No. 23-2807

In the 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 Institution, *et al.*,
Defendants-Appellees.

On Appeal from the United States District Court
for the District of Idaho
Case No. 1:23-cv-00315-DCN

BRIEF OF *AMICUS CURIAE* FOUNDATION FOR MORAL LAW IN SUPPORT OF APPELLEES AND AFFIRMANCE

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DISCLOSURE STATEMENT

Amicus makes the following disclosures under Fed. R. App. P. 26.1:

1. **Is any *Amicus* a subsidiary or affiliate of a publicly owned corporation?**

No. *Amicus Curiae* Foundation for Moral Law, Inc. has no parent company and has not issued stock.

2. **Is there a public corporation not a party to the appeal or an *Amicus* that has a financial interest in the outcome?**

None known.

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INTEREST OF THE *AMICUS*[1]

Amicus curiae Foundation for Moral Law ("the Foundation") is a 501(c)(3) non-profit, national public interest organization based in Montgomery, Alabama, dedicated to defending religious liberty, God's moral foundation upon which this country was founded, and the strict interpretation of the Constitution as intended by its Framers, who sought to protect both. To those ends, the Foundation directly assists, or files *amicus* briefs, in cases concerning religious freedom, the sanctity of life, and other issues that implicate the God-given freedoms enshrined in our Bill of Rights.

The Foundation has an interest in this case because it believes that sex is determined at conception and cannot be changed by social or medical intervention and that separating intimate spaces by sex is a necessary measure to ensure the safety of public-school children that does not violate the Constitution.

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[1] No party or party's counsel authored this brief in whole or in part, or contributed money that was intended to fund its preparation or submission; and no person other than the *amicus curiae*, its members, or its counsel, contributed money that was intended to fund the preparation or submission of this brief.

ARGUMENT

Appellants challenge Idaho's Senate Bill 1100 as a violation of Equal Protection and Due Process. However, under the text, history, and tradition of the Fourteenth Amendment, their claims fail. S.B. 1100 was passed to protect Idaho's K-12 students by separating showers, locker rooms, bathrooms, and similar intimate spaces in public schools by sex.

I. S.B. 1100 does not violate the Equal Protection Clause because biological males and biological females are not "similarly situated."

The Fourteenth Amendment's Equal Protection Clause provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws."[2] Since expanding the Equal Protection Clause to include discrimination on the basis of sex in the 1971 case *Reed v. Reed*, 404 U.S. 71, the Supreme Court has articulated a primary principle for the Equal Protection Clause's reach: All persons "similarly situated" or "who are in all relevant respects alike" should be treated alike.[3]

Appellants' arguments, supposedly based on Title IX and the Fourteenth Amendment from which Title IX derives its power, miss this fundamental principle. A biological male who identifies as female is not similarly situated nor

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[2] U.S. Const. amend. XIV, § 1.

[3] *See City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985); *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992).

alike in any relevant respect to biological females—especially not in the education context of Title IX. In the education context, dealing with bathrooms, locker rooms, housing, and athletics, the primary relevant respect in question is biological anatomy. Therefore, a law that treats biological males like other biological males (regardless of their gender identity) does not violate the Equal Protection Clause.

This is why Title IX specifically allows for sex-separated toilet, locker room, and shower facilities, so long as they are "comparable" to each other[4]: Public students of different biological sexes are not "similarly situated" in the relevant (physical) respects. Gender identity discrimination in this context does not violate the Equal Protection Clause. Thus, as the District Court held below, "unless and until Congress amends Title IX, the concept of separating facilities based on sex is not a form of discrimination actionable under Title IX."[5]

II. Appellants' due process challenge fails the text, history, and tradition test.

Appellants argue that their Fourteenth Amendment right to privacy extends to prohibit the government from revealing anyone's transgender status against their will. As a preliminary matter, the government action of separating most school bathrooms by sex does not inherently expose any transgender student. However,

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[4] 34 C.F.R. § 106.33.

[5] *Roe v. Critchfield*, No. 1:23-cv-315, 2023 WL 6690596, at *27 (D. Idaho Oct. 12, 2023).

even if it did, Appellants' due process challenge would still fail because there is no substantive due process right to privacy in transgender status.

Under *Dobbs v. Jackson Women's Health Organization*,

> the "established method of substantive-due-process analysis" requires that an unenumerated right be "'deeply rooted in this Nation's history and tradition'" before it can be recognized as a component of the "liberty" protected in the Due Process Clause.[6]

In *New York State Rifle & Pistol Association v. Bruen*, the Supreme Court also articulated a history and tradition test for determining whether a law violates the Second Amendment right to bear arms.[7] In *Kennedy v. Bremerton School District*, the Court again looked to history and tradition in formulating the test for the consistency of state action with the Establishment Clause.[8]

The Appellants' due process challenge fails the history and tradition test. There is no right to keep one's transgender status concealed anywhere in our Nation's history; let alone a right to access the opposite sex's private spaces in order to keep that status concealed. To the contrary, the history and tradition of this Nation reflect that in the interests of safety and privacy, showers, locker rooms, bathrooms, and similar intimate spaces, have been separated by sex by law and custom without exception for those with a conflicting gender identity.

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[6] 597 U.S. 215, 251 (2022) (quoting *Washington v. Glucksberg*, 521 U. S. 702, 721 (1997); *cf. Timbs v. Indiana*, 139 S. Ct. 682, 689 (2019)).
[7] 597 U.S. 1 (2022).
[8] No. 21-418, 2022 WL 2295034 (U.S. 2022).

A. The separation of intimate spaces by sex began in ancient times.

The Holy Bible, one of the documents integral to our history and tradition, supports the separation of private spaces by sex. Much of Western legal tradition has been shaped by the Bible. On October 4, 1982, Congress passed Public Law 97-280, declaring 1983 the "Year of the Bible," and the President signed it into law.[9] It read in part:

> Whereas the Bible, the Word of God, has made a unique contribution in shaping the United States as a distinctive and blessed nation and people;
>
> Whereas deeply held religious convictions springing from the Holy Scriptures led to the early settlement of our Nation;
>
> Whereas Biblical teachings inspired concepts of civil government that are contained in our Declaration of Independence and the Constitution of the United States.[10]

Although many today no longer believe the Bible is an authoritative source of law, the evidence establishes that most of those who framed our Constitution and our civil institutions did regard the Bible as an authoritative source of law, as did most of the jurists and legal philosophers the Framers quoted and relied upon.[11]

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[9] Joint Resolution, Pub. L. No. 97-280, 96 Stat. 1211 (1982), https://www.govinfo.gov/content/pkg/STATUTE-96/pdf/STATUTE-96-Pg1211.pdf.

[10] *Id.*

[11] *See* Daniel L. Driesbach & Mark David Hall, *Great Jurists in American History* (2018); I, II & III John Eidsmoe, *Historical and Theological Foundations of Law* (2017); Donald S. Lutz, *The Relative Influence of European Writers on Late Eighteenth Century American Political Thought*, 78 Am. Pol. Sci. Rev. 189 (1984);

Joshua Berman, Senior Editor at Bar-Ilan University, in his 2008 book *Created Equal: How the Bible Broke with Ancient Political Thought*, explained how fundamental the Pentateuch is to our "history and tradition" and how it was particularly significant to the development of the ideas underlying Fourteenth Amendment Due Process Clause because it was the world's first model of a society in which politics and economics embrace egalitarian ideals. Berman wrote:

> If there was one truth the ancients held to be self-evident it was that all men were not created equal. If we maintain today that, in fact, they are endowed by their Creator with certain inalienable rights, then it is because we have inherited as part of our cultural heritage notions of equality that were deeply entrenched in the ancient passages of the Pentateuch.[12]

The Bible is therefore relevant to law and public policy today, and the Bible does speak to the issue of sexual modesty. For example, according to *Genesis* 9:20–27, after the Flood, Noah became a husbandman, drank of the fruit of his vineyard, laid naked in his tent, and was observed by his son, Ham. Learning of

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John Eidsmoe, *Christianity and the Constitution: The Faith of Our Founding Fathers* (1987); I & II Charles S. Hyneman & Donald S. Lutz, *American Political Writing During the Founding Era* (1983).

[12] Joshua Berman, *Created Equal: How the Bible Broke with Ancient Political Thought* 175 (2008). *See also* John Marshall Gest, *The Influence of Biblical Texts Upon English Law*, an address delivered before the Phi Beta Kappa and Sigma xi Societies of the University of Pennsylvania, at 16 (Jun. 14, 1910) https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=7211&context=penn_law_review) ("The law of England is not taken out of Amadis de Gaul, nor the Book of Palmerin, but out of the Scripture, of the laws of the Romans and the Grecians") (quoting Sir Francis Bacon).

this, Noah's other sons immediately brought a garment to cover him. So careful were they to respect their father's privacy that they walked into and out of the tent backwards so they would not see their father's nakedness.

Beginning right after the Fall,[13] the Bible treats nakedness (physical or otherwise) as a matter of shame.[14] In *Leviticus*, Moses uses a Hebrew term that means to "uncover nakedness" in his discussion of sexual sin to repeatedly command against "uncovering the nakedness" of relatives and married women.[15] In contrast, covering someone's nakedness is considered in the Bible to be an act of virtue.[16]

> *Deuteronomy* 22:5 (King James) says that
>
> > woman shall wear that which pertaineth to a man, neither shall a man put on a woman's garment: for all that do so are an abomination to the Lord thy God.

The Bible clearly teaches that the sexes are different and that sexual privacy between them must be respected. That there should be separate bathrooms for men and women is a natural implication of that respect for privacy.

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[13] *See Genesis* 3.
[14] *See Exodus* 20:26; *Deuteronomy* 28:48; *Isaiah* 47:3, 57:8; *Lamentations* 1:8; *Ezekiel* 16:39, 23:18; *Hosea* 2:9–10; *Micah* 1:8; *Nahum* 3:5; *Habakkuk* 2:15; *Revelation* 3:18, 17:16.
[15] *See Leviticus* 18 (King James).
[16] *See Ezekiel* 16:7–11; *II Chronicles* 28:15; *Matthew* 25:34–40.

Thus, artwork indicates that separation by sex was very widely practiced in ancient times.[17] A Bas-relief of a tomb at Thebes shows a bathing Egyptian woman, surrounded by female servants.[18] Pictures of Greek showers that have survived on vases and artifacts show sex-separated baths.[19] And it is certain that from about the sixth to the third century B.C., the Greeks had large public baths designated for women only.[20]

In the Roman Empire, there were different hours for women and men to bathe, and, in some baths, there were separate compartments for men and women.[21] When the practice of mixing sexes started becoming more common in the culture, between 117 and 138 A.D., Emperor Hadrian issued an edict requiring separation of the sexes in Roman public baths.[22] Interestingly, at this time, public toilets were

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[17] *See* Hugo Blumner, *The Home Life of the Ancient Greeks* 158, 161 (1895) (Alice Zimmern trans., 1914) (Fig. 85 & 87) (an illustration of a women's public bath taken from an ancient vase painting that shows women showering together—but only women); Lawrence Wright, *Clean and Decent: The Fascinating History of the Bathroom and the Water Closet* 11 (1960); Albrecht Diirer's renderings of the *Men's Bath* and the *Women's Bath*, circa 1496.

[18] Wright, *supra* note 17 at 11.

[19] *See* S.W. Kelly, *Greek Open-Air Shower Baths for Men* (1937), Wellcome Collection, https://wellcomecollection.org/works/c69emt7t?query=LEYDEN.

[20] Blumner, *supra* note 17 at 159.

[21] *See* Lucy Cleveland, *The Women's Baths of Pompeii*, 7 Mod. Sanitation 186, 187–88 (1910); *see also* Mimari Arastialari, *The Roman Baths of Lycea, An Architectural Study* 45, 117 (1995).

[22] *See* Ray Bowen Ward, *Women in Roman Baths*, 85 Harv. Theo. Rev. 125, 139 (1992) (citing 1 *Scriptores Historiae Augustae* 57 (David Magie trans., 1921)) ("The history of Cassius Dio Cocceianus records that Hadrian 'also commanded

usually shared between the sexes because using these facilities was considered a social activity.[23]

B. According to our history, the tradition of the West is to separate intimate spaces by sex.

In the Middle Ages, public toilets became uncommon as it became customary to urinate and defecate wherever convenient.[24] But, changing attitudes regarding hygiene starting in the 16th century eventually led to a resurgence of public toilets in the 19th century.[25] And this is where scholars diverge. All agree that from the 16th to 19th century, the concept of civility and the ideology of gender led to visual privacy and spatial separation of the sexes being introduced into public toilet design.[26] However, many claim that "the very first instance of

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them [men and women] to bathe separately'"); Joseph Lavalee, *Travels in Istria and Dalmathia; Drawn Up From the Itinerary of L.F. Cassas* 97 (1805) ("The emperors Adrian, Marcus Aurelius, and Alexander Severus, wished the two sexes to have their baths apart; but the prevalence of licentiousness constantly induced the people to evade the decrees on this subject, and these disgraceful proceedings were not entirely abolished till after Constantine; and even then, perhaps, only to give place to a corruption of another kind, and to satisfy the jealous though not less libidinous passions of a few innovators").

[23] Dara Blumenthal, *Little Vast Rooms of Undoing: Exploring Identity and Embodiment Through Public Toilet Spaces* 71–91 (2014).

[24] *Id.*

[25] *Id.*

[26] Barbara Penner, *A world of unmentionable suffering: Women's public conveniences in Victorian London*, 14 Journal of Design History 35 (2001).

sex-separation in public bathrooms occurred in 1739 at a ball . . . in Paris."[27] They argue that public facilities in Western nations were male-only until the Victorian era, so sex-separation in public toilets emerged only after that.[28] And they say that classism, essentially, led to sex-separation in bathrooms and other intimate spaces.[29]

However, this is untrue. Opponents of this theory have thoroughly rebutted it. Namely, W. Burlette Carter, in her article for the *Yale Law & Policy Review*, *Sexism in the "Bathroom Debates": How Bathrooms Really Became Separated by Sex*, established that it was really "women's struggles with rape and sexual harassment" and "their fight for safety within intimate spaces" that led to the

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[27] W. Burlette Carter, *Sexism in the "Bathroom Debates": How Bathrooms Really Became Separated by Sex*, 37 Yale Law & Pol'y Rev. 227, 227, 241, 254 (2018); *see also* Terry S. Kogan, *How Did Public Bathrooms Get to Be Separated by Sex in the First Place?*, AP News (May 26, 2016), https://apnews.com/634c2e566e024c5b9aff3c04ca7550e7/how-did-public-bathrooms-get-be-separated-sex-first-place; Stephanie Pappas, *The Weird History of Gender-Segregated Bathrooms*, Live Sci. (May 9, 2016), https://www.livescience.com/54692-why-bathrooms-are-gender-segregated.html; Sheila L. Cavanagh, *Queering Bathrooms: Gender, Sexuality And the Hygenic Imagination* 20 (2010).

[28] Carter, *supra* note 27 at 240; Kathryn H. Anthony & Meghan Dufresne, *Potty Parity in Perspective: Gender and Family Issues in Planning and Designing Public Restrooms*, 21 Journal of Planning Literature 267 (2007); Blumenthal, *supra* note 23 at 71–91.

[29] *See* Carter, *supra* note 27 at 237–38, 254–55 (discussing the theories of Cavanagh and Kogan).

separation of the sexes in public bathrooms and like spaces.[30] Carter argued, with thorough research in support, that sex-separation was the standard long before the 1739 Parisian ball, by surveying all of the relevant history.[31] Much of the research in this brief comes from her article.

It has been established that the norm of sex-separation existed in ancient times. Moving forward toward the founding of the United States, sex-separation of intimate spaces persisted. In London in the late 1600s, a public bath was established and, to access it,

> [m]edals or tokens, bearing the figure of a man for men's baths and a woman for women's baths, with the respective days of admission, were issued."[32]

In a 1726 satire on bathrooms, writer Jonathan Swift mocked the notion of the nobility using the toilet.[33] He proposed the establishment of public restrooms for the noble and, in describing his design, stated that "[m]en occupy the Right Hand of the Square, and the other Sex the Cells on the Left from the grand Entrance."[34] Thus, in commenting on public bathrooms, this 18th century author *assumed* sex-separation. In fact, years previously, around 1720, Swift had built two

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[30] *Id.* at 254.
[31] *See id.* at 258–90.
[32] Robert Owen Allsop, *Public Baths and Washhouses* 2 (1894).
[33] Jonathan Swift, *The Grand Mystery, or Art of Meditating over an House of Office, Restor'd and Unveil'd* (1726).
[34] *Id.* at 6, 14–15.

sex-separated privies on a married couple's estate.[35] And he spoke again of separate spaces in his 1732 poem, "The Lady's Dressing Room."[36] In it, a fictional man sneaks into a ladies dressing room and toilette and is shocked at the sights and smells.[37] Again, Swift did not question sex-separation.

Therefore, by the 1739 ball in Paris (which could be more acurately called a wedding ball, or masquerade[38]), bathroom sex separation was respected as the norm. And interestingly, masquerades were an especially unlikely place to find such a rule, since there is evidence that "sexual minorities enjoyed the masquerades."[39] Carter says, "[t]hey may even have considered them safe space."[40] According to a 1729 court proceeding, "a male[] who regularly assumed a female persona" attended them.[41] Even more striking, we know that in attendance was the Duke d'Orleans, "the King's uncle (who served as regent when Louis XV was a

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[35] *See* Danielle Bobker, *The Shape of Intimacy: Private Space and the British Social Imagination, 1650–1770*, 108 & n.4 (2007) (unpublished Ph.D. dissertation, Rutgers University), https://rucore.libraries.rutgers.edu/rutgers-lib/24027/PDF/1/ play; Jonathan Swift, *The Works of Jonathan Swift*, 174, 180 (Sir Walter Scott ed. 1883).

[36] Jonathan Swift, *The Lady's Dressing Room*, Poetry Found., https://www.poetryfoundation.org/poems/50579/the-ladys-dressing-room.

[37] *Id.*

[38] Carter, *supra* note 27 at 227.

[39] *Id.* at 265.

[40] *Id.*

[41] *Id.*

child)," and that he had "a tendency of wearing female clothing and having male lovers."[42]

In light of this, it is even more significant that sex separation was instituted at that ball. It means that, by 1739, the separation of bathrooms by sex must have been respected as the norm for so long and so resolutely that even the transgender people of the day (even those from the upper-crust of society) were expected to comply according to their biological sex.

Carter argues that the author who retold the story of the 1739 ball and who likley started the tale that it was the first instance of sex-separated bathrooms, was not meaning to imply that the sex-separation was unusual or noteworthy, but that,

> in italicizing the words for bathrooms (or dressing rooms), [the author] was underscoring that *even the masquerades*, which were to be about fun and frolic, were subject to certain limits. The treatment of bathrooms in this case was a message that there could be absolutely *no* deviations from a binary, heterosexual norm.[43]

C. In America, public baths, bathrooms, and similar intimate spaces have always been separated by sex.

"If we come forward a few decades," Carter writes, turning to American history, "we see that sex-separated facilities remained the norm, even among lower classes."[44] In America in the late 1700s and early 1800s, public baths often

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[42] *Id.* at 266.
[43] *Id.*
[44] Carter, *supra* note 27 at 267.

advertised that they were open to women and explicitly noted the separation of the sexes.[45] Carter discussed several examples:

> An early example of both the benign and presumptively natural approach of sex-separation is found in a letter written to a New York newspaper in 1786. The letter describes the Healing Springs [in what is now Blackville, South Carolina]. A year before the United States Constitution was written and absent any overbearing governmental authority or business directive, bathers established separation by sex as the bathing norm. The letter states:
>
> "A description of this very curious mineral spring I presume would not be amiss-The main spring is about twenty-eight feet in circumference; at present it is in a state of nature, being surrounded with an impenetrable thicket, except where there is a small gap, by which it empties itself into the river, and at which place the people go in to bathe; so that those above are entirely excluded from the sight of those in the bath. Give me leave to insert the regulations which they have made, and which they strictly adhere to.-The women have the use of these springs in the morning till nine o'clock;-during this time an apron is suspended upon a pole erected for that purpose at the entrance of the gap; from that time till twelve o'clock the men have the use of them, and then they hang a hat upon the same pole; while these signals are displayed; the springs are sacred from all intruders."[46]

According to this letter, by America's founding, "people deemed it natural to separate themselves by sex when performing intimate activities like bathing."[47] And the evidence shows that Healing Springs was definitively a public space.[48]

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[45] *Id.* at 270.
[46] *Id.* at 268–69 (quoting *Extract of a Letter from Little River, Ninety Six District*, Loudon's New-York Packet, at 2 (Jun. 1, 1786)).
[47] *Id.* at 269.
[48] *Id.*

In 1796, seven years after the ratification of the U.S. Constitution, a New York bathing house advertised "[c]old bathing for the ladies in the back apartments, two shillings each time."[49] In 1808, the Nantucket Bathing House advertised,

> [o]ur Bathing-house, like those in *Boston*, *New- York*, *&c.* is separated into two main divisions—one for males, the other for females.—The rooms are subdivided into several apartments . . . accommodating for one person.[50]

As Carter points out, "[t]he reference to 'Boston, New-York, &c.' suggests that sex-separation was deemed customary at the time."[51]

In 1811, there was another New York bath house offering one-person tubs with men's baths in one part of the house and women's baths in the other.[52] At the New York Marine Bath in 1817, according to an advertisement,

> The large or public bath [was] exceedingly spacious, and the private baths very numerous and convenient. There [were] also two *Shower Baths*, one in the Ladies' and the other in the Gentlemen's apartments.[53]

In 1813, a newspaper advertised the Washington, D.C. Public Baths, noting, "[t]hree of the baths are for ladies who can bathe in the most private manner they

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[49] *New York Bathing House*, Daily Advertiser, at 3 (May 5, 1796).
[50] *Nantucket Bathing-House*, New-Bedford Mercury, at 3 (Aug. 12, 1808) (emphasis in original).
[51] Carter, *supra* note 27 at 271.
[52] Robert Sutcliff, *Travels In Some Parts of North America, In the Years 1804, 1805, & 1806*, 42 (1811).
[53] *Marine Bath*, Evening Post, at 5 (Sep. 17, 1817).

please."[54] Men and women were even required to use separate entrances there.[55] In 1816, a Maryland paper published plans to establish public baths with some specifically allocated to women.[56] In 1828, the Richmond Hill House in New York advertised their baths as having "[s]eparate apartments for Ladies."[57]

Turning again to bathrooms, there is a trial transcript from 1832 in which witness testimony refers to a "men's water closet," which suggests there was a separate water closet for women.[58] By the 1850s, most American ships had sex-separated bathrooms.[59] And in the 1870s, Chicago installed "urinal and water-closets" in public parks and designated some for women and some for men.[60]

Most importantly, throughout our history, American schools educating both sexes instituted sex-separation in intimate spaces. In 1878, the Massachusetts State Board of Health mandated sex-separation in public school bathrooms.[61] And notably, this was done even before Massachusetts required sex separation in workplaces. In 1887, Massachusetts passed a law mandating sex-separated toilet

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[54] *Washington Public Baths*, Daily Nat'l Intelligencer (Aug. 30, 1813).
[55] *Id.*
[56] *Public Baths*, MD. Gazette & Pol. Intelligencer (Apr. 4, 1816).
[57] *Richmond Hill House*, Evening Post, at 5 (Sep. 17, 1817).
[58] 3 *Legal Examiner* 156 (1833) (reporting on a case decided October 25, 1832).
[59] *Minutes of Evidence Taken Before the Select Committee on the Passengers Act*, *reprinted in* 13 Report From The Select Committee On The Passengers Act 429 (1851).
[60] *A Much Needed Invention*, Chi. Trib. (Sep. 24, 1870).
[61] Mass. St. Bd. of Health, 9 *Annual Report of the State Board of Health of Massachusetts* 229, 234 (1878).

facilities in factories and workshops.[62] In New York in 1886, factory inspectors recommended separate toilets for men and women in response to abundant complaints by women of sexual harassment in the workplace.[63] Thus, laws mandating sex-separation were among the first anti-sexual harassment laws in the nation.

Intimate spaces are unique from other public accommodations. The reason that they have always been separated by sex while other spaces like "wash- houses (for washing clothes), though often located in the same buildings as public baths, were *not* separated by sex,"[64] is because safety and privacy are the reasons for sex-separation. These are not concerns in less intimate spaces. Elitism, classism, and discrimination against people with conflicting gender identities have not motivated sex-separation. As Carter explains, throughout history, "[b]athroom sex-separation arose naturally in most spaces, and it arose out of safety and privacy needs, particularly those of the female-bodied."[65]

According to the evidence, the only time intimate spaces have not been separated by sex in this Nation's history has been when the safety of the women

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[62] "An Act to secure proper sanitary provisions in factories and workshops," 1887 Mass. Acts 668, ch. 103, § 2, (Mar. 24, 1887).
[63] *First Annual Report of the Factory Inspectors of the State of New York for the Year Ending* 20–21 (Dec. 1, 1886).
[64] Carter, *supra* note 27 at 275.
[65] *Id.* at 240.

using that space has not been a concern (usually in prisons or in the workplaces of the lower class, for example).[66] Exceptions have never been made for those with gender identities that conflict with their biological sex. Even at the 18th century Parisian ball, which was for "fun and frolic" and was attended by proud aristocracy identifying with a gender in conflict with their biological sex, the bathrooms were still separated by sex.[67]

To win their due process challenge, Appellants have to show (1) that they have a right under the Fourteenth Amendment to conceal their transgender identity (i.e. to be free from the government revealing it against their will) and (2) that S.B. 1100 actually exposes, by government action, students' transgender identities against their will. Under *Dobbs*, in order to show that they have a right to keep their transgender identity private under the Fourteenth Amendment, Appellants must show that this right is "deeply rooted" in America's history and tradition. In America, intimate spaces open to the public have always been separated by sex, throughout the founding, the ratification of the Fourteenth Amendment, and afterward, without exception for those with conflicting gender identities. Therefore, in our history and tradition, there is no right to conceal one's

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[66] *Id.* at 278–79.
[67] *Id.* at 266.

transgender identity by using intimate facilities assigned to the opposite sex. Thus, Appellants' Due Process challenge fails.

CONCLUSION

S.B. 1100 does not violate the Equal Protection Clause or the due process rights of the Appellants. This Court should affirm the decision of the District Court.

Respectfully submitted,

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