No. 23-2807

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

Plaintiffs-Appellants,

v.

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

Defendants-Appellees

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

PLAINTIFFS-APPELLANTS' REPLY BRIEF

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INTRODUCTION

Schools have a vast array of tools they can lawfully use to safeguard the welfare of *all* students. S.B.1100 is not one of them. It is a sledgehammer poised to bring the full force of state law down on transgender students in the name of privacy and safety. But constitutional and statutory protections constrain the use of discriminatory tools, and Defendants have not shown, and cannot show, why non-discriminatory tools are not up to the task. Doors on restroom stalls, private areas to change, and privacy curtains are all on the table. At the very least, the Constitution requires that before sanctioning discrimination, the government must show that these non-discriminatory tools will not suffice—and that showing is fatally lacking here. Defendants' record in support of their privacy and safety justifications is as barren as they come.

Satisfying the burden of heightened scrutiny would be daunting even for one school, but it is a thousand-fold heavier here because S.B.1100 seeks to blanket the entire State of Idaho with a mandate of discrimination against transgender students, which no school district previously saw fit to adopt for itself. Defendants claim an interest in uniformity, but discrimination is not made more lawful by expanding its scope. Ultimately, S.B.1100 is premised on the notion that objecting to the mere presence of transgender students in school facilities is sufficient to require their exclusion. But Defendants failed to prove the existence and nature of those

objections, particularly in local communities that have affirmatively embraced their transgender youth through the considered adoption and continued maintenance of inclusive policies for years. And more fundamentally, this Court has correctly rejected any such objections as failing to raise cognizable privacy interests, because discomfort with the mere presence of a minority in shared spaces is not a constitutionally tolerable basis for demanding their exclusion.

ARGUMENT

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

A. Defendants' Historical Arguments Are Irrelevant and Meritless.

Contrary to Defendants' argument, the answer to the equal protection question presented by a law enacted by Idaho in 2023 to ban transgender students from school facilities matching their gender identity cannot be found in first-century Rome or eighteenth-century Massachusetts. Defendants' reliance on history—which they contend dispenses with the need for any equal protection analysis at all—is a non-starter. Defs.Br.16-17.

First, Defendants argue that there is a long tradition of separating facilities by sex.[1] But that is decidedly not the issue presented here: far from seeking to

[1] Sex separation in facilities, which emerged in the U.S. after women started entering the workforce in large numbers, was "deeply bound up with early nineteenth century moral ideology concerning the appropriate role and place for

abolish sex-separated facilities, Plaintiffs seek to *access* them. And despite Defendants' best efforts to dress it in historical trappings, a law like S.B.1100 is a distinctly modern invention by modern legislatures. *Cf. Hecox v. Little*, 79 F.4th 1009, 1024 n.8 (9th Cir. 2023) (analyzing Idaho law excluding transgender females from sports and observing that "the ratifiers of the Fourteenth Amendment would certainly not have understood the Act's definition of 'biological sex'" in 1868 given that chromosomes were not even discovered until 1882).

Second, and in any event, history is no defense to discrimination. That is true regardless of whether a practice was, or was not, historically viewed as discriminatory: "the classification must substantially serve an important governmental interest *today*, for in interpreting the equal protection guarantee, we have recognized that new insights and societal understandings can reveal unjustified inequality that once passed unnoticed and unchallenged." *Sessions v. Morales-Santana*, 582 U.S. 47, 59 (2017) (cleaned up). As this Court explained when striking down laws that excluded same-sex couples from marriage on equal protection grounds, "neither history nor tradition [can] save [the laws] from constitutional attack." *Latta v. Otter*, 771 F.3d 456, 476 (9th Cir. 2014).

Defendants conflate the relevance of history for due process, where it can

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women in society." Terry Kogan, *Sex-Separation in the Public Restrooms: Law, Architecture, and Gender*, 14 MICH. J. GENDER & L. 1, 6 (2007).

serve as a guidepost for liberty, with equal protection, where it would often defeat the very purpose of equality. This Court has rejected Idaho's prior attempt to conflate the two, noting that its argument "would undermine decades of Supreme Court precedent striking down laws that discriminate on the basis of sex," which have a long history. *Hecox*, 79 F.4th at 1024 n.8. The same is true for race discrimination, of course, with historical roots that reach as deeply as American history itself. Given that one of the hallmarks of a suspect or quasi-suspect classification is itself a *history of discrimination*, there would be no point in applying heightened scrutiny if the government could turn around and rely on that very history to justify discrimination. This Court has thus rejected the notion "that because transgender people were marginalized in 1868, they should be afforded no constitutional protections on the basis of their transgender status." *Hecox*, 79 F.4th at 1024 n.8; *see also Obergefell v. Hodges*, 576 U.S. 644, 671 (2015) (holding that historical practices cannot "serve as their own continued justification" for infringing the rights of same-sex couples).

B. S.B.1100 Requires Heightened Scrutiny.

Discrimination Based on Sex. Both sides agree that S.B.1100 discriminates based on sex, regardless of how sex is defined, and that heightened scrutiny is therefore required on that basis alone. 1-ER-11. Defendants also do not disagree that discrimination requires both differential treatment and harm, *Bostock v.*

Clayton Cnty., Ga., 140 S. Ct. 1731, 1740 (2020), and that S.B.1100 discriminates against Plaintiffs and others like them because they are excluded from facilities matching their gender identity. Cisgender students, of course, do not experience that harm. Beyond these key points, any other disagreement between the parties regarding the heightened scrutiny required for sex discrimination is ultimately immaterial.[2]

Defendants' insistence that protections against sex discrimination reach only a person's sex assigned at birth, or what they deem "biological sex," is both irrelevant and wrong. It is irrelevant because even assuming that sex could be limited in that fashion, S.B.1100 still discriminates against transgender students like Rebecca Roe and A.J. on that basis.[3] That is the import of *Bostock*. 140 S. Ct.

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[2] "[Q]uestions that implicate constitutional rights" are "classified as one[s] of law and reviewed de novo." *United States v. Hinkson*, 585 F.3d 1247, 1260 (9th Cir. 2009). The mere fact that they arise in a preliminary injunction appeal does not change the standard of review for such "legal issues" underlying the injunction. *Hecox*, 79 F.4th at 1020. Defendants' reliance on *Doe v. Snyder*, 28 F.4th 103 (9th Cir. 2022), which focused on irreparable harm rather than the merits and in the unique context of a mandatory injunction, is not to the contrary. In any event, Plaintiffs prevail under any standard, given that Defendants failed to introduce *any* evidence to prove their privacy and safety justifications.

[3] Defendants' suggestion that Plaintiffs argued that the equal protection claim turns on the definition of sex is demonstrably false. 2-ER-63 (confirming Plaintiffs' position that "sex means more than biological gender" in response to question but explaining why S.B.1100 discriminates based on sex "no matter how that term is defined, even if you read it as narrowly as the Government is suggesting").

at 1739; *see also Roberts v. Clark Cnty. Sch. Dist.*, 215 F. Supp. 3d 1001, 1015 (D. Nev. 2016) (finding argument that discrimination is "based on [plaintiff's] genitalia, not his status as a transgender person, [] is a distinction without a difference").

Defendants' argument is also wrong, however, that protections against sex discrimination are limited to biology, even setting aside the biological origins of gender identity itself. 3-ER-297; *Hecox*, 79 F.4th at 1024 (recognizing such origins and rejecting Idaho's definition of "biological sex"); *F.V. v Barron*, 286 F. Supp. 3d 1131, 1139 (D. Idaho 2018). Discrimination based on sex "is not only discrimination because of maleness" or "femaleness" but encompasses "discrimination because of the *properties or characteristics* by which individuals may be classified as male or female." *Fabian v. Hosp. of Cent. Connecticut*, 172 F. Supp. 3d 509, 526 (D. Conn. 2016). Precedent recognizing the impermissibility of sex stereotypes illustrates the point, and it spans both the statutory and constitutional context. *See* Pls.Br.23-24 (citing *Schwenk*); *J.E.B. v. Alabama*, 511 U.S. 127, 131 (1994); *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 609-10 (4th Cir. 2020) (collecting cases). Those stereotypes were on open display here. And they cannot be swept under the rug as stray legislator comments, because the *statewide political platform* that led to S.B.1100's enactment viewed "biological gender" as "essential" to "a child's identity and purpose," and it "strongly

oppose[d]" any departure from this social expectation. 3-ER-400. Sex discrimination is inherent in S.B.1100 from beginning to end.

Discrimination Based on Transgender Status. S.B.1100 also requires heightened scrutiny because it discriminates based on transgender status. In Defendants' retelling, S.B.1100 was not about transgender students. That would come as quite a surprise to anyone glancing at headlines covering the issue, to the casual observer of any legislative proceedings, and especially to those who both supported and opposed the law. 3-ER-423; 2-ER111; 3-ER-397-401.

First, Defendants admit that S.B.1100 was specifically enacted in order to reverse the inclusive policies (or what the Attorney General of Idaho referred to as "gender identity policies," 3-ER-415) adopted by Idaho schools expressly permitting transgender students to access facilities matching their gender identity. They argue the law was supposedly *justified* in the name of statewide uniformity—but that is not the relevant question at this stage of the equal protection analysis. Whether a law discriminates against a group "'does not depend on why' a policy discriminates." *Latta*, 771 F.3d at 467 (rejecting government's contention that marriage laws did not discriminate based on sexual orientation but rather procreative capacity). Defendants conflate the question of whether S.B.1100 discriminates against transgender people at all with whether it is supposedly

justified in doing so.[4]

Second, S.B.1100 denies only transgender people—not cisgender people—access to facilities consistent with their gender identity. The former are thus the subject of discrimination, whereas the latter are not, because only the former group is harmed by the law. *See Bostock*, 140 S. Ct. at 1740; *see also Brandt v. Rutledge*, 47 F.4th 661, 672 (8th Cir. 2022) (citing *Patel* and recognizing that the relevant equal protection focus is on the individuals injured by a law, not those for whom it is irrelevant); *Latta*, 771 F.3d at 468 (holding that marriage laws discriminated based on sexual orientation, even though heterosexuals were equally barred from marrying a person of the same sex). To the extent Defendants rely on *Adams v. School Board of St. Johns County*, 57 F.4th 791 (11th Cir. 2022), to argue that S.B.1100 does not discriminate based on transgender status because both transgender girls and cisgender boys are excluded from girls' facilities, for instance, they ignore that discrimination requires harm. Defs.Br.27. In *Hecox*, this Court recognized that Idaho law discriminated against transgender women because it banned them from female athletic teams consistent with their gender identity. 79

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[4] Uniformity is also not a freestanding justification. *See Lawson v. Kelly*, 58 F. Supp. 3d 923, 933 (W.D. Mo. 2014); *see also Romer v. Evans*, 517 U.S. 620 (1996) (invalidating statewide restriction on nondiscrimination protections). To the contrary, S.B.1100 blocks school districts from having the "'serious, thoughtful debates'" extolled by Defendants, Defs.Br.16, and crafting "more narrowly drawn policies" for their communities as Boise did. *Hecox*, 79 F.4th at 1038.

F.4th at 1022. The fact that cisgender men were also excluded from female teams—which caused them no harm—did not erase the law's discrimination against transgender women.

S.B.1100 also changed nothing for cisgender people. There was never any doubt that cisgender students were already excluded from facilities designated for another sex before S.B.1100. 3-ER-381-383; Defs.Br.27 (characterizing the law as "redoubling" preexisting boundaries in that respect). The only purported "confusion" that Defendants contend that the law sought to address—and the only change that it accomplished—was with respect to transgender people's ability to use facilities matching their gender identity. Defs.Br.27.

Alternately, to the extent Defendants argue that S.B.1100 does not discriminate based on transgender status because transgender people fall on "both sides" of the line drawn by the law, Defs.Br.28, that is simply another way of saying that the law discriminates against both transgender boys and transgender girls. Far from indicating a "lack of identity" between the law and the group harmed, Defendants' argument confirms it. *Id.*; *see Bostock*, 140 S. Ct. at 1742. One-hundred percent of transgender students are excluded by S.B.1100 from facilities matching their gender identity. The harm that the law inflicts is perfectly co-extensive with the class of transgender people.

Third, the "text, structure, purpose, and effect" of S.B.1100 confirm its

discrimination against transgender people. *Hecox*, 79 F.4th at 1022. Just as "[t]he plain language of [Idaho law] ban[ned] transgender women from 'biologically female' teams" in *Hecox*, the plain language of S.B.1100 bans transgender girls like Rebecca Roe from female-designated restrooms. *Id.* This Court rejected Idaho's argument that simply because a statute "uses 'biological sex' in place of the word 'transgender,' it is not targeted at excluding transgender girls and women." *Id.* at 1024. As noted, cisgender students were already clearly barred from facilities designated for another sex. And by design, S.B.1100 makes it legally impossible for transgender girls to satisfy its definition of female and for transgender boys to satisfy its definition of male: that is how it achieves its goal of reversing inclusive policies. Defendants' contention that lawmakers purportedly did not harbor *animosity* towards transgender students (ignoring the record evidence of sex stereotyping) elides the relevant question of whether S.B.1100 intended to exclude them from facilities matching their gender identity. It did.

C. Defendants Failed to Prove that S.B.1100's Sweeping Ban Is Justified by Privacy or Safety.

Defendants' justifications for S.B.1100 rest on a series of assumptions, each of which they must prove to prevail under heightened scrutiny but each of which lacks any factual support.

Privacy. First, as a threshold matter, Defendants posit that S.B.1100 is warranted because cisgender students in Idaho object to sharing communal spaces

with transgender students using facilities matching their gender identity. But they point to no facts, in the record or otherwise,[5] to substantiate those objections or, indeed, to prove that cisgender students are even necessarily *aware* of when they are sharing facilities with transgender peers, as the district court recognized. 1-ER-19. Instead, Defendants assert that "[t]hese are matters of common knowledge." Defs.Br.24. That assertion is not enough, especially not under heightened scrutiny, and particularly not where communities in Idaho have voluntarily maintained inclusive policies for close to a decade now. Factual support is required. *See Hecox*, 79 F.4th at 1030-31; *Latta*, 771 F.3d at 471.

This case is thus materially different from *Adams*, where there was not only an exclusionary policy adopted by the district but a *factual stipulation* that students objected to transgender students' use of facilities matching their gender identity. 57 F.4th at 806. That stipulation was key to the decision because it dispensed with the "'need for proof'" that would otherwise exist. *Id.* Not so here. If the welfare of Rebecca Roe or A.J. is ultimately to be sacrificed in the name of peer objections, it is hardly unreasonable that the government must first provide proof

[5] Defendants' attempt to characterize these as legislative rather than adjudicative facts is therefore beside the point. Defs.Br.23. In any event, this Court has specifically held that purported "legislative facts" concerning predictions about the welfare of children from allowing same-sex couples to marry were *not* entitled to deference given courts' independent constitutional duty. *Latta*, 771 F.3d at 469.

that those objections actually exist. *See Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1051 (7th Cir. 2017) (emphasizing the absence of any student complaints despite plaintiff's six-month use of the boy's restroom).

Second, Defendants assert that S.B.1100 is justified as a means of addressing these objections. But because there *are* no such objections before the Court, it is wholly speculative whether they relate to (a) shielding an objecting student's unclothed figure from the view of transgender students of a different assigned sex, Defs.Br.22, or (b) merely sharing communal facilities with transgender students, even absent any such visual contact. Regardless, each concern fails.

As to avoiding visual contact, Defendants fail to meet their factual burden under heightened scrutiny of proving why other means cannot address this concern. *See Hecox*, 79 F.4th at 1033 (recognizing that, under heightened scrutiny, courts "must 'reject measures that classify unnecessarily … when more accurate and impartial lines can be drawn"); Pls.Br.21. In the context of restrooms, Defendants have no response to the reality that privacy dividers and stall doors already prevent visual contact. *Grimm*, 972 F.3d at 613-14. At most, Defendants imagine that there could be "bathrooms with minimal or non-existent stalls." Defs.Br.30. But there is no evidence that any Idaho school restroom contains a row of toilets without privacy partitions; and if there were, one obvious solution

would be to put up partitions. Likewise, in the context of locker rooms, Defendants do not deny that schools can provide an objecting student with a more private place to change, such as a restroom stall. *A.C. v. Metropolitan Sch. Dist. of Martinsville*, 75 F.4th 760, 772 (7th Cir. 2023), *cert. denied*, -- S. Ct. -- (2024). Defendants also posit that some school showers could be open, but they do not show why other measures, such as hanging up curtains, could not address that scenario. *Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518, 524 (3d Cir. 2018). As to overnight trips, schools can accommodate a request by an objecting student to stay in a different room. In sum, Defendants have wholly failed to prove why the blanket ban imposed by S.B.1100 is justified by visual privacy in light of the wide range of non-discriminatory measures at the disposal of school administrators, who have confirmed their workability in unrebutted testimony. 3-ER-359-71.

Many of these non-discriminatory measures either already exist or can be readily employed by schools. Defendants also do not (and cannot reasonably) contend that Idaho schools are unable to adopt such measures, because S.B.1100 already requires them to accommodate any privacy concerns. Schools are obligated, for instance, to address the concern of a student who objects to exposing their body before *any* other person in a locker room, shower, or overnight accommodation. Moreover, Defendants derive the wrong lesson from *United States v. Virginia*, 518 U.S. 515 (1996). That case did not hold that sex can be

reduced to mere physiology but, rather, that any physical differences could *not* justify the exclusion of women from Virginia Military Academy—even where their inclusion entailed alterations at the school. *Id.* at 550 n.19 ("Experience shows such adjustments are manageable."). In other words, where the government can provide equal access, it must do so, regardless of what other accommodations the government might make in providing such access.

Defendants' eleventh-hour attempt to introduce news articles about incidents in other states for the first time on appeal does not come close to satisfying their burden under heightened scrutiny; it only underscores their failure to do so. Even if these *post hoc* materials could be considered and their accuracy and reliability established on appeal,[6] none of them remotely demonstrates that a sweeping ban like S.B.1100 is justified. To the contrary, they illustrate that schools possess other more tailored means of addressing any concerns about privacy or safety. For instance, Defendants cite to an unverified situation in Colorado where a student's parents objected to their child sharing a room with a transgender student during an overnight trip—but the trip organizers then accommodated the parents' request for their child to be roomed elsewhere. Defs.Br.7. Depriving all transgender students

[6] For instance, Defendants cite to an incident in Wisconsin, but the district has denounced accounts of the incident as "ill-informed, inaccurate, and incomplete." Sun Prairie Area Sch. Dist., *Supporting All Students*, https://www.sunprairieschools.org/district/equity/supporting-all-students.

of treatment consistent with their gender identity was not warranted to address the objection. None of Defendants' belated examples can distract from their inability to prove why S.B.1100's sweeping ban is justified in Idaho.

Because Defendants cannot show that S.B.1100 is a tailored means of addressing any concern premised on visual privacy, that leaves them to rely on objections to the mere presence of transgender students—but this boundless conception of privacy fails as a matter of law. Despite Defendants' attempt to minimize the import of *Parents for Privacy v. Barr*, 949 F.3d 1210, 1222 (9th Cir. 2020), as limited to the legality of inclusive policies, they cannot escape its reasoning, which also bears on the permissibility of discriminatory policies. *See id.* at 1223 n.10 (referring to cases addressing discriminatory policies as "similar to this one"). After all, in that case, this Court confronted the same question of whether the privacy of cisgender students warrants the exclusion of transgender peers from facilities matching their gender identity. And it answered that question in the negative. That holding cannot be reconciled with Defendants' position that students have a privacy right to use facilities "away from" such transgender students. *Adams*, 57 F.4th at 804. "[D]iscomfort being around students whom [objecting students] define as different from themselves," as the Third Circuit explained, "does not implicate a privacy interest." *Doe*, 897 F.3d at 529 n.69.

Adopting Defendants' position would violate bedrock equality principles

that discomfort with the mere presence of a minority—no matter how sincerely felt—is not a sufficient basis for demanding their removal from shared spaces. Pls.Br.39-41; *see also Parents for Privacy*, 949 F.3d at 1228-29 (recognizing that objecting students "allegedly feel harassed by the mere presence of transgender students in locker and bathroom facilities" but holding that "[t]his cannot be enough"). The government may not "'send nor reinforce messages of stigma or second-class status.'" *Latta*, 771 F.3d at 468. But that is precisely what S.B.1100 would do by banishing transgender students from shared facilities because their simple presence is deemed unacceptable.

Safety. Defendants also fail to meet their burden under heightened scrutiny of proving that S.B.1100 is justified by safety. First, the record confirms that the fear that a cisgender student will pretend to be transgender to access a facility designated for another sex has no factual support in Idaho. 3-ER-382-83. Defendants thus resort to arguing that S.B.1100 is justified because it is *possible* this could happen. Defs.Br.29. But heightened scrutiny requires more than "[c]onjecture, speculation and fears"—especially where many years of experience with inclusive policies in Idaho has affirmatively shown that there is no problem that S.B.1100 prevents. *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 938 (N.D. Cal. 2010); *see also Latta*, 771 F.3d at 469 (rejecting unsupported legislative predictions about child welfare under heightened scrutiny); *Grimm*, 972 F.3d at

614 (observing that fears about students pretending to be transgender is disproven by the experiences of schools across the country).

Second, and perhaps more importantly, Defendants fail to show that S.B.1100 is a tailored response to preventing any safety problem, even if one could be substantiated. For instance, Defendants gesture to an incident in Virginia, Defs.Br.6, the details of which are not before the Court.[7] The undisputed facts in the record here, however, illustrate some of the reasons why Defendants have been unable to prove that this is a problem in Idaho or one that cannot be addressed through non-discriminatory means. In Boise School District, for instance, there is a multi-step process for obtaining school approval of Gender Support Plans, including meetings with school officials and forms to document a student's need for access to facilities consistent with their gender identity. 2-ER-284; 2-ER-288-289; 3-ER-448 (noting policies that "require that the gender identification be both persistent and consistent over time"). School districts across Idaho have a broad array of means available to address any fear that a cisgender student could pretend to be transgender, *see, e.g.*, 3-ER-437 (pre-approval meetings with school principal or building administrator); 3-ER-441 (access based on official school records), in

[7] For instance, there is no evidence that the cisgender student at issue misrepresented to anyone that he was transgender. *See* Michele Goldberg, *The Right's Big Lie About a Sexual Assault in Virginia*, N.Y. TIMES (Oct. 28, 2021), https://www.nytimes.com/2021/10/28/opinion/loudoun-county-trans.html.

addition to existing laws and policies that directly prohibit any misconduct, 3-ER-382. Defendants have failed to meet their burden of showing why S.B.1100's sweeping ban is justified by safety.

D. The Scope of Injunctive Relief Appropriately Mirrors the Scope of S.B.1100's Constitutional Violation.

For the first time on appeal, Defendants belatedly attempt to limit the scope of relief. Defs.Br.30-31 (arguing for law's application to cisgender students and to facilities other than restrooms). But even if they had not waived that argument, it is meritless. Plaintiffs are entitled to a preliminary injunction against the enforcement of S.B.1100 to "exclude[] transgender people from public school restrooms and facilities matching their gender identity." SER-162. Whether that relief is characterized as facial or as-applied "is not what matters." *John Doe No. 1 v. Reed*, 561 U.S. 186, 194 (2010). A challenge to a category of applications of a statute is "'as applied' in the sense that it [does] not seek to strike [the statute] in all of its applications," but is also "'facial' in that it is not limited to the plaintiffs' particular case." *Id.* at 194. Any standards for a facial challenge apply only "to the extent of that reach." *Id.* Thus, Defendants' argument that S.B.1100 could be applied to "males who identify as male," for instance, is irrelevant to the relief sought by Plaintiffs, which does not reach such situations nor bar the mere

maintenance of sex-separated facilities, as Plaintiffs made crystal clear below.[8] *See, e.g.*, 2-ER-47; Dist. Ct. Dkt. 50 at 6-7.

Plaintiffs are, however, entitled to relief that protects all transgender people from S.B.1100's enforcement, rather than only Rebecca Roe and SAGA or only in restrooms. The sweeping nature of S.B.1100 is a key part of its constitutional defect, and that defect equally exists regardless of which transgender person or which facility is at issue. The categorical nature of the ban itself defies the tailoring required by heightened scrutiny and thus warrants an injunction against the range of its applications against transgender people. *See Lopez-Valenzuela v. Arpaio*, 770 F.3d 772, 789 (9th Cir. 2014) (holding that a categorical ban against bail for detainees without a lawful presence was not adequately tailored under heightened scrutiny, and facial relief was therefore warranted, even assuming some individuals could be detained on alternate grounds); *see also Hecox*, 79 F.4th at 1037 (upholding facial aspect of injunction because the law's categorical ban "was likely 'unconstitutional as currently written'" and declining suggestion to remand to tailor injunction depending on circumstances of individual athletes); *United States v. Manning*, 527 F.3d 828, 839 (9th Cir. 2008) (holding that courts cannot rewrite statutes to save them). S.B.1100 cannot be constitutionally applied to deny

[8] It is also undisputed that cisgender students were already excluded from facilities designated for another sex prior to S.B.1100. 3-ER-381-383.

transgender people equal treatment consistent with their gender identity.

II. Plaintiffs' Title IX Claim Is Likely to Succeed.

Defendants erect a straw man in response to Plaintiffs' Title IX claim. According to Defendants, Plaintiffs' Title IX argument rises or falls on the contention that "'sex' in Title IX doesn't refer to biology," Defs.Br.33, and that if "sex" instead means "biological sex," Plaintiffs' claim must fail.

That is wrong. However this Court defines "sex" under Title IX, a straightforward statutory analysis makes clear that (1) S.B.1100 "discriminat[es]" against transgender students "on the basis of sex," 20 U.S.C. § 1681; and (2) no statutory or regulatory provision authorizes that discrimination.

A. S.B.1100 "Discriminat[es]" Against Transgender Students "On The Basis Of Sex."

First, as a near-unanimity of courts have held, laws like S.B.1100 "subject" transgender students to "discrimination" "on the basis of sex." 20 U.S.C. § 1681. As the Fourth Circuit recognized in *Grimm*, a Title IX discrimination claim has two elements: (1) differential treatment based on sex; and (2) discriminatory "harm." 972 F.3d at 616; *see also Bostock*, 140 S. Ct. at 1753. S.B.1100 treats transgender students differently "on the basis of sex." *Supra* § I.B; *Grimm*, 972 F.3d at 616. And it unquestionably harms them. Pls.Br.54-59; *infra* § IV.A.

Against this conclusion, Defendants argue that S.B.1100 cannot discriminate because it treats people who are assigned male and female equally. Defs.Br.33.

But this is precisely the argument that *Bostock* rejected. 140 S. Ct. at 1742-43. Defendants further argue that *Parents for Privacy* held that if a policy treats male and female students equally, it cannot be discriminatory under Title IX. 949 F.3d at 1227-28; Defs.Br.39-40. But the policy in that case did not exclude cisgender plaintiffs from anything based on their sex. 949 F.3d at 1218-19. It treated "all students equally"; that is, it allowed all students to use the facilities corresponding with their gender identity. *Id.* at 1227-28. And the plaintiffs failed to allege sex-based "harm." 949 F.3d at 1228-29. S.B.1100 excludes transgender people from facilities matching their gender identity and does profound harm to them. It plainly discriminates under Title IX.[9]

B. Title IX Includes No Statutory or Regulatory Safe Harbor for S.B.1100's Discrimination Against Transgender People.

Defendants assert that even if S.B.1100 "constitutes discrimination that would otherwise violate Title IX," Defs.Br.38, three provisions—20 U.S.C.

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[9] Defendants assert that, under Plaintiffs' interpretation of Title IX, a cisgender boy might have a discrimination claim if the girls' restrooms were more conveniently located. Defs.Br.41. As Defendants' cited regulation confirms, if one set of facilities truly rose to the level of not being "comparable" to the other, a student *would* have a claim. 34 C.F.R. § 106.33. But any *de minimis* harms are not equivalent to the stigma and ostracism S.B. 1100 will inflict on transgender students. *See Grimm*, 972 F.3d at 617. Title IX is more than capable of drawing that distinction. *See, e.g.*, *Parents for Privacy*, 949 F.3d at 1228 (plaintiffs' allegations of harm did not "rise to the level of a Title IX violation"); *Grimm*, 972 F.3d at 617 (plaintiff's stigma is "sufficient to constitute harm under Title IX").

§ 1686, 34 C.F.R. § 106.33, and 34 C.F.R. § 106.32(b)—operate as full-fledged exceptions to Title IX's anti-discrimination requirement. This argument is groundless.

First, the argument fails under black-letter administrative law. The facilities that S.B.1100 reaches are addressed at most under 34 C.F.R. § 106.33, an implementing regulation of Section 1681, Title IX's anti-discrimination requirement. Pls.Br. 49 & n.9. Section 1686, the only statute among the three provisions relied upon by Defendants, reaches only "living facilities," such as dormitories, which are not covered by S.B.1100.[10] An "implementing regulation cannot override [Title IX's] statutory prohibition against discrimination on the basis of sex." *Grimm*, 972 F.3d at 618. If indeed there were any tension between the two, the statute would control.

Regardless, Defendants' broader argument is wrong. Defendants' contention is that, *if* this Court reads "sex" in Title IX as "biological sex," the regulations must authorize them to exclude transgender students from facilities matching their gender identity, irrespective whether doing so is discrimination under Section 1681. Defendants' assertion that "sex" can mean *only* "biological

[10] That statute is demonstrably *not* the statutory basis for the regulation at issue here, as the United States itself confirmed below. FER-13-14.

sex" under Title IX is itself wrong.[11] But it is also irrelevant: however this Court defines "sex," it is the *rest* of the text, and context, of the provisions at issue—not the definition of the word "sex" in isolation—that defeat Defendants' argument. *See United States v. Pacheco*, 977 F.3d 764, 767-68 (9th Cir. 2020).

Section 1681 bars schools from subjecting people to "discrimination" "on the basis of sex." 20 U.S.C. § 1681. By contrast, Regulation 106.33 states only that schools may "provide" sex-separated toilet, locker room, and shower facilities. 34 C.F.R. § 106.33.

Viewing these provisions side by side, there is no textual basis to read Regulation 106.33 as *displacing* Section 1681's anti-discrimination requirement.[12] Instead, it merely confirms that, in the ordinary course, providing sex-separated facilities is not harmful, and does not constitute discrimination. When doing so would cause discriminatory harm, Section 1681 intervenes.

Most obviously, Regulation 106.33 never uses the word *discrimination.*

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[11] Defendants observe that the definitions of "sex" that the Seventh Circuit cited in *A.C.* acknowledge the relevance of biology. Defs.Br.35. But *A.C.*'s point was not that "biological sex" is irrelevant in such definitions, but that they *also* acknowledge that "sex" can be more nuanced. *See A.C.*, 75 F.4th at 770. Defendants also attempt to twist *Parents for Privacy* into a decision endorsing—rather than questioning—their definition of sex by citing an excerpt out-of-context. The full text supports Plaintiffs. *Compare* Defs.Br.33 *with* Pls.Br.48.

[12] The same analysis would apply to a case that dealt with "maintain[ing]" sex-separated living facilities. 20 U.S.C. § 1686; 34 C.F.R. § 106.32.

"Discrimination" is a term of art with a precise meaning that includes the presence of harm. *Bostock*, 140 S. Ct. at 1753. Section 1681 expressly uses that term. The regulation does not, and there is no exception here that excuses differential treatment where it causes harm. Rather, the regulation clarifies that a school may provide sex-separated facilities—and it is able to provide that clarity precisely *because* such separation ordinarily does not cause harm—but that permission is still subject to the anti-discrimination prohibition where it *does* cause harm. The United States agrees. FER-12. After all, the regulation can only clarify the reach of the statutory anti-discrimination prohibition—not displace it.

By contrast, the word the regulation *does* use—that schools may "provide" sex-separated facilities—cannot be read to indirectly authorize discrimination. Allowing a school to "provide" sex separation as a general matter does not permit the school to do so even in instances where it would discriminate. As courts have similarly recognized, Plaintiffs do not challenge the general provision or maintenance of sex-separated facilities; they challenge the government's "discriminatory exclusion of [them] from the sex-separated [facilities] matching [their] gender identity." *Grimm*, 972 F.3d at 618. That does not mean that a school's facilities are suddenly no longer sex-separated. They are no less sex-separated than in a school that recognizes that intersex people, or people with chromosomal, anatomical, or other biological variations, for instance, must also be

allowed to use sex-separated facilities. *See A.C.*, 75 4th at 770. There, as here in the Boise schools that Plaintiffs attend, schools are still providing sex-separated facilities. Because there is no tension between allowing a school to "provide" sex-separated facilities, and disallowing a school from *discriminating* when it does so, Defendants' argument fails.

Plaintiffs' interpretation is also the only one that comports with the purpose of Title IX and its *raison d'etre*: to prohibit the harm caused by differential treatment on the basis of sex. As Defendants do not dispute, their reading of Regulation 106.33 as an *exemption* from the anti-discrimination rule would also allow schools to *force* transgender students to use facilities that do not match their gender identity—with no alternative. Pls.Br.49. Nothing in Title IX authorizes such flagrant discrimination.[13]

C. Defendants' Spending Clause Arguments Provide No Defense.

Finally, Defendants argue that, if Title IX is ambiguous, the Spending Clause requires interpreting it in their favor. But application of a prohibition of discrimination to varied circumstances does not create such ambiguity. *See Grimm*, 972 F.3d at 619 n.18; Pls.Br.50.

Furthermore, courts have described *Pennhurst*'s notice requirement as a

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[13] Defendants also argue that Plaintiffs' position is unworkable because schools cannot administer inclusive policies. Defs.Br.36. That is wrong. *See supra* § I.C.

"'limitation on private damages'" actions. *Mansourian v. Regents of Univ. of Cal.*, 602 F.3d 957, 967 (9th Cir. 2010); *Soule v. Connecticut Ass'n of Sch., Inc.*, -- F.4th --, 2023 WL 8656832, at *12 (2d Cir. 2023). Defendants argue that *Pennhurst* contradicts that position because it included a request for injunctive relief. Defs.Br.42. But *Pennhurst* addressed a situation where lower courts held that a statute required the state to bear "high cost[s]," and the relief, however described, enforced that interpretation. *Pennhurst State Sch. v. Halderman*, 451 U.S. 1, 18 (1981). Furthermore, *Pennhurst*'s notice requirement does not apply to intentional violations of Title IX: here, S.B.1100 is an "official policy" or "affirmative institutional decision" and thus, the requirement is irrelevant. *Mansourian*, 602 F.3d at 967.

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

Because S.B.1100 threatens the irreversible disclosure of students' transgender status—which Defendants do not deny constitutes private information entitled to protection—Plaintiffs are also likely to succeed on their privacy claim.

Defendants argue on appeal that no one will understand that the students excluded by S.B.1100 from continuing to use facilities matching their gender identity are transgender. As an initial matter, that argument was not made below and is waived. 1-ER-31. It is also illogical, factually unsupportable, and contrary to the district court's own finding that it is "true" that S.B.1100 can cause this

disclosure. 1-ER-31. The *only* evidence in the record on this point was introduced by Plaintiffs. *See, e.g.*, 3-ER-315 (expert testimony that "[w]hen transgender students are excluded from using facilities used by their peers, it does not go unnoticed by other students"); 2-ER-381.

The prospect of an "accommodation" does not change this fact. Forcing a transgender boy to visit the nurse's office every single time he needs to use the restroom, or to stay alone in a room by himself on an overnight trip while his other classmates share rooms, is hardly the type of conduct that escapes the attention of one's peers. Defendants' speculation that perhaps these peers will believe that transgender students have now decided they simply prefer to be alone defies credulity and "fails to comprehend" the reality of the school environment. *See Doe*, 897 F.3d at 530 (rejecting the notion that simply because all students could access single-user facilities, transgender students would not experience greater scrutiny and stigma from being relegated to such facilities).

Defendants' other new argument—that there is no interest in avoiding the *forced disclosure* of private information by the government—fares no better. The government may not accomplish indirectly that which it could not accomplish directly. Just as the government itself may not disclose information entitled to constitutional privacy protection, it also may not cause the disclosure of that private information to others. *See Ray v. Himes*, No. 2:18-cv-272, 2019 WL

11791719, *10 (S.D. Ohio Sept. 12, 2019) (recognizing that the state itself did not disclose transgender plaintiffs' birth certificates but that it nonetheless caused the disclosure of their transgender status to others given the need to use birth certificates). But that is precisely what S.B.1100 would do. After all, use of the facilities covered by the law is not a choice but a necessity of life and school. Defendants cannot escape responsibility for the consequences of their actions.

IV. The Remaining Equitable Factors Overwhelmingly Favor an Injunction.

A. Single-User Restrooms Do Not Ameliorate S.B.1100's Irreparable Harms.

Defendants do not dispute that if Plaintiffs are likely to prevail on the merits, the rest of the equitable factors favor a preliminary injunction. Pls.Br.51. Nor do they address the extensive record evidence that S.B.1100 will expose transgender youth to numerous irreparable harms. Pls.Br.54-59 (collecting citations and cases).

Defendants instead make only one argument: single-user facilities ameliorate S.B.1100's harms. Defs.Br.49. That is wrong, as sister courts have also recognized. *Grimm*, 972 F.3d at 617-18; *Whitaker*, 858 F.3d at 1045.

Excluding transgender students from facilities matching their gender identity—and thereby *forcing* them to use single-user facilities—exposes them to a wide range of harms, including stigma; outing; harassment; physical health consequences; impaired learning ability; and interference with social transition.

See Pls.Br.54-58; 2-ER-274-75, 283, 382; 2-ER-283; 3-ER-382; *supra* § III. Stigma alone is a profound harm of constitutional magnitude, as this Court has emphasized. *Latta*, 771 F.3d at 468. It is not a harm that can be handwaved off.

Defendants purport to rebut this evidence by questioning whether the location of single-user facilities in Plaintiffs' schools are inconvenient. Defs.Br.49. But it is their *exclusion* from facilities matching their gender identity that will stigmatize and harm them. The location of single-user facilities cannot change that.

Defendants further argue that Dr. Budge's declaration supports their position, claiming one cited article shows that single-user restrooms are sufficient. Defs.Br.48. Any cursory review confirms that is false: the article distinguishes between *allowing* students to use gender-neutral facilities as one option and *forcing* them to do so as their only option. SER-150-55; *accord* SER-97-98. Defendants' remaining attacks on Dr. Budge—whose expert testimony the Seventh Circuit has credited, *Whitaker*, 858 F.3d at 1045—are ultimately immaterial, rely on mischaracterizations, or relate to their broader disagreement with the standards of care for the treatment of gender dysphoria recognized by this Court and all mainstream medical organizations in America. *See* AMA Amicus Br.; *Edmo v. Corizon, Inc.*, 935 F.3d 757, 767 (9th Cir. 2019); 2-ER-116-17, 122-28; SER-115-

17. And none of that changes S.B.1100's stigma and other harms to youth like Plaintiffs who have transitioned. Pls.Br.59.

Defendants finally note that *Parents for Privacy* acknowledged that cisgender students who objected to inclusive policies could use alternative facilities. Defs.Br.49. But those students were not *excluded* from facilities consistent with their gender. The Third Circuit rejected the same comparison that Defendants attempt to draw here given the "drastic consequences" at stake for transgender students: "When transgender students face discrimination in schools, the risk to their wellbeing cannot be overstated—indeed, it can be life threatening." *Doe*, 897 F.3d at 529, 530.

B. Defendants Have No Evidence of Comparable Harm.

As in *Hecox*, 79 F.4th at 1036, a preliminary injunction that maintains the status quo does not cause any comparable harm to the government, and Defendants cannot point to any evidence in the record to show otherwise.

CONCLUSION

Discrimination should be the government's last resort, not its first. Because Defendants have failed to justify S.B.1100, a preliminary injunction is warranted.

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Respectfully submitted,

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I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate ACMS system on January 17, 2024, and that service will be accomplished by the appellate ACMS system on all registered participants.

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