APPEAL NO. 23-2807

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REBECCA ROE, by and through her parents and next friends, 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
Case No. 1:23-cv-00315-DCN
Hon. David C. Nye, D.J.

BRIEF OF DEFENDANTS-APPELLEES

RAÚL R. LABRADOR
Attorney General

James E. M. Craig
Division Chief
Idaho Office of
the Attorney General
700 W. Jefferson St., Suite 210
Boise, ID 83720
(208) 334-2400
james.craig@ag.idaho.gov

JOSHUA N. TURNER
Acting Solicitor General

John J. Bursch
Lincoln Davis Wilson
Henry W. Frampton IV
Alliance Defending Freedom
440 First Street, NW, Suite 600
Washington, DC 20001
(202) 393-8690
jbursch@ADFlegal.org
lwilson@ADFlegal.org
hframpton@ADFlegal.org

Counsel for Defendants-Appellees

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INTRODUCTION

States are responsible for ensuring children's health and welfare while attending public schools. In Idaho, the people made it the constitutional duty of the Idaho legislature to maintain a uniform system of public schools. And every school day for approximately seven hours, parents entrust the well-being of their children to the State. Performing that duty, Idaho passed S.B. 1100 to protect the important safety and privacy interests of school children in intimate spaces—children who are still developing mentally, physically, and emotionally.

But Plaintiffs say the United States Constitution and Title IX prohibit Idaho from protecting male and female intimate spaces from intrusion by the opposite sex. Their theories defy common sense and common decency. Nothing in the Constitution or Title IX forbid states from safeguarding the privacy interests of developing minors in their care.

From the first century to the twenty-first, societies have designated public bathroom and like facilities based on sex. The Roman Emperor Hadrian forbid males and females from publicly bathing together, and the Pompeii bathhouses were constructed with male and female designated chambers. And until recently, the United States has known *only* public bathrooms designated by sex. S.B. 1100 applies this historical rule to shower rooms, locker rooms, bathrooms, and overnight stays at Idaho public schools, while allowing single-user restrooms to accommodate anyone who desires them. This practice has existed since time immemorial.

Plaintiffs challenged the law before it went into effect, seeking a preliminary injunction to facially enjoin the law statewide. The district court rightly rejected this

request and followed the Eleventh Circuit's en banc ruling upholding a similar law. *Adams ex rel. Kasper v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 796 (11th Cir. 2022) (en banc). The district court held that S.B. 1100's traditional rule protected important sex-specific privacy interests under the Equal Protection clause and did not discriminate based on transgender identity. This traditional rule also complied with Title IX, which expressly allows sex-based designation of privacy facilities. And the traditional rule did not violate any right to informational privacy.

Plaintiffs appealed. But while Plaintiffs facially challenge S.B. 1100, they focus almost entirely on bathrooms and make little effort to argue that a law providing for sex-based designations is unconstitutional in *all* its applications—for example, where students must undress together in locker rooms, share a shower room, or share a bed overnight. The manifest need for those laws—as shown by the consequences in jurisdictions that lack them[1]—makes it impossible for Plaintiffs to prevail on their facial challenge and illustrates why a sex-based rule has applied in intimate spaces since time immemorial. Such laws protect sex-specific safety and privacy, which explains why Title IX contains statutory and regulatory provisions allowing sex-based designations in private spaces.

This Court has long held that "[t]he desire to shield one's unclothed figure from [the] view of strangers, and particularly strangers of the opposite sex, is impelled by elementary self-respect and personal dignity." *Byrd v. Maricopa Cnty. Sheriff's Dep't*, 629 F.3d 1135, 1141 (9th Cir. 2011). And in its recent *Hecox* decision, this Court applied

[1] *E.g.*, Tyler Arnold, *Colorado Parents Protest After Daughter Told to Share Bed with Male Student on School Trip*, Catholic News Agency (Dec. 6, 2023), https://bit.ly/46YOLNT.

that principle to bathrooms, which "by their very nature implicate important privacy interests" because "the functions of the bathroom are intended to be private." *Hecox v. Little*, 79 F.4th 1009, 1025 & n.10 (9th Cir. 2023). This Court has rejected Plaintiffs' statutory argument too, holding that Title IX authorizes sex-based facilities "based only on biological sex." *Parents for Priv. v. Barr*, 949 F.3d 1210, 1227 (9th Cir. 2020). These precedents foreclose Plaintiffs' ability to show success on the merits.

Finally, Plaintiffs cannot obtain a preliminary injunction because their evidence is defective. They rely on the opinions of Dr. Stephanie Budge that "gender identity" determines sex. But this definition of "sex" is contrary to the Supreme Court's equal protection jurisprudence and the scientific authorities on which Dr. Budge relies. Likewise, Dr. Budge's opinion that "gender affirming" bathroom use is necessary ignores the scientific literature—all of which contradicts her opinion. And tellingly, the lead study she cites—supposedly supporting her assertion that single-user bathrooms are inadequate accommodations—says just the opposite.

Plaintiffs are not likely to prevail on the merits, and they are not irreparably harmed by a law that accommodates them. The only irreparable harm here is to the State's sovereign interests in enforcing its validly enacted laws. The Court should vacate the injunction and affirm.

STATEMENT OF ISSUES

1. Whether S.B. 1100 violates the Equal Protection clause by upholding the traditional designation of locker rooms, bathrooms, and overnight stays by sex and providing single-user bathrooms to any student who prefers them.

2. Whether S.B. 1100 violates Title IX of the Civil Rights Act when sex-specific spaces are allowed by the statute and its regulations.

3. Whether a public-school student has a constitutional right to keep his or her sex private and whether such a right is violated by S.B. 1100, which does not require anyone to disclose their sex.

STATEMENT OF THE CASE

In Senate Bill 1100 ("S.B. 1100"), Idaho codified the "unremarkable" and "nearly universal" proposition that public schools should designate shower rooms, locker rooms, bathrooms, and overnight sleeping quarters based on students' biological differences. *Adams*, 57 F.4th at 796; 3-ER-403–405. Idaho's law also requires schools to accommodate any student who for any reason would prefer to shower, sleep, change, or use the bathroom in a private room. 3-ER-405.

Plaintiffs—an Idaho student who identifies as transgender and a student organization that advocates for LGBT causes—brought a facial challenge to S.B. 1100 under the Equal Protection Clause, Title IX, and the Due Process Clause. They also moved for a preliminary injunction precluding the State "from enforcing Idaho Senate Bill 1100." 1-SER-162. The district court denied Plaintiffs' motion, and this interlocutory appeal followed. 1-ER-38.

A. Longstanding tradition designates intimate facilities by sex.

Designating intimate spaces by sex goes "back as far as written history will take us." W. Burlette Carter, *Sexism in the "Bathroom Debates": How Bathrooms Really Became Separated by Sex*, 37 Yale L. & Pol'y Rev. 227, 287–88 (2018). It "preceded the nation's founding." *Id.* at 229. And at the time of the Fourteenth Amendment, sex-specific bathrooms were the norm in public accommodations like department stores, railway stations, and hotels. Peter C. Baldwin, *Public Privacy: Restrooms in American Cities*, 1869–1932, 48 J. of Soc. Hist. 264, 270–72 (2014). So too for public schools. Carter at 277–78.

The reasons for sex-specific intimate spaces—privacy and safety, particularly for women—have remained equally constant. *Id.* at 288. Nineteenth-century laws requiring employers to provide sex-specific bathrooms for factory workers were "among the earliest state-wide attempts to protect women from workplace sexual harassment." *Id.* at 279. These measures "fit well into labor protection laws of the period" because they put employees' "health and welfare"—in the form of sex-specific bathrooms—above "private employer economic interests." *Id.* So fighting for working-class women's access to sex-specific bathrooms "was a key part of the struggle for women's rights." Kevin Stuart & DeAnn Barta Stuart, *Behind Closed Doors: Public Restrooms and the Fight for Women's Equality*, 24 Tex. Rev. L. & Pol. 1, 38 (2019).

Protecting privacy and safety in intimate spaces is equally important today. As Justice Ginsburg put it, "[s]eparate places to disrobe, sleep, [and] perform personal bodily functions are permitted, and in some situations required, by regard for individual privacy." Ruth Bader Ginsburg, *The Fear of the Equal Rights Amendment*, Wash. Post, Apr. 7, 1975, at A21. And feminist scholars continue to explain the values of privacy and safety in sex-specific spaces. *See, e.g.*, Sheila Jeffreys, *The Politics of the Toilet: A Feminist Response to the Campaign to 'Degender' a Women's Space*, 45 Women's Stud. Int'l F. 42, 46 (2014). Respecting "girls' bodies" requires "safe facilities" for them only. *Id.* at 48.

Recent events confirm the privacy and safety interests at stake. In 2021, a male student wearing a skirt sexually assaulted a female student in the girls' bathroom of a Loudon County, Virginia school. Salvador Rizzo, *Victim of School Bathroom Sexual Assault Sues Virginia School District*, Wash. Post (Oct. 5, 2023), https://bit.ly/4181FrB. Earlier this year, an 18-year-old male student who identifies as female allegedly exposed his

male genitals to a 14-year-old female student in the girls' shower room of a Wisconsin school. Corrine Hess, *U.S. Department of Educ. Is Opening an Investigation into Sun Prairie Locker Room Incident*, WPR (Nov. 30, 2023), https://bit.ly/3t5ao0W. And a school in Colorado tried to force an 11-year-old girl to share a bed with a male student who identified as female on an overnight trip. Melissa Koenig, *Parents Claim Daughter, 11, Was Forced to Sleep in Bed with Transgender Student on Sch. Trip*, N.Y. Post (Dec. 6, 2023), https://bit.ly/46LskLZ.

Given these privacy and safety interests, Justice Thurgood Marshall's famous quip is no surprise: "A sign that says 'men only' looks very different on a bathroom door than a courthouse door." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 468–69 (1985) (Marshall, J., concurring in part and dissenting in part). So too the door to a locker room or shower room.

B. School districts have faced a confusing landscape since 2015.

In recent years, schools across the country have wrestled with requests by students to use intimate spaces designated for the opposite sex. *Parents for Privacy*, 949 F.3d at 1217 (schools face a "difficult task" in "navigating" access to intimate spaces). And in Idaho, controversy and confusion reigned until the legislature intervened. 3-ER-420, 444.

In 2016, the federal government fueled this confusion by issuing a "Dear Colleague" letter requiring schools to admit students to opposite-sex bathrooms, locker rooms, and other intimate spaces based on self-professed gender identity. U.S. Dep't of Educ., *Dear Colleague Letter on Transgender Students* (May 13, 2016), https://bit.ly/484zlbA. Multiple lawsuits followed, and the government rescinded the

letter within a year. U.S. Dep't of Educ., *Dear Colleague Letter* (Feb. 22, 2017), https://bit.ly/3GuHFFZ.

The Idaho School Board Association, a non-governmental entity, tried to address the confusion through a "model" policy purportedly based on the *Dear Colleague* guidance. 3-ER-420. This policy required schools to open sex-specific intimate spaces to members of the opposite sex. *Id.* Some school districts and charter schools passed this or similar policies, though roughly three-quarters did not. 3-ER-425; 1-SER-159. As the Association noted before S.B. 1100's passage, school leaders had to handle these issues "without explicit state or federal statutes to guide them." 3-ER-419.

Complicating things, the federal government in 2021 again issued "guidance" trying to force schools to admit opposite-sex students to single-sex intimate spaces based on self-professed gender identity. U.S. Dep't of Educ., *Confronting Anti-LGBTQI+ Harassment in Schs.* (June 23, 2021), https://bit.ly/3Rcy4Zz. Idaho and other states sued, and a district court enjoined the guidance as likely violating the Administrative Procedure Act. *Tennessee v. U.S. Dep't of Educ.*, 615 F. Supp. 3d 807, 839 (E.D. Tenn. 2022).

Throughout this period, school districts nationwide have struggled with—and defended lawsuits over—district-level policies of all kinds aimed at resolving access to single-sex intimate spaces. *Compare Adams*, 57 F.4th at 798 (lawsuit over policy requiring sex-based designation) *with Parents for Privacy*, 949 F.3d at 1217–18 (lawsuit over policy allowing gender-identity-based designation).

As both the Association and the Idaho Superintendent of Public Instruction recognized, the chaotic landscape placed school districts in a "no-win situation," 3-ER-

444, in which they were subject to dispute and controversy "[n]o matter what" they did. 3-ER-420.

C. The Idaho legislature passes S.B. 1100 as statewide policy.

Purposes of S.B. 1100. Idaho's constitution charges the legislature to maintain a "general, uniform and thorough system" of public schools. Idaho Const. art. IX, sec. 1. So the legislature resolved schools' confusion over access to privacy spaces by passing S.B. 1100.

As explained in the legislative findings, S.B. 1100 promotes student privacy and safety, which are "essential to providing a safe learning environment for all students." 3-ER-403. Forcing students to share changing rooms, locker rooms, bathrooms, and even sleeping quarters with members of the opposite sex "generates potential embarrassment, shame, and psychological injury," since these are spaces where a student "might be in a partial or full state of undress in the presence of others." *Id.* Conversely, designating facilities based on biology is "a long-standing and widespread practice" that respects each student's "natural right to privacy and safety." *Id.* And the law accommodates any student who wants access to a single-occupancy intimate space, no questions asked. *Id.*

Provisions of S.B. 1100. Idaho's law defines "sex" as "the immutable biological and physiological characteristics … genetically determined at conception and generally recognizable at birth, that define an individual as male or female." 3-ER-404. And it provides that public schools must designate every multi-occupancy changing room or restroom solely by sex. *Id.*. Regulated "changing facilities" include locker rooms and shower rooms. *Id.* The law also provides that in any other public-school setting where

a person may be in a state of undress, or any sleeping quarters on an overnight trip, the school must provide designated facilities by sex. *Id.* The law provides limited exceptions, such as rendering medical assistance. *Id.*

The law also requires schools to provide a reasonable accommodation to anyone who for any reason does not want to use a multi-occupancy facility. 3-ER-405. All that is required is a written request, and the school must provide the student with a reasonable single-occupancy space. *Id.*

Any student who encounters a member of the opposite sex in a single-sex facility regulated by S.B. 1100 may bring a civil action against the offending school. *Id.* But the school is liable only if it gave permission to the opposite-sex student to use the facility or failed to take reasonable steps to prohibit the student from doing so. *Id.*

D. The district court denies an injunction.

Plaintiffs' allegations and facial challenge. Plaintiffs' factual allegations are limited: Plaintiff Rebecca Roe, a seventh-grader who identifies as transgender, attends a Boise-area middle school. 1-SER-177. Roe socially transitioned and began publicly identifying as female at the end of fifth grade. 1-SER-179. Roe desires to use the girls' bathroom at school, but S.B. 1100 prohibits this since Roe's sex is not female. 1-SER-181. Roe does not allege wanting to use any sex-specific facilities other than a school bathroom. Likewise, there are no allegations of the physical layout of the bathrooms at the school Roe attends, nor any allegations of what accommodations S.B. 1100 would require.

Plaintiff Sexuality and Gender Alliance (SAGA) is a student organization at Boise High School. 1-SER-181. The Complaint provides no specifics on SAGA members

allegedly affected by S.B. 1100, vaguely alleging that there are members who "wish to use multi-occupancy facilities" inconsistent with their sex. 1-SER-182. SAGA does not specifically allege that it has members who desire to use single-sex facilities other than bathrooms. SAGA also alleges that, *before* Idaho implemented S.B. 1100, its members had access to a private, single-occupancy bathroom, but that it was "in a building separate from most classrooms" and often "occupied or closed." 1-SER-182. The Complaint contains no allegations of what accommodations S.B. 1100 would require Boise High School to provide, nor does it contain any allegations on the layout or use of facilities other than this one bathroom.

Despite the dearth of allegations about locker rooms, changing facilities, overnight accommodations, and the like—Plaintiffs seek to invalidate the entire law. They seek a declaration "that Idaho S.B. 1100 is void and of no force or effect," and a permanent injunction precluding the law's enforcement. 1-SER-201.

Plaintiff's preliminary injunction motion. Plaintiffs' request for preliminary relief was equally broad: they sought to enjoin Idaho and its officials "from enforcing Idaho Senate Bill 1100." 1-SER-162. In support, Plaintiffs jettisoned centuries of practice confirming the propriety of sex-based designation of intimate spaces. Instead, Plaintiffs relied on a series of propositions proffered by their proposed expert, Dr. Stephanie Budge, who admittedly engages in "activism" and "advocacy" on transgender issues. 1-SER-119–21. Dr. Budge got the science wrong in every respect.

Emblematic of the many problems with Dr. Budge's testimony is her contention that "[n]umerous research studies" confirm the "negative psychological impact" of transgender students using single-occupancy bathrooms. 3-ER-301–11. The first study

Dr. Budge cited for this proposition says the opposite: that "providing gender-neutral bathrooms," which S.B. 1100 does, "can be viewed as part of gender-affirming support and care." 1-SER-151. And it specifically recommends "[o]ffering gender-neutral bathrooms" and "private places to change clothes," which S.B. 1100 does. 1-SER-154. Basic errors like this riddled Dr. Budge's expert report. Section II, *infra*.

The district court's decision. The district court correctly discounted Dr. Budge's opinions, focusing "on the law." 1-ER-34. The district court determined that Plaintiffs were unlikely to succeed on the merits, would not suffer irreparable harm, and did not have the balance of equities or public interest in their favor. 1-ER-35.

The court ruled that S.B. 1100 does not discriminate based on transgender status because it "does not draw a line based upon gender identity, but on sex." 1-ER-14. Applying heightened scrutiny, the court concluded that Idaho has a legitimate interest in promoting privacy "based upon the inherent differences between male and female bodies." 1-ER-17. And "[t]here is no doubt S.B. 1100 is substantially related to the Government's legitimate interest in said privacy." 1-ER-18. So S.B. 1100 survives intermediate scrutiny.

Likewise, the court ruled that S.B. 1100 does not violate Title IX because it merely codifies what the statute and implementing regulations allow: sex-based designation of showers, locker rooms, bathrooms, and similar facilities. 1-ER-29. Nor does it violate substantive due process because the accommodation provision does not implicate any fundamental liberty interest. 1-ER-32.

The court also ruled that Plaintiffs failed to show irreparable harm because their argument turned on subjective feelings and speculation, not concrete evidence of harm.

1-ER-33. And the court determined that Plaintiffs failed to show that the balance of equities or public interest tips in their favor because both sides have a significant interest in the outcomes of the case. 1-ER-35.

Because Plaintiffs met none of the preliminary injunction factors, the court held that it "must stay in its lane," not opine on "how elected officials *should* navigate these difficult situations," and simply decide "whether the action they have taken withstands constitutional scrutiny." 1-ER-2, 35–36.

Plaintiffs appealed and moved for a stay pending appeal, which a panel of this Court granted in a summary, unreasoned order, over Judge Callahan's dissent. Defendants moved for reconsideration en banc, which the panel denied, again over a Judge Callahan dissent.

STANDARD OF REVIEW

To obtain a preliminary injunction, Plaintiffs must show they are likely to succeed on the merits, they face irreparable harm without an injunction, and the balance of harms and public interest favor them. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014). Or, if Plaintiffs show irreparable harm and that "the balance of hardships tips sharply" in their favor, they may obtain a preliminary injunction by showing "'serious questions' going to the merits" rather than a likelihood of success. *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134-35 (9th Cir. 2011).

This Court reviews the district court's denial of the preliminary injunction for abuse of discretion. *Doe v. Snyder*, 28 F.4th 103, 106 (9th Cir. 2022). It reviews the district

court's factual findings for clear error, *id.*, and its legal conclusions de novo. *Sw. Voter Reg. Educ. Proj. v. Shelley*, 344 F.3d 914, 917 (9th Cir. 2003) (en banc) (per curiam).

Plaintiffs suggest that de novo review applies across the board because this appeal involves constitutional rights, citing only cases that did *not* involve a preliminary injunction. Pls.Br.20 (citing *United States v. Hinkson*, 585 F.3d 1247 (9th Cir. 2009) and *Cal. First Amend. Coal. v. Calderon*, 150 F.3d 976 (9th Cir. 1998)). But this Court does not deviate from abuse-of-discretion review for preliminary injunctions just because the case implicates constitutional rights. *Snyder*, 28 F.4th at 106 (applying abuse-of-discretion review to equal-protection challenge). Plaintiffs are also wrong that this Court reviews de novo so-called "constitutional questions of fact." Pls.Br.20. That principle applies only "[w]hen the issue presented involves the First Amendment," *Prete v. Bradbury*, 438 F.3d 949, 960 (9th Cir. 2006), which this case does not.

The district court made numerous factual findings, particularly on the failure of Plaintiffs' expert and other evidence. 1-ER-33–35. These are the kinds of factual findings that this Court reviewed for clear error in *Snyder* and it should do the same here.

SUMMARY OF ARGUMENT

There is no constitutional guarantee to use a bathroom, locker room, or overnight accommodation designated for the opposite sex, and there is also no federal prohibition on a State from maintaining sex-specific bathrooms, locker rooms, and overnight accommodations for public-school students. Accordingly, the district court properly exercised its discretion in denying a preliminary injunction.

First, Plaintiffs are not likely to succeed on the merits. Neither the Constitution nor federal law prohibits states from designating locker rooms, restrooms, and overnight stays by sex. Plaintiffs' Equal Protection claims fail because S.B. 1100 is a valid classification based on sex—not "gender identity"—with a direct nexus to longstanding safety and privacy interests. Their Title IX claim fails because the statute allows sex-based designation of intimate spaces. And their privacy claim fails for lack of injury and of a recognized constitutional right.

Second, Plaintiffs are also unlikely to succeed on the merits because Dr. Budge's scientific testimony—which undergirds Plaintiffs' factual claims about "gender identity"—is flawed and unreliable. Her opinion that "gender identity" determines sex contradicts controlling law and science. And her opinion that "gender affirming" bathroom use is necessary and that Idaho's single-use accommodation is inadequate ignores the scientific studies squarely addressing the issue.

Third, Plaintiffs cannot show the other injunction factors because Dr. Budge's testimony shows that S.B. 1100 provides Plaintiffs an adequate accommodation. S.B. 1100 does not irreparably harm, but enjoining it irreparably harms Idaho. The Court should vacate that injunction and affirm.

ARGUMENT

I. The District Court Correctly Held That Plaintiffs Are Unlikely To Prevail On Their Three Legal Theories.

None of Plaintiffs' three legal theories have merit. American society, no different from any other, has always preserved privacy and safety by providing sex-specific intimate spaces in public. The Constitution nowhere demands otherwise. And even the

Supreme Court's landmark equal protection decision in *United States v. Virginia*, 518 U.S. 515 (1996), affirms that "afford[ing] members of each sex privacy from the other sex" is not just consistent with the equal protection clause, but is, in fact, "undoubtedly require[d]." *Id.* at 551 n.19. Plaintiffs' Title IX claim flatly contradicts the plain text of that statute and this Court's precedent, which both authorize, rather than prohibit, sex-separated facilities. And Plaintiffs' final claim regarding a purported right to informational privacy is factually and legally infirm. Plaintiffs do not even have an injury to advance such a claim.

A. Plaintiffs' equal protection claim fails.

Plaintiffs are not likely to prevail on their claim that S.B. 1100 violates the equal protection clause. These claims hinge on the text *and original public meaning* of the Fourteenth Amendment. *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022). "Constitutional analysis must begin with 'the language of the instrument,' ... which offers a 'fixed standard' for ascertaining what our founding document means." *Id.* at 2244–45 (citation omitted).

Plaintiffs' claims cannot survive this interpretive framework. As the Sixth Circuit recently held in a similar context, a plaintiff's efforts "to extend…constitutional guarantees to new territory … suggest[s] that the key premise of a preliminary injunction—a showing of a likelihood of success on the merits—is missing …, particularly when the States are currently engaged in serious, thoughtful debates about the issue." *L.W. ex rel. Williams v. Skrmetti*, 83 F.4th 460, 471 (6th Cir. 2023) (Sutton, C.J.) (quotations omitted). And the people hardly foreclosed laws like Idaho's when they ratified the Fourteenth Amendment in 1868.

That is the end of the matter—as the district court acknowledged: "the Court must stay within its lane." 1-ER-3. And Plaintiffs' efforts to avoid the text and history of the Constitution by relying on disputed scientific evidence simply confirms the inappropriateness of the relief they seek. The Constitution gives states "wide discretion to pass legislation in areas where there is medical and scientific uncertainty," *Gonzales v. Carhart*, 550 U.S. 124, 163 (2007), but grants no such authority to the courts. This Court should decline Plaintiffs' invitation to legislate.

S.B. 1100 Classifies Based on Sex. S.B. 1100's adoption of the traditional standard of sex-specific intimate spaces fully comports with equal protection guarantees. The first question in an equal protection analysis is how the law classifies, and whether it implicates a suspect class. *Hecox*, 79 F.4th at 1021. Absent purposeful discrimination, classification depends on the law's disparate *treatment* among different groups, not on whether the law has a disparate *impact* on a specific group. *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 274 (1979); *Adams*, 57 F.4th at 810.

S.B. 110's plain language answers the question of classification: the law designates locker rooms, bathrooms, and overnight accommodations based on sex. S.B. 1100 defines "sex" as "the immutable biological and physiological characteristics, specifically the chromosomes and internal and external reproductive anatomy, genetically determined at conception and generally recognizable at birth, that define an individual as male or female." Idaho Code § 33-6602(3) [33-6702(3)]. That statutory definition has three key features—it is binary, inherent, and biological—just like the Supreme Court's understanding of sex classifications in its equal protection cases. As the Court has explained repeatedly, there are "two sexes," *United States v. Virginia*, 518 U.S. 515, 533

(1996), they are "immutable," *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973), and they are defined by "our most basic biological differences." *Tuan Anh Nguyen v. I.N.S.*, 533 U.S. 53, 73 (2001). As Justice Ginsburg explained, the "enduring" physiological differences between men and women should be a "cause for celebration." *Virginia*, 518 U.S. at 533. "The truth is that the two sexes are not fungible," *Ballard v. United States*, 329 U.S. 187, 193 (1946), and "[t]he difference between men and women … is a real one." *Nguyen*, 533 U.S. at 73.

Plaintiffs respond that sex is determined by "gender identity," which they say means that S.B. 1100 improperly classifies based on gender dysphoria. In fact, their case turns on this point—they admitted in the district court they "have to say" that gender identity determines sex to prevail. Opp'n to Pls.' Mot. Inj. Pending Appeal, Add.24, ECF No. 8.2. But both controlling law and science foreclose this position.

Plaintiffs cannot smuggle "gender identity" into the longstanding legal definition of sex. The Supreme Court's precedents uniformly treat "sex" as binary, biological, and immutable. And no later case has superseded these decisions. Indeed, the Supreme Court's most recent statutory decisions addressing "transgender status" treat sex as referring "to biological distinctions between male and female." *Bostock v. Clayton County*, 140 S. Ct. 1731, 1739 (2020). That is because "transgender status" is a "distinct concept[ ] from sex." *Id.* at 1746-47. Plaintiffs cite older statements that "the terms 'sex' and 'gender' have become interchangeable." *Schwenk v. Hartford*, 204 F.3d 1187, 1202 (9th Cir. 2000); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). But those remarks predate the modern and particular use of "gender" advanced by Plaintiffs and concern statutes with no bearing here.

As the district court observed, "[t]he Supreme Court has never defined sex to include gender identity," and neither did this Court do so in *Hecox*. 1-ER-12 (discussing *Hecox*, 79 F.4th at 1024). If Plaintiffs were correct, then even the Supreme Court decision upholding sex distinctions would unconstitutionally discriminate against persons suffering from gender dysphoria. The appropriate constitutional interpretive standard precludes attempts to backfill the analysis with the modern construct of "gender identity," which had not even been contemplated when the equal protection clause was ratified in 1868.

Plaintiffs' attempts to conflate "gender identity" and sex is also wrong as a matter of science. They ground this assertion in the opinions of Dr. Budge. 3-ER-298. But the authorities she cites agree that sex is binary and biological. "[T]he Endocrine Society, the American Academy of Pediatrics, and the American Psychiatric Association, all . . . explicitly define sex solely in terms of biological features, excluding gender identity." 2-ER-191. Per the Endocrine Society, "[s]ex is dichotomous, with sex determination in the fertilized zygote stemming from unequal expression of sex chromosomal genes." 2-ER-163 (quotation omitted). As Dr. James Cantor explained, it is because of this basic understanding that "the sex of a fetus is known by sonogram or amniocentesis many months before birth." 2-ER-164. Yet Dr. Budge refused even to admit that prenatal genetic tests can determine a child's sex, though she was unable to cite any authority saying otherwise. 1-SER-47–48. Her conflation of gender identity and sex is mere "ipse dixit of the expert." *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997). It cannot sustain Plaintiffs' claims.

Sex-specific Facilities Protect Safety and Privacy. Because the two sexes are in some respects "similarly situated" and in others "meaningfully dissimilar," *City of Cleburne*, 473 U.S. at 439, the Supreme Court subjects sex classifications to intermediate scrutiny. *Clark v. Jeter*, 486 U.S. 456, 461 (1988); *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 725 (1982). Thus, classifications based on sex must serve "'important governmental objectives'" and be "'substantially related to the achievement of those objectives.'" *Adams*, 57 F.4th at 801 (quoting *Hogan*, 458 U.S. at 724). S.B. 1100 draws a sex-based line, codifying the longstanding historical practice of requiring sex-specific use of bathrooms, locker rooms, and overnight accommodations. Idaho Code § 33-6603 [33-6703] (2)-(4). That ancient boundary fully comports with the Constitution's demands.

Idaho enacted S.B. 1100 to protect important sex-specific safety and privacy interests in locker rooms, bathrooms, and overnight stays.[2] The long history of sex-based designation for such intimate spaces supports these interests and forecloses Plaintiffs' claims. *Dobbs*, 597 U.S. at 235; *see also* Section I, *supra*. Indeed, "[n]ot long ago, a suit challenging the lawfulness of separating bathrooms on the basis of sex would have been unthinkable." *Adams v. Sch. Bd. of St. Johns Cnty.*, 3 F.4th 1299, 1321 (11th Cir. 2022) (panel opinion) (W. Pryor, C.J., dissenting). This "common-sense" practice "protects well-established privacy interests in using the bathroom away from the opposite sex." *Id.* Thus, as the en banc Eleventh Circuit held in *Adams*, the history of

[2] Plaintiffs devote much of their brief to the straw man argument that S.B. 1100 cannot be justified to protect students from exposure to people with gender dysphoria. Idaho has never made that contention, and the law does no such thing.

"the unremarkable—and nearly universal—practice of separating school bathrooms based on biological sex" dooms Plaintiffs' challenge. *Adams*, 57 F.4th at 796; *accord Dobbs*, 597 U.S. at 235. And that is even more true for locker rooms and overnight stays.

Sex-based designation of intimate facilities—based on privacy and safety, particularly for women—is an ancient, enduring practice. Section I, *supra*. In the first century Roman republic, Emperor Hadrian famously "commanded [men and women] to bath separately," legislating a practice that had existed across cultures. Cassio Dio, Roman History, Book LXIX (Loeb Classical ed. 1925). In our own republic, states have long statutorily required sex-separated bathrooms and other facilities, including in public schools. *See, e.g.,* Ninth Annual Report of the State Board of Health (1878) (requiring inspection of whether there are "proper provisions for both sexes" and noting that from a survey of "nearly all the school-buildings in Boston," and 400 other locations, "separate provision for the sexes is usual"). Sex-separated bathroom laws were some of the nation's earliest anti-sexual harassment measures.[3] Such sex-based distinctions are so entrenched that the Supreme Court noted that admitting women to the Virginia Military Institute "would undoubtedly require alterations necessary to

[3] *E.g.,* Act of Mar. 24, 1887, ch. 103, § 2, 1887 Mass. Acts 668 ("[W]herever male and female persons are employed in the same factory or workshop, a sufficient number of separate and distinct water-closets, earth-closets or privies shall be provided for the use of each sex and shall be plainly designated, and no person shall be allowed to use any such closet or privy assigned to persons of the other sex."); Ninth Annual Report of the Factory Inspectors of the State of New York, § 9 (1895) (similar); Second Annual Report of the Factory Inspectors of the State of New York, at 11-12 (1887) (similar); *accord* W. Burlette Carter, *Sexism in the "Bathroom Debates": How Bathrooms Really Became Separated By Sex,* Yale Law & Pol. Rev. 227, 279 (2018) ("Contrary to being sexist or patronizing, the bathroom sex-separation statutes were among the earliest state-wide attempts to protect women from workplace sexual harassment.").

afford members of each sex privacy from the other sex in living arrangements." *Virginia*, 518 U.S. at 550 n.19. So while some institutions have changed, these basic privacy interests have remained.

The courts of appeals agree. This Court has emphasized that "[t]he desire to shield one's unclothed figure from [the] view of strangers, and particularly strangers of the opposite sex, is impelled by elementary self-respect and personal dignity." *Byrd*, 629 F.3d at 1141. And in *Hecox*, this Court recognized the unique privacy interests at stake in bathrooms, which "by their very nature implicate important privacy interest" because "the functions of the bathroom are intended to be private." 79 F.4th at 1025 & n.10. Other circuits too have noted society's "undisputed approval of separate public rest rooms for men and women," *Faulkner v. Jones*, 10 F.3d 226, 232 (4th Cir. 1993), "to accommodate privacy needs." *Chaney v. Plainfield Healthcare Ctr.*, 612 F.3d 908, 913 (7th Cir. 2010). Thus, "most people have a special sense of privacy in their genitals, and involuntary exposure of them in the presence of people of the other sex may be especially demeaning and humiliating." *Fortner v. Thomas,* 983 F.2d 1024, 1030 (11th Cir. 1993) (cleaned up).

S.B. 1100 Satisfies Intermediate Scrutiny. Based on this history, the district court correctly held that "[p]rivacy is a legitimate interest supporting the constitutionality of S.B. 1100." 1-ER-16. As the *Adams* Court explained, this Court owes particular deference to schools' protections of student privacy given their "'custodial and tutelary responsibility for children.'" *Adams*, 57 F.4th at 801-02 (quoting *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 656 (1995)). Sex-based designation of intimate spaces both "advances the important governmental objective of protecting students'

privacy in school bathrooms and does so in a manner substantially related to that objective." *Id.* at 803. Those privacy interests are sex-specific, because they "hinge on using the bathroom away from the opposite sex and shielding one's body from the opposite sex." *Id.* at 806; *accord D.H. ex rel. A.H. v. Williamson Cnty. Bd. of Educ.*, 638 F. Supp. 3d 821, 834 (M.D. Tenn. 2022).

Plaintiffs object, charging that the record does not support S.B. 1100's safety and privacy objectives. Initially, the materials they proffer relate only to bathrooms—not locker rooms or overnight stays. But more important, Plaintiffs mistakenly treat the privacy interests at stake as *adjudicative facts* to be proven by evidence tailored to this case, when they are actually *legislative facts* "which have relevance to legal reasoning and the lawmaking process" more broadly. Fed. R. Evid. 201, advisory committee note on 1972 amendments. Legislative facts are those "facts relevant to shaping a general rule," *Ind. Harbor Belt R.R. Co. v. Am. Cyanamid Co.*, 916 F.2d 1174, 1182 (7th Cir. 1990) (Posner, J.), that "have salience beyond the specific parties to [a] suit," *Carhart v. Gonzales*, 413 F.3d 791, 799 (8th Cir. 2005), *rev'd*, 550 U.S. 124 (2007), and that "help the tribunal decide questions of law and policy and discretion." *Langevin v. Chenango Ct., Inc.*, 447 F.2d 296, 300 (2d Cir. 1971) (Friendly, C.J.) (cleaned up); *United States v. $124,570 U.S. Currency*, 873 F.2d 1240, 1244 (9th Cir. 1989). They may be established at any stage of the proceeding, even on appeal.

Daggett v. Comm'n on Governmental Ethics & Election Pracs., 172 F.3d 104, 112 (1st Cir. 1999); *Free v. Peters*, 12 F.3d 700, 706 (7th Cir. 1993) (Posner, J.); *Dunagin v. City of Oxford*, 718 F.2d 738, 748 n.8 (5th Cir. 1983). That's why *Adams* required no evidentiary

record to recognize the basic safety and privacy interests that support sex-specific bathrooms.

The district court acted well within its discretion to find legislative facts about these safety and privacy interests. These are matters of common knowledge—"it does not take a court to acknowledge what most people inherently recognize: a desire for bodily privacy in restrooms (and like spaces) is rational because one's body is *private*." 1-ER-17. That "is based upon the inherent differences between male and female bodies" and "is even more relevant considering school-age children," who "are still developing—mentally, physically, emotionally, and socially." *Id.*; *accord Adams*, 57 F.4th at 802. Though headlines show the need for these protections, *supra* at 6-7, the district court did not need a specific evidentiary record of harms to find make these common-sense findings. Its recognition of sex-specific privacy interests comports with the overwhelming current of Anglo-American law and was not an abuse of discretion.

The district court also properly found an adequate nexus between S.B. 1100's sex-specific privacy and "the Government's legitimate interest in said privacy." 1-ER-18. This is because "[r]estrooms, changing facilities, and overnight accommodations are, without question, spaces in school (and out of school as the case may be) where bodily exposure is most likely to occur." *Id.* And it rejected Plaintiffs' argument that this nexus was inadequate because "most transgender students use individual stalls in bathrooms." 1-ER-19. For one, "this argument discounts the other provisions of S.B. 1100 dealing with changing facilities and overnight accommodations," where individual spaces are no answer. *Id.* And as *Adams* explained, "[t]he privacy interests hinge on using the bathroom away from the opposite sex and shielding one's body from the

opposite sex, not using the bathroom in privacy." 57 F.4th at 806. "Were it the latter, then only single-stall, sex-neutral bathrooms would pass constitutional muster," which is plainly "not the law." *Id.*

Plaintiffs ask the Court to follow the Fourth Circuit's overturning of a school bathroom policy in *Grimm v. Gloucester County School Board*, 972 F.3d 586 (4th Cir. 2020), and the Seventh Circuit's decision in *Whitaker ex rel. Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1051 (7th Cir. 2017). But those cases did not address privacy interests in showers, overnight stays, and locker rooms—all of which Idaho's law regulates. Further, Judge Niemeyer's vigorous dissent in *Grimm* is more persuasive than the opinions on which Plaintiffs rely. He would have held that sex-specific bathrooms in "accord with longstanding and widespread practice" were "appropriately justified by the needs of individual privacy, as has been recognized by law." 972 F.3d at 628 (Niemeyer, J., dissenting). He acknowledged the "biological differences between the two sexes that are relevant with respect to restroom use." *Id.* at 636. And he noted that the "privacy interest" that people have when "they remove clothes and engage in personal hygiene, … is heightened when persons of the opposite sex are present," especially for children, who "are still developing, both emotionally and physically." *Id.* (cleaned up). So whatever the majority may have believed about the wisdom of certain policies for students with gender dysphoria, the role of the courts "is limited"—to "apply the law" and leave it to the legislature "to determine policy." *Id.* at 637.

This Court's precedents support Idaho's position. For example, while Idaho disagrees with this Court's decision in *Hecox* and has sought en banc review, the panel there recognized the "important privacy interests" in bathrooms that Plaintiffs reject,

and it distinguished those privacy interests from the facts before it. 79 F.4th at 1025 & n.10. Likewise, *Parents for Privacy v. Barr*, 949 F.3d 1210 (9th Cir. 2020), did not overturn sex-specific bathrooms, but rather rejected a challenge to a policy that allowed students with gender dysphoria to use bathrooms of the opposite sex. *Id.* at 1217–18. As the district court explained, "holding that the Constitution does not *require* sex-separate facilities is not the same as a holding that the Constitution *forbids* sex-separate facilities." 1-ER-18. In fact, the variety of legislative approaches on the question suggests the opposite: that, as the district court held, the constitution permits latitude on the question. *Id.*; *L.W. ex rel. Williams v. Skrmetti*, 73 F.4th 408, 412, 415–416 (6th Cir. 2023). Plus, *Parents for Privacy* held that single-user facilities were an adequate accommodation for those who objected to the school's policy, even where inferior. 949 F.3d at 1225. So too here, especially where other intimate spaces are at stake.

Here, Sex is not a Proxy for Gender Discrimination. Against the weight of this undisputed and uniform history, Plaintiffs contend that S.B. 1100's codification of longstanding practice is designed to target students suffering from gender dysphoria. Not so. S.B. 1100 does not distinguish between students with gender dysphoria or any characteristic but instead distinguishes only with respect to sex. S.B. 1100 treats every similarly situated individual the same. It requires all students to use the restroom or changing facilities that correspond with their sex. Plaintiffs' contrary arguments are mistaken.

First, Plaintiffs argue that S.B. 1100 is motivated by improper targeting because its uniform, statewide standard would displace some local school-district policies that designate facilities based on gender identity. Pls.Br.29–30. But those policies responded

to the confusion wrought by the federal government's overreach and the lack of any statewide rule. *See supra* at 7-9. Setting statewide standards is precisely the business of state legislatures in response to issues of significant public concern, such as the safety and privacy of children in intimate spaces. When a legislature responds to new events by redoubling its protection of a traditional boundary, that does not mean that traditional boundary existed only as a pretext. Widespread standards based on fundamental biological differences do not become discrimination just because a legislature codifies them in response to social controversy.

Second, Plaintiffs try to tie this case to *Karnoski v. Trump*, 926 F.3d 1180, 1192 (9th Cir. 2019), which held that a restriction on military service by persons with gender dysphoria concerned a quasi-suspect class. *Id.* at 1186. Although Idaho disagrees with that holding, it is irrelevant because S.B. 1100 does not classify based on gender dysphoria. Plaintiffs say that "on the face of the law," S.B. 1100 discriminates against "transgender people alone," but they cite nothing on the law's face that does so. Pls.Br.25. As in *Adams*, S.B. 1100 "facially classifies based on biological sex," and "does not classify students" according to gender dysphoria. *Adams*, 57 F.4th at 808–09. "[A] 'lack of identity' exists" between that diagnosis "and a policy that divides students into biological male and biological female groups … for purposes of separating the male and female bathrooms by biological sex." *Id.* at 809; *L.W.*, 73 F.4th at 412. Nor can Plaintiffs save this theory with their out-of-context quote of the Supreme Court's statement in *City of Los Angeles v. Patel* that "[t]he proper focus of the constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant." Pls.Br.23 (quoting *Patel*, 576 U.S. 409, 418 (2015)). That language

concerned the standard for facial challenges under the Fourth Amendment, not how to evaluate equal-protection classifications. And even if intermediate scrutiny applied under *Karnoski*, it makes no difference: that standard already applies based on the law's sex classification, and S.B. 1100 passes it easily.

Third, Plaintiffs assert that under *Bostock*, drawing a sex-based line is necessarily a classification based on gender dysphoria. Pls.Br.22–24. That is the inverse of *Bostock*'s holding, which is that classifying based on gender dysphoria necessarily classifies "based on sex." 140 S. Ct. at 1741. And the district court, having previously "held that transgender individuals qualify as a quasi-suspect class" in *Hecox*, 1-ER-12, saw through this misplaced charge of proxy discrimination. That happens where a law discriminates based on a characteristic that is coextensive with a suspect class—e.g., "[a] tax on wearing yarmulkes is a tax on Jews." *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 270 (1993). That isn't the case here; *Bostock* itself recognized that gender dysphoria is a "distinct concept[ ] from sex." 140 S. Ct. at 1746–47. As *Adams* explained, there is a "lack of identity" between that classification and the sex-based line drawn by the law, which includes people with gender dysphoria on both sides. 57 F.4th at 809 (discussing *Geduldig v. Aiello*, 417 U.S. 484, 486, 496–97 (1974)). Such a law "does not depend in any way on how students act or identify," but rather "separates bathrooms based on biological sex, which is not a stereotype." *Id.*; *L.W.*, 83 F.4th at 485. As the district court concluded, "[a] policy or statute can lawfully classify based on biological sex without unlawfully discriminating based on transgender status." 1-ER-20.

Fourth, Plaintiffs say that S.B. 1100 shows actual animus against people with gender dysphoria. Pls.Br.27–28. Far from it. The law provides an accommodation for

people with gender dysphoria that Dr. Budge's studies acknowledge "can be viewed as part of gender-affirming support and care." 1-SER-97, 151. Plaintiffs strain to find evidence of discriminatory intent in legislative testimony, even though "[s]tray remarks of individual legislators are among the weakest evidence of legislative intent," *Tingley v. Ferguson*, 47 F.4th 1055, 1087 (9th Cir. 2022), and "it is quite a leap to attribute these motives to all the legislators whose votes were responsible for the enactment of those laws." *Dobbs*, 597 U.S. at 254; *Barnhart v. Sigmon Coal*, 534 U.S. 438, 457 (2002). Thus, Plaintiffs find discrimination only by mischaracterizing Senator Trakel's comments, which simply addressed whether documented cases of harm were required to enact a preventative law—whether "we have to wait for someone to be hurt, or injured or raped before we implement a law." Idaho Senate Educ. Comm. Hearings at 52:28 (Feb. 23. 2023). As Sen. Trakel made clear, he did "not think that the risk of harm or anything comes from the trans community, but … from predators and people that would abuse this policy to get into opposite sex bathrooms, locker rooms, and overnight trips," i.e., males without gender dysphoria who "identify" as female for the purpose of accessing girls' private spaces. Idaho House Educ. Comm. Hearings at 25:13 (Mar. 15, 2023). The district court correctly found that Plaintiffs' charge of targeting "falls flat when those statements are read in context." 1-ER-25. That finding is not clearly erroneous.

Fifth, and finally, Plaintiffs characterize S.B. 1100 as "a solution in search of a problem," lacking "evidence of transgender students engaging in behaviors that infringe upon the privacy of others." 1-ER-19. But as the district court explained, "[t]he issue is not whether any transgender student has affirmatively done anything—good, bad, or otherwise—to another student." *Id.* The law addresses whether students must expose

themselves "in the presence of someone of the opposite sex—even if the person of the opposite sex is doing nothing invasive, dangerous, or threatening." 1-ER-20. And in any event, "the experience of . . . other cities and states" from around the country bears out exactly why these laws are needed, *Mitchell v. Comm'n on Adult Entm't Establishments*, 10 F.3d 123, 133 (3d Cir. 1993), with stories of tragic harms when males have been allowed to intrude on locker rooms, bathrooms, and beds designated for women. *See supra* at 6-7. Idaho need not wait for a problem to arise before implementing a safeguard that formalizes historical practice.

Plaintiffs Cannot Prevail on a Facial or As-Applied Challenge. Setting aside all the other problems, Plaintiffs' facial challenge to S.B. 1100 fails because the law has many constitutional applications. To succeed on a facial challenge, Plaintiffs would have to "establish that no set of circumstances exists under which the [challenged law] would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987). But they can't. For example, S.B. 1100 prohibits males who identify as male from using a girls' locker room or bathroom, which Plaintiffs do not dispute is permissible.

The law also covers the full gamut of school facilities, including those that lack individual privacy: open locker rooms and shower rooms, overnight accommodations that require bed-sharing, and bathrooms with minimal or non-existent stalls. There is no "more basic subject of privacy than the naked body." *York v. Story*, 324 F.2d 450, 455 (9th Cir. 1963). And having to shower or use the bathroom with the opposite sex violates that privacy. *See, e.g.*, *Vazquez v. County of Kern*, 949 F.3d 1153, 1161 (9th Cir. 2020) (prison showers); *Sepulveda v. Ramirez*, 967 F.2d 1413, 1416 (9th Cir. 1992) (prison

restroom). It is constitutional to apply S.B. 1100 to an open shower or bathroom where individual privacy is unavailable. That alone dooms Plaintiffs' facial challenge.

Nor can Plaintiffs maintain an as-applied challenge. To start, their preliminary-injunction motion didn't seek as-applied relief. They only asked for a blanket injunction preventing Idaho from "enforcing [S.B.] 1100." 1-SER-162. And though their complaint contains two boilerplate references to challenging S.B. 1100 "facially and as applied," all the relief Plaintiffs seek is facial. 1-SER-194, 199. Specifically, they seek (1) declarations that S.B. 1100 violates equal protection, due process, and Title IX because it excludes "transgender people like Plaintiffs" from opposite-sex facilities; (2) a declaration that S.B. 1100 is "void and of no force or effect"; and (3) an injunction prohibiting Idaho from enforcing S.B 1100. 1-SER-201. So they seek to "invalidate[] the law itself," which is the hallmark of a facial challenge. *Foti v. City of Menlo Park*, 146 F.3d 629, 635 (9th Cir. 1998).

Besides not seeking as-applied relief, Plaintiffs did not provide facts to support such a challenge. They submitted no evidence about the layout or level of privacy in any of the girls' bathrooms at Roe's school. Nor any evidence of the single-user accommodation that school would provide. Nor any evidence about any other facilities at that school regulated by S.B. 1100. Likewise, they submitted no evidence concerning the layout or level of privacy in any facilities that SAGA members might want to use at Boise High School, nor any evidence of what accommodation the school would provide under S.B. 1100.

The court cannot decide an as-applied challenge "at such a high level of generality." *Holder v. Humanitarian L. Proj.*, 561 U.S. 1, 37–38 (2010). It is Plaintiffs'

burden to demonstrate they are entitled to an injunction. *Snyder*, 28 F.4th at 111. And without facts that would allow the court to weigh the privacy interests involved in allowing Plaintiffs to use specific facilities, the court has nothing but "hypothetical situations" that cannot support an as-applied claim. *Holder*, 561 U.S. at 22. This too requires affirming the district court.

S.B. 1100 would survive an as-applied challenge in any event because sex-specific intimate spaces advance privacy and safety in the mine-run of cases, regardless of Plaintiffs' individual circumstances. Whether the challenge is facial or as-applied, what matters is how S.B. 1100 relates "to the overall problem the government seeks to correct, not on the extent to which it furthers the government's interests in an individual case." *Ward v. Rock Against Racism*, 491 U.S. 781, 801 (1989). Courts evaluate "the basic validity of the legislative classification." *Feeney*, 442 U.S. at 272. And "[i]f the classification is reasonable in substantially all of its applications," the law is constitutional. *O'Connor v. Bd. of Educ. of Sch. Dist.* 23, 449 U.S. 1301, 1306 (1980) (Stevens, J., in chambers).

Most applications of S.B. 1100 are routine: boys and girls use the intimate spaces designated for their sex without concern the overwhelming majority of the time. And S.B. 1100 specifically regulates spaces where individual privacy is limited or non-existent, such as shower rooms, locker rooms, and overnight accommodations. Its sex-based classification "is valid as a general matter," and no as-applied challenge can succeed. *City of Cleburne*, 473 U.S. at 446.

B. Plaintiffs' Title IX claim fails.

S.B. 1100 codifies what both Title IX and its implementing regulations allow: separate "living facilities," "locker room[s]," "shower facilities," and "toilets, locker room, and shower facilities" for boys and girls based on "sex." 20 U.S.C. § 1686; 34 C.F.R. § 106.33. For Plaintiffs, the only way around this straightforward result is to contend that "sex" in Title IX doesn't refer to biology. But this Court has already squarely rejected that interpretation: Title IX authorizes sex-specific facilities "based only on biological sex." *Parents for Privacy*, 949 F.3d at 1227. Plaintiffs' Title IX claim cannot succeed because the plain meaning of sex under Title IX is binary, biological, and immutable, and statutory context shows the same. Moreover, designating intimate spaces by sex is not "discrimination" in the first place because it treats males and females equally. And the Spending Clause forecloses any contrary result because Title IX does not unambiguously prohibit schools from designating intimate spaces by sex.

Sex is Binary, Biological, and Immutable Under Title IX. The plain meaning of "sex" shows that the use of the term in Title IX means biology, not gender identity. To determine the meaning of a statutory term, courts "look to the ordinary meaning of the term … at the time Congress enacted the statute." *Perrin v. United States*, 444 U.S. 37, 42 (1979). The best evidence of a term's ordinary meaning comes from "dictionaries in use at the time of the statute's enactment." *Gollehon v. Mahoney*, 626 F.3d 1019, 1023 (9th Cir. 2010); *accord Trim v. Reward Zone USA LLC*, 76 F.4th 1157, 1162 (9th Cir. 2023) (relying on contemporaneous dictionary definitions). And courts must not jettison a term's ordinary contemporaneous meaning for an "idiosyncratic

definition" without "persuasive proof" that Congress so intended. *Wis. Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2073 (2018).

Here, the ordinary meaning of "sex" in 1972 is "[t]he property or quality by which organisms are classified according to their reproductive functions." *Sex*, *American Heritage Dictionary of the English Language* (1st ed. 1969). "Sex" refers to biology. And as the *Adams* Court detailed, dictionary after dictionary from around 1972 reflects a biology-based sex definition. *Adams*, 57 F.4th at 812 (quoting six contemporaneous dictionaries). Indeed, "virtually every dictionary definition of 'sex'" in this period "referred to the physiological distinctions between males and females." *Grimm*, 972 F.3d at 632–33 (Niemeyer, J., dissenting) (citing five more dictionaries). That is why the Supreme Court's equal protection decisions—then as now—invariably treat sex as binary, biological, and immutable. *Supra* Section I.A.

Plaintiffs urge the Court to follow *A.C. ex rel. M.C. v. Metropolitan School District of Martinsville*, which found "sex" ambiguous based on two cherry-picked dictionary definitions. 75 F.4th 760, 770 (7th Cir. 2023), *petition for cert. filed*, No. 23-392 (Oct. 13, 2023). That court's errors were two-fold.

First, the court framed the wrong question. Rather than ask whether the *ordinary* meaning of "sex" was biological, it asked whether that was the *only* meaning. *Id.* (asking whether "sex can mean *only* biological sex." (emphasis added)). What matters is the "ordinary" or "primary" meaning of a term, not every possible "idiosyncratic definition." *Trim*, 76 F.4th at 1162. Mere "definitional possibilities" do not make a term ambiguous. *Brown v. Gardner*, 513 U.S. 115, 118 (1994). The overwhelming number of dictionary definitions referencing biology—typically as the first definition—show that

the primary meaning of sex was biological. And neither the *A.C.* court nor Plaintiffs have located a 1970s definition of "sex" that includes or references gender identity.

Second, the two dictionaries the *A.C.* court cited are not ambiguous. The 1968 version of *Black's Law Dictionary* defines "sex" as "[t]he sum of the peculiarities of structure and function that distinguish a male from a female organism; the character of being male or female." *Sex, Black's Law Dictionary* (4th ed. 1968). The primary definition is biological. And the secondary definition relies on the terms "male" and "female," which the dictionary defines biologically as "of the sex that begets young" and "[t]he sex which conceives and gives birth to young" respectively. *Male* and *Female, Black's Law Dictionary* (4th ed. 1968). Again, sex is biological.

Similarly, the 1972 edition of *Webster's New World Dictionary* leads with a biological definition referencing "reproductive functions," then includes a secondary definition referencing "all the attributes by which males and females are distinguished." *Sex, Webster's New World Dictionary of the American Language* (2d ed. 1972). Again, biology is primary. Even Plaintiffs do not appear persuaded by *A.C.*'s dictionary argument. They cite no dictionaries in their brief, and they made no claims about the ordinary meaning of "sex" in 1972. Instead, they simply ask this Court not to rely "solely on dictionary definitions." Pls.Br.46 (cleaned up). They concede that the ordinary use of "sex" in 1972 referred to biology.

Title IX's Context Reinforces the Biological Meaning of Sex. Throughout Title IX, "sex" is a binary concept. For example, Title IX allows schools in some cases to change "from being an institution which admits only students of *one sex* to being an institution which admits students of *both sexes*." 20 U.S.C. § 1681(a)(2) (emphases

added). Title IX also exempts "father-son or mother-daughter activities … but if such activities are provided for students of *one sex*, opportunities for reasonably comparable activities shall be provided for students of the *other sex*." 20 U.S.C. § 1681(a)(8) (emphases added). This provision speaks of "one sex" and "the other sex"—terms that assume sex is binary; it also uses parental and filial terms rooted in biology. *Accord* 20 U.S.C. § 1681(a)(6)–(7) (setting aside organizations traditionally limited to males or females, e.g., fraternities and sororities, the YMCA and YWCA, Boys State and Girls State).

If sex meant gender identity, many Title IX carve-outs would be nonsensical. For example, the carve-out for single-sex classes or extracurriculars requires schools to provide comparable opportunities to students of "the excluded sex." 34 C.F.R. § 106.34(b)(1)(iv) & (2). Another provides that any school district with a single-sex K-12 school "must provide students of *the excluded sex* a substantially equal single-sex school or coeducational school." 34 C.F.R. § 106.34(c)(1) (emphasis added). None of this makes sense unless sex is a binary—and therefore biological—concept.

And if "sex" means gender identity, it's open season on the very sex stereotyping that Title IX prohibits. *Grabowski v. Ariz. Bd. of Regents*, 69 F.4th 1110, 1117 (9th Cir. 2023). How should schools decide whether a student's claim to a particular gender identity is accurate? They would have to consider factors like whether the student "use[s] a more typically feminine name," "dresse[s] in clothes typically worn by girls," "adopt[s] a more feminine hairstyle," and "start[s] using female pronouns," 1-SER-179, all things that perpetuate "archaic and stereotypic notions" about the sexes. *Hogan*, 458 U.S. at 725. Instead, the only reasonable construction is that Title IX allows designating

intimate spaces based on biology—that is, the "enduring" physiological "differences between men and women." *Virginia*, 518 U.S. at 533.

Confirming that "sex" in Title IX means biology, Senator Bayh, whose remarks are "an authoritative guide to the statute's construction," *N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 527 (1982), explained that there would be regulatory safe-harbors when classification by sex is necessary: things like "classes for pregnant girls … in sports facilities, or other instances where personal privacy must be preserved." 118 Cong. Rec. 5807 (1972). All of these are areas where biology, not gender identity, matter. True to form, the earliest Title IX regulations allowed "separate toilet, locker room, and shower facilities on the basis of sex," provided that the facilities for "one sex" were like those provided for "the other sex." U.S. Dep't of Health, Educ., and Welfare, Nondiscrimination on the Basis of Sex, 40 Fed. Reg. 24,128, 24,141 (June 4, 19745). At every turn, context shows that "sex" in Title IX refers to biological distinctions.

These carve-outs are longstanding, and Congress has ratified them. "Congress is presumed to be aware of an administrative interpretation of a statute." *Cazarez-Gutierrez v. Ashcroft*, 382 F.3d 905, 917 (9th Cir. 2004). And when Congress amends some portions of a statute but leaves prior interpretations alone, it "adopt[s]" those interpretations. *Id.*; *accord United States v. Lincoln*, 277 F.3d 1112, 1114 (9th Cir. 2002).

Here, the carve-outs for showers, bathrooms, and locker rooms originated in 1974. 40 Fed. Reg. at 24,141 (original version of 34 C.F.R. § 106.33). Since then, Congress has amended Title IX multiple times—including a 1988 amendment designed to supersede *Grove City Coll. v. Bell*, 465 U.S. 555, 570–74 (1974). *See Nat'l Collegiate Athletic Ass'n v. Smith*, 525 U.S. 459, 466 n.4 (1999) (explaining purpose of 1988

amendment, 102 Stat. 28 (1988)); *see also* 108 Stat. 4023 (1994); 115 Stat. 2091 (2002); 129 Stat. 2173 (2015). Congress knows how to amend Title IX when it disagrees with how other branches interpret the law. But in nearly 50 years Congress has not touched the carve-outs allowing sex-specific intimate facilities. So Congress has "adopt[ed] that interpretation" of Title IX. *Cazarez-Gutierrez*, 382 F.3d at 917.

Plaintiffs' brief and the decisions in *Grimm* and *A.C.* improperly exclude these carve-outs from the statute. According to Plaintiffs, the carve-outs do not apply to S.B.1100 because they authorize "sex-separated facilities" but not "discrimination against transgender people." Pls.Br.47. That's the wrong question. If the statute allows sex-based designation of intimate spaces, and sex means biology, then the statute allows such designation by biology. Whether that designation constitutes discrimination that would otherwise violate Title IX (it does not) is beside the point. *Adams*, 57 F.4th at 814. What matters is whether S.B. 1100 "fits into Title IX's carve-out" for sex-specific facilities. *Id.* It does.

Grimm and *A.C.* could only reach a contrary result by silently redefining sex as gender identity. *Grimm* declined to apply the carve-outs because the plaintiff "was not challenging sex-separated restrooms, but simply seeking access to the boys' restroom as a transgender boy." 972 F.3d at 618 (cleaned up). But in admitting the biologically female plaintiff to a sex-specific bathroom designated for boys, the *Grimm* Court necessarily categorized the plaintiff as male under Title IX, thereby adopting a non-biological understanding of "sex."

So too in *A.C.*, where the Seventh Circuit declined to apply the carve-outs because they purportedly don't say "who counts as a 'boy' for the boys' rooms, and

who counts as a 'girl' for the girls' rooms." 75 F.4th at 770. By admitting a student to a space validly designated by "sex," the court necessarily—though silently—decided what "sex" meant.

Both *Grimm* and *A.C.* ignored the text and statutory context of Title IX to redefine sex as gender identity. By doing so, they failed to apply the statutory and regulatory carve-outs that allow the very sex designation that S.B. 1100 codified. This Court should not follow their error and should instead hold that because Idaho simply "acts in accordance with Title IX's bathroom-specific regulation," its law does not violate Title IX. *Adams*, 57 F.4th at 815.

Designating Intimate Spaces by Sex Provides Equal Treatment. Under Title IX, schools may not "on the basis of sex" subject students to "discrimination under any education program or activity" 20 U.S.C. § 1681(a). Plaintiffs agree that merely "creating sex-separated restrooms in and of itself is not discriminatory." *Grimm*, 972 F.3d at 618; Pls.Br.46. It is only when a school "targets" students because of their sex and fails to "treat[ ] both male and female students the same" that it violates Title IX. *Parents for Privacy*, 949 F.3d at 1228.

Parents for Privacy is instructive. There, a school district's policy designated privacy facilities "by gender identity." *Id.* Several students sued, claiming the policy discriminated against them based on sex because it forced them to share intimate spaces with the opposite sex. *Id.* at 1226. This court disagreed because the school district's policy "applie[d] to all students regardless of their sex."—that is, it designated intimate spaces by gender identity for all students, regardless of sex. *Id.* at 1227. Because the policy "treat[ed] all students—male and female—the same" by designating them to

intimate spaces by gender identity, it was not discriminatory under Title IX. *Id.* at 1228. So too here: S.B. 1100 treats males and females equally by requiring members of both sexes to use the showers, locker rooms, bathrooms, and other intimate facilities designated for their sex. So under *Parents for Privacy*, the law "does not discriminate on the basis of sex" and does not violate Title IX. *Id.* at 1229.

Plaintiffs try to avoid this result by contending that any "exclusion" from a student's desired intimate space is sex discrimination under *Bostock,* which they say *Grabowski* and *Doe* fully import into Title IX. Pls.Br.44–45. They read *Bostock* to mean that if a student cannot use a particular intimate space because of the student's sex, and if the student claims to be harmed by the exclusion, there is a Title IX violation. *Id.* In other words, they argue that *any* sex-based classification is unlawful under *Bostock*, so long as a person claims harm.

But *Bostock* held no such thing. *Bostock* held that discrimination based on transgender status necessarily discriminates based on sex, not the inverse. Indeed, *Bostock* did not "purport to address bathrooms, locker rooms, or anything else of the kind," not even "[u]nder Title VII." 140 S. Ct. at 1753. And the question *Bostock* answered—whether firing a transgender person constitutes discrimination "because of" sex—did not require the Court to determine the meaning of "sex" in Title VII because its reasoning did not "turn[ ] on the outcome" of that definition. 140 S. Ct. at 1739. Here, by contrast, whether designating intimate spaces based on physiological differences between men and women unlawfully discriminates "on the basis of sex" turns on the meaning of the word "sex." If sex means biology and if the law treats the two sexes equally, then the law does not "target" anyone by designating intimate spaces

on that basis—unless one thinks that all sex designation in intimate spaces is discriminatory, which Plaintiffs do not. *Parents for Privacy*, 949 F.3d at 1228.

But that is the thrust of Plaintiffs' logic. If they are right that any "harm" purportedly caused by a student being designated to a particular sex-specific space is actionable, then *any* designation of intimate spaces by sex is unlawful. Consider a male student who identifies as male and desires to use the girls' bathroom because its location is more convenient to his classes. The student is denied access to the girls' bathroom because of his sex, and he's harmed by being late to class. According to Plaintiffs' argument, he has a Title IX claim. But Plaintiffs admit that isn't right. Pls.Br.46. S.B. 1100 treats members of both sexes equally: any male student who wants to use the girls' bathroom is not facing unlawful discrimination; he's required to use the bathroom designated for his sex like everyone else. That does not violate Title IX.

The Spending Clause Also Bars Plaintiffs' Expansive Reading. Whatever else may be true, Title IX does not "so clearly" prohibit designating intimate spaces by biology that states could "fairly … make an informed choice" before accepting federal funds. *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 25 (1981). As Spending-Clause legislation, Title IX must "speak with a clear voice" when it imposes conditions on federal funding. *Id.* at 17. Title IX does not "unambiguously" prohibit designating intimate spaces based on biological differences. *Id.* at 17, 25. Instead, both the statute and its implementing regulations allow it, 20 U.S.C. § 1686; 34 C.F.R. § 106.33, as this Court recognized in *Parents for Privacy*, 949 F.3d at 1227. And Plaintiffs have cited no evidence that "sex" in 1972 meant anything but biology. Forcing schools to admit students to sex-specific intimate spaces based on gender identity "expand[s] the

footprint" of Title IX and "creates rights for students and obligations for regulated entities … that appear nowhere in *Bostock*, Title IX, or its implementing regulations." *Tennessee*, 615 F. Supp. 3d at 839. There's no clear statement to the contrary.

Plaintiffs say that statutory ambiguities do not offend the Spending Clause provided courts enforce any novel interpretations by injunction rather than damages. Pls.Br.50. Not so. *Pennhurst* itself reversed an injunction—not a damages award—because of Spending Clause problems. 451 U.S. at 8–9 (describing relief at issue). "Though Congress' power to legislate under the spending power is broad, it does not include surprising participating States with post acceptance or 'retroactive' conditions." *Id.* at 25. That is exactly what an injunction here would do: impose a new bathroom policy on Idaho because of its schools' pre-existing acceptance of federal funds.

The only case Plaintiffs cite for this novel understanding of the Spending Clause is off-point. In *Davis ex rel. Lashonda D. v. Monroe County Board of Education*, the Court held that Title IX contains sufficient notice that a school may be liable for failing to control student-on-student sexual harassment. 526 U.S. 629, 644–45 (1999). While the Court noted the gravity of holding a state liable for damages, it did not hold—nor even consider—that the clear-statement rule applies *only* to claims for money damages. *Id.* at 639–40. And it certainly didn't silently overrule *Pennhurst*, which forecloses Plaintiffs' claims.

C. Plaintiffs' informational privacy claim fails.

Idaho's law accommodates *any* student who for *any* reason desires access to a single-occupancy intimate space. 3-ER-405. There is no reason to think that only students suffering from gender dysphoria will seek this accommodation. After all,

"adolescence and the bodily and mental changes it brings can be difficult for students, making bodily exposure to other students in locker rooms a potential source of anxiety." *Parents for Privacy*, 949 F.3d at 1217. A student may desire the extra privacy of a single-occupancy space for any number of reasons, and nothing in S.B. 1100 requires her to tell anyone why. Hyperbole aside, there is no evidence that using the single-occupancy accommodation available to all students will disclose a student's sex, "gender identity," sexual preferences, or anything else one might prefer to keep private.

Plaintiffs contend that the accommodation provision somehow violates their substantive due process right to "informational privacy." Pls.Br.51. But S.B. 1100 does not implicate any constitutional privacy interests. Even if individuals have a conditional right to avoid the government unreasonably disclosing their medical information, *Doe v. Att'y Gen.*, 941 F.2d 780, 795–97 (9th Cir. 1991), *disapproved of on other grounds by Lane v. Pena*, 518 U.S. 187 (1996), S.B. 1100 does not involve schools telling anybody anything. Schools will not know, much less disclose, why any particular student wants to use a single-occupancy facility. 3-ER-405. Since S.B. 1100 does not involve the government gathering or disclosing private information, it does not implicate any privacy interests recognized by this court. *Cf. Doe*, 941 F.2d at 796–97 (privacy interest implicated by government disclosing medical information); *Tucson Women's Clinic v. Eden*, 379 F.3d 531, 551–52 (9th Cir. 2004), *abrogated on other grounds by Dobbs*, 597 U.S. 215 (privacy interest implicated by government obtaining unnecessary access to medical information).

Nor does it cause the kind of "forced disclosure" some district courts have held to violate "informational privacy" rights in cases over changes to sex listed on birth

certificates. *See, e.g.*, *Ray v. McCloud*, 507 F. Supp. 3d 925, 934 (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). S.B. 1100 requires no such disclosure: any student can use a single-occupancy facility for any reason—which does not disclose the student's reason for wanting extra privacy. In any event, this Court has not recognized a privacy interest in avoiding "forced disclosures," which represent an unwarranted extension of *Whalen v. Roe,* which involved a *potential* interest in avoiding the *actual* disclosure of private prescription information held by the state. 429 U.S. 589, 600 (1977). *Whalen* did not concern use of intimate facilities, and nothing in it hinted at a constitutional right to change one's government-issued ID to match one's desired gender presentation, which is neither "deeply rooted in the Nation's history and tradition" nor "implicit in the concept of ordered liberty." *Washington v. Glucksburg*, 521 U.S. 702, 721 (1997) (cleaned up). Plaintiffs' privacy claim fails.

II. Plaintiffs' Scientific Claims Are Unfounded and Unreliable.

For Plaintiffs to prevail, it is not enough to show an abstract legal theory that is likely to succeed—they also need evidence to prove it. Without such evidence, "even accepting the merits of [the] underlying claim of discrimination," Plaintiffs cannot show that denial of a preliminary injunction "was unreasonable or unsupported by the record." *Snyder*, 28 F.4th at 113. Here, Plaintiffs' scientific case, based solely on Dr. Budge's testimony, is riddled with defects. And while "[t]he rules of evidence do not apply strictly to preliminary injunction proceedings," *Herb Reed Enters., LLC v. Fla. Ent. Mgmt., Inc.*, 736 F.3d 1239, 1250 n.5 (9th Cir. 2013), Plaintiffs still must have evidence that adequately supports their claims. Dr. Budge's opinions fail to provide it.

Though Dr. Budge's testimony is the linchpin of Plaintiffs' factual case, they largely ignore her in their appeal briefing. They fail to mention that Dr. Budge has acknowledged that she is an "advocate" and "activist" on transgender issues. 1-SER-114–22, 127–130. She says that reliability "can" be important to scientific research, but it is not a necessary ingredient. 1-SER-31–35. Federal law, of course, is to the contrary. *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579 (1993); Fed. R. Evid. 702. And her "activist" opinion has no hope of being admissible.

To support Plaintiffs' case, Dr. Budge opines that social transitioning, including bathroom use based on "gender identity," is effective and necessary to treat gender dysphoria, and that single-user bathrooms are an inadequate accommodation. Both causation opinions derive from her unscientific view that "gender identity" determines sex. *Supra* Point I.A. With such an unscientific foundation, none of her other contentions can succeed. And the remainder of her opinions are fatally flawed in any event.

A. Dr. Budge's causation opinion ignores contrary evidence.

Dr. Budge accepted at face value the standards of care promulgated by the World Professional Association for Transgender Health ("WPATH"). She says that under these "widely accepted" standards, people with gender dysphoria should receive a "social transition" where they live in accordance with their preferred gender "across all aspects" of their life, including bathroom use. 3-ER-296, 302–03; 1-SER-122. She also embraces WPATH's recommendation to use "medical interventions," including "puberty-delaying medication and gender-affirming hormones … for adolescents." 3-ER-302. But both are hopelessly unscientific.

Dr. Budge relies on WPATH's recommendation of social transition while ignoring the best available evidence about the need for that treatment: the eleven cohort studies that have followed minors with gender dysphoria. 2-ER-166–68. Every one of them showed desistance of gender dysphoria *without any intervention*. *Id.* No social transition needed. Yet Dr. Budge failed to mention those studies, much less address them—even though she was confronted with those studies in a case challenging a similar Oklahoma law. 1-SER-89–90, 156–57.

This result-oriented disregard of relevant science undermines the reliability of Dr. Budge's opinion. To be reliable, a general causation opinion like Dr. Budge's must consider *all* relevant evidence. *In re Zoloft (Sertraline Hydrochloride) Prod. Liab. Litig.*, 858 F.3d 787, 796 (3d Cir. 2017). "[E]xpert testimony that 'cherry-picks' relevant data" must be excluded. *EEOC v. Freeman*, 778 F.3d 463, 469 (4th Cir. 2015) (Agee, J., concurring) (collecting cases); *In re Lipitor (atorvastatin calcium) Mktg., Sales Pracs. & Prods. Liab. Litig.*, 892 F.3d 624, 634 (4th Cir. 2018). In theory, Dr. Budge agrees that "scientists should take into account all of the information when making conclusions." 1-SER-23. But she fails to apply "in the courtroom the same level of intellectual rigor" that she acknowledges in academia. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152 (1999).

More troubling was Dr. Budge's ad hoc attempt to explain competing authorities away. Confronted with these studies at her deposition, she dismissed them as "very old," 1-SER-60–61, even though the largest and most recent study dates to 2021. 1-SER-87–88, 132–149. Reviewing that study for the first time at deposition, she testified that the subjects likely did not have gender dysphoria. 1-SER-61, 82–86 But the very first sentence of the study says it "reports follow-up data on the largest sample to date

of boys clinic-referred *for gender dysphoria*." 1-SER-132 (emphasis added). Dr. Budge surmised that the patients in the Singh study may not have gender dysphoria because diagnostic criteria for that condition have changed over time. 1-SER-84–85. But she admitted that diagnostic criteria have become *broader* over time, not narrower, and that if applied to the period at issue in the Singh study, she would expect to see "the same level of diagnoses, same number" as today. 1-SER-81–82.

Equally problematic is Dr. Budge's endorsement of WPATH's recommendations of medicalized transition. 3-ER-301–03. Embracing WPATH, Dr. Budge ignores two recent systematic reviews—one by the UK's National Health Service and one by Sweden—that directly studied that very topic. Those reviews determined that any benefits of medicalized transition did not outweigh their known risks for children. 1-SER-108–13; 2-ER-199–200. Dr. Budge admitted she was aware of those reviews at the time they happened, 1-SER-110, yet her declaration filed in July 2023 did not cite them, much less discuss or distinguish them. 3-ER-291–319. It is "alarming" that Dr. Budge engaged in this "biased reliance on favorable sources" while ignoring two systematic reviews by European medical authorities that "could not be more relevant" to her opinions. *Daniels-Feasel v. Forest Pharms., Inc.*, 2021 WL 4037820, at *12 (S.D.N.Y. Sept. 3, 2021), *aff'd*, 2023 WL 4837521 (2d Cir. July 28, 2023). This activism cloaked in science is not a basis to grant a preliminary injunction.

Dr. Budge's self-contradictory attempt to fit the literature to an opinion she had already reached is not science. "Coming to a firm conclusion first and then doing research to support it is the *antithesis* of this method." *Claar v. Burlington N. R.R. Co.*, 29 F.3d 499, 502–03 (9th Cir. 1994) (emphasis added).

B. Single-user bathrooms are an adequate accommodation.

Finally, Dr. Budge says that the accommodation offered by S.B. 1100—using sex-neutral single-occupancy restrooms—is stigmatizing and damaging. 3-ER-311. But her own authorities undermine her opinion. While S.B. 1100 grants such accommodation to anyone uncomfortable using sex-specific multi-occupancy restrooms, Dr. Budge says that "[n]umerous research studies" confirm the "negative psychological impact of being invalidated and 'othered' in these ways." 3-ER-311. Not so—none of the studies she cites did any research on whether single-user bathrooms caused the impact she claims. To the contrary, the first study she cited in support specifically states that "providing gender-neutral bathrooms … can be viewed as part of gender-affirming support and care." 1-SER-97, 151. By citing this study to reach "conclusions the authors of the study do not make," Dr. Budge "exceed[s] the limits of the conservative scientific methodology." *McClain v. Metabolife Int'l, Inc.*, 401 F.3d 1233, 1248 (11th Cir. 2005); *accord Huss v. Gayden*, 571 F.3d 442, 459 (5th Cir. 2009); *Happel v. Wal-Mart Stores, Inc.*, 602 F.3d 820, 826 (7th Cir. 2010); 2-ER-154. And Plaintiffs cannot obtain an injunction against the law when their own expert's authorities acknowledge the adequacy of its accommodation.

III. Plaintiffs Cannot Indisputably Show the Other Injunction Factors.

Because Plaintiffs' claims fail on the law, they are not entitled to a preliminary injunction, and this Court "need not consider" the other preliminary-injunction factors. *Garcia v. Google, Inc.*, 786 F.3d 733, 740 (9th Cir. 2015) (cleaned up). But the remaining factors also weigh in Idaho's favor.

Irreparable harm. All of Plaintiffs' alleged "harms" come down to one factual claim: it's harmful to a student with gender dysphoria to use a facility based on their sex or a single-occupancy facility available to any student for any reason. Pls.Br.54. *Parents for Privacy* forecloses this argument, having held that the availability of single-user bathrooms foreclosed a constitutional challenge, "even though those alternative options admittedly appear inferior and less convenient." 949 F.3d at 1225. As the district court reasoned, "if 'compelling' cisgender students to use alternate facilities is a reasonable accommodation, there is no reason to suggest asking transgender students to do the same would bring a different result." 1-ER-22. That is especially true where the studies Dr. Budge cites treats single-user bathrooms as "gender affirming." *Supra* Section II.B. Plaintiffs fail to show otherwise.

First, they cite Rebecca Roe's declaration. But Roe's declaration contains zero facts about what facilities are available at the "new school" Roe attends. 2-ER-274–75. While Roe may fear other students speculating about Roe's transgender status, there's no evidence that anyone has or will learn of it. *Id.*

Second, they cite the SAGA president's declaration. It says that before S.B. 1100 required schools to accommodate requests for single-occupancy facilities, Boise High provided one single-user bathroom that the student considered inconvenient because it was "farther" from the student's classes and "sometimes" other students were using it or it was closed. 2-ER-285. There is no evidence how the school would accommodate students today under S.B. 1100, much less sufficient detail to conclude that the cited inconvenience rises to the level of irreparable harm. *Id.* After all, sometimes bathrooms are in use, and sometimes they need maintenance, but that does not warrant court

intervention. Moreover, the student did not allege that using the single-occupancy facility led to anyone discovering the student's transgender status.

Third, Plaintiffs cite the declaration of Morgan Ballis, a school resource officer in Hailey, Idaho. Officer Ballis speculates that S.B. 1100 "may have the effect of revealing a student's transgender status to others who may not know," but he does not explain how using an accommodation available to all would do that. 3-ER-380–81. Piling conjecture on conjecture, he states that S.B. 1100 may "deprive transgender students of any meaningful access to restrooms during the school day"—even though the law specifically requires that the school's accommodation be "reasonable." *Id.*

Fourth, Plaintiffs cite Dr. Budge's declaration, but her opinion undermines Plaintiffs' challenge to this accommodation. Her opinions are also limited to speculative generalities about what *may* happen when people with gender dysphoria cannot use an opposite-sex facility. 3-ER-311–16.

These four declarations contain virtually no facts about the intimate facilities in Idaho schools or the accommodations mandated by S.B. 1100. The district court properly found that the plaintiffs' claim to irreparable harm rested on "the speculation of potential future harm." 1-ER-33.

Balance of the Equities and Public Interest. Since Plaintiffs show only speculative harm, the balance of equities does not favor them, much less "tip[ ] sharply towards" them to justify an injunction. *Cottrell*, 632 F.3d at 1135. Against Plaintiffs' speculation stands other students' legitimate privacy interest in "using the bathroom away from the opposite sex." *Adams*, 57 F.4th at 804. This interest is all the clearer for showers, locker rooms, and overnight accommodations where students desire to shield

their "unclothed figure" from "strangers of the opposite sex." *Byrd*, 629 F.3d at 1141; *accord Faulkner*, 10 F.3d at 232; *Chaney*, 612 F.3d at 913. These interests easily tip the balance of equities in Idaho's favor, which merges with the public interest here. *Drakes Bay*, 747 F.3d at 1092.

CONCLUSION

The Court should affirm the district court's well-reasoned order denying a preliminary injunction.

Dated: December 20, 2023

Respectfully submitted,

RAÚL R. LABRADOR
ATTORNEY GENERAL

/s/ Joshua N. Turner
Joshua N. Turner
Acting Solicitor General
James E.M. Craig
Division Chief
Idaho Office of the
Attorney General
700 W. Jefferson St., Suite 210
Boise, ID 83720
(208) 334-2400

JOSHUA N. TURNER
Acting Solicitor General

/s/ John J. Bursch
John J. Bursch
Lincoln Davis Wilson
Henry W. Frampton IV
Alliance Defending Freedom
440 First Street, NW
Suite 600
Washington, DC 20001
(202) 393-8690
jbursch@ADFlegal.org
lwilson@ADFlegal.org
hframpton@ADFlegal.org

Counsel for Defendants-Appellees

STATEMENT OF RELATED CASES

Under Ninth Circuit Rule 28-2.6, Appellees state they know of no case related to the above-captioned appeal.

/s/ John J. Bursch
John J. Bursch
Counsel for Appellees

December 20, 2023

CERTIFICATE OF COMPLIANCE

This brief complies with Ninth Circuit rule 32-1(a) because it contains 13,940 words. It was prepared in a proportionally spaced typeface using Word for Microsoft 365 in Garamond 14-point font.

/s/John J. Bursch
John J. Bursch
Counsel for Appellees

December 20, 2023

CERTIFICATE OF SERVICE

I hereby certify that on December 20, 2023, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the CM/ECF system, which will accomplish service on counsel for all parties through the Court's electronic filing system.

/s/John J. Bursch
John J. Bursch
Counsel for Appellees

December 20, 2023