

No. 24-3097

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IN THE UNITED STATES COURT OF  
APPEALS FOR THE  
TENTH CIRCUIT

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STATE OF KANSAS, *et al.*,  
*Plaintiffs-Appellees*,

v.

UNITED STATES DEPARTMENT OF EDUCATION, *et al.*,  
*Defendants-Appellants*.

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On Appeal from the United States District Court  
for the District of Kansas  
(5:24-cv-04041)

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**BRIEF OF NATIONAL WOMEN'S LAW CENTER, BEND  
THE ARC: A JEWISH PARTNERSHIP FOR JUSTICE,  
CENTRAL CONFERENCE OF AMERICAN RABBIS,  
EQUALITY CALIFORNIA, FORGE, INC., GLSEN,  
IF/WHEN/HOW: LAWYERING FOR REPRODUCTIVE  
JUSTICE, MEN OF REFORM JUDAISM, NATIONAL  
ASSOCIATION OF SOCIAL WORKERS, NATIONAL  
NETWORK TO END DOMESTIC VIOLENCE, PEOPLE FOR  
THE AMERICAN WAY, PLANNED PARENTHOOD  
FEDERATION OF AMERICA, PUBLIC COUNSEL,  
REPROACTION, SIECUS: SEX ED FOR SOCIAL CHANGE,  
SISTERREACH, SISTERREACH ILLINOIS, THE TREVOR  
PROJECT, THE WOMXN PROJECT, TOM HOMANN  
LGBTQ+ LAW ASSOCIATION, UNION FOR REFORM  
JUDAISM, VIRGINIA SEXUAL AND DOMESTIC  
VIOLENCE ACTION ALLIANCE, WOMEN OF REFORM  
JUDAISM, WOMEN'S BAR ASSOCIATION OF THE  
DISTRICT OF COLUMBIA AS *AMICI CURIAE* IN  
SUPPORT OF APPELLANTS**

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## INTEREST OF AMICI CURIAE<sup>1</sup>

This brief is filed by *Amici* National Women’s Law Center and twenty-four additional organizations committed to gender justice, including both the rights of survivors and LGBTQI+ people.

National Women’s Law Center (NWLC) is a nonprofit legal organization dedicated to advancing and protecting women’s legal rights and the right to be free from sex discrimination. Since 1972, NWLC has worked to secure equal opportunity in education for women and girls through enforcement of Title IX, the Constitution, and other laws. NWLC has led briefs in numerous cases affirming that protections against sex discrimination include protections for LGBTQI+ students. NWLC is committed to ensuring all women and girls, including transgender women and girls, are protected from sexual violence.

Additional *amici* include:

Bend the Arc: A Jewish Partnership for Justice  
Central Conference of American Rabbis  
Equality California  
FORGE, Inc.  
GLSEN

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<sup>1</sup> No party’s counsel authored this brief in whole or in part; no party or party’s counsel contributed money intended to fund this brief, and no person other than amici curiae, their members, and their counsel contributed money to fund this brief. All parties have consented to the filing of this brief.

If/When/How: Lawyering for Reproductive Justice  
Men of Reform Judaism  
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People For the American Way  
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Tom Homann LGBTQ+ Law Association  
Union for Reform Judaism  
Virginia Sexual and Domestic Violence Action Alliance  
Women of Reform Judaism  
Women's Bar Association of the District of Columbia  
Women's Law Project

## SUMMARY OF THE ARGUMENT

Title IX is clear: “No person” should be subject to sex discrimination in an education program or activity. 20 U.S.C. § 1681. For over fifty years, Title IX has required educational environments to be free of sex discrimination, including from harassment and limitations tied to sex-based stereotypes. This case threatens to undermine these critical federal protections against sex discrimination.

The Department of Education (the “Department”) promulgated the final rule at issue to “fulfill Title IX’s protection for students, teachers, and other employees in federally funded elementary schools and secondary schools and postsecondary institutions against all forms of sex discrimination, including sex-based harassment and sexual violence.” *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 89 Fed. Reg. 33474, 33476 (Apr. 29, 2024) (the “Rule”). The Rule clarifies the scope of prohibited discrimination under Title IX, recognizing that discrimination because of sex necessarily includes discrimination because of sexual orientation and gender identity. Among other things, the Rule clarifies that schools cannot discriminate on the basis of sex by treating students in a manner inconsistent with their gender identity. Thus, schools must permit

transgender students to use school facilities, such as locker rooms and restrooms, consistent with their gender identity. 89 Fed. Reg. at 33820.

The Rule aligns with Title IX’s statutory text as well as the statute’s history and core purpose. It also comports with numerous court decisions addressing the scope of sex discrimination under Title IX—decided both before and after the Supreme Court’s ruling in *Bostock v. Clayton County*, 590 U.S. 644 (2020). *Bostock* held that sex discrimination includes sexual orientation and gender identity discrimination under an analogous federal workplace civil rights law, Title VII, because an individual’s sexual orientation and gender identity are “inextricably bound up with sex.” *Id.* at 693. In promulgating the Rule, the Department thoroughly considered this precedent, the statutory text and history, concerns from commenters, and a lengthy record.

Nevertheless, Plaintiffs-Appellees (“Appellees”) challenged the Rule, alleging incorrectly that Title IX’s mandate to prevent sex discrimination does not encompass discrimination based on sexual orientation and gender identity. Appellees also asserted that the Rule infringes on the privacy and safety interests of cisgender students. The district court wrongly agreed and granted Plaintiffs preliminary injunctive relief. *See generally* Appx.

Vol. 3, at 568.<sup>2</sup>

The district court's decision is wrong, both on the law and facts, and deviates from established precedent. Before the Rule's promulgation, courts had overwhelmingly concluded both that discrimination against transgender individuals is sex discrimination and that policies permitting transgender students to use facilities aligned with their gender identity do not harm other students. Multiple circuit courts have found that a school's refusal to adopt transgender-inclusive policies violates Title IX. Far from breaking new ground, the Rule codified existing judicial conclusions. The decision below failed to give due weight to existing precedent.

The district court's decision similarly failed to consider and credit evidence-based research, instead favoring generalized allegations of harm tied to baseless fears. No credible evidence supports allegations that transgender students' use of restrooms or locker rooms consistent with their affirmed gender injures *any* student. To the contrary, research shows that denying transgender students access to gender-aligned restrooms increases their risk of a range of harms, including sexual violence. And

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<sup>2</sup> Citations to "Appx. Vol. X, at XX" refer to the volume and page number of Appellants' appendix.



hundreds of school districts have adopted non-discrimination policies that allow transgender students to use restrooms aligned with their gender identity while maintaining the privacy and safety of all students.<sup>3</sup>

The lower court has wrongfully forestalled Title’s IX broad promise to protect all persons from sex discrimination. *See* 20 U.S.C. § 1681(a). *Amici* urge this Court to reverse the decision below and allow the Rule to take effect.

## **BACKGROUND**

In developing the Rule, the Department carefully evaluated a range of views related to “Participation Consistent With Gender Identity,” including allegations that nondiscrimination policies could impact some students’ privacy or safety interests. *See* 89 Fed. Reg. at 33817-18. The Department addressed the comments in depth, including discussion of relevant research and case law. *Id.* at 33818-21. The Department considered Appellees’ concerns, explaining in detail why protections

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<sup>3</sup> Movement Advancement Project & GLSEN, *Separation and Stigma: Transgender Youth & School Facilities* 4-5 (2017), [https://www.glsen.org/sites/default/files/2019-11/Separation\\_and\\_Stigma\\_2017.pdf](https://www.glsen.org/sites/default/files/2019-11/Separation_and_Stigma_2017.pdf). Indeed, federal courts of appeal have held that such policies do not conflict with ensuring the privacy and safety of all students. *See, e.g., Parents for Privacy v. Barr*, 949 F.3d 1210 (9th Cir. 2020) ; *see also Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518 (3d Cir. 2018).

against sexual orientation- and gender identity-related discrimination fit with Title IX's text and purpose, *see, e.g., id.* at 33804-06, 33809-10. The Department also correctly concluded that “the mere presence of a transgender person in a single-sex space” does not compromise “anyone’s legitimate privacy interest” and that the presence of transgender students does not pose a safety risk to cisgender students. *Id.* at 33820.

Despite a lack of evidence that ensuring transgender students can access facilities aligning with their gender identity would compromise cisgender students’ safety or privacy, the Department nonetheless identified potential nondiscriminatory measures to address safety and privacy concerns. *Id.* The Department highlighted that sex harassment, including sexual violence, is already illegal and schools should take steps to prevent and address harassment for all students. And it noted that recipients of federal funds could offer “single-occupancy facilities, among other accommodations, to any students who seek additional privacy for any reason.” *Id.* The Department also considered comments submitted by sexual-violence-prevention experts urging the Department to confirm that transgender students should not be excluded from school facilities based on their gender identity. *Id.* at 33808-09.

After the Rule was finalized, a group of states, a student, and several

organizations filed this lawsuit, seeking preliminary injunctive relief. *See generally* Appx. Vol. 1, at 15. Among other things, Appellees argued that the Rule exceeded the Department’s authority by including gender identity discrimination within sex discrimination and that the Department failed to offer a reasoned explanation or respond to comments addressing the inclusion of gender identity. *Id.*, at 75.

The district court granted Appellees’ preliminary-injunction request, erroneously finding the Department exceeded its authority in defining sex discrimination to include discrimination based on gender identity. The court likewise concluded that the Rule’s interpretations of sex and discrimination are likely contrary to the Title IX statute. The court also found that Plaintiffs were likely to prevail on the merits of their claim that the Rule was arbitrary and capricious, suggesting that the Department “failed to consider harms to non-transgender students” raised during the notice and comment period. Appx. Vol. 3, at 605.

## ARGUMENT

### **I. The District Court’s Decision Deviates from Title IX’s Text, Purpose, and Legislative History and from Established Precedent.**

#### *A. The decision does not comport with Title IX’s text or purpose.*

The district court largely premised its opinion on the idea that Title

IX is a narrow statute enacted solely to protect cisgender women and that its protections against sex discrimination are limited to discrimination based on sex as assigned at birth. Appx. Vol. 3, at 583-591. But such a reading of Title IX is unmoored from its text and intent. In fact, the statute provides that “[n]o person” should be subject to sex discrimination in an education program or activity. 20 U.S.C. § 1681. It is not limited to women and girls, let alone cisgender women and girls. This expansive language has the broad purpose of eradicating all forms of invidious sex discrimination in educational programs.

The Supreme Court has repeatedly recognized the expansive nature of Title IX’s text. More than forty years ago, in *North Haven Board of Education v. Bell*, the Court recognized that, to “give [Title IX] the scope that its origins dictate, we must accord it a sweep as broad as its language.” 456 U.S. 512, 521 (1982) (quotation omitted); see also *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 175 (2005) (“Congress gave the statute a broad reach.”).

The Supreme Court has acknowledged that sweeping language in “statutory prohibitions often go[es] beyond the principal evil [that prompted their enactment] to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of

our legislators by which we are governed.” *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 79 (1998). As Justice Scalia wrote for a unanimous Court, even though “[m]ale-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII,” Title VII’s broad language extended to that “reasonably comparable evil[].” *Id.*; see also *Bostock*, 590 U.S. at 717. Indeed, male students can and do bring claims under Title IX, including in this Circuit. See, e.g., *Gossett v. Oklahoma ex rel. Bd. of Regents for Langston Univ.*, 245 F.3d 1172, 1180 (10th Cir. 2001) (male student stated plausible Title IX claim). Thus, the “broad reach” of Title IX’s proclamation that “[n]o person” be subject to sex discrimination encompasses discrimination against transgender students.

The district court did not point to anything within Title IX’s text or legislative history to suggest the term sex was meant to refer only to “biological sex”—because it could not. For example, the court referenced statutory language regarding “father-son” and “mother-daughter” activities as evidence that legislators at the time were referring to “biological sex,” Appx. Vol. 3, at 585, but these provisions and history made no reference to any sort of “biology.” And although the district court relied on dictionary definitions to suggest sex meant “biological distinctions,” *Id.*

at 584, that does not preclude sex discrimination from encompassing discrimination based on transgender status. *See infra* Sec. I.B.2.

The legislative history likewise confirms that Congress intended Title IX to offer sweeping protections. In introducing Title IX, Senator Birch Bayh, its principal sponsor, articulated that the “impact of this amendment” was meant to be “far-reaching,” 118 Cong. Rec. 5111, 5808 (1972), as it was “designed to root out, as thoroughly as possible at the present time, the social evil of sex discrimination in education.” *Id.* at 5804. Congress was specifically concerned with eradicating pernicious sex stereotyping—Senator Bayh expressly recognized that sex discrimination in education is based on “stereotyped notions,” like that of “women as pretty things who go to college to find a husband, . . . marry, have children, and never work again.” *Id.* Title IX was therefore necessary to “combat the “vicious and reinforcing pattern of discrimination” based on these myths. *Id.*

The district court misconstrued this history to reach its flawed conclusions. Ignoring the focus on eradicating discrimination based on sex stereotypes, the decision suggests that the original legislative intent was only to safeguard cisgender female students, Appx. Vol. 3, at 590. Here, discrimination against transgender students mirrors the very sex

stereotyping Congress enacted Title IX to remedy. Relying on broad generalizations about transgender students’ bodies and abilities to exclude them from school facilities and activities punishes them for their non-conformity with sex stereotypes associated with their sex assigned at birth—and only perpetuates the rampant discrimination they already face. Prohibiting discrimination against transgender students thus fits well within the statute’s sweeping language.

*B. The district court deviated from established precedent in Title IX and analogous case law.*

Federal courts have routinely rejected Title IX claims alleging that “the mere presence of transgender students [i]s invasive and harmful.”<sup>4</sup> Courts of appeal have repeatedly concluded that transgender-inclusive policies in schools do not violate Title IX, nor do they create harms for other students. Further, courts have found that preventing a student from using

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<sup>4</sup> Susan Etta Keller, *Gender-Inclusive Bathrooms: How Pandemic-Inspired Design Imperatives and the Reasoning of Recent Federal Court Decisions Make Rejecting Sex-Separated Facilities More Possible*, 23 *Geo. J. Gender & L.* 35, 50 (2021), <https://www.law.georgetown.edu/gender-journal/wp-content/uploads/sites/20/2022/03/Gender-Inclusive-Bathrooms.pdf>. These claims echo the unfounded fears historically used to justify discrimination against other groups; courts have rejected similar arguments in the context of racial segregation. *See, e.g.*, Br. of NAACP Legal Defense & Educational Fund, Inc. and Asian American Legal Defense & Education Fund as *Amici Curiae* in Supp. of Resp’t at 4, *Gloucester Cnty. Sch. Bd. v. G.G.*, 580 U.S. 1168 (2017).

a restroom consistent with their gender identity violates Title IX. Finally, this Court, along with many others, has found that sex discrimination necessarily encompasses discrimination against a person on the basis of their sexual orientation or gender identity.

1. Sex discrimination includes discrimination because of sexual orientation or gender identity.

The district court's decision is inconsistent with *Bostock's* reasoning that workplace discrimination against transgender employees was discrimination "because of sex" under Title VII. 590 U.S. at 655-58. When an employer fires an employee who is a transgender woman but tolerates the same conduct by an employee who is a cisgender woman, "the individual employee's sex plays an unmistakable and impermissible role in the discharge decision." *Id.*; *see also id.* at 669 ("[A]s we've seen, discrimination based on homosexuality or transgender status necessarily entails discrimination based on sex; the first cannot happen without the second.").

*Bostock's* reasoning should extend to Title IX. Title VII and *Bostock* serve as appropriate analogues for interpreting Title IX because of the similarities in the respective statutes' language and purpose. Both statutes include prohibitions on discrimination because of a person's sex.



See 20 U.S.C. § 1681(a) (“No person . . . shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity. . . .”); 42 U.S.C. § 2000e–2 (“It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual . . . because of such individual’s . . . sex[.]”). And when schools do not permit students to use facilities, such as restrooms, consistent with their gender identity, students are subjected to discrimination because of their sex. See *Bostock*, 590 U.S. at 660.

This Court has confirmed: “[c]ourts have generally assessed Title IX discrimination claims under the same legal analysis as Title VII claims.” *Throupe v. Univ. of Denver*, 988 F.3d 1243, 1251 (10th Cir. 2021) (quoting *Gossett*, 245 F.3d at 1176; see also *Mabry v. State Bd. of Cmty. Colleges & Occupational Educ.*, 813 F.2d 311, 316 (10th Cir. 1987) (because both “Title VII and Title IX prohibit discrimination on the basis of sex” and “prohibit[] the identical conduct,” Title VII is “the most appropriate analogue” to Title IX). Indeed, this Court has *already* drawn on *Bostock* to resolve a student’s Title IX claim, “assum[ing] that under Title IX, discrimination on the basis

of sexual orientation is sex-based discrimination.” *Dimas v. Pecos Indep. Sch. Dist. Bd. of Educ.*, 2024 WL 1881076, at \*8 (10th Cir. Apr. 30, 2024).

This Court has applied *Bostock* even beyond Title IX. In *Fowler v. Stitt*, this Court relied on *Bostock*’s reasoning to hold that an Oklahoma policy that prohibited the alteration of sex designations on birth certificates violated the Equal Protection Clause. 104 F.4th 770, 788 (10th Cir. 2024). The Court found that the policy “purposefully discriminates against transgender people.” *Id.* Applying *Bostock*’s reasoning in the equal-protection context, the Court went on to conclude that because “the [p]olicy discriminates based on transgender status, it necessarily discriminates on the basis of sex as well.” *Id.* (“[W]e agree with Plaintiffs that *Bostock*’s reasoning applies here.”).

This Court explained why *Bostock* controlled even though *Fowler* was an equal-protection challenge and *Bostock* was a Title VII case: Even if *Bostock*’s analysis were “limited to the context of employment discrimination,” it “did not once state that its analysis concerning the relationship between transgender status and sex was specific to Title VII cases,” or that “its logic concerning the intertwined nature of transgender status and sex was confined to Title VII.” *Id.* at 790. As this Court aptly put it:

Applied here, *Bostock's* reasoning leads to the conclusion that the Policy intentionally discriminates against Plaintiffs based in part on sex. Take Ms. Fowler, for example. If her sex were different (i.e., if she had been assigned female at birth), then the Policy would not deny her a birth certificate that accurately reflects her identity. . . . Thus, the Policy intentionally treats Plaintiffs differently because of their sex assigned at birth.

*Fowler*, 104 F.4th at 789 (internal citations and footnotes omitted). This Court should not depart from its approach in *Fowler*.

Further, the district court wrongly determined that *Bostock* is inapposite to Title IX because “Title IX includes several carve outs to the prohibition on sex discrimination that are not present in Title VII,” such as allowing for some sex-segregated spaces. Appx. Vol 3, at 586. The fact that Title IX permits sex separation under the certain circumstances, and Title VII does not, is a distinction without a difference. Schools that do not permit students to use bathrooms consistent with their gender identity are treating them differently because of their sex, regardless of whether boys’ bathrooms are separate from girls’ bathrooms. And in this regard, there is no meaningful difference between Title IX and Title VII: both statutes prohibit such discriminatory treatment. The minor variations in statutory language do not render *Bostock's* principles inapplicable to Title IX.

The district court further erred by distinguishing *Bostock* from Title IX because the former concerned “employees of private businesses” and the “decisions they made as consenting adults . . . caused no harm to their employers, coworkers, or anyone else for that matter.” The district court incorrectly concluded that the Rule resulted in “the subordination of the interests of non-transgender students” in “the field of education, an area traditionally left to state and local governments and the schools, themselves.” *Id.* at 587. But as described *infra* Section II, the Rule does not subordinate or otherwise harm cisgender students at all. And just as prohibiting workplace discrimination causes no legitimate harm to employers or coworkers (despite regular contrary allegations), prohibiting discrimination in schools does not cause legitimate harm to other students. This Court should not countenance the district court’s mental gymnastics to distinguish Title VII and Title IX.

Finally, the district court’s attempt to distinguish *Fowler* also falls flat. Appx. Vol. 3, at 591. The court suggested that because Title IX explicitly references “male” and “female” students in sex-segregated living facilities, somehow that law is more limited in its application than the Equal Protection Clause’s framework for assessing sex-based discrimination. Yet *Fowler* and *Bostock* relied on similar logic to reach the

opposite conclusion. The *Bostock* Court “assume[d] that ‘sex’ means ‘biological distinctions between male and female.’” *Fowler*, 104 F.4th at 789 (quoting *Bostock*). Even using the “sex-based categories” the district court referenced, Appx. Vol. 3, at 591, both *Fowler* and *Bostock* concluded that “it is impossible to discriminate against a person for being . . . transgender without discriminating against that individual based on sex.” See *Bostock*, 590 U.S. at 660.

2. The district court deviated from established precedent in Title IX and analogous case law.

The Seventh Circuit has *twice* rejected policies barring transgender students from using gender-identity-aligned bathrooms on grounds the policies violated Title IX. *A.C. v. Metropolitan Sch. Dist. of Martinsville*, 75 F.4th 760 (7th Cir. 2023), *cert. denied*, 144 S. Ct. 683 (2024); *Whitaker v. Kenosha Unified Sch. Dist. No.1 Bd. Of Educ.*, 858 F.3d 1034, 1052 (7th Cir. 2017). In *Whitaker*, the Seventh Circuit concluded—pre-*Bostock*—that “a policy that requires an individual to use a bathroom that does not conform with his or her gender identity punishes that individual for his or her gender non-conformance, which in turn violates Title IX.” *Whitaker*, 858 F.3d at 1049. The court recognized that “a transgender individual does not conform to the sex-based stereotypes of the sex that he or she was

assigned at birth,” and therefore the plaintiff was likely to prevail on a sex-stereotyping claim under Title IX. *Id.* at 1048. The decision further explained that a transgender-exclusive policy “does nothing to protect the privacy rights of each individual student vis-à-vis students who share similar anatomy,” and noted the transgender plaintiff had “used the boys’ bathroom . . . without incident or complaint from another student.” *Id.* at 1052.

Six years later, in *A.C.*, the Seventh Circuit had the opportunity to reconsider *Whitaker* following *Bostock*. There, the court affirmed a preliminary injunction under Title IX in favor of three transgender boys who were prohibited from using the boys’ restrooms at their schools. *A.C.*, 75 F.4th at 764. The court reaffirmed its holding in *Whitaker*, namely that “discrimination against transgender students is a form of sex discrimination.” *Id.* at 769.

The court also found it “telling” that *Bostock* held “that discrimination based on transgender status is a form of sex discrimination,” and thus provided “useful guidance.” *Id.* at 768. Accordingly, the court rejected arguments that *Bostock*’s language refraining from addressing “sex-segregated bathrooms, locker rooms, and dress codes” demanded a different result. Applying *Bostock*’s reasoning,

the court asked “whether our three plaintiffs are suffering negative consequences . . . for behavior that is being tolerated in male students who are not transgender.” The answer was yes. *Id.* at 772-73.

In *Grimm v. Gloucester County School Board*, 972 F.3d 586 (4th Cir. 2020), the Fourth Circuit likewise found a Title IX violation when a school denied a transgender boy the use of the boys’ restroom. *Id.* at 613-14. The court observed that the plaintiff was treated worse than similarly situated students. “Unlike the other boys, he had to use either the girls['] restroom or a single-stall option.” *Id.* at 618. The court also recognized that the policy had no relation to protecting students’ privacy interests. *Id.* at 613-14. Although the Fourth Circuit acknowledged that students maintain privacy interests, it stressed that the “bodily privacy of cisgender boys using the boys['] restrooms did not increase” when the plaintiff was prohibited from entering. *Id.* at 614. According to the court, the policy ignored how transgender students use restrooms aligning with their gender identity: “by entering a stall and closing the door.” *Id.* at 613 (quoting *Whitaker*, 858 F.3d at 1052).

Relatedly, in *Doe v. Boyertown Area School District*, 897 F.3d 518 (3d Cir. 2018), addressing purported privacy concerns, the Third Circuit found that a policy allowing all students to use gender-identity-aligned facilities

did not discriminate based on sex, and “therefore does not offend Title IX.” *Id.* at 535. The court was “unpersuaded . . . that the appellants’ asserted privacy interest requires protection from the risk of encountering students in a bathroom or locker room whom appellants identify as being members of the opposite sex.” *Id.* at 531. The court determined that “the presence of transgender students in the locker and restrooms is no more offensive to constitutional or [state] law privacy interests than the presence of the other students who are not transgender. Nor does their presence infringe on the plaintiffs’ rights under Title IX.” *Id.* at 521. Moreover, “barring transgender students from restrooms that align with their gender identity would itself pose a potential Title IX violation.” *Id.* at 533.

The Ninth Circuit also found that a policy allowing transgender students to use restrooms and locker rooms consistent with their gender identity did not violate Title IX, nor did it violate cisgender students’ Fourteenth Amendment privacy rights. *Parents for Priv. v. Barr*, 949 F.3d 1210, 1229 (9th Cir. 2020). The court recognized that Title IX’s authorization of sex-segregated facilities did not mean they “must be segregated based only on biological sex and cannot accommodate gender identity.” *Id.* at 1227. And, the court held, “the use of facilities for their intended purpose, without more, does not constitute an act of harassment



simply because a person is transgender.” *Id.* at 1229. “A policy that allows transgender students to use school bathroom and locker facilities that match their self-identified gender in the same manner [as] cisgender students . . . does not infringe Fourteenth Amendment privacy [rights].” *Id.* at 1240.

Here, the district court’s decision deviated from this line of precedent. Indeed, until the recent spate of rulings addressing the Rule, all but one appellate court had concluded that transgender students should be permitted to use facilities aligned with their gender identity.<sup>5</sup> There have been no intervening changes in law that justify a different result.

## **II. Policies That Allow Transgender Students to Use Facilities Aligned with Their Gender Identity Do Not Harm Cisgender Girls or Women, but Do Protect Transgender Girls and Women From Harm.**

The district court’s analysis was based, in part, on an alleged harm to the safety of Appellees’ populations. Appx. Vol. 3, at 601. As explained below, this purported harm is too speculative to support injunctive relief. *See New Mexico Dep't of Game & Fish v. U.S. Dep't of the Interior*, 854 F.3d

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<sup>5</sup> The district court relied heavily on that outlier case, *Adams ex rel. Kasper v. Sch. Bd. of St. John’s Cnty.*, 57 F.4th 791 (11th Cir. 2022). As Appellants set forth in their brief, *Adams* should not govern here. *See Br. of Appellants* at 30.

1236, 1251 (10th Cir. 2017) (“To constitute irreparable harm, an injury must be certain, great, actual and not theoretical.”) (internal citations omitted). Moreover, the decision disregarded the serious harm the Rule was meant to mitigate: the harm transgender students experience when forced to use restrooms and locker rooms inconsistent with their gender identity. There is abundant data, and lived experience, confirming that policies permitting transgender individuals to use gender-identity-aligned school facilities do not harm other students. But barring transgender students from facilities aligned with their gender identity has potentially catastrophic consequences for their physical safety and mental health.

*A. Research confirms that transgender-inclusive locker and restroom policies do not harm other students.*

Research has confirmed that “fears of increased safety and privacy violations” because of nondiscrimination laws protecting transgender people’s access to restrooms and locker rooms “are not empirically grounded.”<sup>6</sup> Indeed, it is “exceedingly rare” that criminal incidents take

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<sup>6</sup> Amira Hasenbush et al., *Gender Identity Nondiscrimination Laws in Public Accommodations: a Review of Evidence Regarding Safety and Privacy in Public Restrooms, Locker Rooms, and Changing Rooms*, 16 *Sexuality Rsch. and Soc. Pol’y* 70, 81 (July 23, 2018), [https://escholarship.org/content/qt4rs4n6h0/qt4rs4n6h0\\_noSplash\\_8740e92d7f24b6c89dbd4bd4d27fbbcb.pdf](https://escholarship.org/content/qt4rs4n6h0/qt4rs4n6h0_noSplash_8740e92d7f24b6c89dbd4bd4d27fbbcb.pdf); see also Julie Moreau, *No link between trans-inclusive policies and bathroom safety, study finds*, NBC News (Sept.

place in public restrooms, locker rooms, and changing rooms.<sup>7</sup> Specifically, results from a 2018 study revealed “the passage of such nondiscrimination laws is not related to the number or frequency of criminal incidents in such public spaces.”<sup>8</sup>

Law enforcement officials in cities and states with nondiscrimination policies that protect transgender individuals agree. Officials in two jurisdictions with nondiscrimination policies “could not identify a single case in which a transgender person ha[d] been charged with assaulting or harassing women in a public bathroom.”<sup>9</sup> A report from Human Rights Watch also found no evidence that transgender students’ use of restroom or locker room facilities “correspond[ing] to their gender identity puts other students at risk.”<sup>10</sup> As the American Medical Association explained in one report, “no evidence exists” to support claims that those engaging in sexual

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19, 2018), <https://www.nbcnews.com/feature/nbc-out/no-link-between-trans-inclusive-policies-bathroom-safety-study-finds-n911106>.

<sup>7</sup> Hasenbush et al., *supra* note 6, at 79.

<sup>8</sup> *Id.* at 81.

<sup>9</sup> Lou Chibbaro Jr., *Predictions of trans bathroom harassment unfounded*, Washington Blade (March 31, 2016), <https://www.washingtonblade.com/2016/03/31/predictions-of-trans-bathroom-harassment-unfounded/>.

<sup>10</sup> Ryan Thoreson, *Shut Out: Restrictions on Bathroom and Locker Room Access for Transgender Youth in US Schools*, Hum. Rts. Watch (Sept. 14, 2016), [www.hrw.org/report/2016/09/15/shut-out/restrictions-bathroom-and-locker-room-access-transgender-youth-us](http://www.hrw.org/report/2016/09/15/shut-out/restrictions-bathroom-and-locker-room-access-transgender-youth-us).

violence” “will take advantage of public accommodation laws” to target women and children.<sup>11</sup>

The Rule builds on Title IX’s requirement that schools maintain safe educational environments by clarifying that schools must promptly investigate reports of sex harassment, take steps to end harassment, prevent its recurrence, and remedy its effects. 34 C.F.R. § 106.44(f)(1). *Amici* include advocates and service providers for all survivors of sexual violence, including student survivors, and their support is based on their certainty that the Rule will reduce risk of sexual assault or harassment in schools. Indeed, experts who are advocates for survivors of sexual assault, like *amici*, routinely support transgender-inclusive locker and restroom policies precisely because there is no evidence supporting Appellees’ claims that such policies harm others.<sup>12</sup>

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<sup>11</sup> Am. Med. Ass’n & GLMA, *Transgender individuals’ access to public facilities* (2018), <https://www.ama-assn.org/system/files/2019-03/transgender-public-facilities-issue-brief.pdf>.

<sup>12</sup> Nat’l Task Force to End Sexual and Domestic Violence Against Women, *National Consensus Statement of Anti-Sexual Assault and Domestic Violence Organizations in Support of Full and Equal Access for the Transgender Community* (updated Apr. 29, 2016), <https://endsexualviolence.org/wp-content/uploads/2017/09/STATEMENT-OF-ANTI-SEXUAL-ASSAULT-AND-DOMESTIC-VIOLENCE-ORGANIZATIONS-IN-SUPPORT-OF-EQUAL-ACCESS-FOR-THE-TRANSGENDER-COMMUNITY.pdf>.

Appellees’ asserted concerns also consistently fail to consider available or existing mitigating measures. For example, restroom stalls enable all students to use facilities discreetly and privately. *A.C.*, 75 F.4th at 773 (observing that a student’s presence behind the door of a restroom stall does not threaten student privacy). Schools can also install privacy strips and screens. *See, e.g., Grimm*, 972 F.3d at 614. And cisgender students may use available single-occupancy facilities, as the Rule states.<sup>13</sup> *See, e.g., Parents for Priv.*, 949 F.3d at 1225 (holding alleged privacy violation mitigated by “alternative options and privacy protections” for those who did not want to share a facility with a transgender student, even if alternatives “appear[ed] inferior or less convenient”).

In promulgating the Rule, the Department engaged in a thorough consideration of the factual record—including Appellees’ concerns—and correctly concluded that the Rule would not infringe on the privacy and

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<sup>13</sup> The Rule ensures the privacy of all students, whether cisgender, transgender, or nonbinary, by allowing students to choose whether to use sex-separated restrooms that match their gender identity or to use a single-user restroom if they prefer. 89. Fed. Reg. at 33820. No student is forced to use a sex-separated restroom that does not match their gender identity or a single-user restroom, which ensures every student can pick the facility where they feel safest. *Id.* (“[N]othing in Title IX or the final regulations prevents a recipient from offering single occupancy facilities, among other accommodations, to any students who seek additional privacy for any reason.”).

safety rights of cisgender students. *See* 89 Fed. Reg. at 33820. As set forth above, the social science data confirms that transgender inclusive policies create no actual harms to cisgender students.

*B. Excluding transgender students from school facilities aligned with their gender identity harms them.*

Transgender students, on the other hand, suffer significant harms when barred from using facilities aligned with their gender identity, a fact the district court ignored. These harms can have long-lasting impacts on students' health and educational outcomes. Because of transgender students' heightened risk of experiencing sex-based discrimination, the Department's changes to the Rule are critical for three reasons.

*First*, a majority of transgender students report having avoided school facilities because of safety concerns. One survey of K-12 students shows 82.1% of transgender students avoid using the restroom and 69.1% of transgender students avoid using the locker room because they felt unsafe or uncomfortable.<sup>14</sup> Research also shows that when schools exclude transgender students from restrooms matching their gender

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<sup>14</sup> Joseph G. Kosciw et al., GLSEN, *The 2019 National School Climate Survey: The Experiences of Lesbian, Gay, Bisexual, Transgender, and Queer Youth in Our Nation's Schools*, 97 (2020), [https://www.glsen.org/sites/default/files/2020-10/NSCS-2019-Full-Report\\_0.pdf](https://www.glsen.org/sites/default/files/2020-10/NSCS-2019-Full-Report_0.pdf).

identity, they avoid using the restroom altogether while at school, leading to serious health risks, including kidney damage and urinary tract infections.<sup>15</sup> Some transgender students also avoid drinking or eating throughout the school day to avoid restroom use.<sup>16</sup>

*Second*, non-cisgender students are more susceptible to violence in these settings and “at risk of physical, verbal, or sexual assault from other students or adults.”<sup>17</sup> For example, cisgender boys broke seventeen-year-old nonbinary student Cobalt Sovereign’s jaw after Cobalt used the restroom aligned with their sex assigned at birth.<sup>18</sup> The assault occurred

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<sup>15</sup> Sandy E. James et al., Nat’l Ctr. for Transgender Equal., *The Report of the 2015 U.S. Transgender Survey* 224-30 (Dec. 2016) (“2015 Survey”), <https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf> (citing Jody L. Herman, *Gendered Restrooms and Minority Stress: The Public Regulation of Gender and Its Impact on Transgender People’s Lives*, 19 J. Pub. Mgmt. & Soc. Pol’y 65, 75 (2013). See also *Grimm*, 972 F.3d at 593 (transgender student plaintiff developed urinary tract infections due to bathroom avoidance).

<sup>16</sup> See, e.g., *Doe*, 897 F.3d at 523 (forcing transgender students to use restrooms that do not match their gender identity causes students to “avoid going to the bathroom by fasting, dehydrating, or otherwise forcing themselves not to use the restroom throughout the day”); *Whitaker*, 858 F.3d at 1041 (transgender student denied restroom access “restricted his water intake to ensure that he did not have to utilize the restroom at school”); 2015 Survey, *supra* note 15, at 229 (nearly 32% of transgender adult responders avoided eating or drinking to avoid using the restroom).

<sup>17</sup> Thoreson, *supra* note 10.

<sup>18</sup> Kiara Alfonseca, *Transgender student alleges assault after using bathroom, family calls for charges*, ABC News (June 7, 2024),

after a *cisgender* boy violated Cobalt’s privacy and peered over Cobalt’s stall while they were using the facility.<sup>19</sup>

Transgender students who face locker or restroom restrictions are significantly more likely to experience sexual assault than those students who do not.<sup>20</sup> One study showed that 25.9% of transgender and nonbinary U.S. adolescents experience sexual assault—substantially higher than rates of 15% for cisgender high school girls and 4% for cisgender boys.<sup>21</sup> However, transgender and nonbinary youth subjected to locker or restroom restrictions experienced an even higher prevalence of sexual assault: 36%.<sup>22</sup>

*Third*, policies precluding transgender students from using gender-identity-aligned restrooms and locker rooms also cause psychological

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<https://abcnews.go.com/US/transgender-student-assaulted-after-bathroom-family-calls-charges/story?id=110927216>; *see also* Amber Jayanth, *Transgender Butler County man says group beat him up over restroom use*, Fox19 (July 8, 2022), <https://www.fox19.com/2022/07/08/transgender-butler-county-man-says-group-beat-him-up-using-wrong-restroom> (noting a group of cisgender men battered Noah Ruiz after a campground owner forced him to use the women’s restroom).

<sup>19</sup> *Id.*

<sup>20</sup> Gabriel R. Murchison et al., *School Restroom / Locker Room Restrictions and Sexual Assault Risk Among Transgender Youth*, Pediatrics (2019), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8849575/>.

<sup>21</sup> *Id.* at 7.

<sup>22</sup> *Id.* at 6.



harm. “When transgender students face discrimination in schools, the risk to their wellbeing cannot be overstated—indeed, it can be life threatening.” *Doe*, 897 F.3d at 529. The pervasive discrimination that too many transgender students experience at school often results in adverse mental health outcomes. LGBTQI+ students who encounter hostility and discrimination in K-12 educational settings—such as verbal harassment, physical attacks, or sexual assault—report higher levels of depression and lower levels of self-esteem than students who have not experienced victimization.<sup>23</sup> More severe experiences of victimization are tied to higher levels of depression and lower self-esteem.<sup>24</sup> The consequences of discrimination can be catastrophic: transgender students who encounter violence or verbal harassment have a “higher prevalence of lifetime and past-year suicide thoughts and attempts” than respondents who did not have such experiences.<sup>25</sup>

Hostility or discrimination in schools—whether verbal or physical—

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<sup>23</sup> Kosciw, *supra* note 14, at 52-54.

<sup>24</sup> *Id.*

<sup>25</sup> Jody L. Herman et al., The Williams Inst., UCLA Sch. of L., *Suicide Thoughts and Attempts Among Transgender Adults: Findings from the 2015 U.S. Transgender Survey* 22 (Sept. 2019), <https://williamsinstitute.law.ucla.edu/wpcontent/uploads/Suicidality-Transgender-Sep-2019.pdf>.

can negatively impact transgender students' attendance, academic achievement, and educational aspirations. When students experience harassment or hostility at school, they may be less likely to attend to avoid hurtful experiences.<sup>26</sup> In one national survey of LGBTQ students, they “were nearly three times as likely to have missed school in the past month” if the student had experienced a “higher level[] of victimization” because of their sexual orientation or gender identity.<sup>27</sup> LGBTQ students experiencing victimization also report lower GPAs and lower aspirations for secondary education than those not experiencing victimization.<sup>28</sup>

Notably, anti-transgender locker and restroom policies also harm cisgender girls who do not conform to rigid femininity standards, as such policies invoke enforcement of sex-based stereotypes to determine who is a “real” woman or girl. There are numerous examples of gender-nonconforming women being harassed or ejected from women’s restrooms, an experience that is both humiliating and harmful.<sup>29</sup> For example, one

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<sup>26</sup> Kosciw, *supra* note 14, at 48.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> See, e.g., Melanie Springer Mock, *I’m a Woman Who Got Kicked Out of Women’s Bathrooms*, Christianity Today Int’l (June 7, 2016), <https://www.christianitytoday.com/women/2016/june-web-only/im-woman-who-got-kicked-out-of-womens-bathrooms.html>; Matt DeRienzo,

twenty-four-year-old cisgender woman who had cut her hair very short reported being harassed in a women’s restroom.<sup>30</sup> While in a stall, a stranger asserted that she was transgender and said she “better not come out of there.”<sup>31</sup> The district court’s injunction will likewise make some cisgender women and girls more susceptible to this sort of gender policing in public spaces and to serious emotional or physical harm in school facilities.

## CONCLUSION

For the foregoing reasons, this Court should reverse the decision below.

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*Woman mistaken for transgender harassed in Walmart bathroom*, News Times (May 16, 2016); <https://www.newstimes.com/local/article/Woman-mistaken-for-transgender-harassed-in-7471666.php>;

<sup>30</sup> Christopher Wiggins, *Cis Woman Mistaken as Transgender Records Being Berated in Bathroom*, The Advocate (updated May 26, 2023), <https://www.advocate.com/news/2022/11/01/cis-woman-mistaken-transgender-records-being-berated-bathroom>.

<sup>31</sup> *Id.*

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/s/ Madeline Gitomer

Date: September 3, 2024

## **CERTIFICATE OF SERVICE**

I hereby certify that on September 3, 2024, a true and accurate copy of the foregoing proposed brief was electronically filed with the Court using the CM/ECF system. Service on counsel for all parties will be accomplished through the Court's electronic filing system.

/s/ Madeline Gitomer

Date: September 3, 2024