No. 23-2807

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

v.

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

On Appeal from the United States District Court for the District of Idaho, No. 1:23-cv-00315-DCN,
The Honorable David C. Nye, Judge

BRIEF OF INDIANA, ALABAMA, AND 22 OTHER STATES AS AMICUS CURIAE IN SUPPORT OF APPELLEES AND AFFIRMANCE

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INTEREST OF *AMICI* STATES

The States of Indiana, Alabama, Alaska, Arkansas, Florida, Georgia, Iowa, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, North Dakota, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, West Virginia, and Wyoming respectfully submit this brief as *amici curiae* in support of appellees. Fed. R. App. P. 29(a)(2). *Amici* States all have public-school and public-university systems that receive federal funding under Title IX, and many *amici* States or their schools have adopted policies similar to Idaho's Senate Bill 1100 ("S.B. 1100") that require public-school students to use the bathroom or locker room corresponding with their biological sex. In a "public school environment[,] … the State is responsible for maintaining discipline, health, and safety." *Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomi Cnty. v. Earls*, 536 U.S. 822, 830 (2002). *Amici* States therefore have a strong interest in protecting the health, safety, welfare, and privacy of all students.

Traditionally, public institutions have safeguarded students' privacy and welfare by separating the sexes in bathrooms and other facilities. Laws like Idaho's S.B. 1100 reflect the long-held recognition

that forcing boys and girls to share bathrooms, showers, and hotel rooms would compromise the privacy, security, and safety of students, especially girls. When Congress enacted Title IX under the Spending Clause in 1972, no one thought that Title IX's prohibition on discrimination "on the basis of sex," 20 U.S.C. §1681, would end sex-segregated bathrooms. The statute itself and its implementing regulations both provided for the continued separation of the sexes in contexts where sex matters, such as bathrooms, locker rooms, and living quarters. Siding with plaintiffs to conclude now that Title IX and the Equal Protection Clause prohibit different facilities for boys and girls would invalidate policies in place ever since their adoption and undermine States' traditional authority to protect student privacy and welfare.

ARGUMENT

Everyone in this litigation agrees that bathrooms, locker rooms, and overnight accommodations should be separated by sex. Plaintiffs have "never challenged the practice of maintaining sex-separated facilities." Opening Br. 13; *see id.* at 19 (same). They still want facilities separated, just differently. Plaintiffs argue that "sex" should be redefined to include "gender identity." But neither the Equal Protection Clause nor

Title IX demands separation based on gender identity rather than sex. It is rational and constitutional to use traditional definitions of "sex" when assigning students to sex-segregated bathrooms, locker rooms, and sleeping quarters to protect everyone's privacy and safety.

I. The Equal Protection Clause and Title IX Do Not Require Gender-Identity Policies for Bathrooms and Lodgings

A. The Equal Protection Clause does not require States to define "sex" as "gender identity"

The Fourteenth Amendment's Equal Protection Clause prohibits a State from "deny[ing] to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, §1. The Clause is "essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). When two similarly situated persons are treated better or worse because of their sex, heightened scrutiny applies. *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982).

United States v. Virginia is the classic case. 518 U.S. 515 (1996). The Virginia Military Institute admitted only men. *Id.* at 520. The federal government challenged that policy, contending that the Equal Protection Clause required VMI to admit women too. *Id.* at 519. The Supreme Court

agreed. *Id.* While recognizing that "[p]hysical differences between men and women" "are enduring," *id.* at 533, the Court determined that the school's sex-based admissions policy was not rooted in relevant physical differences, but in "generalizations about 'the way women are.'" *Id.* at 550. In the respects that mattered, the Court concluded, the men and women "seeking and fit for a VMI-quality education" were alike. *Id.* at 557. Because VMI did not treat them alike, it violated the Equal Protection Clause, and the remedy was to require women's admission. *Id.* at 547-55.

Notably, the Supreme Court used "sex" to mean "biological sex," not gender identity. Indeed, "the Court's justification for giving heightened scrutiny to sex-based classifications makes sense only with reference to physiology." *Adams v. Sch. Bd. of St. Johns Cnty.*, 3 F.4th 1299, 1334 (11th Cir. 2021) (*Adams II*) (W. Pryor, J., dissenting), *opinion vacated*, *Adams by & through Kasper v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791 (11th Cir. 2022) (en banc) (*Adams III*). Courts apply intermediate scrutiny, not strict, precisely *because* the "inherent" "[p]hysical differences between men and women" are "enduring" and the "'two sexes are not fungible.'" *Virginia*, 518 U.S. at 533. The "difference[s] between men and

women" sometimes require "address[ing] the problem at hand in a manner specific to each gender." *Tuan Anh Nguyen v. I.N.S.*, 533 U.S. 53, 73 (2001). So "[t]he heightened review standard … does not make sex a proscribed classification." *Virginia*, 518 U.S. at 533.

Under this traditional framework, it is clear that maintaining separate bathrooms for boys and girls does not violate the Equal Protection Clause. Idaho here, for example, offered an exceedingly persuasive justification for its classification: protecting student privacy. 2-ER-14; *see Adams III*, 57 F.4th at 804. "[B]athrooms by their very nature implicate important privacy interests." *Hecox v. Little*, 79 F.4th 1009, 1025 (9th Cir. 2023). And the fit between that important interest and the chosen classification cannot get any tighter. Students' privacy interests are rooted in physiology—students' *bodies*—so it makes perfect sense to draw the line based on physiology, too. *See Adams III*, 57 F.4th at 805. The district court correctly concluded that "[p]rivacy is a legitimate interest supporting the constitutionality of S.B. 1100." 2-ER-16–17. That is true generally, the court noted, and "even more" so here "considering school-age children are still developing—mentally, physically, emotionally, and socially—and asking them to expose their bodies to students of the opposite

sex (or to be exposed to the bodies of the opposite sex) brings heightened levels of stress." *Id.* Equal protection is satisfied.

But there is a more fundamental problem with plaintiffs' framing of their claim as a challenge to a sex-based classification. *See* Opening Br. 16. Although S.B. 1100 provides for separate facilities for boys and girls, plaintiffs do not wish to end separate facilities. They "do not challenge" the longstanding practice of schools "maintain[ing] sex-separated facilities—that is, . . . separate facilities for males and females." *Id.* at 19. Plaintiffs instead seek access to sex-separated facilities for "transgender students," saying facilities should be separated based on "gender identity" rather than sex. *Id.* at 19, 23; *see id.* at 16. That is not a challenge to a sex-based classification itself, but rather a disparate-impact challenge. Plaintiffs' own brief makes this clear: Plaintiffs concede sex-separated bathrooms are appropriate; their objection is that separating by sex allegedly "inflicts" a harm "specific to transgender people." *Id.* at 23.

There are good reasons to reject plaintiffs' disparate-impact theory. In a disparate-impact challenge, the first step is to ask whether a law impacts "men and women" differently. *Pers. Adm'r of Mass. v. Feeney*, 442

U.S. 256, 274-75 (1979). Plaintiffs do not identify any way in which having separate boys' and girls' bathrooms somehow advantages "men over women" (or women over men). They do not cite any evidence that, say, girls' bathrooms are more luxurious than boys'. Indeed, the district court acknowledged that S.B. 1100 "'prohibits' both transgender girls *and* transgender boys from using [opposite-sex] facilities" and therefore does not "single[] out transgender students." 2-ER-23–24.

Plaintiffs vaguely refer to "sex stereotypes," Opening Br. 24, but they misunderstand the Supreme Court's jurisprudence on that theory. *See* Opening Br. 22-24. S.B. 1100 does not admit students to the girls' restroom based on whether they "walk more femininely, talk more femininely, dress more femininely, wear make-up, have [their] hair styled, [or] wear jewelry." *Price Waterhouse v. Hopkins*, 490 U.S. 228, 235 (1989) (plurality op.). Rather, "[t]he bathroom policy separates bathrooms based on biological sex, which is not a stereotype." *Adams III*, 57 F.4th at 809; *see Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (noting that stereotypes are not "immutable characteristic[s] determined solely by the accident of birth").

Plaintiffs' response is to recharacterize their claim as "[d]iscrimination based on transgender status." Opening Br. 24. But the Supreme Court has never recognized transgender status as a protected characteristic, or in the equal-protection context, equated transgender status with sex. The Court treats sex as an "immutable," *Frontiero*, 411 U.S. at 686, "enduring," and biologically rooted characteristic, *Virginia*, 518 U.S. at 533. By equating a disparate impact on transgender students with a disparate impact on the sexes, plaintiffs are attempting to end-run the "high" bar for "recognizing a new suspect class." *L.W. by & through Williams v. Skrmetti*, 83 F.4th 460, 486 (6th Cir. 2023).

In any event, plaintiffs' theory of transgender-status discrimination fails. S.B. 1100 does not classify based on transgender status on its face; it separates based on another, distinct characteristic: "sex." Idaho Code § 33-6603(1)(a)–(b), (2), (4); *see id.* § 33-6602(3). Plaintiffs would have courts assume that every sex-based line evinces animus towards transgender persons because those lines prevent "transgender people alone" from accessing "facilities matching their gender identity." Opening Br. 25-26. But that is merely another way of saying that classifying based on

sex disparately impacts transgender persons. It does not show transgender status underlies the classification because users of both male and female bathrooms "include transgender students." *Adams III*, 57 F.4th at 808–09. So plaintiffs again are left with a disparate-impact claim.

Plaintiffs cannot meet the demanding standards for a disparate-impact claim. "[P]urposeful discrimination"—not disparate impact alone—"is the condition that offends the Constitution." *Feeney*, 442 U.S. at 274 (cleaned up); *see, e.g.*, *Geduldig v. Aiello*, 417 U.S. 484 (1974) (state insurance policy excluding pregnancy coverage—disparately impacting women—did not classify based on sex). "Purposeful discrimination" means "more than" "intent as awareness of consequences" and "implies that the decisionmaker … selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Feeney*, 442 U.S. at 274, 279.

Idaho's decision to require bathrooms separated by sex in public schools is a far cry from action taken out of pure spite. Sex-separated bathrooms were not "devised" with the "goal of keeping women," men, or even transgender students "in a stereotypic and predefined place." *Feeney*, 442 U.S. at 274, 279. Rather, "throughout American history,"

bathrooms have been segregated by sex to protect "privacy." *Adams III*, 57 F.4th at 805; *see Hecox*, 79 F.4th at 1025. Even plaintiffs do not dispute that legitimate reasons underlie sex-separated bathrooms. Indeed, they merely request an injunction that would "enjoin S.B. 1100's exclusion of transgender people from facilities matching their gender identity but … *would not bar separating facilities by sex*." Opening Br. 23 (emphasis added). Plaintiffs cannot have it both ways.

There is another problem with applying intermediate scrutiny: plaintiffs' equal-protection claim is really an underinclusiveness challenge.

Return to *Virginia*. There, the government challenged VMI's discriminatory practice of admitting men but not women. 518 U.S. at 519. The claim was not that VMI was wrongly classifying which of its applicants were men and which were women, but that the whole system of accepting men and rejecting women was unlawful discrimination. *Id.* at 523. It was *that* sex-based segregation the government challenged and the Supreme Court dismantled. *Id.* at 547-55.

Similarly, when Oliver Brown sued the school board in Topeka, Kansas, he challenged the entire enterprise of segregating public schools

on the basis of race. He did not ask the Supreme Court to bless separate-but-equal schooling so long as the Board of Education would classify his children as white. *See Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

But here, the plaintiffs take a different tack. They expressly do not challenge the requirement that public schools "separat[e] facilities by sex." Opening Br. 23. They just want the State to segregate differently. They take issue with the State's understanding of male and female, contending that the State must segregate bathrooms based on gender identity instead of sex. *Virginia* and *Brown* this case isn't.

As a result, rational-basis review applies. That is because, while "[s]eparating bathrooms by sex treats people differently on the basis of sex," "the mere act of determining an individual's sex, using the same rubric for both sexes, does not treat anyone differently on the basis of sex." *Adams II*, 3 F.4th at 1325-26 (W. Pryor, J., dissenting). In other words, where, as here, the decision to segregate by sex has already survived heightened scrutiny and the plaintiff merely challenges the State's understanding of sex itself, there is no further "implication of any constitutionally protected fundamental right (or suspect classification)," thus making "heightened scrutiny … indisputably inappropriate." *Ill. Health*

Care Ass'n v. Ill. Dep't of Pub. Health, 879 F.2d 286, 288 n.4 (7th Cir. 1989). The contours of the State's otherwise lawful sex segregation require only a rational basis.

Other precedent underscores the importance of this distinction. For example, in *Jana-Rock Construction, Inc. v. New York Department of Economic Development*, 438 F.3d 195 (2d Cir. 2006), the Second Circuit considered a challenge to the administration of New York's affirmative-action program that gave minority-owned businesses preferential treatment. The plaintiff, Rocco Luiere, did not "challenge the constitutional propriety of New York's race-based affirmative action program." *Id.* at 200. He challenged only New York's "definition" of Hispanic and decision not to treat him—"the son of a Spanish mother whose parents were born in Spain"—as Hispanic. *Id.* at 199-200. In rejecting Luiere's claim, the Second Circuit explained that the "purpose" of strict scrutiny is "to ensure that the government's choice to use racial classifications is justified, not to ensure that the contours of the specific racial classification that the government chooses to use are in every particular correct." *Id.* at 210.

Challenging the race-based regime itself would trigger heightened scrutiny, in other words, but seeking to extend it to new or different situations did not.

Consider also the case of Ralph Taylor. In August 2010, Taylor "received results from a genetic ancestry test that estimated that he was 90% European, 6% Indigenous American, and 4% Sub-Saharan African." *Orion Ins. Grp. v. Wash. State Off. Of Minority & Women's Bus. Enter.*, 2017 WL 3387344, at *2 (W.D. Wash. Aug. 7, 2017), *aff'd sub nom. Orion Ins. Grp. v. Washington's Off. of Minority & Women's Bus. Enter.*, 754 F. App'x 556 (9th Cir. 2018). Even though he had grown "up thinking of himself as Caucasian," Taylor took these results to mean that "he had Black ancestry." *Id.* So he "embraced his Black culture," "join[ing] the NAACP," "tak[ing] great interest in Black social causes," even "subscrib[ing] to Ebony magazine." *Id.* at *3. Then he classified himself as "Black" and applied for special benefits under State and federal affirmative-action programs—and filed suit when his applications were denied. *Id.* at *2-3. The court summarily dispatched with Taylor's claim, explaining that accepting Taylor's expansive definition of "Black" would "strip the provision of all exclusionary meaning." *Id.* at *11. Notably, rather

than apply heightened scrutiny and force the State to justify its definition of "Black," the court recognized the definition's rational basis and rejected Taylor's claim accordingly. *Id.* at *13 ("Both the State and Federal Defendants offered rational explanations for the denial of the application.").

By challenging the lawfulness of a classification's definitional contours rather than the lawfulness of the classification itself, plaintiffs follow the same path as Rocco Luiere and Ralph Taylor. Plaintiffs endorse sex-segregated bathrooms and challenge only Idaho's determination that school bathrooms be separated "based on so-called 'biological sex.'" Opening Br. 23. But the "purpose" of heightened scrutiny "is to ensure that the government's choice to use [protected] classifications is justified," not to police the classifications' "contours." *Jana-Rock*, 438 F.3d at 210. States, schools, and courts after all must have some definition of "sex" to have a meaningful discussion about what triggers heighted scrutiny. So the "contours" attendant to the State's definition of sex warrant only rational-basis review.

B. Title IX cannot require States to redefine "sex" as "gender identity" without saying so unambiguously

Plaintiffs' Title IX claim raises another issue of great concern for the States—the Spending Clause. Congress enacted Title IX pursuant to its Spending Clause authority. *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 640 (1999). "[L]egislation enacted pursuant to the spending power is much in the nature of a contract"—"in return for federal funds, the States agree to comply with federally imposed conditions." *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981). The Supreme Court has recognized that, "if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously." *Id.* There can "be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it." *Id.*; *see Cummings v. Premier Rehab Keller*, 596 U.S. 212, 219 (2022); *South Dakota v. Dole*, 483 U.S. 203, 206-07 (1987). Only unambiguous clarity keeps Spending Clause legislation from undermining States' status as "independent sovereigns." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 576-77 (2012) (opinion of Roberts, C.J., joined by Breyer and Kagan, JJ.).

Suffice it to say, Congress did not put States on clear, unambiguous notice in 1972 that Title IX would force them to use "gender identity"

rather than biological sex to segregate their bathrooms—and their "living facilities," 20 U.S.C. § 1686, and their locker rooms, and their shower facilities, 34 C.F.R. § 106.33. When Title IX was enacted in 1972, "virtually every dictionary definition of 'sex' referred to the *physiological* distinctions between males and females." *Grimm Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 632 (4th Cir. 2020) (Niemeyer, J., dissenting). The district court "note[d] its agreement with the *Adams* majority . . . that Title IX is not ambiguous and . . . the definition of 'sex' in Title IX does not include gender identity." 2-ER-30 n.25.

Even if the meaning of the term "sex" were less than perfectly clear, however, S.B. 1100 would still survive. Where two interpretations of Spending Clause legislation are possible, the tie goes to the States. *See Pennhurst*, 451 U.S. at 24. The onus is on whoever challenges the traditional practice of segregating school bathrooms by sex, biologically defined, to show that state and local governments were on notice they would have to alter their unbroken practice in accepting federal funds. Plaintiffs' request that the Court enjoin S.B. 1100 under Title IX not only "offend[s] first principles of statutory interpretation and judicial

restraint," *Adams III*, 57 F.4th at 817, but the basic workings of our federalist system.

Plaintiffs say that Title IX's status as Spending Clause legislation "merely affect[s] the availability of retrospective relief." Opening Br. 50. But the Supreme Court has never limited the principle that Spending Clause conditions must be unambiguous to remedies. In *Pennhurst*, the Supreme Court demanded a showing of clarity that States had any obligation at all to provide the services demanded. *See* 451 U.S. at 18-28. And plaintiffs' argument that "Title IX encompasses all forms of sex discrimination," Opening Br. 50, likewise falls short. It begs the question as to whether the term "sex" demands classification based on gender identity rather than sex, biologically understood. The limits imposed by the Spending Clause cannot be swept away by articulating a principle at so high a level of generality that States cannot predict what it contains.

II. Plaintiffs' Equal Protection and Title IX Theories Undermine State Authority and Create Administrative Challenges

The implications of plaintiffs' position for state authority are significant. "State[s]," not the federal government, are the traditional guardians of student privacy, health, and welfare. *Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomi Cnty. v. Earls*, 536 U.S. 822, 830 (2002).

At least nine States have exercised their authority to safeguard student privacy and safety by requiring public schools to have sex-separated bathrooms, locker rooms, or sleeping areas. *See* Ala. Code § 16-1-54; Ark. Code § 6-21-120; Idaho Code § 33-6603; Iowa Code § 280.33; Ky. Rev. Stat. § 158.189; N.D. Cent. Code § 15.1-06-21; Okla. Stat. tit. 70, § 1-125; Tenn. Code § 49-2-802. Plaintiffs' position threatens these exercises of traditional state authority without a clear statutory or constitutional basis.

Plaintiffs' approach to Title IX and the Equal Protection Clause, moreover, would inflict substantial compliance costs, leaving schools without the clear guidance they need to set workable policies and focus on their educational mission. According to plaintiffs, schools must let at least some students whose gender identity does not align with their sex use bathrooms designated for the opposite sex. *See* Opening Br. 23. But how are schools supposed to apply that standard? May schools require any supporting documents, or are they supposed to allow a student to use the opposite-sex bathroom based on their say-so? How long must a student identify with a gender before the student can demand access to an opposite-sex facility—a week, a month, a year? How are schools to

weigh conflicting evidence if the student's dress, behavior, legal name, or gender marker on the birth certificate do not align? Must schools now hire experts in gender dysphoria to evaluate students' self-proclaimed identities? All that schools know is that they will risk costly, time-consuming litigation whatever choice they make.

Other compliance difficulties abound. As the Supreme Court recognizes, schools have responsibility for the "discipline, health, and safety" of students. *Earls*, 536 U.S. at 830. Traditionally, schools have safeguarded student privacy and safety by separating students by sex to prevent unwanted bodily exposure. "[S]ex separation in bathrooms dates back to ancient times, and, in the United States, preceded the nation's founding." W. Burlette Carter, *Sexism in the "Bathroom Debates"*, 37 Yale L. & Pol'y Rev. 227, 229 (2018). That is why the Supreme Court acknowledged in *Virginia* that "admitting women to VMI would undoubtedly require alterations necessary to afford members of each sex privacy from the other sex in living arrangements." 518 U.S. at 550 n.19.

Notwithstanding the lineage of sex-segregated bathrooms and privacy justifications, plaintiffs simply dismiss privacy concerns. *See* Opening Br. 28. But what if students start complaining about another

student's use of a bathroom designated for the opposite sex, students fail to use individual stalls, or other students are afraid to express concern for their privacy out of concern the schools will "view them as bigoted"? *Students & Parents for Privacy v. Sch. Dirs. of Twp. High Sch. Dist. 211*, 377 F. Supp. 3d 891, 895 (N.D. Ill. 2019). May schools now treat privacy concerns as genuine? Or what if older buildings have "[n]o individual dressing rooms" and no dividers between urinals? *Veronia Sch. Dist. 47 v. Acton*, 515 U.S. 646, 657 (1995). Must schools now undertake costly building programs to refit facilities? Again, plaintiffs' approach to equal protection and Title IX leaves schools with nothing but questions.

The importance of the issue goes well beyond laws and policies regarding bathroom use. Whatever approach that courts take to the Equal Protection Clause and Title IX in the bathroom context invariably affects schools in other contexts. There can be "only be one definition of 'sex.'" *Adams III*, 57 F.4th at 821 (Lagoa, J., specially concurring). To protect the fairness of female sports and girls' safety, twenty-three States—not to mention school boards—have restricted participation on

girls' teams to the female sex.[1] But a contrary view of "sex" discrimination under Title IX and the Equal Protection Clause threatens those laws and policies to the detriment of girls across the nation. Already, this Court has held that excluding males who identify as female from girls' sports teams violates equal protection and Title IX. *See, e.g.*, *Hecox*, 79 F.4th at 1026-27.

Even outside the school environment, plaintiffs' approach to Title IX and equal protection presents issues. For instance, some courts have wrongly held that widely adopted laws[2] prohibiting experimental gender-

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[1] Ala. Code §16-1-52; Ariz. Rev. Stat. §15-120.02; Ark. Code §6-1-107; Fla. Stat. §1006.205; Idaho Code §33-6203; Ind. Code §20-33-13-4; Iowa Code §261I.2; Kan. Stat. §60-5603; Ky. Rev. Stat. §§156.070, 164.2813; La. Stat. §4:444; Miss. Code §37-97-1; Mo. Rev. Stat. §163.048; Mont. Code Ann. §20-7-1306; N.C. Gen. Stat. §116-401; N.D. Cent. Code §§15-10.6-02, 15.1-41-02; Okla. Stat. tit. 70, §27-106; S.C. Code §59-1-500; S.D. Codified Laws §13-67-1; Tenn. Code §§49-6-310, 49-7-180; Tex. Educ. Code §33.0834; Utah Code §53G-6-902; W. Va. Code §18-2-25d; Wyo. Stat. §21-25-102.

[2] Ala. Code §26-26-4; Ariz. Rev. Stat. §32-3230; Ark. Code §20-9-1502; Fla. Stat. §456.52; Fla. Admin. Code R.64B8-9.019; Ga. Code §31-7-3.5; Idaho Code §18-1506C; Ind. Code §25-1-22-13; Iowa Code §147.164; Ky. Rev. Stat. §311.372; La. Stat. §40:1098.2; 2023 Miss. Laws, H.B. No. 1125, §2; Mo. Ann. Stat. §191.1720; Mont. Code Ann. §50-4-1004; Neb. Rev. Stat. §71-7304; N.C. Gen. Stat. §90-21.151; N.D. Cent. Code §12.1-36.1-02; Okla. Stat. tit. 63, §2607.1; S.D. Codified Laws §34-24-34; Tenn. Code §68-33-103; Tex. Health & Safety Code §161.702; Utah Code §§58-67-502, -68-502; W. Va. Code §30-3-20.

transition procedures for minors must be subject to heightened scrutiny as well. *See, e.g.*, *Brandt v. Rutledge*, 47 F.4th 661, 670 (8th Cir. 2022); *K.C. v. Individual Members of Med. Licensing Bd. of Ind.*, ___ F.Supp.3d ___, 2023 WL 4054086 (S.D. Ind. 2023), *appeal pending*, No. 23-2366 (7th Cir.). (Other courts have properly applied rational-basis review to such challenges. *E.g.*, *Skrmetti*, 83 F.4th at 486; *Eknes-Tucker v. Gov. of Ala.*, 80 F.4th 1205, 1210 (11th Cir. 2023).) And since the Affordable Care Act expressly incorporates Title IX's anti-discrimination provision, 42 U.S.C. §18116, challenges along those lines have been launched too. *Koe v. Noggle*, ___ F.Supp.3d ___, 2023 WL 5339281, *13 n.7 (N.D. Ga. Aug. 20, 2023). This Court should not wield Title IX and the Equal Protection Clause to such detrimental effect.

CONCLUSION

The Court should affirm the district court's denial of a preliminary injunction.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the undersigned certifies that this brief complies with the applicable typeface, type-style, and type-volume limitations. This brief was prepared using a proportionally spaced type (Century Schoolbook, 14 point). Exclusive of the portions exempted by Federal Rule of Appellate Procedure 32(f), this brief contains 4,300 words. This certificate was prepared according to the word-count function of Microsoft Word, the word-processing program used to prepare this brief.

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I hereby certify that on December 22, 2023, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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