

No. 25-5036

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UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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SEXUALITY AND GENDER ALLIANCE,

*Plaintiff-Appellant,*

v.

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

*Defendants-Appellees.*

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

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**APPELLANT’S EMERGENCY MOTION UNDER CIRCUIT RULE 27-3  
FOR INJUNCTION PENDING APPEAL AND TEMPORARY  
ADMINISTRATIVE RELIEF PENDING RESOLUTION OF MOTION  
ADMINISTRATIVE RELIEF REQUESTED BY AUGUST 12, 2025**

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## INTRODUCTION

Plaintiff Sexuality and Gender Alliance (“SAGA”) is a student organization at Boise High School whose transgender members are poised to be ousted from restrooms consistent with their gender identity—which school district policy has permitted them to use for the last *nine years*—when school starts on **Tuesday, August 12th**, unless this Court grants an injunction pending appeal or administrative relief pending disposition of SAGA’s motion.

That exclusion is mandated by Idaho S.B. 1100, a law that categorically bans transgender students from restrooms matching their gender identity. Although enacted in 2023, S.B. 1100 has never been in legal effect during any school year due to various injunctions granted over the course of litigation. Enforcement of S.B. 1100 now would upend the long-standing status quo at Boise High, which has had an inclusive policy in place since 2016.

Applying S.B. 1100 to ban SAGA members from school restrooms matching their gender identity would violate the constitutional guarantee of equal protection and Title IX. The district court recognized that S.B. 1100 requires heightened scrutiny but wrongly held, in denying a preliminary injunction limited to restrooms, that it could be justified by an interest in visual privacy. Excluding transgender students from Boise High restrooms—which have stalls with doors that block visual exposure—is not substantially related to such an interest.

Indeed, this Court’s opinion in an earlier appeal confirms the point. In *Roe v. Critchfield*, 137 F.4th 912, 922-23 (9th Cir. 2025), this Court affirmed the denial of a broad, facial preliminary injunction that would have reached every type of facility covered by S.B. 1100, including locker rooms. But the Court expressly declined to hold that applying S.B. 1100 to restrooms would survive heightened scrutiny. Instead, this Court acknowledged that restrooms do *not* present the same privacy concerns as other types of facilities and quoted favorably from decisions in other circuits approving injunctions of similar discrimination in restrooms.

After the mandate issued in *Critchfield*, Plaintiff narrowly sought a preliminary injunction limited only to restrooms and only to SAGA members at Boise High. That is the same limited injunction Plaintiff now seeks from this Court pending appeal. That relief is consistent with—and supported by—the logic of this Court’s earlier opinion.

Because school starts at Boise High on August 12th, SAGA respectfully requests that this Court grant at least administrative relief by that date, or as soon thereafter as practicable. SAGA has sought this relief as expeditiously as possible, after the district court denied a preliminary injunction on August 7th, with no temporary restraining order in place. Both administrative relief and an injunction pending appeal would merely maintain the status quo as it has existed at Boise High for nearly a decade, until the merits of this appeal can be resolved.

## **BACKGROUND**

### **A. Threatened Harm to Transgender Students at Boise High**

Enforcing S.B. 1100 in restrooms would inflict profound daily psychological and physical harm on the transgender members of SAGA, which is a student organization that supports LGBTQ students at Boise High. A.205.<sup>1</sup> That includes SAGA member Jane Doe, a 16-year-old transgender girl who has received gender-affirming medical care, lives openly as female, and has a feminine appearance with long hair. A.206. Excluding transgender students like Jane from school restrooms matching their gender—which all of their peers are able to use—causes them to feel rejected, stigmatized, and shamed, and it leads to increased depression, anxiety, and suicidality. A.137-138. Relegating students to use single-user facilities only amplifies, rather than cures, those feelings of exclusion and inflicts other harms and inequalities. A.137. In research on transgender youth who were prevented or discouraged from using restrooms matching their gender identity, 60% seriously considered suicide. A.140.

### **B. Status Quo Before S.B. 1100**

Before S.B. 1100 was enacted, many schools across Idaho had inclusive policies and practices that allowed transgender students to use restrooms corresponding to their gender identity, and no school had adopted a policy

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<sup>1</sup> Citations to “A.” are to Plaintiff’s Addendum.

excluding transgender students from using restrooms aligned with their gender identity. In 2015, the Idaho School Boards Association created a model policy specifying that students should be permitted “to use,” *inter alia*, restrooms “that correspond to the gender identity they consistently assert at school.” A.164. Boise School District implemented a practice in 2016 under which transgender students could develop a gender support plan confirming their use of the restroom matching their gender identity. A.303.

**C. Enactment of S.B. 1100**

On February 23, 2023, Idaho enacted S.B. 1100. S.B. 1100 defines “sex” based solely on chromosomes and reproductive anatomy at birth so that transgender males are regarded as females and transgender females are regarded as males. Idaho Code § 33-6702. Employing this definition, S.B. 1100 requires that every public school multiple-occupancy restroom, as well as locker rooms, shower rooms, and overnight accommodations, must be designated by “sex” and used only by members of that “sex.” Idaho Code § 33-6703.

In addition to this statewide mandate, S.B. 1100 creates a private right of action that places a “bounty” on the heads of transgender students. Any student who encounters someone of the “opposite sex” in covered facilities may obtain statutory damages of at least \$5,000. Idaho Code § 33-6706.

S.B. 1100 requires that schools provide “reasonable accommodations” to

anyone who is “unwilling or unable” to use the facilities designated for the person’s “sex,” but this does not include access to facilities “designated for use by members of the opposite sex.” Idaho Code § 33-6705.

#### **D. Initial District Court Proceedings and Prior Appeal**

Plaintiff filed the underlying action and an initial motion for a preliminary injunction on July 5, 2023, seeking a broad injunction that would have prohibited applying S.B. 1100 to all regulated facilities with respect to all transgender students in Idaho. Plaintiffs also filed a motion for a TRO to preserve the status quo before the start of the 2023-24 school year, which the district court granted. Although the district court subsequently denied the preliminary injunction, this Court granted an injunction pending appeal, which remained in place until the appeal concluded in June 2025 upon issuance of the mandate.

With respect to equal protection, this Court first held that S.B. 1100 discriminates against transgender students based on both transgender status and sex, thus requiring heightened scrutiny. *Critchfield*, 137 F.4th at 922-23. It then interpreted Plaintiff’s motion as having presented a facial challenge to S.B. 1100. That meant that, to prevail, “SAGA [had to] show that S.B. 1100’s mandated sex-segregation of *all* covered facilities [was] unconstitutional; its equal protection claim fail[ed] if S.B. 1100’s application to *any* of the covered facilities survives intermediate scrutiny.” *Id.* at 924 (emphasis added); *id.* at 932. This Court framed

narrowly the pertinent governmental interest in enforcing S.B. 1100 as “privacy,” finding “no evidence in the record” to support a “safety” rationale as to any of the law’s applications. *Id.* at 924 n.8. The Court defined that privacy interest as shielding students from exposure to the unclothed bodies of the opposite sex, concluding that that interest is most strongly implicated in “locker rooms and communal shower rooms that lack curtains or stalls.” *Id.* at 925. Because it saw no argument at that stage that S.B. 1100 was not substantially related to this interest in those unpartitioned spaces, it held that Plaintiff was not entitled to a facial injunction. *Id.*

This Court clarified that its holding did not apply to restrooms, specifically. This Court did “not presume that S.B. 1100’s application to each type of facility will be substantially related to the State’s objective of protecting student privacy.” *Id.* at 924. This Court “acknowledged, as the district court did, that the use of restrooms, locker rooms, shower rooms, and overnight accommodations do not present uniform risks of bodily exposure.” *Id.* And this Court quoted with approval the Seventh Circuit’s observation that restroom stalls protect privacy. *Id.*

This Court separately held that Plaintiff had not shown that all of S.B. 1100’s applications to transgender people likely violated Title IX. That is because Title IX includes a statute that expressly allows schools to “maintain[] separate living facilities for the different sexes,” 20 U.S.C. § 1686, and “living facilities”

are not unambiguously limited to “dormitories” (and thus could encompass overnight lodging on school trips, which S.B. 1100 regulates). *Critchfield*, 137 F.4th at 918-19. Nothing in the opinion holds that restrooms in non-residential buildings are “living facilities.”

#### **E. Proceedings Below on Narrow Preliminary Injunction**

Following this Court’s decision, SAGA moved below for a narrow preliminary injunction, seeking to enjoin enforcement of S.B. 1100 only as applied to restrooms and only as to SAGA members, who all attend Boise High.

On August 7, 2025, the district court denied that motion, finding that SAGA was unlikely to succeed on the merits of its equal protection and Title IX claims. The district court concluded that application of S.B. 1100 to restrooms was likely substantially related to a government interest in visual privacy—*not* because of any bodily exposure from the use of restroom stalls (which have doors) but, rather, because students might choose to disrobe and change clothes or perform unspecified hygiene duties in common areas *outside* of restroom stalls. Defendants never advanced that argument below, nor does any record evidence substantiate it.

#### **STANDARD**

This Court may “grant[] an injunction while an appeal is pending.” Fed. R. App. P. 8. The standards for an injunction pending appeal and for a preliminary injunction are the same. *S.E. Alaska Conservation Council v. U.S. Army Corps of*

*Eng'rs*, 472 F.3d 1097, 1100 (9th Cir. 2006). Thus, an injunction pending appeal is warranted where a party has shown (1) a likelihood of success on the merits, (2) likely irreparable harm absent relief, (3) the balance of hardships tips in its favor, and (4) an injunction serves the public interest. *Humane Soc'y of the U.S. v. Gutierrez*, 523 F.3d 990, 991-92 (9th Cir. 2008).

Alternately, an injunction is appropriate when “serious questions going to the merits [are] raised and the balance of hardships tips sharply in the plaintiff’s favor.” *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134-35 (9th Cir. 2011).

This Court reviews the denial of a preliminary injunction for abuse of discretion, but legal conclusions are reviewed *de novo*. *Aircraft Serv. Int'l, Inc. v. Int'l Bhd. Of Teamsters*, 779 F.3d 1069, 1072 (9th Cir. 2015).

## ARGUMENT

This Court should maintain the pre-S.B. 1100 status quo by granting an injunction pending appeal, rather than oust SAGA’s members from restrooms at Boise High matching their gender identity, which transgender students have been able to use for nearly a decade. SAGA is likely to succeed on the merits of its appeal, including because the central reasoning of the district court’s decision is based on an interest in visual privacy to which S.B. 1100 lacks a substantial relationship in the specific context of restrooms.

**I. This Court Should Grant Immediate Administrative Relief to Preserve the Status Quo.**

As an initial matter, this Court should grant administrative relief to preserve the status quo at Boise High pending its determination on SAGA’s motion for an injunction pending appeal. Administrative relief “is only intended to preserve the status quo until the substantive motion for [relief] pending appeal can be considered on the merits, and does not constitute in any way a decision as to the merits of the motion [for relief] pending appeal.” *Doe #1 v. Trump*, 944 F.3d 1222, 1223 (9th Cir. 2019). “When considering the request for [] administrative [relief], [this Court’s] touchstone is the need to preserve the status quo.” *National Urban League v. Ross*, 977 F.3d 698, 702 (9th Cir. 2020). This Court defers weighing the factors considered on a motion for relief pending appeal when deciding whether to issue administrative relief. *Id.* at 702. Here, administrative relief is warranted to preserve the status quo at Boise High pending resolution of this motion for an injunction pending appeal.

**II. SAGA Is Likely to Succeed on Its Equal Protection Claim on Appeal.**

**A. Heightened Scrutiny Applies to S.B. 1100.**

This Court recognizes that discrimination based on sex and transgender status must satisfy heightened scrutiny under equal protection. *Karnoski v. Trump*, 926 F.3d 1180, 1200-01 (9th Cir. 2019). Such discrimination is presumptively unconstitutional, and the government’s heavy burden requires showing an

“exceedingly persuasive justification” that is substantially related to the discriminatory means employed. *United States v. Virginia*, 518 U.S. 515, 533-34 (1996).

This Court has already confirmed that “S.B. 1100 discriminates on the basis of transgender status as well as on the basis of sex.” *Critchfield*, 137 F.4th at 923. That holding is the law of the case, and the district court rightly rejected Defendants’ argument that *United States v. Skrametti*, 145 S. Ct. 1816 (2025) is “clearly irreconcilable” with *Critchfield*, *In re Amy*, 714 F.3d 1165, 1167 (9th Cir. 2013), as it would have to be to abrogate that decision.

*Skrametti* and *Critchfield* construe different laws, address different factual scenarios, and reach different constitutional questions. Unlike the ban on gender-affirming care in *Skrametti*, S.B.1100 discriminates against transgender students based on their sex assigned at birth, not medical diagnosis. As *Bostock v. Clayton County* clarifies, such differential treatment—measured by changing one variable (sex) and seeing whether the prohibition stands—discriminates based on sex. 590 U.S. 644, 660 (2020). And *Skrametti* is equally irrelevant to *Critchfield*’s transgender status analysis, which confirms that a law “bar[ring] only transgender students from using facilities that align with their gender identity” discriminates based on transgender status. *Critchfield*, 137 F.4th at 922-23.

**B. Defendants Cannot Show that Barring SAGA Members from Restrooms Is Substantially Related to an Important Government Interest.**

Applying S.B. 1100 to bar SAGA members from using restrooms consistent with their gender does not substantially further any interest in safety or privacy.

*Safety.* This Court previously found no evidence in the record that S.B. 1100 was substantially related to student safety. *Critchfield*, 137 F.4th at 924 n.8. In opposing SAGA’s motion for a preliminary injunction limited to restrooms, Defendants offered isolated examples of alleged misconduct to attempt to resuscitate a safety justification for excluding all transgender students from common restrooms.<sup>2</sup> The district court examined those examples—but it found them to be “unclear, exaggerated, or speculative.” A.14. It further noted Defendants’ admission that “[t]o be sure,” transgender people “do not pose a categorical threat to public safety” based on their transgender status.<sup>3</sup> *Id.* The

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<sup>2</sup> The centerpiece of the State’s defense was an allegation that one student imagined a transgender girl to be masturbating in a restroom stall based solely on “noises” the student heard. But the school itself concluded after investigation that the allegation was not substantiated, A.35, and the school Defendants tellingly refused to join the State Defendants in their argument below. The transgender student at issue has autism, which causes her to engage in self-stimulating behavior (“stimming”) such as making vocalizations or slapping her hands against her body. A.28, A.34-45. Rather than justify S.B. 1100, Defendants’ argument perfectly illustrates how fear, misunderstanding, and stereotypes can fuel unjustified discrimination against a minority group.

<sup>3</sup> Additionally, schools have existing tools to respond to misconduct by any

record supports that admission. A.145-46, A.236-37.

Ultimately, the district court found that Defendants had failed to carry their burden at this stage that S.B. 1100 substantially furthers safety. A.14.

**Privacy.** This Court previously recognized a cognizable interest in “(1) not exposing students to the unclothed bodies of students of the opposite sex; and (2) protecting students from having to expose their own unclothed bodies to students of the opposite sex.” *Critchfield*, 137 F.4th at 925. Applying S.B. 1100 to ban SAGA members from restrooms matching their gender identity is not substantially related to that interest in visual privacy.

This Court emphasized that different types of sex-designated facilities “do not present uniform risks of bodily exposure,” *id.* at 924, and observed that “the privacy interest in avoiding bodily exposure is most strongly implicated in locker rooms and communal shower rooms that lack curtains or stalls.” *Id.* at 925. This Court affirmed the denial of a facial preliminary injunction based on this range of applications. It did not, however, credit the notion that the government has a legitimate interest in preventing the “mere presence of transgender students in facilities matching their gender identity.” *Id.* at 923 n.6; *see also Parents for Priv.*

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student. A.235-36. And of course, the Constitution does not permit imposing a blanket restriction on an entire group based on the conduct of a few. *See N.A.A.C.P. v. Claiborne Hardware Co.*, 458 U.S. 886, 932 (1982) (“[G]uilt by association is a philosophy alien to the traditions of a free society.”).

*v. Barr*, 949 F.3d 1210, 1222-23 (9th Cir. 2020).

Here, SAGA only requested narrow preliminary relief from S.B. 1100 as applied to its transgender members' use of restrooms. In response, Defendants acknowledged that privacy stalls exist but claimed there could nonetheless be bodily exposure from small gaps in restroom stall doors. The district court did not rely on that argument to justify the law. Such "gaps" do not remove the restroom's structural privacy, where stall doors block meaningful visual exposure during everyday usage, nor do they transform it into a space of forced bodily exposure. Intentionally peering through a small gap would be an invasion of privacy and is already prohibited—S.B. 1100 provides no added protection at all. A.235-36. And Defendants admit that, at Boise High, "[m]ost restroom stalls have privacy strips that prevent individuals outside of a closed restroom stall from easily seeing into the stall." ECF 90-2 at 2.

Instead, the district court relied on a different purported justification, which Defendants themselves had not raised: it held that a broad privacy interest in communal restroom areas—outside stalls—was sufficient to justify S.B. 1100's application to restrooms. It criticized SAGA's "focus on bodily exposure" for people actually "*using* the restroom" for the purpose for which it exists. A.15-16 (emphasis in original). The court held that the government interest at stake was not "limited to" whether a person is visible in a stall and even whether they are "in a

state of partial undress or not.” A.16-17. It posited that “[p]eople often use the common areas of a restroom (as well as a stall) to change items of clothing or undertake other personal hygiene duties.” A.16. It then concluded that these activities in common areas were sufficiently private to justify the categorical exclusion of transgender students from restrooms consistent with their gender. A.17 (state’s privacy interest “applies equally” to “protecting such broader concerns”).

The district court’s statement that students “often use the common areas of a restroom” to change clothes is both unsupported and insufficient to carry Defendants’ burden under heightened scrutiny. A.16. The court did not cite any argument or evidence in the record to support this assumption,<sup>4</sup> which flatly contradicts this Court’s observation, quoting the Seventh Circuit: “[c]ommon sense tells us that the communal restroom is a place where individuals act in a discreet manner to protect their privacy and those who have true privacy concerns are able to utilize a stall.” *Critchfield*, 137 F.4th at 924 (quotes omitted). Indeed, this Court emphasized that the *lack* of privacy partitions (that is, stalls) is why Idaho had a privacy interest in enforcing S.B. 1100 in locker rooms and showers. *Id.* at

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<sup>4</sup> In fact, the only salient evidence in the record negates the district court’s assumption. A.207 (Jane Doe explaining that she “takes care of [her] private business in the stall and leave[s]” and “because other girls in the restroom similarly use stalls, [she] would not be exposed to their bodies either”).

925 (“privacy interest in avoiding bodily exposure is most strongly implicated in locker rooms and communal shower rooms that *lack curtains or stalls*”) (emphasis added). And it explained that “though SAGA suggests *reasonable measures that could accommodate the State's privacy concern*” in these spaces, “including commonsense alternatives like *installing privacy partitions* in changing facilities,” the Court refused to obligate the State to create such partitions. *Id.* at 926 (emphasis added). To hold that Idaho may *also* exclude transgender students from spaces that already have those partitions goes far beyond what this Court contemplated—and renders the Equal Protection Clause a dead letter.

Hypothetical concerns also cannot carry Defendants’ demanding burden here. *Id.* at 922 (justification must be “genuine” and “not hypothesized”). And even if a hypothetical could suffice, the example of a student *choosing* to disrobe in the *common area* of a restroom does not closely fit a cognizable privacy interest. *See id.* at 925 (privacy interest is in protecting students from “*having to expose their own unclothed bodies*” (emphasis added)); *Sessions v. Morales-Santana*, 582 U.S. 47, 63 n.13 (2017) (“close means-end fit required” under intermediate scrutiny). The privacy issue in locker rooms and showers was the absence of privacy partitions—not a particular student’s *choice* not to use such partitions even though they are readily available. Nor does a “general privacy concern” in unspecified hygiene “duties” in common areas satisfy Defendants’ burden to show

a substantial relationship to an important interest.

Finally, the district court’s reliance on tradition and “[p]hysical differences between men and women” does not justify S.B. 1100’s application. A.17 (citing *Virginia*, 518 U.S. at 533). First, arguments about tradition do not satisfy or remove the government’s burden under equal protection to show that S.B. 1100 substantially furthers the privacy interest at issue. *See Virginia*, 518 U.S. at 533 (sex classifications cannot be used to “perpetuate” legal or social inferiority). Second, as *Virginia* went on to explain, physical differences do not *end* the inquiry. Instead, the court must test the relationship between the discriminatory means employed and the stated objective to ensure those physical differences are not used to place “artificial constraints on an individual’s opportunity.” *Virginia*, 518 U.S. at 533; *see also id.* at 550 n.19 (finding privacy in “living arrangements” was manageable).

Here, the district court did not account for the reduced privacy interests in common restroom areas nor the significant harm of excluding a class of students from those spaces. *See Latta v. Otter*, 19 F. Supp. 3d 1054, 1077 (D. Idaho 2014). Defendants are not likely to show a privacy interest that justifies barring SAGA members—who seek only to continue using restrooms for the ordinary purpose for which they exist—from restrooms consistent with their gender identity.

### III. SAGA Is Likely to Prevail on Its Title IX Claim on Appeal.

Although this Court need not reach the issue to resolve SAGA’s motion, SAGA is also likely to succeed on its as-applied Title IX claim on appeal. As the majority of the Courts of Appeal have held, barring transgender students from using restrooms that correspond with their gender identity violates Title IX. *See A.C. by M.C. v. Metro. Sch. Dist. of Martinsville*, 75 F.4th 760, 770 (7th Cir. 2023); *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 619 (4th Cir. 2020).

#### A. *Roe v. Critchfield* Did Not Decide This Narrow Question.

As an initial matter, the district court suggested that this Court, in *Critchfield*, already rejected the argument that S.B. 1100’s application to restrooms is impermissible under Title IX. A.18-19 n.17. That is incorrect. The Court rejected Plaintiff’s facial challenge to S.B. 1100 only—it did not decide whether Plaintiff’s constitutional or statutory challenges would succeed as applied to restrooms specifically. *See infra* at 18.<sup>5</sup> And the Court’s Title IX analysis confirms as much. The Court agreed that S.B. 1100 is discrimination on the basis of sex, *see* 20 U.S.C. § 1681 (prohibiting such discrimination), but it observed that

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<sup>5</sup> The district court pointed to this Court’s statement that Defendants did not have adequate notice “that Title IX prohibits the exclusion of transgender students from restrooms, locker rooms, shower facilities, and overnight lodging.” *Id.* at 929; A.21. But that merely confirmed that the facial challenge—applied to *all* of these facilities—failed, as the rest of the decision made clear.

§ 1686 of Title IX allows schools to separate “living facilities” based on “sex.” 20 U.S.C. § 1686; *see Critchfield*, 137 F.4th at 929. Citing the Spending Clause’s clear-notice requirement, the Court held that “sex” was not unambiguously broader than “biological sex”; and that “living facilities” was not “unambiguously limited to facilities such as dormitories.” *Id.* at 930. Because Section 1686 could encompass at least one facility covered by the facial challenge (such as overnight facilities), that was enough to reject Plaintiff’s challenge. The Court pointedly did *not* decide whether “restrooms” are “living facilities.”

The procedural history of the opinion confirms this narrow reading. The Court initially stated that § 1686’s carve-out might extend not to “*only* living facilities,” but could also encompass other “intimate spaces” such as “*restrooms*, changing rooms, and communal showers.” *Roe v. Critchfield*, 131 F.4th 975, 993 (9th Cir. 2025) (second emphasis added). Plaintiff narrowly petitioned for panel rehearing to specifically argue that restrooms are not “living facilities” under the plain text of that term; that § 1686 does not reach any facilities other than “living facilities”; and that the Court had no need to suggest otherwise to deny the facial injunction. *Critchfield*, No. 23-2807, Dkt. 115. The panel thereafter amended its opinion to the operative version.<sup>6</sup>

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<sup>6</sup> Footnote 15 of the Court’s opinion, cited by the district court, also does not

**B. Applying S.B. 1100 to Restrooms in a Non-Residential Building Violates Title IX.**

**1. As Applied to Restrooms, S.B. 1100 Discriminates on the Basis of Sex Under § 1681 of Title IX.**

Section 1681 of Title IX provides that “[n]o person in the United States shall, on the basis of sex, be ... subjected to discrimination under any education program or activity receiving Federal financial assistance.” 20 U.S.C. § 1681.

S.B. 1100 facially classifies students according to sex assigned at birth and denies transgender students access to restrooms consistent with their gender identity on that basis. That is sex discrimination, as this Court’s precedents confirm. *See Critchfield*, 137 F.4th at 923; *id.* at 929; *Grabowski v. Ariz. Bd. of Regents*, 69 F.4th 1110, 1116 (9th Cir. 2023).

The district court appeared to dispute this reading of Title IX on the basis that Plaintiff could not show that “sex” in Title IX extends beyond “biological sex.” A.18-20. But, as Plaintiff explained below, even if “sex” means “sex assigned at birth,” S.B. 1100 plainly discriminates against transgender students on that basis.

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answer the question here. A.18-19. There, the panel noted that sex-separated facilities were likely assumed in 1972 and “did not merit special mention.” *Critchfield*, 137 F.4th at 930 n.15. But historical expectations, although potentially relevant to interpret ambiguous statutory text under *Pennhurst*, do not alter the meaning of clear text. *See infra* at 21-22. The Court’s actual textual analysis was thus paramount. And that analysis did not hold that restrooms are “living facilities.”

**2. Section 106.33 Does Not Carve Non-Residential Restrooms Out of Section 1681’s Anti-Discrimination Provision.**

Because applying S.B. 1100 to restrooms is clearly discrimination on the basis of sex under § 1681, the question is whether a carve-out applies. 137 F.4th at 930. It does not.

Defendants argued below—and the district court appeared to agree—that 34 C.F.R. § 106.33, a regulation that concerns “separate toilet, locker room, and shower facilities,” forecloses SAGA’s Title IX claim. 34 C.F.R. § 106.33 (“A recipient may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex.”). But this Court actually rejected that argument in *Critchfield*, as it greatly overreads this regulation. Section 106.33 implements Section 1681—not Section 1686. *See* 34 C.F.R. § 106.33 (specifying regulations issued under § 1681). As other circuits have held, Section 106.33 thus cannot be read to *limit* the scope of Section 1681 by inventing exceptions unavailable in the text. *See Grimm*, 972 F.3d at 618; *A.C.*, 75 F.4th at 770. This Court accepted that reasoning: “Section 106.33, entitled ‘Comparable facilities,’ requires that, if a recipient of federal funding provides separate toilet, locker room, and shower facilities on the basis of sex, the facilities must be comparable.” 137 F.4th at 930. “In this way,” the Court concluded, “§ 106.33 extends § 1681’s protections against sex-based discrimination rather than

expanding the scope of § 1686’s carve out.” *Id.* Indeed, any other conclusion would have transformed Section 106.33 into a regulation incompatible with its own implementing statute, creating an obvious problem under *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 371 (2024) (courts must decide the meaning of authorizing statutes themselves, and not defer to agencies).

### **3. The § 1686 “Living Facilities” Carve-Out Does Not Apply to Restrooms, Even Under *Pennhurst*.**

The only relevant question then is whether Title IX’s carve-out for sex-separated “living facilities” under § 1686 includes school restrooms. It does not.

Contemporaneous dictionaries at the time § 1686 was enacted defined “living,” in its relevant and obvious sense, as “appropriate, designed, or adequate for living.” *Webster’s Third New International Dictionary* 1323-24 (1968). To “live” was defined, in turn, as “to occupy a home: DWELL, RESIDE.” *Id.* While overnight facilities regulated by S.B. 1100 are arguably living facilities, restrooms in a non-residential school building simply are not. “Living facilities” are spaces where students live, not where they briefly visit during the school day.

Defendants’ argument below only served to confirm this conclusion. Defendants, in an attempt to defend S.B. 1100, argued that “living facilities” means “private spaces typical to living facilities,” *i.e.*, those that may be found *within* living facilities, even when transposed to a non-residential building. ECF 90 at 16. But the presence of a feature found in a living facility does not transform

a non-living-facility into one, any more than the wheels on a suitcase make it a car (or are themselves a car).

The district court, for its part, did not purport to embrace Defendants’ definition, nor explicate “living facilities” at all. A.18 n.17. It nevertheless concluded that, under *Pennhurst*’s clear-notice rule, Title IX permits excluding transgender students from restrooms aligned with their gender identity. A.20-21. But *Pennhurst* provides no basis to ignore the question of what “living facilities” means. *Pennhurst*’s clear-notice rule only applies to interpret *ambiguous* text. See *Pennhurst*, 451 U.S. at 17; *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 304 (2006).

No such ambiguity exists here. And “the fact that [a statute] has been applied in situations not expressly anticipated by Congress does not demonstrate ambiguity” in the text; “it simply demonstrates [the] breadth of a legislative command.” *Bostock*, 590 U.S. at 674 (quotes omitted); see also A. Scalia & B. Garner, *Reading Law: The Interpretation of Legal Texts* 101 (2012) (unexpected applications reflect only Congress’s “presumed point [to] produce general coverage—not to leave room for courts to recognize *ad hoc* exceptions”).

In sum, S.B. 1100’s restroom exclusion violates Section 1681 of Title IX. Section 106.33, an implementing regulation of § 1681, does not negate that conclusion. And Section 1686, which allows sex-separation in “living facilities,”

cannot reasonably be extended to restrooms in non-residential buildings. Plaintiff is thus likely to succeed in its as-applied Title IX claim.

#### **IV. The Remaining Factors Favor an Injunction Pending Appeal.**

*Irreparable harm.* First, because SAGA is likely to succeed on the merits, it also faces irreparable harm. The violation of rights secured under equal protection and Title IX is per se irreparable harm. *See Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012); *Doe v. Horne*, 683 F. Supp. 3d 950, 975 (D. Ariz. 2024).

Second, the exclusion of transgender students from restrooms consistent with their gender identity will harm SAGA members in multiple, compounding ways on a daily basis. That includes increased risk of depression, anxiety, suicidality, self-harm, bullying, harassment, stigmatization, impaired academic access and performance, and physical pain and discomfort. A.136-145.

The district court wrongly concluded that S.B. 1100's provision of "alternative accommodation" would cure these harms. For transgender students, the proffered alternative—for example, a single-user restroom in the nurse's office—exacerbates, rather than resolves, the harms they will suffer. A.137. Telling such students to "go elsewhere" only reinforces the stigma and shame they experience. And because such single-user facilities are not equal in accessibility and other respects, they also cause additional harms, such as missing out on class time, physical harms when students instead "hold it," and resulting distraction that

compromises their education. *E.g.*, A.206-07. Finally, as one member of SAGA explains, having to visit the nurse’s office frequently “naturally cause[s] other students to ask questions about why someone is going to the nurse’s office so often.” A.27. That privacy risk is one that increases with each passing day, and the involuntary disclosure of a student’s transgender status is an irreversible harm that cannot be undone. It can also result in hostility, intolerance, harassment, and even assault. *See, e.g., F.V. v. Barron*, 286 F. Supp. 3d 1131, 1137 (D. Idaho 2018); *Powell v. Schriver*, 175 F.3d 107, 111 (2d Cir. 1999).

***Balance of harms and public interest.*** The balance of hardships and public interest together favor an injunction. *See Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014) (holding that the factors merge when the government is a party). As detailed above, SAGA’s hardships are manifold. On the other side of the ledger, the State is not harmed by maintaining the status quo that has existed for nearly a decade at Boise High. And there is “no interest in enforcing an unconstitutional law.” *Silvester v. Harris*, No. 11-CV-2137, 2014 WL 6611592, at \*2 (E.D. Cal. Nov. 20, 2014).

## CONCLUSION

An injunction pending appeal, and administrative relief at a minimum, should be granted to maintain the status quo.

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### **CERTIFICATE OF COMPLIANCE**

I hereby certify that the foregoing Motion complies with the limitation of Circuit Rules 32-3 and 27-1 because it contains 5,598 words. This Motion complies with the typeface and the type style requirements of Fed. R. App. P. 27 because this brief has been prepared in a proportionally spaced typeface using Word 14-point Times New Roman typeface.

/s/ Peter C. Renn  
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### **CERTIFICATE OF SERVICE**

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate ACMS system on August 11, 2025 and that service will be accomplished by the appellate ACMS system on all registered participants.

/s/ Peter C. Renn  
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