

No. 26-4551
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EMILIE JACKSON-EDNEY, *et al.*,
Plaintiffs-Appellees,

v.

RAÚL LABRADOR, in his official capacity as
Attorney General of the State of Idaho, *et al.*,
Defendants-Appellants.

On Appeal from the United States District Court
for the District of Idaho
Case No. 1:26-CV-261-AKB

APPELLANTS' OPENING BRIEF

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INTRODUCTION

Separating restrooms by sex is “unremarkable—and nearly universal.” *Adams v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 796 (11th Cir. 2022) (en banc). And the reason for separating restrooms by sex has long been understood: as this Court explained last year, the concept that people in a state of “partial undress”—as restroom users are—“may experience embarrassment, shame, and psychological injury in the presence of [members] of a different sex is neither novel nor implausible.” *Roe v. Critchfield*, 137 F.4th 912, 925 (9th Cir. 2025) (cleaned up). Idaho House Bill 752 (H.B. 752) seeks to preserve bodily privacy and safety in sensitive spaces by requiring everyone to comply with restrooms designated by sex in public places of accommodation and government buildings.

Plaintiffs are individuals who identify as transgender and oppose H.B. 752’s policy, but the preliminary injunction in this case preventing enforcement of H.B. 752 can be reversed without discussing transgender-related issues at all. That’s because the district court’s grounds for finding a likelihood of success on the merits have nothing to do with gender identity. Instead, the court concluded that H.B. 752 was unconstitutionally vague because it contained two exceptions for circumstances where a restroom designated for the person’s sex is not “reasonably available at the time” and the person has a “dire need of urinating or defecating.” Idaho Code § 18-4117(2)(e)-(f).

There is nothing “esoteric or complicated” about these exceptions. *United States v. Osinger*, 753 F.3d 939, 945 (9th Cir. 2014). *Everyone* assesses a restroom’s availability and their need to relieve themselves *every day*. In reaching the contrary and

counterintuitive result that these exceptions are unconstitutionally vague, the district court flouted multiple principles that have been expressed unambiguously by the Supreme Court, which explain that a law is not vague because it (1) gives rise to close cases, (2) incorporates a standard that accounts for several factors or requires estimating some matter of degree, or (3) is difficult for law enforcement to enforce. Moreover, even if the district court were right, that would not justify enjoining H.B. 752 in its entirety.

If the Court agrees that these exceptions are not vague, it can stop there and reverse the preliminary injunction. And to the extent it is inclined to consider affirming on an alternative ground, it should not do so because Plaintiffs' other claims are equally meritless. Their equal protection claim rests on the argument that H.B. 752 is not justified as to them, but the Supreme Court has recently made clear that they must prove that H.B. 752 does not advance Idaho's interests in privacy and safety *generally*, which Plaintiffs cannot possibly show. Plaintiffs' substantive due process informational privacy claim is likewise baseless because H.B. 752 does not disclose anyone's gender identity, which is not protected information in any event.

The Court should also reverse the district court's accompanying grant of class certification. The class the district court certified has no definite boundaries—a class of “all transgender people” who “seek to use” a covered restroom in Idaho is not based on objective criteria, but subjective pronouncements of internal identity and intent. The class is also incredibly diverse and varied in ways that are essential to Plaintiffs' claims.

JURISDICTIONAL STATEMENT

Plaintiffs brought this action under 42 U.S.C. § 1983, and the district court had jurisdiction under 28 U.S.C. § 1331. On June 16, 2026, the district court entered an interlocutory order granting a preliminary injunction and certifying a statewide class under Federal Rule of Civil Procedure 23(b)(2).

Defendants timely filed their notice of appeal on July 16, 2026, within 30 days after entry of the district court's order. 2-ER-249-58; Fed. R. App. P. 4(a)(1)(A). This Court has jurisdiction under 28 U.S.C. § 1292(a)(1) because the district court's order granted a preliminary injunction. *Paige v. California*, 102 F.3d 1035, 1038 (9th Cir. 1996). This Court also has jurisdiction to review the class-certification ruling because it is “inextricably bound up” with the preliminary injunction. *Id.* at 1039.

ISSUES FOR REVIEW

1. Did the district court abuse its discretion by preliminarily enjoining Defendants from enforcing H.B. 752 against members of the certified class?
2. Do Plaintiffs have Article III standing to enjoin enforcement by the prosecutors from the 41 counties in which Plaintiffs do not reside or have plans to visit?
3. Did the district court abuse its discretion by certifying a class of “all transgender people” who seek to use a covered restroom in Idaho?

PERTINENT STATUTES

Pertinent statutes are attached as an addendum to this brief.

STATEMENT OF THE CASE

I. Idaho Enacts House Bill 752 to Promote Privacy and Safety in Sensitive Places.

Three years ago, Idaho required its K-12 public schools to designate restrooms by sex. 2023 Idaho Sess. Laws ch. 120. Students challenged that law and sought a preliminary injunction. The district court denied it, and this Court affirmed, holding that Idaho’s interest in protecting bodily privacy is important and that classifying facilities by sex substantially serves that interest. *Roe*, 137 F.4th at 924-26.

Seeing the need to protect privacy and safety at other state-owned facilities, including colleges and universities, Idaho enacted another statute two years later to require covered facilities to designate multi-user restrooms for males or females and allow use only by members of that sex. 2025 Idaho Sess. Laws ch. 251. This statute was challenged too, and the district court denied a preliminary injunction. *Jones v. Critchfield*, 803 F. Supp. 3d 1078 (D. Idaho 2025), *appeal docketed*, No. 25-5413 (9th Cir.). In upholding the statute, the court reiterated that “[t]he enduring biological differences between men and women are unique and deserving of privacy.” *Id.* at 1091.

H.B. 752 advances the same interests as those prior laws by prohibiting “[a]ny person” from “knowingly and willfully enter[ing] a restroom or changing room in a government-owned building or a place of public accommodation ... that is designated for use by the opposite biological sex.” Idaho Code § 18-4117(1). It creates exceptions for certain circumstances, including to “perform custodial services,” “render medical

assistance,” or “use restroom facilities when the person is in dire need of urinating or defecating and such facility is the only facility reasonably available at the time of the person’s use.” *Id.* § 18-4117(2).

Recent events across Idaho and legislative testimony confirmed a need for a law protecting bodily privacy and safety in public changing rooms and restrooms. Multiple Sandpoint community members described concerns involving a male attendee’s use of the women’s locker room and restroom at the local YMCA under the business’s then-existing policy. 2-ER-94-97, ¶¶ 4d, 2i-2k. In Ammon, Idaho, a male identifying as transgender reached over a Target changing room door and filmed a teenage girl while she was getting dressed. 2-ER-94, ¶ 2h. A Bonner County woman shared that she was a survivor of two attempted rapes in “changing areas without single-sex accommodations” and explained that she and her daughter were terrified of using public restrooms as a result. 2-ER-95, ¶ 2l. And a former law enforcement officer testified that H.B. 752 would curtail the rising number of men committing video voyeurism in women’s restrooms across the State. 2-ER-97-98, ¶ 4e.

H.B. 752 “treats a gap” in Idaho’s criminal code and establishes a layer of protection to guard against such conduct. 2-ER-92, ¶ 2a; *accord* 2-ER-92-93, ¶¶ 2b-2c. Legislators explained that Idaho’s existing indecent-exposure statute did not reach the entry by a member of one sex into another sex’s intimate facilities in public places, leaving Idahoans vulnerable to an invasion of bodily privacy, dignity, and safety in those spaces.

2-ER-92-93, 96-97, ¶¶ 2a, 2d, 4b. H.B. 752 accordingly prescribes penalties comparable to the indecent exposure law. 2-ER-93-94, ¶ 2g.

H.B. 752 was signed into law on March 31, 2026, with an effective date of July 1, 2026.

II. Plaintiffs Challenge H.B. 752; the District Court Enjoins Enforcement of the Law, Contravening Precedent in the Process.

Plaintiffs are six individuals residing across three counties in Idaho who identify as transgender. 2-ER-214-16. They filed this action on April 29, 2026, before H.B. 752 was to take effect. 2-ER-248. Their complaint challenges only H.B. 752's prohibition regarding restrooms, not changing rooms, 2-ER-229 n.38, and argues that H.B. 752 is void for vagueness, violates the Equal Protection Clause, and violates a substantive due process right to informational privacy. 2-ER-242-47.

On the same day they filed their complaint, Plaintiffs moved for a preliminary injunction and class certification. *See* 2-ER-113-16, 138-42. Although their complaint broadly challenged H.B. 752's restroom prohibition as applied to transgender-identifying individuals, their preliminary injunction motion argued only that the law was unconstitutional in two "narrow respects": single-user restrooms designated by sex and multi-occupancy restrooms when no gender-neutral single-user restroom is available. 2-ER-151-52. Their class certification motion requested certification of a class of "transgender people." 2-ER-124.

The district court granted the preliminary injunction. 1-ER-29-30. It held that Plaintiffs were likely to succeed on the merits because two of the exceptions to H.B. 752's central prohibition were unconstitutionally vague in allowing opposite-sex restroom use when the restroom designated for a person's sex is not "reasonably available at the time" and (in the case of one exception) the person has a "dire need of urinating or defecating." 1-ER-13-16. According to the court, those exceptions were so "standardless" that they authorized "arbitrary and discriminatory enforcement" by officers who "could reasonably reach different conclusions regarding identical conduct." 1-ER-13, 16. The court cited legislative testimony asserting that the "dire need" exception would create "significant practical enforcement challenges" for law enforcement. 1-ER-14.

Based on these two exceptions, and without resolving whether H.B. 752's central prohibition was vague or addressing Plaintiffs' other two claims, the court enjoined all Defendants—including prosecutors in the 41 counties where Plaintiffs don't reside and have alleged no plans to travel to—from enforcing any part of H.B. 752's restroom prohibition. 1-ER-9, 17-19, 30.

The district court also certified a class and extended the scope of the preliminary injunction to all members of the class—i.e., "all transgender people who seek to use a restroom in a government-owned building or place of public accommodation in Idaho consistent with their gender identity." 1-ER-30. Despite the differences in age, appearance, gender identity, and degrees of social and medical transition among "all

transgender people” and the lack of objective criteria defining who falls within the class, the court concluded that the class satisfied the commonality requirement for class actions because “every putative class member is subject to the same” state law. 1-ER-24-25.

STANDARD OF REVIEW

The grant and scope of a preliminary injunction are reviewed for abuse of discretion. *California v. Azar*, 911 F.3d 558, 568 (9th Cir. 2018). “The district court’s conclusions of law are reviewed de novo and its findings of fact for clear error.” *Pimentel v. Dreyfus*, 670 F.3d 1096, 1105 (9th Cir. 2012) (per curiam) (cleaned up). “Standing is also reviewed de novo.” *Azar*, 911 F.3d at 568.

“The decision to certify a class and any ... underlying Rule 23 determination involving a discretionary determination” is reviewed “for an abuse of discretion.” *Olean Wholesale Grocery Cooperative, Inc. v. Bumble Bee Foods LLC*, 31 F.4th 651, 663 (9th Cir. 2022) (en banc) (cleaned up). “[T]he district court’s determination of underlying legal questions” is reviewed de novo and its determination “of underlying factual questions” is reviewed for clear error. *Id.*

“A preliminary injunction is an extraordinary remedy never awarded as of right.” *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). The plaintiff “must make a clear showing that [1] he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest.” *Starbucks Corp. v. McKinney*,

602 U.S. 339, 346 (2024) (quoting *Winter*, 555 U.S. at 20). When the nonmovant is the State, the last two factors merge. *Baird v. Bonta*, 81 F.4th 1036, 1040 (9th Cir. 2023).

SUMMARY OF THE ARGUMENT

First, the district court abused its discretion by granting a preliminary injunction. It committed legal error in concluding that Plaintiffs are likely to succeed on the merits of their vagueness claim. H.B. 752’s exceptions are not vague—every person knows how to comply because everyone has a lifetime of experience assessing when a restroom is “reasonably available” and whether they have a “dire need of urinating or defecating.” In concluding otherwise, the district court misunderstood what it means for a statute to be so standardless as to authorize arbitrary enforcement—it has nothing to do with whether different law enforcement officers could reach different results in close cases or whether it will be difficult for officers to gather evidence of a violation.

The Court should not use its discretion to affirm the preliminary injunction based on any of Plaintiffs’ remaining claims either. Given the pervasiveness of signs indicating “men” or “women,” there is no uncertainty in assessing whether a restroom is designated for use by a particular sex. Plaintiffs cannot contest (and said below that they were not contesting) that sex-separated bathrooms substantially advance bodily privacy and safety for all men and women, which is what the Supreme Court recently clarified they would need to show. And no right to informational privacy is violated by a law that does not expose anyone’s gender identity. None of the remaining preliminary injunction factors support preliminary relief either.

Second, Plaintiffs lack standing to sue 41 of the county prosecutors. The named Plaintiffs have shown a connection only to prosecutors in the counties where they live and use restrooms. The class-action nature of the suit changes nothing.

Third, the district court legally erred in certifying a class. There are no definite boundaries on a class of “all transgender people”—class composition must be discerned by objective criteria, not one’s internal sense of self. Moreover, Rule 23 requires class members to suffer the same injury and have common legal contentions, not merely be subject to the same law. The district court misapprehended the appropriate test and did not analyze whether class members shared common contentions for each of Plaintiffs’ claims.

ARGUMENT

“Separating restrooms by biological sex has been common for centuries.” *SAGA v. Critchfield*, 2025 WL 2256884, *8 (D. Idaho Aug. 7, 2025). Sex-separated bathrooms promote privacy and eliminate safety concerns. H.B. 752 codifies this longstanding, common-sense practice by requiring all to adhere to sex-designations made in restrooms and changing rooms in public places. It proscribes conduct with reasonable clarity, is substantially related to its objectives, and does not force disclosure of any constitutionally protected information.

The district court erred in holding otherwise and granting the preliminary injunction—particularly as to the 41 prosecutors¹ that have no connection whatsoever to Plaintiffs’ claims. The district court also should not have certified an indefinite class with diverse members with distinct claims. This Court should reverse both rulings.

I. The District Court Abused Its Discretion by Granting a Preliminary Injunction.

Of the four preliminary injunction factors, likelihood of success on the merits “is a threshold inquiry and is the most important factor.” *Env’t Prot. Info. Ctr. v. Carlson*, 968 F.3d 985, 989 (9th Cir. 2020). Here, the district court held that Plaintiffs were likely to succeed on the merits of their vagueness claim, without addressing their equal protection or substantive due process informational privacy claims. 1-ER-19. And even then, the court resolved only two of Plaintiffs’ three vagueness challenges. 1-ER-17-18.

The district court erred—Plaintiffs have not made a clear showing that they are likely to succeed on the merits of the two vagueness challenges the court analyzed. As for the remaining vagueness challenge and other two claims, the “standard practice ... is to remand to the district court for a decision in the first instance without requiring special justification for so doing,” *Detrich v. Ryan*, 740 F.3d 1237, 1248 (9th Cir. 2013), *abrogated on other grounds by Shinn v. Ramirez*, 596 U.S. 366 (2022); *NetChoice, LLC v. Bonta*, 113 F.4th 1101, 1126 n.9 (9th Cir. 2024), though the Court may exercise its discretion

¹ The prosecutors note their limited role as defined by Idaho Code § 31-2604. The State’s laws and policies are determined by the Legislature.

to “affirm a district court’s grant of a preliminary injunction on any ground supported by the record.” *Bennett v. Isagenix Int’l LLC*, 118 F.4th 1120, 1125 (9th Cir. 2024) (cleaned up). The Court may also “decline to affirm” on alternative grounds that are not likely to succeed. *Sony Computer Ent., Inc. v. Connectix Corp.*, 203 F.3d 596, 608 (9th Cir. 2000).

To the extent the Court is inclined to analyze potential alternative grounds for affirmance, Plaintiffs’ other legal challenges to H.B. 752 are as meritless as the two the district court addressed. And in all events, the district court’s analysis of the remaining preliminary injunction factors—which largely depends on the correctness of its merits analysis—cannot withstand scrutiny.

A. Plaintiffs are not likely to succeed on their vagueness claim.

Plaintiffs’ lead challenge is that H.B. 752 contains three phrases that are unconstitutionally vague on their face—one in its central prohibition and two that are located within the ten exceptions to that prohibition. The district court concluded that the two challenged exceptions were vague, and enjoined the Defendants from enforcing H.B. 752 in its entirety. That decision was wrong, and it should be reversed.

1. H.B. 752’s exceptions when a restroom is not “reasonably available” are not vague.

Two of the exceptions from H.B. 752’s prohibition on “knowingly and willfully enter[ing] a restroom or changing room ... that is designated for use by the opposite biological sex” depend on whether a restroom is “reasonably available.” Idaho Code § 18-4117(1), (2)(e)-(f). A person may (1) “use a single-user facility designated for the

opposite sex, if such single-user facility is the only facility reasonably available at the time of the person's use of the facility," and (2) "use restroom facilities [designated for the opposite biological sex] when the person is in dire need of urinating or defecating and such facility is the only facility reasonably available at the time of the person's use." Idaho Code § 18-4117(2)(e)-(f). Plaintiffs argue that "reasonably available" is unconstitutionally vague.

A statute is unconstitutionally vague if it "fails to give ordinary people fair notice of the conduct it punishes, or [is] so standardless that it invites arbitrary enforcement." *Johnson v. United States*, 576 U.S. 591, 595 (2015). However, a statute "will not be void for vagueness if 'it is clear what the [statute] as a whole prohibits.'" *United States v. Lucero*, 989 F.3d 1088, 1101 (9th Cir. 2021) (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972)). A statute "will meet the requirement of certainty required by the Constitution if its language conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices." *Panther v. Hames*, 991 F.2d 576, 578 (9th Cir. 1993) (cleaned up).

When it comes to H.B. 752, "citizens who desire to obey [that law] will have no difficulty in understanding it." *Colten v. Kentucky*, 407 U.S. 104, 110 (1972) (cleaned up). There is nothing complicated about evaluating whether a restroom is "reasonably available"—those are "ordinary terms [that] express ideas which find adequate interpretation in common usage and understanding." *Budd v. Madigan*, 418 F.2d 1032, 1035 (9th Cir. 1969) (citing *Sproles v. Binford*, 286 U.S. 374, 393 (1932)). A restroom is

reasonably available if it is “present or ready for immediate use” “to a fairly sufficient extent.” *Reasonably*, Merriam-Webster Dictionary, <https://tinyurl.com/2a8ur7fw>; *Available*, Merriam-Webster Dictionary, <https://tinyurl.com/2vyjbuc5>; see *United States v. Gibson*, 998 F.3d 415, 419 (9th Cir. 2021) (relying on dictionary definition to reject vagueness challenge).

The phrase “reasonably available” is not only widely understood as a matter of ordinary speech, but it is also not “beyond the common experience of an ordinary layperson.” *Edge v. City of Everett*, 929 F.3d 657, 667 (9th Cir. 2019). *Everyone* has lifetime’s worth of experience assessing whether a public restroom is ready for use, so they would understand, for example, that a restroom with an “Out of Order” sign on it would not be reasonably available. Idahoans can therefore use “common experience as a glossary ... to meet [H.B. 752’s] practical demands.” *Sproles*, 286 U.S. at 393.

Plaintiffs’ theory below was that it is not clear if a restroom is “reasonably available” to people who identify as transgender and do not want to use a restroom that does “not align[] with their gender identity.” 2-ER-159-60. That theory was misguided on several levels. Questioning a specific application of the statute was the wrong approach for a facial challenge to begin with—a statute is not “render[ed] ... unconstitutionally vague” because “it may not be entirely clear whether” it reaches a “particular” situation. *Gibson*, 998 F.3d at 419; *Hill v. Colorado*, 530 U.S. 703, 733 (2000). But there is also no ambiguity in the situation Plaintiffs describe—the exceptions would

not apply because H.B. 752's plain text turns on the *restroom's* readiness for use (i.e., availability), not the *person's* willingness to use it.

Sensibly, the district court did not adopt Plaintiffs' argument. But what it did instead was no better. Although "the import of Plaintiffs' arguments [was] geared toward the fair notice prong of vagueness," the district court decided to analyze whether the phrase "reasonably available" is so standardless that it invites arbitrary enforcement. 1-ER-12-16. The result was an opinion that contradicted numerous decisions of this Court and the Supreme Court—a reminder of why courts generally stick to the arguments the parties presented. *Greenlaw v. United States*, 554 U.S. 237, 243-44 (2008).

The district court held that "reasonably available" is unconstitutionally vague because it "fails to provide sufficient standards for law enforcement." 1-ER-13. The court reasoned that because H.B. 752 does not give "guidance regarding what factors [to] consider" when assessing the availability of a restroom, "law enforcement [would have] to determine, on a case-by-case basis, whether a particular restroom was 'reasonably available' under the circumstances." 1-ER-13. As a result, "[d]ifferent officers could reasonably reach different conclusions regarding identical conduct." 1-ER-13.

The problem that the "invites arbitrary enforcement" aspect of vagueness seeks to prevent is not that law enforcement may reach different conclusions regarding a particular set of facts. Enforcing the law "*always* ... requires the exercise of some degree of police judgment." *Grayned*, 408 U.S., at 114 (emphasis added); *Thibodeau v. Portuondo*,

486 F.3d 61, 69 (2d Cir. 2007) (prohibition on vague laws “does not ban *all* discretion on the part of police officers or prosecutors”). That is especially true when the law relies on a legal standard rather than a rule, and uses language “marked by flexibility and reasonable breadth, rather than meticulous specificity.” *Grayned*, 408 U.S. at 110. Such flexibility raises no constitutional concern if “it is clear what the [statute] as a whole prohibits.” *Id.*

In other words, “there will always be an inherent but permissible degree of uncertainty in applying any standards-based test,” which may occasion “close cases,” but that “does not make [a statute] unconstitutional.” *Yamada v. Snipes*, 786 F.3d 1182, 1190-91 (9th Cir. 2015).

What the “invites arbitrary enforcement” standard seeks to prevent is a statute that “set[s] a net large enough to catch all possible offenders.” *Kolender v. Lawson*, 461 U.S. 352, 358 & n.7 (1983) (cleaned up). The concern is that a statute may be so ambiguous that it “confers on police a virtually unrestrained power to arrest and charge persons with a violation.” *Id.* at 360 (cleaned up). For example, the Supreme Court held that a vagrancy law criminalizing “wandering or strolling around from place to place without any lawful purpose or object” was vague because it gave “unfettered discretion” to law enforcement to arrest and charge anyone who “looks suspicious.” *Papachristou v. City of Jacksonville*, 405 U.S. 156, 168-71 (1972).

Precedent has consistently identified two qualities that render a statute susceptible to arbitrary enforcement: an “unreasonable amount of [either]

indeterminacy or subjectivity.” *Lucero*, 989 F.3d at 1101; e.g., *City of Chicago v. Morales*, 527 U.S. 41, 62 (1999) (“inherently subjective” standard invited arbitrary enforcement); *Vill. of Hoffman Ests. v. Flipside, Hoffman Ests., Inc.*, 455 U.S. 489, 503 (1982) (“The language of the ordinance is sufficiently clear that the speculative danger of arbitrary enforcement does not render the ordinance void for vagueness.”). Neither quality describes H.B. 752’s “reasonably available” standard.

As for unreasonable subjectivity, a restroom’s availability is an objective question that does not depend on an officer’s personal preferences. Again, the question is not whether the statute is subjective in the sense that it requires “some degree of law enforcement subjectivity” in “close cases.” *Edge*, 929 F.3d at 666. The question is whether the proscribed conduct turns “wholly or principally” on the officer’s sensibilities or “subjective viewpoint.” *Id.* A statute that prohibits people from “conduct[ing] themselves in a manner annoying to passers by,” for example, is wholly subjective because “annoying” is a matter of personal taste—“conduct that annoys some people does not annoy others.” *Id.* at 665 (quoting *Coates v. Cincinnati*, 402 U.S. 611, 614 (1971)); *United States v. Williams*, 553 U.S. 285, 306 (2008) (giving “indecent” as another example). A restroom’s availability turns on objective real-world facts, not the values of anyone enforcing the law.

Whether a restroom is “reasonably available” also is not unreasonably indeterminate. “Available” is not ambiguous—again, it simply asks whether a restroom is present and ready for use. *Available*, Merriam-Webster Dictionary,

<https://tinyurl.com/2vyjbuc5>. And “reasonably” is “a widely used and well understood word[,] and clearly so when juxtaposed with” “available.” *Cameron v. Johnson*, 390 U.S. 611, 616 (1968) (rejecting vagueness challenge to the phrase “unreasonably interfere”). “Reasonably” may introduce a matter of degree in assessing availability to account for (for example) restrooms that will be ready to use soon or with little difficulty (e.g., asking for a key), but that does not call into “doubt the [law’s] constitutionality,” for “the law is full of instances where a man’s fate depends on his estimating rightly some matter of degree.” *Johnson*, 576 U.S. at 603-04 (cleaned up); *see also United States v. Ragen*, 314 U.S. 513, 524 (1942) (“[A] question of reasonableness is not sufficient to make [a statute] too vague to afford a practical guide to permissible conduct”).

Still, the district court characterized “reasonably available” as “standardless” because the statute did not provide “guidance regarding what factors an officer should consider when making that determination.” 1-ER-13. The court tried to identify some “factors” that could influence a restroom’s availability, then faulted H.B. 752 for “not indicat[ing]” which of these factors “availability turns on.” 1-ER-13.

But a statute is “not impermissibly vague merely because [it] ... do[es] not delineate what factors are relevant to [the ultimate] determination” that must be made. *Kashem v. Barr*, 941 F.3d 358, 364 (9th Cir. 2019). The factors the district court listed—occupancy, functionality, and proximity—can affect whether a restroom is reasonably

available in obvious ways.² The point of a legal standard like “reasonably available” is to use one phrase flexible enough to account for these factors (and other potentially “untold and unforeseen variations in factual situations”) instead of listing out each covered circumstance. *Boyce Motor Lines v. United States*, 342 U.S. 337, 340 (1952). But these three factors don’t come close to showing that the phrase “reasonably available” is so “esoteric or complicated” that law enforcement could arbitrarily label wide swaths of restrooms “reasonably available” and make “erratic arrests” of those who attempt to rely on these two relevant exceptions. *Osinger*, 753 F.3d at 945 (first quote); *Papachristou*, 405 U.S. at 162 (second quote).

Case law proliferates with legal standards that have withstood vagueness challenges despite not specifying pertinent factors to consider and requiring discretionary judgment by those enforcing the law. Consider *Guerrero v. Whitaker*, where this Court held that the phrase “particularly serious crime” was not unconstitutionally vague. 908 F.3d 541, 544-45 (9th Cir. 2018). The statute “provide[d] little guidance” regarding which factors to consider other than general dangerousness, and “provide[d] an uncertain standard to be applied to a wide range of fact-specific scenarios”—a far wider range than the assessment of a restroom’s availability. *Id.* at 545. But the statute was “perfectly constitutional” nonetheless. *Id.* (cleaned up).

² Given building codes and disability laws, it’s hard to imagine a situation where a restroom designated for one sex is physically proximate to a person but the restroom designated for the other sex is so far as to not be reasonably available.

Other laws with levels of indeterminacy similar to the statute in *Guerrero* have likewise been upheld. These include laws:

- prohibiting “loud and raucous” sound amplification, *Kovacs v. Cooper*, 336 U.S. 77, 79-80 (1949) (the ordinance “conveys to any interested person a sufficiently accurate concept of what is forbidden”);
- prohibiting speech with a “direct tendency to cause acts of violence,” *Chaplinsky v. New Hampshire*, 315 U.S. 568, 573-74 (1942);
- requiring “[d]rivers of motor vehicles transporting any explosive” to “avoid, so far as practicable ... driving into or through contested thoroughfares,” *Boyce Motor Lines*, 342 U.S. at 340;
- criminalizing negligent homicide, which turns on whether the person “fails to perceive a substantial and unjustifiable risk” and the risk is a “gross deviation from the standard of care that a reasonable person would observe in the situation,” *Panther*, 991 F.2d at 578; and
- prohibiting stalking, including conduct done with “intent to ... harass” that causes “substantial emotional distress,” *Osinger*, 753 F.3d at 943 n.1, 945.

See also Sessions v. Dimaya, 584 U.S. 148, 159 (2018) (“Many perfectly constitutional statutes use imprecise terms like ‘serious potential risk’ ... or ‘substantial risk.’”). If these statutory standards are not vague, then neither is “reasonably available.” *See Lucero*, 989 F.3d at 1103 (upholding statute because it “provide[d] an ascertainable, qualitative standard akin to others found in the law”); *United States v. Kilbride*, 584 F.3d 1240, 1258 (9th Cir. 2009) (similar).

2. H.B. 752's exception for a dire need of urinating or defecating is not vague.

For one of the two exceptions that applies when a restroom corresponding to the person's biological sex is not reasonably available, the person must also have a "dire need of urinating or defecating." Idaho Code § 18-4117(2)(f). The district court held that "dire need of urinating or defecating" was also vague, largely tracking its reasoning for "reasonably available." 1-ER-14-16. That conclusion was wrong for many of the same reasons just explained.

Again, ordinary language and "common experience" provide a certain guide for invoking the "dire need" exception. *Edge*, 929 F.3d at 667. Every person evaluates the urgency of their need to urinate and defecate *every day*. Every person can gauge when that need is so urgent that it becomes "dire." "Dire need" therefore "does not lack any ascertainable standard for inclusion and exclusion." *United States v. Melgar-Diaz*, 2 F.4th 1263, 1269-70 (9th Cir. 2021) (cleaned up). Nor does the need to urinate or defecate depend on the subjective values of those enforcing the law—it reflects physiological factors such as bladder or rectum fullness or muscle fatigue.

The district court again held that the statute gave insufficient "guidance" to law enforcement, and listed ways in which it believed that the statute's common-sense standard nonetheless invited arbitrary enforcement. 1-ER-14.

First, the district court opined that H.B. 752 does not give "guidance concerning what level of urgency qualifies as dire" or "identify any objective benchmark." 1-ER-14.

That's incorrect—the “dire need” exception applies only where a restroom designated for the person's sex is also not reasonably available. Idaho Code § 18-4117(2)(f). The statute is therefore directed at an urgency at least significant enough that a person must urinate or defecate before a restroom designated for their sex (whether at the public place or elsewhere) is available. *See Guerrero*, 908 F.3d at 544-45 (discerning meaning from statutory context). Indeed, it's not clear what other “objective benchmark” H.B. 752 could use to capture the concept of “dire need.” *United States v. Schales*, 546 F.3d 965, 972 (9th Cir. 2008) (“The Constitution does not require impossible standards” of clarity (cleaned up)).

But the district court's concerns about the “level” of urgency and “benchmark” are also merely variations of its concern that different officers might reach “different conclusions regarding identical conduct.” 1-ER-13. As explained, a statute is not vague because citizens must “estimate[] rightly some matter of degree” or because those enforcing the law must undertake “an imprecise line-drawing exercise.” *Guerrero*, 908 F.3d at 545 (cleaned up); *see also Cal. Tchrs. Ass'n v. State Bd. of Educ.*, 271 F.3d 1141, 1152 (9th Cir. 2001) (statute requiring curriculum to be presented “overwhelmingly” or “nearly all” in English was not vague because those were “terms of common understanding”).

The other two concerns regarding arbitrary enforcement were even farther afield. The court criticized H.B. 752 for not “specify[ing] what evidence may establish such a need[] or explain[ing] how an officer is to assess whether the exception applies.” 1-ER-

14. The court cited legislative testimony asserting that the “dire need” exception presents “practical enforcement challenges” and would be “difficult ... to enforce.” 1-ER-14.

Of course, most criminal laws are not accompanied by provisions specifying what kind of evidence may prove a violation—other sources of law already do that, including constitutions, statutes, rules of evidence, and rules of criminal procedure. The district court’s worry seems to be that because it is difficult for police officers to obtain evidence that a person did *not* have a dire need, they will “arbitrarily enforce” the law by making arrests despite a lack of evidence. 1-ER-14 (presuming that officers will enforce the law based on a “subjective assessment of an individual’s physical condition at a particular moment”).

The Supreme Court has explicitly rejected the idea that the difficulty of enforcing a law is relevant to vagueness. In *United States v. Williams*, the Court addressed a vagueness challenge to a statute establishing a crime based on a person’s belief or intent—another fact where the most probative evidence (a person’s thoughts) resides with the accused. 553 U.S. at 305. The Court explained that “[w]hat renders a statute vague is not the possibility that it will sometimes be difficult to determine whether the incriminating fact it establishes has been proved; but rather the indeterminacy of precisely what that fact is.” *Id.* at 306. “[T]he requirement of proof beyond a reasonable doubt”—not the Constitution’s prohibition on vague laws—is what protects defendants from conviction in “close cases” or cases with no evidence. *Id.*; see also *United States v. Edling*, 895 F.3d 1153, 1158 (9th Cir. 2018) (applying rule of lenity “serves the same purpose[]” as vagueness).

This Court, relying on *Williams*, has also rejected the district court’s reasoning. In *United States v. Kilbride*, the defendant argued that a statute’s prohibition on intentional “material falsification” of an email’s header information would cause “many innocent people who privately register [a domain name] without the requisite intent [to] be subject to investigation ... until their intent can be determined, allowing for abuse by enforcement authorities.” 584 F.3d at 1259. The Court responded, “[t]his may be so, but it does not make the statute unconstitutionally vague”—“[w]hile determining as a factual matter whether the requisite intent for culpability ... exists may prove difficult, this does not demonstrate that the concept of intent as used in the statute is an entirely indeterminate, subjective one.” *Id.*

So too here. While it “may prove difficult” to secure evidence that a person’s need to urinate or defecate was not “dire,” that is “irrelevant.” *Id.* If law enforcement cannot procure sufficient evidence to prove a person’s lack of a dire need beyond a reasonable doubt, all that means is the person will *not* be arbitrarily convicted of violating H.B. 752 and will *not* be deprived of liberty without due process of law. That raises no vagueness concerns.

3. The district court erred by enjoining enforcement of H.B. 752 in its entirety based on its conclusion that two exceptions were vague.

Even if “reasonably available” and “dire need” were unconstitutionally vague, that would not justify enjoining the law in its entirety like the district court did.

When federal courts conclude that part of a state statute is unconstitutional, they apply state severability principles to inform the scope of the remedy. *Project Veritas v. Schmidt*, 125 F.4th 929, 958 (9th Cir. 2025). Under Idaho law, “[w]hen part of a statute or ordinance is unconstitutional and yet is not an integral or indispensable part of the measure, the invalid portion may be stricken without affecting the remainder of the statute or ordinance.” *In re SRBA Case No. 39576*, 912 P.2d 614, 631 (Idaho 1995). That largely tracks federal severability law, which turns on “congressional intent,” as determined by whether “the remainder of the statute is capable of functioning independently and thus would be fully operative as a law.” *Barr v. Am. Ass’n of Pol. Consultants, Inc.*, 591 U.S. 610, 625-28 (2020) (plurality) (cleaned up) (collecting cases) (“it is fairly unusual for the remainder of a law not to be operative”).

Here, the two exceptions that the district court deemed unconstitutional are not integral to H.B. 752’s functioning. The statute operates coherently and independently with the central prohibition and the other eight exceptions. Indeed, severance is the ordinary result when the Supreme Court addresses an exception to a statute’s central provision. *E.g.*, *Barr*, 591 U.S. at 636 (invalidating only the exception to statute’s restriction on robocalls); *Sessions v. Morales-Santana*, 582 U.S. 47, 76 (2017) (opting to “abrogate[] [the statute’s] exception, preferring preservation of the general rule”).

Moreover, “when confronting a constitutional flaw in a statute, [courts] try to limit the solution to the problem.” *Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320, 328 (2006); *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 502 (1985) (“a federal court

should not extend its invalidation of a statute further than necessary to dispose of the case before it”). If the district court was correct that the two exceptions allow law enforcement to arbitrarily arrest and prosecute those who attempt to rely on them, that problem would be completely remedied by invalidating those exceptions alone.

The district court gave little explanation for why enjoining enforcement of H.B. 752 in its entirety was proper, and the reasons provided do not hold up. It summarily stated that the exceptions were “integral” or “key,” but did not elaborate further. 1-ER-23. It noted that “[i]nvalidating the two exceptions would defeat the Idaho Legislature’s intended purpose to allow a person to enter a restroom designated for use by the opposite sex under certain circumstances,” 1-ER-23, but that just avoids the severability inquiry entirely. *Every* time the State is enjoined from enforcing part of a statute, the law that remains enforceable differs from the law that the Legislature enacted. The court’s reasoning would mean that severance is never an option.

The court also seemed troubled that severing the exceptions would expand criminal liability. 1-ER-23. But it cited no authority suggesting that severability is not available when it would expand criminal liability, and no such principle exists. *See, e.g., Eberle v. Michigan*, 232 U.S. 700, 704-06 (1914) (severing exceptions from otherwise valid criminal prohibition on sale of alcohol).³ That is simply the natural consequence of

³ *See also State v. Books*, 225 N.W.2d 322, 325-26 (Iowa 1975) (expanding public corruption statute by severing exemption for state employees); *People v. Liberta*, 474

challenging an exception that provides safe harbor from a criminal statute rather than the provisions creating liability.

4. H.B. 752's central prohibition is not vague.

Finally, the district court did not “consider whether Plaintiffs [were] likely to succeed on their argument that the phrase ‘*designated* for use by the opposite biological sex’ in the statute’s central prohibition is also vague.” 1-ER-17-18. This Court should not affirm on that alternative ground because the argument is meritless.

H.B. 752 prohibits any person from “knowingly and willfully enter[ing] a restroom or changing room ... that is designated for use by the opposite biological sex.” Idaho Code § 18-4117(1). These are “words of common understanding.” *Cal. Tchrs. Ass’n*, 271 F.3d at 1151-52. The ordinary meaning of “designate” means “to indicate and set apart for a specific purpose.” *Designate*, Merriam-Webster Dictionary, <https://tinyurl.com/yu9kxry3>. And Plaintiffs do not dispute for purposes of their preliminary injunction motion that “biological sex” has a definite meaning—they have assumed it means “sex assigned at birth,” 2-ER-153, which they consider an empirical fact “noted on a person’s birth certificate shortly after birth.” 2-ER-218, ¶ 37.

And once again, common experience allows Idahoans to identify when a restroom is indicated and set apart for a particular sex’s use. That’s because, as Plaintiffs

N.E.2d 567, 578-79 (N.Y. Ct. App. 1984) (expanding criminal liability by severing exception to rape statute); *Plas v. State*, 598 P.2d 966, 968-69 (Alaska 1979) (expanding criminal liability by severing limitation in prostitution statute).

admit, “[r]estrooms are frequently marked [with] ‘men’ or ‘women,’” 2-ER-162, and the ordinary definitions of those words denote sex: “an adult *male* human” and “an adult *female* person,” respectively. *Man*, Merriam-Webster Dictionary, <https://tinyurl.com/3c8jnrbe> (emphasis added); *Woman*, Merriam-Webster Dictionary, <https://tinyurl.com/3rc5u7bn> (emphasis added). Context confirms the ordinary meaning—there are two restrooms (tracking the binary concept of sex), the two sexes have distinct anatomy requiring separate restrooms, and sex-segregated restrooms have been common for centuries. *Adams*, 57 F.4th at 805 (“sex-separation in bathrooms dates back to ancient times, and, in the United States, preceded the nation’s founding”) (citing W. Burlette Carter, *Sexism in the “Bathroom Debates”: How Bathrooms Really Became Separated by Sex*, 37 Yale L. & Pol’y Rev. 227, 229 (2019)).

Lest there be any doubt that these standard signs designate sex, the International Building Code that most public buildings in Idaho must follow *requires* that, with limited exceptions, “separate facilities shall be provided for each sex,” and that “public facilities shall be provided with signs that designate the sex.” Int’l Bldg. Code ch. 29, §§ 2902.2, 2902.4 (2018), <https://tinyurl.com/4h22pc2t>; *e.g.*, IDAPA 24.39.30.600 (adopting the International Building Code).

Thus, “ordinary people” have “fair notice” that a restroom displaying a “men” sign (for example) is designated for use by those of the male sex. *Johnson*, 576 U.S. at 595; *Grayned*, 408 U.S. at 108 (law must provide “the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly”).

Plaintiffs’ theory is that whether a bathroom is “designated” for a particular sex turns on the subjective intent of a public place’s proprietor. Although the bathroom contains a sign that outwardly indicates that it is for use by members of one sex, Plaintiffs believe it is not “designated” for members of that sex if the proprietor intends to allow anyone who identifies with a gender aligned with that sex to enter the restroom or has permitted such use in the past. Plaintiffs argue that this “subjective intent” interpretation of H.B. 752 renders it vague. *But see Nw. Ass’n of Indep. Schs. v. Labrador*, 166 F.4th 1148, 1162 (9th Cir. 2026) (“Idaho courts construe statutes to avoid conflict with the federal Constitution wherever possible”).

First, that interpretation is simply wrong. The ordinary meaning of “designate” turns on what has been “indicate[d].” *Designate*, Merriam-Webster Dictionary, <https://tinyurl.com/yu9kxry3>; *Richardson v. Comm’r of Internal Revenue*, 125 F.3d 551, 556 (7th Cir. 1997) (relying on ordinary meaning to conclude that tax “designat[ion]” “must contain a clear, explicit and express direction”). That meaning accords with precedent addressing vagueness challenges to statutes using the word “design”—which shares the same etymological root as “designate” and, if anything, would be *more* likely to implicate subjective intent. *United States v. Kuzma*, 967 F.3d 959, 969-70 (9th Cir. 2020) (the phrase “designed to shoot” “requires a purely objective examination of the design features and not an inquiry into the manufacturer’s subjective intent” and is not facially vague); *Vill. of Hoffman Ests.*, 455 U.S. at 501, 505 (“designed ... for illegal use” refers to “objective features” and is not facially vague).

But even if subjective intent *were* the benchmark for whether a restroom is “designated” for a particular sex, that would not create any vagueness problem. There would still be no “indeterminacy [in] precisely what [the incriminating] fact is” that must be proven, *Williams*, 553 U.S. at 305—a person would know that they must comply with the proprietor’s intent. Even if it were difficult to ascertain that information (and it’s unclear it would be), that does not make the statute vague. *Lucero*, 989 F.3d at 1102 (“Although it may be time-consuming, difficult, and expensive to determine whether a given area falls within this definition, the standard for making this determination is nevertheless clear.”); *Henderson v. McMurray*, 987 F.3d 997, 1004 (11th Cir. 2021) (“That [plaintiffs] are not in a strong position to ascertain the fact [that must be proved] does not make the [] provision vague.”).

Though the district court did not resolve Plaintiffs’ vagueness challenge to H.B. 752’s main prohibition, it offered several brief and unhelpful “observations.” 1-ER-18. It suggested that law enforcement may have difficulty assessing “biological sex,” 1-ER-17, even though the difficulty of enforcement is “irrelevant” to vagueness. *Kilbride*, 584 F.3d at 1259.⁴ It accepted Plaintiffs’ “subjective intent” interpretation without analysis

⁴ Contrary to the district court’s opinion, it was the court—not Defendants’ counsel—that raised the possibility “that law enforcement could use DNA testing to prove biological sex.” 1-ER-17; D. Ct. Dkt. 60 at 26:11-14. Defendants’ counsel repeatedly maintained that law enforcement’s ability to prove a violation was not “the question,” and mentioned DNA testing (along with an original birth certificate) as something one charged with violating H.B. 752 could voluntarily provide “at some point in [the]

or mention of Defendants’ position that “designate” turns on what a sign outwardly indicates. 1-ER-18. And it believed the purported need to ascertain a proprietor’s subjective intent meant the law did not give “adequate notice of the proscribed conduct.” 1-ER-18. Based on the arguments above, it should be clear why all these “observations” are simply incorrect.

Far more probative is that the district court itself used the phrase “designated for use by sex” in its injunction, which necessarily assumes that those who are bound to comply understand the phrase’s meaning. Fed. R. Civ. P. 65(d)(1) (injunction must “state its terms specifically” and “describe in reasonable detail ... the act or acts restrained”); *Reno Air Racing Ass’n, Inc. v. McCord*, 452 F.3d 1126, 1134 (9th Cir. 2006) (injunction’s terms must be capable of being “understood by the lay person”).

B. Plaintiffs are not likely to succeed on their equal protection claim.

As for Plaintiffs’ equal protection claim, the district court did not address whether the claim was likely to succeed on the merits. 1-ER-19. If this Court uses its discretion to address the issue, it should hold that the claim is unlikely to succeed.

The Equal Protection Clause “is essentially a direction that all persons similarly situated should be treated alike.” *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). Plaintiffs assert that H.B. 752 unjustifiably discriminates based on sex (as applied

process” of criminal defense to conclusively prove innocence. D. Ct. Dkt. 60 at 24:24-25, 26:4-10, 26:17-18.

to those who identify as transgender) and transgender identity. Their motion for preliminary injunction specifically argues that H.B. 752 cannot be justified when applied to two specific restroom configurations. 2-ER-163.

While some laws prescribing different treatment for men and women rest on “outmoded notions of the relative capabilities of men and women” or “traditional, often inaccurate, assumptions about the proper roles of men and women,” some do not. *City of Cleburne*, 473 U.S. at 441. Some are rooted in “[p]hysical differences between men and women” that “are enduring.” *United States v. Virginia*, 518 U.S. 515, 533 (1996). Laws respecting these differences are “not invidious, but rather realistically reflect[] the fact that the sexes are not similarly situated in certain circumstances.” *West Virginia v. BPJ*, 146 S. Ct. 2356, 2377 (2026) (cleaned up).

H.B. 752 is fundamentally about enduring physical differences between men and women, not the sex-based stereotypes that the Equal Protection Clause is intended to stamp out. The statute requires compliance with sex-segregated restrooms for the same biological-based reasons that have justified such restrooms for centuries.

1. Plaintiffs’ preliminary injunction motion sought relief based on a claim different from the one pled.

Although their complaint alleges that H.B. 752 is unconstitutional as applied to those who identify as transgender in *all* restrooms, 2-ER-213, 244, ¶¶ 5, 152, and seeks correspondingly broad relief, 2-ER-247-48, ¶¶ 169-70, Plaintiffs did not argue in their preliminary injunction motion that they were likely to succeed on that claim. Instead,

they argued only that H.B. 752 is unconstitutional as applied to transgender-identifying individuals in two “narrow contexts”: (1) “single-user restrooms designated for the opposite sex,” and (2) “multi-occupancy restrooms where no gender-neutral single-user restroom is reasonably available.” 2-ER-163 (“At this preliminary juncture, the question is simply whether Idaho can ... justify criminalizing transgender people’s use” of restrooms regarding “the scope of conduct for which Plaintiffs seek a preliminary injunction.”).

Plaintiffs cannot prevail on their challenge as to *all* restrooms by showing H.B. 752 is unconstitutional in two isolated circumstances. Plaintiffs chose the scope of their claim, and that choice “comes at a cost.” *Moody v. NetChoice, LLC*, 603 U.S. 707, 723 (2024). It means they must “establish[] that no set of circumstances exists under which the [restroom prohibition] would be valid” as to those who identify as transgender. *Id.* (cleaned up).⁵ Without that showing, the Court cannot conclude that Plaintiffs are likely to succeed on the merits of their claim—“[w]hen a plaintiff seeks injunctive relief based on claims not pled in the complaint, the court does not have the authority to issue an injunction.” *Pac. Radiation Oncology, LLC v. Queen’s Med. Ctr.*, 810 F.3d 631, 633 (9th Cir. 2015).

⁵ It is irrelevant whether Plaintiffs’ claim is characterized as a facial or as-applied challenge. “The label is not what matters. The important point is that plaintiffs’ claim and the relief that would follow ... reach beyond the particular circumstances of these plaintiffs,” so “[t]hey must [] satisfy [the] standards for a facial challenge *to the extent of that reach*.” *John Doe No. 1 v. Reed*, 561 U.S. 186, 194 (2010) (emphasis added).

To be clear, Plaintiffs may seek narrower *relief* in a preliminary injunction motion than the relief ultimately sought, and “could have brought an as-applied challenge” related to those two circumstances. *NetChoice, LLC v. Bonta*, 170 F.4th 744, 759-60 (9th Cir. 2026). But they cannot argue that they are likely to succeed on a claim they haven’t brought. *Roe*, 137 F.4th at 924-25 & n.9 (“the outcome here is dictated by the type of challenge SAGA raises”—“[t]hough SAGA’s argument focused on restrooms, its complaint plainly challenged S.B. 1100’s application to all covered facilities”).

2. Assuming H.B. 752 triggers intermediate scrutiny as a sex-based classification, it easily passes constitutional muster.

In any event, the claim Plaintiffs pled is as unlikely to succeed as the one their motion advanced.

Plaintiffs’ lead theory below was that H.B. 752 triggers heightened scrutiny as a sex-based classification because it prescribes a different rule for men and women: in accordance with sex-designations made by a public place, men must use one restroom, and women must use the other. 2-ER-164. For purposes of this appeal, Defendants assume that is correct and intermediate scrutiny applies.

The question then becomes whether H.B. 752 (1) “serves important governmental objectives” and (2) is “substantially related to the achievement of those objectives.” *Virginia*, 518 U.S. at 524 (cleaned up). This does not require the government to employ “the least restrictive means or the means most narrowly tailored to achieve the government’s interest,” or even “the most effective means of furthering [its]

objective.” *Roe*, 137 F.4th at 925-26. And it is not the Court’s “role to decide whether [H.B. 752] is substantively good policy.” *Id.* at 925.

The Supreme Court recently explained in *West Virginia v. BPJ* how to analyze “as-applied equal protection argument[s]” like Plaintiffs’. 146 S. Ct. at 2377. Addressing a claim that sex-segregated sports teams were not justified as applied to those who identify as transgender, the Court explained that the “validity of [a] regulation depends on the relation it bears to the overall problem the government seeks to correct, not on the extent to which it furthers the government’s interests in an individual case.” *Id.* at 2376 (cleaned up). So the Court declined to analyze how the law advances the government’s interest as applied to the “specific subclass” of male athletes who identify as women, and instead decided that the interest in separating men’s and women’s sports was “sufficient as a general matter.” *Id.* at 2377.

Thus, Plaintiffs cannot attempt to show that H.B. 752’s restroom provision is unconstitutional by arguing that it fails to adequately advance the State’s interests in bodily privacy and safety in the “individual case” of those who identify as transgender or in particular restroom configurations. *Id.* at 2376 (cleaned up). Rather, they must show that H.B. 752 is not “substantially related” to the “important” interests of bodily privacy and safety generally. *Virginia*, 518 U.S. at 524.

Given the ubiquity and historical pedigree of sex-segregated public restrooms,⁶ which lowers the “quantum of empirical evidence” needed to withstand intermediate scrutiny, *Roe*, 137 F.4th at 925 (cleaned up), it is not surprising that Plaintiffs expressly disclaimed any challenge to “the constitutionality of sex-separated restrooms generally.” 2-ER-48 (“their claim addresses *only* H.B. 752’s criminalization of transgender people’s use of restrooms that align with their gender identity”) (emphasis added). Even if they could do so now, their argument would be futile—H.B. 752 straightforwardly advances the State’s interests in preserving bodily privacy and safety.

Bodily privacy. This Court has already affirmed Idaho’s “important” interests in promoting bodily privacy. *Roe*, 137 F.4th at 923-24. The “right to bodily privacy” is a constitutional right. *Sepulveda v. Ramirez*, 967 F.2d 1413, 1416 (9th Cir. 1992). “[S]hield[ing] one’s unclothed figure from the view of strangers, and *particularly strangers of the opposite sex*, is impelled by elementary self-respect and personal dignity.” *Byrd v. Maricopa Cnty. Sheriff’s Dep’t*, 629 F.3d 1135, 1141 (9th Cir. 2011) (cleaned up) (emphasis added).

⁶ See Kevin Stuart & DeAnn Barta Stuart, *Behind Closed Doors: Public Restrooms and the Fight for Women’s Equality*, 24 Tex. Rev. L. & Pol. 1, 28-37 (2019) (requiring sex-separated restrooms was a victory for women’s rights in the late nineteenth-century, thwarting risks of assault and sexual harassment and providing women with a “space of their own”); Ruth Bader Ginsburg, *The Fear of the Equal Rights Amendment*, Wash. Post at A21 (Apr. 7, 1975) (“Separate places to disrobe, sleep, [and] perform personal bodily functions are permitted, in some situations required, by regard for individual privacy.”).

H.B. 752 advances this interest by reducing the risk of exposure to members of the opposite sex in restrooms. “[B]athrooms by their very nature implicate important privacy interest[s]” because “unquestionably the functions of the bathroom are intended to be private.” *SAGA*, 2025 WL 2256884 at *8 (cleaned up). That much “is easily corroborated by common experience and circuit precedent.” *Roe*, 137 F.4th at 925. Indeed, privacy concerns exist regardless of stall doors in restrooms. Stall doors do not reach from floor to ceiling, and the strike-side gap leaves a direct sightline into the stall from the communal space.

Moreover, “restrooms are not used simply to relieve oneself,” and preserving “[p]rivacy is not limited to obscuring the visual line of sight of others when a person is relieving themselves in a restroom stall.” *SAGA*, 2025 WL 2256884, at *7-8 (emphasis omitted). “[I]n the male bathrooms, [men] use undivided urinals” located outside of the stalls. *Adams*, 57 F.4th at 806. “Individuals undertake other personal duties in the communal areas of restrooms and are entitled to privacy there as well.” *Jones*, 803 F. Supp. 3d at 1091. For example, “[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.” *SAGA*, 2025 WL 2256884, at *7. Nursing children, adjusting clothing, and tending to medical, cosmetic, or menstrual needs all may occur in common areas of restrooms.

By forbidding entrance into bathrooms designated for the opposite sex, H.B. 752 adds a layer of privacy and ensures that restrooms are places where no individual will

be forced to change or undertake private duties in the presence of someone of the opposite sex.

Safety. It is an unfortunate reality that men—both those identifying as transgender and not—have committed violent crimes against women and adolescents in public restrooms.⁷ See *Bridge v. Okla. State Dep’t of Educ.*, 711 F. Supp. 3d 1289, 1296-97 (W.D. Okla. 2024) (concluding that gender-neutral multiple-occupancy restrooms pose “major safety concern[s]”). Requiring everyone to respect restrooms separated by sex necessarily mitigates the risk of crime and advances “important government interests” in safety. *Jackson v. City & Cnty. of San Francisco*, 746 F.3d 953, 965 (9th Cir. 2014).

In discussing the balance of the equities, the district court questioned whether excluding transgender-identifying individuals from restrooms designated for the opposite sex furthered Idaho’s safety interest. 1-ER-21. But that is not the right question for equal protection—the question is whether requiring people to comply with sex-segregated restrooms advances safety “as a general matter.” *BPJ*, 146 S. Ct. at 2377. And the Idaho Legislature had ample evidence to support the decision it made—far more than it

⁷ E.g., *In re Commitment of Thedford*, 2023 WL 107121, at *1 (Tex. App. Jan. 5, 2023) (rape); *People v. Waqa*, 309 Cal. Rptr. 3d 633, 640 (Cal. Ct. App. 2023) (rape); *Hart v. Att’y Gen. of Md.*, 2024 WL 4201418, at *2 (D. Md. Sept. 16, 2024) (rape); Briana Oser, *Young Girl is Raped in School Bathroom by Transgender Peer*, Wash. Examiner (June 20, 2023), <https://tinyurl.com/3rr237a2> (rape); *State v. Brown*, 164 So. 3d 395, 397 (La. Ct. App. 2015) (attempted forcible rape); *Hutton v. State*, 190 N.E.3d 413, 414 (Ind. Ct. App. 2022) (sexual assault); *Gooden v. Edmond Pub. Schs.*, No. CJ-2023-2959 (Okla. Dist. Ct. Okla. Cnty. May 25, 2023) (assault).

needed. *E.g.*, 2-ER-94-99, ¶¶ 2h, 4e, 5c (describing assault statistics and multiple incidents of cameras placed in changing rooms and restrooms); *see Roe*, 137 F.4th at 925 (“harm need not have occurred before a legislature can act”).

3. H.B. 752 does not trigger heightened scrutiny as a classification based on transgender identity.

Separately, Plaintiffs argue that H.B. 752 classifies based on transgender identity, which triggers intermediate scrutiny under this Court’s precedents. *Roe*, 137 F.4th at 923. Whether H.B. 752 classifies based on transgender identity does not affect its constitutionality. *See BPJ*, 146 S. Ct. at 2379 (upholding statute separating athletics by sex even if it were a “transgender classification” “for the reasons already explained” in resolving sex-based challenge).

In any event, H.B. 752 does not classify based on transgender identity. This Court held in *Roe* that laws concerning sex-separated restrooms classify based on transgender identity, 137 F.4th at 923, but *Roe*’s reasoning is “clearly irreconcilable” with intervening Supreme Court precedent. *Miller v. Gammie*, 335 F.3d 889, 899 (9th Cir. 2003) (en banc).

In *United States v. Skermetti*, the Court addressed a statute prohibiting administration of puberty blockers and cross-sex hormones to “enable a minor to identify with ... [an] identity inconsistent with the minor’s sex.” 605 U.S. 495, 506 (2025) (cleaned up). The Court rejected the transgender-based discrimination claim because the statute did not “exclude any individual from medical treatments on the basis of transgender status”—all people were excluded, even if “only transgender individuals” were affected. *Id.* at 518-

19. The Court held likewise in *BPJ*: the law separating athletics by sex did “not classify based on gender identity or transgender status,” but rather based on sex. 146 S. Ct. at 2378-79.

So too here. H.B. 752’s operation is indifferent to a person’s gender identity—*no person* may enter a bathroom designated for the opposite biological sex. Perhaps most people who want to enter a bathroom designated for the opposite sex (and don’t fall within one of H.B. 752’s exceptions) identify as transgender, which means they will not be able to “us[e] facilities that align with their gender identity.” *Roe*, 137 F.4th at 923. But *Skrmetti* and *BPJ* have made clear that such disproportionate impact doesn’t trigger heightened scrutiny.

4. H.B. 752 is not the product of animus.

Plaintiffs also argued below that H.B. 752 is invalid because it is the product of animus towards those who identify as transgender. That argument also should be rejected.

Plaintiffs have argued that animus can be presumed under *Romer v. Evans* based on H.B. 752’s breadth. 517 U.S. 620, 632 (1996). But to presume animus, the Court must conclude that the law is objectively “inexplicable by anything but animus.” *Id.*; *Trump v. Hawaii*, 585 U.S. 667, 705 (2018) (law must “lack any purpose other than a bare desire to harm a politically unpopular group”) (cleaned up). As discussed, H.B. 752 can be easily explained—it directly advances judicially recognized interests in privacy and safety in a way that has been done for centuries.

Plaintiffs also have searched for animus in the Legislature’s subjective motives for enacting H.B. 752. Such arguments have “long [been] disfavored” because “inquiries into legislative motives are a hazardous matter,” and statements by one legislator cannot be “attribute[d] ... to the legislative body as a whole.” *Moving Oxnard Forward, Inc. v. Lopez*, 173 F.4th 1070, 1087 (9th Cir. 2026) (cleaned up). But the legislative history readily establishes that the Legislature enacted H.B. 752 to protect bodily privacy and safety—“in spite of,” not “because of,” “its adverse effects” on those who identify as transgender. *Personnel Adm’r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979); 2-ER-96-99, ¶¶ 3b, 5a-5c.

In this bathroom context, it is natural that Plaintiffs’ interest in having their gender identity affirmed may conflict with an interest in protecting others’ bodily privacy. *See* 2-ER-107-09, ¶¶ 14-19. But the Constitution leaves the choice of which interests to prioritize to the Legislature. *See Skermetti*, 605 U.S. at 509 (“most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons”). Preferring one policy to another is not animus towards anyone, but simply an inevitable occurrence in our democracy. *Id.* at 523 (rejecting allegation of animus).

C. Plaintiffs are not likely to succeed on their informational privacy claim.

Finally, the Court should not use its discretion to affirm based on Plaintiffs’ substantive due process informational privacy claim that the district court did not address. Plaintiffs are not likely to succeed on that claim.

The purported right that Plaintiffs assert loosely derives from two cases from 1977, both of which assumed the right's existence and rejected a claim asserting it. *Whalen v. Roe*, 429 U.S. 589 (1977); *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425 (1977). Since then, the Supreme Court “has said little else on the subject”—the only other time it analyzed the right, it seriously questioned whether the right exists at all. *NASA v. Nelson*, 562 U.S. 134, 144-46 & n.10 (2011). This Court has recognized the right, *Doe v. Att’y Gen. of U.S.*, 941 F.2d 780, 795 (9th Cir. 1991), but the right's dubious constitutional grounding cautions against extending it to a new context like this to enjoin a state law. *See United States v. Rahimi*, 602 U.S. 680, 730 (2024) (Kavanaugh, J., concurring) (constitutional “text and history” serve as “a gravitational pull on the Court’s interpretation of precedent”).

Plaintiffs assert that H.B. 752 violates a right to informational privacy by disclosing their transgender status—they fear others will observe them entering a bathroom designated for their sex, will deduce their sex, and will then deduce their transgender status. Their theory suffers from at least three fatal flaws.

First, H.B. 752 does not “disclose[] or force [Plaintiffs] to disclose their gender identity.” *Gore v. Lee*, 107 F.4th 548, 564 (6th Cir. 2024) (rejecting similar argument). To the extent it forces *any* disclosure, it allows onlookers to reasonably predict only an individual’s *sex*, which is not sensitive information protected by the right to informational privacy (and Plaintiffs do not argue that it is). *Doe v. Bonta*, 101 F.4th 633, 636-37 (9th Cir. 2024) (labeling sex as “innocuous biographical data”). But onlookers

would not be able to infer that an individual identifies as transgender unless they separately knew the individual's gender identity.

Thus, to the extent anyone can infer that Plaintiffs identify as transgender after seeing them enter a restroom corresponding to their sex, it would only be because *Plaintiffs* have divulged their gender identity. There is no other way for anyone to know—Plaintiffs allege that gender identity is “a person’s *internal* sense of oneself.” 2-ER-218, ¶ 39 (emphasis added). Plaintiffs have suggested that onlookers might surmise their gender identity based on the way they “live[], dress[], and express[]” themselves. 2-ER-170. But gender identity cannot reliably be inferred from such indicators—many people who identify as transgender do not wear clothing commonly associated with the opposite sex, and some who do not identify as transgender occasionally do. *See, e.g., Is Drag the Same as Transgender?*, Planned Parenthood (Oct. 13, 2025), perma.cc/2F6U-AW57. In all events, Plaintiffs cannot blame H.B. 752 because it “does not disclose any mismatch [between sex and] their gender identity.” *Gore*, 107 F.4th at 564.

Second, the right to informational privacy does not include the right to keep one's transgender identity a secret. In substantive due process cases, the key inquiry when examining the existence and scope of a constitutional right is whether the right is “deeply rooted in this Nation’s history and tradition” and “implicit in the concept of ordered liberty.” *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997). “And in conducting this inquiry, [the Court] must engage in a careful analysis of the history of the right at issue.” *Reach Cmty. Dev. v. U.S. Dep’t of Homeland Sec.*, 174 F.4th 1143, 1147 (9th Cir. 2026)

(cleaned up). Long gone are the days of shaping an abstract “right to privacy” through “freewheeling judicial policymaking.” *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 235, 240 (2022).

A right to conceal one’s transgender identity is not deeply rooted in this Nation’s history and tradition. Indeed, those who ratified the Fourteenth Amendment would have been baffled at the very “concept of ‘gender identity,’” which “did not enter the English lexicon until the 1960s.” *Gore*, 107 F.4th at 562; Alison Li, *Harry Benjamin and the Birth of Transgender Medicine*, Canadian Med. Ass’n J. (Dec. 11, 2023), <https://tinyurl.com/4bv2rw2m> (first clinical discussion of “transsexualism” appeared in 1966). That sex-separated bathrooms were commonplace when the Fourteenth Amendment was ratified also dispels the notion that the Amendment protects a right to keep private any information disclosed by entering a restroom designated for one’s sex. *Carter* at 277, *supra*; *Gore*, 107 F.4th at 562 (relying on history).

Third, even if Plaintiffs had an informational privacy right to keep their transgender identity secret and H.B. 752 compelled the disclosure of that information, the right to informational privacy is “not absolute.” *In re Cranford*, 194 F.3d 954, 959 (9th Cir. 1999). Rather, it protects only against “*unwarranted* disclosures and *undue* dissemination of personal information.” *Nelson*, 562 U.S. at 157 (cleaned up); *Katz v. United States*, 389 U.S. 347, 350 n.5 (1967) (“Virtually every governmental action interferes with personal privacy to some degree.”). Thus, it “is a conditional right which may be infringed upon a showing of proper governmental interest.” *Cranford*, 194 F.3d at 959 (cleaned up). The compelled

disclosure need not be “necessary or the least restrictive means of furthering [the State’s] interest”—a law cannot “be held unconstitutional simply because a court viewed it as unnecessary, in whole or in part.” *Nelson*, 562 U.S. at 153 (cleaned up).

Here, the same privacy and safety interests that justify H.B. 752 for equal protection purposes justify requiring any disclosure of information that may occur when someone enters a sex-separated restroom. *See* Section I.B.2, *supra*.

D. The remaining preliminary injunction factors weigh against an injunction.

“[A] court need not consider the other [preliminary injunction] factors if a movant fails to show a likelihood of success on the merits.” *Baird*, 81 F.4th at 1040 (cleaned up). But those factors also weigh against preliminary relief.

The only basis for irreparable harm the district court concluded that Plaintiffs had made a “clear showing” was “likely” to occur was that the Plaintiffs would be “depriv[ed] of constitutional rights.” 1-ER-19. For the reasons above, that is not the case, leaving the court’s order with no remaining basis for irreparable harm.

Moreover, the balance of equities and public interest weigh strongly against an injunction. Idaho enacted H.B. 752 to protect bodily privacy and safety in certain public places, and the State’s citizens are deprived of those benefits as long as the law is enjoined and they are “forced to change (or undertake other private duties) in the presence of someone of the opposite sex.” *Jones*, 803 F. Supp. 3d at 1095 n.21 (cleaned up); *see* 2-ER-107-09, ¶¶ 14-19. “Any time a State is enjoined by a court from

effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury.” *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers) (cleaned up).

The district court did “not question the inherent privacy interest implicated by restroom use nor Idaho’s interest in protecting the public from wrongdoers.” 1-ER-20. But it discounted the State’s interests because (1) Idaho’s existing criminal laws already prohibit assault, battery, indecent exposure, trespass, and similar conduct, and (2) only one of the safety incidents specifically identified in the legislative hearings “involved a transgender person,” and the incident occurred ten years ago. 1-ER-20-21. Neither reason is sound.

Starting with the first, H.B. 752 does not prohibit only conduct covered by existing statutes. That is why Plaintiffs—who claim they have been using bathrooms designated for the opposite sex for years, 2-ER-212-13, ¶ 2—immediately sued to enjoin the law, claiming they would be harmed if it took effect. *See also* 2-ER-92-93, ¶ 2a-e (explaining that H.B. 752 “treat[s] a gap” in existing law).

The district court seems to mean that because Idaho has criminal laws punishing specific safety violations, Idaho’s interests will not be significantly diminished by enjoining H.B. 752. But H.B. 752’s value is that it is a “proactive tool” ensuring that those who would do harm never come close to having the opportunity. 2-ER-96, ¶ 4a. Moreover, the district court’s reasoning does nothing to dampen the privacy interest

that H.B. 752 advances by ensuring that citizens are not required to perform private duties while members of the opposite sex are present at all.

As for the district court's second reason—which again is unrelated to the State's interest in preserving bodily privacy—the court was wrong to discount evidence within Idaho and from across the country of safety incidents occurring in restrooms because (according to Plaintiffs) “only one incident” in Idaho “involved a transgender person.” 1-ER-21. There is no magic number of crimes that must occur in Idaho before Idaho can enact laws that would prevent life-altering incidents. *Roe*, 137 F.4th at 925 (“harm need not have occurred before a legislature can act”). Plaintiffs also don't know the gender identity of every perpetrator in these incidents. *E.g.*, 2-ER-97-98, ¶ 4e. And H.B. 752 applies not only to those who identify as transgender, but to everyone, including those who may feign transgender identity to gain access to a restroom designated for the opposite sex. *See Predator Who Claimed to be Transgender Declared Dangerous Offender*, *Toronto Sun* (Feb. 26, 2014), <https://tinyurl.com/mr3sae68>.

* * *

The district court abused its discretion by granting a preliminary injunction. Its analysis of likelihood of success on the merits erred as a matter of law and cannot be saved by resort to Plaintiffs' other meritless claims. And its analysis of the other preliminary injunction factors largely rested on its merits analysis being correct and was otherwise flawed. This Court should vacate the preliminary injunction and reverse.

II. Plaintiffs Lack Standing to Bring This Action Against Most of the County Prosecutors.

Independent of the merits, Plaintiffs are not entitled to an injunction against all of Idaho's county prosecutors because they lack standing to sue most of those prosecutors. To establish standing, "a plaintiff must show (i) that he suffered an injury in fact that is concrete, particularized, and actual or imminent; (ii) that the injury was likely caused by the defendant; and (iii) that the injury would likely be redressed by judicial relief." *TransUnion LLC v. Ramirez*, 594 U.S. 413, 423 (2021). "[P]laintiffs must demonstrate standing for each claim that they press against each defendant, and for each form of relief that they seek." *Murthy v. Missouri*, 603 U.S. 43, 61 (2024) (cleaned up).

But Plaintiffs have not established a threat that H.B. 752 will be enforced against them by 41 of Idaho's 44 county prosecutors—who can only prosecute crimes in their respective jurisdictions, Idaho Code § 31-2604(1)—because Plaintiffs have provided no meaningful evidence that they will ever visit or use a restroom in those 41 prosecutors' counties. Plaintiffs have submitted declarations attesting that they live and use restrooms in Ada, Bannock, and Twin Falls counties, but make no reference to any other county. 2-ER-177-207. The threat of enforcement is therefore not caused by the other 41 county prosecutors and cannot be redressed by an injunction against those prosecutors. *Martinez v. Newsom*, 46 F.4th 965, 970 (9th Cir. 2022) ("To have standing to sue a particular defendant, a plaintiff must have experienced an injury in fact that is fairly traceable to the challenged action of that defendant.").

Indeed, the *only* connection Plaintiffs pled regarding any county other than the three in which they reside is that one Plaintiff, Daniel Doe, “travels for work or fun throughout Idaho.” 2-ER-232-33, ¶ 94; *compare with* 2-ER-184, ¶ 9 (declaration stating only that Doe “travel[s] for work or fun”). This vague allegation comes nowhere near the “clear showing” of standing to sue every single prosecutor in Idaho that is required at the preliminary injunction stage. *Murthy*, 603 U.S. at 58. There is no allegation that Doe intends to travel to and use a restroom in *every single county in Idaho*, from the Idaho panhandle through the Frank Church Wilderness. *G.B. v. EPA*, 172 F.4th 1042, 1058 (9th Cir. 2026) (“causal chain cannot rest on speculative links”) (cleaned up).

The fact that Plaintiffs have sued on behalf of a putative class does not affect the analysis, as the district court incorrectly believed. 1-ER-9-10. As this Court explained when several plaintiffs attempted to sue “hundreds of school districts [across California] in which they [were] not enrolled,” the fact “[t]hat a suit may be a class action adds nothing to the question of standing, for even named plaintiffs who represent a class must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent.” *Martinez*, 46 F.4th at 970 (cleaned up) (“named plaintiffs generally lack standing to sue defendants that have not injured them personally, even if they allege that those defendants injured absent class members”).

Nor was the district court citation to *Matsumoto v. Labrador*, 122 F.4th 787 (9th Cir. 2024), helpful. There, the Court held that the plaintiffs had standing to sue the Attorney

General because he had secondary enforcement authority to enforce the challenged statute against the plaintiffs himself, so an injunction against the Attorney General would provide at least “partial amelioration” of their injury. *Id.* at 801. Here, an injunction against the Boundary County prosecutor, for example, provides *no* relief to the Plaintiffs because their alleged injury has no connection to Boundary County, which is hundreds of miles away from the counties where Plaintiffs live and work.

III. The District Court’s Class Certification Ruling Rested on Legal Error and Should be Reversed.

Finally, the district court abused its discretion in certifying a class because the class is not sufficiently definite and fails Rule 23(a)(2)’s commonality requirement. The district court reached a contrary conclusion only by applying the wrong legal standard. *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 980, 987 (9th Cir. 2011).

For starters, the certified class is not “sufficiently definite to conform to Rule 23.” *Probe v. State Tchrs.’ Ret. Sys.*, 780 F.2d 776, 780 (9th Cir. 1986). A class definition must identify a “distinct group of plaintiffs whose members [can] be identified with particularity.” *Lerwill v. Inflight Motion Pictures, Inc.*, 582 F.2d 507, 512 (9th Cir. 1978). But this class has no objective boundary. Unlike classes certified to include those who have a gender dysphoria diagnosis or have received certain treatments, *e.g.*, *Pritchard ex rel. C.P. v. Blue Cross Blue Shield of Ill.*, 159 F.4th 646, 655 (9th Cir. 2025), the class here consists of “all transgender people who seek to use a [covered] restroom ... consistent with their gender identity.” Membership in the class is therefore unknowable and

unverifiable—whether a person is included in the class and will have their claims finally adjudicated in this case turns on an “internal sense of oneself as belonging to a particular gender,” 2-ER-218-19, ¶¶ 39, 41, which may change, 2-ER-105, ¶ 9, and is “not typically known or immediately knowable” to others. 2-ER-246-47, ¶ 164. And because the class includes only those who “seek to use” a covered restroom in Idaho consistent with their gender identity, a person may enter or leave the class based solely on gender identity, temporary presence in Idaho, or intent. *Mullins v. Direct Digit, LLC*, 795 F.3d 654, 659-60 (7th Cir. 2015) (“classes that are defined by subjective criteria, such as by a person’s state of mind, fail the objectivity requirement”).

The certified class also lacks commonality, which requires “questions of law or fact common to the class.” Fed. R. Civ. P. 23(a)(2). Plaintiffs must “demonstrate that the class members have suffered the same injury.” *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011) (cleaned up). “Their claims must depend upon a common contention,” not “merely that they have all suffered a violation of the same provision of law.” *Id.* The common contention on which Plaintiffs’ claims rest “must be of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.” *Id.*

Here, it is impossible to resolve Plaintiffs’ claims in one stroke because their arguments depend on “evidence that varies from member to member.” *Olean Wholesale*, 31 F.4th at 663 (cleaned up). The putative class of “all transgender people who seek to

use a restroom [covered by H.B. 752] in Idaho consistent with their gender identity” is incredibly diverse. 1-ER-30. Some “have a physical appearance consistent with their gender identity,” but others don’t, 2-ER-167; 2-ER-219, ¶ 42, or have a non-binary gender identity with no typical “physical appearance” or one that doesn’t align with either sex. *See* Shaziya Allarakha, *What are the 72 Other Genders?*, MedicineNet (medically reviewed Feb. 9, 2024), perma.cc/W9WH-R26F. Some have fully medically transitioned, some have socially transitioned, some have not transitioned at all, and some will have their gender dysphoria desist or will detransition. *See Skermetti*, 605 U.S. at 501-06.⁸ Some are open about their transgender identity, while others are not. 2-ER-246-47, ¶ 164. Some may have gender dysphoria exacerbated by using a restroom designated for their sex (according to Plaintiffs), but others inarguably will not (like those whose gender dysphoria would otherwise desist). 2-ER-106-07, ¶ 12. Some are minors, and some are adults.

Yet Plaintiffs’ claims depend on the proposed class members being monolithic.

Consider their claims:

- ***Vagueness*** - Plaintiffs argue that H.B. 752 will enable arbitrary enforcement because law enforcement officers will not be able to “readily identify visually” Plaintiffs’ sex. 2-ER-44 (cleaned up). They contend that *some* transgender-identifying individuals “look[] indistinguishable” from members of the opposite sex, and *some* may have amended their identification documents, so

⁸ *See also* Wylie C. Hembree et al., *Endocrine Treatment of Gender-Dysphoric/Gender-Incongruent Persons: An Endocrine Society Clinical Practice Guideline*, 102 J. Clinical Endocrinology & Metabolism 3869, 3879 (2017) (gender dysphoria desists in about 85% of prepubertal children who experience it).

officers must make “subjective judgments about a person’s appearance.” 2-ER-220-21, ¶¶ 48-49.

- ***Equal protection*** - Plaintiffs argue that because their “outward expression” resembles members of the opposite sex, 2-ER-220-21, ¶¶ 47-48, using a restroom designated for their own sex would “make them and others uncomfortable” and “incite harassment or assault” (thereby undermining the State’s interests in bodily privacy and safety). 2-ER-165-168.
- ***Informational privacy*** - Plaintiffs argue that onlookers observing their restroom use will discern their transgender identity—at least for those whose transgender identity is not already known, 2-ER-246-47, ¶ 164—because the restroom will be designated for a sex that diverges from their “expressed gender identity.” 2-ER-52.

All these claims depend on facts set forth above, which vary among those who identify as transgender.

The district court acknowledged that precedent required Plaintiffs to demonstrate that the proposed class members have “suffered the same injury”—but then decided that “Plaintiffs need not show that every class member ... suffered the same injury.” 1-ER-24-25. Instead, the court stated that commonality was satisfied if there is “a single policy or practice which the proposed class members are all subject to” that “expose[s] them to a substantial risk of harm.” 1-ER-24 (quoting *Parsons v. Ryan*, 754 F.3d 657, 678 (9th Cir. 2014)).

That is the wrong legal standard. The Supreme Court has held that commonality is *not* satisfied merely because “all suffered a violation of the same provision of law.” *Wal-Mart*, 564 U.S. at 350. In the case the district court cited, a common showing of “substantial risk of harm” established commonality only because that was an element

of the Eighth Amendment claim being raised. *Parsons*, 754 F.3d at 676-78; *Roman v. Wolf*, 977 F.3d 935, 944 (9th Cir. 2020) (per curiam) (applying standard “[i]n the context of an Eighth Amendment challenge”). “The same is not true of” Plaintiffs’ claims. *B.K. ex rel. Tinsley v. Snyder*, 922 F.3d 957, 975-77 (9th Cir. 2019) (reversing a district court for making the same mistake). Applying the *Parsons* standard here was an abuse of discretion.

The district court ended with two sentences addressing whether Plaintiffs’ claims rested on common contentions, but it simply identified the relevant standard and summarily concluded it was satisfied with respect to Plaintiffs’ vagueness claim. 1-ER-25. It also did not discuss whether Plaintiffs shared common contentions with respect to the equal protection or informational privacy claims but certified a class as to those claims anyway. *But see Wal-Mart*, 564 U.S. at 350 (question is whether common issue “will resolve an issue that is central to the validity of each one of the claims in one stroke”); *Black Lives Matter L.A. v. City of Los Angeles*, 113 F.4th 1249, 1265 (9th Cir. 2024) (commonality for one claim did not establish commonality for other claims). “[B]ecause the district court did not make factual findings or exercise its discretion based on [a proper] understanding of commonality,” its decision must be reversed. *Tinsley*, 922 F.3d at 976.

CONCLUSION

The Court should reverse the district court’s preliminary injunction and class certification orders.

Dated: August 28, 2026

Respectfully submitted,
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CERTIFICATE OF COMPLIANCE

I certify that this brief contains 13,862 words, excluding the items exempted by FRAP 32(f). The brief's type size and typeface comply with FRAP 32(a)(5) and (6). I certify that this brief complies with the word limit of Cir. R. 32-1.

/s/ Michael A. Zarian
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CERTIFICATE OF SERVICE

I certify that on August, 28, 2026, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the ACMS system, which will accomplish service on counsel for all parties through the Court's electronic filing system.

/s/ Michael A. Zarian
Michael A. Zarian

No. 26-4551
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EMILIE JACKSON-EDNEY, *et al.*,
Plaintiffs-Appellees,

v.

RAÚL LABRADOR, in his official capacity as
Attorney General of the State of Idaho, *et al.*,
Defendants-Appellants.

On Appeal from the United States District Court
for the District of Idaho
Case No. 1:26-CV-261-AKB

ADDENDUM TO APPELLANTS' OPENING BRIEF

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ADDENDUM TABLE OF CONTENTS

Idaho Code § 18-4117A.3

Idaho Code § 18-4117**ENTERING A RESTROOM OR CHANGING ROOM OF THE OPPOSITE SEX.**

(1) Any person who knowingly and willfully enters a restroom or changing room in a government-owned building or a place of public accommodation, as defined in section 67-5902, Idaho Code, that is designated for use by the opposite biological sex of such person shall be guilty of a misdemeanor and may be imprisoned in the county jail for a period not to exceed one (1) year. Any person who pleads guilty to or is found guilty of a violation of this section, a similar statute in another state, or any similar local ordinance for a second time within five (5) years of the first conviction, notwithstanding the form of judgment or withheld judgment, shall be guilty of a felony and may be imprisoned in the state prison for a period not to exceed five (5) years.

(2) The provisions of subsection (1) of this section shall not apply to an individual who enters a restroom or changing room designated for the opposite sex in any of the following circumstances:

- (a) To perform custodial services or maintenance;
- (b) To render medical assistance;
- (c) To provide law enforcement assistance or to supervise any arrestee, detainee, or inmate in a custodial setting;
- (d) To provide services or render aid during a natural disaster, during a declared emergency, or when necessary to prevent a serious threat to good order or safety;
- (e) To use a single-user facility designated for the opposite sex, if such single-user facility is the only facility reasonably available at the time of the person's use of the facility;
- (f) To use restroom facilities when the person is in dire need of urinating or defecating and such facility is the only facility reasonably available at the time of the person's use;
- (g) To use restrooms, changing rooms, and sleeping quarters that have been temporarily designated for use by people of that person's biological sex;
- (h) To provide coaching or athletic training during athletic events;

(i) To accompany and render assistance to a person who is in need of assistance when the person rendering assistance is:

(i) A family member or a legal guardian; or

(ii) The designee of the person in need of assistance and the designee is not a member of the designated sex for the single-sex restroom, changing facility, or sleeping quarters; or

(j) To a minor child who is in need of assistance and, for the purpose of receiving that assistance, is accompanied by a family member, a legal guardian, or the individual's designee who is a member of the designated sex for the single-sex restroom or changing facility.

(3) As used in this section, “changing room” means a facility in which a person may be in a state of undress in the presence of others, including a locker room, changing room, or shower room.