No. 23-2807

In the United States Court of Appeals for the Ninth Circuit

REBECCA ROE, BY AND THROUGH HER PARENTS AND NEXT FRIENDS; RYAN ROE; RACHEL ROE; SEXUALITY AND GENDER ALLIANCE, AN ASSOCIATION,

Plaintiffs-Appellants,

v.

DEBBIE CRITCHFIELD, IN HER CAPACITY AS IDAHO SUPERINTENDENT OF PUBLIC INSTRUCTION, ET AL.,

Defendants-Appellees.

On Appeal from the United States District Court
for the District of Idaho, The Hon. David C. Nye
(Dist. Ct. No. 1:23-cv-00315-DCN)

BRIEF OF AMICUS CURIAE DEFENSE OF FREEDOM INSTITUTE IN SUPPORT OF DEFENDANTS-APPELLEES SEEKING AFFIRMANCE OF DECISION OF COURT BELOW DENYING PRELIMINARY INJUNCTION

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CORPORATE DISCLOSURE STATEMENT

Counsel for *amicus curiae* certify that Defense of Freedom Institute for Policy Studies, Inc. is a nonprofit corporation, has no parent corporation, subsidiary, or affiliate and that no publicly held corporation owns more than 10 percent of its stock.

Dated: December 21, 2023

/s/*Donald A. Daugherty, Jr.*
Donald A. Daugherty, Jr.

STATEMENT OF INTEREST[1]

The Defense of Freedom Institute for Policy Studies ("DFI") is a national nonprofit organization dedicated to defending and advancing freedom and opportunity for every American family, student, entrepreneur, and worker and to protecting the civil and constitutional rights of Americans at school and in the workplace. DFI envisions a republic where freedom, opportunity, creativity, and innovation flourish in our schools and workplaces. Former senior leaders of the U.S. Department of Education who are experts in education law and policy founded DFI in 2021. DFI contributes its expertise to policy and legal debates concerning the proper scope and interpretation of Title IX, including submitting comments to the Department of Education concerning its rulemaking concerning *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 87 Fed. Reg. 41390 (proposed Jul. 12, 2022) (codified at 34 C.F.R. 106).

[1] No counsel for any party authored this brief in whole or in part, and no person or entity, other than amicus curiae or its counsel, contributed money to fund the brief's preparation or submission. All parties have consented to the filing of this brief.

SUMMARY OF ARGUMENT

In *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), the Supreme Court held that it is unlawful under Title VII of the Civil Rights Act of 1964 for an employer to fire an individual "merely for being gay or transgender" because such an action is necessarily based in part on the individual's biological sex. *Id.* at 1754. Some lower courts have relied on *Bostock*'s reasoning in the context of an entirely different statute, Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681 *et seq.*, to prohibit policies requiring students in public schools to use the bathroom designated for their biological sex. *See, e.g.*, *A.C. v. Metro. Sch. Dist. of Martinsville*, 75 F.4th 760 (7th Cir. 2023), *petition for cert. filed* No. 23-392 (October 11, 2023) (Indiana schools' policies regarding use of sex-separated bathrooms by transgender students violated Title IX); *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586 (4th Cir. 2020) (Virginia school board's policy requiring students to use bathrooms corresponding with their "birth-assigned sex" violated Title IX); *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034 (7th Cir. 2017) (Wisconsin school district's policy requiring students to use bathrooms designated

for their biological sex violated Title IX's prohibition of discrimination on the basis of sex). By contrast, the Eleventh Circuit has declined to extend *Bostock*'s reasoning to Title IX in the context of sex-separated bathrooms. *See Adams v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791 (11th Cir. 2022) (Title IX permitted Florida school officials to maintain policy separating bathrooms on the basis of biological sex).

In deciding the appeal now before it, this Court should side with the Eleventh Circuit in recognizing that the Supreme Court's decision in *Bostock* does nothing to supersede the plain meaning of "sex" in Title IX as a binary, biological distinction. *Bostock* contemplated entirely different conduct—hiring and firing adults—in an entirely different setting—the workplace—under a statutory scheme—Title VII—that is entirely distinct from Title IX. Significantly, unlike Title VII, binary, biological distinctions permeate Title IX, with its express, statutory carveout allowing for "separate living facilities" (*e.g.*, bathrooms) based on biological sex as the prime example, *see* 20 U.S.C. § 1686.

This Court should affirm the conclusion of the court below, *Roe v. Critchfield*, No. 1:23-cv-00315-DCN, ECF 60, slip op. at 11–12 (D. Idaho Oct. 12, 2023), that the text, common public meaning at the time of

enactment, and context and history of Title IX establish that the word "sex" for purposes of Title IX refers to a binary distinction between biological males and females. Interpreting Title IX's many uses of the term "sex" to encompass the concept of "gender identity" would not only contravene the plain meaning of the statute, but would also conflict with the very purpose of the law when passed by Congress in 1972: to ensure equal opportunities in education for girls and women. The proper place to address normative questions about the extent to which federal law should prohibit discrimination on the basis of "gender identity" is not the courts, but Congress, which has the constitutional power to legislate for the federal government, has the ability to consider fully the different nuances and consequences involved in policymaking, and is accountable to the public through elections.

The district court below correctly declined to grant plaintiffs' request to enjoin preliminarily Idaho Senate Bill 1100 ("S.B. 1100")—which requires students in Idaho public schools to use the bathroom or locker room designated for their biological sex and mandates sex-separated sleeping quarters for activities involving overnight lodging—from going into effect. *Critchfield*, at 1; 7–8 (describing S.B. 1100). This

Court should lift its stay on enforcement of S.B. 1100 and confirm that Title IX does not prohibit states from requiring that public schools separate bathrooms on the basis of sex as a binary, biological concept.

ARGUMENT

I. The Supreme Court's Holding in Bostock Does Not Bar State Laws Requiring That Students Use Public School Bathrooms, Locker Rooms, and Sleeping Quarters Based On Their Biological Sex.

A. As Distinct Statutory Schemes, Courts Must Evaluate Title IX's Framework Independently from That of Title VII.

The Supreme Court's holding in *Bostock* does not prohibit any state legislature from exercising its sovereign authority over public schools to require, due to interests in student privacy and safety, that students use the bathroom designated for their biological sex. Title IX is a distinct statutory scheme from Title VII under which "sex" can only be understood as a binary, biologically determined characteristic. Moreover, applying a broader definition of the term "sex" in Title IX directly conflicts with the text and purpose of Title IX, which seeks to level the playing field in education for men and women based on a binary, biological understanding of "sex."

To begin, Title VII makes it "unlawful . . . for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2. Thus, the Supreme Court in *Bostock* concluded that an employer unlawfully discriminates against an employee "when it intentionally fires an individual employee based in part on sex." *Bostock*, 140 S. Ct. at 1741. In doing so, the Court "proceed[ed] on the assumption that 'sex' . . . refer[s] only to biological distinctions between male and female." *Id.* at 1739.

Applying the same rule to the Title IX context, and based on the same assumption used by the ruling that "sex" in Title IX only refers to a binary, biological classification, there is no doubt that a school treats boys and girls differently when it declines to allow, for example, a biological girl to use a restroom designated for boys. The girl is, after all, being denied an opportunity to use the restroom that boys can access on the ground that she is a girl.

The critical difference between Title VII and Title IX is that, when Congress passed the latter, it specifically *removed* sex-separated "living facilities" from the reach of the law's prohibition of discrimination on the basis of sex. 20 U.S.C. § 1686 ("[N]othing contained [in Chapter 38] shall be construed to prohibit any educational institution receiving funds under this Act[] from maintaining separate living facilities for the different sexes."). In its regulations implementing Title IX, the Department of Education has long interpreted the Section 1686 "living facilities" carveout to permit educational institutions to provide "separate toilet, locker room, and shower facilities on the basis of sex" if the facilities "provided for students of one sex [are] comparable to such facilities provided for students of the other sex." 34 C.F.R. § 106.33. Thus, Title IX *explicitly permits* schools to engage in the kind of biological, binary distinctions that are at issue in the present case, making *Bostock* inapplicable here.

Moreover, *Bostock* explicitly disclaimed any extension of its interpretation of Title VII to Title IX. *Bostock*, 140 S. Ct. at 1753 (noting concerns about access to bathrooms, locker rooms, and dress codes before recognizing that "none of these other laws are before us"); *see also*

Critchfield, at 26 ("[T]he *Bostock* Court . . . made it painstakingly clear that its holding did not 'sweep beyond Title VII to other federal or state laws' or 'address bathrooms, locker rooms, or anything else of the kind.'") (quoting *Bostock*, 140 S. Ct. at 1753). *Bostock* acknowledged that a different statutory scheme could lead to a different result, stating that "we have not had the benefit of adversarial testing about the meaning of their terms, and we do not prejudge any such question today." *Bostock*, 140 S. Ct. at 1753. Given Section 1686's explicit carveout for sex-separated living facilities—a carveout that cannot be found in the text of Title VII—the Ninth Circuit should recognize, as the district court did below, that it would be inappropriate to apply *Bostock*'s holding to the context of bathrooms separated on the basis of biological sex under Title IX.

B. The Differences Between the Title VII and Title IX Statutory Frameworks Reflect Congressional Recognition of the Differences Between Schools and the Workforce.

Congress's inclusion of a carveout for sex-separated facilities in Title IX but not in Title VII reflects its broader recognition of the many material differences between the workplace and schools. *See, e.g.*, 118 Cong. Rec. 5807 (1972) (statement of Sen. Bayh) (explaining the inclusion

of the carveout as a matter of "permit[ting] differential treatment by sex . . . where personal privacy must be preserved"); *see also Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 651 (1999) ("Courts . . . must bear in mind that schools are unlike the adult workplace."); *Adams*, 57 F.4th at 808 (differentiating *Bostock* from Title IX by noting "the school is not a workplace"). As the Sixth Circuit has recognized, "Title VII differs from Title IX in important respects;" therefore, "it does not follow that principles announced in the Title VII context automatically apply in the Title IX context." *Meriweather v. Hartop*, 992 F.3d 492, 510 n.4 (6th Cir. 2021); *see also Davis*, 526 U.S. at 675 (Kennedy, J., dissenting) (stating that analogies between Title IX and Title VII "are inapposite, because schools are not workplaces and children are not adults").

Relatedly, courts should decline to apply the holding in *Bostock* to sex-separated school bathroom policies because the tradeoffs are different under Title IX and Title VII. *Bostock* addressed whether an employee could be terminated from employment based on sexual orientation or transgender status. Whether an employee can be fired based on sexual orientation is primarily a matter impacting employee

and employer, and does not directly impact the rights and opportunities of third parties.

By contrast, the application of Title IX to school bathroom policies does impact others. As the Supreme Court has acknowledged, "[p]hysical differences between men and women . . . are enduring: 'The two sexes are not fungible; a community made up exclusively of one sex is different from a community composed of both.'" *United States v. Virginia*, 518 U.S. 515, 533 (1996) (quoting *Ballard v. United States*, 329 U.S. 187, 193 (1946)) (cleaned up). Title IX recognizes these physical differences in Section 1686, as does the U.S. Department of Education in its implementing regulation at 34 C.F.R. § 106.33.

The Idaho legislature passed S.B. 1100 to protect the privacy and safety interests of public school students. *See Critchfield*, at 35 (The legislature wrote S.B. 1100 to achieve the goal of "protecting the privacy and safety of [Idaho's] youth while at school"). As such, this case requires weighing the trade-offs between affirming gender identities and protecting student privacy. *Bostock* provides no guideposts resolving these tradeoffs. *See Hecox v. Little*, 79 F.4th 1009, 1025 (9th Cir. 2023) (distinguishing *Adams* in equal protection challenge to state law on

school athletics by noting that "bathrooms by their very nature implicate important privacy interests and are not the equivalent of athletic teams") (footnote omitted).

C. Prohibiting States from Defining Sex-Separated Intimate Facilities Based on Biological Sex Impermissibly Prioritizes Derivative Rights over the Plain Statutory Text.

Bostock determined that Title VII protected discrimination based on sexual orientation by reasoning that "because of" sex incorporates a "but for" test and that a man would not be fired for dating a woman nor a woman fired for dating a man; therefore, the "but for" cause when terminating an employee based on sexual orientation was that employee's sex. *Bostock*, 140 S. Ct. at 1742. Protection of sexual orientation is thus a derivative consequence of protection because of sex.

By contrast, Title IX specifically contemplates binary, biological distinctions based on "sex" in bathrooms and other intimate facilities. The only way in which such sex separation, explicitly permitted by the statute, could violate a student's rights based on that student's "gender identity" would be if a student's gender identity could trump the term "sex" in the statute, without Congress ever having said so. As the Eleventh Circuit noted in *Adams*, interpreting "sex" to include gender

identity "would result in situations where an entity would be prohibited from installing or enforcing the otherwise permissible sex-based carve-outs when the carve-outs conflict with a transgender person's gender identity," an outcome that "cannot comport with the plain meaning of 'sex' at the time of Title IX's enactment and the purpose of Title IX and its implementing regulations, as derived from the text." *Adams*, 57 F.4th at 814. *Bostock* did not contemplate such a scenario, and this Court should decline to extend that case's reasoning to Title IX in this context.

D. The Ninth Circuit's Previous Application of *Bostock* in the Title IX Context Has No Bearing on the Sex-Based Separation of Living Facilities Expressly Permitted by Title IX.

In *Grabowski v. Arizona Board of Regents*, 69 F.4th 1110, 1116 (9th Cir. 2023), the Ninth Circuit recently applied *Bostock*'s reasoning to prohibit discrimination on the basis of sexual orientation under Title IX outside the context of sex-separated intimate facilities. Unlike the case at hand, *Grabowski* did not involve a policy that, like the separation of bathrooms on the basis of sex, was explicitly permitted under the statutory scheme of Title IX.[2]

[2] This Court also cited *Bostock* recently in enjoining preliminarily a state law that prohibited biological males from participating on public school

In *Grabowski*, this Court held that the plaintiff, who had experienced harassment on his college track team based on his perceived sexual orientation, could state a discrimination claim under Title IX. 69 F.4th at 1118. *Grabowski* relied on biological sex as a "but for" cause of the discrimination alleged by the plaintiff, just as the Supreme Court did in *Bostock*. *See Grabowski*, 69 F.4th at 1116 (applying *Bostock* to Title IX by holding "that discrimination on the basis of sexual orientation is a form of sex-based discrimination under Title IX").[3]

Such reliance is not possible, however, in the present case, where there is no discrimination on the basis of sexual orientation—only

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sports teams designated for girls and women. *Hecox*, 79 F.4th at 1026 (basing its holding in part on *Bostock*'s Title VII-based reasoning that "it is impossible to discriminate against a person for being . . . transgender without discriminating against that individual based on sex") (quoting *Bostock*, 140 S. Ct. at 1741). Because the plaintiffs moved for a temporary injunction based solely on their equal protection claims, *see Hecox* 79 F.4th at 1020, the decision provides no relevant, controlling analysis under Title IX.

[3] As the district court noted, the differing text, purpose, and history of Title IX make *Bostock*'s "but for" standard for discrimination under Title VII inappropriate in the Title IX context. *See Critchfield*, at 27 n.22 ("Because Title IX prohibits 'on the basis of sex,' the Court is hesitant to reflexively adopt *Bostock*'s 'because of sex' causation analysis."). However, even assuming, arguendo, that *Bostock*'s "but for" standard has some application under Title IX, it does not prohibit the type of distinctions made in the present case.

congressionally permitted separation of biological sexes in school bathrooms, locker rooms, and overnight accommodations. As the district court pointed out, S.B. 1100 draws lines only around each biological sex and treats neither better nor worse than the other. *Critchfield*, at 13 n.11 (noting that S.B. 1100 "distinguishes between the two sexes, but it does not advantage, or disadvantage, either"). Idaho's statute does not treat students differently based on sexual orientation; it only classifies them based on sex. That classification is undeniably permitted under the framework of Title IX, and *Bostock*, which assumed that "sex" in Title VII refers to biological sex, is relevant only to the extent that it actually *approves of* the kind of biology-based classification made by Idaho because Congress explicitly allowed states to make it.

Grabowski is also inapposite because it relied on Title VII's prohibition of discrimination based on traditional stereotypes about the way members of each sex should conduct themselves, *see* 69 F.4th at 1117. In contrast, Idaho's law is based on anatomical differences between the sexes, not inaccurate or pernicious stereotypes about them (e.g., men's bathrooms do not have urinals because of society's presumptions about how men should behave). In the context of "living quarters,"

Section 1686 eliminates any suggestion that similar substantive standards apply to Titles VII and IX.

II. The Text of Title IX Shows that "Sex" Refers to a Binary Distinction Between Biological Men and Women.

Because Title IX provides an exemption for educational institutions "maintaining separate living facilities *for the different sexes*," Section 1686 (emphasis added), a court must interpret that law by determining the original public meaning of the term "sex" in Title IX—and whether it encompasses the concept of "gender identity." *See Adams*, 57 F.4th at 811 ("[T]his appeal requires us to interpret the word 'sex' in the context of Title IX and its implementing regulations. We cannot, as the Supreme Court did in *Bostock*, decide only whether discrimination based on transgender status necessarily equates to discrimination on the basis of sex . . . ."); *see also Washington v. United States Dep't of State*, 996 F.3d 552, 560-562 (9th Cir. 2021) (relying on original public meaning of statutory text to determine extent of authority granted under it). Here, this Court should recognize that, based on the original public meaning of Title IX and the context in which it was passed, the term "sex" as used in that law means only "biological sex," and it specifically permits state

legislatures to require students in public schools to use the bathroom designated for their biological sex.

A. The Text of a Statute is Paramount in Assessing its Meaning.

"As with any question of statutory interpretation, our analysis begins with the plain language of the statute." *Jimenez v. Quarterman*, 555 U.S. 113, 118 (2009); *see also Marks v. Crunch San Diego, LLC*, 904 F.3d 1041, 1050 (9th Cir. 2018) ("'We begin [our analysis] with the plain language of the statute.'") (citation omitted); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 56 (2012) ("Scalia & Garner") ("As Justinian's Digest put it: *A verbis legis non est recedendum* ('Do not depart from the words of the law')." (quoting Digest 32.69 pr. (Marcellus))). "If the words of a statute are unambiguous, this first step of the interpretive inquiry is our last." *Rotkiske v. Klemm*, 140 S. Ct. 355, 360 (2019); *see also Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 951 (9th Cir. 2009). The Supreme Court has explained that it "normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment." *Bostock*, 140 S. Ct. at 1738; *see also Asgrow Seed Co. v. Winterboer*, 513 U.S. 179, 187 (1995) ("When

terms used in a statute are undefined, we give them their ordinary meaning.").

"It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *West Virginia v. Environmental Protection Agency*, 142 S. Ct. 2587, 2607 (2022) (quoting *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989)); *see also Scalia & Garner* at 56 ("The words of a governing text are of paramount concern, and what they convey, in their context, is what the text means."). "In ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole." *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988); *see also Marks*, 904 F.3d at 1050 (same); *Scalia & Garner* at 167–69 (describing the "whole-text canon" of statutory construction).

As Sir Edward Coke explained, "[I]t is the most natural and genuine exposition of a statute to construe one part of the statute by another part of the same statute, for that best expresseth the meaning of the makers." Scalia & Garner at 167 (quoting Edward Coke, *The First Part of the Institutes of the Laws of England, or a Commentary upon*

Littleton § 728 at 381a (1628; 14th ed. 1791)). Accordingly, "[i]f any section [of a law] be intricate, obscure, or doubtful, the proper mode of discovering its true meaning is by comparing it with the other sections, and finding out the sense of one clause by the words or obvious intent of the other." *Id*.

B. Congress's Use of the Term "Sex" Throughout Title IX to Refer to a Binary, Biological Classification Reveals Its Intent to Permit the Separation of Bathrooms on the Basis of Biological Sex.

The word "sex" in Title IX is unambiguous, a fact underscored by repeated references to binary distinctions between "boys" and "girls." and a complete absence of any reference to sexual orientation or gender identity.[4] For example:

- Section 1681(a)(5) refers to public universities with "a policy of admitting on students of *one sex*," 20 U.S.C. § 1681(a)(5) (emphasis added);

[4] Although not raised explicitly in the decision below, the use of gender identity to define "sex" opens the door to future issues regarding more than two genders, *see, e.g.*, *Hecox*, 79 F.4th at 1016; *Grimm*, 972 F.3d at 621 (Wynn, J., concurring), notwithstanding the clear congressional understanding that "sex" is binary for purposes of Title IX.

- Subsection (6)(B) refers to youth service organizations that have "traditionally been limited to persons of *one sex* . . .," *id.* at (6)(B) (emphasis added);
- Subsection 7 applies to "[b]oy or [g]irl conferences," *id.* at (7);
- Subsection (8) concerns "[f]ather-son or mother-daughter activities at educational institutions" and provides "if such activities are provided for students of *one sex*, opportunities for reasonably comparable activities shall be provided for students of *the other sex*," *id.* at (8) (emphasis added);
- Subsection (9) addresses "'beauty' pageants" in which "participation is limited to individuals of *one sex* only," *id.* at (9) (emphasis added); and
- Section 1681(b) likewise refers to "disparate treatment to the members of *one sex*," 20 U.S.C. § 1681(b) (emphasis added).

"In all but the most unusual situations, a single use of a statutory phrase must have a fixed meaning." *Cochise Consultancy, Inc. v. United States ex rel. Hunt*, 139 S. Ct. 1507, 1512 (2019). These references demonstrate that the word "sex" has only a biological, binary meaning—male or female—for the purposes of Title IX.

C. Interpreting "Sex" to Encompass "Gender Identity" Would Frustrate Congress's Purpose in Passing Title IX to Address Pervasive Discrimination Against Women and Girls in Education

When Congress passed Title IX in 1972, it sought to address pervasive sex discrimination in education, particularly against women and girls and in favor of men and boys. *See Neal v. Bd. of Trustees*, 198 F.3d 763, 766 (9th Cir. 1999) ("Title IX was Congress's response to significant concerns about discrimination against women in education."); *Adams*, 57 F.4th at 811 (The "purpose" of Title IX, "as derived from its text, is to prohibit sex discrimination in education."). "[T]he concept of discrimination 'because of,' 'on account of,' or 'on the basis of' sex was well understood" because it "was part of the campaign for equality that had been waged by women's rights advocates for more than a century" and "meant . . . equal treatment for men and women." *Bostock*, 140 S. Ct. at 1769 (Alito, J., dissenting). There is no evidence that this concept included discrimination against, for example, biological males who identify as females in favor of other biological males. In any event, unlike Congress, courts are not equipped to decide such fundamental issues, particularly where, as here, Congress has clearly demonstrated a binary, biological understanding of "sex" under Title IX.

Before Congress enacted Title IX, government reports, congressional statements, and legislative hearings made abundantly clear that Congress was interested in addressing discrimination against women, particularly in the context of education, and placed the phrase "on the basis of sex" squarely within that context.

In 1970, Representative Martha Griffith, who was one of the most forceful advocates for the addition of "sex" to Title VII of the Civil Rights Act, "gave the first speech ever in the U.S. Congress on the discrimination against women in education," stating in part that "[i]t is shocking and outrageous that universities and colleges, using Federal moneys, are allowed to continue treating women as second-class citizens, while the Government hypocritically closes its eyes." Peg Pennepacker, *The Beginning of Title IX—The Bernice Sandler Story*, National Federation of High School Associations (May 12, 2022), https://tinyurl.com/4durjc49; *see also* 116 Cong. Rec. 6398–6400 (Mar. 9, 1970); Robert C. Bird, *More than a Congressional Joke: A Fresh Look at the Legislative History of Sex Discrimination of the 1964 Civil Rights Act*, 3 Wm. & Mary J. Women & L. 137 (1997).

In April 1970, the President's Task Force on Women's Rights and Responsibilities issued a report warning that "[s]o widespread and pervasive are discriminatory practices against women that they have come to be regarded, more often than not, as normal." *A Matter of Simple Justice: The Report of the President's Task Force on Women's Rights and Responsibilities*, III (Apr. 1970), https://tinyurl.com/y4yc49rk. Presaging what would become Title IX, the Task Force also recommended that Congress amend the Civil Rights Act to "authorize the Attorney General to aid women and parents of minor girls in suits seeking equal access to public education, and to require the Office of Education to make a survey concerning the lack of equal educational opportunities for individuals by reason of sex." *Id*. at IV.

In May 1970, the House and Senate held multiple hearings on and eventually proposed the Equal Rights Amendment to the Constitution, including debating legislation to prevent discrimination against women at American universities. *See* 86 Stat. 1523, 92nd Cong., 2nd Sess. (1972).

In June and July 1970, Congress held hearings on discrimination against women, which sought to prohibit discrimination "on the basis of sex," including in the educational context, placing the phrase "on the

basis of sex" squarely within the context of the treatment of women. *See Discrimination Against Women, Hearings Before the Special Subcommittee on Education of the Committee on Education and Labor of the House of Representatives*, 91st Cong., 2d Sess. (June 1970), https://tinyurl.com/3ardwkve.

In July 1970, Rep. Abner Mikva introduced the Women's Equality Act of 1970, a bill to prohibit discrimination against women in federally assisted programs, government employment, and employment in educational institutions, noting that "[i]t is surprising and inexcusable that the quality of life Americans have sought for nearly 200 years is in many ways denied female Americans by law." 116 Cong. Rec. 22,681–82.

This focus continued in the lead-up to Title IX's enactment. In September 1971, the "father of Title IX," Senator Birch Bayh, introduced a bill that was eventually largely included in Title IX, the Women's Educational Equality Act, 92 S. 2185, 117 Cong. Rec. 22,740-43. *See* Akeem Glaspie, *"Father of Title IX" Birch Bayh Leaves Lasting Legacy for Women's Sports*, IndyStar (Mar. 14, 2019), https://tinyurl.com/4a44aase. In doing so, Senator Bayh stated, "The bill I am submitting today will guarantee that women, too, enjoy the

educational opportunity every American *woman* deserves." 117 Cong. Rec. 32,476 (Sept. 20, 1971).

This focus on women was consistent with Senator Bayh's statements while attempting to introduce similar legislation earlier in 1971. At that time, Senator Bayh stated, "To my mind our greatest legislative failure relates to our continued refusal to recognize and take steps to eradicate the pervasive, divisive, and unwarranted discrimination against a majority of our citizens, the *women* of this country." 117 Cong. Rec. 22,735–43 (Jun. 29, 1971) (emphasis added). Senator Bayh further urged that the legislation would "narrow the gap between our obligations and our performance by giving to women the benefit of the major civil rights legislation of the last decade" and noted that it would "implement[] the recommendations of the President's Task Force on Women's Rights and Responsibilities." *Id.*

Likewise, when Title IX was introduced in the House, it was defended in terms of promoting equality for women. To wit, Representative Edith Green stated, "All that this title does is to ask that a woman be considered as a human being, that her qualifications, her high-school work and other qualifications be considered in the same

fashion of those of a male applicant." 117 Cong. Rec. 39,259 (Nov. 4, 1971).

Introducing in February 1972 an amendment to S. 659 that prohibited the government from providing federal financial assistance to educational institutions that engaged in sex discrimination, Sen. Bayh noted, "While the impact of this amendment would be far-reaching, it is not a panacea. It is, however, an important first step in the effort to provide for the women of America something that is rightfully theirs—an equal chance to attend the schools of their choice, to develop the skills they want, and to apply those skills with the knowledge that they will have a fair chance to secure the jobs of their choice with equal pay for equal work." 118 Cong. Rec. 5808 (Feb. 28, 1972).

Congress passed Title IX to rectify discriminatory treatment of women. Issues regarding "gender identity" and the treatment of students who do not identify with their biological sex are wholly absent from the legislative record. Interpreting the term "sex" to prohibit state laws requiring students in public schools to use the bathroom designated for their biological sex threatens to frustrate the statutory purpose of Title IX. As Justice Alito pointed out in his dissent in *Bostock*, "[f]or women

who have been victimized by sexual assault or abuse, the experience of seeing an unclothed person with the anatomy of a male in a confined and sensitive location such as a bathroom or locker room can cause serious psychological harm." *Bostock*, 140 S. Ct. at 1779 (Alito, J., dissenting). Congress specifically addressed these interests by carving out "living facilities" from Title IX's discrimination prohibitions; interpreting the law to prohibit laws or policies separating bathrooms on the basis of biological sex would ignore not only the text and structure of Title IX but also congressional intent and its very purpose of advancing opportunities for women and girls in educational programs and activities.

III. Whether to Expand the Scope of Title IX is a Question Properly Left to Congress, Not the Courts.

"Today, many Americans know individuals who are gay, lesbian, or transgender and want them to be treated with the dignity, consideration, and fairness that everyone deserves." *Bostock*, 140 S. Ct. at 1784 (Alito, J. dissenting). Nevertheless, "the authority of this Court is limited to saying what the law *is*," not what one might like it to be. *Id*. (emphasis added). This Court should not substitute its judgment for the will of a state legislature accountable to the people where that state has enacted

a student privacy law that does not violate Title IX, and any change to the federal statute must come from Congress.

Even if the word "sex" were somehow ambiguous (it is not), it would still not support expanding its meaning to include such a fluid, undefined term as "gender identity." As a legal and practical matter, Congress is the proper venue to address the application of Title IX to gender identity, not the courts. *Cf. Critchfield* at 34–35 ("The Court . . . must stay in its lane. It cannot provide guidance on how elected officials *should* navigate these difficult situations. It can only decide whether the action they have taken withstands constitutional scrutiny."); *id.* at 35 (quoting *L.W. v. Skrmetti*, 83 F.4th 460, 491 (6th Cir. 2023)) ("[L]ife-tenured judges construing a difficult-to-amend Constitution should be humble and careful about announcing new substantive due process or equal protection rights that limit accountable elected officials from sorting out these medical, social, and policy challenges.").

As Justice Gorsuch has observed, "[l]egislators can be held accountable by the people for the rules they write or fail to write; typically judges cannot." *Democratic Nat'l Comm. v. Wis. State Legis.*, 141 S. Ct. 28, 29 (2020) (Gorsuch, J., concurring in denial of application to vacate

stay). Similarly, "[l]egislatures make policy and bring to bear the collective wisdom of the whole people when they do" and "enjoy far greater resources for research and fact finding on questions of science and safety than usually can be mustered in litigation between discrete parties before a single judge." *Id.*

Perhaps most importantly, "[i]n reaching their decisions, legislators must compromise to achieve the broad social consensus necessary to enact new laws, something not easily replicated in courtrooms where typically one side must win and the other lose." *Id.*; *see also West Virginia*, 142 S. Ct. at 2618 (Gorsuch, J., concurring) ("By effectively requiring a broad consensus to pass legislation, the Constitution sought to ensure that any new laws would enjoy wide social acceptance, profit from input by an array of different perspectives during their consideration, and thanks to all this prove stable over time.") (citing James Madison, *Federalist 10* (Nov. 23, 1787)). The result is that "[t]he need for compromise inherent in this design also sought to protect minorities by ensuring that their votes would often decide the fate of proposed legislation—allowing them to wield real power alongside the majority." *West Virginia*, 142 S. Ct. at 2618 (Gorsuch, J., concurring).

Questions about controversial issues such as access to sex-separated bathrooms and locker rooms are policy questions that would benefit from the legislative process and should be resolved by Congress (if not the states). They are also issues that necessarily involve trade-offs between the preferences of persons with gender identities that differ from their biological sex and women, the class of people Title IX was enacted to protect.

Rejecting the concept of sex as binary, private companies like Facebook have given users the option of selecting among at least 58 different gender identities. Russell Goldman, *Here's a List of 58 Gender Options for Facebook Users*, ABC News (Feb. 13, 2014),http://tinyurl.com/z2ej72st. Which ones constitute protected classifications and on what terms? As gender identity and sexual orientation are perceived as more fluid and less defined, what classifications are legally protected and what are simply matters of personal taste or preference?

These are not easy questions. Answering them requires making complex policy and value judgments, which are best made by a Congress that has access to a wide variety of views, not just those of the parties

before this Court, a greater competence to assess scientific and safety claims, and the ability to adopt stable, nuanced compromises that defy black-and-white determinations. Accordingly, Congress—not the courts—is the best and proper place to resolve questions about whether and how Title IX should apply to gender identity.

CONCLUSION

For the foregoing reasons, the Court should affirm the district court's denial of a preliminary injunction.

Respectfully submitted,

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Dated: December 21, 2023

/s/ *Donald A. Daugherty, Jr.*
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