

RAÚL R. LABRADOR
ATTORNEY GENERAL

LINCOLN DAVIS WILSON, ISB #11860
Chief, Civil Litigation and
Constitutional Defense

JAMES E. M. CRAIG, ISB #6365
Deputy Division Chief
RAFAEL J. DROZ, ISB #9934
Deputy Attorneys General
Office of the Attorney General
P. O. Box 83720
Boise, ID 83720-0010
Telephone: (208) 334-2400
Fax: (208) 854-8073
lincoln.wilson@ag.idaho.gov
james.craig@ag.idaho.gov
rafael.droz@ag.idaho.gov

Attorneys for Defendants

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO**

REBECCA ROE, by and through her
parents and next friends, et al.

Plaintiffs,

v.

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

Defendants.

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

**REPLY IN SUPPORT OF
MOTION FOR LEAVE TO
FILE SUPPLEMENTAL
AUTHORITY**

Plaintiffs would have the Court believe that Ninth Circuit precedent precludes the Court from following the analysis of the Sixth Circuit in *L.W. v. Skrmetti*, ___ F.4th ___, 2023 WL 6321688 (6th Cir. 2023), and denying their motion for preliminary injunction. They are wrong.

First, Plaintiffs say the Ninth Circuit in *Hecox* “rejected the argument” from *L.W.* that the Court’s analysis must be guided by the “original fixed meaning” of the Constitution. Dkt. 56 at 2 (quoting *L.W.*, 2023 WL 6321688, at *5). But the Ninth Circuit’s discussion of that point in *Hecox* (as to which the State seeks en banc review) applies only to that case, not to this one, much less to the ample historical record of sex-separated restrooms. *Cf. Adams by and through Kasper v. Sch. Bd. St. John’s Cnty.*, 57 F.4th 791, 803 n.5 (11th Cir. 2022) (en banc). In all other cases, this Court is bound by the Supreme Court of the United States, which interprets the Constitution according to its original fixed meaning. *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. ___, 142 S. Ct. 2228 (2022); *N.Y. State Rifle & Pistol Ass’n, Inc. v. Bruen*, 597 U.S. ___, 142 S. Ct. 2111 (2022).

Second, Plaintiffs say they “are entitled to preliminary relief regardless of how ‘sex’ is defined.” Dkt. 56 at 3. But their counsel conceded the opposite at oral argument in response to a direct question of the Court. Indeed, Dr. Budge’s un-sourced dogma that an individual’s subjective “gender identity” is “determinative” of sex is the very foundation of Plaintiffs’ claims. Dkt. 15-1 at 2-3 (citing Budge Decl. ¶ 25); *see also* Dkt. 51 at 2–3 (collecting Plaintiffs’ allegations about gender-affirming care). And it is contrary to basic science, including “the definitions of sex from the

Endocrine Society, the American Academy of Pediatrics, and the American Psychiatric Association,” which all “explicitly define sex solely in terms of biological features, excluding gender identity.” Cantor Decl. ¶ 112.

Third, Plaintiffs characterize Defendants as arguing that *Bostock v. Clayton Cnty., Ga.*, 590 U.S. ____, 140 S. Ct. 1731 (2020) “did not ban sex discrimination if it is based on biology.” Dkt. 56 at 4. That is not at all what Defendants or the Sixth Circuit said. Rather, as *L.W.* explained, *Bostock’s* holding that Title VII bars employers from firing “adult employees because their behavior did not match stereotypes of how adult men or women dress or behave,” is entirely different from the law here (and in *L.W.*) which does “not deny anyone general healthcare treatment based on any such stereotypes.” 2023 WL 6321688, at *17. And once again, the fact that the Ninth Circuit has applied *Bostock’s* principles to Title IX is not helpful to Plaintiffs: *Bostock* also defined sex as referring “to biological distinctions between male and female,” 140 S. Ct. at 1739, and the Ninth Circuit has held that “Title IX authorizes sex-segregated facilities ... based ... on biological sex.” *Parents for Privacy v. Barr*, 949 F.3d 1210, 1227 (9th Cir. 2020).

For many of the same reasons as in *L.W.*, basic standards of the Supreme Court’s equal protection jurisprudence prevent Plaintiffs from succeeding on the merits. And nothing the Ninth Circuit has previously held requires holding otherwise. The court should grant leave to file supplemental authority, deny Plaintiffs’ motion for preliminary injunction, and dismiss this case.

DATED: October 6, 2023.

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL

By: /s/ Lincoln Davis Wilson
LINCOLN DAVIS WILSON
Chief, Civil Litigation and
Constitutional Defense

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on October 6, 2023, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which sent a Notice of Electronic Filing to the following persons:

Samuel L. Linnet
sam@alturaslawgroup.com

Avery P. Hitchcock
avery.hitchcock@mto.com

Christina S. Paek
cpaek@lambdalegal.org

Jacob Max Rosen
max.rosen@mto.com

Kell L. Olson
kolson@lambdalegal.org

Jimmy Biblarz
jimmy.biblarz@mto.com

Peter C. Renn
prenn@lambdalegal.org

Katherine M. Forster
katherine.forster@mto.com

Tara L. Borelli
tborelli@lamdalegal.org

Nicholas Sidney
nick.sidney@mto.com

Paul Martin
paul.martin@mto.com

Robyn K. Bacon
robyn.bacom@mto.com

Counsel for Plaintiffs

Counsel for Plaintiffs

/s/ Lincoln Davis Wilson

LINCOLN DAVIS WILSON
Chief, Civil Litigation and
Constitutional Defense