No. 24-6072

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

ANDREW BRIDGE, *et al.*,

Plaintiffs-Appellants,

v.

OKLAHOMA STATE DEPARTMENT OF EDUCATION, *et al.*,

Defendants-Appellees.

On appeal from the United States District Court
for the Western District of Oklahoma
The Honorable Jodi W. Dishman
No. 5:22-cv-00787-JD

RESPONSE BRIEF FOR DEFENDANTS-APPELLEES 1–9 ("STATE DEFENDANTS")

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ORAL ARGUMENT REQUESTED

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ISSUES PRESENTED

1. Whether Title IX plausibly prohibits Oklahoma from separating school restrooms, locker rooms, and showers based on sex, when Title IX expressly allows separating restrooms, locker rooms, and showers based on sex.

2. Whether the Equal Protection Clause plausibly prohibits Oklahoma from separating school restrooms, locker rooms, and showers based on sex.

INTRODUCTION

The "unremarkable—and nearly universal—practice of separating school bathrooms based on biological sex" does not violate the Equal Protection Clause or Title IX, the *en banc* Eleventh Circuit held in late 2022. *Adams v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 796 (11th Cir. 2022). After *Adams*, the court below reached the same conclusion: that neither the Constitution nor Title IX plausibly prohibits schools from maintaining bathrooms, locker rooms, and showers based on sex.

Confirming this point even further, less than a month ago the Supreme Court unanimously agreed that the federal government's attempt to impose on Title IX the opposite view was appropriately enjoined. *See Dep't of Educ. v. Louisiana*, 144 S. Ct. 2507 (2024). Justice Sotomayor explained that "[e]very Member of the Court agrees respondents are entitled to interim relief" from the proposed provision "prohibiting schools from preventing individuals from accessing certain sex-separated spaces consistent with their gender identity." *Id.* at 2510 (Sotomayor, J., dissenting in part).

Plaintiffs offer the same paltry and convoluted arguments here as were made in *Adams* and in the lower-court lead-up to *Louisiana*. None of these elevates the claim that Title IX and the Constitution prohibit separating restrooms, locker rooms, and showers based on sex—biological sex—from fanciful to plausible. This Court should affirm.

STATEMENT OF THE CASE[1]

A. Bathrooms have been separated based on sex for millennia.

"Across societies and throughout history, it has been commonplace and universally accepted to separate public restrooms, locker rooms, and shower facilities on the basis of biological sex in order to address privacy and safety concerns arising from the biological differences between males and females." *Grimm v. Gloucester Cnty. Sch. Bd.*, 822 F.3d 709, 734 (4th Cir. 2016) (Niemeyer, J., concurring in part and dissenting in part), *vacated and remanded by* 137 S. Ct. 1239 (2017). Such practices were recorded in the Ancient Roman, Ancient Greek, Japanese, and Egyptian baths, all pre-dating the 19th Century. *See* W. Burlette Carter, *Sexism in the "Bathroom Debates": How Bathrooms Really Became Separated by Sex*, 37 YALE L. & POL'Y REV. 227, 259–60 (2018). This historical practice "was rooted primarily in safety and privacy concerns." *Id.* at 228.

United States history also contains many examples of sex-separated communal spaces for intimate activities. *Id.* at 268–72, 275–78. For example, ads from early American public baths boasted of things like "[t]hree of the baths are for ladies who can bathe in the most private manner." *Id.* at 271–72. By 1886, "[s]chools educating both sexes followed sex-separation in multi-entry intimate spaces." *Id.* at 277. State laws separating bathrooms by sex "were among the earliest state-wide attempts to protect

[1] State Defendants will cite Plaintiffs' Appendix as App.XX, and the supplemental appendix filed by School Defendants as Supp.App.XX.

women from workplace sexual harassment." *Id.* at 279. One of the "leading reasons behind women's demands for separate restrooms" was that "women needed a physically safe public space." Stuart & Stuart, *Behind Closed Doors: Public Restrooms and the Fight for Women's Equality*, 24 TEX. REV. L. & POL. 1, 28–29 (2019).

Separate restrooms for each sex can be traced to the early years of Oklahoma statehood. School sanitation recommendations in 1909–1910 provided for "well ventilated out-houses for the sexes, separated by closely built fences," and indicated that "[o]ut-houses for males shall have urinals." *First Biennial Rep. of the Okla. State Pub. Health Dep't 1909 & 1910* at 165.[2] In addition, a government inspection form in 1908–1909 asked if "separate water closets" were "provided for male and female employees?" *Second Ann. Rep. of the Dep't of Labor 1908–09* at 258;[3] *see also Eighth Biennial Rep. of the State Super. of Pub. Instr. 1920* at 123 ("In the [locker] room reserved for young women individual private dressing rooms open into private shower compartments.").[4]

Separating restrooms based on sex was such an accepted practice in the United States by the 1970s, that future Justice Ginsburg wrote that the proposed Equal Rights Amendment (ERA) would not render same-sex restrooms unconstitutional because it "does not stamp man and woman as one." Ruth Bader Ginsburg, *Sexual Equality Under the Fourteenth and Equal Rights Amendments*, 1979 WASH. U. L.Q. 161, 175 (1979). The

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[2] *Available at* https://digitalprairie.ok.gov/digital/collection/okresources/id/10135/rec/4.
[3] *Available at* https://digitalprairie.ok.gov/digital/collection/okresources/id/20641/rec/1.
[4] *Available at* https://digitalprairie.ok.gov/digital/collection/okresources/id/62750/rec/83.

"congressional expectation," she observed, was "that the ERA would coexist peacefully with separate public restrooms." *Id.* Ginsburg quipped that "[p]erhaps Congress found it hard to conceive of a plaintiff litigating the issue, or of a judge who would find man or woman harmed by that limited separation." *Id.* What was inconceivable then is now claimed to be constitutionally required.

In sum, "[t]he bathroom has long been treated as unique public space, not as space just like any other. The key reason for the separation was safety and privacy." Carter, *supra*, at 288.

B. With Senate Bill 615, Oklahoma continued this longstanding practice.

The Oklahoma Legislature took these longstanding concerns into account in enacting Senate Bill 615 ("SB 615"). In the wake of revelations that certain public schools were not maintaining separate school restrooms,[5] SB 615 mandates that prekindergarten through twelfth grade schools in Oklahoma "require every multiple occupancy restroom or changing area" to be designated for "the exclusive use" of males or females. 70 OKLA. STAT. § 1-125(B). So, "[t]o ensure privacy and safety" of schoolchildren, *id.*, the Legislature provided a simple "restroom, locker room, changing room, or shower room" rule, *id.* § 1-125(A)(2). Furthermore, the Legislature defined

[5] *See, e.g.*, Ray Carter, *Mothers Urge Change to Stillwater Bathroom Policy*, OCPA (April 13, 2022), https://ocpathink.org/post/independent-journalism/mothers-urge-change-to-stillwater-bathroom-policy.

sex as "the physical condition of being male or female based on genetics and physiology, as identified on the individual's original birth certificate." *Id.* § 1-125(A)(1). At the same time, SB 615 required schools to allow students access to a single-occupancy restroom or changing room—a reasonable accommodation. *Id.* § 1-125(C).[6] It also allowed entry into same-sex facilities by the opposite sex for "custodial, maintenance, or inspection purposes" or "emergency medical assistance." *Id.* 1-125(D)(1)–(2).[7]

C. Plaintiffs incoherently challenged Senate Bill 615 on multiple grounds.

SB 615 took effect on May 25, 2022. Nearly four months later, Plaintiffs filed this lawsuit challenging its constitutionality under the Equal Protection Clause and Title IX. App.10. Soon after, Plaintiffs moved for a statewide preliminary injunction, seeking to upend the status quo. Supp.App.23. Plaintiffs' Complaint (and injunction motion) included various sex stereotypes. For example, they alleged that "social transition" for a transgender boy includes "wearing clothing and modifying his appearance to that stereotypically associated with boys." App.21–22; *see also* Pls. Br. 15 (similar). And one parent testified that she "suspected [Plaintiff] was transgender" in part because "[h]e never wanted to wear feminine clothing, such as dresses and skirts," and "[h]e also never

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[6] Plaintiffs criticize a school's implementation of this accommodation, arguing it is disrupting Plaintiff Stiles's Oklahoma education. Pls. Br. 20–21. Earlier, though, Plaintiffs admit that Stiles family has left the State. *Id.* at 5 n.1. In any event, such allegations could potentially support a lawsuit to enforce SB 615, not enjoin it.

[7] In 2023, the Legislature clarified that a coach may enter a locker room with students "fully clothed" and an "adult of the same sex as the students" present. *Id.* § 1-125(D)(3).

wanted to play with what are traditionally thought of as 'girl' toys and would only play with what are traditionally thought of as 'boy' toys." Supp.App.76–77; *see also* App.32 & Pls. Br. 17.

Also, Plaintiffs admitted in their Complaint that they were designated on their birth certificate as the opposite sex from what they are now claiming. App.29, 32, 35. They added that this designation was made "even though" each Plaintiff "is" a member of the sex they now identify with. *Id.* But they never alleged that the original designation was mistaken in a way that should have been caught at the time. And they repeatedly alleged that they are transgender. App.14–15, 29, 31, 35; *see also* App.19–20 (transgender individuals have "a gender identity that does not align with their sex assigned at birth.").

Defendants 1–9 ("State Defendants") filed a motion to dismiss. App.118. Several weeks later, the State Defendants responded to Plaintiffs' motion for an injunction. Supp.App.548. After Plaintiffs included new evidence in reply, State Defendants filed a surreply with additional declarations. Supp.App.892. On December 30, 2022, the *en banc* Eleventh Circuit upheld a bathroom separation policy in Florida. *Adams*, 57 F.4th at 796. A week later, the court below requested supplemental briefing from the parties on new authorities like *Adams*. App.198. The parties complied. App.200, 205, 221.

D. The district court correctly found Plaintiffs' claims to be implausible.

The district court granted State Defendants' motion to dismiss. App.243. Relying on binding Supreme Court precedent emphasizing that sex is immutable and "[p]hysical differences between men and women … are enduring," *United States v. Virginia*, 518 U.S.

515, 533 (1996) (citation omitted), as well as persuasive cases like *Adams*, the district court held that Plaintiffs had failed to state a plausible equal protection or Title IX claim.

For equal protection, the court found that Plaintiffs identified as a sex different from their biological sex. App.245–47. In support, the court cited Plaintiffs' allegations admitting they were transgender and defining "transgender" as "meaning that they … identify as a sex that is different than the sex each was assigned at birth." App.12. Next, the court found that SB 615 "classifies individuals based on sex" because it separates them "based on their biological sex and requires them to use the facilities that correspond to that sex." App.250. Thus, the court applied intermediate scrutiny and did not determine whether transgender status was a quasi-suspect class. App.250–51 & n.5. Relying on *Adams*, the court also found that SB 615 does not discriminate based on transgender status. *Id.*

The court found it implausible that SB 615 could fail intermediate scrutiny. Relying on Supreme Court caselaw recognizing "the need for privacy between members of each sex in intimate settings" and the State's responsibility to keep public schools safe, the court found that "[s]eparating students based off biological sex … so that they are able to use the restroom, change their clothes, and shower outside the presence of the opposite sex is an important governmental objective." App.251. In so finding, the court rejected Plaintiffs' last-minute attempt to cabin their argument to restrooms, observing that the Complaint expressly extended further than that, and that the analysis for restrooms, locker rooms, and showers is "identical." App.251–52 n.6. The court

also relied on this Court's holding that the "[u]se of a restroom designated for the opposite sex does not constitute a mere failure to conform to sex stereotypes." App.252 (quoting *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1224 (10th Cir. 2007), *deemed overruled on different grounds in Tudor v. SEOSU*, 13 F.4th 1019 (10th Cir. 2021)).

Next, the court found that "the governmental interest is almost identical to the means used to protect the interest." App.253. That is to say, "[p]rotecting students' safety and privacy interests in school restrooms and changing areas is undoubtedly closely related to the statute's mandate that all multiple occupancy restrooms or changing areas be for the exclusive use of either the male or female sex." *Id.* As the court explained, this view was supported by an "unremarkable—and nearly universal" historical practice, *id.* (quoting *Adams*, 57 F.4th at 796), as well as practical sense, given that it "establishes the clearest limiting principle regarding who can go in what restroom," App.253–54. To accept Plaintiffs' view, the court found, would create safety concerns and "put school officials in the position of either having to conduct a subjective analysis of the sincerity of an individual's gender identity or merely take their word for it." App.254. Moreover, if something as "unremarkable" as a sex-separated restrooms in schools were unconstitutional, then "no law recognizing the inherent differences between male and female would pass constitutional muster." App.254.

Given Supreme Court precedent, "[t]his is an untenable position." App.254.[8]

The court found Plaintiffs' Title IX claim similarly implausible. It began by observing that, per binding precedent, "Title VII … is a vastly different statute from Title IX." App.255 (quoting *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 175 (2005)). The court then determined, citing numerous dictionary definitions, that the ordinary public meaning of "sex" when Title IX was enacted could only mean "biology and reproductive functions." App.257. And this was determinative, the court found, because Title IX explicitly allows schools to "maintain[] separate living facilities" and "separate toilet, locker room, and shower facilities" for the "different sexes." App.257. SB 615, in other words, "is perfectly in sync with Title IX." App.257.

The court also responded to Plaintiffs' argument that "biological sex" was an improper label and that factfinding was needed. Plaintiffs' Complaint, the court found, makes clear Plaintiffs' biology. App.258. And no "factfinding conducted by the Court could change this reality or make Plaintiffs' claims cognizable." *Id.* Subsequently, Defendants 10–13 ("School Defendants") filed for dismissal, citing the court's decision on the State Defendants' motion to dismiss. The court granted this motion, as well. App.269. Plaintiffs have appealed these dismissal decisions, but not the denial of an injunction. For the following reasons, the court's dismissal should be upheld.

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[8] The court dismissed the Fourth Circuit's contrary opinion as insufficiently protective of privacy. App.253 n.8 (citing *Grimm v. Gloucester County Sch. Bd.*, 972 F.3d 586, 613–14 (4th Cir. 2020)). The court did not "fail to acknowledge" such authority. Pls. Br. 33, 50.

SUMMARY OF THE ARGUMENT

Physical differences between men and women exist. As courts have often recognized, these differences give rise to important privacy interests in places where persons routinely disrobe, such as restrooms and changing areas. Accordingly, societies have long permitted, with little fanfare, separating places of heightened privacy into male and female spaces. Indeed, they frequently design such spaces to accommodate anatomical differences between males and females.

Plaintiffs seek to turn this well-established precedent and history upside-down. Plaintiffs apparently regard the real physical differences between males and females as stereotypes, and they claim that laws like SB 615 that designate intimate spaces based on the differences between males and females are invidious discrimination. Plaintiffs, that is, seek to prohibit Oklahoma from recognizing biological sex differences in any fashion. Neither the Constitution nor Title IX requires this radical approach.

SB 615 simply and permissibly requires students to use restrooms, showers, and locker rooms corresponding with their sex, as determined by objective physical factors and identified on an original birth certificate. The statute also provides a reasonable accommodation: Students may use a single-occupancy restroom or changing room, which schools must provide. While SB 615 separates based on sex, it does so in a way long recognized as permissible—in a way Plaintiffs *admit* is permissible—and it otherwise treats all students the same regardless of transgender status.

As such, Plaintiffs' Title IX claim cannot succeed. Title IX and its regulations expressly *allow* schools to separate living spaces, restrooms, and similar facilities on the basis of sex, which easily distinguishes this case from *Bostock v. Clayton County,* 590 U.S. 644 (2020). And Plaintiffs' argument that "sex" in Title IX encompasses gender identity is foreclosed by Title IX's text, statutory context, legislative history, and original meaning. Indeed, the Supreme Court just affirmed an injunction of a new Title IX rule that would have enshrined Plaintiffs' views into Title IX regulations.

Moreover, because SB 615 treats all similarly situated individuals the same, Plaintiffs cannot establish intentional discrimination in violation of the Equal Protection Clause. Biological males are not similarly situated to biological females when it comes using the restroom, changing, or showering. And SB 615 withstands even intermediate scrutiny because its separation of the sexes substantially relates to well-recognized, important government interests: protecting privacy and safety in intimate spaces. It certainly passes a rational basis evaluation, which is the standard that should apply here based on Plaintiffs' admission that sex-separation is permissible. No set of facts could establish a plausible claim for relief, and dismissal was proper.

STANDARD OF REVIEW

This Court reviews the granting of a motion to dismiss de novo, applying the same standard as below. *Teigen v. Renfrow*, 511 F.3d 1072, 1078 (10th Cir. 2007). Pleading standards "demand[] more than an unadorned, the-defendant-unlawfully-harmed-me accusation," and "labels and conclusions ... will not do." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (cleaned up). Moreover, "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." *Id.*

A complaint does not survive unless it "contain[s] sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Id.* (citation omitted). But "hyperbole," "unwarranted inferences drawn from the facts or footless conclusions of law predicated upon them[,]" and "mere conclusions characterizing pleaded facts[,]" are not entitled to the assumption of truth. *Lockett v. Fallin*, 841 F.3d 1098, 1104 n.2 (10th Cir. 2016); *Bryson v. City of Edmond*, 905 F.2d 1386, 1390 (10th Cir. 1990) (citation omitted). And a court must, in analyzing whether a complaint states a plausible claim, "draw on its judicial experience and common sense." *Iqbal*, 556 U.S. at 679. When a complaint presents a question of law and "it is clear that no relief could be granted under any set of facts," the complaint "must be dismissed, without regard to whether it is based on an outlandish legal theory or on a close but ultimately unavailing one." *Neitzke v. Williams*, 490 U.S. 319, 327 (1989) (citation omitted).

This Court has also recognized a "preference for affirmance" that flows "from the deference we owe to the district courts and the judgments they reach." *Richison v.*

Ernest Grp., 634 F.3d 1123, 1130 (10th Cir. 2011). As such, this Court is "free to affirm a district court decision on any grounds for which there is a record sufficient to permit conclusions of law, even grounds not relied upon by the district court." *Smith v. Plati*, 258 F.3d 1167, 1174 (10th Cir. 2001) (citation omitted). When analyzing a state law under rational basis review, for example, courts "are not bound by the parties' arguments as to what legitimate state interests the statute seeks to further[,]" but instead they are "obligated to seek out other conceivable reasons for validating" state law. *Powers v. Harris*, 379 F.3d 1208, 1217 (10th Cir. 2004) (citation omitted).

When, as here, plaintiffs seek facial relief, App.43,[9] "it is necessary to proceed with caution and restraint." *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 216 (1975). This is "[b]ecause facial challenges push the judiciary towards the edge of its traditional purview and expertise." *Ward v. Utah*, 398 F.3d 1239, 1247 (10th Cir. 2005). As such, the Supreme Court has "made facial challenges hard to win." *Moody v. NetChoice*, 144 S. Ct. 2383, 2397 (2024). Litigants bringing a facial challenge "normally 'must establish that *no set of circumstances* exists under which the [statute] would be valid.'" *United States v. Hansen*, 599 U.S. 762, 769 (2023) (citation omitted). Therefore, "courts must be vigilant in applying a most exacting analysis to such claims." *Ward*, 398 F.3d at 1247.

[9] *See also* Supp.App.754 (requesting injunction for "Oklahoma transgender students").

ARGUMENT

I. Issue No. 1: It is not plausible that a state law separating school restrooms, locker rooms, and showers based on sex is prohibited by Title IX, which expressly allows for such separation based on sex.

Under Title IX, 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 receiving Federal financial assistance." 20 U.S.C. § 1681(a). Title IX clarifies, however, that "nothing contained herein shall be construed to prohibit any educational institution receiving funds under this Act, from maintaining separate living facilities for the different sexes." *Id.* § 1686. "[L]iving facilities" has consistently been understood to "include restrooms, lockers, and other school areas where disrobing takes place." Comment, *Implementing Title IX: The HEW Regulations*, 124 U. PA. L. REV. 806, 811 (1976); *see also* Jonathan H. Adler, Auer *Evasions*, 16 GEO. J.L. & PUB. POL'Y 1, 20 (2018) ("Title IX expressly allows for the maintenance of single-sex living facilities, such as dormitories, bathrooms, and the like.").

As such, Title IX regulations have long allowed schools to provide "separate toilet, locker room, and shower facilities on the basis of sex," so long as the facilities "provided for students of one sex shall be comparable to such facilities provided for students of the other sex." 34 C.F.R. § 106.33. Similar regulations allow schools to have "separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport." 34 C.F.R. § 106.41(b).

A. Plaintiffs are hindered by their admissions of Title IX's legitimacy.

Plaintiffs do not challenge these statutes or regulations as unlawful. To the contrary, Plaintiffs "do not object to restrooms separated by sex in schools," Plaintiffs' Brief 60 ("Pls. Br."), and they admit that "Title IX funding recipients may provide separate restrooms for boys and girls," *id.* at 62. Thus, Title IX and its regulations permitting sex-separated restrooms, locker rooms, and showers must be presumed legitimate. What, then, are we doing here? How can an Oklahoma law that mirrors these valid laws be plausibly challenged as violating them? It cannot. Rather than make any case for plausibility, Plaintiffs' allegations and arguments are chock-full of incoherence.

For instance, Plaintiffs claim that by treating "transgender girls … differently than cisgender girls" (and "transgender boys" differently from "cisgender boys"), SB 615 is plausibly discriminating "on the basis of sex" in violation of Title IX. Pls. Br. 57, 60. But Title IX allows Oklahoma to "separate toilet, locker room, and shower facilities ***on the basis of sex***." 34 C.F.R. § 106.33 (emphasis added). However it is framed linguistically, Oklahoma is allowed by valid federal laws to separate the facilities in question "on the basis of sex." It is impossible, in other words, to square Plaintiffs' argument here with their admissions of Title IX's validity. If "restrooms separated by sex" are permissible, Pls. Br. 60, then how could a state law that separates restrooms "on the basis of sex" plausibly violate Title IX? The argument collapses on itself.

Moreover, the Title IX regulation approving separation "on the basis of sex" in the restroom context renders irrelevant Plaintiffs' reliance on *Bostock* here. *See* Pls. Br.

57–59, 64. Of course, *Bostock* involved different statutory language and a different context than here. *Compare* 42 U.S.C. 2000e-2(a) (Title VII: "unlawful employment practice … because of … sex"), *with* 20 U.S.C. § 1681(a) (Title IX: "on the basis of sex … discrimination under any education program"). And *Bostock* did not "purport to address bathrooms, locker rooms, or anything else of the kind" under Title VII, much less Title IX. *Bostock*, 590 U.S. at 681. And the Supreme Court has elsewhere emphasized that "Title VII … is a vastly different statute from Title IX." *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 175 (2005); *see also Meriwether v. Hartop*, 992 F.3d 492, 510 n.4 (6th Cir. 2021) ("Title VII differs from Title IX in important respects."). But even ignoring all that—which is a *lot* to ignore—and assuming *Bostock*'s reasoning applies to Title IX, Plaintiffs still have not pleaded a plausible Title IX claim. This is because, again, Title IX indisputably allows separation "on the basis of sex" for restrooms, locker rooms, and showers. No such statute or regulation was present in *Bostock*, much less one the plaintiffs in that case admitted was valid.

If anything, Plaintiffs' view of *Bostock* cuts in Defendants' favor on Title IX. If *Bostock* demonstrates the "intertwined nature of transgender status and sex" in all laws instead of just Title VII, Pls. Br. 58 (quoting *Fowler v. Stitt*, 104 F.4th 770, 790 (10th Cir. 2024)), then any law expressly allowing separation of restrooms, locker rooms, and showers based on sex would ipso facto also allow for a separation of restrooms, locker rooms, and showers that implicates transgender status. Again, Plaintiffs' contentions crumble under their own weight.

Seemingly recognizing that their allegations founder on the rocks of Title IX's express statutory and regulatory allowances, Plaintiffs offer three points of pushback. Pls. Br. 61–64. None of these rebuttals salvages their case.

B. Plaintiffs' convoluted interpretations of Title IX are meritless.

First, Plaintiffs focus on 20 U.S.C. § 1686's indication that "nothing" in Title IX "shall be construed to prohibit any educational institution … from maintaining separate living facilities for the different sexes." Specifically, they claim that "Title IX does not indicate that Congress intended for Section 1686 to undercut the basic prohibition on discrimination described in Section 1681." Pls. Br. 61–62. Inexplicably, that is, they contend that Section 1686 does not have any impact on the rest of Title IX. To begin, they point out that Section 1686 is not one of the listed exceptions to the prohibition on sex discrimination in Section 1681. Pls. Br. 62 n.12. And they add that the Supreme Court, when discussing Title IX's exceptions, "did not cite other sections beyond Section 1681." *Id.* (citing *Jackson*, 544 U.S. at 175). This is remarkably facile. *Jackson* did not purport to list all Title IX exceptions, nor is there any requirement that all exceptions to a general rule be listed in the same statute as the rule. Section 1686 is a valid statute, it has straightforward language, and it clearly operates in conjunction with other Title IX provisions. *See, e.g.*, *Wilson v. Glenwood Intermountain Props.*, 98 F.3d 590, 592 (10th Cir. 1996) ("The [district] court also ruled that in any case defendants' practices were permitted under Title IX, 20 U.S.C. § 1686 ….").

Moreover, Plaintiffs never bother to explain what Section 1686 actually does if it "is not an exception to Section 1681." Pls. Br. 62 n.12. Based on their logic, the obvious answer is: Nothing. It would have no purpose. Despite being permitted by the text to separate living facilities based on sex, schools would have to allow anyone who identified as the opposite sex into a facility. The label might exist, but the substance would be extinguished. Needless to say, courts are not in the habit of treating straightforward statutory language as surplusage—much less entire statutes. Rather, when a proposed interpretation "'render[s] an entire subparagraph meaningless … the canon against surplusage applies with special force." *Pulsifer v. United States*, 601 U.S. 124, 143 (2024) (quotation omitted). "And still more when the subparagraph is so evidently designed to serve a concrete function," *id.*, as is the situation here.

Plaintiffs trudge on, however, arguing that "[u]nlike the statutory exemptions in 20 U.S.C. § 1681(a)(2)–(9), where the broad prohibition on sex discrimination 'shall not apply,' Section 1686 states only that 'nothing contained herein shall be construed to prohibit any education [sic] institution … from maintaining separate living facilities for the different sexes." Pls. Br. 62. But Plaintiffs neglect to even try to explain why the similarly broad phrase "nothing contained herein" should not be interpreted exactly as it reads, which is to operate as an express clarification that *nothing* in Title IX forbids "any educational institution" from maintaining "separate living facilities for the different sexes." 20 U.S.C. § 1686. Congress does not have to use the exact same language to carve out multiple exceptions to a general rule. Plaintiffs also complain that

Section 1686 cannot be read to "override Section 1681's statutory prohibition on 'discrimination,' but instead must be read consistently with the broader prohibition." Pls. Br. 62. But a clear statutory clarification does not "override" anything—it is part and parcel of the Title IX scheme. Rather than read Sections 1681 and 1686 "consistently," *id.*, Plaintiffs' approach would write Section 1686 out of Title IX.

Furthermore, Plaintiffs do little to explain why this Court should disregard the valid regulation allowing "separate toilet, locker room, and shower facilities on the basis of sex." 34 C.F.R. § 106.33. Plaintiffs drop a stray citation to *Grimm*, 972 F.3d 586, but in doing so they inadvertently reveal why *Grimm* is entirely unpersuasive. *See* Pls. Br. 62. To say, as *Grimm* did, that the regulation merely "suggests" that "creating sex-separated restrooms in and of itself is not discriminatory," 972 F.3d at 618, wildly understates things. The regulatory language is crystal clear, offering far more than a mere suggestion. Moreover, the Fourth Circuit's view that sex-separated facilities are permitted but cannot be administered based on a State's supposedly "discriminatory notions of what 'sex' means" is hard to take seriously. *Id.* Plaintiffs echo that sophistry, however, arguing that although "Title X funding recipients may provide separate restrooms for boys and girls, they are not entitled to define 'sex' or 'boys' and 'girls' in a way that discriminates against transgender students." Pls. Br. 62–63. This is nonsensical. Nowhere does the regulatory (or statutory) text restrict a state's ability to define sex as it has been defined for eons. Rather, the regulation expressly *approves* of separation "on the basis of sex,"

which, per Plaintiffs' reading of *Bostock*, would include gender identity. Just like their stunted take on Section 1686, this view would render the regulation toothless.

C. The district court was correct to find that Title IX covers biological sex.

Plaintiffs next argue that the "district court's conception of 'biological sex' was misguided." Pls. Br. 63. This is irrelevant, however, because even if Plaintiffs could somehow prove that their gender identity *is* their sex, then under their own theory Plaintiffs' exclusion from restrooms would not be "on the basis of sex." Logically, that is, a boy's exclusion from the boys' restroom cannot be a *sex*-based exclusion; something else is going on. And whether that something else is good or bad, Title IX protects against "sex" discrimination, not "something else." To be sure, Plaintiffs essentially argue that the "something else" is transgender status, and that, per *Bostock*, transgender status and sex are inextricably intertwined. But, even if true, that just smacks into the roadblock discussed above. Unlike here, that is, *Bostock* did not involve a statute and regulation that expressly permitted separation "on the basis of sex." If sex and gender identity are forever and always intertwined, then Title IX expressly permits separation of restrooms, locker rooms, and showers on the basis of sex *or* gender identity. Plaintiffs' claim of Title IX "sex" discrimination is a non-starter, even if their premises were accepted.

In any event, the district court was not required to accept Plaintiffs' legal allegations as true. And it was correct, as a legal matter, that Title IX does not operate the same way as Title VII. *See* App.254–58. For starters, when Congress has protected

gender identity, it has done so explicitly. *See* 18 U.S.C. § 249(a)(2) (defining hate crimes on the basis of "gender, sexual orientation, [or] gender identity"); 20 U.S.C. § 1092(f)(1)(F)(ii) (similar); 34 U.S.C. § 30503(a)(1)(C) (similar). The Violence Against Women Act ("VAWA"), for example, prohibits funded programs from discriminating based on either "sex" or "gender identity." 42 U.S.C. § 13925(b)(13)(A). "Sex" and "gender identity" must have meant distinct things to the Congress that enacted VAWA, for equating sex with gender identity would create an obvious surplusage. *Cf. INS v. Cardoza-Fonseca*, 480 U.S. 421, 432 (1987) ("The contrast between the language … certainly indicate[s] that Congress intended the two standards to differ.").

Statutory context confirms "sex" in Title IX refers to two—and only two—distinct sexes, as traditionally understood. *See* 20 U.S.C. § 1681(a)(2) (describing how an institution may change "from ... admit[ting] only students of one sex to ... admit[ting] students of both sexes"); *id.* § 1681(a)(6)(B) (referring to "Men's" and "Women's" associations and organizations for "Boy[s]" and "Girls," "the membership of which has traditionally been limited to persons of one sex"); *see also id.* § 1681(a)(5), (a)(7), (a)(8), (a)(9), (b). Gender identity, on the flip side, is widely touted as being fluid and involving more than two categories. *See, e.g.*, *Adams*, 57 F.4th at 803 n.6. Here, as evidenced by the statutory text, congressional intent was to limit "sex" to two objective, permanent categories. *See id.* at 815 ("sex" in Title IX "must" mean "biological sex").

Nevertheless, Plaintiffs define sex as "multifaceted and comprised of many distinct biologically-influenced characteristics," but ultimately understood as "the sex

or gender the individual knows themselves to be." App.19. Plaintiffs argue that these allegations must be accepted as true, but this is highly problematic. For one thing, Plaintiffs also alleged that each Plaintiff is transgender and was originally designated as the opposite sex from that which they now claim. And Plaintiffs never alleged that the original assignments were erroneous at the time, nor did Plaintiffs allege that their anatomy and genetics are anything other than the sex they were "assigned" at birth. Thus, the district court had substantial support in the Complaint to find that each Plaintiff's "biological sex, based on anatomy and genetics," is the sex by which they were originally identified. App.246–47.[10] The mere existence of the Complaint indicates as much. If Plaintiffs' current gender identity matched their "genetics and physiology" as recorded on their original birth certificate, 70 OKLA. STAT. § 1-125, then there would be no lawsuit. Moreover, although Plaintiffs' factual allegations must generally be accepted, what matters here is not what "sex" means in a vacuum, but rather what it means in Title IX. That is a legal question, and no amount of creative or convoluted pleading can change the legal analysis.

The ordinary public meaning of the term "sex" at the time Title IX was enacted likewise confirms "sex" cannot be interpreted as encompassing gender identity. *See Sandifer v. U.S. Steel Corp.*, 571 U.S. 220, 227 (2014) (recognizing "fundamental canon of

[10] *See also* App.21 (Complaint: "The goal of treatment for gender dysphoria is to *align the body* and life of a person who is transgender with their gender identity.").

statutory construction" that "words will be interpreted as taking their ordinary, contemporary, common meaning" (citation omitted)). When Title IX was enacted in 1972, sex carried a "narrow, traditional interpretation." *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1085–86 (7th Cir. 1984). "Reputable dictionary definitions of 'sex' from the time of Title IX's enactment show that when Congress prohibited discrimination on the basis of 'sex' in education, it meant biological sex, i.e., discrimination between males and females." *Adams*, 57 F.4th at 812 (collecting definitions). The district court walked through several such definitions. App.256–57. For example, it cited the 1970 American College Dictionary's definition of "sex" as the "sum of the anatomical and physiological differences with reference to which the male and the female are distinguished." App.256 (quoting *The American College Dictionary* 1109 (1970)). Defendants cited additional examples below. App.146–47; *see also In re Mallo*, 774 F.3d 1313, 1321 (10th Cir. 2014) ("Dictionary definitions are useful touchstones to determine the 'ordinary meaning' of an undefined statutory term." (citation omitted)).

In response, Plaintiffs protest that "dictionary definitions do not clearly support" the district court's view. Pls. Br. 63. But Plaintiffs do not provide or interact with a single definition. Instead, they hide behind a divided Seventh Circuit panel's claim that such definitions are "inconclusive." *A.C. v. Metro. Sch. Dist. of Martinsville*, 75 F.4th 760, 770 (7th Cir. 2023). But the two dictionaries cited by that panel defined sex based on biology. *See, e.g.*, *id.* (acknowledging that Webster's New World Dictionary in 1972 defined sex "with reference to ... reproductive functions"). The panel attempted to

downplay this by claiming that other parts of the definitions were broader, but even those parts referenced "male and female" and gave no indication that "sex" could be subjective, or identity based. *Id.* (quoting Black's Law Dictionary (4th ed. 1968)); *see also id.* at 775 (Easterbrook, J., concurring in the judgment) ("*Adams* is closer to the mark in concluding that 'sex' in Title IX has a genetic sense, given that word's normal usage when the statute was enacted."). As these numerous biology-based definitions show, Plaintiffs' argument that "there is no indication" that sex in Title IX "refers to 'physiological/reproductive sex,'" Pls. Br. 63, is baseless.

The evidence goes beyond dictionaries. For example, Title IX was initially introduced as the Women's Equality Act of 1971. *See* Paul C. Sweeney, *Abuse Misuse & Abrogation of the Use of Legislative History: Title IX & Peer Sexual Harassment*, 66 UMKC L. REV. 41, 54 (1997). And the introducing senator described Title IX's aim to "provide equal access for women and men students to the educational process and the extracurricular activities in a school, where there is not a unique facet such as football involved." *Id.* at 59 (citing 117 Cong. Rec. 30399, 30406 (1971)). Why would football be a "unique" consideration, unless biological differences were what mattered?

Privacy considerations counsel in the same direction. The statute's proponents expressly sought to "to permit differential treatment by sex ... in sports facilities or other instances *where personal privacy must be preserved.*" 118 Cong. Rec. 5,807 (emphasis added). And numerous courts have recognized not only that an individual has a "constitutionally protected privacy interest in his or her partially clothed body," but also

that this "reasonable expectation of privacy" exists "particularly while in the presence of members of the opposite sex." *Doe v. Luzerne Cnty.*, 660 F.3d 169, 176–77 (3d Cir. 2011); *see also Brannum v. Overton Cnty. Sch. Bd.*, 516 F.3d 489, 494 (6th Cir. 2008) ("the constitutional right to privacy ... includes the right to shield one's body from exposure to viewing by the opposite sex"); *Sepulveda v. Ramirez*, 967 F.2d 1413, 1416 (9th Cir. 1992) (recognizing a parolee's right not to be observed by an officer of the opposite sex while relieving himself); *Lee v. Downs*, 641 F.2d 1117, 1119 (4th Cir. 1981) ("involuntary exposure of [genitals] in the presence of people of the other sex may be especially demeaning and humiliating"). Thus, Title IX clearly protects the privacy of the sexes.

D. The new Title IX rule Plaintiffs rely on has been enjoined.

Finally, Plaintiffs tout the "Department of Education's Title IX regulations set to take effect on August 1," which "confirm that the carve-out for 'living facilities' described in Section 1686 does not permit recipients to discriminate against transgender students by denying them access to restrooms." Pls. Br. 63–64. Turns out, spiking the football on this point was premature. The United States' new Title IX rule was challenged in federal courts across the country—on the ground of its treatment of restrooms, among other things—and virtually all of them enjoined the rule as contrary to Title IX. *See, e.g.*, *Tennessee v. Cardona*, No. 24-5588, 2024 WL 3453880 (6th Cir. July 17, 2024); *Louisiana v. U.S. Dep't of Educ.*, No. 24-30399, 2024 WL 3452887 (5th Cir. July

17, 2024).[11] This includes Oklahoma, where the same district judge who dismissed Plaintiffs' case below also enjoined the rule. *Oklahoma v. Cardona*, No. CIV-24-00461-JD, 2024 WL 3609109 (W.D. Okla. July 31, 2024).

Moreover, the United States asked the Supreme Court to stay the scope of the injunctions, and the Supreme Court quickly ruled against the United States. *See Louisiana*, 144 S. Ct. 2507. "Importantly," the Court wrote, practically unprompted, "all Members of the Court today accept that the plaintiffs were entitled to preliminary injunctive relief as to three provisions of the rule, including the central provision that newly defines sex discrimination to include discrimination on the basis of … gender identity." *Id.* at 2509–10; *see also id.* at 2510 (Sotomayor, J., dissenting in part) ("Every Member of the Court agrees respondents are entitled to interim relief as to … 34 C.F.R. § 106.10 (2023) (defining sex discrimination), § 106.31(a)(2) (prohibiting schools from preventing individuals from accessing certain sex-separated spaces consistent with their gender identity) …."). It is difficult to imagine a more damaging development to Plaintiffs' theory here than a unanimous Supreme Court going out of its way[12] to agree

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[11] The lone exception was a district court in Alabama, which the Eleventh Circuit promptly overruled. *See Alabama v. U.S. Sec'y of Educ.*, No. 24-12444, 2024 WL 3981994 (11th Cir. Aug. 22, 2024).

[12] The United States did not actually ask the Supreme Court to stay the injunctions as to the bathroom provision. This itself is highly telling. Before this Court, the United States confidently claims that "SB615 violates Title IX," U.S. Amicus at 9, but the government did not even *try* to get the Supreme Court to agree.

that States are "entitled" to an injunction in the context of bathrooms. This is especially so given that the various injunctions echoed the same arguments the court below made in granting Defendants' motion to dismiss. *See, e.g.*, *Alabama*, 2024 WL 3981994 at *7 n.12 (highlighting the danger to "privacy rights of biological males and females who have to use restrooms with members of the opposite biological sex").

As all this shows, it is utterly implausible that Title IX requires biological boys to be permitted entry to girls' restrooms, locker rooms, and showers, and vice versa. And no amount of pleading or "fact" finding could possibly change that. Oklahoma has not plausibly violated Title IX. To the contrary, SB 615 "is perfectly in sync with Title IX." App.257. The district court's dismissal of Plaintiffs' Title IX claim should be affirmed.

II. Issue No. 2: The Equal Protection Clause does not plausibly prohibit Oklahoma from requiring schoolchildren to use the restrooms, showers, and locker rooms designated for their sex.

No State shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. This means "that all persons subjected to … legislation shall be treated alike, under like circumstances and conditions." *Engquist v. Or. Dep't of Agric.*, 553 U.S. 591, 602 (2008) (citation omitted). This does not "suggest that the law may never draw distinctions between persons in meaningfully dissimilar situations." *SECSYS v. Vigil*, 666 F.3d 678, 684 (10th Cir. 2012). "The Equal Protection Clause does not forbid classifications," nor does it create substantive rights. *Taylor v. Roswell Indep. Sch. Dist.*, 713 F.3d 25, 54 (10th Cir. 2013) (citation omitted). It merely "keeps governmental decision-makers from treating differently persons who are

in all relevant respects alike." *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992); *see also Ashaheed v. Currington*, 7 F.4th 1236, 1249–50 (10th Cir. 2021).

The Equal Protection Clause does not eliminate "dispositive realities" of sex, only assumptions, stereotypes, and overbroad generalizations. *Virginia*, 518 U.S. at 549–50; *see also Michael M. v. Superior Ct. of Sonoma Cnty.*, 450 U.S. 469 (1981) ("[A] legislature may not 'make overbroad generalizations based on sex which are entirely unrelated to any differences between men and women ....'" (citation omitted)). Indeed, in *Virginia* the Supreme Court emphasized that "'[i]nherent differences' between men and women, we have come to appreciate, remain cause for celebration." *Virginia*, 518 U.S. at 533.

To state a plausible claim under the Equal Protection Clause, a plaintiff "must first make a threshold showing that [she was] treated differently from others who were similarly situated to [her]." *Barney v. Pulsipher*, 143 F.3d 1299, 1312 (10th Cir. 1998); *see also SECSYS*, 666 F.3d at 685. Once a plaintiff overcomes this threshold, she must establish the state's discrimination is not "justified by reference to some upright government purpose." *SECSYS*, 666 F.3d at 686. Courts presume legislation is "valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 439-440 (1985). Only when the discrimination targets a fundamental right or suspect class does a heightened review apply. *Id.*; *see also Tonkovich v. Kan. Bd. of Regents*, 159 F.3d 504, 532 (10th Cir. 1998).

Furthermore, "health and welfare laws" are "entitled to a 'strong presumption of validity.'" *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 301 (2022) (citation omitted). This "applies even when the laws at issue concern matters of great social significance and moral substance." *Id.* at 300. And "[t]he State, of course, has a duty of the highest order to protect the interests of minor children." *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984); *see also Aid for Women v. Foulston*, 441 F.3d 1101, 1119 (10th Cir. 2006).

Here, SB 615 only regulates minor children based on their physical anatomy, it does so on an equal basis, and it does not treat any similarly situated individuals differently. There is no plausible scenario in which SB 615 fails rational basis. And even if intermediate scrutiny applies, the district court was correct to dismiss Plaintiffs' claims. After all, the Supreme Court's recent unanimous blessing of injunctions that preserved sex-separated restrooms in the Title IX context makes little sense if the Constitution itself plausibly bans schools from separating restrooms based on sex.

A. Plaintiffs' admissions undermine their claim of discrimination.

Right off the bat, Plaintiffs face major hurdles in their attempt to stave off dismissal. Again, for equal protection, a plaintiff must first establish that she was "treated differently from others who were similarly situated." *Barney*, 143 F.3d at 1312. But facially, SB 615 only differentiates between persons based on sex and, arguably, age. It separates bathrooms, locker rooms, and showers based on sex, that is, and it only applies to preschools through high schools. Plaintiffs do not bring an age discrimination claim. And they openly emphasize that they "do not object to restrooms separated by

sex in schools," Pls. Br. 60, admitting that "Title IX funding recipients may provide separate restrooms for boys and girls," *id.* at 62. Thus, based on their own concessions, Plaintiffs have not made an initial case of discrimination. Logically, if the Equal Protection Clause prohibits bathrooms separated based on biological sex, then "Title IX funding recipients" would most certainly *not* be allowed to "provide separate restrooms for boys and girls." Yet, rather than challenge Title IX as unconstitutional, Plaintiffs have agreed that mandating sex-separated restrooms is permissible. Plaintiffs have seemingly forfeited the only possible grounds on which they could proceed past the first step of analysis.

Further entrenching this development, Plaintiffs repeatedly argue that they are the sex with which they identify. *E.g.*, Pls. Br. 5, 10, 16, 19. As discussed above, this can only mean that sex discrimination is off the table. If a plaintiff "is a girl barred from the girls' room," *id.* at 32, then the exclusion cannot, logically, be based on sex. By so maintaining, Plaintiffs torpedo their own case. At a bare minimum, with these statements Plaintiffs remove this case from the realm of heightened scrutiny, since intermediate scrutiny would apply only if there was differential treatment based on sex. This is a point on which State Defendants believe the district court was incorrect. Rather than intermediate scrutiny, at most rational basis should apply here. *See, e.g.*, *D.H. v. Williamson Cnty. Bd. of Educ.*, No. 3:22-cv-570, 2024 WL 4046581 (M.D. Tenn. Sept. 4, 2024) (dismissing a challenge to a bathroom policy based on rational basis review). Plaintiffs' statements lead directly to that conclusion.

Plaintiffs are stuck between a rock and a hard place. The Equal Protection Clause requires equal treatment of persons "who are *in all relevant respects alike*." *Nordlinger*, 505 U.S. at 10 (emphasis added); *see also City of Cleburne*, 473 U.S. at 439–40 (the Equal Protection Clause "is essentially a direction that all persons similarly situated should be treated alike"). Here, either Plaintiffs are, biologically, the sex with which they identify, in which case no *sex* discrimination is occurring, or they are not, biologically, the sex with which they identify, in which case they are not "in all relevant respects alike" persons who use the restrooms they wish to use. Either way, dismissal is appropriate as a matter of law.

B. The district court did not err by relying on biological sex.

Plaintiffs criticized the district court for deploying the term "biological sex," which "appears nowhere in the Complaint or in S.B. 615." Pls. Br. 37. "[R]ather, it is a term the State Defendants invented in their motion to dismiss." *Id.* This accusation is farcical. SB 615 expressly regulates the sexes "based on genetics and physiology," 70 OKLA. STAT. § 1-125(A)(1), which are terms virtually synonymous with "biology." And, contrary to their "appears nowhere" protestation, the Complaint *twice* refers to biology in the context of gender and sex. *See* App.19 ("Every individual's *sex* is multifaceted and comprised of many distinct *biologically*-influenced characteristics …. [T]here is a significant *biologic* component underlying gender identity." (emphases added)). No one "invented" anything here; rather, State Defendants and the court relied on a phrase that courts have routinely utilized. *See, e.g.*, *Adams*, 57 F.4th at 796 ("separating school

bathrooms based on biological sex passes constitutional muster"); *Gore v. Lee*, 107 F.4th 548, 552 (6th Cir. 2024) (contrasting "biological sex" with "current identity"). This includes the Supreme Court. *E.g.*, *Farmer v. Brennan*, 511 U.S. 825, 829 (1994) ("The practice of federal prison authorities is to incarcerate preoperative transsexuals with prisoners of like biological sex.").

Plaintiffs similarly complain that the "district court adopted its own conception of 'biological sex' and made determinations of fact inconsistent with the Students' allegations." Pls. Br. 7. But as State Defendants explained above, what "sex" means is not a purely factual question demanding total deference, especially not when district courts are required to "draw on [their] judicial experience and common sense" in understanding a complaint's allegations. *Iqbal*, 556 U.S. at 679. And as the *Gore* case shows, the phrase "biological sex" has time and again been utilized by courts to indicate the physical make-up of persons, as opposed to their self-identity. For instance, the *Grimm* decision that Plaintiffs rely heavily on contrasted the plaintiff's "so-called 'biological sex'" with "his gender identity," and acknowledged that "the Supreme Court has recognized 'inherent differences' between the *biological sexes*." 972 F.3d at 593, 607 (emphasis added). Going further, in his *Grimm* concurrence Judge Wynn criticized the *defendants* there for "conflat[ing] two medical concepts: a person's biological sex (a set of physical traits) and gender (a deeply held sense of self)." *Id.* at 621 (Wynn, J., concurring.). Plaintiffs want this Court to follow *Grimm* while claiming the court below erred by using language that *Grimm* used. This is incoherent.

Moreover, as *Adams* indicates, the district court could not have legitimately made "a finding equating gender identity as akin to biological sex," because doing so would contravene Supreme Court precedent. *Adams*, 57 F.4th at 807 (citing *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (plurality opinion)). And Plaintiffs' claim that Oklahoma can separate based on sex but cannot define sex as it has been defined from time immemorial, aside from being illogical, should also lead only to the application of rational basis. *See Jana-Rock Constr. v. N.Y. State Dep't of Econ. Dev.*, 438 F.3d 195, 212 (2d Cir. 2006) (applying rational basis review, instead of strict scrutiny, to a claim that the State's definition of "Hispanic" was underinclusive). "Once it has been established that the government is justified in resorting to" a suspect classification—which Plaintiffs *admit* is the case here, with sex—then heightened "scrutiny has little utility in supervising the government's definition of its chosen categories." *Id.* at 210.

In any event, the district court had ample grounds in the Complaint to determine Plaintiffs' biological sex. Each Plaintiff admitted they were designated, on their birth certificate, as the opposite sex from which they currently identify. App.29, 32, 35. And Plaintiffs did not allege that this designation was made erroneously at the time. And Plaintiffs repeatedly describe themselves as transgender, which means they have "a gender identity that does not align with their sex assigned at birth." App.19. The only reasonable inference the district court could draw from these allegations was that Bridge is biologically female, Miles is biologically female, and Stiles is biologically male. As a result, Plaintiffs' barebones assertions that "Andy Bridge is a boy, ... Mark Miles is a

boy, [and] ... Sarah Stiles is a girl[,]" App.29, 31, 35, do not create a relevant fact dispute. In sum, this Court must reject Plaintiffs' attempt to save their Complaint by conflating their admitted physiological sex with their gender identity.

C. Senate Bill 615 does not discriminate based on transgender status.

Plaintiffs also argue that they are being discriminated against based on transgender status. Nothing of the sort is occurring here. SB 615 does not account for or distinguish students based on gender identity or transgender status, which Plaintiffs admit. Pls. Br. 40. To respect the safety and privacy of undressed students, SB 615 simply requires all students to use the restrooms that correspond with their biological sex. SB 615 treats every similarly situated minor the same. It requires all biological males to use the boys' restroom and all biological girls to use the girls' restroom. And everyone may use a single-occupancy accommodation. This separation based on sex requires no knowledge of gender identity, and it does not "parcel out government benefits or burdens" based on transgender status. Pls. Br. 42 (citation omitted).

Plaintiffs cannot escape that fact by conflating subjective gender identity with sex. Plaintiffs rely on *Bostock*, but that opinion was built on the assumption that "sex" at a baseline refers "to biological distinctions between male and female." *Bostock*, 590 U.S. at 655. (There's that word again: "biological.") Only by recognizing that "homosexuality and transgender status **are distinct concepts from sex**[,]" could the Supreme Court find that the adverse employment action at issue there was discrimination *because of* sex in the Title VII context. *Id.* at 669 (emphasis added). If

biological sex *is* gender identity, then nothing is "simple" in this area. *See id.* at 673 (emphasizing how "simple" the relevant test is). By so pleading, Plaintiffs move themselves away from *Bostock*. Put another way, Plaintiffs' claims hinge on setting aside a key presupposition of *Bostock*, which renders that case inapplicable.

But the biological presupposition is almost certainly why *Bostock* stressed that it did "not purport to address bathrooms, locker rooms, or anything else of the kind," even under Title VII. *Id.* at 681. Adverse employment actions are vastly different from laws based on real physical differences between the sexes. After all, it has long been recognized that "[a] sign that says 'men only' looks very different on a bathroom door than a courthouse door." *Cleburne*, 473 U.S. at 468–69 (1985) (Marshall, J., concurring and dissenting in part); *see also* Ginsburg, *supra*, at 175 (arguing that the Equal Rights Amendment "would coexist peacefully with separate public restrooms"). Laws separating bathrooms, locker rooms, and showers based on biological sex serve a compelling interest of protecting privacy and safety in places where children undress. Such interests were not present in *Bostock*.

Plaintiffs never engage with this fundamental distinction in binding case law. They spend little time discussing the actual distinction being made here (male/female sex) and instead focus on impacts to Plaintiffs where no intentional discrimination occurs (transgender status). *See, e.g.*, App.44–45. Their claim fails as a matter of law unless this Court sets aside precedent and conflates objective biological sex with gender identity. *See Virginia*, 518 U.S. at 533 ("[p]hysical differences between men and women

… are enduring,"); *Michael M.*, 450 U.S. at 469 (recognizing immutable physical differences between the two sexes).

To be sure, citing *Bostock* and *Fowler*, Plaintiffs argue that sex-based distinctions necessarily entail discrimination based on transgender status. Pls. Br. 32. The obvious import of this argument, though, is that *all* sex-based laws inherently, intentionally, and invidiously discriminate based on gender identity—if sex is defined to mean biological sex. Plaintiffs offer no limiting principle, nor do they ever identify a sex-based classification that would be constitutional if sex is defined as it has been for ages. *Contra Kahn v. Shevin*, 416 U.S. 351, 356 n.10 (1974) ("Gender has never been rejected as an impermissible classification in all instances."). If Oklahoma's law here is plausibly unconstitutional, even though it is based solely on physical differences between men and women in a limited arena where those differences matter, then no law differentiating based on biological sex could ever be constitutional. At minimum, a full trial on the merits would have to take place even for the most benign of distinctions.

Plaintiffs make no real effort to grapple with binding precedent contradicting their sweeping theory. They ignore *Frontiero*, 411 U.S. at 686, and *Tuan Anh Nguyen v. I.N.S.*, 533 U.S. 53, 73 (2001), which confirm immutable physiological differences between the two sexes are real. They ignore *Michael M.*, where the Supreme Court emphasized that it "has consistently upheld statutes where the gender classification is not invidious, but rather realistically reflects the fact that the sexes are not similarly situated in certain circumstances." 450 U.S. at 469. They even ignore *Fowler*'s

acknowledgement that "such differences exist." 104 F.4th at 793. Plaintiffs cite *Virginia* when it suits them, *see* Pls. Br. 40 n.7, 49, 53, but they ignore its declarations that "[p]hysical differences between men and women ... are enduring," that "[t]he two sexes are not fungible," and that "[a]dmitting women to VMI would *undoubtedly* require alterations necessary to afford members of each sex privacy from the other sex in living arrangements." *Virginia*, 518 U.S. at 533, 550 n.19 (emphasis added).

Plaintiffs also try (and fail) to explain why this Court's prior ruling on bathrooms does not control. *See Etsitty*, 502 F.3d 1215. To refresh, in *Etsitty* this Court found in the Title VII context that requiring employees to "use restrooms matching their biological sex does not expose biological males to disadvantageous terms and does not discriminate against employees who fail to conform to gender stereotypes." *Id.* at 1225. This Court deemed *Etsitty* overruled in *Tudor*, 13 F.4th 1019, but it only did so "to the extent that [*Etsitty*] conflicts with *Bostock*." *Id.* at 1028. And *Bostock* stated that, even under Title VII, "we do not purport to address bathrooms, locker rooms, or anything else of the kind." 590 U.S. at 681. On bathrooms, then, *Etsitty* is still seemingly good law, as the court below recognized. App.252–53 & n.7. *Tudor* did not hold otherwise, nor could it have. *See In re Smith*, 10 F.3d 723, 724 (10th Cir. 1993) (per curiam) ("We are bound by the precedent of prior panels absent … a superseding contrary decision by the Supreme Court.").

Plaintiffs claim, nevertheless, that *Fowler* found *Etsitty* has been overruled. Pls. Br. 8. But *Fowler* did no more than *Tudor* did, in that it briefly recognized, in discussing

the subject of a quasi-suspect class, that *Etsitty* was "*overruled on other grounds by Bostock*." *Fowler*, 104 F.4th at 794 (underline added). Like *Tudor*, that is, *Fowler* recognized that *Bostock* overruled *Etsitty* on particular "grounds." And the validity of same-sex bathrooms was not one of those grounds, per *Bostock* itself. Thus, Plaintiffs' attempt to compare quotes from *Bostock* and *Etsitty*, Pls. Br. 55, falls flat, both because the selected quote from *Etsitty* is one that *Bostock* overruled in the context of Title VII employment decisions, and because the quote did not reference bathrooms. *See Etsitty*, 502 F.3d at 1222 ("discrimination against a transsexual because she is a transsexual is not 'discrimination because of sex'").

Plaintiffs also argue that *Etsitty's* "rationales are undermined by *Bostock*." Pls. Br. 54. They point to *Fowler*'s indication (over Judge Hartz's dissent) that "*Bostock*'s commonsense reasoning … based on the inextricable relationship between transgender status and sex" applied in *Fowler* to the "initial inquiry of whether there has been discrimination on the basis of sex in the equal protection context." 104 F.4th at 790. But *Fowler* involved birth certificates and *Bostock* involved employment discrimination. The idea that the same "commonsense reasoning" from those scenarios should apply in the same way to, say, a locker room for ten-year-old children—or that *Fowler* demands such a holding—is not obvious, to say the least. Common sense, that is, should *not* necessarily dictate that discrimination is occurring because boys are being prohibited from entering the girls' shower. Plaintiffs practically admit this when they "do not object to restrooms separated by sex in schools." Pls. Br. 60. No such admission was made

about employment practices in *Bostock*; if it had, it is highly difficult imagining *Bostock* still deploying the same reasoning. As such—and because, again, *Bostock* expressly disavowed ruling on restrooms—it cannot be said that *Bostock*'s "reasoning" overruled *Etsitty* on restrooms. At the end of the day, no matter how they dress it up, Plaintiffs are demanding that this Court deem overruled its precedent allowing same-sex restrooms by a decision that expressly *disclaimed* ruling on restrooms.

Importantly, *Fowler* went on to say that, even under this "commonsense" reasoning, "further analysis may preclude recovery under the appropriate level of scrutiny." 104 F.4th at 790. That is, this Court was not declaring in *Fowler* that every law regulating sex was automatically invalid because of the presence of a transgender status claim. And it certainly was not declaring that same-sex bathrooms are automatically invalid, which means (again) that *Etsitty*'s restroom holding that they *are* valid still stands. Indeed, it was not even saying that all such claims are plausible or that every claim gets heightened scrutiny. As argued above, at most only rational basis should apply here, and rational basis review most certainly does not "require determinations of fact." Pls. Br. 54; *see also Teigen*, 511 F.3d at 1083–84.[13]

[13] That *Etsitty* speculated that "[s]cientific research *may* someday cause a shift in the plain meaning of the term 'sex' so that it extends beyond the two starkly defined categories of male and female," 502 F.3d at 1222 (emphasis added), does not turn an implausible constitutional claim about bathrooms into one that survives a motion to dismiss. For one thing, this statement was dicta; for another, Plaintiffs are not alleging here that sex goes beyond two categories, so it is inapplicable.

Plaintiffs next contend that transgender individuals are a quasi-suspect class. Pls. Br. 42–44. But this is irrelevant, given that Oklahoma law does not discriminate against transgender individuals in the first place. Regardless, the argument fails. The Supreme Court has never recognized gender identity or transgender status as a quasi-suspect class, not even in *Bostock*. Nor has this Court made such a ruling in *Tudor* or *Fowler*. As recently as 2015, this Court confirmed it "has not held that a transsexual plaintiff is a member of a protected suspect class for purposes of Equal Protection claims." *Druley v. Patton*, 601 F.App'x 632, 635 (10th Cir. 2015) (unpublished); *see also Brown v. Zavaras*, 63 F.3d 967, 971 (10th Cir. 1995) ("We therefore follow *Holloway* and hold that [a transgender individual] is not a member of a protected class in this case."). Moreover, the Supreme Court "has not recognized any new constitutionally protected classes in over four decades." *L.W. v. Skrmetti*, 83 F.4th 460, 486 (6th Cir. 2023), *cert. granted*, 144 S. Ct. 2679 (2024). It has declined to recognize a quasi-suspect class for mental disabilities, *Cleburne*, 473 U.S. at 445–46; age, *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 312 (1976); poverty, *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 28–29 (1973); and sexual orientation, *Romer v. Evans*, 517 U.S. 620, 632–34 (1996). The bar here is very high, to say the least. *See Skrmetti*, 83 F.4th at 486.

This is for good reason. Regulation of public schools and the minor children within them is intrinsically a local and state responsibility, and Plaintiffs' position would "[r]emov[e] these trying policy choices from fifty state legislatures to one Supreme Court," which "is not how a constitutional democracy is supposed to work … when

confronting evolving social norms." *Id.* at 486–87. The admonition in *Dobbs* is sensibly applied here: Courts should guard against "wielding nothing but 'raw judicial power,' ... [to] usurp[] the power to address a question of profound moral and social importance that the Constitution unequivocally leaves for the people." 597 U.S. at 268–69.

Diving deeper, transgender status does not qualify as a suspect class. *See, e.g.*, *Skrmetti*, 83 F.4th at 486–88; *Eknes-Tucker v. Governor of Ala.*, 80 F.4th 1205, 1230 (11th Cir. 2023). Plaintiffs' claims of historical discrimination in "places of public accommodation," Pls. Br. 43, just assumes the question that is at issue here, which is whether certain places of public accommodation involving same-sex privacy must be opened. Furthermore, gender identity is not immutable. *Skrmetti*, 83 F.4th at 487. Among other things, "[u]nlike existing suspect classes, transgender identity is not 'definitively ascertainable at the moment of birth.'" *Id.* (citation omitted). Plaintiffs cannot plausibly allege otherwise. And perhaps most obviously, transgender individuals are not a politically powerless group. Rather, they are supported by the President, federal agencies, medical associations, the media and entertainment industries, and countless major law firms. Courts should not place a finger on the scrutiny scale due to an alleged lack of power. "These are not," in other words, "the hallmarks of a skewed or unfair political process." *Id.*

D. Senate Bill 615 does not enforce sex stereotypes and is not pretextual.

Plaintiffs argue that SB 615 treats students differently "because of their nonconformity with certain sex stereotypes." Pls. Br. 6, 52. But Plaintiffs never identity

what stereotypes they are talking about, presumably because SB 615 does not operate based on sex stereotypes. Rather, SB 615 contemplates "[p]hysical differences between men and women," which "are enduring." App.243 (quoting *Virginia,* 518 U.S. at 533). Females and males have distinct body parts. This matters when it comes to restrooms, which are designed to accommodate anatomical differences between males and females. Grouping individuals with the same anatomy into the same restrooms, locker rooms, and showers, for privacy and safety, is not promoting a stereotype. If anyone traffics in stereotypes, it is Plaintiffs, who expressly rely on stereotypes (such as which "toys" boys and girls prefer) in their allegations. *See supra* pp.6–7.

Next, Plaintiffs argue that SB 615 was passed pretextually, rather than over legitimate concerns about safety and privacy, and they claim the district court erred by not accepting this allegation as true. But a mere allegation of "pretext" is a "purely legal conclusion[]." *Jones v. Hosemann*, 812 F.App'x 235, 240 (5th Cir. 2020) (per curiam) (unpublished). To survive a motion to dismiss it must be backed up by sufficient factual allegations to make the claim of pretext plausible. *See, e.g.*, *Requena v. Roberts*, 893 F.3d 1195, 1210 (10th Cir. 2018) ("general allegations of racial animus and discriminatory treatment are too vague and conclusory to state a claim"). Here, Plaintiffs offer precious little in terms of specific factual allegations.

Plaintiffs focus mostly on statements from a single legislator. Pls. Br. 47–48. But they did not raise this legislator's comments in their response to the motion to dismiss below. App.152. The argument is therefore waived. *See Hansen v. PT Bank Negara*

Indonesia (Persero), 706 F.3d 1244, 1249 (10th Cir. 2013). In any event, courts have long refused to ascribe intent to a law based on stray legislator statements. This is in part because "[w]hat motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it." *United States v. O'Brien*, 391 U.S. 367, 384 (1968). As such, this Court recently held that "the statements of a few legislators concerning their motives for voting for legislation is a reed too thin to support invalidation of a statute." *Citizens for Const. Integrity v. United States*, 57 F.4th 750, 768 (10th Cir. 2023). Thus, this quote cannot suffice to avoid dismissal. *Fowler* is distinguishable on this point, *contra* Pls. Br. 48, because unlike here the quote in question there came from a governor, not a legislator, concerning a gubernatorial policy. *See* 104 F.4th at 787. And *Colorado Christian University v. Weaver* is also distinguishable, given that the government interest here is enshrined in the text of the law, and not just "in the defendants' litigating papers." 534 F.3d 1245, 1268 (10th Cir. 2008).

Moreover, Plaintiffs' citation is misleading. Plaintiffs try to use that legislator's statements to claim they have offered evidence to undermine SB 615's express focus on privacy and safety. Pls. Br. 47. But that same legislator said in the same release that "[o]ur kids deserve and demand privacy and protection; and in Oklahoma, they will now get it." Press Release, OKLA. SENATE, *Bullard's bill signed to protect boys' and girls'*

bathrooms in public schools (May 27, 2022).[14] And the release quoted two other leaders of the bill touting its protections for the "safety, privacy and dignity of all children." *Id.* Waiver aside, Plaintiffs cannot create a factual issue on pretext by cherry-picking legislative quotes and ignoring the context that confirms the Legislature's purposes.

Nor can Plaintiffs create a factual issue of pretext by arguing that SB 615 was "entirely re-written" late in the legislative process. Pls. Br. 46–47. Plaintiffs didn't make *that* argument in its response below either, meaning it is waived. And such procedural happenings are so commonplace in legislating as to be meaningless. If a bill's following any path but the most basic can affect its constitutionality, that would improperly chill legislative action and invade the separation of powers. Finally, Plaintiffs never connect the dots. What does it matter that the bill changed before it was voted on? How does that undermine the bill's express focus on privacy and safety? It doesn't.

The primary Complaint paragraph Plaintiffs *did* cite below for pretext, *see* App.163 & 171 (citing Complaint ¶ 52), simply states that "[t]he purported 'privacy' and 'safety' concerns are unfounded pretext to target students who are transgender. Students who are transgender pose no risks to the privacy or safety of other students, whether in using multiple occupancy facilities or in any other context." App.27. This is the epitome of a "general allegation[]" that is "too vague and conclusory to state a

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[14] *Available at* https://oksenate.gov/press-releases/bullards-bill-signed-protect-boys-and-girls-bathrooms-public-schools?back=/senator-press-releases/david-bullard/2022-05.

claim." *Requena*, 893 F.3d at 1210. Incidentally, the allegation of "in any other context" tanks Plaintiffs' repeated attempts to cabin their privacy and safety "pretext" pushback to just "stalls" in "multiple occupancy restroom[s]." Pls. Br. 15, 48–49. By their own admission, they think their logic applies to "any other context," which would include locker rooms and showers. *See also id.* at 23. The district court was not required to entertain as plausible the allegation that no privacy or safety interests are at stake in allowing males to enter showers with undressed females, and it was correct to reject Plaintiffs' manufactured attempt to artificially limit their own case to avoid such an obvious scenario. App.251.

In the end, Plaintiffs fall back on the supposed "weight of federal court precedent" that "rejects privacy and safety justifications." Pls. Br. 53. But the *en banc* Eleventh Circuit was not persuaded by this alleged "weight." *See Adams*, 57 F.4th at 805 ("[T]he privacy afforded by sex-separated bathrooms has been widely recognized throughout American history and jurisprudence."). Nor should this Court be.

E. The district court was correct to dismiss Plaintiffs' equal protection claim.

The district court correctly found it implausible that SB 615 would fail intermediate scrutiny. Nevertheless, rational basis review should apply. Again, Plaintiffs concede that they "do not object to restrooms separated by sex in schools," Pls. Br. 60, so sex discrimination should be off the table. *See, e.g.*, *Jana–Rock Constr.*, 438 F.3d at 212. Nor does SB 615 discriminate on transgender status, and such status is not a quasi-

suspect class. Thus, Plaintiffs' claim must fail "if there is 'any reasonably conceivable state of facts that could provide a rational basis for the classification.'" *Copelin–Brown v. N.M. State Pers. Off.*, 399 F.3d 1248, 1255 (10th Cir. 2005) (citation omitted).

SB 615 is expressly and rationally anchored on safety and privacy interests that even Plaintiffs admit "are legitimate interests." Pls. Br. 48. And it is easy to conceive—based on indisputable historical practice, Supreme Court precedent recognizing the physical differences between the sexes, common sense, and copious case law recognizing a person's privacy in their body—why these interests would apply here. This conclusion is strengthened by the deference given to governments when laws protecting the health and welfare of children are in play. *See, e.g.*, *Aid for Women*, 441 F.3d at 1119. Dismissal should therefore be affirmed. *See, e.g.*, *D.H.*, 2024 WL 4046581, at *5 ("the interests of privacy and safety are sufficient to satisfy rational basis review"); *Teigen*, 511 F.3d at 1086 (affirming dismissal of equal protection claims because the policy was rationally related to the state interest).

If intermediate scrutiny is utilized, Defendants should still prevail, as the district court held. "To withstand intermediate scrutiny, a statutory classification must be substantially related to an important governmental objective." *Clark v. Jeter*, 486 U.S. 456, 461 (1988); *Free the Nipple-Fort Collins v. City of Fort Collins*, 916 F.3d 792, 799 (10th Cir. 2019). Intermediate scrutiny does not analyze, however, whether a "state could achieve its objective with some lesser restriction." *Eknes-Tucker*, 80 F.4th at 1236 (Brasher, J., concurring). Again, Plaintiffs admit that safety and privacy of students "are

legitimate interests," Pls. Br. 48, and binding precedent takes it even further. *See, e.g.*, *Fla. Bar v. Went for It, Inc.*, 515 U.S. 618, 625 (1995) (protecting "privacy is a *substantial* state interest" (emphasis added)); *Palmore*, 466 U.S. at 433 ("The State, of course, has a duty of the *highest order* to protect the interests of minor children …." (emphasis added)); *see also Beard v. Whitmore Lake Sch. Dist.*, 402 F.3d 598, 604 (6th Cir. 2005) ("Students of course have a *significant* privacy interest in their unclothed bodies" (emphasis added)). Nor can this exceedingly important interest in protecting undressed students from the presence of the opposite sex plausibly be deemed inapplicable in a place where minors literally disrobe to perform bodily functions. As the district court put it, the State's interest and the means of protecting that interest here are practically "identical." App.253. No amount of fact-finding creative pleading, or illogical cabining of arguments could remove the existence of an "exceedingly persuasive justification" here. *Doe v. Rocky Mountain Classical Acad.*, 99 F.4th 1256, 1261 (10th Cir. 2024).[15] There are cases "in which—notwithstanding impact—the legitimate noninvidious purposes of a law cannot be missed." *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 275 (1979). This is one of those cases.

[15] In *Rocky Mountain*, unlike here, remand was deemed appropriate because the defendant's "objectives" with the policy in question were yet "unstated." *Id.* Also unlike here, the plaintiffs there had not agreed that the interests were legitimate, much less admitted that they did not object to the underlying actions based on sex.

This is not some obscure view. Justice Stewart once wrote that the Supreme Court has "recognized that in certain narrow circumstances men and women are not similarly situated; in these circumstances a gender classification based on clear differences between the sexes in not invidious, and a legislative classification realistically based upon those differences is not unconstitutional." *Michael M.*, 450 U.S. at 478 (Stewart, J., concurring). Even more on point, future Justice Ginsburg explained that "[s]eparate places to disrobe, sleep, [and] perform personal bodily functions are permitted, in some situations required, by regard for individual privacy." Ruth Bader Ginsburg, *The Fear of the Equal Rights Amendment*, WASH. POST, Apr. 7, 1975, at A21.

Certainly, Plaintiffs claim they can show that "students who are transgender pose no risks to the privacy" of other students in "any … context." Pls. Br. 22–23. But such implausible and conclusory statements do not have to be accepted as true. The mere presence of a member of the opposite sex in a restroom or shower is a violation of privacy, and Plaintiffs offer no explanation for how they could possibly show that privacy is not being violated in *any* context if their approach were adopted. Moreover, Plaintiffs do not explain how a school is supposed to distinguish between a person identifying in good faith as transgender and a person claiming a different identity to access and potentially prey on the vulnerable. The district court discussed this expressly, App.254, yet Plaintiffs ignore it. Schools are apparently, under Plaintiffs' theory, just supposed to take people's word for it. That is insufficient when it comes to the responsibility schools have to protect their students.

In the end, what fact-finding should the district court have done? Did it need to verify the indisputable fact that children disrobe in bathrooms, locker rooms, and showers? Must the court entertain the notion that a child's clear privacy interest in her disrobed body might not actually exist? Should the court have indulged the allegation that biological sex is gender identity—ignoring other allegations about transgender status and birth—despite binding precedent holding otherwise? If cases like *Adams* are correct, further factual development would be a waste of time and resources. To be sure, *Adams* itself sifted through record evidence. But that court gave no indication that different facts could have changed its mind. Rather, it held broadly that "the unremarkable—and nearly universal—practice of separating school bathrooms based on biological sex … passes constitutional muster." *Adams*, 57 F.4th at 796. No district court in the Eleventh Circuit would be mistaken in dismissing future bathroom challenges, after *Adams*. Dismissal was similarly appropriate here.

CONCLUSION

This Court should affirm the dismissal of Plaintiffs' claims.

STATEMENT REGARDING ORAL ARGUMENT

State Defendants support oral argument in this case. The issues presented are highly significant, and both the parties and this Court would benefit from the opportunity to analyze them further.

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CERTIFICATE OF COMPLIANCE

This response complies with the typeface requirements of Fed. R. App. P. 32 because it was prepared in a proportionally spaced font (Garamond, 14-point) using Microsoft Word 2016. The document complies with the type-volume limitation of Fed. R. App. P. 27, because it contains 12,948 words, excluding the parts exempted.

s/ *Zach West*
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CERTIFICATE OF DIGITAL SUBMISSION

All required privacy redactions have been made as required by 10th Cir. R. 25.5 and the ECF Manual. Additionally, this filing was scanned with Crowdstrike antivirus updated on July 23, 2024.

s/ *Zach West*
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CERTIFICATE OF SERVICE

I certify that on September 11, 2024, I caused the foregoing to be filed with this Court and served on all parties via the Court's CM/ECF filing system. No paper copies are required pursuant to 10th Cir. R. 27.2.

s/ *Zach West*
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