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' OPENING BRIEF

Peter C. Renn
Kell Olson†
Tara L. Borelli†
Pelecanos†
LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.
800 S. Figueroa St., Suite 1260
Los Angeles, CA 90017
(213) 382-7600
†*Mailing address only*

Samuel L. Linnet
ALTURAS LAW GROUP, PLLC
101 E Bullion St., Unit 2H
Hailey, ID 83333 | (208) 788-6688

Counsel for Plaintiffs-Appellants

Katherine M. Forster
Robyn K. Bacon
Nicholas R. Sidney
Paul Martin
Avery P. Hitchcock
Jimmy P. Biblarz
MUNGER TOLLES & OLSON LLP
350 South Grand Ave., 50th Fl.
Los Angeles, CA 90071
(213) 683-9100

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Regulations

Bills

INTRODUCTION

Idaho Senate Bill 1100 ("S.B.1100") is a sweeping new law that would categorically exclude every transgender student across Idaho from every school restroom and other sex-separated facility matching their gender identity. This statewide mandate would upend a long-standing status quo in which no Idaho school district had chosen to enact such a policy of its own accord. To the contrary, numerous Idaho school districts have chosen to maintain inclusive policies expressly allowing transgender students to access facilities matching their gender identity—for as long as *seven years*—without any evidence of harm.

Unless reversed, the district court's denial of a preliminary injunction against S.B.1100 will unleash grave and irreparable harms upon transgender youth across Idaho. That includes Plaintiff Rebecca Roe, a transgender girl in seventh grade, and A.J., a transgender boy in his senior year at Boise High School who has used the boys' restroom for more than a year without issue pursuant to an inclusive policy that has existed since 2016. It is profoundly stigmatizing and humiliating to be stripped of access to the same communal facilities as everyone else and instead forced to go elsewhere. That exclusion can also forcibly out a student as transgender, violating their privacy and exposing them to harassment. And the ability to live in a manner consistent with one's gender identity is crucial to avert the consequences that can otherwise destroy the lives of transgender youth—

including depression, anxiety, and suicidality—and that can keep the parents of transgender youth awake at night.

Discriminatory policies like S.B.1100 violate equal protection and Title IX, as the vast majority of the federal judiciary has recognized, as well as the constitutional right to informational privacy. No justification can save S.B.1100 under heightened scrutiny on the record here. Defendants introduced no evidence whatsoever to support their privacy and safety justifications—an especially stark factual deficit given that many Idaho schools have maintained inclusive policies for nearly a decade without incident. Moreover, schools have a range of nondiscriminatory tools to promote privacy and safety, which illustrate that these interests are not in a zero-sum competition with equality. And S.B.1100 cannot be justified by the purported privacy right of cisgender students to object the *mere presence* of transgender students in shared spaces. Circuit precedent has already rejected that very proposition: there is no "privacy right not to share restrooms or locker rooms with transgender students whose sex assigned at birth is different than theirs." *Parents for Privacy v. Barr*, 949 F.3d 1210, 1222 (9th Cir. 2020).

Because of the injunction pending appeal granted by this Court, transgender students like Rebecca and A.J. can currently attend school without sacrificing their dignity, privacy, and safety—and without harming a single fellow student. A preliminary injunction is justified and necessary to maintain that status quo.

STATEMENT OF JURISDICTION

The district court had jurisdiction under 28 U.S.C. §§ 1331 and 1343 because Plaintiffs brought claims arising under federal law pursuant to 42 U.S.C. § 1983. This Court possesses jurisdiction under 28 U.S.C. § 1292(a)(1). The district court denied Plaintiffs' motion for a preliminary injunction on October 12, 2023. Plaintiffs timely filed a notice of appeal on October 16, 2023.

STATEMENT OF THE ISSUE

Whether the district court erred in denying a preliminary injunction against enforcement of S.B.1100, an Idaho law that would mandate the categorical exclusion of all transgender people from all school restrooms and other sex-separated facilities matching their gender identity.

STATUTORY AUTHORITIES

All relevant statutory authorities appear in the Addendum to this brief.

STATEMENT OF THE CASE

A. Plaintiffs

Rebecca Roe. Rebecca Roe, who is proceeding pseudonymously to protect her privacy, is currently a seventh grade student in junior high within Boise School District. 2-ER-272, 278. She enjoys hanging out with friends at the mall, playing video games, watching anime shows, and doodling artwork. 2-ER-272.

Rebecca is transgender, meaning that her sex assigned at birth, which was

male, does not match her gender identity, which is female. During fourth grade, Rebecca's parents began to notice signs of depression, and Rebecca began falling behind in coursework. 2-ER-278. After fourth grade, Rebecca told her parents that she did not believe she was a boy. 2-ER-272. Her parents began taking her to see a mental health professional. 2-ER-272. After discussions between Rebecca, her parents, and her treating provider, the decision was made to give Rebecca the opportunity to "be herself" during one spring break. 2-ER-278. Rebecca went shopping and chose girls' clothes for herself. 2-ER-279. In contrast to the distress she felt as a result of gender dysphoria, which is the clinically significant distress that can accompany the discordance between one's gender identity and sex assigned at birth, 3-ER-298-300, Rebecca felt joy and relief when her gender expression matched her gender identity, and she could finally see herself in the mirror. 2-ER-273.

Following this experience, Rebecca continued the process of social transition—that is, living in a manner consistent with one's gender identity, which is an essential aspect of treatment for gender dysphoria. 3-ER-302-04. She began to use a more typically feminine name, wore clothes typically worn by girls, adopted a more typically feminine hairstyle, and used female pronouns. 2-ER-273. Her friends accepted and supported her, and school staff also respected her name and pronouns. 2-ER-273. As part of her gender dysphoria treatment, Rebecca has

also received puberty-delaying medication, which allows transgender adolescents to avoid physical changes that would otherwise occur from the puberty associated with their birth-assigned sex, and can be followed with gender-affirming hormone therapy to bring one's body into alignment with one's gender identity. 2-ER-279.

Rebecca has not used a restroom designated for males, whether at school or elsewhere, since fifth grade. 2-ER-274. Because Rebecca is generally perceived by others as female, it would appear to others that a girl was using the men's restroom if she did so. 2-ER-274. During sixth grade, she generally avoided using the restroom at school. 2-ER-274. The initial plan was that she would use the nurse's restroom, but she ultimately did not feel comfortable doing so, because it felt stigmatizing and isolating to use. 2-ER-274. It was also located in a less accessible location than the communal restrooms. 2-ER-274. She would thus limit her fluid intake and "hold it" at school, creating a physical and mental distraction in class, until she could make it home after the school day to use the restroom. 2-ER-274.

As Rebecca started a new school in seventh grade, alongside new classmates, she wanted to fit in with her female peers and use the girls' restroom like other girls. 2-ER-274. Pursuant to a practice adopted by Boise School District since at least 2016, transgender students have been able to access facilities consistent with their gender identity, which is memorialized in a Gender Support

Plan developed with school counselors. 3-ER-448. The idea of being excluded from the girls' facilities because of S.B.1100 is painful and makes Rebecca feel unequal to other girls. 2-ER-274. If she is only allowed to use the boys' restroom or a single-user facility, she also fears that any of her classmates could find out she is transgender, depriving her of control over her private information. 2-ER-275.

Rebecca's parents agonize over the impact S.B.1100 will have on her mental health, physical safety, and well-being. 2-ER-280. As confirmed by the expert testimony of Dr. Stephanie Budge, who is a psychologist and professor at the University of Wisconsin-Madison, excluding transgender students from facilities matching their gender identity causes these students to feel rejected, stigmatized, and shamed, and exposes them to depression, anxiety, and suicidality. 3-ER-311-12. In research where transgender youth were prevented or discouraged from using facilities matching their gender identity, 60% seriously considered suicide. 3-ER-313. Furthermore, their exclusion from such facilities undermines their social transition and can exacerbate the negative consequences of gender dysphoria. 3-ER-298-99, 303. This exclusion also exposes them to harassment and discrimination. 3-ER-315-16.

SAGA. Plaintiff Sexuality and Gender Alliance ("SAGA") is a student organization that supports LGBTQ students at Boise High School. 2-ER-283. S.B.1100 "goes directly against everything that SAGA stands for" and directly

threatens its transgender members, including its president A.J.[1] 2-ER-284.

A.J. is a transgender boy in his senior year. He came out to his friends as transgender in ninth grade and to his family and others in his life during tenth grade. 2-ER-284. During the summer between tenth and eleventh grade, and with the support of his parents, A.J. reached out to his school counselor to develop a Gender Support Plan, which memorialized the use of his new name and pronouns and confirmed that he would use male-designated facilities on campus. 2-ER-284. Before then, having to use the girls' restroom was painful to A.J. 2-ER-285. The only single-user restroom on campus was also located in a separate building and farther away from most of his classes. 2-ER-285. Starting in his junior year, however, A.J. used the boys' restroom at school, and he has not encountered any problems from other students when he has done so. 2-ER-284. The thought of having to use the girls' restroom again makes him "feel ill." 2-ER-285.

B. Status Quo Preceding S.B.1100

In 2015, the Idaho School Board Association created a model policy specifying that students should be permitted "to use the restrooms and locker

---

[1] As neither Defendants nor the district court questioned, SAGA has standing to seek relief because of the injuries that S.B.1100 inflicts on the organization, including its transgender members who are excluded from facilities matching their gender identity. *See Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 341-42 (1977).

rooms that correspond to the gender identity they consistently assert at school." 3-ER-409. Since its issuance, approximately 60 school districts and charter schools in Idaho have expressly adopted it or similar inclusive practices. 3-ER-395-96, 422-42. Prior to S.B.1100's passage, no Idaho school district had any express policy that categorically banned transgender students from using facilities matching their gender identity. 2-ER-109-11.

There is no record evidence that the adoption of policies and practices expressly allowing students to use sex-separated facilities aligned with their gender identity (hereafter, "inclusive policies") in Idaho schools has caused any harm.[2] The Idaho School Board Association confirmed that schools adopting inclusive policies have had no reported incidents as a result. 3-ER-395-96, 418-21. Experts who work in Idaho schools agree. The President of the Idaho Association of School Resource Officers, Morgan Ballis, presented expert law enforcement testimony that the inclusive policy adopted in the school district he supports as a School Resource Officer, and those adopted in other school districts statewide,

[2] The district court used different terminology, seemingly referring to these as "sex-inclusive" polices and distinguishing them from "sex-separate" policies. 1-ER-5. To be clear, an inclusive policy merely means that transgender students can access facilities matching their gender identity—not that cisgender students can access facilities designated for another sex—and nothing about an inclusive policy is inconsistent with also maintaining sex-separate facilities. There was also never any suggestion that any Idaho school did not maintain sex-separate facilities.

have not harmed the privacy or safety of any cisgender student. 3-ER-382-83. To the contrary, it is transgender students who are at highest risk of harassment and violence as a result of discrimination, which inclusive policies help to address. 3-ER-380-81, 307-09.

Officer Ballis' experience with inclusive policies in Idaho mirrors the experience of school administrators who have successfully implemented inclusive policies in other states. Plaintiffs introduced unrebutted testimony from Diana Bruce and Foster Jones, who implemented inclusive policies in Washington D.C. and Kentucky, respectively, as school administrators. As they showed, these policies have governed the welfare of thousands of students over many years without any privacy or safety issues. 3-ER-359-71.

C. Enactment of S.B.1100

Context Preceding Enactment. S.B.1100 took shape after a fight in early 2023 about whether Caldwell School District should join the numerous other schools in Idaho that have adopted inclusive policies. 3-ER-422-42. At a local school board meeting to discuss the policy, Idaho Senator Chris Trakel—who stated that he was there in his "official position" and who would ultimately become a key proponent of S.B.1100—asserted that such a policy would jeopardize children's "moral health." 3-ER-395. Around that same time, Idaho Senator Cindy Carlson sent a public letter to Idaho Superintendent of Public Instruction

Debbie Critchfield denouncing inclusive policies and declaring "[w]e need to send the message" about kids not being "indoctrinate[d]" with "this garbage." 3-ER-446. Shortly thereafter, S.B.1100 was introduced and raced through the Idaho legislature in a mere month.

Legislative Proceedings. S.B.1100's purpose was to exclude transgender students from facilities matching their gender identity. In advocating for the bill, Senator Trakel quoted from the Idaho Republican Party platform: "We believe biological gender to be an essential characteristic of a child's identity and purpose," and "We strongly oppose any person, entity, or policy that attempts to confuse minors regarding their bio[logical] gender."[3] 3-ER-400. He continued, "We hear a lot of talk about how the transgender are, it's their right to use the bathroom," but he opposed "allow[ing] a boy to use the girl's bathroom or vice versa" and giving "permission to use the opposite sex bathroom." 3-ER-400-01. There were no policies in Idaho schools giving cisgender students permission to use facilities designated for another sex. Rather, he was referring to inclusive

[3] This disapproving sentiment that transgender youth are "confused" about their gender was repeatedly echoed by members of the public supporting S.B.1100. They believed that cisgender students should not share facilities with "boys who think they wanna be girls and girls who think they wanna be boys"; that "[s]ocially transitioning these kids in schools is feeding their mental disorder"; and that "[i]f a human truly believes he or she is a horse, that belief does not make it true" but rather "demonstrates a serious mental problem in the individual - and the same for a male who believes he is a female (and vice versa)." 3-ER-397-99, 462.

policies—like the one considered by Caldwell School District, which he had opposed—that allow transgender students to use facilities consistent with their gender identity.

In attempting to justify the law, legislators also cited hypothetical safety problems, despite the absence of any evidence of such problems in Idaho in all the years preceding S.B.1100. Senator Trakel explained that he did not think that "the risk of harm or anything comes from the trans community" but hypothesized that the bill would prevent "some small child" from otherwise being "molested or raped in the bathroom." 3-ER-397, 401. Other legislators supporting S.B.1100 likewise conceded that there were no "documented cases of trans person violence on non-trans people." 3-ER-401.

S.B.1100's Provisions. In order to achieve its objective, S.B.1100 defines "sex" based solely on chromosomes and reproductive anatomy at birth so that transgender males are regarded as females and transgender females are regarded as males. Idaho Code § 33-6602 [33-6702]. Based on this definition, S.B.1100 requires that every K-12 public school multiple-occupancy restroom or changing facility must be designated by sex and used only by members of that "sex." Idaho Code § 33-6603 [33-6703]. S.B.1100 thus mandates that all schools statewide must banish transgender people from the facilities matching their gender identity. S.B.1100 also applies to school-sponsored events with overnight lodging. Idaho

Code § 33-6603(4) [33-6703]. Thus, for example, if four students generally stay in one hotel suite for a school trip, a transgender student may be forced to stay in a room without any other students, isolating them and depriving them of the same social bonding that other students experience. 1-ER-33.

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

S.B.1100 requires that schools provide "reasonable accommodations" to anyone who is "unwilling or unable" to use the facilities designated for the person's "sex," but this does not include access to facilities "designated for use by members of the opposite sex." Idaho Code § 33-6605 [33-6705]. S.B.1100 also lays out various exemptions—such as permitting a male coach to enter the girls' locker room for the sole purpose of delivering a halftime "pep talk," despite the purported harms from his mere presence according to the law—but none provides transgender students with equal access to facilities matching their gender identity. Idaho Code § 33-6604 [33-6704]; 3-ER-397-401.

The legislature acknowledged in S.B.1100's findings that "federal court judgments" had repeatedly invalidated similar policies. Idaho Code § 33-6601(6)

[33-6701]. Undeterred, it passed S.B.1100.

D. Prior Proceedings

Plaintiffs filed the underlying action and a motion for a preliminary injunction on July 5, 2023. Plaintiffs only sought an order preliminarily enjoining enforcement of S.B.1100's mandate of statewide discrimination—not an order requiring that any Idaho school adopt any inclusive policy—and they also never challenged the practice of maintaining sex-separated facilities.

In support of their preliminary injunction motion, Plaintiffs submitted declarations from Rebecca Roe and her mother, A.J., Dr. Budge, Officer Ballis, Ms. Bruce, and Mr. Jones as well as documentary evidence relating to the status quo in Idaho schools preceding S.B.1100. The only evidence that Defendants submitted in opposition to the preliminary injunction was the lone declaration of a Canadian psychologist, James Cantor, who did not address sex-separated facilities whatsoever. Rather, he only opined generally on his views about gender dysphoria, which fall outside the consensus view of all mainstream medical associations in America, 3-ER-300, such as his belief that *if* youth do not socially transition, then gender dysphoria may desist for *some* of them. 2-ER-168. But he never denied the harms of being excluded from sex-separated facilities for youth who do transition or whose gender dysphoria persists.

Plaintiffs also filed a motion for a TRO to preserve the status quo before the

start of the school year, which the district court granted. The court agreed the injunction would merely "preserve[] the status quo" and explained that the TRO was "not mandating or requiring that school districts in Idaho do anything—including adopt policies that would allow students to use restrooms that coincide with their gender identity." 2-ER-264.

Notwithstanding its TRO decision, the district court subsequently denied Plaintiffs' motion for a preliminary injunction on October 12, 2023. With respect to the equal protection claim, the district court agreed that heightened scrutiny was required but found that S.B.1100 was likely to survive that scrutiny based on the government's asserted interest in privacy. Defendants did not introduce any evidence to support this interest, and the court agreed that "there is no evidence of transgender students engaging in behaviors that infringe upon the privacy of others." 1-ER-19. But the court nevertheless held that the government would likely satisfy heightened scrutiny based on the premise that cisgender students had an inherent right to privacy that was violated by the mere "presence" of transgender students in facilities matching their gender identity. 1-ER-20. The district court also held that Plaintiffs were unlikely to show that S.B.1100 violates Title IX, notwithstanding the harm that such treatment inflicts on transgender students on the basis of sex. With respect to the privacy claim, the court held that the disclosure of information concerning one's transgender status does not likely

implicate a constitutional right, notwithstanding precedent recognizing a constitutional right to informational privacy.

In a brief coda, the district court stated that both sides had done "little more than speculate that harms will occur"—which is accurate as to Defendants but inaccurate as to Plaintiffs, who had submitted numerous declarations, including from Rebecca, her mother, and A.J., showing specific irreparable harms. 1-ER-34.

The district court ordered that the TRO would end, "and S.B. 1100 will take effect, 21 days from the date of this order," which would have been November 2, 2023. 1-ER-38.

Plaintiffs appealed and simultaneously moved for an injunction pending appeal. A motions panel of this Court (Fletcher, Bennett, & Callahan, JJ.) granted Plaintiffs' motion on October 26, 2023, with Judge Callahan dissenting. Dkt. 11.1 (holding that "[t]he standard for evaluating an injunction pending appeal is similar to that employed by district courts in deciding whether to grant a preliminary injunction") (quotes omitted). The statewide ban that S.B.1100 would mandate currently remains enjoined, leaving local school districts free to maintain inclusive policies, or not, on their own accord.

SUMMARY OF ARGUMENT

As recognized by the vast majority of the federal judiciary to address the issue—including the Fourth, Sixth, and Seventh Circuits and numerous district

courts—discriminatory policies like S.B.1100 are inconsistent with the protections promised by the Constitution and Title IX and their fundamental underlying values. *See, e.g.*, *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 608-14 (4th Cir. 2020), *cert. denied*, 141 S. Ct. 2878 (2021); *Whitaker ex rel. Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1051 (7th Cir. 2017); *Dodds v. United States Dep't of Educ.*, 845 F.3d 217, 220-22 (6th Cir. 2016).[4]

The parties agree that S.B.1100 demands heightened scrutiny. Defendants concede that heightened scrutiny is required, at the very least because the law treats people differently based on its definition of "sex." And the record shows that this differential treatment harms transgender students like Plaintiffs. S.B.1100 also requires heightened scrutiny for the independent reason that it discriminates against transgender people. This Circuit has held that transgender people are a

---

[4] *See also A.C. v. Metropolitan Sch. Dist. of Martinsville*, 75 F.4th 760, 770 (7th Cir. 2023); *Doe v. Boyertown*, 897 F.3d 518, 530 (3d Cir. 2018); *Doe #1 v. Mukwonago Area Sch. Dist.*, -- F. Supp. 3d --, 2023 WL 4505245 (E.D. Wis. 2023); *B.E. v. Vigo Cnty. Sch. Corp.*, 608 F. Supp. 3d 725, 729-33 (S.D. Ind. 2022); *A.C. v. Metropolitan Sch. Dist. of Martinsville*, 601 F. Supp. 3d 345, 350-54 (S.D. Ind. 2022); *A.H. v. Minersville Area Sch. Dist.*, 408 F. Supp. 3d 536, 575-78 (M.D. Pa. 2019); *J.A.W. v. Evansville Vanderburgh Sch. Corp.*, 396 F. Supp. 3d 833, 842-43 (S.D. Ind. 2019); *M.A.B. v. Bd. of Educ. of Talbot Cnty.*, 286 F. Supp. 3d 704, 716-18 (D. Md. 2018); *Evancho v. Pine-Richland Sch. Dist.*, 237 F. Supp. 3d 267, 288-89 (W.D. Pa. 2017); *Bd. of Educ. of the Highland Local Sch. Dist. v. U.S. Dep't of Educ.*, 208 F. Supp. 3d 850, 874-76 (S.D. Ohio 2016).

quasi-suspect class under the Equal Protection Clause. S.B.1100 intentionally deprives them, and them alone, of access to facilities consistent with their gender identity. Because that exclusion causes the involuntary disclosure of a student's transgender status, it additionally infringes upon the constitutional right to informational privacy.

Defendants failed to satisfy their heavy burden of justifying S.B.1100 under heightened scrutiny. They failed to introduce even an iota of evidence to show that privacy or safety has ever been compromised without a statewide mandate excluding transgender students from access to facilities matching their gender identity. To the contrary, Plaintiffs introduced evidence that schools in Idaho like those attended by Plaintiffs have expressly permitted such access for at least seven years without any proof of harm. Schools can and do take steps to protect privacy in sex-separated facilities—without discriminating against transgender students. As confirmed by Plaintiffs' unrebutted evidence—which spanned school administration, law enforcement, and students themselves—there is nothing mutually exclusive between maintaining privacy and safety, on the one hand, and upholding nondiscrimination, on the other.

The district court wrongly held that S.B.1100 could nonetheless be justified by objections to the mere presence of transgender students in facilities matching their gender identity. It relied heavily on the Eleventh Circuit's decision in *Adams*

v. School Board of St. Johns County, 57 F.4th 791 (11th Cir. 2022). But this Court has specifically rejected that a cisgender student's right to privacy includes the specific right not to share such facilities with transgender peers. *Parents for Privacy*, 949 F.3d at 1222. Discomfort with a minority is not a constitutionally tolerable basis for insisting upon their removal from shared spaces. Nor does forcing transgender students to use alternative facilities, such as a faculty or nurse's restroom, cure the constitutional problem. Rather, it stigmatizes transgender students as unwanted outsiders in their own communities, compounding the equal protection injury.

For the same reason that S.B.1100 discriminates against transgender students on the basis of sex under equal protection, it also violates Title IX's prohibition against sex discrimination. The Ninth Circuit, like the Fourth and Seventh, has expressly held that Title IX's prohibition on "discrimination" "on the basis of sex," 20 U.S.C. § 1681, like parallel language under Title VII, prohibits discrimination against transgender people. *See Grabowski v. Arizona Board of Regents*, 69 F.4th 1110, 1116 & n.1 (9th Cir. 2023). There is no question that enforcement of S.B.1100 is thus "discrimination" "on the basis of sex" under Title IX. The district court nevertheless held that Title IX expressly authorizes discrimination against transgender people—notwithstanding this precedent—based on regulatory and statutory provisions merely allowing schools to "maintain" or "provide" sex-

separated facilities. As the Fourth and Seventh Circuits have correctly held, however, these provisions merely permit schools to maintain sex-separated facilities—that is, designate separate facilities for males and females—a practice Plaintiffs do not challenge and that, in itself, does not cause sex-based harm. They do not permit schools to discriminate against transgender students by excluding them from sex-separated facilities matching their gender identity—a practice that violates Section 1681, Title IX's core nondiscrimination protection.

Because Plaintiffs are likely to succeed on the merits, a violation of the constitutional and statutory rights at issue here is itself irreparable harm. Moreover, without a preliminary injunction, S.B.1100 will wreak havoc on the lives of transgender youth like Plaintiffs. The stigmatizing exclusion of transgender youth from facilities matching their gender identity will inflict profound psychological and physical harms. It will also cause the irreversible disclosure of their transgender status, which is a bell that cannot be unrung. In contrast, preserving the status quo will not cause any harm to Defendants. *See Hecox v. Little*, 79 F.4th 1009, 1024 (9th Cir. 2023) (preliminary injunction against Idaho law that excluded transgender women from women's sports teams did "not appear to inflict any comparable harm to [Idaho], as the injunction expressly maintained the status quo" of inclusivity). Schools like those in Boise School District have chosen to maintain policies expressly permitting transgender students

to access facilities matching their gender identity for years without evidence of harm. And because a preliminary injunction would only reach S.B.1100's statewide mandate of discrimination, it would leave local school districts to their own devices to adopt any inclusive policies or not.

STANDARD OF REVIEW

Although an order denying a preliminary injunction is subject to abuse of discretion review, "questions 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); *see also Cal. First Amend. Coal. v. Calderon*, 150 F.3d 976, 980 (9th Cir. 1998) ("a district court's ruling on the constitutionality of a state statute is reviewed de novo"). De novo review also applies to "constitutional questions of fact" underlying preliminary injunctions. *Edge v. City of Everett*, 929 F.3d 657, 664 (9th Cir. 2019). Furthermore, as with any preliminary injunction, "legal issues underlying the injunction are reviewed de novo because a district court would necessarily abuse its discretion if it based its ruling on an erroneous view of law." *Hecox*, 79 F.4th at 1020 (quotes omitted).

ARGUMENT

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

Laws like S.B.1100 that discriminate against a quasi-suspect class must survive heightened scrutiny under the Equal Protection Clause to safeguard the

constitutional rights of vulnerable groups who are targeted for mistreatment. *Karnoski v. Trump*, 926 F.3d 1180, 1200-01 (9th Cir. 2019) (holding that discrimination against transgender people requires heightened scrutiny). Where heightened scrutiny applies, the court must presume that the law is unconstitutional, and the government bears a heavy burden of proving otherwise. *United States v. Virginia*, 518 U.S. 515, 533 (1996).

To satisfy its burden, the government must demonstrate an "exceedingly persuasive justification" in which there is a substantial relationship between the discriminatory means employed and the achievement of important government interests. *Id.* at 534. These interests cannot be hypothetical or created *post hoc* in response to litigation. *Id.* at 533. Rather, the court must scrutinize the law's "actual purposes and carefully consider the resulting inequality to ensure that our most fundamental institutions neither send nor reinforce messages of stigma or second-class status." *Latta v. Otter*, 771 F.3d 456, 468 (9th Cir. 2014). Where less intrusive means can substantially achieve the government's interests without discrimination, the law fails heightened scrutiny. *Karnoski*, 926 F.3d at 1200; *Latta*, 771 F.3d at 472.

A. S.B.1100 Requires Heightened Scrutiny Because It Discriminates Based on Sex and Transgender Status.

S.B.1100 requires heightened scrutiny for two independent reasons: it discriminates based on sex and transgender status.

Discrimination Based on Sex. Discrimination requires both differential treatment and harm. *See Bostock v. Clayton Cnty., Ga.*, 140 S. Ct. 1731, 1740 (2020). First, S.B.1100 requires heightened scrutiny because the law differentiates on the basis of "sex," as Defendants conceded below and the district court recognized, 1-ER-12; and that differential treatment harms transgender students because they are denied access to facilities consistent with their gender identity.

S.B.1100 engages in sex-based differential treatment in multiple ways. First, the law cannot even be articulated without reference to "sex." Idaho Code § 33-6603 [33-6703] (prohibiting entry into covered facilities unless the person is of the designated "sex"); *cf. Whitaker*, 858 F.3d at 1051 ("the School District's policy cannot be stated without referencing sex"). Second, *Bostock* explained that if an employer has two employees "who identif[y] as a female," and retains the one who "was identified as female at birth" while firing the other because she "was identified as a male at birth," the employer discriminates based on sex. 140 S. Ct. at 1741. Similarly, if a student who identifies as female can use the girls' restroom if she was identified as female at birth, but a transgender girl may not because she was identified as male at birth, that too is sex discrimination. Third, "[d]iscrimination because one fails to act in the way expected" of their assigned sex has long been recognized as a form of sex discrimination. *Schwenk v. Hartford*, 204 F.3d 1187, 1202 (9th Cir. 2000). Policies like S.B.1100 discriminate

against "transgender students … who fail to conform to the sex-based stereotypes associated with their assigned sex at birth." *Whitaker*, 858 F.3d at 1051; *Dodds*, 845 F.3d at 221; *Grimm*, 972 F.3d at 608-09.

Although S.B.1100 indisputably treats people differently based on sex, the *harm* that it inflicts is specific to transgender people, and it therefore discriminates against them—and only them. "The proper focus … is the group for whom the law is a restriction, not the group for whom the law is irrelevant." *City of Los Angeles v. Patel*, 576 U.S. 409, 418 (2015) (quotes omitted). Cisgender students continue to have access to facilities consistent with their gender identity under S.B.1100, just as they did before, and suffer no injury as a result. But, because of S.B.1100's definition of "sex," transgender students are denied access to facilities matching their gender identity. The relief that Plaintiffs seek is also tailored to that harm: it would enjoin S.B.1100's exclusion of transgender people from facilities matching their gender identity but it would not bar separating facilities by sex.

The district court asserted that "sex" does not include gender identity. 1-ER-12. To the extent that the district court believed that protections against sex discrimination only reach discrimination based on so-called "biological sex," that is wrong as a matter of law. *See, e.g.*, *Schwenk*, 204 F.3d at 1201-02 (explaining that protections against sex discrimination encompass not only "an individual's distinguishing biological or anatomical characteristics" but also gender and related

social expectations, and that "the terms 'sex' and 'gender' have become interchangeable"). The Supreme Court made that clear decades ago in addressing sex stereotypes. *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). And this Court has recognized the scientific reality that "[a] person's sex encompasses the sum of several biological attributes, including … gender identity" in explaining why a legislative definition of "biological sex" was an oversimplification. *Hecox*, 79 F.4th at 1024 (quotes omitted); *accord* 3-ER-298. But even if sex were narrowly defined as an individual's sex assigned at birth—contrary to precedent—that would not erase S.B.1100's sex discrimination, as Defendants concede. "Any way you slice it," an action taken because a person is transgender is "because of the affected individuals' sex." *Bostock*, 140 S. Ct. at 1746.

Discrimination Based on Transgender Status. Second, the district court closed its eyes to the reality that S.B.1100 also discriminates against people based on their transgender status. While that erroneous holding does not lower the level of scrutiny that S.B.1100 must survive, given that the law concededly discriminates based on sex, it underscores the district court's errors in this case and the degree to which its decision cannot be reconciled with binding Ninth Circuit precedent.

As a threshold matter, the district court questioned whether this Court has actually held that transgender people constitute a quasi-suspect class under the

Equal Protection Clause. 1-ER-12. But that is beyond question. In *Karnoski*, this Court held that the district court had "reasonably applied the factors ordinarily used to determine whether a classification affects a suspect or quasi-suspect class." 926 F.3d at 1200. And countless other cases have confirmed that holding. *See, e.g.*, *Hecox*, 79 F.4th at 1026 ("gender identity is at least a 'quasi-suspect class'" quoting *Karnoski*, 926 F.3d at 1201); *Grimm*, 972 F.3d at 611 ("the Ninth Circuit [] joined the many district courts in holding that transgender people constitute a quasi-suspect class").

S.B.1100 discriminates against transgender people for a simple reason: on the face of the law, transgender people—and transgender people alone—are deprived of facilities matching their gender identity. *Cf. Hecox v. Little*, 479 F. Supp. 3d 930, 975 (D. Idaho 2020) (finding that Idaho's athletics law "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").

The district court denied the existence of this discrimination against transgender people on the grounds that S.B.1100 discriminates against everyone based "on their biological sex—male and female." 1-ER-12. But that "is like saying that racially segregated bathrooms treated everyone equally, because everyone was prohibited from using the bathroom of a different race," *Grimm*, 972

F.3d at 609, or that laws excluding same-sex couples from marriage did not discriminate against gay people because everyone could marry a person of a different sex, *Hecox*, 79 F.4th at 1029. And by that reasoning, every instance of discrimination against transgender people could be recast as treatment based on 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. *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.

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

precisely what the law seeks to accomplish.[5] Idaho Code § 33-6601 [33-6701]. S.B.1100 changes nothing for cisgender students, whose use of sex-separated facilities matching their gender identity continues as before. It only changes life for transgender students.

Defendants also conceded below that "[i]t was because districts were making policies" that allowed students to access facilities based on gender identity "that the legislature passed S.B. 1100." 2-ER-91. Those inclusive policies—like the one considered by Caldwell School District, 3-ER-422-42, which spurred S.B.1100's passage—are why the law asserted (albeit wrongly) that students were supposedly being "[r]equir[ed]" to share covered facilities with members of the "opposite biological sex." Idaho Code § 33-6601 [33-6701]. As one lead proponent of S.B.1100 explained: "We hear a lot of talk about how the transgender are, it's their right to use the bathroom," but "[w]e believe biological

[5] The district court stated that "simply because a certain group is left out of the classification drawn by a particular law does not mean that the law is 'targeting' at that group." 1-ER-13. But, as *Hecox* makes clear, 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, and that is precisely what S.B.1100 does here. 79 F.4th at 1042. Laws barring same-sex couples from marriage also did not need to use the words "sexual orientation" to discriminate on that basis. *Id.* at 1043. Discrimination by proxy is facial discrimination. *Id.*

gender to be an essential characteristic of a child's identity and purpose."[6] 3-ER-397-401.

In sum, S.B.1100 requires heightened scrutiny because it discriminates against transgender students based on sex and based on their transgender status.

B. Defendants Failed to Carry Their Heavy Burden of Proving a Substantial Relationship Between S.B.1100 and Privacy or Safety.

Defendants failed to carry their heavy burden of demonstrating they will likely show a substantial relationship between S.B.1100's categorical ban on transgender students and the promotion of privacy or safety. Heightened scrutiny requires the government to support its proffered justifications with evidence, not conjecture. *See Hecox*, 79 F.4th at 1016; *Latta*, 771 F.3d at 471. Unsupported legislative predictions that implicate constitutional rights "have not been afforded deference" by courts. *Latta*, 771 F.3d at 469. Here, Defendants introduced no evidence—not a single document or witness—that substantiated their privacy and safety defenses.

---

[6] The district court misunderstood the "intent" required under equal protection, conflating it with animus. 1-ER-25. While legislators plainly disapproved of transgender students living in accordance with their gender identity—rather than fulfilling their "biological" "purpose"—Plaintiffs need not show animus, nor an intent to cause harm, to show intentional discrimination. *See, e.g.*, *Johnson v. California*, 543 U.S. 499, 505 (2005) (applying heightened scrutiny to policy ostensibly serving benevolent purpose of reducing racial tension in prisons). They need only show an intent to exclude transgender students from facilities matching their gender identity, which was the entire point of S.B.1100.

Absence of Demonstrated Harm. First, S.B.1100 is a solution in search of a problem. The law is premised on specific asserted findings, including the notion that cisgender students will suffer "psychological injury" without the law, Idaho Code § 33-6601 [33-6701]; but Defendants offered no proof that the status quo before S.B.1100—without the statewide mandate that S.B.1100 would impose—caused any privacy or safety harms in Idaho's schools. All Idaho schools have always functioned without the law's statewide mandate. Indeed, no school districts in Idaho even saw fit to adopt a categorical ban against transgender students' use of facilities matching their gender identity at the local level before S.B.1100's enactment. 1-ER-5, 2-ER-110, 90. S.B.1100 would transform Idaho's educational landscape overnight, abandoning a status quo in which 0% of school districts categorically banned transgender students from facilities matching their gender identity and mandating a new regime in which 100% of school districts are required to do so. The law's sweeping scope demands a commensurate factual justification.

Defendants' lack of evidence to substantiate their asserted privacy or safety justifications is particularly glaring given that a significant swath of Idaho schools have had, for as long as *seven years*, the converse of S.B.1100: inclusive policies. 3-ER-395-96. If S.B.1100 were substantially related to preventing Defendants' claimed harms, there would be overflowing evidence of such harms in those

schools, given that thousands of students have attended them with inclusive policies in place. The absence of any such evidence is akin to a smoking gun against Defendants' factual defense.

Not only did Defendants fail to meet their own burden of production, but they also failed to rebut Plaintiffs' vast array of evidence showing that a preliminary injunction against S.B.1100's statewide categorical ban would not compromise privacy or safety. The district court did not address or disagree with any of this evidence. This unrebutted evidence spanned multiple perspectives, from students to law enforcement to school administration.

To begin, Plaintiffs' own experiences show that transgender students' ordinary use of facilities matching their gender identity has not caused harm to others. Pursuant to a Gender Support Plan developed in concert with school officials and his parents, Boise High School student A.J. used the boys' facilities matching his gender identity during his junior year—without any incident or harm to others—and he has been able to continue doing so during his senior year while S.B.1100 has been enjoined. 2-ER-284. Other circuits have recognized that transgender students' prior use of facilities matching their gender identity without incident is powerful proof dispelling the government's claimed harms. *See, e.g.*, *Grimm*, 972 F.3d at 614 (seven weeks of use); *Whitaker*, 858 F.3d at 1052 (six months of use). S.B.1100's categorical ban hinges on the existence of harms that

Plaintiffs' experiences directly negate.

Officer Ballis presented expert testimony showing the absence of any safety or privacy harms at Idaho schools caused by inclusive policies. 3-ER-379-84. That includes the district he supports as a law enforcement officer, which has had an inclusive policy since 2016. Rather, from a law enforcement perspective, "the real privacy risk" stems from placing transgender students in a position where their identity is involuntarily revealed to others. 3-ER-382. The Idaho School Board Association similarly confirmed that there were no reported incidents as a result of inclusive policies. 3-ER-418-21.

School officials with direct experience in implementing inclusive policies provided further confirmation that they do not harm privacy or safety. Diana Bruce oversaw the development and implementation of an inclusive policy at D.C. Public Schools, which educates nearly 50,000 students across 118 schools, in 2015. 3-ER-360. Like other inclusive policies adopted elsewhere, that policy was developed after a deliberative process involving local stakeholders. 3-ER-361-62. During its development, it was typically adults—rather than students—who voiced any concerns, which revolved around hypothetical issues relating to privacy and safety; but the scenarios they envisioned "did not play out in reality." 3-ER-363. Similarly, Foster Jones implemented an inclusive policy at his high school in Atherton, Kentucky. Some members of the public initially expressed skepticism,

believing such policies "might be fine for schools in California, but not Kentucky." 3-ER-368. But "the value of human life is the same in Kentucky as it is anywhere else." 3-ER-368. After a deliberative process involving parents, teachers, administrators, and students, the school adopted an inclusive policy, which did not cause any privacy or safety issues. 3-ER-368-70. To the contrary, "the overwhelming reaction from all of our students has been both positive and supportive." 3-ER-370.

Absence of Tailoring. Second, S.B.1100 lacks a substantial relationship to promoting privacy or safety, because it is not adequately tailored to achieving such interests. Defendants argued that S.B.1100 is justified by an interest in preventing cisgender students who object to being seen by, or seeing, transgender students using facilities matching their gender identity, in contexts where students are unclothed. But they failed to prove why less intrusive means—including options for anyone desiring greater privacy—cannot substantially achieve that interest, without also imposing a categorical ban on transgender students. That is part of their burden under heightened scrutiny. *Karnoski*, 926 F.3d at 1200; *Latta*, 771 F.3d at 472; *Hecox*, 69 F.3th at 1033. By its own terms, S.B.1100's concern only exists, at most, where students are purportedly required to share covered facilities in ways that implicate their asserted interests in bodily privacy. Idaho Code § 33-6601 [33-6701].

Schools have a range of tools at their disposal to address any objecting student's desire not to see or be seen by others in facilities while performing private functions. *See, e.g.*, *Parents for Privacy*, 949 F.3d at 1225 (policy "provide[d] alternative options and privacy protections to those who do not want to share facilities with a transgender student"). The district court's view that privacy and equality "struggle to co-exist," 1-ER-3, and that furthering one goal necessarily comes at the cost of the other, ignores this reality. *Cf. Grimm*, 972 F.3d at 614 (observing that, after community learned of plaintiff's use of boys restroom, privacy "actually increased" because district took steps to increase privacy protections for everyone, by installing additional privacy barriers).

One universally available measure is maintaining doors on restroom stalls, which operate as an opaque barrier that prevents visual contact between the stall user and others. Courts have rejected the government's privacy rationale because it "ignores the reality of how a transgender child uses the bathroom: 'by entering a stall and closing the door.'" *Grimm*, 972 F.3d at 613. And the same is true for cisgender students. "A transgender student's presence in the restroom provides no more of a risk to other students' privacy rights than the presence of an overly curious student of the same biological sex who decides to sneak glances at his or her classmates performing their bodily functions. Or for that matter, any other student who uses the bathroom at the same time." *Whitaker*, 858 F.3d at 1052.

Consistent with this reality, the district court agreed that the government's purported privacy concern "*may* not be as much of a concern in restrooms where stalls are widely used," and that users of a facility may not even be *aware* that a fellow user is transgender—even as it paradoxically relied on privacy to justify the complete denial of a preliminary injunction.[7] 1-ER-19. The district court posited that stall doors could only solve privacy objections in restrooms but not changing facilities and overnight lodging. But a student who does not, for example, wish to be seen changing clothes in shared areas of a locker room or overnight lodging can also use a restroom to do so. *See A.C.*, 75 F.4th at 772 (recognizing that locker room use was "indistinguishable from bathroom use" given that stalls would allow students to change privately); *Doe*, 897 F.3d at 531 ("any student who is uneasy undressing … in the presence of others can take steps to avoid contact"); *Whitaker*, 858 F.3d at 1052 ("the communal restroom is a place where individuals act in a discreet manner to protect their privacy and those who have true privacy concerns are able to utilize a stall"). Defendants failed to satisfy their burden of proving why these or other alternatives would not be adequate to address any purported privacy concerns. To the contrary, in their answer to the complaint, "Defendants

[7] Peers may be unaware that a classmate is transgender, especially if the classmate is not generally "out" about their status, underscoring the privacy implications of S.B.1100. *See infra* § III.

admit there are measures that can be taken to increase privacy for anyone desiring additional privacy." Dist. Ct. Dkt. 73 at 17.

Alternatively, to the extent that the government's concern is about cisgender students seeing (rather than being seen by) transgender students, the unrebutted evidence shows that transgender students are most likely of all to take steps to avoid bodily exposure, which may jeopardize their safety and exacerbate their gender dysphoria. 3-ER-317-18. That is why this Court observed that while sex-separated facilities may be a source of anxiety for adolescents, "this is particularly true for transgender students who experience gender dysphoria." *Parents for Privacy*, 949 F.3d at 1217.

Mere Presence of Transgender Students. Third, Defendants cannot survive heightened scrutiny based on the preferences of students who object to the mere presence of transgender students using facilities matching their gender identity. That contention is factually unsupported and legally untenable.

As a threshold matter, there is no record evidence to substantiate the premise that cisgender students in Idaho invariably object to sharing facilities with their transgender peers—particularly in schools like those attended by Plaintiffs whose communities voluntarily adopted inclusive policies and have maintained them for years. In that respect, this case is the inverse of litigation brought by transgender students, such as *Grimm* and *Whitaker*, who were challenging local school policies

that sought to *exclude* them from facilities matching their gender identity. Here, the local school communities that will be most acutely affected by S.B.1100 are those that sought to *include* them in access to such facilities. Even if local school districts in other locations with exclusionary policies could substantiate the objections of cisgender students, *see, e.g.*, *Adams*, 57 F.4th 791, the same has not been established here for the range of Idaho schools whose communities have chosen to support their transgender students. Given that the majority of federal courts of appeal have invalidated even locally adopted bans, Defendants cannot justify a statewide categorical ban that, unlike even the policy at issue in *Adams*, would force local communities to discriminate against their own wishes.

Against this factual vacuum, the district court nonetheless speculated about the objections of cisgender students. It imagined that these students experience "heightened levels of stress" from the mere presence of transgender peers using facilities matching their gender identity, without any supporting record evidence. 1-ER-17-18. But this is precisely the type of speculation forbidden under heightened scrutiny. *Whitaker*, 858 F.3d at 1052. A.J., for instance, has used the boys' restroom for more than a year without any evidence of issue from others.

The district court's reasoning—which relied heavily on the Eleventh Circuit's decision in *Adams* and on objections to the mere presence of transgender students—is irreconcilable with Ninth Circuit precedent. The stated premise of

S.B.1100 is that students have a "natural right to privacy" not to be "[r]equir[ed]" to share school facilities with "members of the opposite biological sex." Idaho Code § 33-6601 [33-6701]. But that is in direct conflict with *Parents for Privacy*, a case brought by students objecting to an inclusive school district policy that expressly allowed transgender students to use sex-separated facilities matching their gender identity. In affirming the dismissal of that case, this Court rejected the proposition that the right to privacy encompasses a right for a cisgender student "not to share restrooms or locker rooms with transgender students whose sex assigned at birth is different than theirs." 949 F.3d at 1222. And it held that the "mere presence" of transgender students does *not* violate the rights of cisgender students. *Id.* at 1228-29. The district court here therefore erred when it held that cisgender students had a privacy right that purportedly competed with, and ultimately prevailed over, transgender students' right to equal protection.

Other circuits are in accord that exclusionary policies cannot be justified by objections to the mere presence of transgender students. *See, e.g.*, *Grimm*, 972 F.3d at 614; *Whitaker*, 858 F.3d at 1052. Indeed, they have looked to this Court's holding in *Parents for Privacy* in support of that proposition. *Grimm*, 972 F.3d at 614 ("both the Third and Ninth Circuits have now rejected privacy-related challenges brought by cisgender students to the shared use of restrooms with transgender students"). Like this Court's recognition that restrooms implicate

privacy considerations, *see Hecox*, 79 F.4th at 1025, they have acknowledged that schools have a "legitimate interest in ensuring bathroom privacy rights are protected"—but that does not encompass excluding transgender students from facilities based on objections to their mere presence. *Whitaker*, 858 F.3d at 1052.

The district court misunderstood the holding in *Parents for Privacy*. It believed that the inclusive policy at issue in that case "did not infringe on the privacy rights of petitioners because accommodations were available for any student who did not want to share facilities with a transgender student." 1-ER-18. Not so. The decision made clear, first and foremost, that the right to privacy did *not* include the right "not to share restrooms or locker rooms with transgender students." 949 F.3d at 1222. This Court did not hold that such a right existed and that its infringement was addressed through accommodations. Rather, the decision mentioned those accommodations as reinforcing its ultimate conclusion only *after* making clear that the right to privacy did not itself include avoiding "any risk of bodily exposure to a transgender student in school facilities." 949 F.3d at 1225.

Furthermore, the district court dismissed the relevance of *Parents for Privacy* on the grounds that it merely held that inclusive policies are constitutionally permitted but not mandated. 1-ER-17. As a threshold matter, Plaintiffs do not claim that schools are required to adopt inclusive policies. But equal protection does require the government to refrain from unlawful

discrimination, and on that score, the reasoning of *Parents for Privacy* cannot be ignored. The reason why inclusive policies are permissible is because the mere presence of transgender students does not infringe the privacy of other students. The privacy arguments rejected in *Parents for Privacy* are the same as the privacy arguments advanced by Defendants here. In fact, *Parents for Privacy* identified that link, observing that cases "in which courts also rejected [objecting students'] purported privacy interest, in favor of transgender students' access to school facilities" were "similar to this one." 949 F.3d at 1223 n.10 (citing, e.g., *Whitaker*).

Even setting aside *Parents for Privacy*, permitting discrimination based on objections to a transgender student's mere presence would be anathema to core equal protection principles. Excluding a transgender student based on their mere presence is "a special kind of discrimination against a child that he will no doubt carry with him for life." *Grimm*, 972 F.3d at 620. As this nation's civil rights laws have long recognized, the "daily affront and humiliation involved in discriminatory denials of access to facilities ostensibly open to the general public" is profound. *Daniel v. Paul*, 395 U.S. 298, 307-08 (1969). The objection to the mere presence of transgender students "echoes the sort of discomfort historically used to justify exclusion" of other members of other minority groups from equal participation in society. *Grimm*, 972 F.3d at 623 (Wynn, J., concurring).

That is also why S.B.1100's "reasonable accommodation" provision does not remotely cure the injuries at issue. "It is the [] policy of illegal discrimination that is the source of plaintiff's irreparable harm, and no amount of 'accommodation' could remedy the harmful psychological effects of that discrimination." *Doe*, 2023 WL 4505245, at *8. Under heightened scrutiny, the government may not "send nor reinforce messages of stigma or second-class status." *Latta*, 771 F.3d at 468 (quotes omitted). Yet that is precisely what S.B.1100 does when it relegates transgender students to "other" facilities. It is deeply stigmatizing to be excluded from the same facilities available to peers and forced to go elsewhere. While S.B.1100 purports to promote the privacy of "all" students, it plainly undermines the privacy of transgender students, including by exposing their transgender status to others. *See infra* § III. And whenever use of single-user facility is not available or practical, a transgender student's use of facilities discordant with their gender identity will not promote any subjective feelings of comfort on the part of cisgender users of that facility. *See, e.g.*, 2-ER-279 (noting that "if [Rebecca Roe] were to use the restroom designated for males, it would appear to others that a girl was using the men's restroom, something far more disruptive to social expectations than her use of the women's restroom").

While cisgender students are entitled to hold any private beliefs about their transgender peers, "the law cannot, directly or indirectly, give them effect."

Palmore v. Sidoti, 466 U.S. 429, 433 (1984). When "sincere, personal opposition becomes enacted law and public policy, the necessary consequence is to put the imprimatur of the state itself on an exclusion that soon demeans or stigmatizes." *Obergefell v. Hodges*, 576 U.S. 644, 672 (2015); *accord Latta*, 771 F.3d at 470 ("private opposition" could not justify excluding same-sex couples from marriage). The government "may not avoid the strictures of [equal protection] by deferring to the wishes or objections of some fraction of the body politic." *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 448 (1985).

Safety. Finally, to the extent that Defendants seek to justify S.B.1100 on the basis of safety, their argument fails for independent reasons in addition to those above. The government failed to identify any evidence to support the law's accusation that inclusive policies cause "sexual assault, molestation, rape, voyeurism, and exhibitionism," Idaho Code § 33-6601 [33-6701], even though many Idaho schools have implemented such policies for years. *See Grimm*, 972 F.3d at 614 (noting that the school board's fears were not borne out in the experiences of the numerous schools in the state providing equal treatment).

As confirmed by Officer Ballis, there is also no evidence that inclusive policies in Idaho have led to cisgender students engaging in an elaborate charade of pretending to be transgender to gain access to prohibited facilities—which, in any event, could not justify discriminating against transgender students. 3-ER-382-83.

To the extent that any student engages in misconduct, S.B.1100 does not help law enforcement to respond to it. School and law enforcement officials are already equipped with tools under school policies and criminal laws to handle any misconduct. 3-ER-382. S.B.1100 adds nothing to them. 3-ER-382.

In fact, S.B.1100 undermines rather than furthers an interest in safety by endangering transgender students. As Officer Ballis explained, "to the extent there are safety risks in facilities such as school restrooms, it is overwhelmingly students who are transgender who tend to be the victims of such incidents." 3-ER-380-81. S.B.1100 amplifies transgender students' exposure to victimization by revealing their status to others. 3-ER-380-81. And in instances when transgender students have no practical alternative but to use facilities associated with their assigned sex as a result of S.B.1100, and where they are perceived not to belong, they similarly face victimization. 3-ER-313. The law also communicates an unmistakable message to cisgender students that their transgender classmates are not suitable to be among them, which can encourage harassment, bullying, and violence. 3-ER-315-16. In sum, S.B.1100 cannot be justified in the name of safety for any group.

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

Plaintiffs are independently likely to succeed on their Title IX claim. Title IX provides that "[n]o person in the United States shall, on the basis of sex, be … subjected to discrimination under any education program or activity receiving

Federal financial assistance." 20 U.S.C. § 1681. Discrimination against transgender people is discrimination "on the basis of sex" under Title IX. *Grabowski*, 69 F.4th at 1116 & n.1.

The majority of federal courts of appeal to address the issue have correctly held that the exclusion of transgender students from facilities matching their gender identity harms them on the basis of sex and thus violates Title IX. *Grimm*, 972 F.3d at 616; *Whitaker*, 858 F.3d at 1050; *A.C.*, 75 F.4th at 770; *Dodds*, 845 F.3d at 221; *see also Doe*, 897 F.3d at 533. Only the Eleventh Circuit has come out the other way, refusing to hold that Title IX, like Title VII, protects transgender people at all. *Adams*, 57 F.4th 791; *A.C.*, 75 F.4th at 775 (Easterbrook, J., concurring) (observing that the majority in *Adams* believed that Title VII and Title IX used "sex" in different ways). This Circuit disagrees. *Grabowski*, 69 F.4th at 1116 (we "construe Title VII and Title IX protections consistently").

A. S.B.1100 Violates Title IX's Prohibition Against Discrimination "On The Basis Of Sex."

The district court first questioned whether S.B.1100 violates Title IX's central prohibition on discrimination "based on sex." 1-ER-27-28. Under this Court's precedent, it clearly does.

In *Bostock*, the Supreme Court held that Title VII prohibits discrimination against transgender people as a form of sex discrimination. 140 S. Ct. at 1741. Multiple decisions from sister circuits, before and after *Bostock*, have held that the

exclusion of transgender people from facilities matching their gender identity violated, or likely violated, Title IX. *Grimm*, 972 F.3d at 616-18; *Whitaker*, 858 F.3d at 1046-50; *A.C.*, 75 F.4th at 771-74; *Dodds*, 845 F.3d at 221; *see also Doe*, 897 F.3d at 533. These decisions confirm that such an exclusion is differential treatment "on the basis of sex" that causes harm—the two necessary elements of a Title IX "discrimination" claim. *Cf. Bostock*, 140 S. Ct. at 1753 ("[T]he term 'discriminate against' refers to 'distinctions or differences in treatment that injure protected individuals.'" (quoting *Burlington N. & S. F. R. Co. v. White*, 548 U.S. 53, 59 (2006)). While the district court wrongly held that S.B.1100 does not discriminate based on transgender status,[8] it recognized that S.B.1100 "is based on sex." 1-ER-28.

The Ninth Circuit has not specifically addressed the lawfulness of excluding transgender students from facilities matching their gender identity; but it has held that *Bostock*'s analysis applies with equal force to Title IX. *See Grabowski*, 69 F.4th at 1116 (citing *Grimm*, 972 F.3d at 616).

Although it cited *Grabowski*, the district court explained at length why it believed *Bostock*'s reasoning should not apply to Title IX. 1-ER-28. Specifically,

[8] The district court asserted that "classifications based on sex" are not "necessarily classifications based on gender identity," 1-ER-27—but where transgender people are denied treatment consistent with their gender identity because of their assigned sex, that is necessarily sex discrimination. *See supra* § I.A.

the district court held that the fact that *Bostock* "dealt with Title VII" while "this case deals with Title IX" was one of the "problems with Plaintiffs' reliance on *Bostock*." 1-ER-27. But in *Grabowski*, this Court held that it "construe[s] Title VII and Title IX protections consistently" and that the "same result" reached in *Bostock* "applies to Title IX." 69 F.4th at 1116. The district court also suggested that *Grabowski* might be distinguishable because it dealt with "sexual orientation," not "gender identity." 1-ER-28. But this Court has also "construe[d] Title IX's protections consistently with those of Title VII" in the specific context of discrimination against transgender people. *Doe v. Snyder*, 28 F.4th 103, 114 (9th Cir. 2022).

In short, S.B.1100 clearly violates Title IX's prohibition on "discrimination" "on the basis of sex." 20 U.S.C. § 1681.

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

The district court next held that even if S.B.1100 is "discrimination" "on the basis of sex" under Section 1681, three statutory or regulatory provisions operate as carve-outs to that provision: 20 U.S.C. § 1686 (schools may "maintain[] separate living facilities for the different sexes"), 34 C.F.R. § 106.33 (schools may "provide separate toilet, locker room, and shower facilities on the basis of sex"), and 34 C.F.R. § 106.32(b) (schools may "provide separate housing on the basis of sex"). 1-ER-28-29. That interpretation is wrong, because it would authorize

precisely what Title IX was enacted to forbid: harm caused by sex-based discrimination. Title IX creates no safe harbor for S.B.1100.

As the Fourth and Seventh Circuits have held, the statutory and regulatory provisions the district court cited 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, an act Plaintiffs do not challenge. *See A.C.*, 75 F.4th at 770 ("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."). These provisions do not answer the question of "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?" *A.C.*, 75 F.4th at 770. And they do not provide a school authority to "act in [a] discriminatory manner," that is, to violate Section 1681's prohibition on sex-based harm, "when dividing students into those sex-separated facilities." *Grimm*, 972 F.3d at 618 n.16.

That conclusion is the correct one. In interpreting a statute, this Court looks "to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *United States v. Pacheco*, 977 F.3d 764, 767-68 (9th Cir. 2020) (quotes omitted). Moreover, a statute's meaning "does not turn solely on dictionary definitions of its component words." *Id.* (quotes omitted); *accord Home Depot U. S. A., Inc. v. Jackson*, 139 S. Ct. 1743, 1747-48 (2019).

Nothing in the text of Sections 1686, 106.33, and 106.32(b) states that they authorize *discrimination* against transgender people in sex-separated facilities. These provisions merely state that schools may "maintain" or "provide" certain sex-separated facilities. That practice, in itself, does not cause sex-based harm—which is to say, it does not "discriminate." *Bostock*, 140 S. Ct. at 1753. These provisions do not state that "discrimination" "on the basis of sex" is authorized when a school maintains or provides such facilities: unlike Section 1681, they do not even use the word "discrimination." Where sex-based differentiation causes harm—as it does when excluding transgender students from facilities matching their gender identity—it is Section 1681, which addresses "discrimination," that applies, not Sections 1686, 106.33, and 106.32(b), which do not even use that term.

The definition of the word "sex" in Sections 1686, 106.33, and 106.32(b) does not change that. *See Pacheco*, 977 F.3d at 767. "Title IX does not define sex," let alone state that "sex" in these provisions must be defined in a way that would allow schools to exclude transgender students from sex-separated facilities matching their gender identity. *A.C.*, 75 F.4th at 770 ("The statute says nothing on this topic."). Indeed, "narrow definitions of sex do not account for the complexity of the necessary inquiry." *Id.* (further noting that someone who is intersex is entitled to Title IX's protections but a policy based on biological sex would fail to account for them).

Parents for Privacy is again instructive. To be sure, the decision first observed that the various facility-related provisions under Title IX at most allow a school to do something, not require it. But then it went further, explaining: "Just because Title IX authorizes sex-segregated facilities does not mean that they are required, *let alone that they must be segregated based only on biological sex and cannot accommodate gender identity*." 949 F.3d at 1227 (emphasis added). In other words, facilities separated by "sex" under these provisions does not necessarily mean facilities separated by "*biological* sex." That reading accords with the Seventh Circuit, *A.C.*, 75 F.4th at 770, and is incompatible with the Eleventh Circuit's view. *Adams*, 57 F.4th at 815 (holding that Title IX "must" be read to allow separation based only on "biological sex").

Understanding Sections 1686, 106.33, and 106.32(b) in context further compels this conclusion. Title IX's central protection against "discrimination" applies to transgender people. *Grabowski*, 69 F.4th at 1116. It thus forbids harmful sex-based differential treatment against them. Interpreting the provisions on which the district court relied to simply allow the "maintenance" or "provision" of sex-separated facilities, as the Fourth and Seventh Circuits have, effectuates their purpose without creating any conflict with Title IX's nondiscrimination protection. Reading these provisions to instead allow "segregat[ion] based only on biological sex," *Parents for Privacy*, 949 F.3d at 1227, that is, to allow

"discrimination" on the basis of sex, distorts their text and puts them in conflict with that promise of equal treatment. Nothing in Sections 1686, 106.33, and 106.32(b) suggests they were intended to create a vast loophole in Title IX's nondiscrimination protection, which would also mean the government could—consistent with Title IX—jettison any purported "accommodation" provision and force transgender students to use facilities associated with their assigned sex. These provisions do not sanction S.B.1100's sex-based harm, and especially not through any regulations subservient to Title IX's statutory protection.[9]

The Eleventh Circuit, having failed to hold that Title IX protects transgender students at all, had no need to reconcile its reading of these provisions with Section 1681's prohibition on "discrimination." No court of appeal that has held that Title IX protects transgender people from discrimination has then held that Sections 1686, 106.33, and 106.32(b) withdraw that protection.

C. The Spending Clause Cannot Justify Defendants' Interpretation.

Defendants also argued below that if Title IX is unclear as to whether it bars S.B.1100, the Spending Clause of the Constitution requires interpreting Title IX to

---

[9] Only Title IX's regulations address restrooms and locker rooms. 34 C.F.R. § 106.33; *compare* 20 U.S.C. § 1686 ("living facilities"). Those regulations are issued under Section 1681. 34 C.F.R. § 106.33. Plainly, regulations cannot be read to authorize conduct prohibited by a statute. *See Grimm*, 972 F.3d at 618; *A.C.*, 75 F.4th at 770.

permit S.B.1100's discrimination. The district court did not adopt or address this argument, and it provides no alternative basis for this Court to affirm. *See Grimm*, 972 F.3d at 619 n.18 (rejecting similar argument).

First, Defendants' Spending Clause argument, even if it were otherwise correct, would merely affect the availability of retrospective relief—that is, "money damages." *Davis v. Montgomery Cnty. Bd. of Educ.*, 526 U.S. 629, 639 (1999); *cf. Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 283 (1998) ("petitioners seek not just to establish a Title IX violation but to recover damages"). The Spending Clause does not affect whether Plaintiffs are entitled to an injunction based on "the scope of the behavior that Title IX proscribes"—the only question in this appeal. *See Davis* 526, U.S. at 639.

Second, in any event, there is no ambiguity in Title IX that would offend the Spending Clause. The Spending Clause does not require Congress to "prospectively resolve every possible ambiguity concerning particular applications" of a statute. *Bennett v. Ky. 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, recipients of federal funds have notice that Title IX encompasses all forms of sex discrimination, including against

transgender people. In short, the Spending Clause offers no refuge for S.B.1100.

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

By excluding transgender students from facilities matching their gender identity, S.B.1100 exposes their transgender status to others in violation of their constitutional right to privacy. When a transgender girl is forced to use the boys' restroom because that is the only facility she can reach in the five minutes between classes, or when she cannot go with her female friends into the girls' restroom, the government jeopardizes the disclosure of her transgender status. 3-ER-315-16, 2-ER-275. Consigning transgender students to "alternative" facilities does not solve the problem, because it draws even more scrutiny and attention from peers and "very publicly brand[s] all transgender students with a scarlet 'T.'" *Doe*, 897 F.3d at 530; *Whitaker*, 858 F.3d at 1045-46.

The district court agreed: "It is true this may occur." 1-ER-31. Indeed, the district court also agreed Plaintiffs' legal "argument makes sense" because information about one's gender identity "is personal and private." 1-ER-32. The *only* reason that the district court found that Plaintiffs were unlikely to prevail on their privacy claim is because it believed there was no fundamental liberty interest at stake. 1-ER-32. That is incorrect. "Ninth Circuit cases have uniformly recognized a constitutional right to informational privacy." *Doe v. Cnty. of San Diego*, 576 F. Supp. 3d 721, 733 (S.D. Cal. 2021); *see, e.g.*, *Tucson Woman's*

Clinic v. Eden, 379 F.3d 531, 551 (9th Cir. 2004). Even Defendants concede "the existence of a right to informational privacy." Dkt. 8.1 at 18.

Furthermore, virtually every federal court to consider the issue has also held that one's transgender status is entitled to constitutional privacy protection. "The excruciatingly private and intimate nature of transsexualism, for persons who wish to preserve privacy in the matter, is really beyond debate." *Powell v. Schriver*, 175 F.3d 107, 111 (2d Cir. 1999). That is why courts have held that government actions that can involuntarily disclose that status violate transgender people's constitutional right to privacy. *See, e.g.*, *Ray v. McCloud*, 507 F. Supp. 3d 925, 931-32 (S.D. Ohio 2020); *Arroyo Gonzalez v. Rossello Nevares*, 305 F. Supp. 3d 327, 333 (D.P.R. 2018); *Love v. Johnson*, 146 F. Supp. 3d 848, 856 (E.D. Mich. 2015). The only case cited by the district court concerned whether there was a *state* constitutional privacy right in one's gender identity. 1-ER-32.

In addition to its inherently private nature, the disclosure of one's transgender status, particularly in circumstances where one would otherwise keep that information private, can provoke intense "hostility and intolerance from others." *Powell*, 175 F.3d at 111. The "mismatch" between a transgender person's gender identity and sex assigned at birth can incite harassment or even physical assault. *F.V. v Barron*, 286 F. Supp. 3d 1131, 1139 (D. Idaho 2018).

Defendants cannot justify S.B.1100's infliction of these privacy intrusions.

There is no interest served by the gratuitous disclosure of students' transgender status to others. A preliminary injunction is uniquely necessary in light of the irreversible nature of the disclosure of that information.

IV. The Remaining Equitable Factors Tip Sharply in Plaintiffs' Favor.

Because Plaintiffs are likely to succeed on the merits here, they have also necessarily met their burden of showing a likelihood of irreparable harm. "It is well established that the deprivation of constitutional rights unquestionably constitutes irreparable injury." *Hecox*, 79 F.4th at 1035-36 (quotes omitted). "A violation of Title IX also causes irreparable harm." *Doe v. Horne*, No. CV-23-00185-TUC-JGZ, 2023 WL 4661831, at *20 (D. Ariz. July 20, 2023) (collecting cases). For the same reason, the balance of hardships and public interest—which combine where the government is the defendant—necessarily favor an injunction. *See Hecox*, 79 F.4th at 1036 ("the public interest and the balance of the equities favor preven[ting] the violation of a party's constitutional rights") (quotes omitted).

That alone entitles Plaintiffs to a preliminary injunction. Nevertheless, Plaintiffs, in the record below, went beyond demonstrating a likelihood of success on the merits. They also proved, through copious and unrebutted evidence, that the "balance of hardships tips sharply in the[ir] favor." *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134-35 (9th Cir. 2011). The district court's contrary

conclusion—to the extent not inexorably colored by its analysis of the legal merits—was clearly erroneous.[10]

A. Plaintiffs Showed that Ending Idaho's Long-Standing Status Quo and Mandating Discrimination Would Inflict Irreparable Harm.

In a brief page of analysis, the district court found that Plaintiffs did "little more than speculate that harms will occur" to transgender students, including Plaintiffs, should S.B.1100 exclude them from facilities matching their gender identity and end a years-long status quo in which they were expressly able to use such facilities. 1-ER-34. That conclusion was irreconcilable with the record.

Plaintiffs provided evidence that, should S.B.1100 take effect, it will cause at least six harms to transgender individuals: (1) psychological harm, including stigmatization; (2) forcible outing; (3) harassment, bullying, and violence; (4) health consequences from avoiding use of facilities; (5) impairment in learning ability; and (6) interference with social transition. *See* 3-ER-291-19 (Expert Declaration of Dr. Stephanie Budge), 3-ER-382-83 (Expert Declaration of Officer Ballis), 2-ER-274-75 (Declaration of Rebecca Roe), 2-ER-283-84 (Declaration of A.J.). Below, Defendants did not even attempt to rebut the vast majority of these

[10] As noted, "constitutional questions of fact" underlying preliminary injunctions are reviewed de novo. *Edge*, 929 F.3d at 664. Because the district court's analysis of the harms the parties face from enforcing, or not enforcing, S.B.1100 underlie both the constitutional and equitable analyses, they are entitled to no deference. Regardless, under any standard of review, the district court clearly erred.

harms. For example, there is no question that Rebecca and A.J. will experience stigma from being excluded from the facilities matching their gender identity—and this Court has emphasized the need to consider "messages of stigma" when a quasi-suspect class experiences discrimination. *Latta*, 771 F.3d at 468.

These harms were not just well-supported in *this* record. *See, e.g.*, 3-ER-311-12 (expert testimony showing that discriminatory policies like S.B.1100 expose transgender youth to depression, anxiety, and suicidality). They are well-recognized across federal courts. *See, e.g.*, *Grimm*, 972 F.3d at 617-18 (recognizing that "feeling stigmatized and isolated by having to use separate restroom facilities," a "walk to the restroom [feeling] like a 'walk of shame'," and negative impacts on both physical and mental health from restroom avoidance are irreparable harms); *Whitaker*, 858 F.3d at 1045 (recognizing that a similar policy was "directly causing significant psychological distress and plac[ing the Plaintiff] at risk for experiencing life-long diminished well-being and life-functioning").

This Court has also expressly acknowledged these harms. *See Parents for Privacy*, 949 F.3d at 1217 ("Defendants and many amici highlight the importance of the [inclusive facilities] policy for creating a safe, non-discriminatory school environment for transgender students that avoids the detrimental physical and mental health effects" that result from exclusionary policies).

The district court failed to engage with this factual record or address most of this evidence. 1-ER-33-35. Instead, it dismissed all of it in conclusory fashion, citing three reasons for finding the equities in equipoise.

First, the court stated that "neither party was able to identify any specific instances of harm befalling transgender, or cisgender, students in Idaho." 1-ER-33. This statement was certainly true for *Defendants*, who introduced no evidence at all that S.B.1100 was substantially related to protecting cisgender students in Idaho. But Plaintiffs clearly showed that transgender youth in Idaho like Rebecca and A.J.—who submitted declarations—will face immediate harm from S.B.1100 if it goes into effect. Without a preliminary injunction, Rebecca faces being irreversibly outed to peers as transgender and ejected from the girls' restroom that she has been able to use for the entirety of the school year. High school senior A.J. will be ousted from the boys' restroom that he has used, without incident, for more than a year now. Without an injunction, he may very well graduate from high school with S.B.1100 in force, and that experience of discrimination is how he will remember high school for the rest of his life. As in *Hecox*, these are undeniable, "deeply personal, irreparable harms." 79 F.4th at 1036.

The district court also ignored the unrebutted testimony of Officer Ballis that inclusive policies in Idaho have caused no problems and "are important to protect the safety of transgender youth." 3-ER-374. As Officer Ballis explained,

S.B.1100 endangers Idaho's transgender students by revealing their status to others and exposing them to victimization. 3-ER-374-75.

The district court further discounted the declaration of Dr. Budge, who opined at length on the psychological harms transgender students face when they are excluded from facilities that match their gender identity, by again suggesting it provided no "conclusive information about *Idaho*." 1-ER-34. But the harms that transgender students face as a result of such an exclusion are not Idaho-specific. Dr. Budge relied on well-established research on the negative effects of discrimination as well as her extensive clinical experience treating transgender minor patients to document S.B.1100's effects on transgender youth. 3-ER-292-97. Likewise, as to the harms caused by interference with social transition, the standard of care for treating transgender youth—which is supported by all major medical associations in America, 3-ER-300—is also not state-specific.

Second, the district court cited in passing Defendants' argument that S.B.1100's "accommodation" provision cures Plaintiffs' harms, although it did not expressly endorse that argument. 1-ER-33. Regardless, Plaintiffs produced unrebutted evidence that single-occupancy facilities do not ameliorate S.B.1100's exclusionary harms, including stigma and the risk of irreparable and forcible outing. *See, e.g.*, 2-ER-274 (Rebecca "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 [her] school, who were not limited to using only that single-stall facility"); 2-ER-275 (Rebecca: "I am afraid that any of my classmates … could find out that I am transgender, and I want to have control over my private information."); *see also* 2-ER-283, 85; 3-ER-311-16.

Again, courts agree with Plaintiffs. *See Whitaker*, 858 F.3d at 1045-46 (recognizing that use of single-user restrooms "actually invited more scrutiny and attention from [] peers, who inquired why [the student] had access to these restrooms and asked intrusive questions about [the student's] transition" which worsened feelings of "depression and anxiety"); *Grimm*, 972 F.3d at 617-18 (recognizing that forcing a student to use a separate restroom constitutes irreparable harm by drawing more scrutiny from others and publicly branding transgender students).

Third, the district court gestured to the dispute between Defendants' purported expert—Dr. Cantor, who has never treated a transgender minor,[11] 2-ER-113-14—and Dr. Budge over the "science behind gender dysphoria." 1-ER-33-34. But this dispute provided no basis for rejecting Plaintiffs' showing of irreparable harm. Dr. Cantor's opinion was exceptionally limited in scope: he did not address or dispute the first *five* of the harms Plaintiffs cited above that S.B.1100 will

[11] Dr. Cantor's expertise instead lies in "MRI and other biological studies of the origins of pedophilia." 2-ER-144.

cause—including forcible outing, stigma, and harassment. He did not even mention sex-separated facilities in his report. *See generally* 2-ER-140-206. The disconnect between his testimony and what is at issue here is illustrated by the fact that he *supports* the right of transgender people to use restrooms matching their gender identity. 2-ER-115.

Addressing the sixth harm—interference with social transition—Dr. Cantor merely opined that some minors who showed gender nonconformity before puberty would have high rates of "desistance" without social transition. 2-ER-168. That opinion changes nothing about the harms for youth like Rebecca who *have* socially transitioned (which S.B.1100 does not prohibit or even purport to address); for post-pubertal youth like high school senior A.J.; and for all minors whose gender dysphoria does not desist. Stated differently, crediting Dr. Cantor's declaration in its entirety would not rebut Plaintiffs' showing of irreparable harm.

In any event, this Court has repeatedly acknowledged the basic facts Dr. Budge cited, including that "[l]iving in a manner consistent with one's gender identity is a key aspect of treatment for gender dysphoria." *Karnoski*, 926 F.3d at 1187 n.1; *see also Edmo v. Corizon, Inc.*, 935 F.3d 757, 767 (9th Cir. 2019).

B. Defendants Failed to Identify Any Comparable Harm From Maintaining the Status Quo.

The district court also wrongly concluded that the remaining injunction factors—the balance of the equities and public interest—"are roughly even." 1-

ER-35. Defendants did not introduce a single piece of evidence to show that the long-standing status quo in Idaho has caused any harm whatsoever. *See supra* § I.B. And Plaintiffs, in turn, produced unrebutted testimony that inclusive policies in Idaho have caused no problems. *Id.* Defendants' mere assertion that allowing transgender students to use facilities alongside their cisgender peers could somehow cause a *comparable* harm to Idaho is wrong—and foreclosed by this Circuit's precedent. *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.").

Regardless, Defendants cannot show why it is necessary for them to *immediately* end inclusive policies that have existed for years—after permitting those policies for nearly a decade—and impose a statewide mandate of discrimination. A preliminary injunction would not require any district to adopt a new policy or practice. It would merely maintain the nearly decade-long status quo. There is no basis to conclude that maintaining that status quo pending a judgment in this case could cause "comparable harm" to Defendants as compared to the harms that S.B.1100 will inflict on transgender youth like Plaintiffs if it goes into effect. *Hecox*, 79 F.4th at 1036.

CONCLUSION

For the foregoing reasons, the district court's denial of a preliminary

injunction should be reversed.

Dated: November 22, 2023

Respectfully submitted,

/s/ Peter C. Renn
Peter C. Renn
Kell Olson†
Tara L. Borelli†
Pelecanos†
LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.
800 S. Figueroa St., Suite 1260
Los Angeles, CA 90017
(213) 382-7600
†*Mailing address only*

Samuel L. Linnet
ALTURAS LAW GROUP, PLLC
101 E Bullion St., Unit 2H
Hailey, ID 83333
(208) 788-6688

Katherine M. Forster
Robyn K. Bacon
Nicholas R. Sidney
Paul Martin
Avery P. Hitchcock
Jimmy P. Biblarz
MUNGER TOLLES & OLSON LLP
350 South Grand Ave., 50th Fl.
Los Angeles, CA 90071
(213) 683-9100

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

Counsel for Plaintiffs-Appellants

STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, I hereby certify that I am unaware of any related cases currently pending in this court.

/s/ Peter C. Renn
Peter C. Renn

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Plaintiffs-Appellants' Opening Brief complies with the word limit of Circuit Rule 32-1 because it contains 13,983 words, excluding the items exempted by Fed. R. App. P. 32(f), if applicable. This brief complies with the type size and typeface requirements of Fed. R. App. P. 32(a)(5) and (6) because this brief has been prepared in a proportionally spaced typeface using Word 14-point Times New Roman typeface.

/s/ Peter C. Renn
Peter C. Renn

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate ACMS system on November 22, 2023, and that service will be accomplished by the appellate ACMS system on all registered participants.

/s/ Peter C. Renn
Peter C. Renn