Samuel L. Linnet (ISB No. 9788)
sam@alturaslawgroup.com
ALTURAS LAW GROUP, PLLC
101 E Bullion St., Unit 2H
Hailey, ID 83333
(208) 788-6688

Peter C. Renn*
prenn@lambdalegal.org
Kell L. Olson*†
kolson@lambdalegal.org
Tara L. Borelli*†
tborelli@lambdalegal.org
Christina S. Paek*
cpaek@lambdalegal.org
LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.
800 South Figueroa St., Suite 1260
Los Angeles, CA 90017
†*mailing address only*
(213) 382-7600 (T) | (213) 402-2537 (F)

*Admitted *pro hac vice*

Katherine M. Forster*
katherine.forster@mto.com
Robyn K. Bacon*
robyn.bacon@mto.com
Nicholas R. Sidney*
nick.sidney@mto.com
Paul Martin*
paul.martin@mto.com
Avery P. Hitchcock*
avery.hitchcock@mto.com
Jimmy P. Biblarz*
jimmy.biblarz@mto.com
MUNGER TOLLES & OLSON LLP
350 South Grand Ave., 50th Fl.
Los Angeles, CA 90071-3426
(213) 683-9100 (T) | (213) 687-3702 (F)

J. Max Rosen*
max.rosen@mto.com
MUNGER TOLLES & OLSON LLP
560 Mission Street, 27th Fl.
San Francisco, CA 94105-2907
(415) 512-4000 (T) | (415) 512-4077 (F)

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-00315-DCN

Plaintiffs' Reply in Support of Motion for Preliminary Injunction [Dkt. 15] and Opposition to Defendant's Motion to Dismiss [Dkt. 47]

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INTRODUCTION

The question presented by Plaintiffs' motion is narrow: whether this Court should continue to preliminarily enjoin S.B. 1100's statewide mandate of categorical discrimination against all transgender students across all Idaho schools—which will dramatically alter a longstanding status quo—or whether Defendants, based on the factual record now before this Court, have supported their contention that privacy and safety will be imperiled, and in ways that less intrusive means cannot address, without the law's immediate enforcement.

Defendants fail to tailor their opposition to that fact-and-statute-bound question. Most importantly, they offer no factual support whatsoever to substantiate their privacy and safety defense. That itself is fatal under heightened scrutiny because Defendants bear the burden of demonstrating an exceedingly persuasive justification, which they fail to do in opposing the preliminary injunction and cannot do on a motion to dismiss. Defendants have not shown how the longstanding status quo in Idaho—i.e., the absence of any statewide mandate of categorical discrimination—has caused any of their claimed harms. The record here is thus materially indistinguishable from this Court's ruling in *Hecox*, recently affirmed by the Ninth Circuit. *Hecox v. Little*, 479 F. Supp. 3d 930 (D. Idaho 2020), *aff'd*, -- F.4th --, 2023 WL 5283127, at *20 (9th Cir. 2023) ("A preliminary injunction does not appear to inflict any comparable harm to [Idaho], as the injunction expressly maintained the status quo.").

Indeed, the factual vacuum here is even starker than in *Hecox* because, for years, many Idaho schools have had inclusive policies expressly allowing transgender students to access facilities matching their gender identity. While nothing about the injunction would require any school to adopt such a policy, the absence of any evidence of harm from schools that have chosen to do so is akin to a smoking gun against Defendants' factual defense.

Defendants respond with only red herrings. They proffer the astounding notion that perhaps S.B. 1100 did not actually intend to exclude transgender people from facilities matching their gender identity, but merely tolerated that outcome as an unwanted side effect, despite the statute's language, the context leading to its passage, and the understanding of legislators. Likewise, Defendants spill pages of ink in support of their contention that sex-separated facilities can be important. But Plaintiffs do not challenge the permissibility of designating separate facilities for males and females. A preliminary injunction will not alter the ability of schools to bar cisgender students from using the facilities of another gender. This case presents only the question whether S.B. 1100 may categorically require every Idaho school, full stop, to ban all transgender people, full stop, from using facilities matching their gender identity.

Finally, Defendants inexplicably try to transform this case—about school facilities—into a case about gender-affirming care. There is a separate vehicle for the latter dispute. *Poe v. Labrador*, No. 1:23-cv-269-BLW (D. Idaho) (challenging H.B. 71). It is not this case. Legislators may well disapprove of the fact that transgender youth like Rebecca Roe and A.J. are, with the support of their parents, living their lives consistent with their gender identity; but nothing about S.B. 1100 will change that fact. Instead, what S.B. 1100 will do is deprive them of the basic ability to go about their everyday business, stigmatize them as unwanted outsiders, and infringe their right to privacy—irreparable harms that only a preliminary injunction can prevent.

FACTUAL BACKGROUND

As this Court's TRO recognized, it is Plaintiffs who seek to maintain the status quo, which has never categorically mandated discrimination against transgender students at all Idaho schools, and Defendants who seek to disrupt it. Plaintiffs begin by clarifying at the outset what precisely constitutes the status quo, as it illuminates the true scope of what S.B. 1100 will do.

In opposing a TRO, Defendants proffered a carefully worded declaration stating that "before the enactment of SB 1100," approximately three-quarters of Idaho public school districts did not have any policy that would "permit" the relief sought by Plaintiffs. Decl. of Greg Wilson, Dkt. 39-1, ¶ 6.[1] A review of those policies confirms that this statement can only mean that such districts did not have written policies that expressly *allowed* transgender students to use facilities matching their gender identity. There is no evidence that 75 percent of Idaho's schools *banned* transgender students from such facilities.[2] In fact, before S.B. 1100, either all or virtually all districts in Idaho did not have a written policy excluding transgender students from facilities matching their gender identity.[3] Biblarz Supp. Decl. ¶¶ 3-7.

If not preliminarily enjoined, S.B. 1100 will thus enact a greater statewide sea change—and disruption to the status quo—than Defendants have suggested, causing all or virtually all schools across Idaho to swing from having no written policy affirmatively excluding transgender students from facilities matching their gender identity to necessarily having such a policy.

ARGUMENT

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

A. S.B. 1100 Discriminates Against Transgender People, Because Only Transgender People Are Denied Facilities Matching Their Gender Identity.

Both sides agree that S.B. 1100 demands heightened scrutiny, and, as noted below,

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[1] Mr. Wilson does not address charter schools, which are also covered by S.B. 1100. *See* Supp. Decl. of Jimmy Biblarz ¶ 2.

[2] By analogy, if only 25% of employers expressly included veteran status in their written nondiscrimination policies, that does not mean that the remaining 75% refuse to hire veterans.

[3] The mere fact that schools maintain "sex-separate" facilities—which simply means that there are male-designated facilities and female-designated facilities—does not mean that transgender students are thereby excluded from facilities matching their gender identity. *Cf.* TRO at 4. Boise School District illustrates the point. Decl. of A.J., Dkt. 15-4, ¶ 8. Nor does allowing transgender students to use facilities matching their gender identity thereby make those facilities "sex-inclusive" (as distinct from making them transgender-inclusive). *Cf.* TRO at 6.

Defendants completely fail to meet their burden of justifying the law at this preliminary stage. That alone shows Plaintiffs are likely to succeed. Nevertheless, Plaintiffs and Defendants do disagree as to one important issue: whether heightened scrutiny applies solely because S.B. 1100 discriminates on the basis of sex, or whether it is also required because S.B. 1100 discriminates against transgender people. Defendants insist that S.B. 1100 "discriminates" against everyone based on sex and thus is neutral as to transgender people. That argument ignores not only the purpose and text of S.B. 1100, but the obvious fact that Idaho passed it specifically to do what it does: mandate that schools ban *transgender* people from using facilities aligned with their gender identity. By seeking to downplay the fact that S.B. 1100, in purpose and design, discriminates specifically against transgender people, Defendants attempt to obscure the nature of the discrimination at issue and the harm that it inflicts.

It defies reason—not to mention the legislative record—to suggest that S.B. 1100 does not discriminate against transgender people. Discrimination requires not merely differential treatment but differential treatment plus injury. *See, e.g.*, *Bostock v. Clayton Cnty., Ga.*, 140 S. Ct. 1731, 1740 (2020) ("To 'discriminate against' a person, then, would seem to mean treating that individual worse than others who are similarly situated."). Both before and after S.B. 1100, cisgender students have access to facilities matching their gender identity and thus have suffered no injury from the law. A cisgender girl who has access to the restroom that matches her gender identity, for instance, is not treated worse than a cisgender boy when she cannot access the boys' restroom. In contrast, S.B. 1100 discriminates against transgender people, because it deprives them—and only them—of facilities matching their gender identity. A transgender girl who is excluded from the restroom that matches her gender identity has been treated worse than a cisgender girl who is not excluded from the restroom that matches her gender identity.

That was precisely this Court's analysis in *Hecox*, which the Ninth Circuit has affirmed. This Court held that the law there "discriminates between cisgender athletes, who may compete on athletic teams consistent with their gender identity, and transgender women athletes, who may not compete on athletic teams consistent with their gender identity." *Hecox*, 479 F. Supp. 3d at 975. Replacing "athletes" with "students," and replacing "compete on athletic teams" with "access facilities," confirms that S.B. 1100 follows an indistinguishable path of discrimination. That is, S.B. 1100 discriminates between cisgender students, who may access facilities consistent with their gender identity, and transgender students, who may not. *Hecox* answers the question of whom S.B. 1100 discriminates against.

Defendants' contrary argument "is like saying that racially segregated bathrooms treated everyone equally, because everyone was prohibited from using the bathroom of a different race." *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 609 (4th Cir. 2020), *cert. denied*, 141 S. Ct. 2878 (2021). Indeed, by that reasoning, every instance of discrimination against transgender people could be recast as simply treating everyone according to their sex assigned at birth. For example, an employer's requirement that all workers must present at work consistent with their assigned sex or be fired also would not discriminate against transgender people. *Cf. Karnoski v. Trump*, 926 F.3d 1180, 1201 & n.18 (9th Cir. 2019) (holding that military policy that purported to allow transgender individuals to serve "'in their biological sex'" discriminated based on transgender status, independent of provisions concerning gender dysphoria). *Bostock* makes clear that the equal application of discriminatory treatment (e.g., injuring both transgender men and transgender women) does not change the character of the discrimination. 140 S. Ct. at 1742.

The foregoing is a sufficient basis to conclude that S.B. 1100 discriminates against transgender people; but that conclusion also follows from the "text, structure, purpose, and

effect" of S.B. 1100," which "all demonstrate that the Act categorically bans transgender [people]" from facilities "that correspond with their gender identity." *Hecox*, 2023 WL 5283127, at *8. It is absurd to claim that S.B. 1100 was not about transgender people. First, its 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—and thus the exclusion of transgender people from facilities matching their gender identity is precisely what the law seeks to accomplish, not a mere byproduct. Idaho Code § 33-6601 [33-6701].[4]

Second, the context and legislative history of S.B. 1100 make clear that the purpose of the law was not, generally, to have separate facilities for males and females but, specifically, to exclude transgender people from facilities matching their gender identity. The animating backdrop for S.B. 1100 was Caldwell School District's consideration of a policy expressly permitting transgender students to use sex-separated facilities consistent with their gender identity. Decl. of Jimmy Biblarz, Dkt. 15-9, Ex. 5. Senator Carlson believed such policies "indoctrinate" students with "garbage," which belies Defendants' claim that transgender students' facilities usage was not what motivated S.B. 1100. *Id.*, Ex. 6. The hearings on S.B. 1100 reflected this purpose. For instance, Senator Trakel said, "We hear a lot of talk about how the transgender are, it's their right to use the bathroom." *Id.* ¶ 13. And he explained, "[w]e believe biological gender to be an essential characteristic of a child's identity and purpose," and "[w]e strongly oppose any . . . attempts to confuse minors regarding their bio gender." *Id.* This

[4] As *Hecox* makes clear, it is no response that the law does not use the word "transgender," because, as here, terms such as "biological sex" can be specifically written to exclude transgender females from the definition of female, and transgender males from the definition of male. 2023 WL 5283127, at *10. Laws that excluded same-sex couples from marriage also did not need to use the words "sexual orientation" for courts to recognize that they discriminated based on sexual orientation. *Id.* Discrimination by proxy is facial discrimination. *Id.*

discussion of transgender people, and what legislators believed was appropriate for them, was not some "[s]tray remark[]." Opp. at 14 n.4. To the contrary, "transgender" or "trans" was referenced at least 75 times in committee hearings alone.[5] Supp. Decl. of Jimmy Biblarz ¶ #.

Third, the only change that S.B. 1100 would accomplish in Idaho concerns transgender people.[6] There is no evidence that cisgender students were using facilities designated for another sex, including in districts with inclusive policies and practices, and in fact such usage was already barred before S.B. 1100. Decl. of Morgan Ballis, Dkt. 15-8, ¶ 28. Nor is there evidence that schools were not providing separate facilities for males and females at all. As in *Hecox*, 2023 WL 5283127, at *10, the record here is unlike that in *Adams v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791 (11th Cir. 2022), where the court found no evidence that the local school board at issue intended to discriminate against transgender students.[7]

B. Defendants Fail to Meet Their Heavy Burden of Proving a Substantial Relationship Between S.B. 1100 and Protecting Privacy and Safety.

Defendants do not dispute that, under heightened scrutiny, they must demonstrate an exceedingly persuasive justification; that the law must address an actual and not hypothetical or speculative problem; that the law must be specifically tailored to the problem; that there cannot

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[5] Members of the public shared legislators' understanding that the purpose of S.B. 1100 was to exclude transgender people from facilities matching their gender identity. *See, e.g.*, Biblarz Decl. ¶ 13(vi) (asserting that cisgender people should not share facilities with "boys who think they wanna be girls and girls who think they wanna be boys"), (ii) ("Socially transitioning these kids in schools is feeding their mental disorder"), Ex. 10 ("If a human truly believes he or she is a horse, that belief does not make it true. That belief demonstrates a serious mental problem in the individual – and the same for a male who believes he is a female (and vice versa)").

[6] *Hecox* rejects any defense premised on a purported "lack of identity" between the quasi-suspect class at issue and the group discriminated against by the law. Opp. at 13. And, in fact, there is such identity here because 100% of cisgender people are permitted to access facilities matching their gender identity, whereas 0% of transgender people are permitted to do so under S.B. 1100.

[7] To be clear, Plaintiffs need not show animus, nor an intent to cause harm, to show intentional discrimination under equal protection. *E.g.*, *Johnson v. California*, 543 U.S. 499, 505 (2005).

be less intrusive means of addressing the problem; and that the law's interests must be sufficient to overcome the indignity, stigma, and message of second-class status it inflicts. Mot. at 10.

Given this well-established law, Defendants' response misses the mark for several reasons at the outset. First, Defendants ignore that this lawsuit does not challenge the permissibility of having separate facilities for males and females as a general matter but, rather, the permissibility of excluding transgender people from facilities aligned with their gender identity. Defendants' arguments, including cites to Justices Marshall and Ginsburg, attack a straw man. Plainly, nothing about the injunction here requires the demolition of male and female restrooms. Second, Defendants' burden is particularly heavy here: unlike the local policies at issue in other cases, including *Adams*, S.B. 1100 imposes a statewide categorical ban, which not only mandates discrimination across hundreds of Idaho schools but also divests schools and administrators of any ability to adopt or tailor transgender-inclusive policies. The law's overbroad scope makes it particularly indefensible. Third, Defendants ignore that this challenge is to S.B. 1100—a specific, statewide piece of legislation with a specific legislative history and findings—that must be defended on the actual record leading to its enactment, not on the basis of "specula[tion] and … conjecture," *Whitaker By Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1039 (7th Cir. 2017), or the record of a local school board policy developed elsewhere (e.g., the one in *Adams*). These mounting challenges for Defendants—a narrow question presented, a sweepingly overbroad law, and an anemic legislative record—are insurmountable under heightened scrutiny.

As an initial matter, despite their suggestion to the contrary, Defendants must substantiate their justification with factual support under heightened scrutiny. *Hecox* illustrates the point: the Ninth Circuit relied upon this Court's finding "that there was scientifically 'no evidence to

suggest a categorical bar against a transgender female athlete's participation'" and that the studies relied upon by the Idaho legislature failed to provide adequate support for the law. 2023 WL 5283127, at *15-16. Similarly, the Ninth Circuit held in *Latta* that the fear that different-sex couples might marry less frequently if same-sex couples were permitted to do so was inadequate, because the government "failed to produce any support for that prediction." *Latta v. Otter*, 771 F.3d 456, 471 (9th Cir. 2014). Unsupported legislative predictions that implicate constitutional rights "have not been afforded deference" by courts. *Hecox*, 2023 WL 5283127, at *17 (quotes omitted); *see also Whitaker*, 858 F.3d at 1052. And Defendants' demand for deference so as not to discourage "serious, thoughtful debates" backfires here. Opp. at 3. Rather than allow local school districts to craft policies for their own communities as Boise did, S.B. 1100 categorically blocks all schools across the state from doing so, including even "more narrowly drawn policies." *Cf. Hecox*, 2023 WL 5283127, at *22. As in *Hecox*, the law's "sweeping prohibition . . . is too overbroad to satisfy heightened scrutiny." *Id.* at *15.

The need for evidence to substantiate an exceedingly persuasive justification also underscores why Defendants' motion to dismiss is inappropriate. In the Complaint, Plaintiffs alleged facts that show why S.B. 1100's categorical ban is not substantially related to privacy or safety. Compl. ¶¶ 97-101. Defendants do not explain how their motion can be granted given that these factual allegations must be accepted as true at the pleading stage. Indeed, Defendants do not cite to a single paragraph of the complaint in their motion at all, nor do they even move to dismiss all of Plaintiffs' claims (ignoring, as noted below, the privacy claim). The motion must be denied. *See M.A.B. v. Bd. of Educ. of Talbot Cnty.*, 286 F. Supp. 3d 704, 724 (D. Md. 2018) (denying motion to dismiss because factual allegations showed that transgender student's exclusion from school facilities was not substantially related to privacy justification); *Grimm v.*

Gloucester Cnty. Sch. Bd., 302 F. Supp. 3d 730, 751-52 (E.D. Va. 2018) (denying motion to dismiss given plaintiff's prior use of boys' bathroom for weeks without incident, and privacy could be promoted through non-discriminatory means).

On the preliminary injunction, Defendants wholly fail to meet their burden of substantiating S.B. 1100's purported legislative findings on safety and privacy, Idaho Code § 33-6601 [33-6701], which they all but ignore. They have not introduced any evidence whatsoever of problems from Idaho schools not having a statewide categorical ban excluding transgender students from facilities matching their gender identity, which has always been the status quo before S.B. 1100. And that absence of evidence is particularly striking given that a significant number of Idaho schools have had, for many years, the converse of S.B. 1100: policies and practices expressly permitting transgender students to access facilities matching their gender identity. Biblarz Decl. ¶¶ 7, 9. If the absence of a statewide categorical ban were substantially related to preventing the harms claimed by Defendants, there would doubtless be plentiful evidence of such harms in those schools, given that thousands of students have attended them with transgender-inclusive policies and practices in place.

Instead, Defendants try to satisfy their factual burden with non-facts. First, Defendants' attempt to substitute an appeal to "common-sense" for actual evidence fails. Opp. at 7. S.B. 1100 is premised upon specific findings—including that Idaho will see an "increas[e] in the likelihood of sexual assault, molestation, [and] rape" without the law. Defendants offer no evidence to substantiate those findings, which are plainly disproven by Plaintiffs' evidence. Ballis Decl. ¶¶ 22-33. Next, Defendants attempt to avoid their burden by labeling the facts they must prove legislative rather than adjudicative facts. Opp. at 9 n.3. But the problem is that Defendants fail to point to *any* facts at all to substantiate their justifications. Vaguely gesturing

toward "the authorities set forth in this brief"—which, at best, attempts to rely on the factual records developed by local school boards in other states—and without even specifying what facts Defendants hope to rely upon in those other records, does not satisfy their burden. *Id.* It reduces to nothing more than "sheer conjecture and abstraction," which fails under heightened scrutiny. *Whitaker*, 858 F.3d at 1052; *Grimm*, 972 F.3d at 614. Finally, Defendants engage in rank speculation that *cisgender* students could pretend to be transgender to gain access to facilities, but they have not shown this to be an actual problem. *Cf. Hecox*, 2023 WL 5283127, at *19 ("The record is devoid of evidence that any boy attempted to join a girls' team"). Legislators supporting S.B. 1100 similarly resorted to such speculation. Biblarz Decl. ¶ 13; *cf. Hecox*, 2023 WL 5283127, at *3 (noting that legislator "had no evidence" of prior dispute of athlete's gender). And Defendants fail to show why other tools, or "more narrowly drawn" measures, to directly address such a problem are inadequate. *Hecox*, 2023 WL 5283127, at *22; Ballis Decl. ¶¶ 28-29.

Second, Defendants do not even try to rebut Plaintiffs' evidence that preliminarily enjoining S.B. 1100's statewide categorical ban will not imperil privacy or safety. They do not address the expert testimony of Officer Morgan Ballis, who serves as President of the Idaho Association of School Resource Officers. Officer Ballis showed that, even at schools with policies expressly allowing transgender students to use facilities matching their gender identity, there has been no evidence of any problems, including safety or privacy harms. Ballis Decl. ¶¶ 22-33. They also do not rebut the testimony of Diana Bruce and Foster Jones, school administrators who have deep experience with such policies and confirm that they do not cause any harms. Dkt. 15-6 & 15-7; *see Grimm*, 972 F.3d at 614. And Defendants do not rebut the testimony of Boise High School senior A.J., who used the boys' facilities matching his gender identity for his junior year, without any incident or harm to others. A.J. Decl. ¶ 8. Many courts

have relied upon transgender students' prior use of facilities matching their gender identity without incident as evidence disproving the government's claimed justifications. *See, e.g.*, *Grimm*, 972 F.3d at 614 (seven weeks of use); *Whitaker*, 858 F.3d at 1052 (six months of use).

Third, Defendants fail to show how S.B. 1100 prevents "one's unclothed figure from being seen by the opposite sex" (as they define sex) that less intrusive means cannot. Opp. at 1. Defendants cannot articulate how this goal is implicated given that people enter restroom stalls and close the door behind them. *Grimm*, 972 F.3d at 613-14. And schools can make that same option available in locker rooms as well, among a wide range of options at the disposal of schools, for anyone who may prefer greater privacy. *See Parents for Privacy v. Barr*, 949 F.3d 1210, 1225 (9th Cir. 2020); *Doe v. Boyertown Area School Dist.*, 897 F.3d 518, 530-31 (3d Cir. 2018). Defendants fail to prove why these less intrusive means cannot substantially achieve their interests, without also imposing a categorical ban on transgender students, who already have particular reason to safeguard their own privacy and avoid actions that could exacerbate their distress or compromise their safety. Decl. of Stephanie Budge, Dkt. 15-5, ¶ 68. As in *Romer v. Evans*, 517 U.S. 620, 632 (1996), the overbreadth of S.B. 1100 illustrates its lack of tailoring. Courts "must reject measures that classify unnecessarily and overbroadly by gender when more accurate and impartial lines can be drawn." *Hecox*, 2023 WL 5283127, at *18 (quotes omitted).

Fourth, Defendants fail to rebut Plaintiffs' showing that S.B. 1100 actually undermines any privacy interest. The law robs transgender youth of control over the disclosure of private information. *Infra* III. Defendants also do not deny the stigma that the law imposes on them—and the "unmistakable message" it sends that they are not suitable to be among their peers, Budge Decl. ¶ 63—which courts must "carefully consider" under heightened scrutiny. *Hecox*, 2023 WL 5283127, at *13. And Defendants do not explain how having a transgender boy—

whose gender identity and expression is male, and is known as a boy to his peers—use the girls' facilities will promote any subjective feelings of comfort on the part of cisgender girls.

Defendants' arguments rely on inapposite out-of-circuit authorities. To begin, the reasoning of those authorities—that there is a privacy right to use facilities "away from" the transgender students at issue because a privacy interest attaches once a restroom door swings open—is foreclosed by *Parents for Privacy*, which held that the "mere presence" of transgender students does *not* violate the privacy of cisgender students. *Compare Adams*, 57 F.4th at 806 ("The privacy interests hinge on using the bathroom away from the opposite sex"), *with Parents for Privacy*, 949 F.3d at 1228-29 ("Plaintiffs allegedly feel harassed by the mere presence of transgender students in locker and bathroom facilities. This cannot be enough."). Thus, while there may be a split between other circuits, that does not mean this Court is writing on a clean slate, because *Parents for Privacy* rejected the precise aspect of *Adams* that Defendants rely upon here.[8] *See also Whitaker*, 858 F.3d at 1052 (rejecting that "mere presence" of transgender student violates cisgender students' privacy). Indeed, the existing gulf between the Ninth and Eleventh Circuits is striking: *Adams* pointedly did not hold that transgender people are a quasi-suspect class, *Adams*, 57 F.4th at 803 n.5 ("[W]e have grave 'doubt' that transgender persons constitute a quasi-suspect class"), and refused to hold even that Title IX protects transgender people. The Ninth Circuit has squarely embraced both propositions. *Karnoski*, 926 F.3d at 1187 n.1; *Grabowski v. Arizona Bd. of Regents*, 69 F.4th 1110, 1116 (9th Cir. 2023). In any event, S.B. 1100 is distinguishable from the policy in *Adams*, including through S.B. 1100's sheer breadth, its absence of factual support for its specific findings, its record of animus, and its

[8] Similarly, *Parents for Privacy*, 949 F.3d at 1223, rejected the argument that *Byrd v. Maricopa Cnty. Sheriff's Dep't*, 629 F.3d 1135 (9th Cir. 2011), a Fourth Amendment strip search case, created any privacy right to use facilities away from transgender students.

exceptions that forfeit any important government interest for half-time pep talks. Mot. at 15 n.7.

Finally, Defendants' insistence that Plaintiffs seek to alter practices dating back to "ancient times" is wrong in several respects. First and foremost, Plaintiffs do not seek to abolish sex-separated facilities as explained above. Second, Defendants' reliance on *Dobbs* conflates the relevance of history for due process as opposed to equal protection. *Hecox*, 2023 WL 5283127, at *9 n.8. Defendants do not even address the Ninth Circuit's rejection in *Hecox* of identical arguments they made in that appeal. Third, there is no ancient tradition of excluding transgender people from facilities matching their gender identity; laws like S.B. 1100 are a distinctly modern invention. Finally, even if there were such a tradition, "neither history nor tradition [can] save [the laws] from constitutional attack." *Latta*, 771 F.3d at 476. Otherwise, maintaining discrimination would become a purpose unto itself, and that is not the law.

C. Dr. Cantor Fails to Rebut the Wide Range of Harms Inflicted by S.B. 1100, and His Fringe Views on Medical Treatment Are Irrelevant Here.

After requesting and receiving almost seven weeks to prepare their opposition, the *only* evidence Defendants managed to produce is the declaration of Dr. James Cantor. That declaration wholly fails to meet Defendants' burden under heightened scrutiny. On its own terms, Dr. Cantor's declaration fails to rebut the vast majority of Dr. Budge's testimony. More broadly, Dr. Cantor's declaration fails to address the actual issue in this case: the consequences of excluding transgender people from facilities matching their gender identity.[9]

First, Dr. Cantor fails to rebut the wide range of harms caused by S.B. 1100. Dr. Budge's declaration provided background on gender identity, gender dysphoria, and discrimination (Budge Decl. §§ II-III) before showing six separate harms caused by discriminatory policies like

[9] Again, Defendants' attempt to turn this case into a battle of experts, while ultimately unavailing, further makes clear that their motion to dismiss is meritless and must be denied.

S.B. 1100 (*id.* § IV). Interference with one aspect of treatment for gender dysphoria (social transition) is one of those harms—but by no means the only one. Excluding transgender youth from facilities matching their gender identity also subjects them to (1) psychological harm including shame, stigmatization, and fear of violence (*id.* ¶¶ 53-57); (2) disclosure of one's transgender status (*id.* ¶¶ 61-62); (3) harassment, bullying, and violence (*id.* ¶¶ 63-64); (4) health consequences from avoiding use of facilities (*id.* ¶ 65); and (5) a reduction in their ability to concentrate and learn (*id.* ¶ 66). Defendants do not dispute those five categories of harm.

Second, in the one category of harm Dr. Cantor discusses—interference with social transition—he stops short of addressing the relevant issue: the harm of excluding transgender students from facilities matching their gender identity. In fact, he makes no mention of facilities at all. The disconnect between his general opinions about transgender people and the specific issue of facilities is illustrated by the fact that, in other public statements that Dr. Cantor does not address, and Defendants ignore, he *supports* the right of transgender people to use restrooms matching their gender identity. Budge Rebuttal ("Reb.") Decl. ¶ 8. Dr. Cantor also does not and cannot rebut the harms caused by S.B. 1100 in interfering with transition, as he lacks the relevant clinical experience to do so, in contrast to Dr. Budge.[10] Budge Reb. Decl. ¶¶ 6-7, 16; *Whitaker*, 858 F.3d at 1045 (relying on Dr. Budge's clinical expertise). While he critiques Dr. Budge for not anticipatorily rebutting his other views in advance, no expert needs to preemptively rebut purported evidence that is unreliable, irrelevant, or mischaracterized.[11]

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[10] Even in cases where bans on medical treatment are directly at issue, courts have noted the limited usefulness of Dr. Cantor's testimony given his lack of relevant experience. *E.g.*, *Koe v. Noggle*, No. 1:23-CV-2904-SEG, 2023 WL 5339281, at *21 n.28, *23 n.34 (N.D. Ga. Aug. 20, 2023) (emphasizing that Dr. Cantor has "no experience treating gender dysphoria in youth").

[11] Defendants also attack Dr. Budge by pointing to an article that describes her lab's "advocacy and activism" against discrimination and her acknowledgement that all scientists should be as

Dr. Cantor mostly voices his disagreement with the provision of gender-affirming care in the first instance.[12] For example, Dr. Cantor believes that, without social transition, there would be high rates of "desistance" in children who showed gender nonconformity before puberty, implying that *some* youth may not ultimately need treatment. Cantor Decl. ¶ 57; *but see* Budge Reb. Decl. ¶¶ 24-31 (rebutting desistance claims). But S.B. 1100 does not bar transition, whether medical or social, and "what is or should be the default treatment for transgender youth is not the question before the court."[13] *B.P.J. v. W. Va. State Bd. of Educ.*, 550 F. Supp. 3d 347, 351 n.4 (S.D.W. Va. 2021) (rejecting similar attempt to transform case about discrete issue, like schools' treatment of transgender students, into larger dispute about gender-affirming care); *A.M. by E.M. v. Indianapolis Pub. Sch.*, 617 F. Supp. 3d 950, 958 (S.D. Ind. 2022) (finding Dr. Cantor's opinions immaterial). And even considering that impermissible *post hoc* justification, there is no evidence or logical nexus that excluding transgender youth from school facilities will cause them not to transition or to voluntarily change their gender identity, which they cannot do. Budge Reb. Decl. ¶¶ 15, 23-34. Instead, S.B. 1100 merely penalizes students who do transition and communicates disapproval, which is not a legitimate state interest. *Latta*, 771 F.3d at 471.

Defendants' argument about the mental health impact of single-user facilities—a subject they notably discuss despite complete silence from Dr. Cantor on the subject—also misses the mark. Defendants misconstrue one article cited by Dr. Budge that offering a gender-neutral option is not, in itself, harmful. Opp. at 25. But the article does not remotely suggest that doing

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transparent as possible about bias. Opp. at 19; Budge Dep., Dkt. 47-3, 112:1-119:2. In other words, they fault Dr. Budge for being *too* honest in explaining that everyone has bias "in some way, shape, or form . . . because we're human" and that this recognition in no way undermines but rather helps to ensure the rigor of scientific research. Budge Dep. 113:19-21, 114:12-115:3.

[12] Indeed, his declaration here is largely recycled from those he has filed in challenges to gender-affirming care bans. *See, e.g.*, *L.W. v. Skrmetti*, No. 3:23-cv-376, Dkt. 113-3 (M.D. Tenn.).

[13] Notably, H.B. 71, at issue in *Poe v. Labrador*, also does not ban social transition.

so *ameliorates* the harm of excluding youth from facilities aligned with their gender identity. To the contrary, the evidence shows that relegating transgender youth to these single-user facilities as their only option is harmful.[14] *See* Budge Decl. ¶ 56 (citing multiple studies). Defendants also do not rebut the harms for transgender youth like Rebecca Roe and A.J. who wish to use the same sex-designated facilities as their peers and are prevented from doing so.[15]

Third, although not directly relevant for the reasons discussed, Dr. Cantor's view that the WPATH Standards of Care are wrong is a fringe view that has been repeatedly rejected. This Court and the Ninth Circuit have repeatedly relied upon the Standards of Care, which are recognized by all mainstream medical organizations in America, and have also acknowledged the basic importance of transition for transgender people. *E.g.*, *Karnoski*, 926 F.3d at 1187 n.1 ("Living in a manner consistent with one's gender identity is a key aspect of treatment for gender dysphoria."); *Edmo v. Corizon, Inc.*, 935 F.3d 757, 767 (9th Cir. 2019); *F.V. v. Barron*, 286 F. Supp. 3d 1131, 1143 n.12 (D. Idaho 2018). Idaho itself previously conceded the validity of those standards—a concession Defendants do not address. *Edmo*, 935 F.3d at 767 (stating "[b]oth sides," including Idaho, "and their medical experts agree[d]"). And other courts have recognized "the consensus approach of the medical and mental health community." *Grimm*, 972 F.3d at 595 (discussing *Edmo*, 935 F.3d at 769)); *Whitaker*, 858 F.3d at 1040. Defendants cannot

[14] The cited article shows psychological harm flowing directly from being "prevented or discouraged from using a bathroom that corresponds to . . . gender identity." Doc. 47-6 at 2, 4; *id.* at 5 (schools should "support the right of students to use a bathroom that matches their identity *and* efforts to establish gender-neutral facilities") (emphasis added); *see also* Budge Dep. 95-96 (clarifying that a measure is not "affirming care" unless it is desired by the patient).

[15] Decl. of Rebecca Roe, Dkt. 15-2, ¶ 14 ("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 (describing mental, physical, and academic harms when Rebecca avoided using the nurse's restroom).

show Plaintiffs are unlikely to prevail by putting in dispute basic facts the Ninth Circuit—and Idaho itself—have repeatedly accepted. *See also* Budge Reb. Decl. ¶¶ 9-12.

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

In *Grabowski*, 69 F.4th at 1116, the Ninth Circuit applied *Bostock*'s analysis of discrimination based on "sex" to Title IX. Given that holding, Defendants do not dispute that Title IX's anti-discrimination provision, 20 U.S.C. § 1682, prohibits discrimination against transgender people. Opp. at 16-18. Instead, they argue that other provisions effectively operate as a carve-out to that mandate: 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)(1) (schools may "provide separate housing on the basis of sex").

Defendants are mistaken. As every federal Court of Appeal to address this question other than the Eleventh has held, these provisions are merely "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 state that "schools may act in an arbitrary or discriminatory manner when dividing students into those sex-separated facilities." *Id.*; *accord A.C. v. Metropolitan Sch. Dist. of Martinsville*, 75 F.4th 760, 770 (7th Cir. 2023) ("Though [Section 1686] certainly permits the maintenance of sex-segregated facilities, we stress again that … the plaintiffs in these cases have [no] quarrel with that rule.").[16] To conclude otherwise would undermine Title IX's promise of equal treatment for transgender people and be irreconcilable with Ninth Circuit authority.

[16] *See also Doe*, 897 F.3d at 533 (agreeing "that barring transgender students from restrooms that align with their gender identity would itself pose a potential Title IX violation"); *Dodds v. United States Dep't of Educ.,* 845 F.3d 217, 221 (6th Cir. 2016) (district failed to show "likelihood of success" in reversing Title IX holding in favor of transgender plaintiff).

As an initial matter, the text of these provisions does not, contrary to Defendants' argument, afford them a blanket license to discriminate. In contrast to S.B. 1100, Title IX does not define "sex," let alone state that it must be defined to prohibit transgender students from using sex-separated facilities aligned with their gender identity. *See, e.g.*, *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"). Further, permitting transgender students to use such facilities in no way jeopardizes the practice these provisions allow, i.e., sex-separated facilities. *See id.* (rejecting "that separate facilities for the sexes forecloses access policies based on gender identity").

The Ninth Circuit recognized as much in *Parents for Privacy*. There, the plaintiff argued that an inclusive policy violated Title IX on the basis of the same statutory and regulatory provisions that Defendants cite. 949 F.3d at 1227. In rejecting the argument, the court did first observe that these regulations, at most, *allow* a school to do something, not require it. But it then went further: it explained that the term "sex-segregated facilities" did not mean "biological sex-segregated facilities." "[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 understanding of "sex-segregated facilities" accords with *Grimm* and *A.C.* and is irreconcilable with *Adams*. *Adams*, 57 F.4th at 815 (court "must" "read 'sex' in Title IX to mean 'biological sex.'").

In any event, "in the context of statutory interpretation, whether a term is ambiguous does not turn solely on dictionary definitions of its component words." *United States v. Pacheco*, 977 F.3d 764, 767-68 (9th Cir. 2020) (quotes omitted). Instead, courts look "to the language itself, the specific context in which that language is used, and the broader context of the statute as a

whole." *Id.* (quotes omitted). As courts have recognized, that context is particularly crucial when interpreting Title IX's provisions at issue here. *See A.C.*, 75 F.4th at 770 (citing dictionary definitions of the word "sex" that supported transgender plaintiff's claim, but concluding that "[n]arrow definitions of sex do not account for the complexity of the necessary inquiry").

As noted, Title IX's central provision is an anti-discrimination mandate, which applies, inclusively, to transgender people. Interpreting Sections 1686, 106.33, and 106.32(b) to simply permit sex-separated facilities, as the Fourth and Seventh Circuits held, effectuates the purpose of these provisions without creating any conflict with Title IX's anti-discrimination mandate. A claim of discrimination under Title IX requires both a showing that a student was treated differently based on a protected characteristic and that that treatment caused harm. *See Grimm*, 972 F.3d at 618. Requiring a cisgender boy to use the boy's bathroom does not harm him. *See id.* ("[T]he act of creating sex-separated restrooms in and of itself is not discriminatory.").

Reading these provisions to allow "segregat[ion] based only on biological sex," *Parents for Privacy*, 949 F.3d at 1227 would place them squarely in conflict with Section 1682(a)'s anti-discrimination provision. Excluding a transgender boy from using the boy's restroom harms him, for he "alone [cannot] use the restroom corresponding with his gender." *Grimm*, 972 F.3d at 618. Nothing in Sections 1686, 106.33, and 106.32(b) suggests they were intended to create a vast loophole in Title IX's anti-discrimination provision, allowing "arbitrary or discriminatory" treatment of transgender persons in every area covered by these provisions. *Id.* at n.16.

Indeed, Defendants themselves fail to reckon with the scope of their argument. Like the majority in *Adams*, Defendants observe that S.B. 1100 allows transgender people to use "unisex, single-occupancy bathroom[s]," suggesting that that measure makes the law more reasonable. *E.g.*, Opp. at 25; *Adams*, 57 F.4th at 798. But if Defendants are right, then Title IX—even as it

purports to protect transgender students—not only permits schools to exclude them from facilities consistent with their gender identity, but also to refuse to provide them the option of a single-occupancy bathroom. Even Defendants do not condone such egregious discrimination. A reading of Title IX that would so denigrate its anti-discrimination mandate with regard to transgender people cannot be reconciled with the purpose and text of that statute.

A closer analysis of *Adams* underscores this conclusion. The Eleventh Circuit had no need to address this central conflict in Defendants' reading of Sections 1686, 106.33, and 106.32(b), because *Adams* nowhere held that *Bostock* applies to Title IX *at all*. *See Adams*, 47 F.4th 791, 801, 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."); *accord Parents Defending Educ. v. Olentangy Loc. Sch. Dist. Bd. of Educ.*, No. 2:223-cv-01595, 2023 WL 4848509, at *7 (S.D. Ohio July 28, 2023). The Ninth Circuit *has* expressly applied *Bostock* to Title IX. *Grabowski*, 69 F.4th at 1116. No appellate court that has held that Title IX prohibits discrimination against transgender people has *also* held that the provisions Defendants cite allow schools to exclude transgender people from gender-aligned facilities. The Ninth Circuit will not be the first.

Defendants' spending clause argument fares no better. Citing *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1 (1981), Defendants argue that Title IX is at most unclear as to whether it permits S.B. 1100, and must be construed in Defendants' favor. Opp. at 18. But, as noted, there is no ambiguity: the mere lack of a definition of the word "sex" does not create one. *Cf. United States v. Flores-Garcia*, 198 F.3d 1119, 1123 n.5 (9th Cir. 2000) (court would not apply rule of lenity unless statute was ambiguous "after resort to the language and structure, legislative history, and motivating policies of the statute"). Further, *Pennhurst* does not require

Congress to "prospectively resolve every possible ambiguity concerning particular applications" of a statute. *Bennett v. Kentucky Dep't of Educ.*, 470 U.S. 656, 669 (1985). With regard to anti-discrimination legislation, "so long as a spending condition has a clear and actionable prohibition of discrimination, it does not matter that the manner of that discrimination can vary widely." *Benning v. Georgia*, 391 F.3d 1299, 1306 (11th Cir. 2004). Here, funding recipients have notice that Title IX encompasses all forms of sex discrimination, including against transgender people. *Jackson v. Birmingham Bd. of Educ.,* 544 U.S. 167, 175, 182-83 (2005); *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 638-39 (1999); *Grimm*, 972 F.3d at 619 n.18 ("*Bostock* forecloses that 'on the basis of sex' is ambiguous as to discrimination against transgender persons."). "[A] State that accepts funds under [a statute with an implied cause of action] does so with the knowledge that the rules for . . . liability will be subject to judicial determination." *Henrietta D. v. Bloomberg*, 331 F.3d 261, 285 (2d Cir. 2003). "[T]he Pennhurst notice problem does not arise in a case . . . in which intentional discrimination is alleged." *Jackson*, 544 U.S. at 182-83 (alterations incorporated). In any event, Defendants' argument could not affect "the scope of the behavior that Title IX proscribes," the only issue presented by the preliminary injunction, but merely the availability of "money damages." *Davis*, 526 U.S. at 639.

Finally, Defendants fail to even address the United States' additional arguments 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 that cannot be read as authorizing discrimination prohibited by that provision. SOI at 11-12; *see also Grimm*, 972 F.3d at 618; *A.C.*, 75 F.4th at 770. Defendants make only an absurd procedural argument: that somehow the United States may not articulate an argument in this case based on statutory text and legislative history because of an injunction in *Tennessee v. United States Dep't of Educ.*,

615 F. Supp. 3d 807 (E.D. Tenn. 2022), and, presumably that this Court is somehow precluded from considering it. That decision enjoined the United States from enforcing published administrative guidance on Title IX. *See id.* at 817-18, 842. The United States did not bring this case, and it does not cite to or rely on that guidance in its Statement of Interest—let alone argue, for instance, that the guidance is entitled to administrative deference. The United States' brief presents a purely legal statutory interpretation argument that is now before this Court.

III. Defendants Fail to Respond to Plaintiffs' Privacy Claim.

Defendants fail to respond to Plaintiffs' privacy claim and have thus waived several issues. First, Defendants concede that there is a constitutional right to privacy in one's transgender status. Mot. at 18. Second, even if the Court were to credit Defendants' fiction that S.B. 1100 does not discriminate against transgender people under equal protection or Title IX, Defendants must nevertheless justify the law's burden on the privacy rights of transgender people under the privacy claim. But Defendants fail to rebut Plaintiffs' evidence that S.B. 1100 infringes upon transgender people's ability to exercise control over the disclosure of their transgender status. While Defendants assert that transgender students can use alternate facilities, they fail to produce any evidence to rebut Plaintiffs' expert testimony that their exclusion from facilities matching their gender identity itself can disclose their status. Budge Decl. ¶ 61; *accord* Budge Dep. 90:20-25. And their relegation to "other" facilities, such as a faculty or nurse's restroom, does not cure the problem; indeed, it exacerbates the disclosure by drawing unwanted attention to the students at issue. Budge Decl. ¶ 52; Rebecca Roe Decl. ¶ 16 ("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."). Last, Defendants fail to demonstrate any government interests

that can justify the law's privacy intrusions, including the absence of "less intrusive means of achieving the same government objectives." *Idaho AIDS Foundation, Inc. v. Idaho Housing and Finance Ass'n*, 422 F. Supp. 2d 1193, 1199 (D. Idaho 2006); *supra* I.B.

IV. Defendants Fail to Rebut Plaintiffs' Undisputed Evidence of Irreparable Harm, and the Balance of Hardships and Public Interest Tip Sharply in Plaintiffs' Favor.

Defendants concede that this Court can enjoin S.B. 1100 either based on a showing that Plaintiffs are likely to succeed on the merits or under the Ninth Circuit's serious questions standard. Opp. at 24. Here, Plaintiffs are entitled to an injunction under either standard.

First, the balance of hardships "tips sharply in plaintiff's favor." *Karnoski*, 926 F.3d at 1198 n.4. Plaintiffs introduced evidence that, if S.B. 1100 excludes transgender youth from facilities matching their gender identity, they will experience stigma; increased risk of depression, anxiety, and self-harm; interference with social transition; and the loss of control over their privacy. Mot. at 2-4, 8-9, 19-20. As in *Hecox*, these are "deeply personal, irreparable harms without injunctive relief." *Hecox*, 2023 WL 5283127, at *20. Defendants have only one response: these harms cease if transgender people may use "unisex, single-occupancy bathroom[s]." Opp. at 25. But Plaintiffs showed that using a single-occupancy restroom, when even feasible, fails to ameliorate S.B. 1100's stigmatic, psychological, medical, and privacy-related harms. *See* Rebecca Roe Decl. ¶¶ 14-16; A.J. Decl. ¶¶ 4, 9; Budge Decl. ¶¶ 53-64. Courts agree. *See Whitaker*, 858 F.3d at 1045-46 (district "actually exacerbated the harm, when it dismissed [transgender student] to a separate bathroom where he was the only student who had access," "invit[ing] more scrutiny and attention from [] peers" and "intensif[ying] his depression and anxiety"); *accord Grimm*, 972 F.3d at 617-18. Incredibly, with such high stakes for transgender people, Defendants do not even try to rebut this evidence. They rest their response on a misreading of Dr. Budge's declaration, again wrongly asserting that *permitting* students to

use gender-neutral, single-occupancy facilities is the same as *forcing* them to do so. *Supra* I.C.

Defendants also fail to identify any comparable harm if S.B. 1100 is preliminarily enjoined. They assert that enjoining S.B. 1100 will somehow "leave [the] safety and privacy interests wholly unprotected for the majority of students who do not have gender dysphoria." Opp. at 24. But Defendants cite no evidence for this proposition, much less that less intrusive means are unavailable. To the contrary, as the Ninth Circuit held in *Hecox*, a preliminary injunction here would "not appear to inflict any comparable harm to [defendants], as the injunction expressly maintain[s] the status quo"—a status quo that undisputedly includes schools that have long expressly allowed transgender students to use restrooms matching their gender identity without incident. *Hecox*, 2023 WL 5283127, at *20. As noted above, *supra* I.B, Plaintiffs' evidence shows that Idaho's longstanding practice of permitting schools to adopt inclusive policies and practices has not led to any evidence of privacy or safety harms, and Defendants put in no evidence that S.B. 1100 is necessary to address any such problems. Defendants' bare assertions that the mere presence of transgender people in facilities aligned with their gender identity necessarily creates any privacy or safety problem is factually and legally untenable. *Parents for Privacy*, 949 F.3d at 1228-29; *Whitaker*, 858 F.3d at 1052-53.

An injunction here will not require any school to adopt any practice or policy it has not yet adopted. But it will prevent S.B. 1100 from effecting a dramatic change to Idaho law, including the eradication of inclusive policies and practices that have, in many places, existed for years. These equities tip sharply for Plaintiffs and justify an injunction under any standard.

CONCLUSION

Plaintiffs respectfully request the Court grant their motion and deny Defendants' motion.

Dated: September 6, 2023 Respectfully Submitted,

/s/ Peter C. Renn
Peter C. Renn
Kell L. Olson
Tara L. Borelli
Christina S. Paek
LAMBDA LEGAL DEFENSE & EDUCATION FUND

Samuel L. Linnet
ALTURAS LAW GROUP, PLLC

Katherine M. Forster
Robyn K. Bacon
J. Max Rosen
Nicholas R. Sidney
Paul Martin
Avery P. Hitchcock
Jimmy P. Biblarz
MUNGER TOLLES & OLSON LLP

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 6th day of September, 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:

Lincoln Davis Wilson
lincoln.wilson@ag.idaho.gov

Rafael John Droz
rafael.droz@ag.idaho.gov

/s/ Peter C. Renn
Peter C. Renn

Samuel L. Linnet (ISB No. 9788)
sam@alturaslawgroup.com
ALTURAS LAW GROUP, PLLC
101 E Bullion St., Unit 2H
Hailey, ID 83333
(208) 788-6688

Peter C. Renn*
prenn@lambdalegal.org
Kell L. Olson*†
kolson@lambdalegal.org
Tara L. Borelli*†
tborelli@lambdalegal.org
Christina S. Paek*
cpaek@lambdalegal.org
LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.
800 South Figueroa St., Suite 1260
Los Angeles, CA 90017
†*mailing address only*
(213) 382-7600 (T) | (213) 402-2537 (F)

*Admitted *pro hac vice*

Attorneys for Plaintiffs

Katherine M. Forster*
katherine.forster@mto.com
Robyn K. Bacon*
robyn.bacon@mto.com
Nicholas R. Sidney*
nick.sidney@mto.com
Paul Martin*
paul.martin@mto.com
Avery P. Hitchcock*
avery.hitchcock@mto.com
Jimmy P. Biblarz*
jimmy.biblarz@mto.com
MUNGER TOLLES & OLSON LLP
350 South Grand Ave., 50th Fl.
Los Angeles, CA 90071-3426
(213) 683-9100 (T) | (213) 687-3702 (F)

J. Max Rosen*
max.rosen@mto.com
MUNGER TOLLES & OLSON LLP
560 Mission Street, 27th Fl.
San Francisco, CA 94105-2907
(415) 512-4000 (T) | (415) 512-4077 (F)

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

Jimmy P. Biblarz

Samuel L. Linnet (ISB No. 9788)
sam@alturaslawgroup.com
ALTURAS LAW GROUP, PLLC
101 E Bullion St., Unit 2H
Hailey, ID 83333
(208) 788-6688

Peter C. Renn*
prenn@lambdalegal.org
Kell L. Olson*†
kolson@lambdalegal.org
Tara L. Borelli*†
tborelli@lambdalegal.org
Christina S. Paek*
cpaek@lambdalegal.org
LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.
800 South Figueroa St., Suite 1260
Los Angeles, CA 90017
†*mailing address only*
(213) 382-7600 (T) | (213) 402-2537 (F)

**Admitted pro hac vice*

Attorneys for Plaintiffs

Katherine M. Forster*
katherine.forster@mto.com
Robyn K. Bacon*
robyn.bacon@mto.com
Nicholas R. Sidney*
nick.sidney@mto.com
Paul Martin*
paul.martin@mto.com
Avery P. Hitchcock*
avery.hitchcock@mto.com
Jimmy P. Biblarz*
jimmy.biblarz@mto.com
MUNGER TOLLES & OLSON LLP
350 South Grand Ave., 50th Fl.
Los Angeles, CA 90071-3426
(213) 683-9100 (T) | (213) 687-3702 (F)

J. Max Rosen*
max.rosen@mto.com
MUNGER TOLLES & OLSON LLP
560 Mission Street, 27th Fl.
San Francisco, CA 94105-2907
(415) 512-4000 (T) | (415) 512-4077 (F)

UNITED STATES DISTRICT COURT
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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.

Appendix A

Supplemental Bibliography of Stephanie L. Budge, Ph.D.

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