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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

BRADLEY ROBERTS, individually,

Plaintiff,

v.

CLARK COUNTY SCHOOL DISTRICT,

Defendant

No. 2:15-CV-00388-JAD-PAL

BRIEF OF *AMICUS CURIAE* LAMBDA LEGAL DEFENSE AND EDUCATION FUND WITH RESPECT TO PLAINTIFF AND DEFENDANT'S CROSS-MOTIONS FOR PARTIAL SUMMARY JUDGMENT

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INTRODUCTION

Clark County School District (CCSD) banned police officer Bradley Roberts from the men's restroom because of who he is, a transgender man whose gender identity does not match his birth-assigned sex. While other men were free to use the communal restrooms appropriate for them, CCSD fenced those off from Mr. Roberts and instead confined him to alternate restrooms away from others. It did so in acquiescence to one employee's preference for his exclusion. After the state civil rights agency signaled that it was prepared to find that CCSD's practice constituted illegal discrimination, CCSD finally reversed course. But, by then, Mr. Roberts had already endured countless daily indignities during his year-long restroom ban. CCSD now defends the permissibility of a policy it no longer stands behind and has abandoned.

CCSD deprived Mr. Roberts of something so basic that most employees take it for granted—a restroom consistent with one's gender identity—and it did so because of "sex" under both Title VII and Nevada state law. First, both laws forbid discrimination based on nonconformity to sex stereotypes, which is invariably at issue when the target of discrimination is transgender. Here, CCSD viewed Mr. Roberts as having genital characteristics that it deemed inappropriate for a man. It therefore conditioned restroom access upon Mr. Roberts going under the knife to conform his genital characteristics to what CCSD believed was acceptable for men.

Second, what it means to be transgender is inherently linked to sex. By definition, transgender people are those whose gender identities (that is, the internal sense of being male or female) do not match their birth-assigned sex. Protection against gender identity discrimination therefore protects transgender people. Ninth Circuit precedent has long held that gender identity is included as a component of sex under Title VII, and Nevada state law provides the same coverage by its express terms. Furthermore, penalizing a transgender employee for undergoing gender transition—or for not "completing" it in the employer's view—also discriminates on the basis of sex. By analogy, an employer who fires an employee for converting from Christianity to Judaism also necessarily discriminates on the basis of religion. There is no exception for these protections simply because the discrimination at issue occurs in the context of the restroom as opposed to any other aspect of the workplace.

IDENTITY AND INTEREST OF *AMICUS CURIAE*

Founded in 1973, Lambda Legal Defense and Education Fund, Inc. ("Lambda Legal") is the nation's oldest and largest legal organization whose mission is to achieve full recognition of the civil rights of lesbian, gay, bisexual, and transgender ("LGBT") people and those living with HIV through impact litigation, education, and public policy. The issues pending before the Court are of acute concern to Lambda Legal and the community it represents, who stand to be directly impacted by the Court's ruling. Transgender people face staggering levels of employment discrimination, and calls for legal help in this area are consistently among the most numerous that Lambda Legal receives. This includes inquiries from transgender employees experiencing discrimination with respect to sex-separated facilities. Lambda Legal thus submits this brief to address the specific issues raised by CCSD's exclusion of Mr. Roberts from the restroom consistent with his gender identity.

Lambda Legal has extensive experience litigating cases affecting the rights of LGBT people. *See Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); *Lawrence v. Texas*, 539 U.S. 558 (2003); *Romer v. Evans*, 517 U.S. 620 (1996); *Sevcik v. Sandoval*, 911 F. Supp. 2d 996 (D. Nev. 2012), *rev'd sub nom. Latta v. Otter*, 771 F.3d 456 (9th Cir. 2014). Notably, this experience includes participation as either party counsel or *amicus curiae* in cases addressing the application of employment protections to LGBT people—including some of the cases that the parties have relied upon here. *See, e.g.*, *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75 (1998) (*amicus*); *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011) (party counsel); *Kastl v. Maricopa Cty. Cmty. Coll. Dist.*, 325 F. App'x 492 (9th Cir. 2009) (*amicus*); *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061 (9th Cir. 2002) (*amicus*); *Lopez v. River Oaks Imaging & Diagnostic Grp., Inc.*, 542 F. Supp. 2d 653 (S.D. Tex. 2008) (party counsel); *Mitchell v. Axcan Scandipharm, Inc.*, No. 05-243, 2006 U.S. Dist. LEXIS 6521 (W.D. Pa. Feb. 17, 2006) (*amicus*).

FACTUAL BACKGROUND

For more than two decades, Plaintiff Bradley Roberts has worked as a police officer to protect the safety and interests of the Clark County School District community. Dkt. 55-1 at 3.[1]

[1] All record cites refer to CM/ECF pagination.

After attending college and serving in the U.S. Navy for four years, he ultimately sought employment with CCSD. *Id.* CCSD first hired him as a campus monitor in 1992. *Id.* In 1994, he became a CCSD police officer, a position that he continues to hold today. *Id.*

In addition to being an experienced police officer, Mr. Roberts is also transgender. That is, although he was assigned female at birth, Mr. Roberts has a male gender identity. *Id.* Gender identity refers to one's internal sense of being male or female. Dkt. 55-9 at 3. For most individuals, their gender identity matches their sex assigned at birth; for transgender individuals, they do not. The discordance between one's sex assigned at birth and one's gender identity can cause significant distress, which is also known as gender dysphoria.

Gender dysphoria is a well-established medical condition recognized by medical authorities. The international Standards of Care for the treatment of gender dysphoria explain that, like most medical conditions, "[t]reatment is individualized: What helps one person alleviate gender dysphoria might be very different from what helps another person." Eli Coleman *et al.*, *Standards of Care for the Health of Transsexual, Transgender, and Gender-Nonconforming People, Version 7*, 13 Int'l J. of Transgenderism 165, 168 (2011), *available at* http://www.wpath.org/uploaded_files/140/files/IJT%20SOC,%20V7.pdf.

Treatment measures can include living in the gender role consistent with one's gender identity, hormone therapy, and surgical treatment—or only some combination thereof. *Id.* at 171. Not all treatment measures, such as genital surgery, are appropriate for all individuals, as courts have also recognized. *Id.* ("Some patients may need hormones, a possible change in gender role, but not surgery; others may need a change in gender role along with surgery but not hormones."); *cf. Rosati v. Igbinoso*, 791 F.3d 1037, 1040 (9th Cir. 2015) (holding that a blanket policy prohibiting surgical treatment for transgender prisoners with gender dysphoria, without regard to individualized evaluation, supported deliberate indifference to serious medical needs); *D.F. v. Carrion*, 43 Misc. 3d 746, 754 (N.Y. Sup. Ct. 2014) ("not all transgender people seek surgery to align their appearance more closely with their gender identity"). Indeed, CCSD's outside counsel itself advises clients that because "not all transgender people elect to have sex-reassignment surgery, employers should apply their policies and procedures equally to all transgender

employees, regardless of surgical status." Dkt. 56-23 at 4. By analogy, chemotherapy can be appropriate for a particular cancer patient, while radiation therapy is not.

By October 2011, Mr. Roberts was living in a manner consistent with his male gender identity, which included using the men's restroom. Dkt. 55-1 at 3. On October 4, 2011, CCSD convened a meeting to inform Mr. Roberts that an unspecified employee had complained that Mr. Roberts was using the men's restroom. *Id.;* Dkt. 88-1 at 2. In response, Mr. Roberts explained to his CCSD Police Department superiors that he was transgender, that his gender identity was male, and that he was in the process of gender transition. Dkt. 55-1 at 3. On the basis of the employee's complaint and the fear of others like it, CCSD admits that it imposed a general ban on Mr. Roberts's use of the men's restroom on any CCSD property. Dkt. 88 at 11 (admitting that, by November 2011 if not earlier, Mr. Roberts had been "specifically directed not to use the men's restroom at CCSD facilities"); Dkt. 88-1 at 2 (admitting "[t]he reason [CCSD] asked Roberts not to use men's restroom facilities . . . was to avoid any future complaints").

Instead, CCSD required him to use only alternate gender-neutral restrooms rather than the sex-specific communal facilities available to others. Dkt. 50 at 4; Dkt. 55-11 at 6; Dkt. 56-9 at 2; Dkt. 88-1 at 2. CCSD agreed that having Mr. Roberts use the women's restroom was not a viable option, "because his appearance was of the male gender." Dkt. 56-9 at 2; *accord* Dkt. 55-22 at 2; Dkt. 55-1 at 7. In light of CCSD's restroom ban, Mr. Roberts generally resorted to using restrooms outside CCSD, such as those at local businesses. Dkt. 55-1 at 5.

CCSD admits that it has never imposed a restroom restriction like the one it imposed on Mr. Roberts on any other employee. Dkt. 56-25 at 4. No other CCSD employee has ever been banned from a restroom consistent with his or her gender identity.

CCSD's restroom ban was specifically conditioned on Mr. Roberts's presumed genital characteristics. In a meeting attended by Mr. Roberts and his superiors, CCSD's legal counsel told Mr. Roberts that he was "still biologically female" and that he could not use the men's restroom unless he furnished CCSD with medical proof that "he had a genital (sex change) surgical procedure." Dkt. 56-10 at 3-4. In short, CCSD required him to have typical male genitalia, which it believed he lacked. Dkt. 55-1 at 6. As things stood, CCSD viewed him as

someone merely "claiming to be male." Dkt. 55-22 at 2. Mr. Roberts felt "highly humiliated about this semi-public discussion of [his] genitals," especially in the presence of his superiors. Dkt. 55-1 at 6. For example, Mr. Roberts's sergeant pointedly asked, "I don't mean to sound rude, but what about your sex organs?" Dkt. 55-1 at 5; Dkt. 55-6 at 5. During his long tenure with CCSD, "it ha[d] never dawned on [Mr. Roberts] to ask anyone about their genitals." Dkt. 55-9 at 2; Dkt. 55-1 at 5. He was "dumbfounded and embarrassed and a little mad, that people seem[ed] to think that it was suddenly OK to ask" "[b]elow the belt" questions. Dkt. 55-9 at 2.

CCSD's restroom ban lasted for a year, until October 4, 2012, and was reaffirmed throughout that time over Mr. Roberts's continuing objections. Meanwhile, the Nevada Equal Rights Commission had investigated the matter, issued a probable cause determination that CCSD had engaged in discrimination, and, on September 6, 2012, scheduled the matter for a hearing to determine liability the following month. Dkt. 27 at 30; Dkt. 55-1 at 11. On October 4, 2012, a few weeks before the scheduled hearing, Mr. Roberts was summoned to the Police Department's headquarters. Dkt. 55-1 at 11. He was informed that he could now use the men's restroom while on CCSD property, thus reversing CCSD's earlier genitalia-based ban. Dkt. 56-15 at 2.

ARGUMENT

It is impossible to discriminate against a transgender person without taking that person's sex into account. There are two interrelated ways in which CCSD discriminated against Mr. Roberts based on sex. First, discrimination against a transgender person invariably involves sex stereotypes. *See* Section I.A. Second, discrimination against a transgender person is necessarily discrimination because of sex, whether that is based on the individual's gender identity or gender transition. *See* Section I.B. CCSD discriminated on the basis of sex in all of these ways when it banned Mr. Roberts from the restroom consistent with his gender identity. *See* Section II.

I. Discrimination Because an Employee Is Transgender Constitutes Discrimination "Because of Sex."

A. Discrimination Because an Employee Is Transgender Necessarily Relies upon Sex Stereotypes.

More than a quarter century ago, the Supreme Court explained that "we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the

stereotype associated with their group." *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989). In short, "*Price Waterhouse* sets a rule that bars discrimination on the basis of sex stereotypes." *Nichols v. Azteca Rest. Enters., Inc.*, 256 F.3d 864, 874 (9th Cir. 2001). Because Nevada's protections against employment discrimination, N.R.S. 613.330, are interpreted similarly to Title VII, sex stereotyping is also impermissible under state law. *Cohen-Breen v. Gray Television Grp., Inc.*, 661 F. Supp. 2d 1158, 1165 n.2 (D. Nev. 2009). "Like their federal counterparts, the Nevada antidiscrimination statutes have laudable goals and will be broadly construed." *Copeland v. Desert Inn Hotel*, 99 Nev. 823, 826 (1983).

The plaintiff in *Price Waterhouse* had been denied partnership at an accounting firm because of her failure to conform to sex stereotypes. One partner viewed her as "macho." 490 U.S. at 235. Another advised that she should "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." *Id.* The Supreme Court held that an adverse employment decision motivated by such sex-stereotypical views is impermissible: Title VII commands that "gender must be irrelevant to employment decisions." *Id.* at 240. Title VII therefore does not merely prohibit discrimination against women "as women" and against men "as men." The accounting firm was willing to promote a woman to partnership; but the issue was whether the plaintiff conformed to a particular stereotype of how women should express their gender. Notably, a plaintiff prevails so long as sex was a "motivating factor," even if other factors were also at play. 42 U.S.C. § 2000e-2(m).

In *Schwenk*, the Ninth Circuit held that this prohibition against sex stereotyping applies with particular force to transgender people, whose gender identity and expression transgress the stereotypes associated with their sex assigned at birth. *Schwenk v. Hartford*, 204 F.3d 1187, 1202 (9th Cir. 2000). The plaintiff in *Schwenk* was a transgender female prisoner who had been sexually assaulted by a prison guard and brought suit under the Gender Motivated Violence Act (GMVA), which applied if the conduct at issue was "because of gender."[2] *Id.* at 1198. The facts showed that the guard's actions were motivated by both the plaintiff's gender identity and

[2] *Schwenk* held that its interpretation of "gender" also applies to Title VII. 204 F.3d at 1202 (holding that the GMVA is "parallel" to Title VII, because "both statutes prohibit discrimination based on gender as well as sex," which are "interchangeable" terms).

expression. As to her gender identity, the guard's demands for sex "began only after he discovered that [plaintiff] considered herself female" and "included commentary about her transsexuality." *Id.* at 1202. As to her gender expression, plaintiff had "a feminine rather than typically masculine appearance or demeanor," and the guard even offered to bring her make-up from outside the prison to "enhance the femininity of her appearance." *Id.*

The Ninth Circuit made crystal clear that "sex" includes an individual's "gender or sexual identity" as well as "socially-constructed gender expectations." *Id.* In so holding, the court confirmed that *Price Waterhouse* had overruled prior circuit authority narrowly defining "sex" under Title VII and limiting its application to transgender people. Previously, in *Holloway*, the court had held that "sex" was limited to "an individual's distinguishing biological or anatomical characteristics." *Id.* at 1201 (citing *Holloway v. Holloway v. Arthur Andersen & Co.*, 566 F.2d 659 (9th Cir. 1977) (internal quotes omitted)). However, the "initial judicial approach taken in cases such as *Holloway* has been overruled by the logic and language of *Price Waterhouse*." *Schwenk*, 204 F.3d at 1201.

Indeed, there has been "near-total uniformity" in the federal judiciary that this initial approach was "eviscerated" by *Price Waterhouse*. *Glenn*, 663 F.3d at 1318 n.5 & 1319 (holding that sex stereotyping protections "cannot be denied to a transgender individual"); *accord Smith v. City of Salem*, 378 F.3d 566, 574-75 (6th Cir. 2004) (recognizing that sex stereotyping protections are not denied "simply because the person is a transsexual"); *Barnes v. City of Cincinnati*, 401 F.3d 729 (6th Cir. 2005) (applying *Smith*); *Rosa v. Park West Bank & Trust Co.*, 214 F.3d 213, 215-16 (1st Cir. 2000) (holding that protections against sex stereotyping apply to transgender people).

Discrimination because an individual is transgender necessarily relies upon sex stereotypes. A transgender person contravenes the social expectation that people identify as their sex assigned at birth. As the Ninth Circuit explained, by definition, a transgender person's "inward identity [does] not meet social definitions of masculinity [or femininity]" that are associated with one's birth-assigned sex. *Schwenk*, 204 F.3d at 1201. In that sense, "[a] person is defined as transgender precisely because of the perception that his or her behavior transgresses

gender stereotypes." *Glenn*, 663 F.3d at 1316. "There is thus a congruence between discriminating against transgender and transsexual individuals and discrimination on the basis of gender-based behavioral norms." *Id.* In other words, *Schwenk* stands for the proposition that "discrimination on the basis of transgender status is also gender discrimination." *Latta*, 771 F.3d at 495 n.12 (Berzon, J., concurring).

Like *Schwenk*, many other courts have also recognized an inextricable link between discrimination against a transgender person and discrimination on the basis of gender nonconformity. *See Glenn*, 663 F.3d at 1316; *Smith*, 378 F.3d at 575 ("discrimination against a plaintiff who is a transsexual – *and therefore* fails to act and/or identify with his or her gender [assigned at birth] – is no different from the discrimination directed against Ann Hopkins in *Price Waterhouse*") (emphasis added); *Rumble v. Fairview Health Servs.*, No. 14-cv-2037, 2015 U.S. Dist. LEXIS 31591, at *4 (D. Minn. Mar. 16, 2015) ("Because the term 'transgender' describes people whose gender expression differs from their assigned sex at birth, discrimination based on an individual's transgender status constitutes discrimination based on gender stereotyping."); *Finkle v. Howard Cty.*, 12 F. Supp. 3d 780, 788 (D. Md. 2014) ("any discrimination against transsexuals (as transsexuals) – individuals who, by definition, do not conform to gender stereotypes – is proscribed by Title VII's proscription of discrimination on the basis of sex as interpreted by *Price Waterhouse*"); *Schroer v. Billington*, 577 F. Supp. 2d 293, 305 (D.D.C. 2008) (Title VII prohibits sex stereotyping, regardless of whether one is viewed as "an insufficiently masculine man, an insufficiently feminine woman, or an inherently gender-nonconforming transsexual"). Consistent with this body of case law, the EEOC recognized in *Macy* that "consideration of gender stereotypes will inherently be part of what drives discrimination against a transgender[] individual." *Macy v. Holder*, No. 0120120821, 2012 EEOPUB LEXIS 1181, at *25 (EEOC Apr. 20, 2012).

B. Discrimination Based on a Transgender Employee's Gender Identity or Gender Transition Constitutes Discrimination Based on Sex.

When an employer engages in disparate treatment because an employee is transgender, the employer has taken into account a criterion "related to the sex of the victim," which is "[w]hat

matters." *Schwenk*, 204 F.3d at 1202. Because "gender stereotyping is simply one means of proving sex discrimination," discrimination that occurs because an individual is transgender obviates the need for any proof of sex stereotyping. *Macy*, 2012 EEOPUB LEXIS 1181, at *30, *32-33. Discrimination because an employee is transgender constitutes sex-based discrimination for two reasons independent of sex stereotypes: first, gender identity is a component of sex itself, and second, discrimination because of gender transition is discrimination based on sex.

Discrimination Based on Gender Identity. First, because gender identity is a component of sex, discrimination against a transgender person—who is defined as such precisely because of his or her gender identity—constitutes sex discrimination. Stated differently, but for Mr. Roberts's male gender identity, he would not experience discrimination as a transgender person. The Ninth Circuit has held that "sex" includes "an individual's sexual identity" or, as more commonly known, "gender [] identity." *Schwenk*, 204 F.3d at 1201 (internal quotes omitted) & 1202 (holding that conduct motivated by an individual's "gender or sexual identity" is because of "gender," which is "interchangeable" with sex). It rejected the view adopted by earlier cases that had excluded "gender"—which includes "an individual's sexual identity"—from the meaning of "sex" in Title VII. *Id.* at 1201. *Schwenk* was correct to do so. After all, if one's dress, hairstyle, and make-up usage constitute aspects of sex—as *Price Waterhouse* confirms that they do—then the same logically holds true for gender identity, which gives rise to those outward expressions of gender. *See Smith*, 378 F.3d at 575; *Schroer*, 577 F. Supp. 2d at 306. CCSD's suggestion that Title VII does not prohibit discrimination based on gender identity is belied by even a casual reading of *Schwenk* and its interpretation of "sex." District courts in the circuit agree. *Norsworthy v. Beard*, 87 F. Supp. 3d 1104, 1119 (N.D. Cal. 2015) ("In *Schwenk*, the Ninth Circuit explained that gender means 'an individual's sexual identity.'").

Both the EEOC and the U.S. Department of Justice also agree with *Schwenk* that discrimination based on gender identity is discrimination based on "sex." *Macy*, 2012 EEOPUB LEXIS 1181, at *32 ("a transgender person who has experienced discrimination based on his or her gender identity may establish a prima facie case of sex discrimination"); U.S. Dep't of Justice Memorandum (Dec. 15, 2014), *available at* http://www.justice.gov/sites/default/files/opa/press-

releases/attachments/2014/12/18/title_vii_memo.pdf (agreeing that this is "best" and "most straightforward" reading of Title VII).

CCSD grasps at out-of-circuit authority like *Etsitty* to no avail. *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215 (10th Cir. 2007). The Tenth Circuit relied upon an interpretation of "sex" that the Ninth Circuit repudiated in *Schwenk* in light of *Price Waterhouse* and that no other federal appeals court has adopted after *Price Waterhouse*.[3] Specifically, *Etsitty* assumed that "sex" does not encompass "anything more than male and female," which the court viewed in terms of a "biological male" and "biological female." *Id.* at 1222 & n.2 (internal quotes omitted). The law of this Circuit, however, rejects the notion that "sex" is limited to "an individual's distinguishing biological or anatomical characteristics." *Schwenk*, 204 F.3d at 1201. As the Ninth Circuit observed, "Title VII barred not just discrimination based on the fact that [the plaintiff in *Price Waterhouse*] was a woman.'" *Id.*; *accord Schroer*, 577 F. Supp.2d at 307.

Title VII's protections do not rise or fall depending upon whether any particular sex-related characteristics are "biological . . . or socially-constructed." *Schwenk*, 204 F.3d at 1201 (internal quotes omitted). Both are protected. Notably, however, scientific evidence shows that gender identity itself has biological roots. *See, e.g.*, Aruna Saraswat et al., *Evidence Supporting the Biologic Nature of Gender Identity*, 21 Endocrine Practice 199, 199-202 (2015) (comprehensively reviewing scientific literature regarding biological origins of gender identity, including studies of neuroanatomy, prenatal hormones, and genetic factors). It is thus a mistake to make broad assumptions, as CCSD does, about what precisely constitutes Mr. Roberts's "biological sex." In any event, circuit precedent already instructs that gender identity is a component of "sex," no matter what its origins.

Discrimination Based on Gender Transition. Second, discrimination based on gender transition is also necessarily based on sex. Discrimination because of a change in religion

[3] *Johnston v. Univ. of Pittsburgh* is inapplicable for similar reasons. 97 F. Supp. 3d 657 (W.D. Pa. 2015), *appeal docketed* No. 15-2022 (3d Cir. Apr. 22, 2015). The court acknowledged the Ninth Circuit's holding in *Schwenk* but simply declined to follow it. *Id.* at 672 n.15. It also believed that "reliance on Title VII employment discrimination cases is unwarranted," because plaintiff had brought a Title IX claim. *Id.* at 669 n.11. To the extent it considered Title VII, it relied on authority overruled by *Price Waterhouse*—which the Ninth Circuit cautioned against. *Compare id.* at 671 n.14 ("this court will follow the definition embraced by *Ulane* and its progeny") *with Schwenk*, 204 F.3d at 1201 (*Ulane*'s "judicial approach . . . has been overruled").

provides an apt analogy. Firing an employee because she converts from Christianity to Judaism "would be a clear case of discrimination 'because of religion.'" *Schroer*, 577 F. Supp. 2d at 306. Even if the employer "harbors no bias toward either Christian or Jews but only 'converts[,]' . . . [n]o court would take seriously the notion that 'converts' are not covered by the statute." *Id.*; *accord Macy*, 2012 EEOPUB LEXIS 1181, at *33. Similarly, an employer can treat men and women equally as a general matter but nonetheless discriminate against those who who undertake gender transition or who do not "complete" gender transition in the employer's view.

Title VII's Statutory Language. As *Schwenk* illustrates, recognizing that transgender people are protected by Title VII "does not create a new 'class' of people covered under Title VII." *Macy*, 2012 EEOPUB LEXIS 1181, at *34. It is Title VII's prohibition against discrimination based on "sex"—unquestionably a protected characteristic—that bars discrimination against transgender employees based on their gender identity or gender transition. By the same token, Title VII does not separately enumerate protection for classes consisting of Christianity-to-Judaism converts, "macho" women, or employees in interracial relationships. It does not need to do so: individuals in each of those categories are already protected through Title VII's prohibition against discrimination based on "religion," "sex," and "race." *See Schroer*, 577 F. Supp. 2d at 306-07; *Price Waterhouse*, 490 U.S. at 235; *McGinest v. GTE Serv. Corp.*, 360 F.3d 1103, 1118 (9th Cir. 2004).

Particularly in the period before *Price Waterhouse*, courts "allowed their focus on the label 'transsexual' to blind them to the statutory language itself." *Schroer*, 577 F. Supp. 2d at 307. But discrimination based on sex cannot be erased simply because of an employee's "mode of self-identification." *Smith*, 378 F.3d at 574. In light of the erroneous interpretations of "sex" that some courts adopted in the past and their lingering effects, it is unsurprising that some states have taken special efforts to make clear that gender identity and expression are encompassed within state laws that prohibit discrimination based on sex more generally. Of course, state and federal law can achieve the same scope of protection, even if they do so in slightly different ways. For example, a state can expressly prohibit discrimination based on "gender expression"—including one's appearance, clothing, and hairstyle—even though that essentially reinforces the

protection based on "sex" set forth in *Price Waterhouse* under Title VII.[4] The same is true for express state law protection against discrimination based on "gender identity," which mirrors *Schwenk*'s holding that gender identity is a component of sex. As here, state and federal laws can provide co-extensive belt-and-suspenders protection.

Ultimately, it does not matter whether Congress had transgender employees specifically in mind when enacting Title VII. A similar argument was made—and emphatically rejected—about whether Congress specifically intended to prohibit same-sex harassment. Justice Scalia recognized on behalf of a unanimous court that "male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII." *Oncale*, 523 U.S. at 79. "But statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Id.* As the Ninth Circuit explained in *Schwenk*, there is nothing in the statute parallel to Title VII "to suggest that it would not apply to . . . transsexuals." 204 F.3d at 1205. Thus, "such persons do fall within its purview." *Id.*

II. CCSD Discriminated Against Mr. Roberts Because of Sex.

A. CCSD's Restroom Ban Discriminated Against Mr. Roberts Because He Is Transgender.

CCSD's restroom ban discriminated against Mr. Roberts because he is transgender. As an initial matter, although CCSD's brief asserts that its restroom policy was based solely on genitalia and applied to everyone, the undisputed facts tell a different story. CCSD had no written policy regarding restroom usage in 2011. Dkt. 55-3 at 3. Mr. Roberts was singled-out for questioning about his genital characteristics and required to furnish medical proof of the same—lines of inquiry that he had never before witnessed at CCSD despite his long tenure there. Dkt. 55-1 at 5;

[4] Of course, the fact that Congress has not amended Title VII to include "gender expression" in no way undermines *Price Waterhouse*. "Congressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction, including the inference that the existing legislation already incorporated the offered change." *General Constr. Co. v. Castro*, 401 F.3d 963, 970 (9th Cir. 2005) (internal quotes omitted). Furthermore, "a subsequent amendment [can be] intended to clarify, rather than change, the existing law." *Callejas v. McMahon*, 750 F.2d 729, 731 (9th Cir. 1984) (internal quotes omitted).

Dkt. 55-6 at 5.

Legally, even if CCSD had subjected all employees to genital inspection for restroom access, a genitalia test nonetheless excludes a transgender employee like Mr. Roberts—and only him—from the restroom consistent with his gender identity. It has no relevance whatsoever for non-transgender employees whose gender identities match their birth-assigned sex and expected genital characteristics. That is powerfully illustrated by this fact: only Mr. Roberts was summoned to learn that CCSD's genitalia-based restroom requirement was being abandoned. The change was immaterial to everyone else. Restricting restroom access to "matching genitalia" is simply another way of articulating a restriction on transgender employees like Mr. Roberts, which enforces sex stereotypes that male bodies must look a certain way. That is a form of facial discrimination as a matter of law, just as "discriminating against individuals with gray hair is a proxy for age discrimination."[5] *Pac. Shores Props., LLC v. City of Newport Beach*, 730 F.3d 1142, 1159 n.23 (9th Cir. 2013); *accord Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 270 (1993) ("A tax on wearing yarmulkes is a tax on Jews.").

B. CCSD's Restroom Ban Discriminated on the Basis of Sex, Including Sex Stereotypes, Gender Identity, and Gender Transition.

Title VII and Nevada law do not stop at the restroom door. At bottom, CCSD's position seeks to divorce the restroom from the rest of the workplace and the rules that govern it. But there is no carve-out in Title VII or Nevada law to exempt discrimination merely because it is directed at the restroom as opposed to any other aspect of the workplace. Discrimination against a transgender employee is unlawful, period, and that is true regardless of whether the discrimination concerns hiring, firing, or any other term or condition of employment. The fact that restrooms are separated by sex does not mean that restrooms are a lawless frontier where Title VII or Nevada law is suspended. Certainly, no employer could bar "masculine" women from using the women's restroom or bar "feminine" men from using the men's restroom.

[5] A facially discriminatory policy like CCSD's restroom ban also has statute-of-limitations implications. "When an employer adopts a facially discriminatory [policy]," it "engages in intentional discrimination" every time it acts on the basis of the policy. *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 634 (2007). Each day when Mr. Roberts was denied access to the men's restroom pursuant to the facially discriminatory ban, a "fresh" violation occurred.

The harm that an employee experiences from being excluded from a restroom consistent with his or her gender identity—let alone for a year—is no trivial matter. "Equal access to restrooms is a significant, basic condition of employment." *Lusardi v. McHugh*, No. 0120133395, 2015 EEOPUB LEXIS 896, at *27 (EEOC Apr. 1, 2015); *see also Baker v. John Morrell & Co.*, 220 F. Supp. 2d 1000, 1011, 1014 (N.D. Iowa 2002) (describing access to restroom facilities as "fundamental" and noting that the denial of equal access to such facilities "has been found to alter the terms and conditions of a plaintiff's employment"); Dkt. 56-29. A non-transgender man who is forced to use a different restroom than other men would undoubtedly feel humiliated by that differential treatment, particularly if the stated reason was because his penis was not the size or shape that his employer expected of typical men. Mr. Roberts felt that way as well. CCSD did not deem him fit to share the same space as other men to discharge the most elementary of bodily functions, for the most intimate of reasons.

Discrimination Based on Sex Stereotypes. As noted above, discrimination against a transgender person inherently relies upon sex stereotypes, and those stereotypes were at work here. Stereotypes about what it means to be a man can encompass how one looks "below the belt," as Mr. Roberts described it. CCSD refused to treat Mr. Roberts as a "real" man entitled to access spaces designated for men unless he first obtained surgery to conform his genital characteristics to that of most men. Dkt. 56-10 at 3. Otherwise, CCSD viewed Mr. Roberts as merely "claiming to be male." Dkt. 55-22 at 2. As the Nevada Equal Rights Commission explained, CCSD "require[d] Roberts to prove his conformity with [CCSD's] expectations regarding the male anatomy in order to use the men's bathrooms." Dkt. 56-11 at 4.

A focus on sex-related anatomy, such as genitalia or breasts, "is inescapably 'because of . . . sex.'" *See Rene*, 305 F.3d at 1065-66 (noting that plaintiff's harassers did not grab his elbow but instead grabbed his crotch, and that when one's genitals are targeted, it is "impossible to delink" that from gender) (one of two opinions jointly constituting *en banc* majority). Indeed, even CCSD's cited authority agrees that "neither a woman with [stereotypically] male genitalia nor a man with stereotypically female anatomy, such as breasts, may be deprived of a benefit or privilege of employment by reason of that nonconforming trait." *Kastl v. Maricopa Cty. Cmty.*

Coll. Dist., No. CIV 02-1531-PHX-SRB, 2004 U.S. Dist. LEXIS 29825 (D. Ariz. Jun. 3, 2004) (denying motion to dismiss). Mr. Roberts was no less of a man—and entitled to full treatment as such—notwithstanding CCSD's expectations of appropriate genital characteristics for a man.

Like all physical characteristics, there is also a wide range of human variation in genital characteristics, and the law does not allow an employer to dictate to employees the perimeters of what it deems acceptable for a man or a woman. Insisting that a man must have genital characteristics of a particular size or shape in order to be a "real" man is rooted in sex stereotypes. An employer also could not condition restroom access on whether a non-transgender man's genital characteristics measured up to the employer's standards; and it is no answer to tell him that he can make an appointment with a surgeon to align his body with what the employer finds acceptable. Similarly, an employer could not demand that a non-transgender female employee undergo surgery to obtain larger breasts in order to conform to the employer's stereotypical ideas of what women should look like. If the plaintiff in *Price Waterhouse* could not be required to "dress more femininely," 490 U.S. at 235, she certainly could not be coerced to go under the knife to make her body look more feminine in her employer's eyes. Transgender people are not exempt from the universal protections against sex stereotyping afforded to all individuals.

Permitting employers to scrutinize their employees' genital characteristics—which are indisputably related to "sex"—would also have frightening practical implications. Judge Leen underscored the stakes here: "The phrase 'private parts' has been in my vocabulary for more than 50 years for good and common sense reasons. It is difficult to fathom a subject more likely to cause embarrassment than requesting proof of one's genitalia." Dkt. 99 at 13.

Discrimination Based on Gender Identity and Gender Transition. Furthermore, CCSD's restroom ban also discriminated on the basis of gender identity, in violation of both Title VII and Nevada law. *Schwenk*, 204 F.3d at 1201; N.R.S. 613.330. CCSD asserts that there is no authority for the proposition that denying transgender people appropriate restroom access discriminates on the basis of gender identity. That is incorrect as a descriptive matter. More fundamentally, CCSD fails to offer any reason why gender identity protections—which are otherwise understood as protecting transgender people from discrimination—are suspended in the

restroom. To the contrary, it is precisely in sex-separated contexts that discrimination against transgender people can be most apparent.

For example, in *Doe*, the Maine Supreme Court held that the exclusion of a transgender female student from the girls' restroom violated state law prohibiting discrimination on the basis of gender identity. *Doe v. Reg'l Sch. Unit 26*, 86 A.3d 600 (Me. 2014). Like CCSD, the school banned the plaintiff from using the restroom consistent with the plaintiff's gender identity after receiving a third-party complaint. *Id.* at 603. The school then consigned the plaintiff (and the plaintiff alone) to using a gender-neutral restroom. *Id.* at 603. The Maine Supreme Court held that this practice was unlawful discrimination on the basis of gender identity. *Id.* at 606-07. "She was treated differently solely because of her status as a transgender girl. This type of discrimination is forbidden." *Id.* at 606.

California came to a similar conclusion. The state civil rights agency brought suit against an employer that excluded a transgender employee from the restroom consistent with his gender identity unless and until he had "completed" sex reassignment surgery. *See Dep't of Fair Emp't and Hous. v. Am. Pac. Corp.* ("*AMPAC*"), No. 34-2013-00151153 (Sacramento Super. Ct. Mar. 11, 1014), *available at* http://www.dfeh.ca.gov/res/docs/Announcements/Lozano%20final%20order.pdf. *AMPAC* held that the civil rights agency had stated a valid claim under California law prohibiting discrimination based on gender identity. Notably, the court recognized that the employer's invocation of coworker discomfort could not justify its discriminatory conduct. *Id.*

Here, even though Mr. Roberts had socially transitioned to live openly as a man, legally changed his name, obtained a Nevada driver's license reflecting his male gender, and took medical steps (including chest surgery) to transition, CCSD decided that Mr. Roberts had not gone far enough. Dkt. 55-1 at 8-10. With respect to restroom access, CCSD decided for Mr. Roberts that his gender transition would not be truly complete "until he had a genital (sex change) surgical procedure." Dkt. 56-10 at 3. Discrimination based on an employee's gender transition, or the perceived status thereof, is discrimination based on sex. *Schroer*, 577 F. Supp. 2d at 306.

Of particular relevance here, both the EEOC and the Nevada Equal Rights Commission have held that federal and state law prohibit discriminatory restroom practices. In *Lusardi*, the

EEOC confirmed that the exclusion of a transgender employee from the restroom consistent with her gender identity violated Title VII's prohibition on sex discrimination. 2015 EEOPUB LEXIS 896, at *17. Like Mr. Roberts, the employee had been barred from communal restrooms available to other employees and consigned to using only alternate restrooms. *Id.* at *4-5. The employer imposed this restriction based on the presumed preferences of other employees. *Id.* at *18-19. Because this restriction was based on the fact that the employee was transgender, it was also necessarily based on sex, as the EEOC had previously confirmed in *Macy*. 2015 EEOPUB LEXIS 896, at *17-18. The restroom restriction "isolated and segregated [the employee] from other persons of her gender. It perpetuated the sense that she was not worthy of equal treatment and respect." *Id.* at *10.

As the nation's key enforcer of Title VII, the EEOC's administrative decisions are entitled to deference. *See EEOC v. Cal. Psychiatric Transitions*, 725 F. Supp. 2d 1100, 1112 (E.D. Cal. 2000). Indeed, adjudicatory decisions like *Macy* and *Lusardi* that interpret statutory terms are entitled to *Chevron* deference—not merely *Skidmore* deference applicable to informal agency guidance that CCSD discusses. *See INS v. Aguirre-Aguirre*, 526 U.S. 415, 425 (1999) (holding that the adjudicatory decisions of the BIA "should be accorded *Chevron* deference" because the agency gives statutory terms "concrete meaning through a process of case-by-case adjudication") (internal quotation marks omitted); *Gomez v. Campbell-Ewald, Co.*, 768 F.3d 871, 878 (9th Cir. 2014) (*Chevron* deference to FCC adjudication); *Alaska Wilderness League v. U.S. EPA*, 727 F.3d 934, 937 (9th Cir. 2013) (*Chevron* deference to EPA adjudication). Tellingly, in a candid statement to its clients, even CCSD's outside counsel agrees that *Chevron* deference is appropriate in "situations when the EEOC engages in notice-and-comment rulemaking or formal adjudication, as in the *Macy* ruling." Dkt. 56-23 at 5 n.12.

To be sure, *Chevron* deference may not always apply, as when a court finds that a statute is unambiguous; but where it does apply, it significantly alters the legal analysis. Under *Chevron*, courts "may not supply the interpretation of the statute [they] think best" but instead "must limit [themselves] to asking whether the agency's answer is based on a permissible construction of the statute." *Marmolejo-Campos v. Holder*, 558 F.3d 903, 908 (9th Cir. 2009) (en banc) (internal

quotes omitted). The EEOC's decisions in *Macy* and *Lusardi* unquestionably represent a "permissible" construction of Title VII.[6]

CCSD wrongly urges this Court to disregard the deference owed to the EEOC's decisions because of a non-precedential Ninth Circuit decision preceding them, *Kastl*.[7] 325 F. App'x at 492. First, the EEOC's decisions are entirely consistent with—and, indeed, rely upon—the only relevant Ninth Circuit *precedent* here, which is *Schwenk*. Unpublished Ninth Circuit decisions like *Kastl* are non-precedential and non-binding. 9th Cir. R. 36-3(a). Second, as discussed below, the EEOC's decisions are in fact consistent with *Kastl* on the issue that is dispositive here: the exclusion of a transgender person from the restroom consistent with his or her gender identity constitutes a prima facie case of discrimination based on "sex." Third, because the EEOC's decisions in *Macy* and *Lusardi* did not exist when *Kastl* was decided, the court in *Kastl* did not have a corresponding obligation of deference at the time. This Court does.

In *Brand X*, the Supreme Court held that federal courts must generally defer to agency interpretations entitled to *Chevron* deference, even where those interpretations conflict with the precedent of a federal circuit court. *Nat'l Cable & Telecomm. v. Brand X Internet Servs.* ("*Brand X*") 545 U.S. 967, 982-83 (2005). The Ninth Circuit has heeded that instruction many times, recognizing that a court can be obliged to follow an agency's interpretation rather than circuit precedent. *See, e.g., Jiang v. Holder*, 611 F.3d 1086, 1093 (9th Cir. 2010) (holding that an agency's construction trumped prior Ninth Circuit precedent); *Metrophones Telecomm., Inc. v. Global Crossing Telecomm., Inc.*, 423 F.3d 1056, 1065 (9th Cir. 2005) (same); *see also AARP v. EEOC*, 390 F. Supp. 2d 437, 447 (E.D. Pa. 2005) (recognizing that district courts must also follow *Brand X* even in the face of contrary circuit precedent).

The only exception is where prior judicial precedent holds that a statute's language "unambiguously" commands a particular meaning that is contrary to the agency's interpretation. *Brand X*, 545 U.S. at 982-83. That bar is not met here. Even if *Kastl* were precedent, its two-paragraph decision in no way held that Title VII's language "unambiguously" foreclosed any

[6] Of course, if the Court agrees that the "best" interpretation of Title VII is that discrimination against transgender employees is based on "sex," the issue of deference is also immaterial.

[7] Unless otherwise indicated by citation, references to "*Kastl*" throughout this brief refer to the Ninth Circuit's unpublished decision, rather than the district court orders in the action.

construction. *Cf. Jiang*, 611 F.3d at 1093. Thus, even if there were any tension with circuit precedent actually requiring resolution in this case, *Macy* and *Lusardi* would still govern.[8]

The Nevada Equal Rights Commission's guidance regarding state law is straightforward: "An employer may *not* prevent or discourage an employee who identifies with a particular sex from using the dedicated bathroom for that particular sex." Dkt. 55-9 at 2 (Nevada Equal Rights Commission, Facts About Gender Identity and Expression Discrimination) (emphasis in original). Notably, this reflects the agency's official guidance—not merely an "investigator's bare conclusion," as CCSD characterizes it—although individual investigative determinations will naturally align with the agency's formal legal position.

CCSD argues that the Nevada Equal Rights Commission has misinterpreted the laws it is charged to enforce. It notes that Nevada law "specifically addressed dress and grooming standards . . . but made no specific pronouncement about restroom use." Dkt. 88 at 27 n.10. To the extent that has any relevance, it helps Mr. Roberts, not CCSD. The operative nondiscrimination statute provides that "*Except as otherwise provided in N.R.S. 613.350*, it is an unlawful employment practice for an employer" to engage in discrimination. N.R.S. 613.330(1) (emphasis added). There are six "[l]awful employment practices" enumerated in N.R.S. 613.350. One of those practices relates to appearance, grooming, and dress standards; but that exception does not carve out restrooms from coverage—nor does any other exception on the list. In light of this statutory text, the Nevada Equal Rights Commission correctly rejected the precise argument that CCSD urges here. Dkt. 55-9 at 4 (agency guidance explaining that an employer "*may* impose grooming standards" but that it "may *not* prevent or discourage an employee who identifies with a particular sex from using the dedicated bathroom for that particular sex") (emphasis in original). "[T]he construction placed on a statute by the agency charged with the duty of administering it is entitled to deference." *Elliot v. Resnick*, 114 Nev. 25, 32 n.1 (1998).

[8] CCSD argues that *Macy* and *Lusardi* should not be given retroactive effect. But it cites a case about whether a statute should apply to conduct that occurred *before its enactment*, whereas here, Title VII was passed in 1964. Moreover, *Schwenk* has been the binding law of the circuit since 2000. It made clear that transgender people are protected under Title VII and nowhere carved out restrooms. CCSD did not actually nor reasonably rely on any binding authority to the contrary. Indeed, CCSD was also undeterred by Nevada's express inclusion of gender identity and expression in state law and *Macy*'s issuance. If CCSD took a calculated risk that a court would ignore *Schwenk*—or *Price Waterhouse*, for that matter—it did so at its own peril.

Civil rights tribunals adjudicating discrimination claims in other states have uniformly held that the exclusion of transgender people from the sex-specific restrooms available to non-transgender people discriminates on the basis of gender identity. *Sommerville v. Hobby Lobby Stores*, Charge Nos. 2011CN2993/2011CP2994 (Ill. Human Rights Comm'n May 15, 2015) (finding that the "decision to restrict Complainant's access to the women's restroom on account of her gender related identity violated" state law), *available at* http://www.windycitymediagroup.com/pdf/Sommervilleruling.pdf; *Mathis v. Fountain-Fort Carson Sch. Dist. 8*, Charge No. P20130034X, Determination (Colo. Civil Rights Division Jun. 17, 2013) ("By not permitting [a transgender girl] to use the restroom with which she identifies, as non-transgender students are permitted to do, the [school] treated the [student] less favorably than other students"), *available at* http://www.transgenderlegal.org/media/uploads/doc_529.pdf; *Jones v. Johnson Cty. Sheriff's Dep't*, No. 12-11-61830, Order Finding Probable Cause (Iowa Civil Rights Comm'n Mar. 5, 2013) (holding that the government's exclusion of a transgender woman from the women's restroom made out a prima facie case of discrimination based on gender identity, which the government had not rebutted with a non-discriminatory reason), *available at* http://www.lambdalegal.org/in-court/legal-docs/jones_ia_20130305_order.

Taken together, at least twelve states (including Nevada) plus the District of Columbia[9]

[9] The jurisdictions include California (Cal. Educ. Code § 221.5(f); *AMPAC*, *supra*); Colorado (3 Colo. Code Regs. § 708-1, Rule 81.9; *Mathis*, *supra*); Delaware (State of Delaware, State of Delaware Guidelines on Equal Employment Opportunity and Affirmative Action Gender Identity Guidelines, *available at* http://www.delawarepersonnel.com/policies/documents/sod-eeoc-guide.pdf); Illinois (*Sommerville*, *supra*); Iowa (Iowa Civil Rights Commission, Sexual Orientation & Gender Identity – An Employer's Guide to Iowa Law Compliance, *available at* http://publications.iowa.gov/13717/1/SOGIEmpl.pdf; *Jones*, *supra*), Maine (*Doe*, 86 A.3d at 606); Massachusetts (Massachusetts Department of Elementary & Secondary Education, Guidance for Massachusetts Public Schools Creating a Safe and Supportive School Environment: Nondiscrimination on the Basis of Gender Identity, *available at* http://www.doe.mass.edu/ssce/GenderIdentity.pdf); New Jersey (N.J. Stat. § 10:5-12(f)(1)); New York (New York State Education Department, Guidance to School Districts for Creating a Safe and Supportive School Environment for Transgender and Gender Nonconforming Students, *available at* http://www.p12.nysed.gov/dignityact/documents/Transg_GNCGuidanceFINAL.pdf); Oregon (Or. Admin. R. 839-005-0031(2)); Vermont (Vermont Human Rights Commission, Sex, Sexual Orientation and Gender Identity: A Guide to Vermont's Anti-Discrimination Law for Employers and Employees, *available at* http://hrc.vermont.gov/sites/hrc/files/publications/trans-employment-brochure.pdf); Washington (Wash. Admin. Code § 162-32-060; Washington State Human Rights Commission, Guide to Sexual Orientation and Gender Identity and the Washington Law Against Discrimination, *available at* http://www.hum.wa.gov/Documents/Guidance/GuideSO20140703.pdf); and Washington D.C. (D.C. Mun. Regs. tit. 4, § 801.1(a)).

and the federal government[10] have all recognized—through administrative decisions, regulations, and other guidance—that the exclusion of transgender people from facilities consistent with their gender identity constitutes sex-based discrimination in an array of contexts. These authorities also illustrate that there is nothing mutually exclusive between providing transgender people with equal access to facilities consistent with their gender identity, on the one hand, and maintaining facilities separated by sex, on the other hand. As the Nevada Equal Rights Commission explained, recognizing that transgender people have an equal right to access the restroom consistent with their gender identity does not negate "the legitimacy of restrooms segregated by sex." Dkt. 56-11 at 4. Mr. Roberts did not ask CCSD to abolish sex-separated restrooms; he merely asked to be treated like any other man. Maintaining sex-separated restrooms does not stigmatize men or women or deprive them of their basic dignity, but excluding transgender people from the restrooms consistent with their gender identity does.

C. CCSD's Reliance on *Kastl* and Other Authorities Is Misplaced.

CCSD's reliance on the *Kastl* litigation, which involved a transgender woman who had been denied access to the women's restroom, is misplaced for several reasons, in addition to *Brand X*. First, CCSD glosses over the most important aspect of the decision for purposes here: the Ninth Circuit recognized that the plaintiff had *successfully* established a prima facie case of sex discrimination based on the restroom restriction and reversed the district court's holding to the contrary on that point. *Compare Kastl v. Maricopa Cty. Cmty. Coll. Dist.*, No. CIV 02-1531-PHX-SRB, 2006 U.S. Dist. LEXIS 60267, at *20 (D. Ariz. Aug. 22, 2006) (district court holding that plaintiff failed to state a prima facie case) *with Kastl*, 325 F. App'x at 493-94 (Ninth Circuit holding that "Kastl states a prima facie case of gender discrimination under Title VII").[11]

[10] The U.S. Department of Education has explained on multiple occasions that Title IX's prohibition against sex discrimination means that, in the context of sex-separated restrooms, schools must treat transgender people consistent with their gender identity. *E.g.*, U.S. Dep't of Educ., Office of Civil Rights, Opinion Letter (Jan. 7, 2015), *available at* http://www.lambdalegal.org/sites/default/files/28-2.pdf. The U.S. Department of Justice agrees that Title IX requires that access to sex-separated restrooms must be based on gender identity. Statement of Interest of the United States, *Tooley v. Van Buren Pub. Sch.*, No. 2:14-cv-13466 (E.D. Mich. Feb. 24, 2015), *available at* http://www.justice.gov/sites/default/files/crt/legacy/2015/02/27/tooleysoi.pdf.

[11] CCSD obliquely refers to an unspecified case regarding a transgender student's restroom usage, but declines to cite it by name, because that 2008 decision cannot be reconciled with the Ninth Circuit's 2009 decision in *Kastl*. *Compare Doe v. Clark Cty. Sch. Dist.*, No. 2:06-CV-1074-JCM(RJJ), 2008 U.S. Dist. LEXIS 71204, at *9 (D. Nev. Sept. 17, 2008) ("Plaintiffs cannot state

It is difficult to overstate the significance of that aspect of the decision. "The prima facie case serves an important function in litigation" because it creates an inference of discrimination that, if unexplained, requires "judgment for the plaintiff." *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 254 (1981). *Kastl* thus stands for the proposition that the exclusion of a transgender employee from a restroom consistent with the employee's gender identity is a legally sufficient basis for finding discrimination because of "sex" under Title VII. That supports Mr. Roberts, not CCSD. Judge Leen made the same observation in this case: the Ninth Circuit "clearly held" that Ms. Kastl "had stated a prima facie claim of Title VII gender discrimination as a transgender individual who was told she could not use the women's restroom based on the employer's expectations about men and women and gender stereotypes." Dkt. 99 at 16. All of CCSD's cases assert that restroom restrictions on transgender people are somehow not based on "sex."[12] None can be squared with *Kastl*, which holds the exact opposite on the prima facie case.

Second, although *Kastl* ultimately affirmed summary judgment for the employer, it did so based on case-specific grounds inapplicable to CCSD here. The employer asserted that it had a legitimate non-discriminatory reason ("safety") for its conduct, and the court believed that the plaintiff had failed to offer sufficient evidence to rebut that justification.[13] *Kastl*, 325 F. App'x at 494. Here, however, CCSD *has not* invoked "safety"—or any other rationale, for that matter—in this litigation as a justification for Mr. Roberts's exclusion from the men's restroom. The reason for its tactical choice is self-evident: CCSD now agrees Mr. Roberts should be able to use the men's restroom, having disavowed its prior practice, and CCSD cannot credibly claim that its current practice jeopardizes anyone's safety. *Kastl* does not support CCSD for that reason alone.

Third, *Kastl* only considered plaintiff's claim under the *McDonnell Douglas* burden-shifting framework, as plaintiff did not argue there was direct evidence of discrimination. Direct

a *prima facie* case of sex discrimination") (capitalization omitted) *with Kastl*, 325 F. App'x at 493-94 ("[Plaintiff] states a prima facie case of gender discrimination"). CCSD's reliance on *Doe* in 2011-12 was unreasonable, and it is also irrelevant to liability, as distinct from damages.

[12] Some of CCSD's cases also treat restrooms as Title VII-free zones. In *Sturchio v. Ridge*, decided before *Kastl*, the court admitted it was "unaware" of any relevant case law on restroom usage and believed that "[p]erhaps, in the future, the law" might become more developed. No. CV-03-0025-RHW, 2005 U.S. Dist. LEXIS 37406, at *50 (E.D. Wash. Jun. 23, 2005).

[13] The district court had also struck late filings that plaintiff had submitted in opposition to defendant's motion for summary judgment because plaintiff's counsel had not discharged "her professional responsibilities in a timely manner." *Kastl*, 2006 U.S. Dist. LEXIS 60267, at *10.

evidence is evidence that, if believed, proves the discriminatory motive without inference. *Bergene v. Salt River Project Agric. Improvement & Power Dist.*, 272 F.3d 1136, 1141 (9th Cir. 2001). The burden shifting of *McDonnell Douglas* operates as a tool to smoke out the real reason for an employment action and therefore does not apply where direct evidence exists. *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985). For example, if an employer admits, "I fired the cashier because he is Latino," it makes no analytical sense to ask whether there was a legitimate, non-discriminatory reason for the action and whether that reason is pretextual (the second and third stages of the burden-shifting framework). Here, there is direct evidence of discrimination, as Mr. Roberts has noted. *Cf. Lusardi*, 2015 EEOPUB LEXIS 896, at *18.

Because *Kastl* did not consider whether the restroom restriction was itself direct evidence of discrimination, it assumed that "safety" was a non-discriminatory reason at the second stage of *McDonnell Douglas*. But "an explanation inextricably linked to the protected trait . . . is not non-discriminatory." *Id.* at 26 n.6; *accord Pac. Shores Props.*, 730 F.3d at 1159 n.23. By analogy, an employer who believes that the exclusion of African-American employees from communal restrooms somehow protects other employees also cannot invoke "safety" as a race-neutral justification. Similarly, an employer who hires only white salespeople to satisfy customer preference cannot assert "profit motive" as a race-neutral justification. Whether discrimination has occurred is what matters here—not whether the employer believes it has a good reason for the discrimination.

CCSD's authorities also assume that tradition and popular acceptance can immunize a discriminatory practice. *See, e.g., Goins v. W. Grp.*, 635 N.W.2d 717, 723 (Minn. 2001) (surmising that the Minnesota legislature did not intend to alter the "traditional and accepted practice" surrounding restrooms); *Johnson v. Freshmark*, 337 F. Supp. 2d 996, 1000 (N.D. Ohio 2003) (sanctioning the "accepted principles established" for restroom usage and "only" requiring plaintiff "to conform").[14]

Reliance on tradition is wrong on the facts and the law. As a factual matter, genitalia-based restroom policies like the one that CCSD adopted are of recent vintage. They were

[14] The underpinning of *Johnson* was superseded by the Sixth Circuit's precedential decision in *Smith*, 378 F.3d at 574-75, which was issued after the conclusion of the *Johnson* litigation.

specifically formulated in response to transgender people like Mr. Roberts, as discussed above. Dkt. 56-25 at 4. As a legal matter, it is no answer under Title VII or Nevada law that a discriminatory practice has purportedly existed for a long period of time. "An institution's desire to maintain its traditions . . . is not an acceptable defense to claims of employment discrimination under Title VII—in fact, it is precisely the problem Title VII was enacted to address." *United States v. City of New York*, 905 F. Supp. 2d 438 (E.D.N.Y. 2012). As the Ninth Circuit has explained, defending a discriminatory exclusion based on its longstanding existence is "circular reasoning, not analysis." *Latta*, 771 F.3d at 475-76 (striking down Nevada's ban on marriage for same-sex couples, which existed in territorial laws predating statehood) (internal quotes omitted).

A practice also cannot be justified by its popular acceptance. Some employees may not wish to share the same restroom as a transgender person. CCSD admits that it was one such employee's complaint, and the fear of more to come, that prompted the restroom ban here. But the preferences of others cannot justify a breach of our commitment to equality. *See Lam v. Univ. of Hawai'i*, 40 F.3d 1551, 1560 n.13 (9th Cir. 1994) ("[t]he existence of . . . third party preferences for discrimination does not . . . justify discriminatory hiring practices"); *Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d 385, 389 (5th Cir. 1971) ("While we recognize that the public's expectation of finding one sex in a particular role may cause some initial difficulty, it would be totally anomalous if we were to allow the preferences and prejudices of the customers to determine whether the sex discrimination was valid.").

As the court noted in *AMPAC*, "hypothetical assertions of emotional discomfort about sharing facilities with transgender individuals" echo "similar claims of discomfort in the presence of a minority group, which formed the basis for decades of racial segregation in housing, education, and access to public facilities." Order at 4. Many dark chapters of American history repeatedly teach the same lesson: it is precisely when prevailing public attitudes would indulge an instinct "to guard against people who appear to be different in some respects from ourselves" that an unwavering commitment to equality of treatment is most needed. *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 486 (9th Cir. 2014) (internal quotes omitted).

CONCLUSION

For the foregoing reasons, Lambda Legal respectfully requests that the Court hold that there is no genuine dispute that CCSD's exclusion of Mr. Roberts from the restroom consistent with his gender identity discriminated on the basis of sex, including gender identity, under Title VII and Nevada law in resolving the pending cross-motions for partial summary judgment.

DATED: January 29, 2016.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I will electronically file the foregoing with the Clerk of the Court for the United States District Court, District of Nevada by using the CM/ECF system on January 29, 2016. All participants in the case are registered CM/ECF users, and will be served by the CM/ECF system.

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