LAMBDA LEGAL

VIA ACMS FILING

Molly C. Dwyer, Clerk of Court
Office of the Clerk
U.S. Court of Appeals for the Ninth Circuit
P.O. Box 193939
San Francisco, CA 94119-3939

February 14, 2024

Re: *Roe v. Critchfield*, Case No. 23-2807
Response to Notice of Supplemental Authority Pursuant to Fed. R. App. P. 28(j) and Circuit Rule 28-6

Dear Ms. Dwyer:

Bridge v. Oklahoma State Department of Education, CIV-22-00787-JD, 2024 WL 150598 (W.D. Okla. Jan. 12, 2024), an out-of-circuit decision on the pleadings, is wrong and irreconcilable with this Court's precedent.

First, *Bridge* concluded that because Oklahoma law did not explicitly reference transgender students, it could not discriminate based on transgender status. *Id*. at *4 n.5. But *Hecox v. Little*, 79 F.4th 1009, 1042 (9th Cir. 2023), holds that laws need not reference "transgender" people to discriminate against them when they define "biological sex" to make it impossible for a transgender girl, for instance, to be treated as female. Pls.Opening.Br.24-28. And while the Tenth Circuit has not recently addressed the issue, this Court has squarely held that transgender people constitute a quasi-suspect class. Pls.Opening.Br.25.

Second, *Bridge* held that cisgender students have a right to privacy to use facilities "outside the presence" of transgender peers using facilities matching their gender identity. 2024 WL 150598, at *5. But *Parents for Privacy v. Barr*, 949 F.3d 1210, 1222 (9th Cir. 2020), rejects that conclusion. *Bridge* also asserted that "any biological male could claim to be transgender"—an unsubstantiated fear disproven by the record here. 2024 WL 150598, at *6; Pls.Reply.Br.17-18.

Third, *Bridge* relied on Tenth Circuit authority, *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215 (10th Cir. 2007), excluding transgender people from protections against sex-based discrimination. But *Etsitty*'s foundation was overruled by *Bostock*. *Etsitty* also relied on Ninth Circuit authority that this Court recognized in *Schwenk v. Hartford*, 204 F.3d 1187, 1202 (9th Cir. 2000), had been overruled, because protections against sex discrimination encompass more than "biological differences."

Fourth, *Bridge*'s Title IX analysis misses the forest for its trees. *Bridge* first held that Title VII and Title IX are different, rendering *Bostock* inapplicable. 2024 WL 150598, at *1 n.1, *6. This Court's precedent construes them consistently. Pls.Opening.Br.44-45 (citing *Grabowski*). *Bridge* next fixated on the meaning of "sex" in a *regulation*, but it ignored the word "discrimination" in the *statute*, from which the regulation does not and cannot create an exception. Title IX prohibits differential treatment based on sex where it causes harm, without exception.

Respectfully submitted,

s/ Peter C. Renn

Peter C. Renn
Counsel for Plaintiffs-Appellants

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate ACMS system on February 14, 2024. I certify that all participants in the case are registered ACMS users and that service will be accomplished by the appellate ACMS system.

s/ Peter C. Renn
Peter C. Renn