconcilable with these cases.

Finally, the court erroneously concluded that Defendants face comparable harm if S.B. 1100 is enjoined. But the notion that the mere presence of transgender people in facilities constitutes harm is factually and legally untenable. *Parents for Privacy*, 949 F.3d at 1228-29; *Whitaker*, 858 F.3d at 1052-53. Instead, as in *Hecox*, an injunction here does "not appear to inflict any comparable harm" because it "expressly maintain[s] the status quo." 79 F.4th at 1036.

CONCLUSION

An injunction pending appeal should be entered to maintain the status quo.

Dated: October 16, 2023

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Motion complies with the type-volume limitation of Fed. R. App. P. 27 because it contains 5,200 words. This Motion complies with the typeface and the type style requirements of Fed. R. App. P. 27 because this brief has been prepared in a proportionally spaced typeface using Word 14-point Times New Roman typeface.

/s/ Peter C. Renn
Peter C. Renn

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate ACMS system on October 16, 2023, and that service will be accomplished by the appellate ACMS system on all registered participants.

/s/ Peter C. Renn
Peter C. Renn

No. 23-2807

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REBECCA ROE, by and through her parents and next friends, Rachel and Ryan Roe, *et al.*,

Plaintiffs-Appellees,

v.

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

Defendants-Appellants.

On Appeal from the United States District Court for the District of Idaho
No. 1:23-cv-00315-DCN

ADDENDUM TO APPELLANTS' EMERGENCY MOTION UNDER CIRCUIT RULE 27-3 FOR INJUNCTION PENDING APPEAL

RELIEF NEEDED BY NOVEMBER 1, 2023

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UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

REBECCA ROE, by and through her parents and next friends Rachel and Ryan Roe, SEXUALITY AND GENDER ALLIANCE, an association,

Plaintiffs,

v.

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

Defendants.

Case No. 1:23-cv-00315-DCN

MEMORANDUM DECISION AND ORDER

I. INTRODUCTION

Before the Court is Plaintiffs Rebecca Roe, Rachel and Ryan Roe, and Sexuality and Gender Alliance's (collectively "Plaintiffs") Motion for Preliminary Injunction ("PI Motion"). Dkt. 15. Defendants Debbie Critchfield et al. (collectively "Defendants") oppose the motion. Dkt. 48. Defendants have also moved to dismiss all of Plaintiffs claims in their entirety. *Id*. The Court held oral argument on September 13, 2023, and took both motions under advisement.

Upon review, and for the reasons set forth below, the Court DENIES Plaintiffs' PI Motion and DENIES Defendants' Motion to Dismiss. There will be no preliminary injunction and Idaho's statute will soon take effect because Plaintiffs have not met their burden for an injunction. That said, the case will move forward because Defendants have

not met their burden for dismissal either.

II. OVERVIEW

This is a difficult case. Each of the parties before the Court seek to protect important individual rights. The critical question, however, is what happens when individuals' rights converge and those rights struggle to co-exist? As the Court has explained before, "much can be said about the intersection, and overlapping nature, of these rights and the degree to which one right impacts another." *Perlot v. Green*, 609 F. Supp. 3d 1106, 1111 (D. Idaho 2022). Today, the Court is again faced with "tackling the difficult interplay between various [] rights." *Id*. In doing so, it is ever "cognizant of the fact that in enforcing or protecting certain rights, other rights may be impinged." *Id*.

The outcome of cases such as this are celebrated by some and lamented by others. Regardless of the Court's ruling today, someone will feel left out. In a pluralistic society, however, everyone cannot win every time. There must be reasonable give and take and sensible people on all sides of the issue should work together in a collaborative effort.

The present task is particularly difficult considering the communities on both sides of the debate are some of Idaho's most vulnerable: children and youth. Although it likely comes as little solace to Idaho's transgender students who, as a result of the Court's decision today, may have to change their routines, or who, regrettably, may face other societal hardships, the Court must stay within its lane. Its duty is to interpret the law; it is not a policy-making body. As such, the Court cannot say which approach is best. It can only decide whether the approach chosen by the Idaho Legislature is legal. And, in the context of a preliminary injunction such as this, the question is even more nuanced since

the Court's analysis is *preliminary*. Today, the Court reviews the challenged law and asks this simple question: have Plaintiffs convinced the Court the law is likely unconstitutional? The answer is no.

The Court, of course, does not assess this simple question in a vacuum. It is mindful that its "technical" legal decisions have real-world consequences. However, when the Court runs too far afield and starts to "write" the law or suggest what the law should be to achieve certain societal goals, it has overstepped.

For the reasons explained herein, the Court finds Plaintiffs have not met their burden to obtain a preliminary injunction at this stage of the proceedings. As such, the law Plaintiffs challenge may go into effect. Additionally, the Court finds Defendants have not met their burden under Federal Rule of Civil Procedure 12(b)(6) and will not dismiss Plaintiffs' claims in their entirety.

III. BACKGROUND

On March 22, 2023, the Idaho Legislature adopted Idaho Senate Bill 1100 ("S.B. 1100" or "the Bill"). On July 1, 2023, S.B. 1100 went into effect. S.B. 1100 requires, among other things, that students in Idaho public schools use the bathroom or locker room that corresponds with their biological sex. Similar regulations apply to overnight accommodations. Before S.B. 1100, school districts were free to regulate these issues as each deemed fit. Roughly 25% of school districts in Idaho had policies that allowed individuals to use facilities and accommodations consistent with their gender identity. Dkt.

39-1, at 2. The other 75% of school districts did not have regulations one way or the other.[1]

On July 6, 2023, Plaintiffs filed this lawsuit challenging S.B. 1100 as unconstitutional.

Plaintiff Rebecca Roe is a twelve-year-old transgender girl[2] who has attended school within the Boise School District since kindergarten. She began her social transition in the fifth grade and desires to use the restroom, and changing facilities, that coincides with her gender identity. Roe alleges that excluding her from those facilities will jeopardize her social transition, imperil her mental and physical health, and violate her right to privacy by "outing" her to her peers. Dkt. 15-1, at 13.

Plaintiff Sexuality and Gender Alliance ("SAGA") is a student organization focused on supporting, uplifting, and representing lesbian, gay, bisexual, transgender, and queer (LGBTQ) students at Boise High School. One of SAGA's members, A.J. is a transgender

[1] This data comes from the Declaration of Greg Wilson, Chief of Staff for Defendant Debbie Critchfield, Superintendent of the Idaho State Department of Education, and was filed as part of Defendants' opposition to Plaintiffs' Motion for Temporary Restraining Order. Dkt. 39-1, at 2. Therein, Wilson states: "To the best of the State Education Department's estimation, even before the enactment of SB 1100, the vast majority of Idaho public school districts (approximately three-quarters of school districts) maintained sex-separated restrooms, changing facilities, and overnight accommodations and did not have any policy that would permit the relief that Plaintiffs seek here." *Id*. Consistent with these representations, the Court previously stated that prior to S.B. 1100, 75% of school districts in Idaho had sex-separate regulations. Dkt. 44, at 4. The parties clarified at the hearing, however, that while 25% of school districts had inclusive policies before S.B. 1100, 75% of school districts simply had no policy either way. Neither side was aware of any school that affirmatively had a sex-separate policy. Wilson's declaration is, therefore, somewhat misleading, if not wholly false. While it is true that 75% of school districts did not have a "policy that would permit the relief Plaintiffs seek" (i.e. they did not have a sex-inclusive policy), this is not the same thing as affirmatively "maintain[ing] sex-separated [facilities]." Although this information is not overly relevant to the Court's decision today, Defendants are reminded to be completely accurate in all representations before the Court to ensure just and fair results.

[2] Roe was born a biological male but identifies as female.

boy.[3] Like Roe, he wishes to use the restroom associated with his gender identity and asserts casting him out of those facilities will cause irreparable injuries.

Defendant Debbie Critchfield is Superintendent of Public Instruction in Idaho. The Superintendent of Public Instruction is responsible for carrying out policies, procedures, and duties authorized by law regarding educational matters. Idaho Code § 33-125. The other Defendants are the State Board of Education and the members of that Board, as well as the Boise School District, its superintendent, and board members. All are responsible for implementing, and governing, laws related to public education in Idaho.

In conjunction with their Complaint, Plaintiffs filed a Motion to Proceed Anonymously (Dkt. 13)[4] and the instant PI Motion. Dkt. 15. Defendants swiftly filed a Motion for Extension of Time (Dkt. 21) requesting an approximately 60-day extension to respond to Plaintiffs' PI Motion. The Court partially granted Defendants' request, extended the briefing deadlines, and set the PI Motion for a hearing on September 13, 2023. Dkt. 31.

As part of their opposition to Defendants' Motion for Extension, Plaintiffs argued the Court could grant the extension, but if it did so, it should also take other actions to protect Plaintiffs' rights in the interim—such as sua sponte issuing a Temporary Restraining Order ("TRO"). Dkt. 25, at 3–4. In its July 20, 2023 Decision on Defendants' Motion for Extension, the Court noted that while it *could* take other action, it would not do so on its own. Dkt. 31, at 4 (explaining it would not take any further action "sua sponte").

[3] A.J. was born a biological female but identifies as male.

[4] Defendants did not respond to this motion, and the Court subsequently granted the request. Dkt. 38.

On July 28, 2023, Plaintiffs filed a Motion for Temporary Restraining Order ("TRO Motion") asking the Court to do what they previously suggested the Court could do sua sponte: issue a TRO until the Court's scheduled hearing and decision on the PI Motion. Dkt. 34. Defendants opposed the Motion. Dkt. 39.

On August 10, 2023, the Court issued a decision granting Plaintiffs' TRO Motion. Dkt. 44. In that decision, the Court explained that, because there is already a circuit split regarding the constitutionality of bills such as S.B. 1100, the factors it was required to weigh in reaching its decision were "roughly even" between the parties. Accordingly, the Court chose to focus almost entirely on the concept of preserving the status quo. *See generally id* at 3–7. Said another way, the Court sought to maintain the landscape as it existed prior to S.B. 1100 pending a more complete review of the issues. The Court determined the situation in Idaho before S.B. 1100 was inconsistent. Some schools and school districts had "inclusive" policies while others had no policy whatsoever. Thus, the Court "put[] a pause on S.B. 1100" and returned things to the way they were before: without codified regulations either way. *Id*. at 8. The Court specifically noted it was not finding S.B. 1100 constitutional or unconstitutional. *Id*. at 8–9. Instead, it simply held S.B. 1100 in abeyance. *Id*. The Court's decision today dives deeper into the substantive issues.

Defendants then filed their response brief to Plaintiffs' PI Motion. Dkt. 48. In addition to opposing the motion, Defendants asked the Court to affirmatively dismiss all of Plaintiffs' claims. *Id*. Because this filing was a combined response (to the PI Motion)

and new motion (to dismiss), the Court adjusted some of the briefing. *See* Dkt. 49.[5]

Briefing concluded and the Court held a hearing on September 13, 2023. Dkt. 53.

IV. LEGAL STANDARD

Injunctive relief "is an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22, (2008) (citing *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997)). A party seeking a preliminary injunction must establish: (1) a likelihood of success on the merits; (2) likely irreparable harm in the absence of a preliminary injunction; (3) that the balance of equities weighs in favor of an injunction; and (4) that an injunction is in the public interest. *Id*. at 20. Where, as here, "the government is a party, these last two factors merge." *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014).

V. ANALYSIS

The Court begins by reviewing the text of S.B. 1100.

S.B. 1100 requires that "every public school restroom or changing facility accessible by multiple persons at the same time must be: (a) Designated for use by male persons only or female persons only; and (b) Used only by members of that sex." Idaho Code Ann. § 33-6603(1)(a)–(b). The Bill also requires that "no person shall enter a multi-occupancy restroom or changing facility that is designated for one sex unless such person is a member of that sex." Idaho Code Ann. § 33-6603(2).

S.B. 1100 defines "sex" as "the immutable biological and physiological

[5] The Court notes the United States exercised its right under 28 U.S.C. § 517 and submitted a Statement of Interest during this timeframe. Dkt. 41.

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." Idaho Code Ann. § 33-6602(3).

In addition to restrooms and changing facilities, S.B. 1100 requires that "during any school authorized activity or event where persons share overnight lodging, school personnel must provide separate sleeping quarters for members of each sex. No person shall share sleeping quarters, a restroom, or a changing facility with a person of the opposite sex, unless the persons are members of the same family." Idaho Code Ann. § 33-6603(4).

S.B. 1100 carves out certain exemptions to these requirements, such as for cleaning staff, medical personnel, coaching staff during athletic events, and in times of natural disasters and emergencies. *See generally* Idaho Code Ann. § 33-6604(1)–(8).

The Bill also requires that schools provide, upon written request, a "reasonable accommodation" to any student who, "for any reason, is unwilling or unable to use a multi-occupancy restroom or changing facility designated for the person's sex and located within a public school building, or multi-occupancy sleeping quarters while attending a public school-sponsored activity." Idaho Code Ann. § 33-6605(1)(a).

Finally, S.B. 1100 provides a civil cause of action against the school for any student who encounters a person of the opposite sex in a restroom, changing facility, or sleeping quarters and it is determined the school gave that person permission to use the facilities of the opposite sex or failed to prohibit the person from using facilities of the opposite sex. Idaho Code Ann. § 33-6606(1)(a)–(b). The student, if successful, can recover $5,000, attorney's fees, and other monetary damages.

Plaintiffs allege S.B. 1100 is unconstitutional and violates: (1) the Equal Protection Clause, (2) Title IX, and (3) their right to privacy. Dkt. 1, at 30–37. Against the backdrop of the *Winter* factors, the Court addresses these claims in turn.

A. Success on the Merits

The Court previously observed—in deciding the TRO Motion—that it could not make a well-reasoned decision on this critical first factor because it had only received Plaintiffs' briefing at that juncture. Dkt. 44, at 7–8. Noting the current circuit split on relevant matters, the Court stated it would give this issue a more "complete review" later. *Id*. Today is that time, and with the benefit of full briefing and oral argument, the Court delves into these substantive issues.

1. Equal Protection

The Equal Protection Clause of the Fourteenth Amendment provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. It is "essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). The state may not discriminate against classes of people in an "arbitrary or irrational" way or with the "bare . . . desire to harm a politically unpopular group." *Id.* at 446–47. As the Court noted at the outset, however, this aspirational promise must coexist with the practical reality that laws often draw lines between groups of people, and those lines may naturally prove advantageous to some groups while disadvantaging others. *Romer v. Evans*, 517 U.S. 620, 631 (1996).

When considering an equal protection claim, the Court must first determine what

level of scrutiny to apply and then decide whether the policy at issue survives that level of scrutiny.

There are three levels of review: strict scrutiny, intermediate scrutiny, and rational basis review. Laws are subject to strict scrutiny when they discriminate against a suspect class, such as a racial group, *e.g., Grutter v. Bollinger*, 539 U.S. 306, 326 (2003), or when they discriminate based on any classification but impact a fundamental right, such as the right to vote. *E.g., Reynolds v. Sims*, 377 U.S. 533, 562 (1964). Laws are subject to intermediate scrutiny when they discriminate based on certain other suspect classifications, such as gender. *Miss. Univ. for Women v. Hogan,* 458 U.S. 718, 723 (1982). When no suspect class is involved and no fundamental right is burdened, courts apply a rational basis test to determine the legitimacy of the classification. *Olagues v. Russoniello,* 770 F.2d 791, 802 (9th Cir.1985).

In this case, the parties agree the Court must apply intermediate, or heightened, scrutiny.[6] But they disagree on *why* the Court uses this level of review. Because the parties agree, the Court is reluctant to say more, but feels compelled to clearly state why it is applying intermediate scrutiny in this case because the distinction bears on various conclusions throughout this decision.

Plaintiffs assert that, consistent with Ninth Circuit precedent, intermediate scrutiny applies because transgender persons represent a quasi-suspect class. *See Karnoski v.*

[6] *See, e.g.*, *Clark v. Jeter*, 486 U.S. 456, 463–465 (1988) (referring to intermediate scrutiny as "heightened scrutiny" in the equal protection context, which similarly distinguishes between three levels of scrutiny—strict, heightened, and rational basis).

Trump, 926 F.3d 1180, 1200-01 (9th Cir. 2019). The Court does not disagree with this assertion but notes the circuit in *Karnoski* did not explicitly hold transgender individuals constitute a quasi-suspect class; only that intermediate scrutiny applies if a law or policy treats transgender persons in a less favorable way than all others. Notably, Courts within the District of Idaho, including this court, *have* held that transgender individuals qualify as a quasi-suspect class. *See F.V. v. Barron*, 286 F. Supp. 3d 1131, 1143–1145 (2018); *Hecox v. Little*, 479 F. Supp. 3d 930, 973 (D. Idaho 2020) ("*Hecox*").

Defendants, on the other hand, argue S.B. 1100 does not classify students based upon their sexual orientation or gender identity, but on their biological sex—male and female—and that, consistent with Supreme Court precedent, classifications based on sex are subject to intermediate scrutiny. *See Clark v. Jeter*, 486 U.S. 456, 461 (1988). The Court agrees with Defendants.[7] The classification that is drawn by S.B. 1100 is based upon sex, not gender identity.

The Court will discuss this concept in greater detail later, but notes here that the definition of sex (in S.B. 1100 and in the legal community as a whole) does not include gender identity as Plaintiffs seem to suggest. The Supreme Court has never defined sex to include gender identity.[8] Even in *Bostock v. Clayton Cnty., Ga*—a recent landmark decision

[7] The Court recognizes the Ninth Circuit's recent holding that gender identity is "at least a quasi-suspect class." *Hecox v. Little,* 79 F.4th 1009, 1026 (9th Cir. Aug. 17, 2023) (citing *Karnoski v. Trump*, 926 F.3d 1180, 1200–01 (9th Cir. 2019)). Again, the Court does not disagree. But that is not the issue. The issue is whether gender identity is the distinction drawn by S.B. 1100. The Court finds it is not.

[8] In fact, the Court cannot locate a single case where a court at any level defined the term "sex" to include "gender identity" or "transgender status." To be sure, this is, no doubt, partially because until recently the term "gender" and "sex" were synonymous. And, as noted, courts have found that discrimination based on transgender status or gender identity can be equated to sex discrimination. This line of reasoning is likely

about discrimination against transgender individuals in employment—the United States Supreme Court did not disturb the parties' agreed-upon definition that sex referred to the "biological distinctions between male and female" and that "homosexuality and transgender status are distinct concepts from sex." 140 S. Ct. 1731, 1739, 1746–47 (2020). Now, the *Bostock* Court ultimately held that "discrimination based on homosexuality or transgender status necessarily entails discrimination based on sex" in the context of Title VII, but the Court did not change the underlying definition of "sex." *Id*.

Turning closer to home, this Court, in *Hecox*—another case that will be discussed in more detail below—held that the definition of "sex" was "the anatomical and physiological processes that lead to or denote male or female. Typically, sex is determined at birth based on the appearance of external genitalia." 479 F. Supp. 3d at 945. On appeal, the Ninth Circuit did not formally define sex. While it called out the challenged Act's definition of sex as "an oversimplification of the complicated biological reality of sex and gender" it did not define the term itself, nor did it disturb this Court's definition. *Hecox v. Little*, 79 F.4th 1009, 1024 (9th Cir. Aug. 17, 2023).[9] To be sure, the Ninth Circuit found that the definition of sex in the law Hecox challenged functioned as a "form of [p]roxy discrimination," but, like *Bostock*, it did not redefine the term "sex" itself. *Id*. at 1024.

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why Plaintiffs contend that the definition of sex is not dispositive of their claims in this case and that, regardless of how sex is defined, S.B. 1100 discriminates against transgender individuals. As will be explained, however, simply because a certain group is left out of the classification drawn by a particular law does not mean that law is "targeted" at that group. Terms must be given definitions. And those definitions must mean something. Here, S.B. 1100 defines "sex" based on biology. No court presented with this same issue has defined the term otherwise.

[9] Defendants in *Hecox* recently asked for a hearing before the full Ninth Circuit (en banc). Ninth Cir. Case No. 20-35815, Dkt. 219.

The Court will return to these cases, and concepts, throughout this decision. But because the definition of sex—in S.B. 1100 and in cases before this district, the circuit, and the Supreme Court—does not include gender identity, S.B. 1100 does not draw a line based upon gender identity, but on sex.[10] And because any regulation based upon sex warrants intermediate scrutiny, that is the level of scrutiny the Court will use here today.[11]

Under intermediate scrutiny, "a party seeking to uphold government action based on sex must establish an exceedingly persuasive justification for the classification." *United States v. Virginia*, 518 U.S. 515, 524 (1996) (cleaned up).

Here, Plaintiffs contend S.B. 1100 does not withstand intermediate scrutiny, and that they have a likelihood of success on their equal protection claim, because Defendants cannot show the Bill is tailored to the Defendants' stated interests of privacy and safety.

Naturally, Defendants disagree, asserting that separating bathrooms for privacy is "common sense" and dates to time immemorial. Defendants' comments, and overall arguments, echo the sentiments articulated in the Eleventh Circuit's en banc opinion in *Adams ex rel. Kasper v. School Bd. of St. Johns Cnty.*, 57 F.4th 791 (11th Cir. 2022) ("*Adams*"). Because Defendants rely heavily on this case, and because the Court finds that Court's analysis persuasive, it will briefly review *Adams*.

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[10] Definitions aside, even if the Court found S.B. 1100 discriminated based on transgender status, it would still apply intermediate scrutiny. Thus, the Court does not depart from its prior finding that transgender individuals qualify as a quasi-suspect class; it simply finds that is not the distinction at issue in S.B. 1100.

[11] And while S.B. 1100 is based on sex, it does not include any of the hallmarks of sex discrimination. It does not prefer one sex over the other; include one sex and exclude the other; provide benefits to one sex and not the other; or apply one rule to one sex and not the other. It distinguishes between the two sexes, but it does not advantage, or disadvantage, either. *Bostock's* holding about the interplay between discrimination based up on transgender status and sex does not change that fact.

In *Adams,* the Eleventh Circuit upheld a lower court order rejecting an equal protection challenge to a K-12 school policy that provided female, male, and sex-neutral bathrooms, and required male students to use the male-designated bathrooms, female students to use the female-designated bathrooms, and accommodated transgender students with sex-neutral bathrooms. *See id.* at 797. The policy at issue in that case defined "male" and "female" as the gender identified on a student's birth certificate. *See id.* The Eleventh Circuit rejected plaintiffs' argument that the policy unconstitutionally discriminated based on transgender status and found that it was "substantially related" to the school district's important interest in securing its pupils' privacy and welfare. *See id.* at 811. That court specifically held the challenged policy was not targeted at transgender students—at most, it had a disparate impact upon them which did not rise to the level of a constitutional violation because no animus was shown. *Id*.[12]

The Court also briefly previews the other circuit cases dealing with these issues that constitute the "circuit split" it has referred to.

In 2020, the Fourth Circuit upheld a challenge, brought by a transgender male student, against a school district policy that required students to use bathrooms based on

[12] There are, of course, differences between *Adams* and the present case. For one, the district court in *Adams* reached its conclusion after a three-day bench trial. That decision was obviously overturned, but the procedure there was slightly different than that before the Court today. Relatedly, the bench trial in *Adams* highlighted the fact that the school district had studied these issues extensively and involved members of the LGBTQ community in enacting its policies. The Court is not saying this factor was dispositive of any merits-based issue (at the district or appellate level), but there is no evidence in the present record to suggest the Idaho legislature involved members of the LGBTQ community in crafting S.B. 1100. Such an effort may have yielded fruit. Finally, it goes without saying, but the dispute in *Adams* revolved around a school district policy, while the challenge today is to a state-wide law. Regardless of the procedural differences between *Adams* and this case, the Court finds the *Adams* decision persuasive for the reasons outlined herein.

their biological sex. *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586 (4th Cir. 2020), *as amended* (Aug. 28, 2020). There, the Circuit found that the school's refusal to amend the student's records to reflect his gender identity violated the Equal Protection Clause and constituted discrimination on the basis of sex in violation of Title IX. *See generally id*.

In 2017, the Seventh Circuit similarly affirmed a district court's decision to enter a preliminary injunction against a school district's unwritten policy that barred a transgender male student from using the boys' bathroom after he started his female-to-male transition. *Whitaker By Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034 (7th Cir. 2017). There, the Circuit determined the school board's decision violated Title IX and the Equal Protection Clause. *See generally id*.

More recently, the Seventh Circuit noted the existing circuit split, reaffirmed *Whitaker*, and declined to give credence to *Adams* in upholding two preliminary injunctions entered by district courts enjoining school districts from restricting transgender students from using restrooms and locker rooms of their choice. *A.C. by M.C. v. Metro. Sch. Dist. of Martinsville*, 75 F.4th 760 (7th Cir. 2023).[13]

The Court adds its voice to this divided landscape.

Privacy is a legitimate interest supporting the constitutionality of S.B. 1100. The

[13] After oral argument, Defendants filed a Motion for Leave to File Supplemental Authority. Dkt. 55. Plaintiffs oppose the motion. Dkt. 56. In their motion, Defendants bring a recent decision from the Sixth Circuit, *L.W. v. Skrmetti*, 2023 WL 6321688 (6th Cir. Sept. 28, 2023), to the Court's attention. In *Skrmetti*, the Sixth Circuit reversed injunctions against state laws that restricted certain medical treatments for minors with gender dysphoria. Although the subject matter of that case is different, the Circuit there grappled with some of the same issues before the Court today. The Court is aware of the *Skrmetti* decision and, like all cases, will give it the weight it deems appropriate. Defendants could have brought this decision to the Court via a Notice of Supplemental Authority, but insofar as they did so via Motion, the Court will grant the same.

Ninth Circuit has, on numerous occasions, reiterated its "longstanding recognition that the desire to shield one's unclothed figure from the view of strangers, and particularly strangers of the opposite sex, is impelled by elementary self-respect and personal dignity." *Byrd v. Maricopa Cnty. Sheriff's Dep't*, 629 F.3d 1135, 1141 (9th Cir. 2011) (cleaned up) (collecting cases). Other circuits agree. *See, e.g., Adams*, 57 F.4th at 806 ("[I]t is well established that individuals enjoy protection of their privacy interests in the bathroom, so concerns about privacy in the bathroom are legitimate concerns."); *Faulkner v. Jones,* 10 F.3d 226, 232 (4th Cir. 1993) (noting "society's undisputed approval of separate public rest rooms for men and women based on privacy concerns"); *Fortner v. Thomas*, 983 F.2d 1024, 1030 (11th Cir. 1993) (recognizing a "constitutional right to bodily privacy because most people have a special sense of privacy in their genitals, and involuntary exposure of them in the presence of people of the other sex may be especially demeaning and humiliating" (cleaned up)).

But it does not take a court to acknowledge what most people inherently recognize: a desire for bodily *privacy* in restrooms (and like spaces) is rational because one's body is *private*. That individuals generally desire privacy is based upon the inherent differences between male and female bodies. *See United States v. Virginia*, 518 U.S. 515, 533 (1996) ("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." (cleaned up)). This appreciation is even more relevant considering school-age children are still developing—mentally, physically, emotionally, and socially—and asking them to expose their bodies to students of the opposite sex (or to be exposed to

the bodies of the opposite sex) brings heightened levels of stress.

There is no doubt S.B. 1100 is substantially related to the Government's legitimate interest in said privacy. Restrooms, changing facilities, and overnight accommodations are, without question, spaces in school (and out of school as the case may be) where bodily exposure is most likely to occur. That S.B. 1100 restricts access to who will interact in those circumstances based upon sex furthers the goal of privacy.

The Court next turns to Plaintiffs' counterarguments and why each is unavailing in calling into question Defendant's legitimate interest in privacy.

Plaintiffs first argue that the Ninth Circuit has already definitely answered whether privacy can justify sex-separation in bathrooms. In *Parents for Privacy v. Barr*, the Ninth Circuit rejected a challenge to a policy that allowed transgender students to use restrooms, locker rooms, and showers that matched their gender identity, rather than their biological sex assigned at birth. 949 F.3d 1210 (9th Cir. 2020). There, the Circuit found the school district's policy did not infringe on the privacy rights of petitioners because accommodations were available for any student who did not want to share facilities with a transgender student. Plaintiffs in this case assert the outcome in *Parents for Privacy* means the Ninth Circuit would reject Defendants' privacy justification today. The Court is not so sure.

To begin, while somewhat perplexing to say aloud, it appears gender-inclusive policies are constitutional *and* sex-separate policies are constitutional. That is to say, *Parents for Privacy's* holding that the Constitution does not *require* sex-separate facilities is not the same as a holding that the Constitution *forbids* sex-separate facilities. More

importantly, the Ninth Circuit recently noted that "bathrooms by their very nature implicate important privacy interest" because, unquestionably "the functions of the bathroom are intended to be private." *Hecox*, 79 F.4th at 1025 n.10. Thus, whether privacy is a legitimate interest for sex-based distinctions is still an open question. The Ninth Circuit has not, however, foreclosed Defendants' arguments as Plaintiffs suggest.

Plaintiffs next contend Defendants' privacy justification ignores the fact that most transgender students use individual stalls in bathrooms so there is no reason a cisgender students' "privacy" will even be impacted. Dkt. 15-1 (citing *Grimm*, 972 F.3d at 613). The Court understands Plaintiffs' argument. Not to be unduly technical, but transgender girls would use individual stalls because female restrooms do not contain urinals. And transgender boys cannot physically use urinals and would, therefore, also use individual stalls. Thus, an argument could be made that *often* people in the restroom would never know the gender identity of the person going into the stall next to them. But this argument discounts the other provisions of S.B. 1100 dealing with changing facilities and overnight accommodations. While privacy *may* not be as much of a concern in restrooms where stalls are widely used, the same cannot be clearly said of shared changing facilities and overnight accommodations.

Third, Plaintiffs assert S.B. 1100 is a solution in search of a problem. They aver there is no evidence of transgender students engaging in behaviors that infringe upon the privacy of others. Defendants do not dispute this. Neither does the Court. But this argument misses the mark. The issue is not whether any transgender student has affirmatively done anything—good, bad, or otherwise—to another student. The issue is whether a student

must, against his or her wishes, be forced to change (or undertake other private duties) in the presence of someone of the opposite sex[14]—even if the person of the opposite sex is doing nothing invasive, dangerous, or threatening. The Court will circle back to this momentarily when discussing *Hecox*, but S.B. 1100 essentially boils down to this issue. The Bill is not based upon animus towards those who identify as transgender, nor was it passed to relegate transgender students to the fringes of society. S.B. 1100 was enacted to protect the privacy of the sexes. A policy or statute can lawfully classify based on biological sex without unlawfully discriminating based on transgender status.

Relatedly, Plaintiffs' assert it is transgender students who will suffer the real invasion of privacy if S.B. 1100 is allowed to go into effect. As explained in the Court's discussion on their privacy claim, Plaintiffs here are referring more to informational privacy in their gender identity and biological sex as opposed to privacy in the sense the Court has been using the word thus far, i.e. being free from interference and intrusion when engaged in private physical activities like changing or using the restroom. And while Plaintiffs do not explicitly make the argument, the Court recognizes transgender students may feel an invasion of their privacy (in the context of taking care of their physical needs) in having to *comply* with S.B. 1100 and use restrooms or facilities that do *not* match their gender identity.[15] The Court understands the concerns and recognizes the reality that in

[14] This issue is complicated by the fact that individuals transition differently. Some choose to alter certain physical characteristics; others do not. Not to mention the fact that individuals could conceivably change their gender identity from one school year to the next (or even during the year). Without a clear demarcation—some objective "line in the sand" so to speak—there would be no regulations at all and thus no expectation of privacy for anyone at any time in any circumstance.

[15] As with the Court's example about restroom stall usage, it does not mean to point out the obvious or minimize any student's experience by relegating it to an example. Traversing school for young people is

protecting the privacy of some students, the privacy of others decreases. The reality, however, is that neither the Court, nor the law, can fairly accommodate all interests. *See Caribbean Marine Servs. Co. v. Baldrige*, 844 F.2d 668, 678 (9th Cir. 1988) (noting that, when dealing with privacy concerns, it is often difficult to accommodate competing interests).

Speaking of accommodations, Plaintiffs complain the carve-out in S.B. 1100 is not a sufficient accommodation. Their only argument, however, is that allowing transgender students to use "other" facilities is stigmatizing and damaging. Dkt. 15-1, at 12. The Court will touch on this more when discussing harm below but returns to the Ninth Circuit's holding in *Parents for Privacy*. As a reminder, that case was the inverse of this case: Plaintiffs challenged an *inclusive* policy the school district had enacted. Part of the reason the Circuit found the challenged policy did not violate the Fourteenth Amendment was because there were accommodations offered to those who did not want to share facilities with transgendered students. 949 F.3d at 1225. And it made this finding "even though those alternative options admittedly appear inferior and less convenient." *Id*. So too in this case. S.B. 1100 provides options for transgender students—actually for *any* students—who do not wish to use the bathroom that corresponds with their biological sex. The convenience

difficult enough without having to worry about "legal" questions surrounding daily bodily functions such as using the restroom and changing. The Court recognizes that in upholding S.B. 1100, it is now those transgender students who will be using the restroom (or changing facility) that does not match his or her gender identity who may face privacy concerns. S.B. 1100 could make that transgender student uncomfortable. It could make others in those facilities uncomfortable as well. While a transgender girl may make a cisgender girl uncomfortable, she may also make a cisgender boy uncomfortable. And both cisgender girls and cisgender boys could make a transgender boy uncomfortable. Thus, any regulation (or even no regulation at all) could, conceivably, cause some students to feel uncomfortable.

and desirability of those options, however, is not an overly relevant part of the equation. But if "compelling" cisgender students to use alternate facilities is a reasonable accommodation, there is no reason to suggest asking transgender students to do the same would bring a different result.

Lastly, the Court returns to *Hecox*. Plaintiffs assert the Court's original decision in *Hecox* (and the Circuit's affirmance of that decision) is instructive and urge the Court to follow the rulings in that case because the legal issues in this case are the same. Not quite.

In *Hecox*, the Plaintiffs brought a constitutional challenge to Idaho's Fairness in Women's Sports Act (the "Act") which prohibited transgender athletes from participating in women's sports. The Court granted Plaintiffs' Motion for Preliminary Injunction and enjoined the law from going into effect. Among other things, the Court found the Defendants' justifications for the Act's categorical exclusion of transgender women from women's sports—promoting sex equality for cisgender women in sports and protecting scholarships for women—were not legitimate government interests because there were other ways to achieve those goals. Defendants appealed and the Circuit affirmed. Plaintiffs in this case cite heavily from both decisions, particularly in support of the notion that S.B. 1100 discriminates based upon transgender status.

The Court begins by reiterating that Defendants in *Hecox* have asked for en banc review. Resolution of that case is thus, still an open matter. More importantly, there is a small, but important difference between the Act and S.B. 1100 that renders Plaintiffs' discrimination argument less persuasive in the present dispute.

In *Hecox*, the Defendants argued, much as they do here, that the Act did not

discriminate on the basis of transgender status because it classified individuals based upon biological sex. 79 F.4th at 1025. The Circuit explained, however, that this argument appeared pretextual because it was only transgender female athletes who were excluded under the law; the Act *allowed* transgender male athletes the opportunity to compete on male sports teams. What's more, the act subjected only female (cisgender or transgender) athletes to a verification process but did not mandate the same for male (cisgender or transgender) athletes. Noting that "a law is not immune to an equal protection challenge if it discriminates only against some members of a protected class but not others," the Circuit rejected Defendants' argument. *Id*. Because the Act excluded only transgender females and mandated certain requirements just for females (cisgender and transgender) the Ninth Circuit agreed Plaintiffs could likely show it discriminated on the basis of transgender status *and* on the basis of sex. Simply put, Defendants could not fairly say the act differentiated based on sex when one biological sex was treated better than the other and the law had requirements that only affected one quasi-suspect class of people.[16]

S.B. 1100 is different. It does not prohibit only transgender girls from using facilities consistent with their gender identity; it "prohibits" both transgender girls *and* transgender

[16] The Ninth Circuit significantly hedged its decision in *Hecox*. It specifically noted it was not deciding the "larger question of whether any restriction on transgender participation in sports violates equal protection." 79 F.4th at 1039. *See also id*. at 1052 ("In my understanding, nothing in today's decision, or in the district court's decision, precludes policymakers from adopting appropriate regulations in this field—regulations that are substantially related to important governmental interests.") (Christen J., concurring in part and dissenting in part). The Circuit explained its ruling was "narrow" and only answered the question of whether the district court abused its discretion. *Id*. at 1016, 1020, 1021, 1039, 1050. It also observed that, in the time since the district court issued its opinion, some of the world's leading athletic organizations—including some the district court relied on in reaching its original decision—had revisited their guidance concerning transgender athletes. *Id*. at 1051.

boys from using those facilities. And both sides of the classification at issue—biological males and biological females—includes transgender students. Thus, to say S.B. 1100 singles out transgender students mischaracterizes how the law operates. The Court is not implying that because the law "discriminates" equally it is lawful, but rather because S.B. 1100 does not differentiate between transgender boys and transgender girls—even though it does differentiate amongst the biological sexes—the conclusion from *Hecox* does not apply here. To repeat, S.B. 1100 is not based upon sexual orientation or gender identity; it is based on sex. And that basis is equal between the sexes and between transgender students who belong to both sexes. That other groupings of individuals are left out is, therefore, not discrimination against those groups, but rather a natural consequence of setting parameters. *Romer*, 517 U.S. at 631.[17]

A final word on discrimination. The term "discrimination" has become quite the buzzword over the past twenty years. And it is typically used in a very derogatory manner. To be sure, one definition of discrimination is a "prejudiced or prejudicial outlook, action, or treatment." Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/discrimination (last visited October 12, 2023). Another definition, however, is "the act of making or perceiving a difference." *Id*. The Court does not mean to get into semantics, but the prevalent idea in society today that simply because a person supports one position necessarily means he or she "discriminates" against the other position

[17] Additionally, as outlined above, unlike the Court's findings in *Hecox*, it has determined the disparate treatment S.B. 1100 mandates in this case is substantially related to the government's stated interest of privacy and safety.

(or against a person who supports the opposite position) is short-sighted.[18] Reasonable people can support one position and not have any animus or ill-intent for the other position. The Court is not implying that some supporters of S.B. 1100 are basing their support on completely altruistic feelings. But it is not implying they are basing their support on animus or hatred either. The Court receives enough "hate mail" and "hate calls" to know there are people on both sides of the equation who do not have respect for the other side. But Plaintiffs' repeated arguments that the proponents of S.B. 1100 all demonstrated blatant discriminatory animus against transgender students during the legislative history falls flat when those statements are read in context. *See* Dkt. 15-1.

Lastly, the Court wishes to address the concept of "safety." Besides asserting Defendants cannot meet their burden that S.B. 1100 is related to privacy, Plaintiffs also contend Defendants cannot show S.B. 1100 is substantially related to any legitimate concerns surrounding "safety." The difficult part of this argument is that Defendants combine the two concepts. They couch their support of S. B. 1100 in terms of "safety and privacy." And, to a large degree, Plaintiffs do as well. Thus, the Court finds it need not make a separate determination as to "safety." For the most part, the Court agrees that, in this context, the concepts are substantially related. Furthermore, because the Court has already determined Defendants have shown the nexus between S.B. 1100 and privacy, even were the Court to construe the term "safety" separately, it would still not carry the day for

[18] Those who attempt to force some type of ideological purity on others, or who reject as bigoted and discriminatory any opinion that differs with their own, would be wise to remember that the refusal to listen to the other side of a debate swiftly leads to less collaboration, less protection, and ultimately less freedom. In a pluralistic society, the exploration—not acceptance, but also not facial rejection—of a variety of ideas is what makes this Country great.

Plaintiffs in achieving a preliminary injunction. As the Supreme Court has observed, "in a public school environment[,] . . . the State is responsible for maintaining discipline, health, and *safety*." *Bd. of Educ. v. Earls*, 536 U.S. 822, 830 (2002) (emphasis added).

In sum, the Court finds Plaintiffs have not met their burden in showing they are likely to succeed on the merits of their Equal Protection claim. S.B. 1100 distinguishes based upon sex, not gender identity.[19] Moreover, S.B. 1100 is substantially related to the Government's important interest in protecting the privacy and safety of students from those of the opposite sex while they are engaged in personal and private functions.

2. Title IX

Plaintiffs contend they are likely to succeed on their Title IX claim for the "same reasons" they are likely to succeed on their equal protection claim. Dkt. 15-1, at 22. Insofar as the Court has found Plaintiffs are *not* likely to succeed on their equal protection claim, it will not repeat that analysis here. Still, the Court must discuss Title IX separately to highlight relevant nuances.

Title IX provides: "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." 20 U.S.C. § 1681(a).

The threshold problem is, again, whether S.B. 1100 is based on sex. Plaintiffs

[19] But as already noted, even if the Court found the classification drawn by S.B. 1100 *was* based on transgender status, it would still find Plaintiffs have not met their burden because privacy is a legitimate government interest regardless of which suspect class is at issue.

contend S.B. 1100 discriminates based upon transgender status and that, consistent with the Supreme Court's holding in *Bostock* that discrimination against transgender people constitutes discrimination based on sex, the Court should apply that same reasoning here and strike the Bill down. 140 S. Ct. 1731 (2020). There are two problems with Plaintiffs' reliance on *Bostock.* First, that case dealt with Title VII; this case deals with Title IX. Second, as outlined, S.B. 1100 is a law based upon sex, not sexual orientation or gender identity.

There is no doubt the Supreme Court held in *Bostock* that discrimination "because of" sexual orientation is a form of sex discrimination under Title VII. 140 S. Ct. at 1743. But the *Bostock* Court also made it painstakingly clear that its holding did not "sweep beyond Title VII to other federal or state laws" or "address bathrooms, locker rooms, or anything else of the kind." *Id*. at 1753.[20] Moreover, the fact that the *Bostock* court held that classifications based on gender identity are necessarily classifications based on sex does not mean that classifications based on sex (as here) are necessarily classifications based on gender identity.[21]

Notably, there is a circuit split on whether *Bostock*'s Title VII analysis applies in the Title IX context. The Sixth Circuit has held that "it does not follow that principles announced in the Title VII context automatically apply in the Title IX context." *Meriwether*

[20] In fact, Justice Alito, in his dissent, specifically pointed to *Hecox* (which at the time was just a newly filed lawsuit), and his concerns about how the Supreme Court's decision would be read in cases where Title IX was at issue. 140 S. Ct. at 1780, 1783 (Alito, J. dissenting).

[21] And in *Bostock*, the employers fired adult employees because their behavior was perceived as inconsistent with gender stereotypes. Here, the law is directed at children and does not depend on how a student acts or identifies; it only depends on the student's sex. Those factual distinctions are relevant as well.

v. Hartop, 992 F.3d 492, 510 n.4 (6th Cir. 2021). The Eleventh Circuit in *Adams* likewise held that the interpretation of the word "sex" set forth in *Bostock* does not apply to Title IX. 57 F.4th at 811–14. And, while the Fifth Circuit has held "transgender discrimination is a form of sex discrimination under Title VII," it has not held as much with respect to Title IX. *Olivarez v. T-mobile USA, Inc.*, 997 F.3d 595, 603 (5th Cir. 2021).

Conversely, in *Grimm,* the Fourth Circuit held that "although Bostock interprets Title VII of the Civil Rights Act of 1964 . . . it guides our evaluation of claims under Title IX." (cleaned up). 972 F.3d at 616. In like manner, the Ninth Circuit recently held that "discrimination on the basis of sexual orientation is a form of sex-based discrimination under Title IX." *Grabowski v. Ariz. Bd. of Regents*, 69 F.4th 1110, 1116 (9th Cir. 2023).[22]

Plaintiffs rely on *Grabowski* and assert they prevail on their Title IX claim outright. Again, however, S.B. 1100 is based on sex, not sexual orientation[23] or gender identity. More importantly, Title IX already allows the practice of sex-separate facilities. Again, while odd to say, the legal landscape is such that discrimination based on sexual orientation (and *maybe* gender identity) appears barred under Title IX, *but* Title IX also allows for sex-

[22] For its part, the Court is of the opinion that Title VII and Title IX should be treated differently. The two Titles have differing language, implicate different legal liability structures, and serve different purposes. For example, Title IX talks about discrimination "on the basis of sex" whereas Title VII talks in terms of "because of sex." These phrases are different, and the Court must give full effect to the difference in word choice. Henry J. Friendly, *Mr. Justice Frankfurter and the Reading of Statutes, in* Benchmarks 224 (1967) ("[W]hen Congress employs the same word, it normally means the same thing, when it employs different words, it usually means different things."). By failing to acknowledge the different phrases Title VII and Title IX employ, the Court "would risk amending [the] statutes outside the legislative process reserved for the people's representatives." *Bostock*, 140 S. Ct. at 1738. Because Title IX prohibits "on the basis of sex," the Court is hesitant to reflexively adopt *Bostock's* "because of sex" causation analysis.

[23] *Grabowski* dealt with sexual orientation, not gender identity, in the context of Title IX. Whether that difference is material is debatable, but the Court's point is that case is not on "all fours" with this case as Plaintiffs suggest.

separated facilities. Thus, unless and until Congress amends Title IX, the concept of separating facilities based on sex is *not* a form of discrimination actionable under Title IX.

While prohibiting discrimination based upon sex, the regulations in Title IX specifically outline that "nothing contained herein shall be construed to prohibit any educational institution receiving funds under this Act, from maintaining separate living facilities for the different sexes." 20 U.S.C. § 1686. And the corresponding code sections implementing Title IX outline that educational institutions "may provide separate toilet, locker room, and shower facilities on the basis of sex," so long as the facilities "provided for students of one sex [are] comparable to [the] facilities provided for students of the other sex." 34 C.F.R. § 106.33.

The United States, in its statement of interest, references these exceptions but asserts they do not apply when a student is transgender. Dkt. 41, at 10.[24] It reaches this conclusion based upon the idea that "excluding a student from a particular single-sex restroom or locker room facility designated for another sex, as a general rule, does not cause that student harm." *Id*. But, because the students here are transgender, and excluding them *could* cause harm, the United States (and Plaintiffs) aver the Court can simply ignore these implementing regulations. The Court cannot agree.

[24] Defendants argue the United States is barred from making this argument because of an injunction in another case where the state of Idaho is a plaintiff. Specifically, in *Tennessee v. United States Dep't of Educ.,* a federal district court enjoined the United States from arguing a specific letter explaining how Title IX applied to transgender individuals was formal Department of Education guidance because the letter had not gone through the notice and comment process under the Administrative Procedures Act. 615 F. Supp. 3d 807 (E.D. Tenn. 2022). While the Court agrees with Defendants that the United States cannot argue there is *official* guidance on how Title IX should be interpreted in cases such as this, that is not what the United States does here. It simply states its position. Such is acceptable and does not run afoul of the injunction in *Tennessee*.

Again, S.B. 1100 is a regulation based upon sex. And while Title IX itself does not define sex,[25] even the authorities Plaintiffs cite in support of their position do not go as far as they would like. Enter again *Parents for Privacy*. Plaintiffs once more cite to *Parents for Privacy* and argue the Ninth Circuit has foreclosed Defendants' argument today because inclusive facilities have been upheld and any type of contrary regulation is discriminatory. But to repeat: just because inclusive facilities are constitutional does not mean sex-separate facilities are unconstitutional. Because *Parents for Privacy* was the inverse of this case, it takes some mental gymnastics to determine how the Ninth Circuit's holdings there may affect matters here. In rejecting those plaintiffs' challenge that the school's *inclusive* policy violated Title IX, the Ninth Circuit in *Parents for Privacy* found "just because Title IX authorizes sex-segregated facilities does not mean that they are required, let alone that they must be segregated based only on biological sex and cannot accommodate gender identity." 949 F.3d at 1227. Thus, while the Ninth Circuit ruled that inclusive policies were allowed, it also *clearly* stated that Title IX authorizes exactly what S.B. 1100 has done here: create sex-separate facilities. The bottom line is that Title IX may not preclude regulations based on, or incorporating, gender identity, but it does not require them either.

[25] The Fourth and Seventh Circuits—in *Grimm* and *A.C.*—essentially determined that, in the context of Title IX, the term "sex" should be read to include gender identity. Although neither court explicitly states this, the outcome of both cases makes clear those courts viewed gender identity as included under the "sex' umbrella of Title IX. The Eleventh Circuit (in *Adams*) held that "sex" means biological sex in the context of Title IX based upon the legislative history and understanding of the term "sex" when Title IX was enacted. The Court will not undertake a separate review of the history of Title IX at this time but notes its agreement with the *Adams* majority (and Judge Niemeyer's dissent in *Grimm* and Judge Easterbrook's dissent in *A.C.*) that Title IX is not ambiguous and—consistent with its findings above regarding the general legal definition of "sex,"—the definition of "sex" in Title IX does not include gender identity.

Ultimately, the Court finds Plaintiffs have not shown they are likely to succeed on the merits of their Title IX claim because Title IX allows the structure S.B. 1100 mandates. Furthermore, while Title VII and Title IX are related in certain aspects—thus rendering *Bostock* and other cases helpful—they differ materially in other respects and those differences are crucial in this case. Ultimately the Court finds Plaintiffs have not met their burden of establishing a likelihood of success on their Title IX claim.

3. Privacy

Finally, Plaintiffs argue they are likely to succeed on their privacy claims because forcing them to use certain facilities could expose their gender identity and doing so would be a violation of their privacy. As noted, the specific privacy interest Plaintiffs advocate here is slightly different than the privacy referenced above. Plaintiffs are not talking so much about physical privacy in shielding their bodies from others in restrooms, changing facilities, and overnight accommodations, but rather they are talking about informational privacy in their gender identity and whether others know their gender identity and/or biological sex.[26]

For their part, Defendants largely did not discuss this argument in their opposition.

[26] Some transgender students are open about their gender identity. Others are not. Plaintiffs' privacy claim is largely directed at those students who are transgender, but who have not disclosed that information to others (i.e. Roe's friends do not know she is a biological male; they only know her as female). Plaintiffs assert this "outing" of a transgender student's status could happen in a variety of ways once S.B. 1100 takes effect. For example, if a student has been using one sex-specific restroom and now must use the other sex-specific restroom (or an alternate restroom altogether), other students may realize the student is transgender. It is true this may occur. To be sure, however, that same phenomenon of students discovering another's gender identity may currently be happening as transgender students use facilities that coincide with their gender identity, but not their biological sex. Thus, to an extent, Plaintiffs' privacy claim *is* related to physical privacy because physical privacy could help prevent the inadvertent disclosure of one's transgender status. But again, the privacy claim here is more broadly directed at the information itself, not how it may be disclosed.

This led Plaintiffs to assert any opposition was waived. Defendants did discuss privacy more in their final sur-reply, but only to emphasize that Plaintiffs have not put forth enough to support this claim. Defendants also went one step further and contended that even if Plaintiffs could show a specific injury in the disclosure of their gender identity, due process does not protect against that disclosure when competing interests are at stake. With little argument (and even less applicable caselaw) on this claim, the Court is left wanting. Nonetheless, it finds Plaintiffs have, again, not met their initial burden of establishing a likelihood of success on this privacy claim.

A federal district court in California was recently faced with deciding whether children have a privacy interest in their gender identity for purposes of determining if teachers had to disclose any changes in gender identity to the children's parents. Because the challenged law was couched in terms of a state privacy right, the court looked to California *state* court decisions for guidance. It found that none "recogniz[ed] a child's right to quasi-privacy about their gender identity expressions[.]" *Mirabelli v. Olson*, 2023 WL 5976992, at *10 (S.D. Cal. Sept. 14, 2023). The present case is, obviously, different, but like the *Mirabelli* Court, the Court is not aware of any relevant and binding caselaw—in Idaho state or federal court—providing a true "privacy" interest in one's gender identity.

Plaintiffs' argument makes sense. Information about one's sex, sexual orientation, and/or gender identity is personal and private. But that does not mean the disclosure of this information is a violation of due process because it does not implicate a fundamental liberty interest. *See Washington v. Glucksberg*, 521 U.S. 702, 721 (1997). The Court finds Plaintiffs unlikely to succeed on their privacy claim.

B. Irreparable Harm

While the merits-based prong is typically viewed as the most important element of a preliminary injunction, *see Disney Enters., Inc. v. VidAngel, Inc*., 869 F.3d 848, 856 (9th Cir. 2017), the issue of irreparable harm in this case is also important.

As the Court has already discussed, harm may result irrespective of how it rules on Plaintiffs' PI Motion today. Plaintiffs assert harm will befall transgender students because they will be "outed" to their peers when they are forced to travel to different restrooms in their schools, change in different facilities, and stay in different overnight accommodations. Defendants, on the other hand, assert these accommodations are sufficient and that failing to uphold S.B. 1100 could result in harm to those who do not identify as transgender because they will be forced to share spaces, and expose their bodies, to persons of the opposite sex. The problem is both sides can only speculate on this front. At the hearing, neither party was able to identify any *specific* instances of harm befalling transgender, or cisgender, students in Idaho. The Court is sensitive to both side's concerns; however, it cannot base its decision on what some students may subjectively feel or the speculation of potential future harm.

Both sides spend a great deal of time discussing the science behind gender dysphoria and what S.B. 1100 *might* mean for transgender students. Plaintiffs' expert, Dr. Stephanie Budge, explains that transgender students may suffer depression, anxiety, or other psychological harms if they are not allowed to socially transition and use facilities matching their gender identity. On the other hand, Defendants' expert, Dr. James Cantor, explains the science actually demonstrates many of the concerns transgender individuals

face dissipate with time and the harms Dr. Budge asserts often do not come to pass.[27] Again, however, neither side has any conclusive information about *Idaho* and any specific harm students—transgender or cisgender—have, or will, suffer.

The Court understands why both sides focus much of their attention on their competing experts' opinions. Nevertheless, as the Sixth Circuit recently noted, "expert consensus, whether in the medical profession or elsewhere, is not the North Star of substantive due process, lest judges become spectators rather than referees in construing our Constitution." *Skrmetti*, 2023 WL 6321688, at *12. Even if the Court had consistent expert opinions in this case—which it does not—such would not mean it *had* to follow what the experts recommend. The Court's duty is legal in nature. And while science and society has much to say on these topics, the Court's focus is on the law.

To obtain a preliminary injunction, a possibility of irreparable harm is insufficient. Instead, Plaintiffs must establish that irreparable harm is likely, and not just possible, in the absence of an injunction. *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011); *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 23 (2008). Because neither side does little more than speculate that harms will occur, the Court finds this factor roughly even. Plaintiffs may experience some harm, but Defendants (and those who support S.B.

[27] Defendants assert Dr. Budge's testimony is "biased" and should not be considered because she is a self-described activist on transgender issues. They also claim Dr. Budge wholly ignores relevant studies that contradict her own findings. In like manner, Plaintiffs take issue with some of Dr. Cantor's findings and his lack of experience treating individuals with gender dysphoria. Arguments regarding the sufficiency of expert testimony are better left for later in the case. Suffice it to say, the Court will not delve into either expert's testimony at this preliminary stage of the proceedings. It has, frankly, not relied on this testimony because the science in this area is constantly evolving. And while the law is evolving to some degree as well, the Court is an expert in the law, not science; thus, it has determined the most suitable outcome is to base its decision on the law. It has given both experts' testimony the weight it deems appropriate.

1100) may as well.

C. Balance of Equities and Public Interest

As explained, because the Government is a party in this suit, the last two *Winter* factors merge. *See Jewell*, 747 F.3d at 1092.

As is typically the case, neither party discussed either of these factors (together or separately) in any amount of detail. Both simply argue their side prevails on the third and fourth prongs considering their success on the first prong.

There is no doubt the public has an interest in this issue. And the interest is significant on both sides. Whether the equities tip one way or the other likewise depends on which position one takes—for or against S.B. 1100.

For its part, the Court finds these factors are roughly even. Supporters and opponents of S.B. 1100 both have a vested interest in the outcome of this case.

VI. CONCLUSION

This is a difficult case. The Court previously prevented S.B. 1100 from taking effect based upon the concept that maintaining the status quo—of no formal regulation—would allow the parties more time to fully address the difficult issues involved in this case. And while its decision today is still not a full adjudication on the merits, the Court finds that Plaintiffs have not shown they are likely to succeed on the merits of their claims. The Court is not implying Plaintiffs' arguments are meritless—after all, some courts have upheld similar arguments to those Plaintiffs offer now. On the other hand, other courts have upheld the arguments Defendants proffer. Indeed, this area of law (and societal policy) is evolving.

The Court, however, must stay in its lane. It cannot provide guidance on how elected

officials *should* navigate these difficult situations. It can only decide whether the action they have taken withstands constitutional scrutiny. As the Sixth Circuit aptly noted just a few weeks ago with respect to regulations about medical care for transgender minors: "[L]ife-tenured judges construing a difficult-to-amend Constitution should be humble and careful about announcing new substantive due process or equal protection rights that limit accountable elected officials from sorting out these medical, social, and policy challenges." *Skrmetti*, 2023 WL 6321688 at *23.

Ultimately, the Court is not convinced Plaintiffs can prevail on their equal protection claims because: 1) S.B. 1100 is based upon sex, not gender identity, and 2) privacy and safety are important government interests and separating these types of facilities on the basis of sex is "substantially related to the achievement of those objectives." *Hogan*, 458 U.S. at 724.[28] The state of Idaho has an interest in protecting the privacy and safety of its youth while at school. It has written a law to achieve that goal, while also mandating a reasonable accommodation for any student who feels he or she cannot follow the law. That not all people agree with the law is the reality of living in a pluralistic society where everyone cannot have everything they want according to how they see the world. *See Romer*, 517 U.S. at 631.

Plaintiffs likewise cannot show they are likely to prevail on the merits of their Title

[28] And the Court would reach this conclusion *even if* it were to assume, as Plaintiffs argue, that S.B. 1100 discriminates based on transgender status. That is, frankly, the whole point of this exercise. Under intermediate scrutiny, the government must show that it has a persuasive justification for the classification it has drawn. It has done so here *regardless* of which classification the Court uses—sex or transgender status. Thus, while there may be disagreement on the complicated, esoteric, and ever-evolving landscape of discrimination based on gender identity and whether that is the same as discrimination based on sex, it matters not because privacy is a legitimate interest either way.

IX claim because Title IX *specifically* allows for sex-separate facilities. S.B. 1100, therefore, does not violate Title IX, it adheres to it.

And finally, Plaintiffs have not shown they are likely to prevail on the merits of their privacy claim because they have not demonstrated they have a protectable liberty interest in the nondisclosure of their gender identity.

Thus, while the Court finds the remaining *Winter* factors roughly even, it finds Plaintiffs have not prevailed on the critical first prong required to obtain a preliminary injunction today.

That said, Defendants have not shown Plaintiffs' claims are entitled to full dismissal. While they move to dismiss all claims, Defendants do so in a perfunctory manner, with little explanation. The idea seems to be that Plaintiffs' claims are based on speculative science and cannot withstand muster. As noted, however, the Court will not be delving into the science behind the parties' positions today. But the fact that other courts have found merit in similar claims against the backdrop of regulations *similar* to S.B. 1100 weighs against finding that Plaintiffs' claims are wholly implausible. The Court will not dismiss Plaintiffs' claims at this time.

Because the Court's decision today will take time to implement, the Court will extend the TRO for 21 days. This should provide enough time for school districts to identify and designate restrooms, changing facilities, and overnight accommodations in a manner consistent with S.B. 1100. Once the 21 days have elapsed, S.B. 1100 will be in full force and effect.

VII. ORDER

1. Plaintiffs' Motion for Preliminary Injunction (Dkt. 15) is DENIED.
2. Defendants' Motion to Dismiss (Dkt. 47) is DENIED.
3. The Court's previously entered TRO will end, and S.B. 1100 will take effect, 21 days from the date of this order.
4. Defendants' Motion for Leave to File Supplemental Authority (Dkt. 55) is GRANTED.

DATED: October 12, 2023

David C. Nye
Chief U.S. District Court Judge

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

REBECCA ROE, by and through her parents and next friends Rachel and Ryan Roe, SEXUALITY AND GENDER ALLIANCE, an association,

Plaintiffs,

v.

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

Defendants.

Case No. 1:23-cv-00315-DCN

MEMORANDUM DECISION AND ORDER

I. INTRODUCTION

Before the Court is Plaintiffs' Motion for Temporary Restraining Order ("TRO"). Dkt. 34. Defendants oppose the motion. Dkt. 39. Because oral argument would not significantly aid its decision-making process, the Court will decide the motion on the briefing. Dist. Idaho Loc. Civ. R. 7.1(d)(1)(B). For the reasons below, the Court GRANTS the Motion and will issue a TRO until further notice.

II. BACKGROUND

On July 6, 2023, Plaintiffs filed the above-entitled civil rights action challenging Idaho Senate Bill 1100 ("S.B. 1100"). Dkt. 1. S.B. 1100 was adopted on March 22, 2023, took effect on July 1, 2023, and requires, among other things, that students in Idaho public schools use the bathroom or locker room that corresponds with his or her biological sex,

i.e. the person's sex assigned at birth. Plaintiffs allege this law is unconstitutional and disproportionately harms students who identify as transgender.

Alongside their Complaint, Plaintiffs filed a Motion to Proceed Anonymously (Dkt. 13)[1] and a Motion for Preliminary Injunction (Dkt. 15) ("PI Motion"). Defendants then filed a Motion for Extension of Time requesting an approximately 60-day extension to respond to Plaintiffs' PI Motion. Dkt. 21. The Court partially granted the request, extended the briefing deadlines, and set the PI Motion for a hearing on September 13, 2023. Dkt. 31.

Notably, in their opposition to Defendants' Motion for Extension, Plaintiffs argued the Court could grant the extension, but if it did, it should also take other actions to protect Plaintiffs' rights in the interim—such as sua sponte issuing a TRO. Dkt. 25, at 3–4. In its Decision, the Court noted that while it *could* take various actions to accomplish certain goals, it would not do so of its own accord. Dkt. 31, at 4 (explaining it would not take any further action "sua sponte").

On July 28, 2023, Plaintiffs filed the instant Motion for TRO, in which they formally ask the Court to do what they previously suggested the Court could do sua sponte: issue a TRO until the Court's scheduled hearing and decision on the PI Motion. Dkt. 34.

Like their prior suggestion that the Court act sua sponte, Plaintiffs suggest in their present Motion that the Court can issue a TRO without a response from Defendants. Dkt. 34-1, at 3, 7.[2] While this is true, *see* Fed. R. Civ. P. 65(b), the Court strongly prefers to hear

[1] The Court recently granted this motion. Dkt. 38.

[2] Plaintiffs recognized, however, that the Court would likely want a response from Defendants. Dkt. 34-1, at 7 n.1.

from both sides on any issue when feasible. Here, Defendants asked the Court to give them a short time to respond. Dkt. 35. The Court obliged and set an expedited briefing schedule. Dkt. 36. The Court also asked the parties to focus on the "status quo" question in their briefing as that would likely be its "main focus in determining Plaintiffs' TRO Motion." Dkt. 37.

III. LEGAL STANDARD

A preliminary injunction and a TRO generally serve the same purpose of "preserv[ing] the status quo ante litem pending a determination of the action on the merits." *Los Angeles Mem'l Coliseum Comm'n v. Nat'l Football League*, 634 F.2d 1197, 1200 (9th Cir. 1980); Fed. R. Civ. P. 65.

A plaintiff seeking a preliminary injunction or TRO "must establish [1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest." *CTIA-The Wireless Ass'n v. City of Berkeley*, 854 F.3d 1105, 1114 (9th Cir. 2017) (quoting *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)).

IV. ANALYSIS

Although the issues in this case are "complex" and "weighty," Dkt. 31, at 4, the question today is relatively simple: what is the status quo that must be preserved pending resolution of Plaintiffs' PI Motion?

The 2023-2024 school year begins next week, on August 16, 2023. Plaintiffs request

that the Court enter a TRO prohibiting S.B. 1100 from going into effect[3] until the Court issues a full ruling on the PI Motion. Dkt. 34. They contend a short, prohibitory TRO will preserve the status quo and prevent harm. Defendants oppose the request, arguing the TRO Plaintiffs are requesting is mandatory and will *change*, rather than *preserve*, the status quo.

Defendants are incorrect on both fronts.

Both sides admit that prior to S.B. 1100 being adopted by the Idaho Legislature—and long before it went into effect last month—there was a patchwork of regulations and rules concerning which students could use which restrooms[4] in Idaho schools. Dkt. 39, at 2; Dkt. 40, at 2. Some school districts (approximately 75% of the 115 school districts in Idaho) maintained rules mandating sex-separate restrooms, changing facilities, and overnight accommodations. Dkt. 39-1, at 2. A smaller percentage (25%) had policies in place that allowed for individuals to use facilities consistent with their chosen gender identity.

Then S.B. 1100 passed. S.B. 1100 requires that schools mandate students use restrooms consistent with their biological sex.

Because of this, Defendants assert the status quo the Court must maintain is sex-separate bathrooms. But this is not accurate. The relevant "status quo" for purposes of an injunction "refers to the legally relevant relationship *between the parties* before the controversy arose." *Arizona Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1061 (9th Cir.

[3] Like most bills in Idaho, S.B. 1100 became law on July 1, 2023. That said, because no public school districts have yet to go back into session, it is not really "in effect" yet.

[4] For ease, the Court will consistently refer just to restrooms, but S.B. 1100 also encompasses locker rooms, overnight accommodations etc.

2014) (emphasis in original); *see also Regents of Univ. of California v. Am. Broad. Companies, Inc.*, 747 F.2d 511, 514 (9th Cir. 1984) (for purposes of injunctive relief, the status quo means "the last uncontested status which preceded the pending controversy") (cleaned up). In this suit, Plaintiffs contests the enforceability and constitutionality of S.B. 1100. The status quo, therefore, is the policy in Idaho prior to S.B. 1100's passage and enactment.[5]

So even though some school districts did, in fact, have policies separating bathroom usage, others did not. Thus, while S.B. 1100 may "codify[] the common practice," of sex-separate bathrooms, Dkt. 39, at 2, that does not mean the new law is the status quo. Simply put, the status quo concerning bathroom usage in Idaho schools was diverse; but no law, no restriction, and no mandate dictated those policies. In other words, keeping the status quo at this stage is doing just that: leaving schools to their own devices without any input from the state of Idaho, and without any formal regulations one way or the other.

Reviewing what would happen if the Court ruled the other way helps see why this must be the case. If the Court were to allow S.B. 1100 to go into full force and effect, it would *require* all schools to adopt the sex-separated policy. Doing this would not be a change for some schools and would be a change for others. But the mere fact that S.B. 1100

[5] The Court finds the timing of Plaintiffs' lawsuit does not change is analysis. *See Aggarao v. MOL Ship Mgmt. Co.*, 675 F.3d 355, 378 (4th Cir. 2012) ("The status quo to be preserved by a preliminary injunction [] is not the circumstances existing at the moment the lawsuit or injunction request was actually filed, but the last uncontested status between the parties which preceded the controversy.") (cleaned up); *GoTo.com, Inc. v. Walt Disney Co.*, 202 F.3d 1199, 1210 (9th Cir. 2000) ("The status quo ante litem refers not simply to any situation before the filing of a lawsuit, but instead to the last uncontested status which preceded the pending controversy.") (cleaned up). The last uncontested status in this case between these two parties was the landscape before S.B. 1100 passed.

dictates a state-wide policy is the change that upends the status quo of there not being a policy in the first instance. Asking school districts to implement this specific regime would change the school-by-school status quo that has been in place for numerous years.

This dovetails into the difference between a prohibitory injunction and a mandatory injunction. The Court turns to that issue next.

A prohibitory injunction preserves the status quo by preventing a party from taking some action before a determination on the merits of the action. *Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d 873, 878-79 (9th Cir. 2009). *See also Heckler v. Lopez,* 463 U.S. 1328, 1333 (1983) (a prohibitory injunction "freezes the positions of the parties until the court can hear the case on the merits"). By contrast, a mandatory injunction "orders a responsible party to take action." *Meghrig v. KFC W., Inc.*, 516 U.S. 479, 484 (1996). Because mandatory injunctions "go[ ] well beyond simply maintaining the status quo," they are "particularly disfavored" and subject to a heightened burden of proof. *Marlyn Nutraceuticals*, 571 F. 3d at 879. *See also Diamond House of SE Idaho v. City of Ammon*, 381 F. Supp. 3d 1262, 1270 (D. Idaho 2019).

By granting the TRO today, the Court is not mandating or requiring that school districts in Idaho do anything—including adopt policies that would allow students to use restrooms that coincide with their gender identity. Nor is it requiring Defendants to do anything. It is simply prohibiting, for the time being, the enforcement of a new State-wide law and allowing the continuation of school-by-school imposition of policies.

In sum, the Court finds that the status quo was the legal landscape before S.B. 1100 was passed, and that landscape did not require sex-separate or sex-inclusive restrooms.

Each school district was free to implement its own policies or regulations. That system continues today.

Now, the Court recognizes that, when deciding a TRO, it should look at the standard *Winter* factors[6] "not merely on preservation of the status quo." *Golden Gate Rest. Ass'n v. City & Cnty. of San Francisco*, 512 F.3d 1112, 1116 (9th Cir. 2008) (cleaned up). The conundrum in this case—like many cases where competing constitutional rights are at stake—is that both sides allege factors two, three, and four lean their way. Both contend the equities tip in their favor, that the public interest supports their view, and that they will each suffer future harm if the Court does not rule as they suggest. Without delving substantively into the parties' respective arguments, the Court simply notes these three factors are roughly even. The Court concludes its review of the *Winter* factors with factor one—a likelihood of success on the merits.

As the Court has noted elsewhere, a Plaintiff's ability to demonstrate "a likelihood of success on the merits, or serious questions going to the merits, is the most important element of a preliminary injunction." *Perlot v. Green*, 609 F. Supp. 3d 1106, 1126 (D. Idaho 2022) (citing *Disney Enters., Inc. v. VidAngel, Inc.*, 869 F.3d 848, 856 (9th Cir. 2017) (cleaned up). This showing, however, is only *preliminary* because the parties have typically not engaged in any discovery by the time a preliminary injunction motion is filed. A TRO that precedes a PI, such as this, is even more removed from the merits and substance of the

[6] These factors include: (1) A likelihood of success on the merits; (2) likely irreparable harm in the absence of a preliminary injunction; (3) that the balance of equities weighs in favor of an injunction; and (4) that an injunction is in the public interest. *Winter*, 555 U.S. at 20.

case.[7] Said another way, at this point the Court is effectively tasked with trying to make a pre-preliminary call on the prospects of Plaintiffs' claims. It cannot do so at this time with any degree of certainty.

Notably, there is already a circuit split on the issues raised in this case. The Fourth Circuit has decided that denying gender-affirming bathroom access can violate both Title IX and the Equal Protection Clause, while the Eleventh Circuit found no violations based on substantially similar facts. *Compare Grimm v. Gloucester County School Board*, 972 F.3d 586 (4th Cir. 2020), *with Adams ex rel. Kasper v. School Board of St. Johns County*, 57 F.4th 791 (11th Cir. 2022) (*en banc*). And just last week, the Seventh Circuit effectively joined the Fourth Circuit when it upheld preliminary injunctions entered in two district court cases dealing with these same issues. *See A.C. by M.C. v. Metro. Sch. Dist. of Martinsville*, 2023 WL 4881915 (7th Cir. Aug. 1, 2023).

Candidly, against this divided backdrop, the Court does not know if Plaintiffs will be able to show success on the merits or not at the upcoming hearing. Hence the Court's focus today on the status quo. Ultimately, the Court finds the *Winter* factors do not tip strongly one way or the other. The Court does find, however, that preserving the status quo pending a more complete review is the most fitting approach at the current juncture.

V. CONCLUSION

Today, the Court puts a pause on S.B. 1100. It does not find it unconstitutional. It

[7] For example, in this case, Defendants' deadline to respond to Plaintiffs' PI Motion (and Plaintiffs' Complaint) is still weeks away. Limited discovery has taken place in the form of retained experts and reports, but again, the Court only has those from Plaintiffs.

does not find it constitutional. This is not a full adjudication of *any* argument on the merits. The Court is simply holding S.B. 1100 in abeyance and preserving the situation as it existed prior to the parties' disagreement, which is that S.B. 1100 *will not* be in effect when school starts on August 16, 2023. School districts may choose how to organize their bathrooms, changing facilities, and overnight accommodations—whether that is sex-separate or transgender-inclusive; whether it is consistent with what it did last year or not. But the State of Idaho will not be mandating that decision at this time.

VI. ORDER

1. Plaintiffs' Motion for Temporary Restraining Order (Dkt. 34) is GRANTED.
2. The provisions of S.B. 1100 are held in abeyance until the Court has an opportunity to rule on the merits of this action.
3. The TRO will last until the Court issues a decision on Plaintiffs' PI Motion unless ordered otherwise.

DATED: August 10, 2023

David C. Nye
Chief U.S. District Court Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

REBECCA ROE, by and through her parents and next friends, Rachel and Ryan Roe; SEXUALITY AND GENDER ALLIANCE, an association,

Plaintiff,

vs.

DEBBIE CRITCHFIELD, in her official capacity as Idaho State Superintendent of Public Instruction; IDAHO STATE BOARD OF EDUCATION; LINDA CLARK, WILLIAM G. GILBERT JR., DAVID HILL, SHAWN KEOUGH, KURT LIEBICH, CALLY J. ROACH, and CINDY SIDDOWAY, in their official capacities as members of the Idaho State Board of Education; INDEPENDENT SCHOOL DISTRICT OF BOISE CITY #1; DAVE WAGERS, MARIA GREELEY, NANCY GREGORY, ELIZABETH LANGLEY, BETH OPPENHEIMER, SHIVA RAJBHANDARI, in their official capacities as members of the Independent School District of Boise City #1 Board of Trustees; COBY DENNIS, in his official capacity as Superintendent of Independent School District of Boise City #1,

Defendants.

Case No. 1:23-CV-315-DCN

Boise, Idaho
September 13, 2023
9:03 a.m.

TRANSCRIPT OF MOTION HEARING PROCEEDINGS

BEFORE THE HONORABLE DAVID C. NYE
CHIEF UNITED STATES DISTRICT COURT JUDGE

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Proceedings recorded by stenography. Transcript produced by computer-aided transcription.

THE COURT: Let me ask a couple questions, and I guess I'll begin where you just ended.

Realitywise, as far as if *Hecox* has taught us anything, this case isn't going to end today; it's going to be appealed. *Hecox* has been on appeal now for two years. So the likelihood that A.J. is going to have problems during his senior year, that -- that's probably not true. But we'll see.

MR. RENN: We certainly hope that's the case if the Court agrees to grant the preliminary injunction. If the Court were to merely dissolve the TRO, then I think the harms that we discussed would absolutely occur to him as well as to many other transgender youth in Idaho.

THE COURT: And as a practical matter, if I decide to dissolve the TRO, you're going to ask me for a stay of that decision while you appeal. I'm going to deny it because, otherwise, I just gave you the preliminary injunction you're looking at.

So the Ninth Circuit is going to make that decision on a stay. I don't know what they're going to do; I have no idea. But I don't know that today's the end for A.J. either way that I go. But there are certainly other children that would be impacted, yes.

In your brief, you -- the author wrote that the statute denies transgender youth the equal dignity and respect that Idaho affords to nontransgender youth. What is that

Now, if that holding has been applied to Title IX, then, under Title IX, sex means biological sex. And Title IX, as a matter of statute and as a matter of regulation, says that sex-separated bathrooms are okay, that the statute doesn't prohibit those. So if that's true, then the fact that the *Bostock*'s rationale applies to Title IX actually makes the case stronger for us.

And the Ninth Circuit has held specifically in *Parents for Privacy* -- I'll grab the quote again -- that Title IX authorizes sex-segregated facilities based on biological sex. And that's page 811, 57 F.4th.

(Reporter interruption.)

MR. WILSON: 57 F.4th at 811.

THE COURT: Do you agree --

MR. WILSON: I'm sorry. I was -- that was the *Adams* decision. *Parents for Privacy* is 949 F.3d at 1227.

THE COURT: Do you agree with Mr. Renn when he was talking about the 75/25 statistics that there's 25 percent of the school districts in Idaho have inclusive policies, and the other 75 percent are silent? I guess my real question is, are there any school districts in Idaho that have a policy that says you must use your biological gender bathroom?

MR. WILSON: I'm not aware of any districts that have done that. I think this is, again, the nature of a long -- a long-standing rule, something that was true for the Egyptians

and true for the founders and true when this state was created.

You don't usually make policies to reinforce those standards. It was because districts were making policies to the contrary that the legislature passed S.B. 1100 in this case.

THE COURT: All right. I think I had one other question. Okay. I understand your argument on the experts. That seems to me to be an argument on weight. Doesn't that go later in the case, on summary judgment, rather than on a motion to dismiss?

MR. WILSON: So I'll concede that our experts -- that's not relevant to the motion to dismiss. That's only relevant to the motion for preliminary injunction.

But on the preliminary injunction motion, every one of plaintiffs' claims is founded on Dr. Budge's declaration about gender-affirming care. That's at the heart of it. And if that is not something that the Court gives a lot of credence to, then plaintiffs can't prevail on the science, just like they can't prevail on the law.

THE COURT: Okay. Thank you. I appreciate you clarifying that. That's all I had.

MR. WILSON: Thank you, Your Honor.

THE COURT: Thank you.

Mr. Renn.

C E R T I F I C A T E

I, ANNE BOWLINE, a Registered Merit Reporter and Certified Realtime Reporter, do hereby certify that I reported by machine shorthand the proceedings contained herein on the aforementioned subject on the date herein set forth, and that the foregoing 67 pages constitute a full, true and correct transcript.

Dated this 6th day of October, 2023.

/s/ Anne Bowline

ANNE BOWLINE
Registered Merit Reporter
Certified Realtime Reporter

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

REBECCA ROE, et al.,

Plaintiffs,

v.

DEBBIE CRITCHFIELD, et al.,

Defendants.

Case No. 1:23-cv-315

DECLARATION OF REBECCA ROE

I, Rebecca Roe, hereby declare as follows:

1. I am a Plaintiff in this action and using a pseudonym (Rebecca Roe) here. I offer this declaration in support of Plaintiffs' motion for preliminary injunction. I have personal knowledge of the facts set forth in this declaration and could and would testify competently to

those facts if called as a witness.

2. I am a 12-year-old girl, and I live in Idaho. I have attended school within the Independent School District of Boise City #1 ("Boise School District") since I was in kindergarten. I will be in the seventh grade during the 2023-24 academic year at a junior high school within Boise School District.

3. I enjoy playing video games, hanging out with friends at the mall, watching anime shows, and doodling artwork. I also take *kung fu* lessons, both for physical exercise and potential self-defense.

4. Although I am now thriving as a transgender girl, my mental health suffered in the past before I came to better understand my gender identity and received the support that I needed.

5. During the summer after fourth grade, the issue of my gender arose while I was talking with my parents about pride month for lesbian, gay, bisexual, transgender, and queer (LGBTQ) people. In the course of that conversation, I told my parents that I did not believe I was a boy.

6. In fifth grade, older students would sometimes pick on me, such as when they saw me by myself during recess. Overall, I struggled socially at school during the year, even though I also had a tight circle of friends.

7. My parents began taking me to see a therapist to make sure I received the mental health support I needed. During my therapy sessions, I expressed that I did not feel like a boy, consistent with what I had conveyed to my parents during the summer after fourth grade. The therapist also spoke with me about any distress that I felt around issues related to gender.

8. My gender identity is female. I have never felt typically masculine like others

assigned male at birth. When I would look at my male friends, I would think to myself, "I don't feel like this." When I would look at my female friends, however, I would think to myself, "I feel more like that."

9. After discussions between my therapist, my parents, and me, we agreed that I should try "being myself" for spring break in 2021, when I was not attending school, and to express my gender in the way that felt most comfortable to me. I went shopping and chose girls' clothes for myself. In contrast to the distress that I felt as a result of gender dysphoria, I felt joy and relief when my gender expression matched my gender identity. That is how I feel when I look in the mirror and see my authentic self, myself as a girl, staring back at me.

10. Following this experience, and particularly after the end of fifth grade, I continued the process of social transition to live in a manner consistent with my gender identity. For example, I began to use a more typically feminine name and asked others to use that name, dressed in clothes typically worn by girls, adopted a more typically feminine hairstyle, and started using female pronouns.

11. My friends accepted and supported me as I undertook the process of social transition. They respected my name and pronouns. School staff respected my name, which was updated in the school information system, and pronouns too. Overall, my experience in sixth grade was significantly better than my experience in fifth grade because I was able to live in a manner consistent with my gender identity in several respects and was generally treated by my peers like any other girl.

12. After I began my social transition, I also began using the women's restroom outside of school without incident. Like other girls, I would enter the women's restroom, go into a stall and close the door behind me, use the toilet, and then wash my hands and leave. It was a

routine practice that did not cause any problems for anyone, including others using the restroom at the same time as me. Living in a manner consistent with my gender identity, including having access to the girls' restroom, is an important aspect of the treatment for my gender dysphoria.

13. I have not used a men's restroom, whether at school or outside of school, since fifth grade. Using the men's restrooms would feel wrong to me because I am a girl. Also, when I am in public, I am generally perceived by others as a girl. Thus, if I were to use the restroom designated for men, it would appear to others that a girl was using the men's restroom, something far more disruptive to social expectations than my use of the women's restroom.

14. During sixth grade, I generally avoided using the restroom at school. Prior to the start of the school year, the initial plan was that I would use the nurse's restroom rather than the boys' restroom. However, I ultimately did not feel comfortable using the nurse's restroom, because it felt stigmatizing and isolating to use in comparison to the other girls at my school, who were not limited to using only that single-stall facility. It was also in a less accessible location than the restrooms used by my female classmates.

15. As a result, I generally avoided using the restroom at school. I limited my fluid intake and would "hold it" at school to avoid using the restroom. These measures were not only unhealthy but they were increasingly difficult to endure as the school day progressed. They also created a physical and mental distraction while I was in class, as I spent time thinking to myself that I was "almost there" as I waited for the school day to finally end just so that I could use the restroom at home.

16. I will be attending a new school starting in seventh grade, alongside new classmates, and would like to fit in with my female classmates. The idea of my exclusion from facilities designated for girls is painful and stressful and makes me feel unequal to other girls. It

makes me feel like an outsider. If I am only allowed to use either the boys' restroom or a single-stall restroom, I am afraid that any of my classmates at my new school could find out that I am transgender, and I want to have control over my private information. My new school is also farther from home, making it even more difficult and unhealthy for me to delay using the restroom until the end of the day. Particularly at this point in my transition, I wish to use the girls' restroom when I am outside the home, including at school. I am a girl and I just want to be treated like any other girl.

* * *

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 2 day of July, 2023.

Rebecca Roe

Rebecca Roe

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Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

REBECCA ROE, et al.,

Plaintiffs,

v.

DEBBIE CRITCHFIELD, et al.,

Defendants.

Case No. 1:23-cv-315

DECLARATION OF RACHEL ROE

I, Rachel Roe, hereby declare as follows:

1. I am the mother of Plaintiff Rebecca Roe. My daughter (Rebecca), my husband (Ryan), and I are using pseudonyms. I offer this declaration in support of Plaintiffs' motion for preliminary injunction. I have personal knowledge of the facts set forth in this declaration and

could and would testify competently to those facts if called as a witness.

2. My husband Ryan and I live in Idaho, and we are the parents of Rebecca Roe, a 12-year-old girl who will be in the seventh grade during the 2023-24 academic year at a junior high school within the Independent School District of Boise City #1 ("Boise School District").

3. Rebecca is transgender. When Rebecca was born, she was designated as male but her gender identity is female.

4. Although Rebecca is now thriving as a transgender girl, her mental health suffered in the past before she came to better understand her gender identity and received the support that she needed. My husband Ryan and I became concerned about Rebecca's mental well-being around the time she was in fourth grade. She exhibited signs of depression and seemed generally "checked out." She also began falling behind in coursework even though she otherwise generally excels academically.

5. During the summer after fourth grade, the issue of Rebecca's gender arose in the context of a conversation with us regarding pride month for lesbian, gay, bisexual, transgender, and queer (LGBTQ) people. Ryan and I wanted to reassure her that we would still love her no matter who she was. In the course of that conversation, Rebecca expressed to us that she did not believe that she was a boy. We were unsure of what to make of this information at the time.

6. Overall, Rebecca struggled socially at school during fifth grade, even though she also had a tight circle of friends.

7. Motivated by concerns about Rebecca's well-being, Ryan and I began taking Rebecca to see a therapist to ensure that she received the mental health support she needed.

8. After discussions with Rebecca, her therapist, Ryan, and me, we decided to give Rebecca the opportunity to "be herself" for spring break in 2021, when Rebecca was not

attending school, and to express her gender in the way that felt most comfortable to her. For instance, Rebecca went shopping and chose girls' clothes for herself. As a result, I noticed improvements in her mental health and that she seemed to be more confident in herself.

9. Following this experience, and particularly after the end of fifth grade, Rebecca continued the process of social transition to live in a manner consistent with her gender identity. For example, she began to use a more typically feminine name rather than a typically masculine name and asked others to use her new, female name; she dressed in clothes typically worn by girls; she adopted a more feminine hairstyle; and she started using female pronouns.

10. After Rebecca began her social transition, she also began using restrooms designated for females outside of school without incident. Living in a manner consistent with her gender identity, including having access to the girls' restroom, is an important aspect of the treatment for Rebecca's gender dysphoria.

11. Rebecca has not used a restroom designated for males, whether at school or outside of school, since fifth grade. When Rebecca is in public, she is generally perceived by others as female. Thus, if she were to use the restroom designated for males, it would appear to others that a girl was using the men's restroom, something far more disruptive to social expectations than her use of the women's restroom.

12. As part of treatment for her gender dysphoria, Rebecca also receives puberty-delaying medication, which allows transgender adolescents to avoid physical changes associated with their endogenous puberty, and can be followed by gender-affirming hormone therapy where medically appropriate, which facilitates even greater alignment between one's gender identity and body. Living in a manner consistent with her gender identity, including having access to the girls' restroom, is an important aspect of the treatment for Rebecca's gender dysphoria.

13. My husband and I have significant concerns and worry about Rebecca's physical safety, mental health, and her general well-being if she were excluded from girls' facilities. As parents who love their child and want to see her thrive, we agonize that Rebecca's use of the boys' restroom, which may be unavoidable at times if she is excluded from the girls' facilities, would expose her transgender status in situations where it would otherwise remain private and leave her vulnerable to violence and targeting by other students.

14. Idaho is our home. Our daughter grew up here and has been thriving in this community. To protect and encourage her growth, my husband and I want a safe and respectful learning environment for our daughter just like any other parents.

* * *

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 2 day of July 2023.

Rachel Roe

Rachel Roe

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Defendants.

Case No. 1:23-cv-315

DECLARATION OF A.J., PRESIDENT OF PLAINTIFF SAGA

I, A.J., hereby declare as follows:

1. I have lived in Idaho my whole life and have lived in Boise since ninth grade. I enjoy robotics and participate in robotics competitions, I play multiple musical instruments, and I like to draw.

2. I am a student at Boise High School in Boise, Idaho, and I am the current President and a member of Plaintiff Sexuality and Gender Alliance (SAGA), a student organization for high school students at Boise High. SAGA and its activities are led by students. One of SAGA's goals is to ensure that LGBTQ+ students are safe and welcome at school. I have personal knowledge of the facts set forth in this declaration and could and would testify competently to those facts if called as a witness.

3. Based on my leadership role within SAGA and the support we provide, I am aware that some SAGA members will be harmed by S.B. 1100. For example, consistent with school policies pre-dating S.B. 1100, there are students who wish to use multi-occupancy restrooms and facilities on school grounds, including during the 2023-24 school year, consistent with their gender identity, and inconsistent with their sex assigned at birth.

4. Any transgender SAGA member who is prohibited from using facilities consistent with their gender identity under S.B. 1100 will be harmed by being treated differently than their peers who can use facilities consistent with their gender identity. They will have to choose between using facilities inconsistent with their identity, causing distress and potential harassment, or avoiding facilities use, causing discomfort and potential health issues. Some members will face the risk of being outed as transgender under S.B. 1100 by having to change their established restroom use or by being forced to use restrooms inconsistent with their identities (including the names and pronouns they use in the school community). This includes being outed in situations where someone would not otherwise disclose their transgender status, e.g., to people they don't know in the restroom, even if they may be out about being transgender in other ways.

5. S.B. 1100 goes directly against everything that SAGA stands for, which is about supporting all members of the LGBTQ+ community and ensuring that school is a safe and welcoming environment for them. If S.B. 1100 remains in effect, SAGA will also have to spend additional time supporting students that have lost restroom access and advocating for more gender-neutral restroom options for students so they can make it through their school day. Because SAGA does not have the capacity to handle multiple projects at a time, this would interfere with its ability to perform other mission-driven student services, such as the clothing drive they have done in the past and would like to do again this year.

6. I am one of the SAGA members who will be affected by SB 1100. I am a transgender male who was assigned as female at birth. I came out to my friends as a transgender male in ninth grade and came out to more people in my life during tenth grade, including my family. As I came out to more people at school as male, it became increasingly uncomfortable to use female-designated facilities and I avoided it whenever possible.

7. In the summer between tenth and eleventh grade, I reached out to my school counselor to ask whether we could create a gender support plan. With the help of my counselor and the support of my parents, we drafted a plan that clarified the use of my new name, pronouns, and facilities on campus. It confirmed that I should use male-designated facilities where they are separated by sex. A true and correct copy of the Gender Support Plan form used by my school is attached as **Exhibit A**.

8. Starting in eleventh grade, once my gender support plan was in place, I have used the restroom designated for boys when I use multi-occupancy restrooms on campus. I have not encountered any problems or issues from other students when I have used the restroom.

9. There is only one single-user restroom that students can use on my school campus and it is not always available. Sometimes other students are using the bathroom, and sometimes it is closed for use altogether. It is in a separate building and farther from most of my classes than the multi-occupancy restrooms.

10. The thought of having to use the girls' bathroom makes me feel ill. The past school year, since coming out fully at school, has been the happiest I've been in my entire life. I remember the painful and exhausting feeling of having to use the girls' restroom at the end of tenth grade, after I had started coming out to more peers as male but before my gender support plan was in place. Each time, it brought up the awful feelings I had while I was still in the closet. I know that being forced back into that circumstance, with students who know me and interact with me as a male student, would be even worse now.

* * *

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 2 day of July, 2023.

AJ

A.J.

Exhibit A

Gender Support Plan

Student's Preferred Name:_____ Legal Name: _____
Student's Gender: Assigned Sex at Birth: Grade Level:
Date of Birth: Parent(s)/Guardian(s):

PARENT/GUARDIAN INVOLVEMENT
Is guardian(s) of the student aware of their student's wish to implement a gender support plan?
Is guardian(s) of the student supportive of their student's wish to implement a gender support plan?

STUDENT SAFETY
Who will be the student's "go to adult" on campus?
Does the student feel regular one-on-one check-in's are necessary? If so, who will provide this support?
If this person is not available, what should the student do?
What are the expectations in the event the student is feeling unsafe and how will the student signal need for help?

NAME & STUDENT RECORDS
Name/gender marker currently in the Student Information System:
Name to be used when referring to the student Pronouns
What name and gender marker does the student and parent want reflected in the Student Information System?
Can preferred pronouns be noted on the Student Information System?
Does the student want their email and login updated?
Name on high school diploma

Please note: *When you apply for college, most colleges and universities currently require legal names on transcripts and applications so that they can match the application and transcript to the FAFSA. The FAFSA application requires students to enter both their legal names and social security numbers, and they must match.*
If you have decided to change the name on your school records but have not legally changed your name, you will need to either request that your name be changed back to your legal name on your school records before your transcripts are sent to the colleges to which you apply or contact those colleges and universities to let them know that your transcript, application and FAFSA will not match.

USE OF FACILITIES
Student will use the following restroom(s) on campus:
Student will use the following locker room on campus:

DISTRICT PROGRAMS AND EXTRACURRICULAR ACTIVITIES
In what other district programs (i.e. GATE, TVMSC, Pro-Tech, etc.) and/or extracurricular activities will the student be participating in?

OTHER CONSIDERATIONS
Does the student have any siblings at school?

Are there any specific dynamics with other students, families or staff members that need to be discussed or accounted for?
Other considerations or concerns or issues:

CONFIDENTIALITY, PRIVACY AND DISCLOSURE

How public or private will information about this student's gender be (check all that apply)?
____ Site level leadership/administration will know (specify staff members):
___ Teachers and/or other school staff will know (specify staff members):
____ District level AO staff will be made aware of name change or preferred name in order to connect student to State AO funds as the State requires students' legal names.
____ Student will not be openly "out", but some students are aware of the student's gender
Specify the students:_____
____ Student is open with others (adults and peers) about gender
____ Student would like this plan to be transferred to current programs and/or next school of attendance, enabling those working with the student to use the appropriate name and/or pronoun.
(If student is a minor, parent must initial here and sign below to release this document to current programs and/or future schools.)
____Student or parent initials indicate permission to share with future schools as well as the following programs beyond home school staff (i.e. pro tech, special education, other specialists, etc…):
_____

_____

Other:_____

_____

Student Signature_____Date_____

Parent/Guardian Signature _____Date_____

Staff Signature_____Date_____

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Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

REBECCA ROE, et al.,

Plaintiffs,

v.

DEBBIE CRITCHFIELD, et al.,

Defendants.

Case No. 1:23-cv-315

EXPERT DECLARATION OF STEPHANIE L. BUDGE, PH.D.

EXPERT DECLARATION OF STEPHANIE L. BUDGE, PH.D.

I, Dr. Stephanie L. Budge, Ph.D., hereby declare as follows:

1. I submit this expert declaration based on my personal knowledge.

2. I am a licensed psychologist specializing for over 15 years in issues of gender identity and gender transition and, in particular, the mental health of transgender individuals and the treatment of gender dysphoria. I am an associate professor in counseling psychology at the University of Wisconsin-Madison.

3. I have been retained by counsel for the Plaintiffs in the above-captioned matter to provide expert opinions about: (a) the psychological understanding of gender identity, (b) gender dysphoria and its treatment, including social transition, (c) the importance of access to sex-separated facilities as a part of social transition, (d) the harms caused by excluding transgender students from using sex-separated facilities that are aligned with their gender identity, and (e) misinformation about transgender individuals' use of restrooms consistent with their gender identity.

I. QUALIFICATIONS

4. The information provided regarding my professional background, experiences, publications, and presentations are detailed in my curriculum vitae. An accurate and true copy is attached as Exhibit A to this declaration.

5. I received a master's degree in educational psychology from the University of Texas at Austin in 2006 and a Ph.D. in counseling psychology in 2011 from the University of Wisconsin-Madison. My Ph.D. concentration specifically focused on transgender individuals' mental health. I also specialized in psychological assessment as part of my Ph.D. degree program.

6. I have been a mental health professional since 2006, and I am currently licensed to practice psychology in the state of Wisconsin (license # 3244-57). I have been a faculty member in counseling psychology at the University of Wisconsin-Madison since 2014.

7. I have extensive expertise working with transgender people, those whose gender assigned at birth is different from their gender identity. I have been a mental health provider to transgender individuals since 2007. Transgender individuals have comprised the majority of my clinical caseload since 2011, and I have worked clinically with approximately 200 transgender patients through the provision of individual therapy, group therapy, psychological evaluations, and supervision of others' clinical work. A significant portion of my clinical work has focused on adolescents and young adults. For example, I held an appointment as a clinical health psychologist at UW Health Pediatric and Adolescent Transgender Health ("PATH") clinic, where I conducted clinical assessments with transgender adolescents ages 13-18. I have also facilitated clinical support groups for transgender adolescents ages 14-18 at the Counseling Psychology Training Clinic ("CPTC") at the University of Wisconsin-Madison, and I provided psychotherapy to transgender adolescents when I had a private practice.

8. As a faculty member at UW-Madison, I teach courses that focus on training master's and doctoral students to become mental health professionals and psychological researchers. I provide pro bono clinical services and train student therapists in best practices in clinical work with transgender patients at the Counseling Psychology Training Clinic, the community clinic affiliated with my academic department at UW-Madison.

9. As part of my faculty appointment, I am the Director of the Transgender Counseling Advocacy Research and Education ("CARE") Collaborative. In this role, I design research projects that focus on the mental health needs of transgender individuals. One of the current research projects is an open clinical trial focusing on the effectiveness of psychotherapy for transgender individuals. As part of this clinical trial, we have trained over 100 mental health providers on how to reduce distress that is experienced from discrimination by other individuals

or entities, and 49 patients have been enrolled in and received psychotherapy as part of the trial. While some of the research we conduct is with adults, we engage in a large body of research that focuses on transgender adolescents. Specifically, we have recently conducted and presented analyses from the Trans Teen and Family Narratives project, and we finalized publishing our sixth and final article from the longitudinal Transgender Youth and Families Study in 2022.

10. I am the Director of the Advancing Health Equity and Diversity (AHEAD) program in the School of Medicine and Public Health at UW-Madison. In this role, I mentor postdoctoral scholars and junior faculty in the School of Medicine and Public Health who focus their clinical and research efforts on health equity issues.

11. I have published 99 invited and peer-reviewed journal articles and book chapters, with the majority of these focusing on transgender individuals. Notably, several of these publications are focused on the impact of discrimination on transgender youth and adults' mental health and effective interventions to improve transgender youth and adults' mental health. I have been involved in more than 200 academic presentations (internationally, nationally, and regionally). The majority of these presentations have been focused on transgender individuals, with a significant proportion focusing on transgender adolescents under the age of 18.

12. I am an associate editor for the journal *Psychology of Sexual Orientation and Gender Diversity*. I am on the editorial board for the *International Journal of Transgender Health* as well as *LGBTQ+ Family: An International Journal.* Researchers in the United States and internationally regularly seek my assistance as an expert reviewer for research focused on transgender individuals.

13. I have received several awards for my work in the science and clinical practice of working with transgender individuals. Recently, I received the 2021 American Psychological

Association Distinguished Contribution to Counseling Psychology Award for my clinical work and research with transgender people. I also received the 2021 American Psychological Association Social Justice Award for my contributions to psychotherapeutic practice with transgender people. I was the first recipient of the American Psychological Association Transgender Research Award in 2010. Locally, I am also a member of the Wisconsin Transgender Health Coalition ("WTHC"), an organization focused on improving health care for transgender individuals throughout Wisconsin. My primary role on the coalition is to consult on research projects and collect data about transgender individuals in the upper Midwest in order to tailor health care interventions for local community members. For my community-focused research, I received the UW-Madison School of Education 2018 Community Engaged Scholar Award, the 2021 UW-Madison Exceptional Service Award, and the 2022 UW-Madison School of Education Excellence in Diversity Award.

14. I am a member of the Society for the Psychology of Sexual Orientation and Gender Diversity within the American Psychological Association ("APA"), of which I am also a member. In August 2021, I completed a 10-year term as co-chair of the Science Committee for the Society. We provide programming at the APA annual convention to disseminate cutting edge research on the best psychological practices and evidence-based treatments with lesbian, gay, bisexual, transgender, and queer ("LGBTQ") individuals. At the 2022 APA annual convention, I chaired or participated in six presentations and panels that focused on best practices in psychological science regarding transgender populations and interventions to reduce psychological distress for transgender individuals. In 2021, I became a Fellow of the American Psychological Association.

15. In addition, I am a member of the World Professional Association of Transgender Health ("WPATH"). WPATH is an interdisciplinary professional organization of individuals worldwide specializing in research and practice in transgender health. WPATH publishes the Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People, which are widely accepted by health care practitioners across disciplines who provide care to transgender individuals.

16. I am being compensated at an hourly rate of $250/hour for actual time devoted for research, preparation, reports, and / or consulting related to my expert opinion in this case. If deposed or providing testimony, I will be compensated at a rate of $400/hour. I also receive $3,000 a day for compensation when travel is required for my services. My compensation does not depend on the outcome of this litigation, the opinions I express, or the testimony I provide.

17. In the previous four years, I have testified as an expert at trial or by deposition in *Boyden v. Conlin*, 341 F. Supp. 3d 979 (W.D. Wis. 2018) and *Cooper v. USA Powerlifting & USA Powerlifting*, Minnesota Case No. 62-CV-21-211.

18. In preparing this expert declaration, I reviewed the text of Idaho Senate Bill 1100 at issue in this matter. My opinions are based on my education; my clinical experience; research findings from my own scholarship; my review of the seminal and most influential psychological and public health research on transgender individuals, including the most current research, published as recently as this year. Attached as Exhibit B is a bibliography of the relevant and pertinent medical and scientific literature relating to the opinions expressed in this expert declaration. The materials I have relied upon in preparing this expert declaration are the same types of materials that experts in my field of study regularly rely upon when forming opinions on

these subjects. I reserve the right to supplement these opinions based on subsequent developments in my field and/or factual developments in this litigation.

II. BACKGROUND INFORMATION ON GENDER IDENTITY AND GENDER DYSPHORIA

19. The term "gender identity" is a well-established concept in psychology and medicine, referring to a person's internal or psychological sense of having a particular gender. All human beings have a gender identity. People usually begin to explore and understand their gender identity around the age of three (with some variation), although some transgender individuals may not begin to recognize or express their gender identity until later in life.

20. Neuroimaging data demonstrate strong evidence to indicate biological factors related to transgender identity (*see* Sanchez & Pankey, 2017 for a review; Spizzirri et al., 2018). Given the multifaceted nature of sex as described above, neuroimaging can capture a multitude of components that reflect the complexity of sex (referred to as the brain mosaic by neuroscience researchers, *see* Rouse & Hamilton, 2021). Neuroscience research conducted with transgender people reflects the complexity of sex and has become more specific over the years. There is not one particular component in the brain that is indicative of sex, and the studies over the years reflect the complexity of how researchers are measuring components of sex. For example, transgender women's hypothalamus responded similarly to cisgender women's hypothalamus when encountering pheromones (Berglund et al., 2008) and transgender women demonstrated similar cognitive responses in their parietal lobe to cisgender women when manipulating certain 2D and 3D images (Carillo et al., 2010). In addition, research indicates adolescent trans boys demonstrated alignment with cisgender boys in their sensorimotor network; similar findings were noted for adolescent trans girls when compared to cisgender girls (Nota et al., 2017).

21. At birth, the sex of infants is typically assigned as male or female based on external genitalia. Typically, individuals born with the external physical characteristics commonly associated with males identify as men and experience themselves as male, and individuals born with the external physical characteristics commonly associated with females identify as women and experience themselves as female. However, for transgender individuals this is not the case. For transgender individuals, their internal sense of their gender—that is, their gender identity—differs from the sex they were assigned at birth.

22. Every individual's sex is multifaceted and composed of many distinct biologically influenced characteristics, including, but not limited to, chromosomal makeup, hormones, internal and external reproductive organs, secondary sex characteristics, and gender identity. Where there is a divergence between these characteristics, gender identity is the most important and determinative factor.

23. Unlike cisgender children and adolescents, transgender children and adolescents experience a pervasive, consistent, persistent, and insistent sense of being a gender different from the sex assigned to them (*e.g.*, Olson et al., 2015; Rafferty et al., 2018).

24. For many people who experience incongruence between their gender identity and their sex assigned at birth, the incongruence can cause serious emotional distress.

25. Gender dysphoria, codified in the American Psychiatric Association's (2022) Diagnostic and Statistical Manual of Mental Disorders Fifth Edition Text Revision ("DSM-5-TR"), is the psychiatric diagnosis for the distress associated with gender incongruence. Individuals who are diagnosed with gender dysphoria can experience a number of different symptoms. When individuals with distress related to gender incongruence do not obtain

competent and necessary treatment, serious and debilitating psychological distress (for example, suicidal ideation, substance use, depression, anxiety, and self-harm) often occurs.

26. Under the DSM-5-TR, there are two criteria used for diagnosing gender dysphoria in adults and adolescents (302.85), Criteria A and B. The symptoms under Criterion A for identifying gender dysphoria include a marked incongruence between one's experienced/expressed gender and one's assigned gender, of at least 6 months' duration, as manifested by at least two of the following:

(1) A marked incongruence between one's experienced/expressed gender and primary and/or secondary sex characteristics (or in young adolescents, the anticipated secondary sex characteristics);

(2) A strong desire to be rid of one's primary and/or secondary sex characteristics because of a marked incongruence with one's experienced/expressed gender (or in young adolescents, a desire to prevent the development of the anticipated secondary sex characteristics);

(3) A strong desire for the primary and/or secondary sex characteristics of the other gender;

(4) A strong desire to be of the other gender (or some alternative gender different from one's assigned gender);

(5) A strong desire to be treated socially as the other gender (or some alternative gender different from one's assigned gender); and

(6) A strong conviction that one has the typical feelings and reactions of the other gender (or some alternative gender different from one's assigned gender).

27. According to the DSM-5-TR Criterion B, a diagnosis of gender dysphoria also requires a finding of clinically significant distress or impairment in social, occupational, educational, or other important areas of functioning.

28. The diagnostic criteria for gender dysphoria in pre-pubertal children have some similarities with the criteria for adolescents and adults. Criterion A is mostly the same, but children must have six symptoms rather than two. Gender dysphoria symptoms for children include the following:

(1) A strong desire to be of the other gender or an insistence that one is the other gender (or some alternative gender different from one's assigned gender);

(2) In children who were assigned a male sex at birth, a strong preference for cross-dressing or simulating female attire; or for children assigned a female sex at birth, a strong preference for wearing only typical masculine clothing and a strong resistance to the wearing of typical feminine clothing;

(3) A strong preference for cross-gender roles in make-believe play or fantasy play;

(4) A strong preference for the toys, games, or activities stereotypically used or engaged in by the other gender;

(5) A strong preference for playmates of the other gender;

(6) In children who were assigned a male sex at birth, a strong rejection of typically masculine toys, games, and activities and a strong avoidance of rough-and-tumble play; or in children who were assigned a female sex at birth, a strong rejection of typically feminine toys, games, and activities;

(7) A strong dislike of one's sexual anatomy; and

(8) A strong desire for the primary and/or secondary sex characteristics that match

> one's experienced gender. Primary sex characteristics are present from birth, such as genitals and reproductive organs. Secondary sex characteristics develop at puberty, for example breast size, facial hair, and vocal quality.

Criterion B for children is similar to Criterion B for adolescents and adults, listed above, with more of an emphasis on school.

29. To receive a diagnosis of gender dysphoria, a licensed medical or mental health provider will conduct an intake and health history of a patient and will ask questions that focus on the diagnostic criteria for gender dysphoria. The diagnosis is most often provided based on a diagnostic interview where a highly trained clinician asks questions derived from a diagnostic manual, and, if a minor, with the patient's parents present; some providers may also use psychological assessment tools that focus on gender dysphoria.

30. The World Professional Association for Transgender Health ("WPATH") publishes the Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People ("SOC"; Coleman et al., 2022), which are widely accepted protocols for the treatment of gender dysphoria. These standards are developed by the foremost experts in the field of transgender health based on systematic review of the evidence-based research on transgender health.

31. WPATH has published several iterations of the SOC since 1979. The eighth and most current version of the SOC was published in 2023. Every major medical and mental health organization within the United States that has taken a position on gender-affirming care (including, for example, the American Psychological Association, the American Psychiatric Association, the American Academy of Pediatrics, the American Counseling Association, and the American Medical Association) agrees with WPATH and the Endocrine Society that, when

clinically indicated, puberty-delaying medication and gender-affirming hormones are appropriate and medically necessary treatments for adolescents.

32. According to the SOC, providers working with adolescents or children presenting with gender dysphoria should have: a) at least a master's degree or its equivalent in a clinical behavioral science field, b) competence using the DSM-5-TR or the International Classification of Diseases (ICD), c) the ability to recognize and diagnose coexisting mental health concerns and to distinguish these from gender dysphoria, d) documented supervised training and competence in psychotherapy or counseling, e) knowledge about gender non-conforming identities and expressions, and the assessment and treatment of gender dysphoria, and f) regular continuing education in the assessment and treatment of gender dysphoria. In addition to these components, it is necessary for providers to have specialized training in child and adolescent development, with a specific emphasis on assessment and diagnosis/psychopathology for children and adolescents.

33. Under the WPATH SOC, treatment of gender dysphoria often includes social transition. Social transition refers to living in the world in a manner consistent with the individual's gender identity. The WPATH SOC also provide that for some adolescents and adults, medical interventions to align the individual's body with their gender identity may be indicated. Treatment is individualized based on the needs of the patient and the patient's age.

34. For transgender people, social transition can be an important aspect of treatment to reduce the symptoms of gender dysphoria. As part of a social transition, an individual will typically, among other things, use a name and pronouns congruent with their gender identity, dress and groom in a manner typically associated with their gender identity and use sex-designated facilities such as restrooms that align with their gender identity. To be clinically

effective at alleviating the distress associated with gender dysphoria, a social transition must be respected consistently across all aspects of a transgender individual's life—for example, at home, in school, and at work.

35. Most transgender adolescents will undergo some type of social transition. Youth who do not move forward with a social transition are often barred from doing so due to external factors, such as unsupportive caregivers or lack of safety (*see* Ehrensaft et al., 2018). Current evidence-based treatment protocols indicate that when a transgender adolescent socially transitions, mental health and medical providers and social supports should affirm the adolescent's gender identity to ensure that their gender identity is part of their lived experience in all aspects of their lives. It is the aim of treatment to assist the children and adolescents in successfully integrating their internal identity into a life that allows them to function consistently in accordance with that identity and not feel shame for who they are. For those transgender adolescents for whom social transition is part of their treatment of gender dysphoria, it is likely that serious distress will result if clinically indicated aspects of transition are impeded. Under the SOC, there are no medical interventions indicated for pre-pubertal children. For transgender adolescents, hormone therapy may be prescribed—either puberty-delaying hormones designed to delay the onset of physical changes associated with puberty and/or hormones designed to masculinize or feminize the individual's appearance. According to the SOC, gender-affirming surgeries may be advised for some older adolescents, depending on a number of factors. While surgeries are generally not performed until after the adolescent has reached the age of majority, there may be some factors that clinically indicate the need for surgery prior to the age of majority (*see* Grimstad et al., 2021). Whether any of these medical interventions are indicated for a patient depends on the needs of the individual patient. And both the SOC and the Endocrine

Society guideline, Endocrine Treatment of Gender Dysphoric/Gender Incongruent Persons: An Endocrine Society Clinical Practice Guideline, advise that informed consent and a rigorous psychological assessment occur before initiating any medical interventions to treat adolescents with gender dysphoria.

36. Transgender boys treated with hormone therapy may appear indistinguishable from cisgender boys at school, and transgender girls treated with hormone therapy may appear indistinguishable from cisgender girls. Transgender boys who are prescribed puberty blockers will not develop breasts or the muscle and fat distribution experienced by girls during puberty, and if that is followed by testosterone, they typically will, among other changes, have a chest, muscle/fat distribution, facial and body hair, skin changes that may increase acne, and deepened voice typical of other boys. Transgender girls who are prescribed puberty blockers will not develop the deepened voice, facial hair, and muscle development experienced by boys during puberty, and if that is followed by estrogen and anti-androgen medication, they will have the breast development, redistribution of fat (specifically to abdomen, buttocks, hips, thighs, and arms), musculature, and hair and skin texture typical of other girls.

37. Psychotherapy to reduce the harmful effects of stigma and improve resiliency can also be an important form of support for individuals of any age with gender dysphoria. While psychotherapy can be useful as a support tool, it is not a substitute for social and medical transition as a means to reduce or eliminate gender dysphoria.

38. There is no "one size fits all" treatment regimen. In addition, individuals may be constrained by practical limitations—for instance, medical contraindications or cost—on the ability to obtain particular treatments.

39. Before transgender identity and gender dysphoria were well understood by the

medical and psychological communities, there were attempts to use psychotherapy to try to change the individual's gender identity to match their sex assigned at birth. This has been referred to as "conversion" or "reparative therapy" in much of the academic and clinical literature. Such efforts were found to be ineffective and harmful and are therefore now considered unethical, and their use on minors is now illegal in numerous states.

III. DISCRIMINATION AGAINST AND VICTIMIZATION OF TRANSGENDER INDIVIDUALS

40. Excluding transgender boys from using facilities used by other boys, and transgender girls from using facilities used by other girls, subjects these youth to discrimination in a context in which they already experience a disproportionate amount of discrimination and adverse health impacts that result from discrimination.

41. Psychological science has used the concept of minority stress to understand and explain the reasons why transgender people (and members of other minority groups) experience physical and mental health disparities. The model focused on minority stress indicates that there are three types of minority stressors: 1) external stressors, 2) expectations of external stressors, and 3) internal stressors. Examples of external stressors experienced by transgender people include discrimination, prejudice, harassment, rejection, and non-affirmation of gender identity. Examples of internal stressors experienced by transgender people include: concealing one's gender identity, internalizing gender-related stigma, and constantly thinking about one's gender. Transgender people will often expect that they will experience external stressors due to having actually experienced these in the past (or currently experiencing them) as well as witnessing or hearing about other transgender people who have experienced external stressors.

42. In addition to studies that focus generally on external stressors, there have been several studies that delve into specific types of external stressors. For example, there is one type

of external stressor called misgendering that includes communications or actions that convey that a person's gender is misperceived or is being purposefully denied. Examples of misgendering can include using a name or pronouns inconsistent with a person's gender identity or denying them access to gendered facilities that are consistent with their gender identity (McLemore, 2018). McLemore (2015) found that experiences of being misgendered were associated with anxiety and negative affect (*e.g.*, hostility and guilt), lower self-esteem related to appearance, and felt stigma. In a follow-up study with more specific measures regarding mental health, McLemore (2018) again reported that experiences of being misgendered were related to depression, anxiety, stress, and felt stigma.

43. Misgendering, along with other forms of external stressors, is considered a form of social exclusion. Social psychology has established that seeking social acceptance is one of the most basic human needs and that the harms of social exclusion based on identity are widespread and can be catastrophic. On an individual level, social exclusion impacts one's sense of belonging, self-esteem, sense of existence, and self-control. Social exclusion is associated with an increase in maladaptive behaviors, risky behaviors, and risk-taking behaviors. On a systematic level, social exclusion is often reinforced by organizations and institutions adopting policies and procedures that can enforce discrimination toward certain groups of people. Social exclusion is considered harmful in general; however, it can be even more harmful when people in positions of power perpetuate notions that isolate and stigmatize transgender people. Research on social identity theory describes the harm that results when people of higher status—usually people in power such as administrators—fail to affirm or actively disaffirm lower-status individuals with a marginalized identity. This often leads to external forms of harm such as ostracization and discrimination against the individual by peers and others, as well as internal

harms such as internalized shame and self-hatred. These internal and external factors can be directly related to psychological distress, such as post-traumatic stress disorder, depressive disorders, anxiety disorders, and hypertension, amongst myriad other health concerns.

44. In a study involving 610 transgender individuals (Galupo et al. 2020), study participants provided information about their experience of gender dysphoria. When asked about the impact of being misgendered or otherwise discriminated against based on their being transgender, they provided descriptions such as "it's like a visceral, violating, physical manifestation of psychological pain for me" and "each of those [misgenderings] is a knife."

45. There is a large body of scientific data indicating that transgender people experience a significant number of external stressors. The U.S. Transgender Survey (James et al., 2016), collected data regarding discrimination experiences of 27,715 transgender people, aged 18 and above in the United States. This dataset concluded that transgender people experience substantial discrimination through a multitude of contexts, including employment, education, facilities, housing, legal protections, and access to health care services. Follow-up studies using the same nation-wide dataset indicate that experiences of transgender-related harassment in K-12 environments years primarily accounts for negative mental health experiences and that socially transitioning buffers the effects of harassment in those environments (Turban et al., 2021).

46. In their systematic review of discrimination experiences reported by transgender people, McCann & Brown (2017) found that for 19 studies including over 9,000 participants, experiences of transgender-specific discrimination ranged from 40-70%, depending on the type of discrimination (e.g., health care discrimination, harassment, violence). However, more recent estimates indicate the numbers might be higher than in the 2017 review. In a study my

colleagues and I recently conducted with a sample of 575 transgender participants, 92.6% reported at least one lifetime experience of transgender-related discrimination (for example, not being treated fairly or justly in specific environments), 94.2% reported at least one lifetime experience of anti-transgender rejection (for example, relationships ending or feeling unwelcome in certain communities), and 78.9% reported at least one lifetime experience of anti-transgender victimization (for example, experiences of physical harm, harassment, or property damage) (*see* Barr, Snyder, Adelson, & Budge, 2021). Also, in a recent study focusing on discrimination experiences of transgender people, 76.1% of the sample reported experiencing discrimination in the past year (Puckett et al., 2020). In addition to experiences of discrimination, transgender people report extensive exposure to mistreatment, harassment, and violence (James et al., 2016). One of the largest nationwide U.S. studies focused on LGBTQ youth demonstrates that transgender youth experience significant amounts of harassment, bullying, and violence (Kosciw et al., 2022). In a report from the data that compared transgender and cisgender youth (GLSEN, 2021), 84.4% of transgender youth felt unsafe at school when compared to 20.6% of their cisgender LGBQ peers. In addition, 43.6% of the transgender sample reported missing school because they felt unsafe or uncomfortable, compared to 24.9% of their cisgender LGBQ peers. The study indicated that 77.3% of transgender students reported experiencing discrimination at school, compared to 46.1% of the cisgender sample. In the overall report (Kosciw et al., 2022), 80.3% of youth reported hearing biased language regarding gender expression and 65.2% reported hearing anti-transgender language while at school. Of those youth, 72% reported that there was a staff member present while hearing those remarks and that 91.2% of staff never intervened or intervened only sometimes. In one of the largest nationwide Canadian studies to focus on transgender youth (Taylor et al., 2020), 66% of youth reported being bullied, 35% were

physically threatened or injured, 9% were threatened with a weapon; 63% reported experiencing verbal sexual harassment, 34% reported physical sexual harassment.

47. Transgender children and adolescents experience a great deal of victimization in the school environment, including bullying, physical assault, sexual assault, maltreatment, property victimization, and witnessing/indirect victimization. In their systematic review, Martin-Castillo et al. (2020) examined the effects of school-based victimization throughout 19 studies covering over 23,000 transgender people. Results from this systematic review indicate that transgender youth experience significantly higher rates of victimization at school than their cisgender peers.

48. There also is robust data regarding the psychological impact of external stressors for transgender youth and young adults. Exposure to discrimination has been linked with higher reports of depression, anxiety, post-traumatic stress disorder, self-harm, and suicidality (e.g., Chozden et al., 2019; Price-Feeney, Green, & Dorison, 2020; Veale et al., 2019; Wilson et al., 2016). In a recent study, Pease and colleagues (2022) note that external minority stressors were directly related to psychological distress for young adults. In addition to this finding, they also note that experiencing more anti-transgender discrimination leads to higher levels of gender dysphoria, which then increase psychological distress for young adults.

49. Regarding mental health disparities, transgender youth consistently report higher instances of mental health concerns when compared to their cisgender counterparts. When compared with cisgender matched controls, transgender youth displayed a twofold to threefold increased risk of depression, anxiety, suicidal ideation, suicide attempt, and self-harm (Reisner et al., 2015). Fox et al. (2020) report that transgender adolescents were 8 times more likely to report depressive symptoms when compared to cisgender adolescents and were 5 times more

likely than cisgender adolescents to report self-harm and suicidality. There is a large body of research demonstrating that these disparities can be explained primarily by the presence of external stressors.

50. Although all psychological distress deserves attention, suicidality (suicidal ideation, suicide attempts, and completed suicide) is perhaps one of the most devastating outcomes due to the finality of completed suicide. For transgender youth, the evidence indicates that suicidality is an overwhelming mental health disparity. For example, in a recent sample of transgender youth, 86% reported suicidal ideation and 56% reported a previous suicide attempt and that external stressors such as harassment and bullying were directly related to suicide attempts (Austin et al., 2022). Data indicate that transgender youth are 2.71 times more likely to attempt suicide when compared to cisgender youth (Jackman et al., 2019). As noted above, these disparities can be explained primarily by the presence of external stressors.

51. Studies demonstrate that a negative school climate is not only detrimental to transgender youths' mental health, but also impacts their academic achievement. When compared to cisgender youth, transgender youth were three times more likely to be truant from school more often due to feeling more unsafe and distressed (Day et al., 2018). Additionally, transgender youth reported greater victimization at school and poorer academic performance when compared to cisgender LGBQ+ peers (Poteat et al., 2021).

IV. THE IMPACTS OF EXCLUDING TRANSGENDER STUDENTS FROM FACILITIES THAT MATCH THEIR GENDER IDENTITY

52. In the United States, school and other public multiple occupancy restrooms and locker rooms are typically separated based on gender (women's and men's or girls' and boys' restrooms and locker rooms), unlike most other spaces. When facilities are gendered and a transgender individual is prohibited from using facilities consistent with their gender identity, a

variety of negative consequences can result, each of which can lead to adverse mental and/or physical health for the excluded transgender person. These include: (1) feelings of rejection, invalidation, isolation, shame, and stigmatization; (2) interference with the process of social transition; (3) disclosure that the individual is transgender to others who may not know that (and to whom the individual does not wish to disclose that); (4) communication to others of a view that the transgender individual does not belong in spaces used by their peers and that there is something wrong with the individual, which can foster additional discrimination, harassment, and even violence; (5) efforts to avoid going to the restroom, including restricting intake of fluids and food, which can cause serious physical illness; and (6) reduction in the ability to concentrate and learn. In addition, when "accommodations" are offered to transgender individuals that require them to use a separate restroom that is not usually designated for their group (*e.g.*, sending a high school student to a faculty or nurse's restroom) or when a transgender person, unlike others, is told that they—but not their peers—must use a single-user restroom, that individual likewise is being told not only that their gender identity is invalid, but that they are something "other" and must be separated from all their peers because of who they are. Numerous research studies have confirmed the negative psychological impact of being invalidated and "othered" in these ways (*e.g.*, Price-Feeney et al., 2021; McGuire et al., 2022; McLemore, 2015; McLemore, 2018).

A. Excluding students who are transgender from facilities that are consistent with their gender identity worsens the already severe discrimination experienced by transgender people, contributing to negative health outcomes.

53. Adding to the discrimination transgender youth already experience by excluding them from using the same restrooms and locker rooms as their peers subjects these youth to significant psychological harm and worsens their mental health, including causing feelings of

feelings of rejection, invalidation, isolation, shame, and stigmatization, as well as depression, anxiety, and suicidal ideation. Research also indicates that there are cumulative effects of experiencing discrimination, especially related to trauma. In a recent study, my colleagues and I found that the chronicity and accumulation of discrimination events were related to higher incidences of Post-Traumatic Stress Disorder (Barr et al., 2021).

54. Although many transgender individuals report negative consequences when they are restricted from using restrooms consistent with their identity, this exclusion may be particularly damaging during adolescence. Adolescence is marked by a time of development where individuals' attention and awareness are particularly heightened related to looks, "fitting in," and navigating complex social interactions. Transgender adolescents are typically acutely self-conscious of the ways they may be perceived as different from their peers of the same gender. An internal consequence of that "not fitting in" is often internalized shame and sometimes diagnosable social anxiety and depression. External consequences can include experiences of bullying, harassment, and discrimination by peers and adults within school institutions. Of particular concern is bullying and harassment of transgender students, and even violence against them, if they use restrooms that are inconsistent with how they appear to, or are known to, others.

55. In addition to the links between harassment and discrimination from peers and clinical distress in transgender adolescents, it can be even more harmful when adults in power perpetuate notions that isolate and stigmatize transgender adolescents. Research on what is known as social identity theory describes the harm that results when people of higher status—usually people in power, such as, in the case of students, school administrators—fail to affirm or actively disaffirm lower-status individuals with a marginalized identity. This often leads to

external forms of harm such as ostracization and discrimination against the individual by peers and others, as well as internal harms such as internalized shame and self-hatred. These internal and external factors can be directly related to psychological distress, such as post-traumatic stress disorder, depressive disorders, anxiety disorders, and hypertension, amongst myriad other health concerns.

56. Research demonstrates that serious harms can result when transgender individuals are not allowed to use restrooms corresponding to their gender identity (Horne et al., 2022; McGuire et al., 2022; Price-Feeney et al., 2021). Most transgender individuals begin using restrooms consistent with their identity after completing other aspects of social transition (wearing clothing associated with their gender, changing their hair, etc.). Transgender and gender non-conforming people regularly face harassment and victimization in restrooms when they are perceived not to belong (Herman, 2013). Requiring transgender individuals to use facilities that do not correspond to their gender identity following a social transition thus subjects those individuals to increased risk of actual victimization as well as to the realistic fear of such victimization, with the accordant harms resulting from that stress.

57. Highlighting the harm caused to transgender youth, Price-Feeney, Green, and Dorison (2021) note that in a sample of 7,370 transgender youth, 58% reported being prevented or discouraged from using a restroom that corresponds to their gender identity. Of those youth, 85% reported experiencing depression and 60% seriously considered suicide. Statistical analyses indicated that restroom discrimination against transgender youth not only increased depression and thoughts of suicide but was also related to one or more suicide attempts. Additional data indicate that internalizing the impact of legislation restricting restroom use is related to depression and anxiety for transgender people (Horne et al., 2022). McGuire et al.'s (2022)

qualitative study of transgender youths' experiences with restrooms indicate that restrictions on one's use of gendered restrooms impeded participants from having a good quality of life and that this impacted how they structured their lives, moved through their days, interacted with others, and envisioned their futures. They also described chronic embarrassment, anxiety, and poor self-esteem specifically tied to fears of harassment and actually experiencing harassment in restrooms that specifically did not align with their gender identity.

B. Excluding transgender students from facilities that are consistent with their gender identity interferes with social transition.

58. Because social transition involves an individual living in the world in a manner consistent with the individual's gender identity, being excluded from facilities consistent with one's gender identity is inconsistent with and will interfere with the process of social transition.

59. Research demonstrates the importance of social transition for transgender youth. Research from the longitudinal TransYouth Project (TYP) indicates that transgender youth who have socially transitioned demonstrate similar mental health patterns when compared to cisgender youth (Durwood et al., 2017; Olson et al., 2016). Additional research demonstrates that social transition processes are related to less depression, less suicidal ideation, less and suicidal behaviors (Russell et al., 2018).

60. Consequently, delaying social transition is detrimental for transgender youth. Horton's (2022) qualitative study of parents of transgender youth provides an in-depth analysis of the consequences of delaying social transition for the parents' children, notably mentioning the psychological distress that results from delaying social transition. In the largest nationwide survey in the U.S. focusing on discrimination experiences of transgender people 18 and older, impeding social transition processes (for example, not being able to change one's name) is directly related to experiencing harassment and assault (James et al., 2016). In a large (N =

1,519) nation-wide Canadian survey of transgender youth, findings similarly demonstrate that not being able to access social transition components/processes is also directly related to experiencing harassment, assault, and denial of services (Taylor et al., 2020).

C. Requiring transgender students to use facilities that are inconsistent with their gender identity can disclose that they are transgender to others who do not know that.

61. Most transgender individuals begin using restrooms consistent with their identity after completing other aspects of social transition (such as wearing clothing associated with their gender, changing the way they wear their hair, and changing their name and pronouns to be consistent with their gender). Because of that, when transgender individuals who are in the process of social transition are forced to use facilities inconsistent with how their gender is perceived by others or are excluded from facilities used by other students who identify as the same sex as them, this can disclose to others who may not already be aware of the student's transgender status that the student is transgender.

62. There are two primary outcomes from this forced disclosure—one being that transgender youth will experience the psychological distress and gender dysphoria that come from worrying about their gender identity being disclosed without their permission. The second outcome is that transgender youth can become targets for discrimination when their transgender status is made known to others.

D. Excluding transgender students from facilities used by their peers can lead to harassment, bullying, and even violence.

63. When transgender students are excluded from using facilities used by their peers, it does not go unnoticed by other students, who receive the unmistakable message that their transgender classmates are not suitable to be among them. This can encourage other students to

engage in harassment, bullying, and even violence toward transgender students (*see* Taylor et al., 2020; Murchison et al, 2019).

64. Requiring transgender individuals to use facilities that do not correspond to their gender identity following a social transition thus subjects those individuals to increased risk of actual victimization as well as the realistic fear of such victimization, with the accordant harms resulting from that stress.

E. Transgender students excluded from restrooms consistent with their gender identity often take steps to avoid using the restroom, which can have adverse physical consequences.

65. To avoid the harmful effects of non-affirmation or fear of victimization, transgender individuals, including transgender minors, will often avoid using the restroom in any public space, including at school. This can lead to significant health consequences. First, transgender individuals will often avoid an intake of fluids to avoid the necessity to urinate; this can have significant health consequences related to dehydration. Even if transgender individuals do not avoid fluid intake, they will often hold urine in their bladders to avoid using the restroom; this can also cause negative health consequences such as urinary tract or kidney infections. - Transgender individuals may also avoid eating certain foods (or restrict food in general) to circumvent defecation, leading to constipation and muscle damage/weakness (*see* James et al., 2016 for data regarding these outcomes).

F. Restricting transgender students from using facilities consistent with their gender identity interferes with their education.

66. Disaffirmation of a transgender student's gender identity, interference with the student's social transition, and anxiety about having their transgender identity disclosed and having to use restrooms inconsistent with the student's gender identity causes emotional harm that interferes with students' ability to concentrate, learn, and thrive at school. In addition,

reducing fluid and food intake and holding urine in their bladders is psychologically distressing and distracting and also makes it harder for students to concentrate in their classes and learn. All of this interferes with these students' education and denies them equal educational opportunities. It impairs their ability to develop a healthy sense of self, peer relationships, and the cognitive skills necessary to succeed in adult life.

V. MISINFORMATION ABOUT TRANSGENDER INDIVIDUALS' USE OF RESTROOMS CONSISTENT WITH THEIR GENDER IDENTITY

67. Policies restricting transgender individuals, and in particular transgender youths', access to restrooms that are consistent with their gender identity are frequently sought to be justified by claims that are not supported by the facts. One such piece of misinformation is that transgender people are a threat to the safety of other people when they use restrooms that do not correspond to the sex they were assigned at birth. The evidence does not support this concern (Crissman et al., 2020). This claim is frequently advanced with assertions that a transgender individual assaulted someone in a restroom when in fact the individual who committed the assault generally is not transgender. The evidence indicates that transgender people are not any more likely to pose a threat to safety in restrooms when compared to cisgender people. In fact, transgender individuals are the ones who are most likely to be assaulted in restrooms (*see* Murchison et al., 2019; Taylor et al., 2020).

68. Another piece of misinformation is that transgender people will expose their genitals to others or engage in "peeking" at others' genitals in public restrooms. Such conduct is illegal or may subject individuals engaging in it to discipline but, even more importantly, there is no evidence indicating that transgender people are more likely to engage in such misconduct. In my clinical experience discussing restroom safety and perception of threats with transgender patients and community members, they are more concerned about their own safety and are

focused on their own anxiety and fear when using the restroom. Young people generally exhibit modesty with regard to exposure of their genitals to others, and this is particularly true of transgender young people for whom bringing any attention to their genitals makes them extremely uncomfortable and can increase their experience of gender dysphoria. Gender dysphoria is an uncomfortable and distressing experience, by definition, and transgender people attempt to avoid experiencing it if provided with the opportunity (*see* Galupo et al., 2020).

* * *

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 12 day of May, 2023.

Stephanie L. Budge, Ph.D.

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

REBECCA ROE, et al.,

Plaintiffs,

v.

DEBBIE CRITCHFIELD, et al.,

Defendants.

Case No. 1:23-cv-315

DECLARATION OF DIANA BRUCE

DECLARATION OF DIANA BRUCE

I, Diana Bruce, hereby declare as follows:

1. I make this declaration based on my own personal knowledge. If necessary, I could and would testify to these facts and circumstances.

2. I am the former Director of Health and Wellness for the District of Columbia Public Schools ("DCPS"). I held this position from October 2008 until January 2019. I am currently a consultant based in the Washington, D.C. area, focusing on gender inclusivity, diversity, and health equity in schools.

3. I received my Bachelor of Arts in Journalism from the University of Texas at El Paso in 1994. In 1997, I received my masters of Public Administration and Policy from the Columbia University School of International and Public Affairs. I also hold a certificate from Cornell University in diversity, equity, and inclusion.

4. DCPS educates nearly 50,000 students across 118 schools in Washington, D.C.

5. Consistent with the District of Columbia's non-discrimination laws, as they were amended in 2006 to include gender identity and expression, DCPS has been providing transgender students with access to restroom and locker room facilities consistent with their gender identity since 2006. Data from the U.S. Centers for Disease Control and Prevention indicates that between 2% and 3% of middle and high school students in the District of Columbia identify as transgender. *See* Office of the State Superintendent of Education, 2021, Washington, D.C. Youth Risk Behavior Survey Data Files, available at https://osse.dc.gov/page/2021-dc-yrbs-data-files.

6. During my time with DCPS, I regularly consulted with other school administrators around the country about DCPS's experience with inclusive policies for transgender students, and learned from other schools' experiences. Drawing in part from those resources, we determined that it would be appropriate for DCPS to adopt a formal set of guidelines regarding those policies to ensure that everyone was aware of and understood them.

7. In June 2015, I led the effort surrounding DCPS's adoption of formal guidance regarding transgender students' access to school facilities, which codified our practice of allowing those students to use restroom and locker room facilities consistent with their gender identity. In addition, the policy also addresses many related matters, such as the procedure to change a student's name in the school's records, resources for teachers of transitioning students, enforcement of dress code, and so forth. The official policy that DCPS adopted formalized and superseded the informal policy that had been in place since 2006 and generally expounded upon DCPS's existing non-discrimination policy.

8. According to the 2015 policy guidance, if one student expresses discomfort with sharing facilities with a transgender student, the school will make another restroom available to the first student. During my time with DCPS, there were a few occasions where a parent called my office to ask about our policy. But no school reported to me that any students ever asked to use a different restroom.

9. In my capacity with DCPS, my goal was to make sure that every young person was as present and engaged in their academic work as possible. We determined at a very early point that promoting a safe and welcoming environment in schools helped promote these positive tendencies among DCPS's students, and therefore helped us reach that goal.

10. When we created the 2015 policy, we consulted with school administrators from around the country. In particular, we drew upon the Los Angeles Unified School District's policy, which had been in place for many years with great success. Armed with this information, we formed a new committee consisting of approximately 20-30 community advocates, teachers, students, and parents, which helped steer the development of the new policy.

11. When we developed the 2015 DCPS policy, we also consulted with DCPS's own

administrators, teachers, faculty, and students regarding their experiences with transgender students in our district. We discovered that when transgender students were unsure about whether they could use the restroom that matches their gender identity, many said that they simply avoided school restrooms for the entire length of the school day.

12. That kind of distraction—and possible health risk—cannot possibly help students learn. As educators, we do not want students preoccupied with avoiding restrooms when they should be present in the classroom and focusing on learning. We decided that a clear set of guidelines regarding restroom and locker room facilities would help transgender students feel more like any other student in their school, rather than outsiders.

13. The 2015 DCPS policy that we created was not difficult to adopt, and it did not present any lingering issues in our schools. In my experience, students are comfortable with a policy that requires equal treatment among students. They can understand and empathize with someone who just wants to use the restroom. If anything, in our experience any minor disruption was due to staff members' inconsistency before implementation of the formal policy, rather than student activity. This was why we determined that clear, formalized guidance regarding transgender students' use of locker room and restroom facilities in accordance with their gender identities was important and necessary for schools, as was training for teachers and administrators. By the time I left DCPS, we had trained thousands of DCPS personnel, including principals, school staff, faculty, and some parents.

14. Implementing the 2015 policy in DCPS's schools was a straight-forward process. In reality, all schools deal with a very wide variety of issues related to locker room and restroom

use, including student behavioral issues, which are completely unrelated to a student's gender identity.

15. We heard some concerns about the 2015 policy at first, typically from adults rather than DCPS students. These concerns usually involved hypothetical issues of student safety or privacy in the school restrooms or locker rooms. During my time with DCPS, I am aware of only one incident involving a transgender student's use of these facilities, and in that case it was the transgender student who was confronted by other students who were unaware that DCPS policy permitted her to use the girls' restroom. Those students, once informed of the policy, did not indicate any further concern. This was a blip on the radar that further indicated the need for clear written policies. Otherwise, no concerns materialized.

16. Similarly, when I conducted my regular trainings of DCPS staff, there were some occasions where staff members would ask hypothetical questions to understand the contours of DCPS's policy as it related to student privacy and safety. In my experience, the scenarios they suggested remained hypothetical and did not play out in reality. For instance, I am not aware of a single instance where a cisgender student pretended to be transgender in order to access sex-separated facilities.

17. Like other students, transgender students just want to use the restroom at school and be safe when they do it. And contrary to some concerns, transgender students are not interested in walking around restrooms or locker rooms exposing themselves and examining other students' anatomy. This is based on a misconception of what it means to be transgender. Like everyone else, transgender students just want to learn and to get through the school day safely.

18. The results of DCPS's 2015 formal policy guidelines—which remain in place today—were overwhelmingly positive, not only for transgender students, but for all students, faculty, administrators, and the community. As educators, we have an obligation to make sure every student feels valued, included, and respected. By treating all students the same without regard to their gender identity, the policy removed a tremendous source of distraction from DCPS's students, helped foster a safe and welcoming learning environment among all DCPS students, promoted awareness of important student safety and privacy issues for all DCPS students, and even informed our decisions regarding new construction and renovation of restroom and locker room facilities in DC public schools.

19. Since I departed DCPS in 2019, I have remained in contact with colleagues who continue to work within the school system. Everything that I have learned from them regarding DCPS's experience remains consistent with everything I have described above.

20. In my private consulting practice since 2019, I have been retained by public and private schools who wish to make their schools more welcoming and inclusive of their transgender students. I have provided policy development, implementation, and training support to these schools to assist them in adopting inclusive policies. Their experience in the adoption of these policies has been positive.

* * *

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 12 day of May, 2023.

Diana Bruce

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Case No. 1:23-cv-315

DECLARATION OF FOSTER "TRIPS" JONES

DECLARATION OF FOSTER ("TRIPS") JONES, B.A., M.A., M.S.C.

I, Foster (Trips) Jones III, declare as follows:

1. I have personal knowledge of the facts set forth in this declaration and could and would testify competently to those facts if called as a witness.

2. I am currently the Assistant Principal of J.M. Atherton High School ("Atherton" or "Atherton High School"), which educates approximately 1,500 students in Louisville, Kentucky. Atherton is in the Jefferson County Public School District ("JCPS"). I became the Assistant Principal in 2017. Prior to that, I was a school counselor at Atherton High School from 2013–2017. Before that, I was a school counselor at a Department of Defense school in Yokosuka, Japan and at a middle school in Indiana. Prior to that, I taught eighth grade United States history in Indiana.

3. I earned a Bachelor of Arts in History from Bellarmine College in 1998, a Master of Arts in Teaching at Bellarmine College in 2001, a Master in School Counseling from Indiana University Southeast in 2006, and a certificate in Instructional Leadership for School Principals from Spalding University in 2016.

4. During my tenure at Atherton, the school has moved from being ranked 12th in Kentucky based on the American College Testing (ACT) exam, to being ranked 4th in the state by *U.S. News and World Report*. In 2022, Atherton High School became the first high school in Kentucky to receive the American School Counseling Association (ASCA)'s Model Program (RAMP) distinction. Schools are given the RAMP designation based on their data-driven approach to decision-making and for delivering services to all students in an exemplary educational environment.

5. Atherton is a very diverse school. Approximately 40% of students receive free or

reduced-price school lunches.

6. In June 2014, Atherton implemented a formal policy respecting students' gender identity, which includes access to sex-separated facilities like restrooms and locker rooms.

7. The policy came about because an Atherton student had identified herself as transgender to school administrators and wanted the school to treat her as a girl in all respects, including access to school restroom facilities. I had worked closely with the student in my capacity as the school counselor. I met with the student roughly a half dozen times. Over several years, I helped her navigate the emotions she faced at the time as she was undertaking the process of gender transition. To better educate myself on the needs of transgender students, and gender identity more broadly, I attended educational presentations organized by Atherton's Gay-Straight Alliance, read widely about gender identity and related topics, and studied background materials provided by our school's then principal, Dr. Thomas Aberli.

8. The student advocated for a change to Atherton's school bathroom policies. The student had several meetings with Dr. Aberli, with the goal of developing a new, gender inclusive bathroom policy. Dr. Aberli instituted a temporary policy that allowed students to use the locker room and bathroom that best matched their gender identity or gender expression, and that allowed any student to request to use a private bathroom for any reason. The policy was modeled off of a long-standing policy used by the Los Angeles Unified School District. Some members of the community expressed that inclusive policies might be fine for schools in California, but not in Kentucky. However, Dr. Aberli's view, which I share, is that the value of human life is the same in Kentucky as it is anywhere else.

9. Dr. Aberli wanted to formalize the policy via a public decision-making process. In JCPS, certain policies are delegated to individual schools via a twelve-member School-Based

Decision Making Council (SBDM Council), comprised of parents, teachers, administrators, and a student representative. The proposed bathroom policy went through this council. Dr. Aberli, in conjunction with the SBDM Council, sought input from school administrators, teachers, parents, and students. All evidence the committee considered was posted on the school's website. The school held several community meetings about the policy.

10. Three policies were considered: 1) keep the interim policy, 2) require students to use the facility associated with their sex assigned at birth, and 3) leave the decision up to the school principal.

11. The committee ultimately chose to continue with the interim policy. There was little community opposition to the policy; my sense at the time was that public opposition was primarily from people not affiliated with the Atherton school community.

12. The policy has been successful at our school. It has been a positive experience and has sent a strong signal to all students that Atherton High is a welcoming and inclusive school community. Our policy guarantees all students an equal right to privacy. Our experience has been that privacy has increased for all students as a result of this policy, particularly because any student who is uncomfortable with using a communal locker room or bathroom is able to use a private facility. There have been no privacy infractions, and this policy increases privacy by avoiding the need to "out" transgender students, as would occur if they were forced to use restrooms matching their birth-assigned sex.

13. Atherton has an admissions committee because it offers an International Baccalaureate program, and I have served on the admissions committee. Over the years, various students, including transgender students in particular, have expressed that they wanted to come to Atherton because it is such an inclusive, supportive environment, and that policies like this

one attract them to the school. It is my understanding that despite some initial opposition at public forums, there have been no complaints of incidents involving privacy issues as a result of implementing the policy. There are multiple transgender students at our school, and their use of restrooms or locker rooms has not been an issue. Since the policy was adopted, I would estimate that I have served as the assistant principal to more than 100 transgender students.

14. Nor have we experienced any issues with safety in our facilities related to the policy. There have been no reported instances of violence or assault related the policy. We have received no complaints from any students regarding safety issues created by the policy.

15. Since Atherton implemented its policy, our transgender students have thrived, and we have observed that students feel safer living in a manner consistent with their gender identity, knowing that our school supports them. In fact, the overwhelming reaction from all of our students has been both positive and supportive.

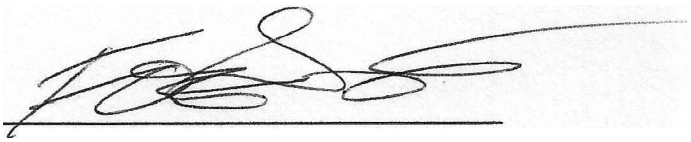
16. On March 29, 2023, state legislators in Kentucky overrode a gubernatorial veto to pass a ban on transgender students using the bathroom that aligns with their gender identity. Based on my experience at Atherton, I firmly believe that policies like this one will be psychologically and developmentally harmful to transgender students, without benefiting any other students. School administrators at Atherton are currently assessing any impact this state law might have on our school's policy.

17. I make this declaration from my own knowledge of the facts and circumstances set forth above. If necessary, I could and would testify to these facts and circumstances.

* * *

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 29 day of June, 2023.



Foster “Trips” Jones

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Case No. 1:23-cv-315

DECLARATION OF OFFICER MORGAN BALLIS, M.S. E.M.

DECLARATION OF OFFICER MORGAN BALLIS, M.S. E.M.

I, Officer Morgan Ballis, hereby declare as follows:

1. I make this declaration based on my own personal knowledge and if necessary, I could and would testify to these facts and circumstances.

2. I am a Patrol Officer and full-time School Resource Officer ("SRO") with the Hailey Police Department, in Hailey, Idaho. I also serve as the Hailey Police Department's LGBTQ+ Liaison to the community.[1] I have more than 15 years of experience as a law enforcement educator, firearms instructor, and tactical trainer.

3. I submit this declaration to address Idaho Senate Bill 1100's purported legislative findings that the law protects privacy and student safety from risks such as "sexual assault, molestation, rape, voyeurism, and exhibitionism." Based on my law enforcement, security, and military background, I believe that these findings are inaccurate.

4. In preparing this expert declaration, I reviewed the text of Idaho Senate Bill 1100 ("S.B. 1100") and Blaine County School District Policy 519.50, entitled "Gender Inclusion Policy." I have reached my opinions by applying my expertise in school-related policing services, emergency preparedness, and crisis situations to the privacy- and safety-related issues raised by S.B. 1100. The experience, education, and training I have relied upon in preparing this expert declaration are the same types of experience, education, and training that experts in my field regularly rely upon when forming opinions on these subjects. I reserve the right to supplement these opinions based on subsequent developments in my field and/or factual developments in this litigation.

5. Within the last four years, I testified as an expert during an administrative hearing in *Police Benevolent Association of the City New York, Inc. v. New York City Police Department*.

[1] My testimony is offered in my individual capacity and not on behalf of my employer or any professional associations with which I am affiliated.

6. I am being compensated $300 per hour for my work on this case. My compensation does not depend on the outcome of this litigation, the opinions I express, or the testimony I provide.

A. Background and Qualifications

7. My professional background, experiences, publications from the last 10 years, and presentations are detailed in my curriculum vitae. A true and correct copy is attached as Exhibit A to this declaration.

8. I began my career by serving more than 10 years in the infantry field of the United States Marine Corps. My work in the Marine Corps involved protecting critical assets and personnel overseas under the Combined Joint Task Force–Horn of Africa; and supporting federal law enforcement under the Joint Task Force–North, a multi-service operation by the United States Department of Defense for counterdrug and anti-terrorist operations. As an Infantry Unit Leader and Reconnaissance and Surveillance Team Leader I developed and conducted hundreds of hours of training for host-nation law enforcement partners. I received multiple military awards, including the Combat Action Ribbon (for engaging the enemy during combat operations), Navy and Marine Corps Commendation Medal (for actions as a Reconnaissance and Surveillance Team Chief), Navy and Marine Corps Achievement Medal (2nd Award) (for actions as an Infantry Unit Leader), and Marine Corps Good Conduct Medal (3rd Award) (for maintaining a disciplinary record above reproach).

9. In 2014, I became a National Rifle Association ("NRA") Law Enforcement Instructor and founded an organization called Defensive Tactics and Firearms, for which I serve as the Chief Firearms Instructor. In that capacity I developed training curriculum focused on off-duty carry considerations and active shooter response for first responders. As part of this work, I

have been invited to observe and critique hundreds of hours of law enforcement training exercises in addition to developing my own curriculum. I have also trained and educated more than 8,000 citizens, law enforcement, and service members in tactics and firearms.

10. In 2018, I founded a consulting firm called the Campus Safety Alliance, which is a network of emergency management professionals, law enforcement trainers, and educational leaders providing evidence-based safety solutions for Pre-K-12 facilities and faith-based organizations serving children. Campus Safety Alliance ensures that clients are aligned with the Department of Homeland Security's National Preparedness mission goals by providing threat vulnerability assessments, developing policies and procedures, and conducting risk management training. Campus Safety Alliance has trained and educated more than 17,000 students, 2,500 educators, and 1,500 law enforcement and military personnel in active assailant response.

11. I am also a nationally recognized subject matter expert in School Active Assailant Events. As an active shooter response trainer for law enforcement and educators, I have presented my research and methodology at conferences across the U.S.

12. I obtained both Bachelor of Science and Master of Science degrees in Homeland Security & Emergency Management in 2017 and 2019 respectively, during which I focused my studies on understanding and preventing targeted attacks against schools. I am currently completing a Ph.D. in Emergency Management, and my dissertation focuses on active assailant events and response in pre-K through 12th grade facilities.

13. I hold a number of trainer certifications, including but not limited to:

a. National Association of School Resource Officers (NASRO), Basic School Resource Officer

b. Out to Protect, LGBT Awareness Trainer

c. International Association of Directors of Law Enforcement Standards and Training (IADLEST), Nationally Certified Instructor

d. Louisiana State University, National Center for Biomedical Research and Training (LSU, NCBRT), Law Enforcement Active Shooter Emergency Response Trainer

e. Advanced Law Enforcement Rapid Response Training (ALERRT), Civilian Response to an Active Shooter Events Trainer and Active Attack Integrated Response Trainer

f. San Diego County Office of Education Active Shooter Trainer

g. ALiCE (Alert, Lockdown, Inform, Counter, Evacuate) Instructor

h. Last Resort Firearms Training, Active Shooter Instructor

i. Massad Ayoob Group, Deadly Force Instructor

j. Tom Givens, Rangemaster Instructor

k. Active Self Protection Instructor

l. NRA, Training Counselor

    A. Certified Rifle Instructor

    B. Certified Pistol Instructor

    C. Concealed Carry Weapon Instructor

    D. Personal Protection Inside the Home Instructor

    E. Personal Protection Outside the Home Instructor

m. NRA, Refuse to Be a Victim Instructor

n. U.S. Concealed Carry Association, Concealed Carry & Home Defense Instructor

B. School Resource Officer and LGBTQ+ Liaison Experience

14. I joined the Hailey Police Department in 2022 as a Patrol Officer and full-time School Resource Officer.

15. I serve as one of two full-time SROs with the Hailey Police Department, and I am assigned to work as the full-time SRO at Wood River High School, Silver Creek High School, and Alturas Elementary School in Hailey, Idaho. I work closely with the second full-time SRO, Shawna Wallace, who covers the other two schools in the City of Hailey. My duties involve investigating allegations of criminal incidents, and enforcing state and local laws and ordinances at my assigned schools and adjacent areas. The work that I have done with Officer Wallace has received national recognition from the National Association of School Resource Officers, which named the Hailey Police Department as a Model SRO Agency in 2023.

16. I use a variety of methods to educate the school community about safety issues and to stay informed about the full range of safety issues affecting school campuses. For example, I host "Cop Talks" in collaboration with the school news program to educate staff and students on Idaho laws, city ordinances, and the criminal justice system. I also host a variety of classroom discussions addressing issues such as the Fourth Amendment, bullying, substance abuse, mental health, anonymous reporting, and healthy relationships, among others. I maintain an open-door policy and students frequently seek me out to ask advice and to seek guidance in resolving various issues.

17. The Hailey Police Department's work to make SROs a trusted safety resource has led to a noticeable improvement in student willingness to share allegations of misconduct with the SROs, which enhances our ability to promote a safe environment. In particular, our work has yielded an increased willingness among students to report incidents of sexual assault, and these

reports have led to numerous felony arrests. Notably, none of these incidents have involved a transgender student, much less a transgender perpetrator.

18. My SRO duties also include performing threat assessments, risk assessments, and suicide assessments. As part of this work I function as an emergency manager for the Blaine County School District, helping them develop and revise their safety and emergency crisis preparation and building security protocols, training staff on safety and prevention procedures, and making improvements in how the schools perform their emergency drills and training for staff and students by implementing trauma-informed practices.

19. I am the President of the Idaho Association of School Resource Officers ("IDASRO"), a nonprofit organization that disseminates information about best practices for teaching students about good citizenship and community responsibility, and advocates for school law enforcement issues. In particular, IDASRO focuses on advocating for evidence-based and trauma-informed school safety practices; continuing education for SROs with a dedication to being lifelong learners alongside staff and students; and creating equity in K-12 emergency management systems. The organization maintains contact with roughly 205 SROs across the state of Idaho, who use the organization as a resource to discuss trends in safety issues within the schools.

20. I also serve as the Hailey Police Department's LGBTQ+ Liaison. Although I am not a member of the LGBTQ+ community, I advocated for the creation of this Liaison position after being hired by the Hailey Police Department. I see one of the core functions of my job as supporting students, especially those that tend to have higher rates of suicide, victimization, and homelessness. LGBTQ+ students share all of those vulnerabilities, which made it important to

me to help create and serve in this position.[2]

21. In my role as the Hailey Police Department's LGBTQ+ Liaison, I serve as the point of contact for organizations and individuals in the LGBTQ+ community, serve as a resource for and assist with investigations of cases involving members of the LGBTQ+ community, and provide training to police agency personnel on issues relating to gender identity and sexual orientation. I regularly attend LGBTQ+ meetings at the schools and in the larger community, including meetings for the Wood River High School Pride Club, the Wood River High School Gay Straight Alliance, and Parents and Friends for Lesbians and Gays.

C. S.B. 1100 Does Not Advance Any Interests in School Safety and Privacy

22. Based on my experience and training, it is my opinion that a law like S.B. 1100 not only fails to advance its claimed interests in preventing "sexual assault, molestation, rape, voyeurism, and exhibitionism" and protecting privacy, but risks undermining those interests. I begin this discussion with an overview of the Blaine County School District's policy of equal treatment for transgender students in sex-separated facilities and programs, which helps illustrate several key points.

23. In 2016, Blaine County School District adopted a Gender Inclusion Policy (Code 519.50).[3] The Blaine County School District serves more than 3,000 students within eight different schools, educating students from kindergarten through 12th grade.[4] There are nearly

[2] Price-Feeney, M., et al., *Impact of Bathroom Discrimination on Mental Health Among Transgender and Nonbinary Youth*, J. ADOLESC. HEALTH 68(6):1142-1147 (June 2021) ("Price-Feeney, *Impact of Bathroom Discrimination*"), doi: 10.1016/j.jadohealth.2020.11.001; The Trevor Project, *Homelessness and Housing Instability Among LGBTQ Youth* (2022), https://www.thetrevorproject.org/wp-content/uploads/2022/02/Trevor-Project-Homelessness-Report.pdf.

[3] *See* https://go.boarddocs.com/id/bcsd61/Board.nsf/Public?open&id=policies#.

[4] *See* https://www.blaineschools.org/domain/129.

1,500 students attending the three schools to which I am assigned as the full-time SRO.[5]

24. The Gender Inclusion Policy (also, the "Policy") recognizes that "[a]ll students need a safe, supportive school environment to progress academically and developmentally," and provides that its purpose is to "facilitate compliance with applicable laws" and foster an educational environment "that is safe, supportive, and fully inclusive for all students, regardless of gender identity or gender expression." The policy respects students' gender identity by providing that schools will use their chosen name and pronouns, and allows them to adhere to the dress code provisions that match their gender identity.

25. Students and their parents are provided an opportunity to place the student's gender identity on their school registration record. Students are then permitted to participate in sex-separated activities, including physical education and health classes, in accordance with their gender identity. Students must also use the restrooms and locker rooms that match the gender identity on their registration form.

26. Nothing about respecting the gender identity of transgender students harms the safety of any other student, and instead policies like this one are important to protect the safety of transgender youth. That is why S.B. 1100's categorical ban on any inclusive policies such as this one fails to advance its stated interests. Because inclusive policies like the one Blaine County School District do not harm any cisgender students, categorically banning such policies serves only to undermines the safety of transgender students, who are the most vulnerable.

27. In general, to the extent there are safety risks in facilities such as school restrooms, it is overwhelmingly students who are transgender who tend to be the victims of such

[5] *Id.*

incidents.[6] LGBTQ+ students, and especially transgender students of color, are at far greater risk of harassment and bullying than others, and thus are far more likely to be the victims of misconduct and criminal behavior.[7] S.B. 1100, on the other hand, not only bans inclusive policies that pose no appreciable risk to anyone, but has the potential to increase victimization by forcing transgender students out of the restrooms and facilities matching their gender identity.[8] This may have the effect of revealing a student's transgender status to others who may not know that fact, which can increase the risk of victimization, and deprive transgender students of any meaningful access to restrooms during the school day. No one's safety is enhanced by such a measure, and instead the already vulnerable population of transgender students is placed at greater risk.[9]

28. Additionally, S.B. 1100 does not provide any useful or meaningful law enforcement tools to protect student safety. As the Gender Inclusion Policy itself recognizes,

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[6] Truman, J.L., et al., U.S. Dep't of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Violent Victimization by Sexual Orientation and Gender Identity*, 2017–2020 (June 2022), https://bjs.ojp.gov/content/pub/pdf/vvsogi1720.pdf; Johns, M.M., et al., U.S. Dep't of Health and Human Services, Centers for Disease Control and Prevention, *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*, MORBIDITY AND MORTALITY WEEKLY REPORT 68(3);67–71 (Jan. 25, 2019), doi: http://dx.doi.org/10.15585/mmwr.mm6803a3; Johns, M.M., et al., U.S. Dep't of Health and Human Services, Centers for Disease Control and Prevention, *Trends in Violence Victimization and Suicide Risk by Sexual Identity Among High School Students - Youth Risk Behavior Survey, United States, 2015-2019*, MORBIDITY AND MORTALITY WEEKLY REPORT SUPPL. 69(1):19-27 (Aug. 21, 2020), doi: 10.15585/mmwr.su6901a3; Rostad, W.L., et al., *Substance Use and Disparities in Teen Dating Violence Victimization by Sexual Identity Among High School Students*, PREVENTION SCIENCE 21(3):398-407 (April 2020), doi: 10.1007/s11121-019-01049-7.

[7] *See* footnote 6, *supra*.

[8] GLSEN, Inc., et al., *Separation and Stigma: Transgender Youth & School Facilities* (2017), https://www.glsen.org/sites/default/files/2019-11/Separation_and_Stigma_2017.pdf.

[9] Price-Feeney, *Impact of Bathroom Discrimination*; Hatzenbuehler, M.L., et al., *Protective school climates and reduced risk for suicide ideation in sexual minority youths*, AM. J. PUBLIC HEALTH 104(2):279-86 (Feb. 2014), doi: 10.2105/AJPH.2013.301508.

SROs are already equipped with all the tools necessary to address misconduct and safety issues. The Policy recognizes that misconduct is punishable under other existing policies that deal directly with the prohibited behavior, stating:

> **Bullying, Harassment, and Discrimination Prohibition**
>
> Prohibited behaviors are listed in Bullying, Intimidation, and Harassment Policy 506.50.
>
> Reporting of incidents, investigation, disciplinary actions, referral to law enforcement, and protection against retaliation are outlined in the Bullying Intimidation and Harassment Policy 506.50.
>
> If there is a concern that the harassment may be sexual in nature, the building administrator should consult with their building harassment investigation representative.

29. A law like S.B. 1100 that excludes vulnerable transgender students from essential facilities like restrooms, in a way that risks making them a target, adds nothing to the existing tools which already address safety concerns.

30. With respect to S.B. 1100's concern with "protecting the privacy … of all students," the Gender Inclusion Policy also recognizes and already accounts for this interest. The Policy recognizes that "[a]ll students have a right to privacy," which "includes the right to keep one's transgender status private at school." I am not aware of transgender students engaging in conduct posing any privacy risks to others in the state of Idaho. Instead, as the Policy acknowledges, the real privacy risk comes from forcing transgender students to reveal their identity to others, in contexts when it may not be safe for them to do so.

31. I do not collect information or directly ask students to reveal whether they are transgender and using facilities that match their gender identity because it does not serve any law enforcement purpose. Nonetheless, during both my time as an SRO, and the five-year tenure of my colleague Ms. Wallace as an SRO in the school district, I am not aware of any reports of transgender students engaging in misconduct while in facilities matching their gender identity,

nor of any reports of cisgender students pretending to be transgender to gain illicit access to the other sex's sex-separated facilities. I would be likely to know of such incidents were they to occur based on my work as an SRO, my support of all eight schools in the district as an emergency management and threat assessment resource, my close work with Officer Wallace, and because most school personnel contact me when they need to report any misconduct.

32. As mentioned above, through my work as the President of the Idaho Association of School Resource Officers, I am able to monitor discussions among approximately 205 SROs statewide as they discuss trends and patterns in safety challenges. These discussions often involve issues such as drug use, TikTok challenges that may pose health and safety risks to our students, and sexual assault. Despite the fact that multiple schools in Idaho follow inclusive policies or practices like the one in Blaine County School District[10]—I have never seen anyone ask questions about or ask for assistance regarding safety issues surrounding those policies. There has been no mention of transgender students misbehaving in multi-user sex-separated facilities; nor has there been any reference to a cisgender student misusing those policies to seek access to facilities for the other sex. No such concerns have been raised in any of the trainings I have provided as a law enforcement officer, or to my knowledge at any law enforcement conferences that I have attended. To the contrary, the sessions I have attended as a learner have been geared instead towards the importance of protecting LGBTQ+ students through inclusive policies due to their risk of victimization, and the need to reduce the collateral effects of discrimination such as depression and suicidality.

[10] *See* Flandro, Carly, "Attorney general questions legality of 'dangerous' LGBTQ+ policy used in many Idaho schools," IDAHO CAPITAL SUN, Jan. 25, 2023, https://idahocapitalsun.com/2023/01/25/attorney-general-questions-legality-of-dangerous-lgbtq-policy-used-in-many-idaho-schools/.

33. In summary, it is my opinion that S.B. 1100 does not advance safety or privacy interests. Instead, S.B. 1100 hampers law enforcement interests in protecting vulnerable students such as transgender students.

* * *

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 30 day of June, 2023.

Officer Morgan Ballis

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

REBECCA ROE, et al.,

Plaintiffs,

v.

DEBBIE CRITCHFIELD, et al.,

Defendants.

Case No. 1:23-cv-315

DECLARATION OF JIMMY P. BIBLARZ

DECLARATION OF JIMMY P. BIBLARZ

I, Jimmy P. Biblarz, declare as follows:

1. I am an attorney at law duly admitted and licensed to practice law in the State of California and counsel for Plaintiffs Rebecca Roe and Sexuality and Gender Alliance in the above-captioned action. My *pro hac vice* application to appear before this Court is pending. I am an attorney at the law firm of Munger, Tolles & Olson LLP in Los Angeles. I have personal knowledge of the facts contained herein or know of such facts by my review of the files maintained by Munger, Tolles & Olson LLP in the normal course of its business, and if called upon to do so, could and would competently testify thereto.

2. Attached hereto as Exhibit 1 is a copy of Idaho Senate Bill 1100 ("S.B. 1100") (engrossed version), codified as I.C. § [33-6701]33-6601 et seq., downloaded on July 5, 2023 from https://legislature.idaho.gov/wp-content/uploads/sessioninfo/2023/legislation/S1100E1.pdf.

3. Attached hereto as Exhibit 2 is a copy of Policy 3281 written by the Idaho School Boards Association ("ISBA"), downloaded on July 5, 2023 from http://www.idahoednews.org/wp-content/uploads/2016/05/ISBA-gender-identity-policy.pdf.

4. Attached hereto as Exhibit 3 is a copy of:

(i) A January 25, 2023, letter from Idaho Attorney General Raúl Labrador to Misty Swanson, Executive Director of the Idaho School Boards Association ("ISBA") regarding ISBA's Policy 3281, downloaded on July 5, 2023 from http://www.idahoednews.org/wp-content/uploads/2023/01/LabradorISBALetter.pdf.

(ii) A copy of several messages Mr. Labrador posted on Twitter regarding ISBA Policy 3281's legality, downloaded on July 5, 2023 from https://twitter.com/Raul_Labrador.

5. Attached hereto as Exhibit 4 is copy of the January 30, 2023, response letter from Ms. Swanson to Mr. Labrador, regarding Policy 3281, downloaded on July 5, 2023 from http://www.idahoednews.org/wp-content/uploads/2023/01/ISBAAGresponse.pdf.

6. Below is an excerpt of Senator Chris Trakel's public comments during a January 9, 2023 meeting of the Caldwell School District School Board Meeting. A video of the full meeting can be accessed here: https://www.youtube.com/watch?v=ZynQenEjmJ4.

(i) Senator Chris Trakel (R-ID), District 11 (01:28:02): "I am here on my official position … You under Idaho law are required to maintain the morals and health of all the students. How can you do that when like that little girl came up here and said you allow a male to use a female bathroom? You're going to put all of their moral health and safety at risk and like I told you before you will face litigation. You call that a threat, I'm telling you that is what will happen. It has already happened in several states and there's already been rulings on it. So before you waste taxpayer money, before you put a kid in harm's way, you better throw this policy out."

7. Attached hereto as Exhibit 5 is a copy of:

(i) A January 25, 2023, article published by the *Idaho Capitol Sun*, authored by Carly Flandro, titled "Attorney General questions legality of 'dangerous' LGBTQ+ policy used in many Idaho schools," downloaded on July 5, 2023 from https://idahocapitalsun.com/2023/01/25/attorney-general-questions-legality-of-dangerous-lgbtq-policy-used-in-many-idaho-schools/. In the article, Quinn Perry, the deputy director of ISBA, "estimates that about 60 local education agencies or LEAs (which includes traditional school districts or charters) already have the LGBTQ+ policy in place."

(ii) Examples of policies that permit transgender students to use restrooms and other single-sex facilities that align with their gender identity adopted by school districts across Idaho—specifically Basin District #72 (downloaded on July 5, 2023 from https://basinschools.net/wp-content/uploads/2019/07/Policy-Section-500.pdf), Bonneville Joint School District #93 (downloaded on July 5, 2023 from https://lff.d93.k12.id.us/WebLink/ElectronicFile.aspx?docid=292267&dbid=0), Jerome Joint School District #261 (downloaded on July 5, 2023 from https://site44232.overdrive.io/3000-students/3281_gender_identity_and_sexual_orientation.pdf/), and Blackfoot School District #55 (downloaded on July 5, 2023 from

https://docs.d55.k12.id.us/Policies/New.Nov.2018.519.5.Gender.Identity.pdf). Based on my review of publicly available policies, additional school districts with such policies in place prior to the enactment of S.B. 1100 include but are not limited to: Blaine County District #61, Buhl Joint District #412, Challis Joint District, Cascade School District, Firth School District, Kendrick District #283, Kimberly District #414, Kootenai District #274, Marsh Valley Joint District #21, Middleton District #134, Mountain Home District #193, Mullan District #392, Murtaugh Joint District #418, Orofino Joint District #171, Payette Joint District #371, Preston Joint District #201, Richfield District #316, Ririe Joint District #252, Rockland District #382, Salmon River Joint District #243, Shelley Joint District #60, Twin Falls District #411, Whitepine Joint District #288, Wilder District #133, and North Gem District #149.

8. Attached hereto as Exhibit 6 is a copy of:

(i) A January 19, 2023, letter from Idaho Superintendent of Public Instruction Debbie Critchfield to State Senator Cindy J. Carlson, downloaded on July 5, 2023 from https://www.idahoednews.org/news/attorney-general-questions-legality-of-lgbtq-policy-thats-used-in-scores-of-idaho-schools/.

(ii) A January 23, 2023, response letter from Senator Carlson to Ms. Critchfield, downloaded on July 5, 2023 from https://www.idahoednews.org/news/attorney-general-questions-legality-of-lgbtq-policy-thats-used-in-scores-of-idaho-schools/.

9. Attached hereto as Exhibit 7 is a copy of Boise Public School District's 2016 statement on its transgender inclusive practice, downloaded on July 5, 2023 from https://www.idahoednews.org/wp-content/uploads/2016/05/Boise-transgender-student-statement.pdf.

10. Attached hereto as Exhibit 8 is a copy of:

(i) A screenshot I captured on July 5, 2023 of the "About" page of the Idaho Family Policy Center's website (https://idahofamily.org/about-ifpc/).

(ii) A blog post in which the Idaho Family Policy Center takes credit for drafting S.B. 1100, downloaded on July 5, 2023 from https://idahofamily.org/major-victory-gov-little-signs-school-bathroom-bill/.

11. Attached hereto as Exhibit 9 is a copy of:

(i) A screenshot taken I captured on July 5, 2023 from "USAspending" of the results of a search for federal grants to Idaho education agencies in 2022 and 2023 (https://www.usaspending.gov/search/?hash=a7f4b51a7d0cbc0701c5de19c9af8d38).

(ii) A spreadsheet detailing federal grants to the Idaho Board of Education; compiled from raw data downloaded from https://www.usaspending.gov/search on July 5, 2023.

(iii) A summary of the Boise Public School District's 2022-2023 annual budget, demonstrating its receipt of federal educational funding, downloaded on July 5, 2023 from https://cdnsm5-ss8.sharpschool.com/UserFiles/Servers/Server_508222/File/Annual%20Budgets%20&%20Audits/22-23BudgetDoc.pdf.

12. Attached hereto as Exhibit 10 is a copy of a public comment submitted via email in support of S.B. 1100 and produced in response to a legislative public records request.

13. Below are excerpts from the February 23, 2023 Idaho Senate Education Committee hearing and the March 15, 2023 Idaho House Education Committee hearing on S.B. 1100 cited in the Complaint. The full transcripts can be accessed at https://legislature.idaho.gov/sessioninfo/2023/standingcommittees/SEDU/ and https://legislature.idaho.gov/sessioninfo/2023/standingcommittees/HEDU/.

(i) Senator Chris Trakel (R-ID), District 11 (00:53:12 – Senate hearing): "So, I ask you, vote in favor of this bill and don't wait until some small child is molested or raped in the bathroom. Thank you."

(ii) Melissa Blevins, member of the public (01:03:57 – Senate hearing): "Gender dysphoria is a diagnosable mental health disorder. Feeding a mental health disorder is

not care. Socially transitioning these kids in schools is feeding their mental disorder. It does not give them the mental health care they need."

(iii) Matt Edwards, member of the public (01:08:14 – Senate hearing): "Um, this particular policy as written, I believe is, um, will effectively end dangerous policies like 3281, which will reduce, uh, the likelihood of a predatory individual to disguise themselves as female in order to take advantage of this, of, of policy 3281, and then prey on innocent, uh, female students in locker rooms and restrooms. Let me repeat that because I'm not talking about, uh, gender dysphoria stricken students. I'm talking about predators who would take advantage of a policy like 3281 in order to disguise themselves as a female to do all sorts of, uh, various activities from gawking, from self-pleasure for, to even attacking a innocent female student in, in a bathroom or a locker room."

(iv) Michael Hahn, member of the public (01:09:30 – Senate hearing): "I'm Michael Hahn. I'm, uh, I live in, uh, Meridian, Idaho, and I'm representing myself. Um, just to keep it simple, right? God made men and women, right, and then eventually, uh, men and women made men's and women's bathrooms for men and women. So, just like this previous gentleman just said, it's there to keep them safe because kids are under attack at schools, at libraries, at all kinds of places. So let's just keep it simple. And I'm just amazed and perplexed that in this time and age we are talking about creating a law to making sure that boys go to boys' bathrooms and girls go to girls' bathrooms. All right, we have either part A or part B. Let's keep it simple. Thank you."

(v) Alex Kuyper, member of the public (01:11:22 – Senate hearing): "I'm Alex Kuyper. I'm a trans student from District 29, and I attend Pocatello High School. I'm a varsity on the speech and debate team, and I'm speaking to express my strong opposition to S.B. 1100. As a concerned citizen and advocate for equality, I urge you to reject the-- this discriminatory legislation and protect the rights and wellbeing of all Idaho, uh, students. This bill is not only unconstitutional, but it also perpetuates harmful stereotypes and contributes to the stigmatization of marginalization of transgender individuals. Banning transgender youth from the

bathroom, that aligns with their gender identity, not only denies them the right to use facilities that align with their gender, but it also places them at an increased risk of harassment and violence. This bill incorrectly states that trans kids using their preferred restroom leads to cis-students experiencing harassment, embarrassment, and other terrible acts like rape. Not only does this perpetuate the trans community as pedophiles, abusers, and totally false characteristics, but legislation, precedent and rhetoric that is in this bill and other hundreds of bills introduced across this US isolates-- this-- isolates the trans community. This has incredibly detrimental impacts. Unfortunately, my childhood friend, my, uh, Adrian, who attended Century High School, unfortunately committed suicide this year. This hurt many-- This hurt me and many of others in our community, knowing that they had a support group, but inherent problems weren't being solved. Passing legislation like this will only continue to isolate the trans community and will kill more people. I, myself fell victim to suicidal thoughts and depression when our elected officials who swore to represent and protect us are trying to eliminate us."

(vi) Lyle Johnstone, member of the public (01:24:07 – Senate hearing): "Yes. Committee. Mr. Chairman, thank you for this time to, um, support Senate Bill 1100. I believe this is a straightforward bill. It, uh, fixes many of the problems that school systems have had and, and have wrongly considered bad ideology, as in policy 32-81. Um, everyone under, I guess the age of 100, as I would look at it, especially under the age of 18, should be able to safely go to the restroom of their born sex. And not have to share that bathroom with other people who may-- boys who think they wanna be girls and girls who think they wanna be boys. They may use the restroom of their birth sex. And I believe this is a great bill that solved many problems in the state of Idaho. Uh, one gentleman earlier did address that possibly we could go a step further to cities and municipalities and that type of thing. But I absolutely support Senate Bill 1100."

(vii) Senator Janie Ward-Engelking (D-ID), District 18 (00:34:16 – Senate hearing): "Um, thank you, Mr. Chairman. Um, and I, I just have one question for Senator Adams right now. I'm trying to read through this quickly and assess where um, there are exemptions. And I'm just wondering, we many times have coaches that are of the opposite sex of the team

that they're, uh, instructing. I'm thinking a girls basketball team, maybe with a male coach, and many times they go into the locker room at halftime to give a pep talk and get their teams motivated. Um, I didn't really see a carveout for that. Is there one?"

(viii) Senator Dave Lent, Chair (R-ID), District 13 (00:34:59 – Senate hearing): "Senator Adams?"

(ix) Senator Ben Adams (R-ID), District 12 (00:35:00 – Senate hearing): "Mr. Chairman, um, this is something that actually, uh, came up just the other day. So, uh, Senator Senator Ward-Engelking, if you would like to, uh, bring an amendment, uh, to add that into this bill, I would welcome it."

(x) Senator Dave Lent, Chair (R-ID), District 13 (00:35:15 – Senate hearing): "Thank you."

(xi) Senator Janie Ward-Engelking (D-ID), District 18 (00:35:16 – Senate hearing): "Thank you, Mr. Chairman. Having been a coach, I might think we need to. Thank you."

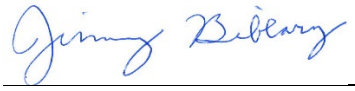
(xii) Senator Trakel (R-ID), District 11 (00:23:55 – House hearing): "I'd just like to point out Article 14, Section Four, the Idaho Republican Party, our platform here, the Idaho Republican Party recognizes that children are a heritage of the Lord. We believe biological gender to be an essential characteristic of a child's identity and purpose. We call upon parents, responsible citizens, and officers of government to promote measures that respect and protect the biological gender of children. We strongly oppose any person, entity, or policy that attempts to confuse minors regarding their bio gender. So that's our stance, statewide. So I remind you of that this morning. And another thing I'd like to say is we hear a lot of talk about— wow, I'm fast. We hear a lot of talk about how the transgender are, it's their right to use the bathroom, but you gotta remember: to allow a boy to use the girl's bathroom or vice versa, you're removing the safety and rights of those individuals that already have the entitlement to use that bathroom. So in order to give Child A permission to use the opposite sex bathroom of Child B's, you're removing Child B's protection, rights, and freedoms and you're putting them in the exact same

situation we're supposedly trying to take the, uh, trans child out of. I'd also like to point out, that I do not think that the—the risk of harm or anything comes from the trans community, but instead, I'd like to point out that harm comes from those predators and people that would abuse this policy to get into the opposite sex bathrooms, locker rooms, and overnight trips. And I'd like to remind you that we're here to protect those people and do what we can. And the solution, obviously is not to allow cross-sex bathrooms. Thank you."

(xiii) Representative Woodings (D-ID), District 19 (00:40:19 – House hearing): "Madam Chair and um, and Representative, I'm seeing a little bit of inconsistency in this bill. I'm hoping that you can help me understand it a little bit. Um, it's not my understanding that there's been any documented cases of trans person violence on non-trans people, um, as this bill states in section 33.66.01, subsection 4." Representative Hill (R-ID), District 14 (responding): "Mm-hmm."

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on this 6 day of July, 2023, at Los Angeles, California.



Jimmy P. Biblarz

Exhibit 1

LEGISLATURE OF THE STATE OF IDAHO
Sixty-seventh Legislature First Regular Session - 2023

IN THE SENATE

SENATE BILL NO. 1100, As Amended

BY EDUCATION COMMITTEE

AN ACT

RELATING TO PROTECTING THE PRIVACY AND SAFETY OF STUDENTS IN PUBLIC SCHOOLS; AMENDING TITLE 33, IDAHO CODE, BY THE ADDITION OF A NEW CHAPTER 66, TITLE 33, IDAHO CODE, TO PROVIDE LEGISLATIVE FINDINGS, TO DEFINE TERMS, TO ESTABLISH PROVISIONS REGARDING SCHOOL RESTROOMS, TO PROVIDE EXEMPTIONS, TO PROVIDE FOR REASONABLE ACCOMMODATION IN CERTAIN INSTANCES, TO PROVIDE FOR A CIVIL CAUSE OF ACTION, AND TO PROVIDE FOR PREEMPTION; PROVIDING SEVERABILITY; AND DECLARING AN EMERGENCY AND PROVIDING AN EFFECTIVE DATE.

Be It Enacted by the Legislature of the State of Idaho:

SECTION 1. That Title 33, Idaho Code, be, and the same is hereby amended by the addition thereto of a NEW CHAPTER, to be known and designated as Chapter 66, Title 33, Idaho Code, and to read as follows:

CHAPTER 66
PROTECTING THE PRIVACY AND SAFETY OF STUDENTS IN PUBLIC SCHOOLS

33-6601. LEGISLATIVE FINDINGS. The legislature finds that:

(1) There are real and inherent physical differences between men and women;

(2) Every person has a natural right to privacy and safety in restrooms and changing facilities where such person might be in a partial or full state of undress in the presence of others;

(3) This natural right especially applies to students using public school restrooms and changing facilities where student privacy and safety is essential to providing a safe learning environment for all students;

(4) Requiring students to share restrooms and changing facilities with members of the opposite biological sex generates potential embarrassment, shame, and psychological injury to students, as well as increasing the likelihood of sexual assault, molestation, rape, voyeurism, and exhibitionism;

(5) Providing separate public school restrooms and changing facilities for the different biological sexes is a long-standing and widespread practice protected by federal law, state law, and case law;

(6) Federal legislative action, federal executive action, and federal court judgments that prevent public schools from maintaining separate restrooms and changing facilities for different biological sexes are inconsistent with the United States constitution and violate the privacy and safety rights of students; and

(7) A statewide policy ensuring separate school restrooms and changing facilities on the basis of biological sex is substantially related to the important governmental interest in protecting the privacy and safety of all students.

33-6602. DEFINITIONS. For the purposes of this chapter:

(1) "Changing facility" means a facility in which a person may be in a state of undress in the presence of others, including a locker room, changing room, or shower room.

(2) "Public school" means any public school teaching K-12 students within an Idaho school district or charter school.

(3) "Sex" means 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.

33-6603. SCHOOL RESTROOMS. (1) Every public school restroom or changing facility accessible by multiple persons at the same time must be:

(a) Designated for use by male persons only or female persons only; and

(b) Used only by members of that sex.

(2) No person shall enter a multi-occupancy restroom or changing facility that is designated for one sex unless such person is a member of that sex. The public school with authority over the building shall ensure that all restrooms and changing facilities provide its users with privacy from members of the opposite sex.

(3) In any other public school setting where a person may be in a state of undress in the presence of others, school personnel must provide separate and private areas designated for use by persons based on their sex, and no person may enter these private areas unless such person is a member of the designated sex.

(4) During any school authorized activity or event where persons share overnight lodging, school personnel must provide separate sleeping quarters for members of each sex. No person shall share sleeping quarters, a restroom, or a changing facility with a person of the opposite sex, unless the persons are members of the same family.

33-6604. EXEMPTIONS. This chapter shall not apply:

(1) To single-occupancy restrooms and changing facilities or restrooms and changing facilities that are conspicuously designated for unisex or family use;

(2) To restrooms and changing facilities that have been temporarily designated for use by that person's biological sex;

(3) To a person of one sex who uses a single-sex facility designated for the opposite sex, if such single-sex facility is the only facility reasonably available at the time of the person's use of the facility;

(4) To a person employed to clean, maintain, or inspect a restroom or single-sex facility;

(5) To a person who enters a restroom or facility to render medical assistance;

(6) To a person who is in need of assistance and, for the purposes of receiving that assistance, is accompanied by a family member, a legal guardian, or the person's designee who is a member of the designated sex for the single-sex restroom or changing facility;

(7) To coaching staff and personnel during athletic events; or

(8) During an ongoing natural disaster or emergency, or when necessary to prevent a serious threat to good order or student safety.

33-6605. REASONABLE ACCOMMODATION. (1) A public school shall provide a reasonable accommodation to a student who:

(a) For any reason, is unwilling or unable to use a multi-occupancy restroom or changing facility designated for the person's sex and located within a public school building, or multi-occupancy sleeping quarters while attending a public school-sponsored activity; and

(b) Provides a written request for reasonable accommodation to the public school.

(2) A reasonable accommodation does not include access to a restroom, changing facility, or sleeping quarter that is designated for use by members of the opposite sex while persons of the opposite sex are present or could be present.

33-6606. CIVIL CAUSE OF ACTION. (1) Any student who, while accessing a public school restroom, changing facility, or sleeping quarters designated for use by the student's sex, encounters a person of the opposite sex has a private cause of action against the school if:

(a) The school gave that person permission to use facilities of the opposite sex; or

(b) The school failed to take reasonable steps to prohibit that person from using facilities of the opposite sex.

(2) Any civil action arising under this chapter must be commenced within four (4) years after the cause of action has occurred.

(3) Any student who prevails in an action brought under this chapter may recover from the defendant public school five thousand dollars ($5,000) for each instance that the student encountered a person of the opposite sex while accessing a public school restroom, changing facility, or sleeping quarters designated for use by aggrieved student's sex. The student may also recover monetary damages from the defendant public school for all psychological, emotional, and physical harm suffered.

(4) Any student who prevails in action brought under this chapter is entitled to recover reasonable attorney's fees and costs from the defendant public school.

(5) Nothing in this chapter limits other remedies at law or equity available to the aggrieved student against the school.

33-6607. PREEMPTION. This chapter preempts any law, regulation, policy, or decree enacted or adopted by any city, county, municipality, or other political subdivision within the state that purports to permit or require public schools to allow persons to use facilities designated for the other sex.

SECTION 2. SEVERABILITY. The provisions of this act are hereby declared to be severable and if any provision of this act or the application of such provision to any person or circumstance is declared invalid for any reason, such declaration shall not affect the validity of the remaining portions of this act.

SECTION 3. An emergency existing therefor, which emergency is hereby declared to exist, this act shall be in full force and effect on and after July 1, 2023.

Exhibit 2

POLICY TITLE: Gender Identity and Sexual Orientation	POLICY NO: 3281 PAGE 1 of 4

The Board believes in fostering an educational environment that is safe and free of discrimination for all students, regardless of sexual orientation, gender identity, or gender expression. This policy is designed to create a safe learning environment for all students and to ensure that every student has equal access to all school programs and activities. Failure of any school student or school employee to abide by the terms and provisions of this policy will subject such individual to disciplinary action.

Definitions

"Sexual orientation" shall mean an individual's physical or emotional attraction to the same and/or the opposite gender. "Gay," "lesbian," "bisexual" and "straight" are all examples of sexual orientations. A person's sexual orientation is distinct from a person's gender identity and expression.

"Gender identity" shall refer to a person's deeply felt internal sense of their own gender.

"Gender expression" shall refer to how a person expresses their gender to others, often through behavior, clothing, hairstyles, activities, voice, or mannerism.

"Transgender," an adjective, shall refer to a person whose gender identity or expression is different from that traditionally associated with the person's sex assigned at birth.

School Facilities

In the case of middle/junior high school students and high school students, the principal or building administrator is encouraged to request a meeting with a transgender student and, if the student grants permission, with their parent/guardian upon the student's enrollment in the District or in response to a currently enrolled student's change of gender expression or identity. The goal of the meeting is to develop understanding of that student's needs with respect to their gender identity.

In the case of elementary school students, it will generally be the parent/guardian that informs the school of the impending transition. However, if the school's staff believe that a gender identity or expression issue is presenting itself and creating difficulty for the child at school, the school's administrative staff and/or counselor approaching the student's parent/guardian about the issue is appropriate. An individual teacher shall not approach a student' parent/legal guardian to address such a student situation without first conferring with the school's administration about the subject matter and obtaining permission to enter into such a discussion. A meeting may be held

at the request of the student's parent/guardian or at the request of the principal or building administrator. Together, the family and school can identify appropriate steps, if any, to support the student.

Students will be allowed to use the restroom and locker room that corresponds to the gender identity they consistently assert at school. No student will be required to use facilities that conflict with his or her gender identity consistently asserted at school. A transgender student or any other student who has a need or desire for increased privacy may be given the option of using a separate or private restroom or changing area, such as a single stall restroom, if such is available. No student shall, on account of their transgender status, be required to use such separate facilities.

School Activities

The District will provide all students the opportunity to participate in any activities segregated by gender in a manner that is consistent with their gender identity consistently asserted at school. However, activities under the direction of the Idaho High School Activities Association (IHSAA) shall be subject to IHSAA rules and regulations).

School Trips

In the case of overnight trips sponsored by the District, students will be assigned sleeping rooms that correspond to the gender identity they consistently assert at school or to a private sleeping room. No student shall be required to sleep in a private room or in an assigned room conflicting with his or her consistently asserted school gender identity.

In no case will a transgender student be denied the right to participate in an overnight trip because of that student's transgender status.

In no case will a student be denied the right to participate in an overnight trip because of that student's sexual orientation. Likewise, a student will not be required to use a private sleeping room or denied participation on the basis of that student's sexual orientation.

Student Records and Privacy

The District's official records required by law shall utilize a student's legal name. In situations where State or federal law or administrative rules require school employees to use or report a student's legal name or gender, such legal name or gender shall be utilized. However, school staff shall utilize practices to avoid the inadvertent disclosure of the student's transgender status.

Information regarding a student's sexual orientation, gender identity, gender expression, legal name, or gender assigned at birth may constitute confidential information. Disclosure of such information shall be in accordance with District policies pertaining to student privacy. The student's educational record shall not include mention of the student's sexual orientation.

However, in the course of ordinary school interactions and communication, District staff shall use the name and pronouns consistently asserted by the student at school, regardless of the student's legal name and sex. A student is not required to legally change their name/gender or their official school records as a prerequisite to the use of a name and the pronouns consistent with the student's identity. Intentional and persistent refusal to use the name and gender by which the student identifies is a violation of this policy and may subject an employee to discipline, up to and including possible termination.

Change of Official School Records

District records required by law to include the student's legal name and/or gender will be changed by the District upon the student's/former student's presentation of appropriate documentation to the District Office. Any current or former student may present to the Superintendent or designee responsible for student records a copy of a court order or birth certificate identifying a change the student's legal name and/or gender. The student's records will be changed accordingly.

Confidentiality

School employees should not disclose a student's transgender status or sexual orientation to other individuals, regardless of setting, including the other school personnel or (in the case of middle school, junior high school, and high school students) the student's parents/guardians, unless they have a legitimate need to know or unless the student has authorized such disclosure. Action in violation of such student confidentiality may subject an employee to discipline, up to and including possible termination and for certificated personnel, a report to the Professional Standards Commission.

When contacting the parent/guardian of a transgender student, school personnel should use the student's legal name and the pronoun corresponding to the student's gender assigned at birth unless the student or parent/guardian has specified otherwise.

Training

The District may conduct staff development or awareness activities for students or parents on transgender issues or gender diversity. However, in regard to such activities the District and its personnel shall not disclose the transgender status of any student without permission of that student and their parents/guardians.

Dress Codes

School dress codes shall be gender neutral in all situations including attire during the traditional school day, school activities including dances/prom, and graduation. The District will allow students to dress in a manner that is consistent with their gender identity within the constraints of the dress codes and any other rules regarding student attire.

Students may wear clothing or accessories that voice their views on lesbian, gay, bisexual, and transgender (LGBT) issues, regardless of viewpoint, provided these conform to the dress code; are not a disruption to the educational environment; and are not obscene, threatening, lewd, or vulgar.

School Dances

The District shall not impose different or unique practices or rules for same sex couples who attend and/or participate in school activities, including dances. This includes such matters as prohibition of attendance of same sex student couples, limitations of public displays of affection only applicable to same sex couples, discounted couples tickets, gender identity for dance court titles that correspond to birth sex and other such distinctions.

Safe Environment

It is the responsibility of the District to ensure all students, including LGBT students, have a safe school environment. Discrimination, harassment, bullying, or sexual harassment complaints involving LGBT students shall be handled in the same manner as other discrimination, harassment, bullying, and sexual harassment complaints.

Cross Reference:
- 2140 Student and Family Privacy Rights
- 3255 Student Dress
- 3280 Equal Education, Nondiscrimination, and Sex Equity
- 3290 Sexual Harassment/Intimidation of Students
- 3295 Hazing, Harassment, Intimidation, Bullying, Cyber Bullying, Menacing
- 3575 Student Data Privacy and Security

Legal Reference:
- 20 U.S.C. § 1681, et seq. Title IX of the Educational Amendments
- I.C. § 33-133(1)(j)(ii) Definitions—Student Data—Use and Limitations—Penalties

Other Reference: Idaho High School Activities Association Rules & Regulations, Rule 11-3 Transgender Student Participation

Policy History:
Adopted on: 10/12/15
Revised on:

Exhibit 4

January 30, 2023

Attorney General Raúl Labrador
PO Box 83720
Boise, ID 83720-0010
AGLabrador@ag.idaho.gov
Delivered via Email

Re: Letter dated January 25, 2023

Dear Attorney General Labrador,

Thank you for reaching out and for your interest in the service and work of the Idaho School Boards Association (ISBA).

ISBA was founded in 1942 to serve school boards and school board members throughout the state of Idaho. For 81 years, ISBA has worked to meet the needs of school governance in Idaho communities large and small, rural and more densely populated. We help school board members carry out their school governance role in ever-changing environments. We are confident that we all share the goal of quality schools and quality education that prepare Idaho students to excel and meet the challenges that they will face as they become adults and leaders in our communities and our state.

One of the services we provide to locally elected school board leaders is our model school policy services. Like other school board associations across the country, it is an optional but widely used service that we offer.

School leaders in Idaho have been dealt the responsibility of handling LGBT issues in their schools without explicit state or federal statutes to guide them. Rather they must navigate inconsistent court rulings, or guidance and rules issued through federal agencies, some of which can and has changed overnight depending on who is elected to serve as President of the United States. Current interpretation of Title IX – and likewise for Title VII – does protect discrimination on the basis of sex to include a person's gender identity and sexual orientation.

All of ISBA's model policies are drafted in-house and go through an extensive legal review process. None of ISBA's current employees are attorneys, and any legal questions are referred to our outside legal counsel whose lawyers practice education law and represent education clients throughout the state. ISBA does not write any model policy based on any special interest group or entity, and our business partners and affiliates have not played a role in writing any model policy. Our model policies are developed to assist school communities address practical issues that arise in their schools on a daily basis and require a clear, uniform and workable solution.

IDAHO SBA School Boards Association

As you noted in your letter, policies adopted at the local level vary, and are tailored to fit the individual community. That is precisely how ISBA's model policies service works. Like any action of a public agency, when a school board adopts a policy, it can do so only in a properly noticed public board meeting. The policy you inquired about was initially released in July 2015 based on *Dear Colleague* guidance issued by the U.S. Department of Education Office for Civil Rights. ISBA provides a model version of this policy upon request, or if a district or charter school chooses to purchase the complete manual that includes all our model policies, this is one of the policies that is included. ISBA's manual that includes all of its model policies is over 1,000 pages long, and it would be simply impossible for every policy to be adopted by a particular school board. Instead, individual boards choose the policies they need to govern their schools effectively. We have not, and do not, indicate to our members this policy is required by law. Rather, the policy serves as framework for each local board to determine – alongside their community –what is best for their students and helps them understand the various legal complexities and rights guaranteed to students under the United States Constitution. Those who have done so have done it with compassion, as they work with students and their families who may have an individual personal need. No matter what a school district or charter school does, they are subjecting themselves either to litigation from non-accommodated LGBT students or upset a group of parents who disagree with those accommodations.

ISBA has respected and upheld – and always will respect and uphold -- the authority of local school boards who have worked through these policies with their community. We have maintained that our job is to provide schools with a framework on sensitive topics that navigates the layers of legal complexities, all to avoid costly litigation, intense investigations from the U.S. Department Office for Civil Rights, or the loss of federal funding. As someone who was elected to uphold the law, I am sure you can appreciate while some people in Idaho would prefer to relinquish funding from and oversight by the federal government, the reality is that federal funding serves as a precious resource for public schools particularly for our most vulnerable students, such as students who receive special education services, free and reduced lunch, and more.

We agree that Idaho schools should be a safe environment, where all students acquire the basic skills, knowledge, and character that they need to thrive in life. It should be noted that in places where these policies have been adopted and operating for many years, there have been no reported incidents of unlawful behavior. We have worked diligently to ensure that schools can accommodate children or parents who may disagree or are uncomfortable with this type of policy.

We have traditionally had an excellent working relationship with the Office of the Attorney General in Idaho, partnering to inform school board members on Idaho's openness in government laws. I would welcome an opportunity to meet with you or your staff directly or provide you my direct contact information where you can reach me by phone if you have any questions regarding the work and mission of ISBA.

Our members and their needs are our number one priority. We are proud of our mission to advocate for Idaho students and public education and will continue to support and empower local school boards for student success.

Thank you again for your interest. I would be happy to meet with you or one of your colleagues to discuss further if you would like.

Best Regards,

Misty Swanson

Misty Swanson
Executive Director

Exhibit 5

EDUCATION GOVERNMENT + POLITICS

Attorney general questions legality of 'dangerous' LGBTQ+ policy used in many Idaho schools

AG says policy may violate Idaho law and says his office is taking a 'serious look'

BY: **CARLY FLANDRO** - JANUARY 25, 2023 10:03 PM

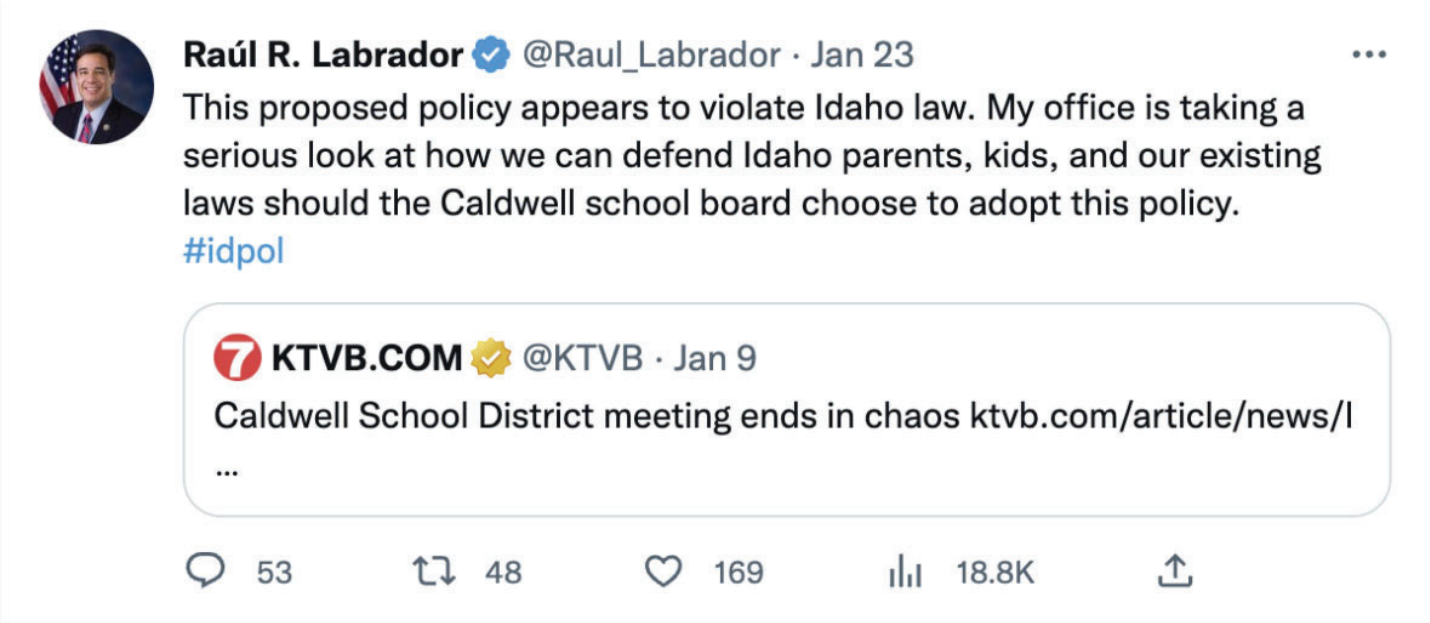
Idaho Attorney General Raúl Labrador this week questioned the legality of what he called a "dangerous" and "suspect" LGBTQ+ rights policy that's already in place at about a third of Idaho's school districts and charters. (Otto Kitsinger for the Idaho Capital Sun)

Originally posted on IdahoEdNews.org on January 25, 2023

Idaho Attorney General Raúl Labrador this week questioned the legality of what he called a "dangerous" and "suspect" LGBTQ+ rights policy that's already in place at about a third of Idaho's school districts and charters.

That policy came into the limelight when attendees at a Jan. 9 Caldwell School Board meeting yelled at, insulted, and threatened board members over the draft of a potential policy, which would establish rights and protections for all students, regardless of sexual orientation. Trustees were forced to call the meeting to an early end.

On Monday, Labrador chimed in on the discord on Twitter: "This proposed policy appears to violate Idaho law. My office is taking a serious look at how we can defend Idaho parents, kids, and our existing laws should the Caldwell school board choose to adopt this policy." Labrador further detailed his concerns in a Wednesday letter to Misty Swanson, the executive director of the Idaho School Boards Association.



If adopted, Caldwell's draft policy would:

- Allow students to use bathrooms and locker rooms aligning with their gender identity.
- Protect students from being denied participation in overnight trips due to their sexual orientation.
- Require district staff to use a student's preferred name and pronouns.
- Protect students' privacy in regards to personal information, such as sexual orientation and legal name.
- Protect the rights of same-sex couples to attend school activities, including dances, and prohibit general discrimination against those couples.

Caldwell's draft policy originated from an Idaho School Boards Association model policy. ISBA works with lawyers and staff members to create model policies that districts and charters may use and tailor to their individual needs.

Quinn Perry, the deputy director for ISBA, estimates that about 60 local education agencies or LEAs (which includes traditional school districts and charters) already have the LGBTQ+ policy in place. Perry pointed out that, in districts where students can use bathrooms and lockers rooms that align with their gender identity, accommodations can be made for other students who may be uncomfortable with that.

On Tuesday, Perry said she had no reason to believe the policy is violating any current Idaho law and reiterated that ISBA's model policies are vetted by an attorney.

Labrador's office at first gave no comment when asked for details on how the policies violate Idaho law or on the implications of Labrador's Tweets for LEAs where such policies are already in place.

"We won't comment on the specific laws implicated at this time because we don't litigate in the press," Emily Kleinworth, the public information specialist for the Attorney General's office, wrote in an email Wednesday morning.

However, a few hours later, Labrador's office sent EdNews a letter that he wrote to the ISBA's Executive Director Misty Swanson.

"I … find it unsettling – and inconsistent with your stated values – that the ISBA would advocate a dangerous policy that actively disenfranchises parents and families, the cornerstone of any schooling system," Labrador wrote in the letter.

Labrador also cited Idaho Code 67-1041, which lays out the duties of an attorney general.

"As Idaho's Attorney General, it is my job to protect the rights of Idaho residents and safeguard the legal interests of the State," Labrador wrote. "I have serious concerns that Policy 3281 conflicts with state law, infringes on the fundamental rights of Idaho parents to direct their children's upbringing and education, and violates educators' first Amendment rights. I also worry that the policy will endanger students …"

Labrador listed a number of specific concerns, including that the policy would:

- "Allow biological boys to use girls' locker rooms and bathrooms"
- "Force teachers to use pronouns that don't correspond to students' biological sex" and
- "Require school employees to conceal students' intimate choices about sex and gender – along with potential gender dysphoria – from their parents."

Labrador also admonished the ISBA for any role it may have played in providing legal advice to the Caldwell school board regarding the policy.

"Navigating the important, delicate state-federal balance of power and authority is something a nonprofit organization should refrain from doing," he said.

Swanson was not immediately available to comment on the letter. EdNews will update the story if Swanson or ISBA provides further comment.

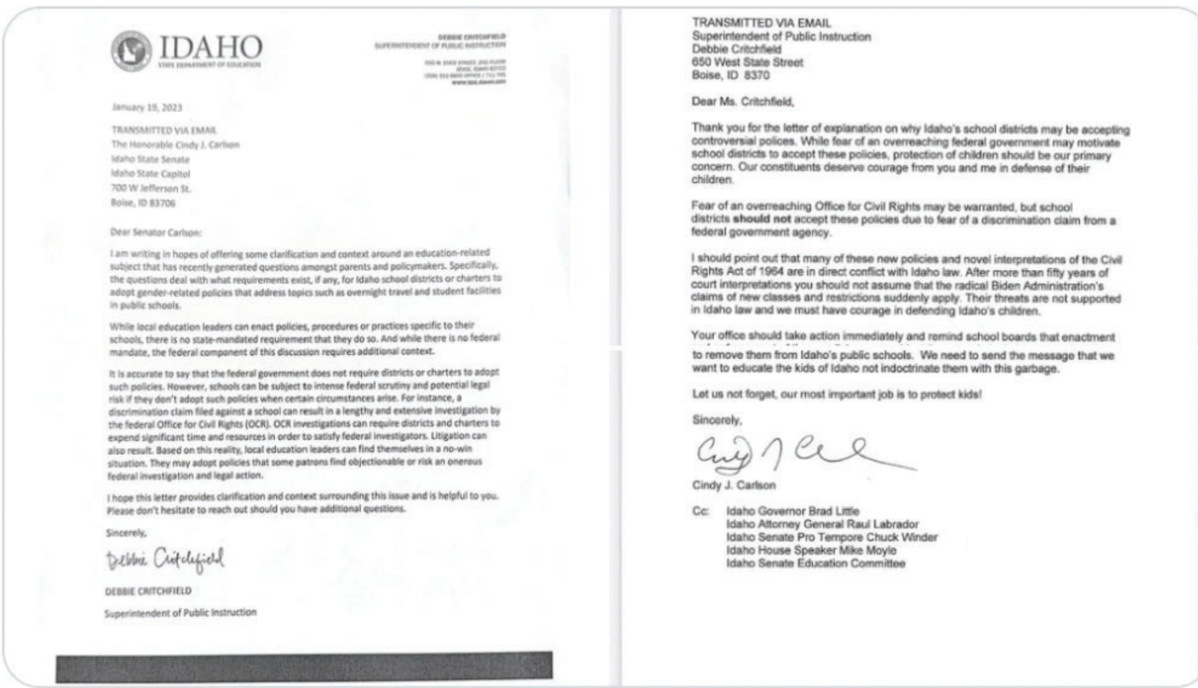
Republican Sen. Cindy Carlson calls LGBTQ+ rights policies "garbage"

State Superintendent Debbie Critchfield and Sen. Cindy Carlson, R-Riggins, have weighed in on the policy as well.

On Monday, the Idaho Freedom Caucus posted photos of letter correspondence between the two on its Twitter page.

Idaho Freedom Caucus @freedomcaucusID · Jan 23

Letter from the State Superintendent regarding the transgender policies, and a well thought out response from Sen. Carlson, an Idaho Freedom Caucus member.
#nicholsforidaho #peopletician #provenconservative #idgop #idleg #idfreedomcaucus



IDAHO
STATE DEPARTMENT OF EDUCATION

DEBBIE CRITCHFIELD
SUPERINTENDENT OF PUBLIC INSTRUCTION

January 19, 2023

TRANSMITTED VIA EMAIL
The Honorable Cindy J. Carlson
Idaho State Senate
Idaho State Capitol
700 W Jefferson St.
Boise, ID 83706

Dear Senator Carlson:

I am writing in hopes of offering some clarification and context around an education-related subject that has recently generated questions amongst parents and policymakers. Specifically, the questions deal with what requirements exist, if any, for Idaho school districts or charters to adopt gender-related policies that address topics such as overnight travel and student facilities in public schools.

While local education leaders can enact policies, procedures or practices specific to their schools, there is no state-mandated requirement that they do so. And while there is no federal mandate, the federal component of this discussion requires additional context.

It is accurate to say that the federal government does not require districts or charters to adopt such policies. However, schools can be subject to intense federal scrutiny and potential legal risk if they don't adopt such policies when certain circumstances arise. For instance, a discrimination claim filed against a school can result in a lengthy and extensive investigation by the federal Office for Civil Rights (OCR). OCR investigations can require districts and charters to expend significant time and resources in order to satisfy federal investigators. Litigation can also result. Based on this reality, local education leaders can find themselves in a no-win situation. They may adopt policies that some patrons find objectionable or risk an onerous federal investigation and legal action.

I hope this letter provides clarification and context surrounding this issue and is helpful to you. Please don't hesitate to reach out should you have additional questions.

Sincerely,

Debbie Critchfield

DEBBIE CRITCHFIELD

Superintendent of Public Instruction

TRANSMITTED VIA EMAIL
Superintendent of Public Instruction
Debbie Critchfield
650 West State Street
Boise, ID 8370

Dear Ms. Critchfield,

Thank you for the letter of explanation on why Idaho's school districts may be accepting controversial polices. While fear of an overreaching federal government may motivate school districts to accept these policies, protection of children should be our primary concern. Our constituents deserve courage from you and me in defense of their children.

Fear of an overreaching Office for Civil Rights may be warranted, but school districts **should not** accept these policies due to fear of a discrimination claim from a federal government agency.

I should point out that many of these new policies and novel interpretations of the Civil Rights Act of 1964 are in direct conflict with Idaho law. After more than fifty years of court interpretations you should not assume that the radical Biden Administration's claims of new classes and restrictions suddenly apply. Their threats are not supported in Idaho law and we must have courage in defending Idaho's children.

Your office should take action immediately and remind school boards that enactment
to remove them from Idaho's public schools. We need to send the message that we want to educate the kids of Idaho not indoctrinate them with this garbage.

Let us not forget, our most important job is to protect kids!

Sincerely,

Cindy J. Carlson

Cc: Idaho Governor Brad Little
Idaho Attorney General Raul Labrador
Idaho Senate Pro Tempore Chuck Winder
Idaho House Speaker Mike Moyle
Idaho Senate Education Committee

7 16 32 1,922

In an emailed letter dated Jan. 19, Critchfield wrote to Carlson to offer "some clarification and context" about whether Idaho LEAs are required "to adopt gender-related policies that address topics such as overnight travel and student facilities in schools."

There are no federal or state mandates to required schools to adopt such policies, but local education leaders may opt to do so, Critchfield wrote.

However, LEAs are also subject to "intense federal scrutiny and potential legal risk" if they don't have such policies in place.

"Based on this reality, local education leaders can find themselves in a no-win situation," Critchfield wrote. "They may adopt policies that some patrons find objectionable or risk an onerous federal investigation and legal action."

Last year, the U.S. Department of Education's Office of Civil Rights (OCR) confirmed that Title IX protects students from discrimination based on sexual orientation and gender identity and explained it will enforce Title IX.

In a Jan. 23 response, Carlson wrote that "school districts **should not** accept these policies due to fear of a discrimination claim from a federal government agency."

According to the Office for Civil Rights, "LGBTQ+ students often face additional challenges in schools, including disproportionately experiencing persistent bullying, harassment, and victimization."

"The Department of Education strives to provide schools with the support they need to create learning environments that enable all students to succeed, regardless of their gender identity or sexual orientation," Acting Assistant Secretary for Civil Rights Suzanne B. Goldberg said in a June 2021 press release. "As part of our mission to protect all students' civil rights, it is essential that OCR acts to eliminate discrimination that targets LGBTQ+ students."

Carlson urged Critchfield to "take action immediately and remind school boards that enactment and enforcement of these policies may subject them to criminal charges under Idaho law."

Carlson then cited indecent exposure and child abuse laws.

Carlson CC'd Gov. Brad Little, Labrador, Sen. Chuck Winder, Rep. Mike Moyle and the Idaho Senate Education Committee, and called for all to "come together and take a stand against these controversial policies" and protect Idaho's kids.

"We want to send the message that we want to educate the kids of Idaho not indoctrinate them with this garbage," Carlson wrote.

The same day, Labrador took to Twitter with his comments on Caldwell's proposed policy.

LGBTQ policies already in place can vary, but some mirror Caldwell's draft proposal

EdNews searched the policies at some of the state's largest districts and charters, and found a handful where a similar policy to Caldwell's draft proposal is in place. Those LEAs and links to their policies are listed below:

- Bonneville School District: Read the policy here
- Twin Falls School District: Read the policy here on page 82
- Idaho Virtual Academy: Read the policy here on page 164
- Idaho Arts Charter: Read a policy on name/gender changes here and a policy and and policy on transgender and gender nonconforming students here

- Sage International: Read the policy here on page 94

In some cases, the policies that are already on record are very similar to Caldwell's draft policy. That's the case for the policies in place at Twin Falls School District, the Idaho Virtual Academy, the Idaho Arts Charter, and Sage International.

But in other cases, the policy is notably different.

Bonneville's policy, for example, requires students to use restrooms/dressing rooms according to "official records," unless a student has a doctor's note "verifying the student is taking a medically prescribed hormone treatment under a physician's care for the purpose of gender transition."

In terms of overnight trips, students are "assigned sleeping rooms pursuant to the sex assigned to the student in their official school records." However, the policy allows for accommodations for students if parents request them.

Bonneville's policy does not require staff to use a student's preferred name and pronouns whenever possible, as do versions of the policy at other LEAs.

What's next for Caldwell? Labrador pushes for another public meeting.

After its Jan. 9 board meeting was cut short, trustees also canceled a second hearing on the proposed LGBTQ+ student policy "after careful consideration and due to safety concerns."

"The trustees will be working with the Caldwell Police Department to create a plan to ensure the safety of participants at all future meetings because the safety of our students, parents, patrons, and staff is of utmost importance," the district said in a statement posted on its website.

At this time, it's unclear when or whether another public hearing might be held.

On Monday, Labrador seemed to push for another public meeting in a second Tweet on the policy: "The Caldwell school board should be protecting all non-violent free speech. Parents have a right to show up and have their voices heard on all issues affecting their children. I look forward to seeing parents being granted access in future meetings."

Raúl R. Labrador @Raul_Labrador · Jan 23

The Caldwell school board should be protecting all non-violent free speech. Parents have a right to show up and have their voices heard on all issues affecting their children. I look forward to seeing parents being granted access in future meetings. #idpol

KTVB.COM @KTVB · Jan 17

Caldwell School Board cancels public hearing ktvb.com/article/news/e
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CARLY FLANDRO

Reporter Carly Flandro works in the East Idaho bureau of Idaho Ed News. A former high school English teacher, she writes about teaching, learning, diversity and equity. You can follow her on Twitter @idahoedcarly and send her news tips at carly@idahoednews.org.

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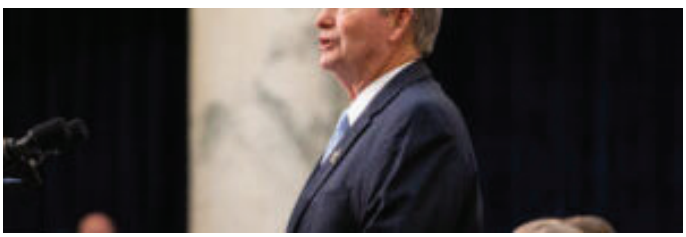

Basin District #72

STUDENTS - GENDER IDENTITY AND SEXUAL ORIENTATION POLICY 513

Gender Identity and Sexual Orientation

The Board believes in fostering an educational environment that is safe and free of discrimination for all students, regardless of sexual orientation, gender identity, or gender expression. This policy is designed to create a safe learning environment for all students and to ensure that every student has equal access to all school programs and activities. Failure of any school student or school employee to abide by the terms and provisions of this policy will subject such individual to disciplinary action.

Definitions

"Sexual orientation" shall mean an individual's physical or emotional attraction to the same and/or the opposite gender. "Gay," "lesbian," "bisexual" and "straight" are all examples of sexual orientations. A person's sexual orientation is distinct from a person's gender identity and expression.

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"Transgender", an adjective, shall refer to a person whose gender identity or expression is different from that traditionally associated with the person's sex assigned at birth.

School Facilities

In the case of middle/junior high school students and high school students, the principal or building administrator is encouraged to request a meeting with a transgender student and, if the student grants permission, with their parent/guardian upon the student's enrollment in the District or in response to a currently enrolled student's change of gender expression or identity. The goal of the meeting is to develop understanding of that student's needs with respect to their gender identity.

In the case of elementary school students, it will generally be the parent/guardian that informs the school of the impending transition. However, if the school's staff believe that a gender identity or expression issue is presenting itself and creating difficulty for the child at school, it may be appropriate for the school's administrative staff and/or counselor to approach the student's parent/guardian about the issue. An individual teacher shall not approach a student' parent/legal guardian to address such a student situation without first conferring with the school's administration about the subject and obtaining permission to enter into such a discussion. A meeting may be held at the request of the student's parent/guardian or at the request of the

Basin District #72

principal or building administrator. Together, the family and school can identify appropriate steps, if any, to support the student.

Students will be allowed to use the restrooms and locker rooms that correspond to the gender identity they consistently assert at school. No student will be required to use facilities that conflict with his or her gender identity consistently asserted at school. A transgender student or any other student who has a need or desire for increased privacy may be given the option of using a separate or private restroom or changing area, such as a single stall restroom, if such is available. No student shall, on account of their transgender status, be required to use such separate facilities.

School Activities

The District will provide all students the opportunity to participate in any activities segregated by gender in a manner that is consistent with their gender identity consistently asserted at school. However, activities under the direction of the Idaho High School Activities Association (IHSAA) shall be subject to IHSAA rules and regulations.

School Trips

In the case of overnight trips sponsored by the District, students will be assigned sleeping rooms that correspond to the gender identity they consistently assert at school or to a private sleeping room. No student shall be required to sleep in a private room or in an assigned room conflicting with his or her consistently asserted school gender identity.

In no case will a transgender student be denied the right to participate in an overnight trip because of that student's transgender status.

In no case will a student be denied the right to participate in an overnight trip because of that student's sexual orientation. Likewise, a student will not be required to use a private sleeping room or be denied participation on the basis of that student's sexual orientation.

Student Records and Privacy

The District's official records required by law shall utilize a student's legal name. In situations where State or federal law or administrative rules require school employees to use or report a student's legal name or gender, such legal name or gender shall be utilized. However, school staff shall use practices to avoid the inadvertent disclosure of the student's transgender status.

Information regarding a student's sexual orientation, gender identity, gender expression, legal name, or gender assigned at birth may constitute confidential information. Disclosure of such information shall be in accordance with District policies pertaining to student privacy. The student's educational record shall not include mention of the student's sexual orientation.

Basin District #72

However, in the course of ordinary school interactions and communication, District staff shall use the name and pronouns consistently asserted by the student at school, regardless of the student's legal name and sex. A student is not required to legally change their name, gender, or official school records as a prerequisite to the use of a name and the pronouns consistent with the student's identity. Intentional and persistent refusal to use the name and gender by which the student identifies is a violation of this policy and may subject an employee to discipline, up to and including possible termination.

Change of Official School Records

District records required by law to include the student's legal name and/or gender will be changed by the District upon the student or former student's presentation of appropriate documentation to the District Office. Any current or former student may present to the Superintendent or designee responsible for student records a copy of a court order or birth certificate identifying a change the student's legal name and/or gender. The student's records will be changed accordingly.

Confidentiality

School employees should not disclose a student's transgender status or sexual orientation to other individuals, regardless of setting, including the other school personnel or (in the case of middle school, junior high school, and high school students) the student's parents/guardians, unless they have a legitimate need to know or unless the student has authorized such disclosure. Action in violation of such student confidentiality may subject an employee to discipline, up to and including possible termination and for certificated personnel, a report to the Professional Standards Commission.

When contacting the parent/guardian of a transgender student, school personnel should use the student's legal name and the pronoun corresponding to the student's gender assigned at birth unless the student or parent/guardian has specified otherwise.

Training

The District may conduct staff development or awareness activities for students or parents on transgender issues or gender diversity. However, in regard to such activities the District and its personnel shall not disclose the transgender status of any student without permission of that student and their parent(s)/guardian(s).

Dress Codes

School dress codes shall be gender neutral in all situations, including attire during the traditional school day, school activities including dances and prom, and graduation. The District will allow students to dress in a manner that is consistent with their gender identity within the constraints of the dress codes and any other rules regarding student attire.

Basin District #72

Students may wear clothing or accessories that voice their views on lesbian, gay, bisexual, and transgender (LGBT) issues, regardless of viewpoint, provided these conform to the dress code; are not a disruption to the educational environment; and are not obscene, threatening, lewd, or vulgar.

School Dances

The District shall not impose different or unique practices or rules for same sex couples who attend and/or participate in school activities, including dances. This includes such matters as prohibition of attendance of same sex student couples, limitations of public displays of affection only applicable to same sex couples, discounted couples tickets, gender identity for dance court titles that correspond to birth sex, and other such distinctions.

Safe Environment

It is the responsibility of the District to ensure all students, including LGBT students, have a safe school environment. Discrimination, harassment, bullying, or sexual harassment complaints involving LGBT students shall be handled in the same manner as other discrimination, harassment, bullying, and sexual harassment complaints.

Cross Reference:

2140	Student and Family Privacy Rights
3255	Student Dress
3280	Equal Education, Nondiscrimination, and Sex Equity
3290	Sexual Harassment/Intimidation of Students
3295	Hazing, Harassment, Intimidation, Bullying, Cyber Bullying, Menacing
3575	Student Data Privacy and Security

Legal Reference:

20 U.S.C. § 1681, et seq.	Title IX of the Educational Amendments
I.C. § 33-133(1)(j)(ii)	Definitions—Student Data—Use and Limitations—Penalties

Other Reference: Idaho High School Activities Association Rules & Regulations, Rule 11-3 Transgender Student Participation

Policy History:

Adopted on: 8/16/2016

Revised on:

GENDER IDENTITY AND SEXUAL ORIENTATION

The Bonneville Joint School Board of Trustees believes in fostering an educational environment that is safe and free of discrimination for all students, regardless of sexual orientation, gender identity, or gender expression. The Board also believes in ensuring that every student has equal access to all school programs and activities.

Guidelines

Meeting with Parent(s)/Guardian(s)

1. Generally, it will be the responsibility of a transgender student's parent/guardian to request a meeting with the administrator or staff to discuss appropriate accommodations to support and meet the needs of the student with respect to their gender identity, sexual orientation, or transgender status.

2. The building administrator may request a meeting with a transgender student and with the parent or guardian of the student in response to a student's change of gender or identity. The goal of the meeting is to develop understanding of that student's needs with respect to their gender identity.

3. Together, the family and administrator can identify appropriate steps, if any, to support the student.

Official Student Records

1. Requests to make changes to official student records required by law to include a student's legal name and/or gender will be handled on an individual basis pursuant to a meeting with the student and his/her parent(s) or guardian(s).

2. Official records may only be changed upon presentation of the following documentation:

    a. Court order or birth certificate identifying a change of the student's legal name and/or gender.

Restroom/Dressing Room Use

1. Official student records will be used to determine restroom/dressing room use.

2. Physician's written statement verifying the student is taking a medically prescribed hormone treatment under a physician's care for the purposes of gender transition

may be used temporarily to determine restroom/dressing room usage consistent with rules adopted by the Idaho High Schools Athletics Association.

Student Privacy

1. A student's transgender status or sexual orientation should not be disclosed to other individuals including other District personnel unless there is a need to know or unless the student has authorized such disclosure.

2. District staff shall implement practices to avoid inadvertent disclosure of a student's transgender status.

Extracurricular Activities

Participation in extracurricular activities will be under the direction of the Idaho High School Activities Association (IHSAA).

School Sponsored Overnight Trips

1. In the case of overnight trips sponsored by the District, students will be assigned sleeping rooms pursuant to the sex assigned to the student in their official school records.

2. If accommodations are requested a plan will be developed by the parent(s) or guardian(s) and the trip advisor with the idea of supporting the student and making him/her comfortable.

Disciplinary Action

1. Discrimination, harassment, bullying, or sexual harassment complaints shall be handled in the same manner for all students.

2. Failure of any District employee to abide by the terms and provisions of this policy may subject such individual to disciplinary action up to and including termination and for certificated personnel, a report to the Professional Standards Commission.

DEFINITIONS:

Gender Expression: how a person expresses their gender to others, often through behavior, clothing, hairstyles, activities, voice, or mannerism.

Gender Identity: a person's deeply felt internal sense of their own gender. A person's gender identity may be different from or the same as the person's sex assigned at birth.

Gender Transition: the process in which transgender individuals begin asserting the sex that corresponds to their gender identity instead of the sex they were assigned at birth. During gender transition, individuals begin to live and identify as the sex consistent with their gender identity and may dress differently, adopt a new name, and use pronouns consistent with their gender identity. Transgender individuals may undergo gender transition at any stage of their lives, and gender transition can happen swiftly or over a long duration of time.

Sex Assigned at Birth: the sex designation recorded on an infant's birth certificate should such a record be provided at birth.

Sexual Orientation: an individual's physical or emotional attraction to the same and/or the opposite gender. "Gay," "lesbian," "bisexual" and "straight" are all examples of sexual orientations. A person's sexual orientation is distinct from a person's gender identity and expression.

Transgender: a person whose gender identity or expression is different from that traditionally associated with the person's sex assigned at birth.

Transgender Female: someone who identifies as female but was assigned the sex of male at birth.

Transgender Male: someone who identifies as male but was assigned the sex of female at birth.

Adopted 01-11-2017 Reviewed Revised 08-08-2018

Cross Reference:	Student and Family Privacy Rights #2140 Equal Education, Nondiscrimination, and Sex Equity #3280 Sexual Harassment/Intimidation of Students #3290 Hazing, Harassment, Intimidation, Bullying, Cyber Bullying, Menacing #3295 Safe and Secure Learning Environment #3555 Student Data Privacy and Security #3665 Uniform Grievance #4112
Legal Reference:	Idaho Code § 33-133(1)(j)(ii) Definitions—Student Data—Use and Limitations—Penalties 20 U.S.C. § 1681, et seq. Title IX of the Educational Amendments
Other Reference:	Idaho High School Activities Association (IHSAA) Rules & Regulations, Rule 11-3 Transgender Student Participation

Jerome Joint School District No. 261

STUDENTS **3281**

Gender Identity and Sexual Orientation

The Board believes in fostering an educational environment that is safe and free of discrimination for all students, regardless of sexual orientation, gender identity, or gender expression. This policy is designed to create a safe learning environment for all students and to ensure that every student has equal access to all school programs and activities.

Definitions

"Sexual orientation" shall mean an individual's physical or emotional attraction to the same and/or the opposite gender. "Gay," "lesbian," "bisexual" and "straight" are all examples of sexual orientations. A person's sexual orientation is distinct from a person's gender Identity and expression.

"Gender identity" shall refer to a person's deeply felt internal sense of their own gender.

"Gender expression" shall refer to how a person expresses their gender to others, often through behavior, clothing, hairstyles, activities, voice, or mannerisms.

"Transgender", an adjective, shall refer to a person whose gender identity or expression is different from that traditionally associated with the person's sex assigned at birth.

"Gender Non Conforming", not adhering to societies gender norms.

School Facilities

In the case of middle/junior high school students and high school students, the principal or building administrator is encouraged to request a meeting with a transgender student and, if the student grants permission, with their parent/guardian upon the student's enrollment in the District or in response to a currently enrolled student's change of gender expression or identity. The goal of the meeting is to develop understanding of that student's needs with respect to their gender Identity. If the student requests a formal gender support plan, parental permission is required.

In the case of elementary school students, it will generally be the parent/guardian that informs the school of the impending transition. However, if the school's staff believe that a gender identity or expression issue is presenting itself and creating difficulty for the child at school, it may be appropriate for the school' s administrative staff and/or counselor to approach the student's parent/guardian about the issue. An individual teacher shall not approach a student' parent/legal guardian to address such a student situation without first conferring with the school's administration about the subject and obtaining permission to enter into such a discussion. A meeting may be held at the request of the student's parent/guardian or at the request of the principal or building administrator. Together, the family and school can identify appropriate steps, if any, to support the student.

School Activities

Activities under the direction of the Idaho High School Activities Association (IHSAA) shall be subject to IHSAA Rules and regulations.

Student Records and Privacy

The District's official records required by law shall utilize a student's legal name. In situations where State or federal law or administrative rules require school employees to use or report a student's legal name or gender, such legal name or gender shall be utilized. However, school staff shall use practices to avoid the inadvertent disclosure of the student's transgender status.

Information regarding a student's sexual orientation, gender identity, gender expression, legal name, or gender assigned at birth may constitute confidential information. Disclosure of such Information shall be in accordance with District policies pertaining to student privacy. The student's educational record shall not include mention of the student's sexual orientation.

A student is not required to legally change their name, gender, or official school records as a prerequisite to the use of a name and the pronouns consistent with the student's identity.

Change of Official School Records

District records required by law to include the student's legal name and/or gender will be changed by the District upon the student or former student's presentation of appropriate documentation to the District Office. Any current or former student may present to the Superintendent or designee responsible for student records a copy of a court order or birth certificate identifying a change the student's legal name and/or gender. The student's records will be changed accordingly..

Confidentiality

School employees should not disclose a student's transgender status or sexual orientation to other Individuals, regardless of setting, including the other school personnel or (m the case of middle school, junior high school, and high school students) the student's parents/guardians, unless they have a legitimate need to know or unless the student has authorized such disclosure.

Training

The District may conduct staff development or awareness activities for students or parents on transgender issues or gender diversity. However, in regard to such activities the District and Its personnel shall not disclose the transgender status of any student without permission of that student and their parents/guardians.

Dress Codes

School dress codes shall be gender neutral in all situations, including attire during the traditional school day, school activities including dances and prom, and graduation. The District will allow students to dress in a manner that is consistent with their gender identity within the constraints of the dress codes and any other rules regarding student attire.

School Dances

The District shall not impose different or unique practices or rules for same sex couples who attend and/or participate in school activities, including dances. This includes such matters as prohibition of attendance of same sex student couples, limitations of public displays of affection only applicable to same sex couples, discounted couples tickets, gender identity for dance court titles that correspond to birth sex, and other such distinctions.

Safe Environment

It is the responsibility of the District to ensure all students, including LGBT students, have a safe school environment. Discrimination, harassment, bullying, or sexual harassment complaints involving LGBT students shall be handled In the same manner as other discrimination, harassment, bullying, and sexual harassment complaints

Cross References:	2140	Student and Family Privacy Rights
	3255	Student Dress
	3280	Equal Education Nondiscrimination and Sex Equity
	3290	Sexual Harassment / Intimidation of Students
	3295	Hazing, Harassment, Intimidation, Bullying, Cyber Bullying, Menacing
	3575	Student Data Privacy and Security

Legal References: 20 U.S.C. $ 1681, et seq. Title IX of the Education Amendments of 1972
I.C. $ 33-133(l)(j)(ii) Definitions - Student Data — Use and Limitations – Penalties

Other Reference: Idaho High School Activities Association, Current Rules and Regulations Manual Rule 11-3 Transgender Student Participation

Policy History:
Adopted on: 07/19/2022
Revised on: 11/15/2022

POLICY TITLE: GENDER IDENTITY AND SEXUAL ORIENTATION	POLICY NO: 519.5 PAGE 1 of 3

The Blackfoot School District believes in fostering an educational environment that is safe and free of discrimination for all students, regardless of sexual orientation, gender identity, or gender expression. The Board also believes in ensuring that every student has equal access to all school programs and activities.

DEFINITIONS:

Gender Expression: how a person expresses their gender to others, often through behavior, clothing, hairstyles, activities, voice, or mannerism.

Gender Identity: a person's deeply felt internal sense of their own gender. A person's gender identity may be different from or the same as the person's sex assigned at birth.

Gender Transition: the process in which transgender individuals begin asserting the sex that corresponds to their gender identity instead of the sex they were assigned at birth. During gender transition, individuals begin to live and identify as the sex consistent with their gender identity and may dress differently, adopt a new name, and use pronouns consistent with their gender identity. Transgender individuals may undergo gender transition at any stage of their lives, and gender transition can happen swiftly or over a long duration of time.

Sex Assigned at Birth: the sex designation recorded on an infant's birth certificate should such a record be provided at birth.

Sexual Orientation: an individual's physical or emotional attraction to the same and/or the opposite gender. "Gay," "lesbian," "bisexual" and "straight" are all examples of sexual orientations. A person's sexual orientation is distinct from a person's gender identity and expression.

Transgender: a person whose gender identity or expression is different from that traditionally associated with the person's sex assigned at birth.

Transgender Female: someone who identifies as female but was assigned the sex of male at birth.

Transgender Male: someone who identifies as male but was assigned the sex of female at birth.

GUIDELINES:

Meeting with Parent(s)/Guardian(s)

1. Generally, it will be the responsibility of a transgender student's parent/guardian to request a meeting with the administrator to discuss appropriate accommodations to support and meet the needs of the student with respect to their gender identity, sexual orientation, or transgender status.
2. The building administrator may request a meeting with a transgender student and with the parent or guardian of the student in response to a student's change of gender or identity.
3. The goal of the meeting is to develop understanding of that student's needs with respect to their gender identity.

4. Together, the family and administrator can identify appropriate steps, if any, to support the student.

Official Student Records

1. Requests to make changes to official student records required by law to include a student's legal name and/or gender will be handled on an individual basis pursuant to a meeting with the student and his/her parent(s) or guardian(s).
2. Official records may only be changed upon presentation of the following documentation:
    a. Court order or birth certificate identifying a change of the student's legal name and/or gender.

Restroom/Dressing Room Use

1. Official student records will be used to determine restroom/dressing room use.
2. Physician's written statement verifying the student is taking a medically prescribed hormone treatment under a physician's care for the purposes of gender transition may be used temporarily to determine restroom/dressing room usage consistent with rules adopted by the Idaho High School Activities Association.
3. If accommodations are requested a plan will be developed by the parent(s) or guardian(s) and the building administrator with the idea of supporting the student and making him/her comfortable.

Student Privacy

1. A student's transgender status or sexual orientation should not be disclosed to other individuals including other District personnel unless there is a need to know or unless the student has authorized such disclosure.
2. District staff shall implement practices to avoid inadvertent disclosure of a student's transgender status.

Extracurricular Activities

Participation in extracurricular activities will be under the direction of the Idaho High School Activities Association (IHSAA).

School Sponsored Overnight Trips

1. In the case of overnight trips sponsored by the District, students will be assigned sleeping rooms pursuant to the sex assigned to the student in their official school records.
2. If accommodations are requested a plan will be developed by the parent(s) or guardian(s) and the trip advisor with the idea of supporting the student and making him/her comfortable.

Disciplinary Action

1. Discrimination, harassment, bullying, or sexual harassment complaints shall be handled in the same manner for all students.
2. Failure of any District employee to abide by the terms and provisions of this policy may subject such individual to disciplinary action up to and including termination and for certificated personnel, a report to the Professional Standards Commission.

♦ ♦ ♦ ♦ ♦ ♦ ♦

CROSS REFERENCE:
Board Policy 506: Student Harassment
Board Policy 506.5: Prohibition Against Harassment, Intimidation and Bullying
Board Policy 512: School Climate
Board Policy 681: Student Records: FERPA and forms 681F1, 681F2, 681F3

LEGAL REFERENCE:
Idaho Code § 33-133(1)(j)(ii) Definitions—Student Data—Use and Limitations—Penalties
20 U.S.C. § 1681, et seq. Title IX of the Educational Amendments

OTHER REFERENCE:
Idaho High School Activities Association (IHSAA) Rules & Regulations, Rule 11-3 Transgender Student Participation

AMENDED: January 17, 2019

Exhibit 7

Educating Today for a better tomorrow

Response to News Media Regarding Presidential Directive
Re: Civil Rights of Transgender Students

Boise, ID -- 05/13/2016 -- Boise School District received the directive from the White House and will be reviewing it further, but believe it reinforces our practice, as well as prior guidance from the federal government, which is captured in the following information that all Boise schools received earlier this school year:

The U.S. Department of Education Office for Civil Rights has instructed schools nationwide that sex discrimination prohibitions in federal law include protections for gender identity. As such, under federal civil rights law, the District is required to provide access to public facilities consistent with the student's gender identity.

Gender identity is not a fluid concept. A student may not choose to identify as a male one day and a female the next. School districts elsewhere that have implemented these policies require that the gender identification be both persistent and consistent over time.

Our Counseling Department has developed an intake process and Gender Support Plan to help the schools and families ensure the best support for their specific situation related to transgender students.

Furthermore, in August, we sent out resources to schools to help provide guidance as they continue to provide safe and supportive school environments for all students, including transgender students. In school principals' meetings, transgender issues have also been an agenda topic, as needed.

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

REBECCA ROE, et al.,

Plaintiffs,

v.

DEBBIE CRITCHFIELD, et al.,

Defendants.

Case No. 1:23-cv-00315-DCN

Plaintiffs' Notice of Errata Regarding Declarations of Rebecca Roe and Rachel Roe [Dkts. 15-2, 15-3]

Plaintiffs respectfully submit this errata to correct an inadvertent error that the reference to the year "2021" in paragraph 9 of the Declaration of Rebecca Roe (Dkt. 15-3) and in paragraph 8 of the Declaration of Rachel Roe (Dkt. 15-2) submitted in support of Plaintiffs' motion for preliminary injunction should instead be "2022."

Dated: July 13, 2023

/s/ *J. Max Rosen*
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Robyn K. Bacon
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LAMBDA LEGAL DEFENSE & EDUCATION FUND

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 13th day of July, 2023, I filed the foregoing electronically through the CM/ECF system, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing:

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

REBECCA ROE, et al., Plaintiffs, v. DEBBIE CRITCHFIELD, et al., Defendants.	Case No. 1:23-cv-00315-DCN **STATEMENT OF INTEREST OF THE UNITED STATES OF AMERICA**

Before this Court is a challenge to the State of Idaho's attempt to designate the sex of individual students in K-12 public schools for the purpose of categorically excluding transgender[1] students from single-sex facilities consistent with their gender identity. Idaho Code Ann. §§ 33-6601 *et seq.* (S.B. 1100).[2] Though Idaho students have long used facilities such as restrooms and locker rooms according to the sex with which they identify—and have done so without recorded incident—the law challenged here forbids this practice. Purporting to address a purely hypothetical danger, S.B. 1100 demands that all Idaho K-12 public schools bar transgender students from using restrooms, changing facilities, and temporary sleeping quarters with students who share their gender identity. Idaho claims, without evidence, that this categorical exclusion protects the privacy and safety of "all students." But within the category of "all students" are transgender students, and S.B. 1100 threatens, in a very real and well-documented manner, their privacy and safety and denies them their federally guaranteed right to access their public education free from sex discrimination.

The United States has a significant interest in protecting the right of students to participate in an educational environment free of unlawful sex discrimination. The U.S. Department of Justice (DOJ) and the U.S. Department of Education enforce Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, *et seq.* (Title IX), which protects students from sex discrimination in the education programs and activities of federal funding recipients. DOJ is charged with coordinating

[1] The term "transgender" describes a person whose gender identity differs from the person's sex assigned at birth. *Karnoski v. Trump*, 926 F.3d 1180, 1187 n.1 (9th Cir. 2019). A person's "gender identity" is their "deep-core sense of self as being a particular gender." *Hecox v. Little*, 479 F. Supp. 3d 930, 945 (D. Idaho 2020), aff'd, No. 20-35813, 2023 WL 1097255 (9th Cir. Jan. 30, 2023) (citations omitted).

[2] Citations to Idaho Code Ann. §§ 33-6601 *et seq*. and S.B. 1100 are to Idaho Code Ann. (West 2023), Title 33 Education, Chapter [67] 66 Protecting the Privacy and Safety of Students in Public Schools.

federal agencies' implementation and enforcement of Title IX. 28 § C.F.R. Pt. 54; Exec. Order No. 12,250, 45 Fed. Reg. 72,995 (Nov. 2, 1980); *see also* 28 § C.F.R. 0.51. DOJ also has authority to investigate and resolve complaints that a public school board is depriving students of equal protection based on sex. 42 U.S.C. § 2000c-6. The United States has a significant interest in ensuring that the proper legal standards are applied to private litigants' claims under Title IX and the Equal Protection Clause of the Fourteenth Amendment.

The United States therefore respectfully submits this Statement of Interest, under 28 U.S.C. § 517,[3] to advise the Court of its view that Title IX and the Equal Protection Clause do not permit Idaho to categorically exclude transgender students from using public schools' multi-user, single-sex facilities consistent with their gender identity.[4]

BACKGROUND

S.B. 1100 purports to decree each person's "sex," declaring that sex is "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."[5] Idaho Code Ann. § 33-6602(3). S.B. 1100 requires public schools to designate all multi-occupancy restrooms and changing facilities "for use by male persons only or female persons only" and bar any person not a "member of that sex" from entering such facility. *Id.* § 33-6603(1) and (2). The law also applies to overnight lodging arrangements for school-sponsored activities, which it refers to as "sleeping quarters." *Id.* § 33-

[3] "The Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States." 28 U.S.C. § 517.

[4] The United States takes no position on Plaintiffs' right to privacy claim.

[5] The United States does not concede to the accuracy of this definition.

6603(4). S.B. 1100 provides for some exceptions, including for "coaching staff and personnel during athletic events," but makes no exception for transgender students. *Id.* § 33-6604. And although S.B. 1100 includes "reasonable accommodation[s]," those accommodations do not, under any circumstances, allow a transgender student to access these sex-specific facilities if a person of the "opposite sex . . . could be present." *See id.* § 33-6605.

Idaho proffers "the privacy and safety of all students" as justification for these restrictions. Idaho Code Ann. § 33-6601(7). Specifically, Idaho claims that this law is justified because allowing students of the "opposite sex" to share restrooms and changing facilities "increas[es] the likelihood of sexual assault, molestation, rape, voyeurism, and exhibitionism" and "generates potential embarrassment, shame, and psychological injury to students." *Id.* § 33-6601(4).

S.B. 1100 creates a private cause of action, allowing any student to sue their public school for "each instance that [a] student encountered a person of the opposite sex" in a restroom, changing room, or sleeping quarters. Idaho Code Ann. § 33-6606(1) and (3). These students are entitled to $5000 in damages for each incident, as well as additional monetary damages and reasonable attorney's fees. *Id.* § 33-6606(3) and (4).

Plaintiff Rebecca Roe is a 12-year-old girl who is transgender and has attended Boise School District schools since kindergarten. No. 15-2, at 2.[6] Rebecca's declaration states that she is generally perceived as female by others and has used restrooms designated for girls outside of school without incident. No. 15-2, at 3. She has not used a boys' or men's restroom at school or

[6] "No.__, at __" refers to the docket entry number and page number of documents filed in this case, using the Court's CM/ECF pagination. For purposes of this Statement of Interest, the United States assumes the truth of Plaintiffs' personal declarations, Nos. 15-2 (Decl. of Rebecca Roe); 15-3 (Decl. of Rachel Roe); 15-4 (Decl. of A.J., President of Plaintiff SAGA), because those declarations are consistent with evidence and expert testimony the United States has encountered in its work about the experiences of many transgender students and their families, as well as with the findings of this Court and others in other litigation involving transgender students.

outside of school since the fifth grade. No. 15-2, at 4. Before starting sixth grade, Rebecca planned to use the nurse's restroom, but reports in her declaration that it was "stigmatizing and isolating" and less accessible than restrooms used by all the other girls at school. No. 15-2, at 4. As a result, Rebecca avers that she avoided using the restroom at school, limiting fluid intake and "hold[ing] it," which was unhealthy and created a physical and mental distraction throughout the school day. No. 15-2, at 4. For seventh grade, Rebecca will attend a new school with new classmates and wants to use the girls' facilities. No. 15-2, at 4-5. Rebecca's declaration expresses her fear that, if she is required to use the boys' restroom or a single-user restroom, classmates at her new school would know that she is transgender. No. 15-2, at 5. She states that, as the school year approaches, she is experiencing stress and pain thinking about the stigma and burdens S.B. 1100 imposes. No. 15-2, at 4-5. Rebecca's mother's declaration states that she and her husband worry about their child's physical safety, mental health, and general well-being because revealing that Rebecca is transgender makes her vulnerable to violence and targeting by other students. No. 15-3, at 4.

Plaintiff Sexuality and Gender Alliance (SAGA), is a student-led organization for high school students at Boise High School. No. 15-4, at 2. As set forth in the declaration of A.J., current president of SAGA, one of the organization's goals is "to ensure that LGBTQ+ students are safe and welcome at school." No. 15-4, at 2. SAGA has transgender members who, consistent with their school's policies pre-dating S.B. 1100, wish to use multi-occupancy restrooms and facilities that align with their gender identity. No. 15-4, at 2-3. A.J. is one of these students. Since the eleventh grade, A.J. reports in his declaration, he has used boys' restrooms consistent with his gender-support plan and has had no problems with other students when doing so. No. 15-4, at 3. Boise High School has only one single-user restroom that is less accessible than the various multi-

user restrooms and is sometimes closed for use. No. 15-4, at 4. A.J.'s declaration states that the thought of being forced to use the girls' restroom makes him "feel ill." *Ibid*.

S.B. 1100 now prohibits all Idaho public schools from allowing transgender students to use single-sex facilities with peers who share their gender identity. As a result, transgender students like Plaintiffs face an impossible choice: use facilities that do not align with their gender identities at the expense of their health, privacy, and safety; use separate, incomparable, single-user facilities and be outed as transgender to their peers, also at the expense of their health, privacy, and safety; *or* continue to use their established facilities and risk a damages lawsuit against their school. Plaintiffs therefore ask this Court to maintain the pre-S.B. 1100 status quo and enjoin Idaho from enforcing S.B. 1100. No. 1, at 38.[7]

ARGUMENT

On a motion for a preliminary injunction, the court reviews: (1) the movant's likelihood of success on the merits; (2) the threat of irreparable harm to the movant absent an injunction; (3) the balance of hardships; and (4) the public interest. *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011). The United States believes that Plaintiffs will likely succeed on the

[7] Where plaintiffs seek to preserve the status quo pending a decision on the merits, there is no heightened burden of proof. *Hecox*, 479 F. Supp. 3d at 972. The relevant "status quo" for purposes of an injunction "refers to the legally relevant relationship between the parties before the controversy arose." *Ibid*. (citing *Arizona Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1061 (9th Cir. 2014)). Here, Plaintiffs filed a motion for preliminary injunction to contest the enforceability of S.B. 1100. The status quo, therefore, is the policy in Idaho prior to S.B. 1100's enactment. *See ibid*. Prior to the enactment of S.B. 1100, Plaintiffs' school district designated multiuser, single-sex restrooms and changing facilities women/girls or men/boys and permitted students to use facilities consistent with their gender identity. Idaho's legislative finding that the "long-standing" practice was to separate such facilities based on "biological sex" discounts the long history of people who are transgender using single-sex facilities in Idaho that align with their gender identities without incident. Idaho's attempt at restrictively defining a person's sex to limit transgender students' access to school facilities is what is new.

merits of their Title IX and Equal Protection Clause claims and does not address the other preliminary injunction factors.

First, S.B. 1100 restrictively defines "sex" to categorically exclude students who are transgender from their public schools' multiuser, single-sex restrooms and changing facilities that are consistent with their gender identity. Taking as true Plaintiffs' personal declarations—which are consistent with the findings of this Court and others regarding transgender youth generally—this sex-based exclusion causes Plaintiffs substantial harm and deprives them of educational opportunities. S.B. 1100 therefore forces Plaintiffs' public schools to discriminate against them on the basis of sex in violation of Title IX, and no statutory or regulatory exception permits them to do so.

Second, S.B. 1100 runs afoul of the Equal Protection Clause's demand that the law's sex-based classifications be substantially related to the achievement of an important governmental objective. *See United States v. Virginia*, 518 U.S. 515, 533 (1996) (*VMI*). S.B. 1100, both by its terms and against the backdrop of its legislative record, lacks an "exceedingly persuasive justification" for its categorical exclusion of transgender students from single-sex facilities consistent with their gender identity, and therefore cannot withstand constitutional scrutiny. *See ibid.*

I. Plaintiffs Are Likely to Prevail on Their Title IX Claim

Title IX provides, "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." 20 U.S.C. § 1681(a). Plaintiffs prevail on their Title IX claim by showing that: (1) their educational institution receives federal financial assistance; (2) they were excluded from participation in an education program or

activity on the basis of sex; and (3) the exclusion caused them legally cognizable harm. *See Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 616-17 (4th Cir. 2020) (citation omitted), as amended (Aug. 28, 2020), cert. denied, 141 S. Ct. 2878 (2021). Plaintiffs are likely to make these showings.

First, Boise School District is a public school district that receives federal funds. Second, S.B. 1100 requires the district to exclude transgender students like Plaintiffs from an education program or activity—namely, school facilities—"on the basis of sex." *See Grimm*, 972 F.3d at 616. S.B. 1100 defines what it means to be of the male or female "sex" and then bars students whose gender identity is different from their "sex" as defined in the statute from entering school restrooms and changing facilities designated for "the opposite sex." Idaho Code Ann. §§ 33-6602-33-6603. The purpose and effect of S.B. 1100 is to exclude transgender students like Plaintiffs from those public-school facilities because of their sex assigned at birth, or, as the legislature terms it, their "biological sex." *Id.* § 33-6604(2). This is, by definition, exclusion "on the basis of sex." *See Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1739, 1741 (2020); *Grabowski v. Arizona Bd. of Regents*, 69 F.4th 1110, 1116-17 (9th Cir. 2023) (citing *Doe v. Snyder*, 28 F.4th 103, 114 (9th Cir. 2022) (finding *Bostock* controlling with respect to the meaning of discrimination on the basis of sex under Title IX).

Finally, assuming the truth of Plaintiffs' personal declarations, the sex-based exclusions mandated by S.B. 1100 subject them to cognizable harm. It is this injury that renders Plaintiffs' exclusion from single-sex facilities "discriminatory" under Title IX. *See Bostock,* 140 S. Ct. at 1753 (quoting *Burlington N. & Santa Fe Ry. Co.*, 548 U.S. 53, 59 (2006)) ("[T]he term 'discriminate against' refers to 'distinctions or differences in treatment that injure protected individuals.'").

Plaintiffs' declarations describe the concrete and substantial harms this exclusion will impose on them. *See, e.g.,* Nos. 15-2, 15-3, 15-4. Plaintiffs also offer declarations from school law enforcement, a psychologist and professor with expertise in transgender health, and school administrators who work with transgender students to underscore these harms. *See, e.g.,* Nos. 15-8, at 12; 15-5, at 22; 15-6, at 4. The harms described in these declarations are consistent with harms recognized by courts in other cases involving the exclusion of transgender students from single-sex facilities. *See Grimm*, 972 F.3d at 597-601, 617-18 (bathroom policy made plaintiff feel "alienat[ed]" and "humiliat[ed]"); *Dodds v. U. S. Dep't of Educ.,* 845 F.3d 217, 221-22 (6th Cir. 2016) (exclusion from the girls' restrooms "had substantial and immediate adverse effects" on plaintiff's "daily life," "health," and "well-being"); *A.C. by M.C. v. Metro. Sch. Dist. of Martinsville*, No. 22-1786, 2023 WL 4881915, at *8 (7th Cir. Aug. 1, 2023) (transgender boys "reported feeling depressed, humiliated and excluded by the requirement to use either the girls' bathrooms or the unisex bathroom"); *Whitaker by Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1045-47 (7th Cir. 2017) (exclusion from boys' restroom "stigmatized" transgender boy, causing him "significant psychological distress" including "depression and anxiety"), cert. dismissed, 138 S. Ct. 1260 (2018).

Likewise, courts have recognized that relegating transgender students to single-user facilities generally does not ameliorate—and may amplify—these injuries. Nos. 15-2, at 5; 15-4, at 2; *Grimm*, 972 F.3d at 617-18 (quoting *Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518, 530 (3d Cir. 2018)) (forcing transgender students to use gender-neutral facility would likewise "constitute harm under Title IX, as it 'invites more scrutiny and attention' from other students, 'very publicly branding all transgender students with a scarlet 'T'.'") (brackets omitted), cert. denied, 139 S. Ct. 2636 (2019).

If this Court credits the Plaintiffs' declarations, Plaintiffs satisfy the elements of their Title IX claim. The only question, then, is whether Title IX contains an exception that would allow recipients to subject Plaintiffs to sex-based harm in the context that S.B. 1100 applies. It does not.

Since 1975, Title IX's implementing regulations have specified that separate or differential treatment on the basis of sex is presumptively a form of prohibited sex discrimination. *See, e.g.,* 34 CFR § 106.31(b)(4), (7) ("Except as provided in this subpart, in providing any aid, benefit, or service to a student, a recipient shall not, on the basis of sex . . . [s]ubject any person to separate or different rules of behavior, sanctions, or other treatment; [or] [o]therwise limit any person in the enjoyment of any right, privilege, advantage, or opportunity."). Nevertheless, the regulations have recognized limited contexts in which recipients are permitted to separate students on the basis of sex, including restrooms and locker rooms. *See* 34 C.F.R § 106.33 (toilet, locker room, and shower facilities); *see also, e.g., id.* § 106.34(a)(3) (human sexuality classes). But these limited instances of allowable separation do not, and cannot, sanction sex-based harm to students in these contexts. *See Grimm*, 972 F.3d at 618 ("[T]he implementing regulation cannot override the statutory prohibition against *discrimination* on the basis of sex."). Rather, the regulations allow this separation precisely because excluding a student from a particular single-sex restroom or locker room facility designated for another sex, as a general rule, does not cause that student harm. *Cf. Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81 (1998) (Title VII does not reach non-harmful "differences in the ways men and women routinely interact with" each other). That general rule, however, does not hold when the student is transgender. In that circumstance, such exclusion *does* impose not only legally cognizable but substantial harm of the type Plaintiffs' declarations describe. *See* Nos. 15-2, 15-3, 15-4.

Thus, to the extent that Title IX's regulations permit sex-separation of restrooms and changing facilities in K-12 schools, a recipient may not carry out such separation in a manner that discriminates against students by subjecting them to the kind of harms at issue here—which, as reflected in numerous court opinions—are substantial. *See Parents for Privacy v. Barr*, 949 F.3d 1210, 1227 (9th Cir.) ("[J]ust because Title IX authorizes sex-segregated facilities does not mean that they are required, let alone that they must be segregated based only on biological sex and cannot accommodate gender identity."), cert. denied, 141 S. Ct. 892 (2020); *Grimm*, 972 F.3d at 618 ("All [Title IX's implementing regulation] suggests is that the act of creating sex-separated restrooms in and of itself is not discriminatory—not that, in applying bathroom policies to [transgender] students . . . the Board may rely on its own discriminatory notions of what 'sex' means.").

There are likewise no statutory exemptions or other statutory provisions that allow recipients to discriminate in the context of sex-separate bathrooms and changing facilities in K-12 public schools. Indeed, Congress has specified limited circumstances where Title IX does not prohibit harm resulting from sex separation. *See, e.g.*, 20 U.S.C. §1681 (a) (1-9); 20 U.S.C. § 1686. In particular, the statute's "living facilities" provision carves out from Title IX's general prohibition on sex discrimination an allowance for recipients to maintain sex-separate living facilities. 20 U.S.C. §1686 ("Notwithstanding anything to the contrary contained in [Title IX]," nothing in Title IX "shall be construed to prohibit any educational institution . . . from maintaining separate living facilities for the different sexes."). But that carve out does not apply to restrooms, locker rooms, or shower facilities, which the Title IX regulations have long addressed separately from "living facilities." *Compare* 34 C.F.R. § 106.32 (housing, citing Section 907 of the Education Amendments (20 U.S.C. §1686) as its statutory authority) *with* 34 C.F.R. § 106.33 (toilet, locker

room, and shower facilities, citing Section 901 of the Education Amendments (20 U.S.C. §1681) as its statutory authority); 40 Fed. Reg. 24128, 24141 (June 4, 1975).[8] Congress therefore created no statutory exemption or carve out for sex-separate restrooms and changing facilities in K-12 public schools, which are governed by Title IX's general non-discrimination mandate prohibiting sex-based exclusions that "injure protected individuals." *See Bostock*, 140 S. Ct. at 1753.[9]

In short, Title IX and its regulations provide no "safe harbor" for S.B. 1100 and other laws and policies that seek to exclude students who are transgender from using the single-sex bathrooms and changing facilities that are consistent with their gender identity. If this Court determines Plaintiffs have established the facts described in their declarations, which are consistent with facts found in other cases cited above, the United States believes they are likely to prevail on the merits of their Title IX claim.

II. S.B. 1100 Violates the Equal Protection Clause of the Fourteenth Amendment

The Constitution prohibits Idaho from implementing S.B. 1100. The law classifies on the basis of sex and discriminates against people who are transgender, a "quasi-suspect class." *See Karnoski v. Trump*, 926 F.3d 1180, 1201 (9th Cir. 2019). S.B. 1100 must therefore withstand heightened scrutiny. It does not. Even assuming Idaho's asserted interest in "protecting the privacy and safety of all students" is genuine, S.B. 1100 is not, either on its face or on the basis of

[8] *See* https://www.ecfr.gov/current/title-45/subtitle-A/subchapter-A/part-86.

[9] This Court should therefore decline to follow the Eleventh Circuit's reasoning that the statutory carve out for living facilities should somehow be understood to also create a carve out for bathrooms and locker rooms, which are clearly governed not by Section 1686, but by the statute's general nondiscrimination mandate, Section 1681. *See Adams v. Sch. Bd. Of St. Johns Cnty.*, 57 F.4th 791, 813-14 (11th Cir. 2022) (en banc). Such reasoning cannot be reconciled with Title IX's plain text and ignores that Congress could have, but did not, address anything other than the practice of maintaining sex-separate "living facilities" in Section 1686.

its legislative record, substantially related to the achievement of that goal. Plaintiffs are therefore likely to succeed on the merits on their equal protection claim.

A. S.B. 1100 Warrants Heightened Scrutiny Under the Equal Protection Clause

Heightened scrutiny applies here because S.B. 1100 classifies based on sex and because it discriminates against people who are transgender, a quasi-suspect class. *See Grimm*, 972 F.3d at 608 (holding that an exclusionary bathroom policy relied on sex-based classifications); *Karnoski*, 926 F.3d at 1201 (accepting district court's determination that transgender people are members of a quasi-suspect class).

S.B. 1100 restrictively defines "sex," then limits how students may access facilities based on that definition. The law therefore relies on a sex-based classification and cannot be enforced "without referencing sex." *Grimm*, 972 F.3d at 608 (quoting *Whitaker*, 858 F.3d at 1051). The Supreme Court has long recognized that such sex-based classifications warrant heightened scrutiny. *See, e.g.*, *VMI*, 518 U.S. at 532-33 (citing *Miss. Univ. for Women v. Hogan*, 458 U.S. 718 (1982)). Indeed, every circuit to address transgender students' access to sex-separated spaces has applied heightened scrutiny. *Grimm*, 972 F.3d at 607-10; *Dodds,* 845 F.3d at 221 (affirming district court decision that employed heightened scrutiny because bathroom policy discriminates based on sex stereotypes); *Whitaker*, 858 F.3d at 1051 (same); *Martinsville*, No. 2023 WL 4881915, at *8; *Adams v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 803 (11th Cir. 2022) (en banc).

Heightened scrutiny also applies here because transgender people are a quasi-suspect class. In *Karnoski*, the Ninth Circuit upheld the district court's determination that, applying the relevant factors, transgender people constitute a quasi-suspect class. 926 F.3d at 1201 ("the district court reasonably applied the factors ordinarily used to determine whether a classification affects a suspect or quasi-suspect class"). This conclusion is consistent with the decisions of many other

courts to have considered the question. *See, e.g., Grimm,* 972 F.3d at 610-13.[10] This Court should not hesitate to reach the same conclusion. It is irrelevant that S.B. 1100 refrains from explicitly using the word "transgender": under the law's definition of "sex," transgender students are the only students banned from facilities that align with their gender identity. *See Hecox v. Little*, 479 F. Supp. 3d 930, 975 (D. Idaho 2020), aff'd, No. 20-35813, 2023 WL 1097255 (9th Cir. Jan. 30, 2023). S.B. 1100 thus discriminates against transgender students, who are members of a quasi-suspect class, and employs a classification based on sex. Idaho, therefore, must show that S.B. 1100 survives heightened scrutiny.

B. S.B. 1100 Cannot Survive Heightened Scrutiny

To survive heightened scrutiny, Idaho must show the law "serves important governmental objectives" and the "discriminatory means employed are substantially related to the achievement of those objectives." *See VMI*, 518 U.S. at 524 (quoting *Miss. Univ. for Women*, 458 U.S. at 724). "The burden of justification is demanding[,] rests entirely on the State," and must be "'exceedingly persuasive.'" *Id.* at 533 (quoting *Miss. Univ. for Women,* 458 U.S. at 724). The governmental interest "must be genuine, not hypothesized" and "must not rely on overbroad generalizations." *Ibid*. A classification does not withstand heightened scrutiny when "the alleged objective" of the classification differs from the "actual purpose." *Miss. Univ. for Women,* 458 U.S. at 730.

[10] *See also Ray v. McCloud*, 507 F. Supp. 3d 925, 937 (S.D. Ohio 2020); *F.V. v. Barron*, 286 F. Supp. 3d 1131, 1145 (D. Idaho 2018), decision clarified sub nom. *F.V. v. Jeppesen*, 477 F. Supp. 3d 1144 (D. Idaho 2020); *Flack v. Wis. Dep't of Health Servs.*, 328 F. Supp. 3d 931, 951-53 (W.D. Wisc. 2018); *M.A.B. v. Bd. of Educ. of Talbot Cnty.*, 286 F. Supp. 3d 704, 719 (D. Md. 2018); *Evancho v. Pine-Richland Sch. Dist.*, 237 F. Supp. 3d 267, 288 (W.D. Pa. 2017); *Bd. of Educ. of the Highland Loc. Sch. Dist. v. U.S. Dep't of Educ.*, 208 F. Supp. 3d 850, 873-74 (S.D. Ohio 2016); *Adkins v. City of New York*, 143 F. Supp. 3d 134, 139-40 (S.D.N.Y. 2015); *Norsworthy v. Beard*, 87 F. Supp. 3d 1104, 1119 (N.D. Cal. 2015).

S.B. 1100 cannot survive the rigorous analysis that heightened scrutiny demands. Idaho claims that S.B. 1100 furthers the important governmental interest of "protecting the privacy and safety of *all* students." Idaho Code Ann. § 33-6601(7) (emphasis added). Even if this stated purpose is genuine, S.B. 1100 is not "substantially related" to the achievement of that objective. *See VMI*, 518 U.S. at 533 (citation omitted). In fact, S.B. 1100's categorical exclusion of transgender students from sex-specific facilities consistent with their gender identity significantly jeopardizes *their* safety and privacy, and does little, if anything, to advance the privacy and safety of other students. *See Hecox*, 479 F. Supp. 3d at 976 (citing *Latta v. Otter*, 19 F. Supp. 3d 1054, 1077 (D. Idaho), aff'd, 771 F.3d 456 (9th Cir. 2014)) (courts evaluate whether the "proffered justifications overcome the injury and indignity inflicted on Plaintiffs and others like them."). S.B. 1100 is therefore not substantially related to its stated purpose.

First, S.B. 1100's stated purpose of "protecting the privacy and safety of all students" necessarily includes the safety and privacy of transgender students, as the word "all," by definition, is encompassing. The law, however, threatens rather than protects transgender students' safety and privacy. Using school facilities matching their gender identity is essential to the mental health and physical safety of transgender students. *See Grimm*, 972 F.3d at 595-97 (discussing the significant body of evidence and research on this topic and describing the mental and physical harms associated with excluding a transgender child from school facilities consistent with their gender identity); *Whitaker*, 858 F.3d at 1040-42, 1045-46 (discussing the irreparable harm, including depression, thoughts of suicide, and intrusion on privacy, that transgender student was likely to suffer if excluded from the boys' bathroom and required to use single-user restroom). As the Third Circuit recognized, "transgender students face extraordinary social, psychological, and medical risks" that weigh heavily in favor of allowing them to live consistent with their gender

identities at school, which includes access to appropriate facilities. *Boyertown*, 897 F.3d at 529 (finding that policies allowing transgender students to use facilities consistent with their gender identity is necessary because doing otherwise "can exacerbate gender dysphoria, lead to negative educational outcomes, and precipitate self-injurious behavior.").[11]

Moreover, S.B. 1100 creates a private cause of action that incentivizes students to surveil transgender students, or any student suspected of being transgender, further placing their safety and privacy at risk. Idaho Code Ann. § 33-6606 (providing that any student who "encounters a person of the opposite sex" in a public-school restroom, changing facility, or sleeping quarters has a private cause of action against the school district and may recover $5000). S.B. 1100 provides a financial inducement for students to police one another, even in schools where transgender students have used the facilities consistent with their gender identity without incident, creating new and pressing safety issues for transgender students who are already the subject of increased victimization by their peers. *See Grimm*, 972 F.3d at 597. Should a transgender student, or any student for that matter, be accused of entering the "wrong" restroom or changing room, they may very well be made the subject of an inquiry into their "external reproductive anatomy." Idaho Code Ann. § 33-6602(3). This provision shows that S.B. 1100 was clearly not intended to ensure the safety and privacy of *all* students.

S.B. 1100's "accommodations" provisions do nothing to alleviate these threats to transgender students' safety and privacy. In fact, forcing transgender students to use single-user restrooms threatens to out them as transgender to their peers. *See Boyertown*, 897 F.3d at 530 (forcing transgender students to use single-user facilities causes "extraordinary consequences" that

[11] S.B. 1100's legislative findings acknowledge these cases. *See* Idaho Code Ann. § 33-6601. Yet, the statute and legislative record fail to grapple with their holdings and detailed analyses.

non-transgender students who voluntarily use single-user facilities do not experience); *Whitaker*, 858 F.3d at 1045 (requiring a transgender student to use single-user facilities "actually invited more scrutiny and attention from his peers"). As courts have recognized, requiring transgender students to use single-user facilities publicly brands them as unequal, invades their privacy, and renders them vulnerable to violence and harassment. *See Boyertown*, 897 F.3d at 530; *see also Grimm*, 972 F.3d at 609; *Whitaker*, 858 F.3d at 1045.

In short, S.B. 1100 creates rather than solves safety and privacy problems, particularly for transgender students. Because S.B. 1100 itself subjects transgender students to harm and severely compromises their privacy and safety, Idaho cannot show that the law is "substantially related" to its stated purpose of protecting "all students." *See VMI*, 518 U.S. at 533.

Second, S.B. 1100 does little, if anything, to advance the safety and privacy of non-transgender students. S.B. 1100 claims the law protects students from "sexual assault, molestation, rape, voyeurism, and exhibitionism." Idaho Code Ann. § 33-6601(4). But schools already create and enforce nondiscriminatory rules designed to ensure the safety of their facilities. *See Martinsville*, 2023 WL 4881915, at *9 (noting that schools monitor student conduct in bathrooms and locker rooms and gender-affirming policies "neither thwart rule enforcement nor increase the risk of misbehavior" in those facilities). The legislative record is bereft of any evidence of transgender students in Idaho engaging in any of the named conduct. Instead, proponents conceded that there were no "documented cases of trans person violence on non-trans people." *Protecting the Privacy and Safety of Students in Public Schools: Hearing on S.B. 1100 Before the H. Educ. Comm.*, 67th Leg., 1st Sess. (Idaho 2023) (00:40:05-00:40:50) (statements of Rep.

Woodings and Rep. Hill, Members, H. Comm. on Educ.).[12] Thus, even if this Court were to credit the legislative record's statements about supposed safety threats to public school students arising from the use of restrooms by persons of the "opposite sex," as the law defines that term, Idaho offers no justification for applying those assumptions so sweepingly to all transgender students. *See VMI*, 518 U.S. at 541-42 (justifications for sex-based classifications must not rely on "overbroad generalizations," and "we have cautioned reviewing courts to take a hard look at generalizations or tendencies of the kind pressed by [the State]") (citations and internal quotation marks omitted).

Similarly, Idaho claims that S.B. 1100's categorical ban is justified because of the "potential embarrassment, shame, and psychological injury" some students might feel if they share a restroom or changing facility with a person of "the opposite biological sex." Idaho Code Ann. § 33-6601(4). Courts have found that such privacy justifications cannot substantiate the exclusion of transgender students from single-sex facilities consistent with their gender identity, given the reality of how they use those facilities. *See, e.g., Grimm,* 972 F.3d at 613-15 (Excluding transgender students from restrooms that correspond to their gender identity "ignores the reality of how a transgender child uses the bathroom: by entering a stall and closing the door.") (quoting *Whitaker*, 858 F.3d at 1052); *Martinsville,* 2023 WL 4881915, at *9 ("Gender-affirming facility access does not implicate the interest in preventing bodily exposure because there is no such

[12] Idaho legislators appeared to rely on an incident in Loudoun County, Virginia as justification for S.B. 1100. *See Protecting the Privacy and Safety of Students in Public Schools: Hearing on S.B. 1100 Before the H. Educ. Comm.*, 67th Leg., 1st Sess. (Idaho 2023) (00:32:44-00:33:10) (statement of Rep. Wisniewski, Member, H. Comm. On Education). Nebulous references to a single out-of-state incident that may not even involve a transgender student do not provide an "exceedingly persuasive" justification for the sweeping exclusion of transgender students from all single-sex facilities in Idaho public schools. *See Hecox*, 479 F. Supp. 3d at 978-79 (anecdotes about runners from other states were insufficient to support banning transgender athletes in Idaho) (citation omitted).

exposure."); *Whitaker*, 858 F.3d at 1052 ("A transgender student's presence in the restroom provides no more of a risk to other students' privacy rights than . . . any other student who uses the bathroom at the same time."). Such injuries are insufficient to justify categorically excluding all transgender students from single-sex school facilities consistent with their gender identity, particularly when doing so subjects *them* to concrete, demonstrable embarrassment, shame, and psychological, and even physical, injuries. *See Boyertown*, 897 F.3d at 529-30 (finding that non-transgender students' discomfort could not be "equate[d] . . . with the very drastic consequences that the transgender students must endure if the school were to ignore the latter's needs and concerns"); *see also Parents for Privacy*, 949 F.3d at 1225 (holding that transgender students' access to bathrooms matching their gender identity did not violate non-transgender students' constitutional privacy right). Idaho's "proffered justification[]" of privacy for non-transgender students does not "overcome the injury and indignity inflicted on [transgender students]." *See Hecox*, 479 F. Supp. 3d at 976 (citation omitted).

Finally, to the extent Idaho claims S.B. 1100 is clearly related to its important objective of protecting the privacy interests of students to use facilities away from the "opposite biological sex" *as S.B. 1100 defines that term*, this reasoning is fatally circular. *See, e.g., Adams,* 57 F.4th at 805 (reasoning, in circular fashion, that "[t]he School Board's bathroom policy is clearly related to—indeed, is almost a mirror of—its objective of protecting the privacy interests of students to use the bathroom away from the opposite sex"). The State cannot simply argue that its discriminatory means (excluding students from facilities based on "sex" without regard for gender identity) is justified by its discriminatory ends (separating facilities on the basis of "sex" without regard for gender identity). *See VMI*, 518 U.S. at 545 (rejecting as "notably circular" and a misperception of the Court's precedent the State's argument that "[s]ingle-sex education at VMI serves an important

governmental objective, . . . and exclusion of women is not only substantially related, it is essential to that objective") (internal citations omitted). If this sort of circular reasoning were sufficient to withstand heightened scrutiny, all sex-based exclusions could be justified as substantially related to the "important" goal of sex separation simply by stating as much. *VMI* explicitly rejected this faulty logic, *see ibid.*, and this Court should too.

In sum, if privacy and safety of all students is Idaho's goal, S.B. 1100 does not further it. S.B. 1100 disregards the safety and privacy of transgender students and exacerbates dangers they already face. And the legislative record fails to demonstrate that the categorical exclusion of transgender students from single-sex facilities consistent with their gender identity is "substantially related" to protecting the safety and privacy of other, non-transgender students. Because Idaho has not demonstrated an "exceedingly persuasive justification" for its discriminatory law, Plaintiffs are likely to succeed on the merits of their equal protection claim.

CONCLUSION

S.B. 1100 requires public schools to discriminate against transgender students by subjecting them to sex-based harms and depriving them of equal educational opportunities in violation of Title IX. S.B. 1100's exclusionary sex-based means also do not further Idaho's purported goal of protecting all students' privacy and safety. Instead, S.B. 1100 imposes state-sanctioned injuries and indignity on transgender students. Such a law cannot withstand the heightened scrutiny the Constitution requires. Plaintiffs are therefore likely to succeed on the merits of their Title IX and equal protection claims.

Respectfully submitted, this 8th day of August, 2023.

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

REBECCA ROE, et al.,

Plaintiffs,

v.

DEBBIE CRITCHFIELD, et al.,

Defendants.

Case No. 1:23-cv-00315-DCN

Supplemental Declaration of Jimmy P. Biblarz

SUPPLEMENTAL DECLARATION OF JIMMY P. BIBLARZ

I, Jimmy P. Biblarz, do declare as follows:

1. I am an attorney at law duly admitted and licensed to practice law in the State of California and counsel for Plaintiffs Rebecca Roe and Sexuality and Gender Alliance in the above-captioned action. I am admitted to appear before this Court pro hac vice. I am an attorney at the law firm of Munger, Tolles & Olson LLP in Los Angeles. I have personal knowledge of the facts contained herein or know of such facts by my review of the files maintained by Munger, Tolles & Olson LLP in the normal course of its business, and if called upon to do so, could and would competently testify thereto.

2. In Greg Wilson's Declaration in Support of Defendants' Opposition of Plaintiffs' Motion for a Temporary Restraining Order, he avers: "To the best of the State Education Department's estimation, even before the enactment of S.B. 1100, the vast majority of Idaho public school districts (approximately three-quarters of school districts) maintained sex-separated restrooms, changing facilities, and overnight accommodations and did not have any policy that would permit the relief that Plaintiffs seek here." Although S.B. 1100 also applies to charter schools, *see* 33-6602(2) ("'Public school' means any public school teaching K-12 students within an Idaho school district or charter school."), Mr. Wilson states that his averment does not pertain to or include them, Wilson Decl. ¶ 5 ("The state of Idaho has 115 traditional public school districts, without counting public charter schools."); *id.* ¶ 6 (addressing "Idaho public school districts").

3. In preparation for Plaintiffs' reply brief in support of their motion for a preliminary injunction, I oversaw research into the basis for Mr. Wilson's averment that "before the enactment of SB 1100," "that vast majority of Idaho public school districts (approximately

three-quarters of school districts) … did not have any policy that would *permit* the relief that Plaintiffs seek here." Wilson Decl. ¶ 6 (emphasis added).

4. To test this proposition, I searched at length for any publicly available "policy" in any Idaho public school district (*i.e.*, not charter schools, which Mr. Wilson does not purport to address) that, before S.B. 1100, categorically prohibited transgender students from using sex-separated facilities aligned with their gender identity. To reasonably conduct this search, I first identified the list of Idaho public school districts from the State of Idaho's website (https://www.idaho.gov/education/school-districts/). I determined that each school district had a publicly accessible website on which it published district policies, handbooks, community updates, calendars, and related information. For example, Bonneville Joint School District #93's website can be accessed at https://www.d93schools.org/. I then visited the website of each public school district in Idaho, and looked for available policy manuals, handbooks, press releases, handouts, or other available writings related to whether a school district had a policy expressly allowing, or expressly disallowing, under all or certain circumstances, a transgender person to use sex-separated facilities that correspond with their gender identity.

5. Through this search, I was able to locate numerous written, accessible policies or practices governing the subject matter stated above (many of which expressly allowed, before S.B. 1100, transgender students to use facilities that aligned with their gender identity). However, I identified no written policy that met Mr. Wilson's description, *i.e.*, that existed before the enactment of S.B. 1100 and categorically excluded transgender students from sex-separated facilities that correspond to their gender identity.

6. For districts where I did not identify any available policies via their websites, I then conducted a Google search of the school district name and a variety of key terms including

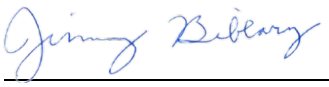
"transgender," "bathroom access," and "facilities policy." I identified and read several media articles that discussed school board debates about facilities policies. Lastly, to the extent they were publicly available on districts' websites, I reviewed school board meeting minutes from the last three years for districts where I had been unable to find any facilities policy information. I looked for agenda items related to facilities policies.

7. Again, I was not able to locate any policy that met Mr. Wilson's description, *i.e.*, that existed before the enactment of S.B. 1100 and categorically excluded transgender students from sex-separated facilities that correspond to their gender identity.

8. I also reviewed the Idaho House Education Committee and Idaho Senate Education Committee hearings on S.B. 1100. Between the two hearings, the words "transgender" or "trans" (referring to transgender people), were referenced at least 75 times.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Dated: September 6, 2023



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UNITED STATES DISTRICT COURT
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REBECCA ROE, et al.,

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DEBBIE CRITCHFIELD, et al.,

Defendants.

Case No. 1:23-cv-00315-DCN

EXPERT REBUTTAL DECLARATION OF STEPHANIE L. BUDGE, PH.D.

EXPERT REBUTTAL DECLARATION OF STEPHANIE L. BUDGE, PH.D.

I, Dr. Stephanie L. Budge, Ph.D., hereby declare as follows:

1. I submit this expert declaration based on my personal knowledge.

2. If called to testify in this matter, I would testify truthfully based on my expert opinion.

3. In preparing this declaration, I reviewed the expert declaration submitted by Dr. James Cantor, Ph.D., in support of the Defendants' Opposition to Plaintiffs' Motion for Preliminary Injunction. As with my prior expert declaration in this matter, I also relied on my scientific education and training, my research experience, and my knowledge of the scientific literature in the pertinent fields.

4. The materials I have relied upon in preparing this declaration are the same types of materials that experts in my field of study regularly rely upon when forming opinions on these subjects. I may wish to supplement these opinions or the bases for them as the result of new scientific research or publications in response to statements and issues that may arise in my area of expertise.

5. My understanding is that this case is a legal challenge to SB 1100, which prohibits transgender youth from using school-based sex-separated facilities that align with their gender identity.

A. Dr. James Cantor does not have the level of expertise required to provide expert opinions regarding the issues raised in my initial declaration

6. There are several reasons why Dr. Cantor does not have the level of expertise to provide expert opinions regarding the issues discussed in my declaration. As part of his introduction, Dr. Cantor mentions his prior association with academic journals and as a member of the American Psychological Association. Dr. Cantor has never been on a review board or an editor of a journal that specializes in transgender health, but instead journals that focus on sexuality, sexual behavior, and sexual abuse; it is also notable that he is no longer even in these

positions.[1] Dr. Cantor also mentions his experience being the chair for the Committee for Science Issues for the American Psychological Association's (APA) LGBT Division but fails to mention that this was 20 years ago (2002-2003), while the field of transgender science has developed significantly since then.[2] I have been a member of the LGBT Division of APA since 2006 and I have never heard anyone in the division or in the APA generally indicating Dr. Cantor's expertise related to transgender issues. As a scholar in the field, I regularly attend transgender-focused academic conferences and larger conferences relating to mental health issues (such as the American Psychological Association convention). I have never seen Dr. Cantor present at those conferences on any issues relating to transgender health nor have I seen his name listed regarding transgender health on any of the scientific programming at any conference I have attended. In fact, his conference presentations and journal publications primarily focus on pedophilia, sex offenders, and hypersexuality; the articles that do focus on transgender people include one peer reviewed original research article, two commentaries, and two versions of the same book chapter. Only one of his publications has been an original research article about transgender people.[3]

7. Dr. Cantor downplays the importance of clinical expertise in his declaration, yet he opines on the role that psychotherapy can play in addressing gender dysphoria. It is notable

[1] In contrast, I am an associate editor for the *Psychology of Sexual Orientation and Gender Diversity* and on the editorial board of two transgender-centered academic journals (*International Journal of Transgender Health* and *LGBTQ+ Family: An Interdisciplinary Journal*).

[2] In contrast, I was the co-chair of the same committee from 2011-2021 and am a current member of the committee.

[3] In comparison, I have published 54 peer-reviewed journal articles regarding transgender people, 12 book chapters regarding transgender people, and have provided more than 100 international and national peer-reviewed presentations on transgender-related issues.

that there is no mention in Dr. Cantor's declaration that he has ever treated a minor with gender dysphoria. Additionally, when mentioning his professional expertise, he does not provide any information that he has ever diagnosed a child or adolescent with gender dysphoria, nor does it seem that he has ever monitored or supervised any minor patient receiving gender affirming treatment.

8. At no point in his declaration does Dr. Cantor mention facilities or restrooms and how his conclusions in his declaration relate to this specific case at hand. However, in a "Bill of Transsexual Rights" that he has drafted and posted on his personal website, he notes that "[t]ranssexual individuals have the right, during transition, to access sex-specific public facilities in which their contrary genital status would not be evident. For example, for the great majority of instances, a presurgical male-to-female transsexual presenting as female can use a female-designated restroom unobtrusively. (Cantor, nd)" *See* http://www.jamescantor.org/bill-of-rights.html. Therefore, in his own work Dr. Cantor recognizes the importance of transgender people's access to the sex-separated facility that matches their gender identity. He also states that "one does not choose to be dysphoric about the sex they were born into," that people "have the right to be free from undue pressure . . . not to transition," and that transgender people "have the right to be recognized in their new gender by . . . local and federal governments."

B. Dr. Cantor's Criticisms of the Standards of Care for Treatment of Gender Dysphoria Are Not Well-Founded

9. Dr. Cantor spends much of his declaration criticizing the well-established international standards of care for transgender youth, which have been promulgated both by the World Professional Association for Transgender Health ("WPATH") and the Endocrine Society. Below, I offer the ways in which Dr. Cantor's criticisms are lacking and embody an outlier view that is not supported by medical science or best practices in the provision of medical care.

10. Contrary to Dr. Cantor's unsupported claim that these standards lack a sufficient evidentiary basis, both WPATH and the Endocrine Society have developed standards for treating gender dysphoria in minors using the same evidence-based approach used to develop standards of care and practice guidelines for the treatment of many other medical conditions. For example, "[r]ecommendations in the SOC-8 are based on available evidence supporting interventions, a discussion of risks and harms, as well as feasibility and acceptability within different contexts and country settings. Consensus on the final recommendations was attained using the Delphi process that included all members of the guidelines committee and required that recommendation statements were approved by at least 75% of members (p.8) (Coleman et al., 2022)." In addition, each recommendation is labeled according to a modified version of the Grading of Recommendations, Assessment, Development and Evaluations ("GRADE") framework, which helps clarify the quality of the evidence supporting the recommendation, among other things.

11. Similarly, the Endocrine Society's "evidence-based guideline" for hormone therapy treatment is based in part on two systematic reviews commissioned to help develop the guideline and used the best available evidence from other published systematic reviews and individual studies (Hembree et al. 2017). These recommendations were also developed using the GRADE approach to describe the strength of recommendations and the quality of evidence. Dr. Cantor suggests that the efficacy of this care has been called into doubt by reports from several international health care systems. But none of the countries Dr. Cantor discusses—the United Kingdom, Sweden, Finland, Norway, and France—ban either puberty blockers or hormones for transgender adolescents. Similarly, none of the international reports that Dr. Cantor cites is a clinical practice guideline, and none recommend banning medical care for transgender youth. The primary focus of concern in these countries is *improving* the delivery of services and quality

of care, including ensuring that providers follow the standards of care and provide medical treatments only after careful evaluation and assessment.

12. For example, Dr. Cantor cites a report by Dr. Hilary Cass (2022), which reviewed the delivery of care to transgender youth in England and identified problems related to the centralization of care in a single facility. Dr. Cantor fails to note that this report concludes by recommending that England create *more* centers for providing this care and that providers follow the Endocrine Society Guidelines when providing hormone therapy.

C. Dr. Cantor's View that Transgender Youth Are Mentally Ill and Should Not be Given Supportive Medical Care or Permitted to Transition Is Not Well-Founded

13. Dr. Cantor does not explain how his criticisms of the standards of care for treating gender dysphoria in youth are relevant to my understanding of the central issue in this case: whether transgender youth should be able to use sex-separated facilities that align with their gender identity. Although it is not entirely clear, Dr. Cantor appears to believe that minors who are diagnosed with gender dysphoria should be required to live in accordance with their sex assigned at birth and should not be permitted to transition either socially or through medications. Instead, Dr. Cantor appears to believe these minor patients should be given counseling to prevent them from identifying as transgender, based on his view that gender dysphoria in minors is a manifestation of some other mental health condition, such as borderline personality disorder. Cantor Dec. ¶ 93.

14. Dr. Cantor's views on this topic have no scientific basis and contradict the medical consensus that gender dysphoria in minors is a real and distinct medical condition, and not a manifestation of "gender identity confusion" caused by other "mental health issues." Cantor Dec. ¶ 93. Dr. Cantor's claim that patients who have borderline personality disorder are regularly being misdiagnosed with gender dysphoria has no scientific or clinical basis. None of

the studies he cites for this proposition involve transgender youth, and there are no studies that support Dr. Cantor's claims regarding this association.

15. Dr. Cantor's views also contradict the medical consensus that trying to encourage or compel transgender youth to live in accordance with their sex assigned at birth is ineffective, unethical, and harmful. For example, the WPATH standards of care explicitly state that conversion therapy (also referred to as "reparative therapy" and "gender identity change efforts" ("GICE")) not only does not result in changes in gender identity, but also is associated with increases in clinical distress (Coleman et al., 2022). The American Psychological Association (2023) also notes in its resolution on GICE "that scientific evidence and clinical experience indicate that GICE put individuals at significant risk of harm" and that the organization opposes any of these practices based on the evidence base. Similarly, the American Academy of Child and Adolescent Psychiatry (2018) has noted that there "lack[s] scientific credibility and clinical utility" for conversion therapy and "there is evidence that such interventions are harmful. As a result, 'conversion therapies' should not be part of any behavioral health treatment of children and adolescents. However, this in no way detracts from the standard of care which requires that clinicians facilitate the developmentally appropriate, open exploration of sexual orientation, gender identity, and/or gender expression, without any pre-determined outcome."

16. It is also my clinical experience that psychotherapy is not effective as the sole treatment for individuals who need to socially transition and who need medical changes to their bodies to reduce gender dysphoria. I have often worked with individuals diagnosed with gender dysphoria who have financial barriers that do not allow them to receive medical treatments. I have also provided psychotherapy to transgender adolescents who experienced interpersonal barriers to social and medical transition. While psychotherapy can assist these patients with

coping on a day-to-day basis, many of these patients experience significant distress from delays in social and medical transition, and psychotherapy alone does not alleviate their dysphoria. Clinically, I see extremely high rates of suicidal ideation and suicidal intent with patients who have barriers to social and medical transitioning. I have assisted several of these patients with obtaining inpatient care to ensure that they do not die by suicide (that inpatient care, however, is costly and usually only provides a short-term solution to their immediate distress). As noted in my previous declaration, delaying the transition process can be detrimental for transgender youth, with early recommendations noting the importance of not delaying a gender dysphoria diagnosis and treatments (including social transition) that are most appropriate for the youth (Edwards-Leeper et al., 2012) and more recent articles noting the immense harms from delaying treatment (de Vries et al., 2021). In sum, Dr. Cantor's view that minors with gender dysphoria should not be permitted to transition and should be counseled to live in their sex assigned at birth contradicts a long-standing and well-established consensus opposing such practices as ineffective and harmful.

17. Dr. Cantor also expresses concern that the process of diagnosing gender dysphoria fails to account for "differential diagnoses" (other diagnoses that might explain the patient's symptoms), Cantor Dec. ¶ 115, but this misunderstands both my testimony and the required assessment process for gender dysphoria. In my clinical experience working with transgender youth, all clinical intakes and assessments have included a DSM-5-TR diagnostic interview, with a process of assessing *all* possible psychiatric diagnoses. It is possible for transgender people to be diagnosed with co-occurring psychiatric disorders along with gender dysphoria, and indeed assessing for such diagnoses is one of the goals of assessing the patient.

18. Dr. Cantor's suggestion that treatment for gender dysphoria involves "transition-on-demand" further underscores his lack of familiarity with the standards of care in this field. Cantor Dec. ¶ 66. Under the WPATH standards of care for working with transgender youth and standard clinical practice in the field, clinicians engage in extensive assessments of informed assent and consent with transgender youth.

D. Gender Identity and Sex Assigned at Birth

19. Dr. Cantor similarly disputes that "gender identity is well-established in psychology and medicine"—pointing to a statement taken out of context in the DSM-5-TR. Cantor Dec. ¶ 111. In fact, as noted in my prior declaration, gender identity is a well-established term in psychology and medicine that has been in use for decades. It is defined in the DSM-5-TR, which explains: "Gender identity is a category of social identity and refers to an individual's identification as male, female," or another category. It is a central component of gender dysphoria, which is the distress caused when a person's gender identity diverges from their assigned sex at birth. Gender identity is also discussed at length in the WPATH Standards of Care, the Endocrine Society Practice Guidelines, and a large body of medical literature.

20. Dr. Cantor uses outdated, inaccurate, and narrow definitions of sex. Dr. Cantor mentions that sex can only be determined either by "visual inspection" or "chromosomes." There are several significant flaws to this outdated argument, the first being that major medical and psychological associations agree that sex is multifaceted, comprising of chromosomes, hormones, internal and external genitalia, secondary sex characteristics, and gender identity (e.g., American Academy of Pediatrics, 2018; American Psychological Association, 2014; American Psychological Association, 2021; American Psychiatric Association, 2017; American Medical Association, 2018).

21. To be more specific, American Medical Association Board member Dr. William Kobler has explained: "Sex and gender are more complex than previously assumed. It is essential to acknowledge that an individual's gender identity may not align with the sex assigned to them at birth. A narrow limit on the definition of sex would have public health consequences for the transgender population and individuals born with differences in sexual differentiation, also known as intersex traits" (AMA, 2018). The second is that visual inspection is inherently flawed regarding determination—for example, if a cisgender man sustains injuries to his genitals to make them unrecognizable, that would mean that his sex is undeterminable. Similarly, in the past, babies with intersex conditions that influence their genitals typically had medical providers decide the sex of the baby, usually deciding female since those genitals were easier to reconstruct—but such surgeries on babies often had disastrous effects when the assigned sex did not match the person's gender identity (Carpenter 2016). Chromosomes are not limited to XX and XY and thus cannot also be deemed as the only major way to determine one's sex. Given that there are biological changes that occur with hormone therapy and gender affirming surgeries, relying solely on one aspect of sex determined in utero is outdated.

22. In his report, Dr. Cantor contends that the terminology "sex assigned at birth" should not be used. His arguments are grounded in a false and narrow definition of sex, and further illustrate that his views are outside the consensus of experts and practitioners in the field. "Sex assigned at birth" is the terminology that is used by the major medical and psychological organizations when referring to infants being labeled as male or female at birth (see American Academy of Pediatrics, 2018; American Psychological Association, 2014; American Psychological Association, 2021; American Psychiatric Association, 2017; American Medical Association, 2018). In addition to this terminology being the primary terminology that is used by

these organizations, this is also reflected in the field in academic publications and presentations. For example, in March 2023, in the *Journal of Adolescent Health*, Tabb and colleagues (2023) published an article titled "The Role of Caregiver Acceptance and Sex Assigned at Birth on Depression Among Gender-diverse Youth." A Google Scholar search conducted on August 25, 2023 of the terms "sex assigned at birth" OR "assigned sex at birth" elicited 3,950 results for articles published in 2023 alone.

23. Dr. Cantor also incorrectly claims that gender identity is not innate and has no biological foundation. Cantor Dec. ¶ 76. This is false. There is consensus among professional organizations that one's gender identity cannot be voluntarily changed and it is a "deeply felt, inherent sense" (e.g., American Psychological Association, 2021). Furthermore, as the Endocrine Society Clinical Practice Guidelines for Endocrine Treatment of Gender-Dysphoric Persons (2017) explain: "although there is much that is still unknown with respect to gender identity and its expression, compelling studies support the concept that biologic factors, in addition to environmental factors, contribute to this fundamental aspect of human development" (p. 3875).

E. The Evidence Does Not Support Dr. Cantor's Theories Regarding Desistence and "Rapid Onset" of Gender Dysphoria

24. To support his view that minors should not be permitted to transition, Dr. Cantor claims that "among prepubescent children who feel gender dysphoric, the majority cease to want to be the other gender over the course of puberty." Cantor Dec. ¶ 57. He relies on "11 cohort studies showing these [desistence] outcomes in children," which come from a commentary he wrote of the American Academy of Pediatrics (2018) statement supporting gender-affirming care—not from his own research or a systematic review of the research.[4] The generally decades-

[4] At least two things are noteworthy about the commentary Dr. Cantor cites. First, even though Dr. Cantor mentions multiple times how important systematic reviews are in his declaration,

old studies that are cited to promote this argument: a) are often misunderstood, and b) have significant flaws in their design.

25. First, *all* 11 studies collected data on youth prior to the changes in 2013 to the Diagnostic and Statistical Manual of Mental Disorders promulgated by the American Psychiatric Association. These changes resulted in an updating of the prior diagnosis of "gender identity disorder" to a more accurate and less stigmatizing diagnosis called "gender dysphoria." Because Dr. Cantor's 11 studies collected data under prior versions of the DSM, with less precise criteria for the diagnosis, these studies often included children merely because they exhibited gender-nonconforming behaviors, but who did not have gender dysphoria, and did not identify as transgender. Therefore, the concept of gender dysphoria being "outgrown" does not make sense for the vast majority of these children since they did not have gender dysphoria to begin with. All of these studies used criteria for inclusion that were not specific enough to distinguish those with gender dysphoria from cisgender children. The current DSM-5-TR (American Psychiatric Association, 2022) gender dysphoria criteria are more precise in requiring that children/adolescents identify with a gender that is different from their assigned gender for at least six months, which was not the case for the older studies upon which Dr. Cantor relies.

26. In fact, the sample out of the 11 that has the most recent data collection was the Steensma et al. (2013) article, with data was collected between 2000-2008. Steensma & Cohen-

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these 11 articles are not the product of such a review. He has never conducted a systematic review focused on transgender people or youth specifically.

Second, Dr. Cantor claims this "commentary" is his most-cited paper relating to gender dysphoria, and "illustrates the expertise" for which he is recognized. Cantor Dec. ¶ 13. But the fact that this is his "most-cited" paper does not mean it is widely cited nor that it is accepted as authoritative. According to Google Scholar this paper only has 37 citations; in contrast, my most cited paper regarding the process of discrimination and transitioning in relationship to mental health for transgender people has 930 citations.

Kettinis (2018) agree that their data have been cited incorrectly to support the purportedly low persistence rates and have stated that their "studies cannot be used to support" low persistence estimations, in that they never calculated or reported rates of persistence/desistence. They also note that the negative social climate for transgender children and adolescents should be taken into account when reading the data, since that may account for reluctance to live openly as transgender. They further state that their data did not actually reflect *gender dysphoria* in children and "expect that future follow up studies using the new diagnostic criteria may find higher persistence rates." Finally, they indicate that the terms "desistence" and "persistence" have been misused; they state that when they were researching youth, there were many youth who may have been "hesitating, searching, fluctuating, or exploring" and that those youth have been "misclassified as desisting." Dr. Cantor even cites this article as one that he agrees with in paragraph 67, when he states: "Multiple accomplished international researchers studying outcomes of gender dysphoric children responded . . . [including] Steensma & Cohen-Kettinis, 2018."

27. Temple Newhook et al. (2018) provide a comprehensive review of the data in the articles Dr. Cantor cites, explaining these flaws in further detail. Dr. Cantor spends a great deal of time specifically critiquing the Temple Newhook et al. (2018) article in his declaration, but his comments simply underscore the weakness in his own testimony. His first critique is that the authors did not conduct a systematic review for their article; but Dr. Cantor never provided information about conducting his own systematic review of the 11 articles he so often cites. It should be noted that systematic reviews have very specific processes that should be used, such as using the Preferred Reporting Items for Systematic reviews and Meta-Analyses (PRISMA), of which I did not see Dr. Cantor reporting in the papers he published. Temple Newhook's critiques

were focused on publications that were more recently published because the terminology of persistence/desistence did not exist for the earlier studies cited by Cantor (2020); however, many of the critiques remain applicable to the earlier studies.

28. Dr. Cantor also cites the Singh et al. (2021) study among his 11 articles to demonstrate his argument regarding desistence, but this reliance shares the same flaws as above. First, the data were collected from 1975-2009 with follow-ups up to 2011—all before the adoption of more precise criteria for gender dysphoria in the DSM-5 issued in 2013. In the method section, there are descriptions of many different ways that data were collected between 1975-2011, thus the methodological rigor of how follow-ups were completed is low. As well, they state: "Due to lack of study resources and time constraints, contact with 162 other eligible participants was not attempted (p.4)." Note that the number of people they did not attempt to contact was higher than the overall sample size for the entire study (N = 139). As mentioned above, DSM-III and DSM-IV diagnoses did not require insistence and persistence of identity for at least six months in the diagnosis and the diagnosis could be provided without persistence of identity and could instead rely on stereotyped behaviors, thus is it possible that the 88 participants who were diagnosed with gender identity disorder were simply displaying gender atypical (for the time period) behavior (note: the other 51 youth in the sample did not meet criteria for *any* of the previous DSM diagnoses). Finally, these data were collected by the Gender Identity Service, Child, Youth, and Family Program at the Centre for Addiction and Mental Health (CAMH) in Toronto, Ontario. The program was shut down in in 2015 "after an external review found its approach was out of step with accepted clinical practice" (The Canadian Press, 2015)—thus all data were collected during a time period when the clinic was not meeting the needs of the youth who were referred to care.

29. Also, the grouping of 11 articles provided by Dr. Cantor does not correspond to the language provided in the articles—none of the articles identify any of the youth as transgender. Dr. Cantor makes a point to contend that researchers should not cherry-pick their data, and yet it appears that is exactly what he is doing in this instance.

30. Today, based on current scientific knowledge and clinical practice, researchers and clinicians are much better equipped to differentiate transgender from cisgender children and adolescents. As the Endocrine Society Practice Guidelines (2017) explain: "It may be that children who only showed some gender nonconforming characteristics have been included in the follow-up studies, because the DSM-IV text revision criteria for a diagnosis were rather broad . . . . With the newer, stricter criteria of the DSM-5-TR, persistence rates may well be different in future studies (p. 3876)."

31. Dr. Cantor does not dispute that minors whose transgender identification persists into adolescence are likely to continue to identify as transgender as adults. Indeed, Dr. Cantor has written that "the majority of kids who continue to feel trans after puberty rarely cease." (Cantor 2020). While the age varies for each individual, adolescence often begins around age 10 (UNICEF, 2023). As recent studies have shown, for "transgender adolescents who, following careful assessment, receive medical necessary gender-affirming medical treatment," "rates of reported regret . . . are low." (Coleman et al., 2022). As noted above, Dr. Cantor does not explain the relevance of his testimony to excluding any transgender youth from facilities that match their gender identity; but that absence of explanation is especially striking as to transgender adolescents in particular, whose gender identity even Dr. Cantor does not dispute is unlikely to become aligned with their sex assigned at birth.

32. In addition, Dr. Cantor mentions the concept of "rapid onset gender dysphoria" ("ROGD"), which has been debunked in the scientific community and is not a valid diagnostic term. In 2018, Lisa Littman conducted a study which has been heavily critiqued for its methodological flaws (see Ashley, 2020 and Restar, 2020 for examples). While there are many flaws in the study Littman conducted, the major ones are: 1) the consent form noted that Littman felt that transgender identity in youth was influenced by social contagion, which would likely lead to a self-selection bias of the respondents who would choose to participate in the study, 2) Littman included only *parents* of gender nonconforming or transgender youth and not youth themselves, 3) Littman used unvalidated measures of diagnostic criteria and asked parents to provide diagnostic impressions of their children and also did not provide any psychometric information regarding any measures used, 4) Littman asked parents to comment on their own perceptions of whether or not their child's gender identity had a "rapid onset" (with rapid onset not being defined), 5) 77% of the parents believed their child's transgender identification "was not correct," and 6) recruitment relied significantly on three websites known to have parents who were vocal about promoting the concept of ROGD.

33. Beyond the flaws in the article, scientific evidence also demonstrates that ROGD does not have validity. For example, Bauer et al. (2022) evaluated clinical data from 10 gender clinics across Canada to analyze data focused on youth's report of "recent gender knowledge." The authors analyzed several research questions using their large clinic-based dataset to better understand the claims made by Littman. They indicate: "We did not find support within a clinical population for a new etiologic phenomenon of rapid onset gender dysphoria during adolescence. Among adolescents under age 16 years seen in specialized gender clinics, associations between more recent gender knowledge and factors hypothesized to be involved in rapid onset gender

dysphoria were either not statistically significant or were in the opposite direction to what would be hypothesized" (p. 225).

34. In paragraph 62, Dr. Cantor states that "social transition itself represents an active intervention, such that social transition may cause the persistence of gender dysphoria when it would have otherwise resolved." The argument that Dr. Cantor is making does not make sense—this is akin to supporting a gay person's sexual orientation and then saying that the support caused the person to be gay. Dr. Cantor does not provide any evidence to support his statement. Instead, longitudinal research indicates that transgender youth who have been able to socially transition report similar depression and self-worth and marginally higher anxiety when compared to matched controlled peers, likely because youth who transition and are known to be transgender are subject to greater rates of stigma (Durwood et al. 2017). Conversely, research demonstrates that delaying social transition does not change a young person's gender identity, and instead can cause distress for transgender youth (Horton, 2022). It should also be noted that for many youth, social transition is not enough to improve mental health without also engaging in medical interventions, and therefore assessing social transition on its own often does not provide the full picture for what transgender youth may need. As explained above, however while social transition is often insufficient on its own, it is no less necessary for this fact.

F. Research Design in this Area Should Be Based on Hypotheses and Research Questions

35. In his declaration, Dr. Cantor provides an overview of the Pyramid of Evidence, regarding how to assess the quality of studies. Dr. Cantor's claim rests on false or misleading assumptions. For example, he notes that a randomized controlled trial ("RCT") provides the strongest evidence of safety and efficacy. While randomized controlled trials provide the highest quality of evidence in many contexts, management of gender dysphoria in minors is not ethically

amenable to randomized controlled trials. Because there is already substantial evidence that puberty blockers and hormone therapy benefit transgender minors, it would be unethical to propose a study randomly assigning some patients to these treatments and some to a placebo. Deutsch et al., (2016) state that randomizing transgender people to receive or not receive hormone therapy or surgery violates the principle of equipoise (true scientific uncertainty about whether an intervention will help the individual); there are ethical ways to conduct RCTs with transgender youth and adults, however, these studies would be focused on schedules and delivery modes of treatment, and not on whether or not the treatment is effective. Cisgender youth receive pubertal suppression treatments and hormone therapy treatments for a host of medical disorders, and such treatments are considered safe and effective (albeit with side effects, as medical treatments typically have). Given the ethical considerations and bodies of existing evidence, researchers in this field must rely on other types of study design, such as longitudinal cohort studies, which monitor change in symptoms over the course of treatment (de Vries et al., 2014) or cross-sectional studies comparing treated and untreated persons (Turban et al., 2022).

36. Regarding the questions at hand in this particular case, Dr. Cantor ignores that this is a case that focuses on the harm that is caused to transgender youth if they are forced to use a sex-separated facility that does not align with their gender identity. Randomized controlled trials are conducted when there are questions regarding if one particular form of treatment demonstrates efficacy when compared to placebo or no treatment or demonstrates effectiveness when two treatments are compared to one another. Directors of the National Health Services Research and Development Centre for Evidence-Based Medicine in the UK and Center for the Evaluative Clinical Sciences in the US (Sackett & Wennberg, 1997) indicated: “Our thesis is short: the question being asked determines the appropriate research architecture, strategy, and

tactics to be used—not tradition, authority, experts, paradigms, or schools of thought." Medical and psychological research methods texts (which are updated regularly) note that the research design should be based on what types of research questions are being asked and which hypotheses are being tested (e.g., Browner et al. 2022; Hammond et al., 2015; Schweigert, 2021). In fact, in clinical research, Bragge (2010) notes that the hierarchy of evidence further extrapolates a within-hierarchy of evidence, meaning that the research question must be the determining factor of what type of research design is appropriate for the following categories: interventions, diagnostic tests, prognosis, and anticipating complications. In sum, if the research question is not appropriate for or does not apply to a randomized controlled design, an RCT design should not be considered in the hierarchy of evidence.

37. Thus, in situations where researchers are asking—1) if there is an impact (in any direction) on transgender youth who are required to use sex-separated facilities that do not align with their gender identity, 2) what the extent of the impact is, and 3) what factors are associated with the impact—the research design is not intervention-focused and thus a randomized controlled trial is not appropriate or ethical. These would likely best fit the "prognosis" category outlined above, where clinical courses are estimated and complications are anticipated. Bragge (2010) states explicitly: "if the central clinical issue is 'prognosis,' a Prospective Cohort Study – not an RCT – is the highest ranked primary study design for this research category. (p.5)" For an example of a prospective cohort study focused on the harm caused by legislation focused on sex-separated spaces, see Horne et al. 2022. In addition, for research questions that focus on the amount or prevalence of a concern, best practices in research design include observational cross-sectional or longitudinal designs (Mann, 2003; 2012). The studies described in my declaration

regarding the type of harms and the amount of harms caused by transgender youth experiencing stigma and discrimination are considered observational designs.

38. Given Dr. Cantor's fixation on the importance of using RCTs without any attention to understanding how research design decisions are implemented, it appears he does not understand how research design decisions can and should occur. As well, from my read of his CV, Dr. Cantor has never conducted a clinical trial, whereas I have conducted two separate clinical trials with transgender patients, which lends to a more authoritative understanding of conducting intervention research.

G. Reducing Stigma for Transgender Youth Reduces Suicidality and Suicide

39. Dr. Cantor cites Dhejne (2011) for the proposition that undergoing sex-reassignment surgery does not decrease suicidality among transgender adults. First, this study is not relevant to this specific case at hand as it does not focus on transgender youth or sex-separated facilities. Regardless, Dr. Cantor's claim misrepresents the data from Dr. Dhejne's study, which found that suicide rates are higher among transgender people than the general population. The study did not compare treated versus untreated transgender women, as Dr. Cantor incorrectly suggests. Dr. Dhejne compared morbidity and mortality statistics from a national database of transgender people with those in the general Swedish population, and only made comparisons between cisgender and transgender groups, not before and after surgery, or transgender women with surgery and without surgery. Given entrenched societal stigma towards transgender people, it is not surprising that transgender people experience higher rates of suicidality. The study itself warns against drawing any conclusions regarding the effectiveness of surgery as a treatment for gender dysphoria: "For the purpose of evaluating whether sex reassignment is an effective treatment for gender dysphoria, it is reasonable to compare reported gender dysphoria pre and post treatment. Such studies have been conducted either prospectively

or retrospectively and suggest that sex reassignment of transsexual persons improves quality of life and gender dysphoria." (Dhenje et al., 2011) Since the study was published, Dr. Dhejne has cautioned that interpretations like Dr. Cantor's are incorrect (Dhejne, 2017).

40. Dr. Cantor further opines that McNeil, et al. (2017) does not show that transition reduces suicidality among transgender youth (Cantor, paragraph 87). In fact, the study concluded that "[d]iscrimination emerged as strongly related to suicidal ideation and attempts, whereas positive social interactions and timely access to interventions appeared protective." Bauer, et al. (2015), which Dr. Cantor erroneously cites for the proposition that social support is associated with increased suicide attempts, further supports that conclusion: "Our findings support a strong effect for social exclusion, discrimination and lack of medical transition (for those needing it) on suicide ideation and attempts, and potentially on the survival of trans persons." The WPATH Standards of Care cite Bauer's study as evidence that "[a]ccess to gender-affirming medical treatment is associated with a substantial reduction in the risk of suicide attempt." (Coleman et al., 2022).

41. Dr. Cantor also cites Canetto, et al. (2021) in support of his implausible claim that providing social support to transgender youth is associated with increased suicidal attempts. The Canetto study did not include or address transgender youth and does not support Dr. Cantor's claim.

42. The harms caused by suicidal ideation are themselves very serious. In a recent systematic review of the impact of suicidal ideation, the harms directly associated with suicidal thoughts are clear: a sense of loss of the self, lack of self-worth, low self-esteem, loss of meaning in life, self-hatred, feelings of worthlessness, increased guilt, and increased shame (Søndergaard et al., 2023). These experiences are incredibly painful. Even if suicidal ideation and suicide were

not related, which they are, preventing suicidality alone would be a compelling reason to provide medically needed care to transgender adolescents.

43. Because suicide attempts and suicide are interrelated, reducing stigma and implementing treatment that reduces attempts and completed suicide is essential, even if current research designs cannot quantify that impact precisely (Jones et al., 2022). Dr. Cantor claims that youth in general are experiencing more suicidal ideation and attempts (specifically in relation to social media use) but ignores the disparity that exists between cisgender and transgender youth, accounting instead for only factors that would impact all youth, such as social media. For example, a recent study found that transgender teens were 7.6 times as likely to attempt suicide as their cisgender peers (Kingsbury et al., 2022). As well, transgender youth's suicide risk was statistically significantly higher in every category (felt sad/hopeless, considered attempting suicide, made a suicide plan, attempted suicide, and had a suicide attempted treated by a doctor or nurse) when compared to cisgender boys and girls (Johns et al., 2019).

44. In summary, Dr. Cantor's declaration does not address any components of this particular case directly as he does not opine on the harm directly related to transgender youth who are banned from using sex-separated facilities that align with their gender identity. He does not dispute that stigma directed toward transgender youth is harmful and that being barred from using a facility that matches one's gender identity causes greater stigma and harm. In fact, Dr. Cantor notes that it is important for transgender people to use facilities that are aligned with their gender identity. Additionally, Dr. Cantor appears to misunderstand fundamental research design, failing to appreciate that the research question and hypothesis must match the research design. Contrary to Dr. Cantor's critiques, it is clear that that RCTs would be inappropriate or unethical to test regarding the questions at hand in this particular case. His critique of the evidence base in

this area is thus misplaced and fails to show any scientific disagreement with the peer-reviewed research literature showing that discriminating against transgender youth in school facilities is harmful to them.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury under the laws of the United States of American that the foregoing is true and correct.

Executed this 31 day of August 2023.

Stephanie L. Budge, Ph.D.