

Emily Croston (ISB No. 12389)
ecroston@acluidaho.org
Paul Southwick (ISB No. 12439)
psouthwick@acluidaho.org
ACLU OF IDAHO FOUNDATION
P.O. Box 1897
Boise, ID 83701
(208) 344-9750

Barbara Schwabauer*
bschwabauer@aclu.org
Eleanor Matheson*
ematheson@aclu.org
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION
915 15th Street N.W.
Washington, DC 20005

Chase Strangio*
cstrangio@aclu.org
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION
125 Broad Street, 18th Floor
New York, NY 10004
(212) 549-2500

Samuel L. Linnet (ISB No. 9788)
sam@alturaslawgroup.com
ALTURAS LAW GROUP, PLLC
111 N 1st Avenue, Suite 2I, PO Box 2975
Hailey, ID 83333
(208) 788-6688

Peter C. Renn*
prenn@lambdalegal.org
Kell L. Olson*[†]
kolson@lambdalegal.org
Tara L. Borelli*[†]
tborelli@lambdalegal.org
Pelecanos*[†]
pelecanos@lambdalegal.org
A.D. Sean Lewis*
alewis@lambdalegal.org
Charlie Ferguson*[†]
cferguson@lambdalegal.org
LAMBDA LEGAL DEFENSE AND
EDUCATION FUND, INC.
800 South Figueroa St., Suite 1260
Los Angeles, CA 90017
[†]*mailing address only*
(213) 382-7600 (T) | (855) 535-2236 (F)

*Admitted *pro hac vice*
Attorneys for Plaintiffs (additional counsel identified on the following page)

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO**

EMILIE JACKSON-EDNEY, *et al.*,

Plaintiffs,

v.

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

Defendants.

Case No. 1:26-cv-00261-AKB

**REPLY TO ATTORNEY GENERAL
[DKT. 40] IN SUPPORT OF
PLAINTIFFS' MOTION FOR
PRELIMINARY INJUNCTION AND
PROVISIONAL CLASS
CERTIFICATION [DKT. 3]**

Katherine M. Forster*
katherine.forster@mto.com
Kyle A. Groves*
kyle.groves@mto.com
Jannet Gomez*
jannet.gomez@mto.com
MUNGER TOLLES & OLSON LLP
350 South Grand Ave., 50th Fl.
Los Angeles, CA 90071-3426
(213) 683-9100 (T) | (213) 687-3702 (F)

J. Max Rosen*
max.rosen@mto.com
Qian Zhe (Danny) Zhang*
danny.zhang@mto.com
MUNGER TOLLES & OLSON LLP
560 Mission Street, 27th Fl.
San Francisco, CA 94105-2907
(415) 512-4000 (T) | (415) 512-4077 (F)

*Admitted *pro hac vice*
Attorneys for Plaintiffs

TABLE OF CONTENTS

ARGUMENT 1

I. Plaintiffs Are Likely to Succeed on Their Void-for-Vagueness Claim. 1

 A. H.B. 752’s “Reasonably Available” and “Dire Need” Exceptions Are Impermissibly Vague. 1

 B. H.B. 752’s Central Prohibition Is Also Impermissibly Vague. 5

II. Plaintiffs Are Likely to Succeed on Their Equal Protection Claim. 6

 A. Plaintiffs’ Relief Is Consistent With the Full Equal Protection Claim Pled. 6

 B. H.B. 752 Triggers Heightened Scrutiny. 8

 C. H.B. 752 Likely Fails Heightened Equal Protection Scrutiny. 10

 D. H.B. 752 Lacks Rational Basis Because It Was Motivated by Animus. 13

III. Plaintiffs Are Likely to Succeed on Their Informational Privacy Claim. 13

IV. The Remaining Factors Favor a Preliminary Injunction. 15

CONCLUSION..... 15

TABLE OF AUTHORITIES

	Page(s)
FEDERAL CASES	
<i>Byrd v. Maricopa County Sheriff's Department</i> , 629 F.3d 1135 (9th Cir. 2011)	10
<i>City of Cleburne, Texas v. Cleburne Living Center</i> , 473 U.S. 432 (1985).....	13
<i>In re Crawford</i> , 194 F.3d 954 (9th Cir. 1999)	14, 15
<i>Doe v. Bonta</i> , 101 F.4th 633 (9th Cir. 2024)	14
<i>Doe v. Horne</i> , 115 F.4th 1083 (9th Cir. 2024)	13
<i>Familias Unidas por la Justicia, AFL-CIO v. U.S. Department of Labor</i> , 795 F. Supp. 3d 1325 (W.D. Wash. 2025).....	7
<i>F.V. v. Barron</i> , 286 F. Supp. 3d 1131 (D. Idaho 2018)	14
<i>Forbes v. Napolitano</i> , 236 F.3d 1009 (9th Cir. 2000)	6
<i>J.E.B. v. Alabama ex rel. T.B.</i> , 511 U.S. 127 (1994)	9
<i>Jones v. Critchfield</i> , 803 F. Supp. 1078 (D. Idaho 2025)	9, 11
<i>Kallstrom v. City of Columbus</i> , 136 F.3d 1055 (6th Cir. 1998)	14
<i>Kolender v. Lawson</i> , 461 U.S. 352 (1983).....	1, 3, 4, 6
<i>Latta v. Otter</i> , 771 F.3d 456 (9th Cir. 2014)	9, 10
<i>Moody v. NetChoice, LLC</i> , 603 U.S. 707 (2024).....	7

<i>NetChoice, LLC v. Bonta</i> , 170 F.4th 744 (9th Cir. 2026)	7, 8
<i>Parents for Privacy v. Barr</i> , 949 F.3d 1210 (9th Cir. 2020)	11
<i>Planned Parenthood of Idaho, Inc. v. Wasden</i> , 376 F.3d 908 (9th Cir. 2004)	4
<i>Roe v. Critchfield</i> , 137 F.4th 912 (9th Cir. 2025)	8, 10, 15
<i>Romer v. Evans</i> , 517 U.S. 620 (1996)	13
<i>Sexuality & Gender Alliance v. Critchfield</i> (“SAGA”), No. 1:23-CV-00315-DCN, 2025 WL 2325628 (D. Idaho Aug. 12, 2025)	8, 9, 11, 12
<i>Simon v. City & County of San Francisco</i> , 135 F.4th 784 (9th Cir. 2025)	7
<i>United States v. Kuzma</i> , 967 F.3d 959 (9th Cir. 2020)	5
<i>United States v. Skrmetti</i> , 605 U.S. 495 (2025)	8, 9
<i>Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.</i> , 455 U.S. 489 (1982)	5
<i>Whitaker v. Kenosha Unified School District No. 1 Board of Education</i> , 858 F.3d 1034 (7th Cir. 2017)	10
STATE CASES	
<i>Boundary Backpackers v. Boundary County</i> , 128 Idaho 371 (1996)	4
<i>Day v. Armstrong</i> , 362 P.2d 137 (Wyo. 1961)	5
<i>Doe v. Burk</i> , 513 P.2d 643 (Wyo. 1973)	5
<i>State v. Cudahy Packing Co.</i> , 82 P. 833 (Mont. 1905)	5
<i>Wheeler v. State</i> , 281 Md. 593 (1977)	5

STATE STATUTES

Idaho Code Annotated

§ 18-41171, 5

§ 18-660511

§ 33-66025

CONSTITUTIONAL PROVISIONS

U.S. Constitution Amendment I.....7

U.S. Constitution Amendment XIV14

OTHER AUTHORITIES

Black’s Law Dictionary (12th ed. 2024).....6

Peter C. Baldwin, *Public Privacy: Restrooms in American Cities, 1869–1932*,
48 J. of Soc. Hist. 264 (2014)10

Transgender woman arrested for voyeurism at Target, *East Idaho News* (July 12,
2016), <https://perma.cc/SX4Q-7MX6>.....12

Plaintiffs have demonstrated that they are entitled to a preliminary injunction that narrowly prohibits Defendants from enforcing H.B. 752 against members of a provisionally certified class in single-user restrooms and in multi-user restrooms when no other restroom is reasonably available. Allowing H.B. 752’s criminal prohibition to apply in those circumstances would egregiously and irreparably harm Plaintiffs. Defendants’ contrary arguments fail.

ARGUMENT

I. Plaintiffs Are Likely to Succeed on Their Void-for-Vagueness Claim.

Defendants have not shown that H.B. 752 “define[s] the [relevant] criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.” *Kolender v. Lawson*, 461 U.S. 352, 357 (1983).

A. H.B. 752’s “Reasonably Available” and “Dire Need” Exceptions Are Impermissibly Vague.

“Reasonably Available.” Defendants’ attempt to clarify what it means for a facility to be “the only facility reasonably available at the time” fails. §§ 18-4117(2)(e)-(f).¹ As an initial matter, Defendants make a straw man argument that a “reasonableness” standard is clear enough to avoid rendering a statute unconstitutionally vague. Dkt. 40 (“PI Opp.”) at 8. But Plaintiffs do not argue that a “reasonableness” standard can never be sufficiently clear to impose criminal penalties, but rather that “reasonable” is not sufficiently clear *in the context of this statute*.

Defendants do not clarify H.B. 752’s scope—if anything, they exacerbate the ambiguity. They assert that every ordinary person would understand “availabl[e] at the time of the person’s use” as limiting the exception to “temporary conditions that make a restroom inaccessible, not

¹ All statutory code citations are to the Idaho Code Annotated, unless otherwise noted.

abiding personal unwillingness.” PI Opp. at 9. Saying it does not make it so. Take a simple hypothetical: what if, in a covered facility, there is *only* a men’s restroom—i.e. the absence of a women’s restroom is permanent. Surely, the men’s restroom is the only one “reasonably available”—so the statute clearly is not unambiguously limited to “temporary” conditions.

Nor does anything in the text make clear to an ordinary person that *whether* a restroom is “reasonably available” cannot turn on the characteristics of the person present in the covered facility. What if a woman who uses a wheelchair needs a restroom in a covered entity where the men’s restroom is accessible (e.g., on the ground floor) but the women’s restroom is not accessible (e.g., on the second floor). Surely that individual could—under H.B. 752’s exception—use the men’s restroom, as it would be the only one “reasonably available” to *that individual*. Surely, Defendants would not ignore individual circumstances like these.

At bottom, Defendants’ attempts to exclude consideration of individual circumstances is driven by the desire to ignore transgender people’s individual circumstances. They want it to seem obvious that no ordinary person could find it “reasonable” for a transgender person to be unable to use a multi-user restroom not aligned with their gender identity because of the threatened harms of doing so, including harassment and assault. Dkt. 46-2 (“Calkins Decl.”) ¶ 37. But that is Defendants’ subjective value judgment, and it does nothing to render H.B. 752 sufficiently clear to all Idahoans. Ample evidence suggests that ordinary people do view a multi-user restroom in those circumstances as reasonably unavailable to a transgender person. For example, multiple federal courts have expressly found it *unconstitutional* to require transgender people to use restrooms that do not align with their gender identity—in part because of the profound harms that such forced usage causes. Dkt. 3-1 (“PI Mot.”) 10 (collecting cases).

Defendants’ own previous, civil restroom laws confirm that ordinary people would view

the law’s reasonableness standard as excusing a transgender person’s use of an opposite-sex restroom. Defendants attempt to distinguish those statutes on the basis that they addressed “reasonable *accommodation[s]*.” PI Opp. at 9 (emphasis added). That makes no difference: all three statutes ban transgender people from using multi-occupancy restrooms consistent with their gender identity, and all three statutes use the term “reasonable” to refer to restroom usage by those “unable or unwilling” to use the multi-occupancy restrooms the statutes prescribe for them. PI Mot. at 10 (citing statutes). At a minimum, by explicitly narrowing the scope of “reasonable accommodations” in the two civil laws, the Legislature repudiated an understanding of reasonableness with which it disagreed. Idaho has no persuasive reason why clarifying those parameters was necessary in a *civil law*, but its absence in a *criminal one* is irrelevant to a vagueness challenge. *See Kolender*, 461 U.S. at 357.

“Dire Need.” Defendants interpret the “ordinary meaning” of “dire need” to mean “whether the need to urinate or defecate can wait until a restroom is available.”² PI Opp. at 9. But that atextual definition does not supply an intelligible, objective standard either. Whether a person’s “need” to urinate or defecate is “dire” is inherently subjective and contains no fixed, qualifiable meaning. An ordinary person approaching the restroom cannot know whether their need—however pressing it may feel to them—rises to the level of “dire” in the eyes of law enforcement, nor when a restroom will become “available.”

Perhaps unsurprisingly, Defendants ignore Sergeant Bryan Lovell’s statement representing the Idaho Fraternal Order of Police (IFPA) (“IFPA Rep. Sgt. Lovell”), highlighting the “dire need” exception’s lack of enforceable standards. He explained that “[i]t is unclear how

² Defendants’ comparison of a transgender person risking imprisonment when deciding to use a restroom to a child being asked “can you hold it?” by a parent on a road trip is absurd and insulting.

an officer responding to a call would reasonably determine whether someone was truly in ‘dire need’” for purposes of the exception, thus “creating an unenforceable standard that places officers in a difficult position.” Dkt. 3-3 (“Groves Decl.”), Ex. 4. IFPA Rep. Sgt. Lovell’s concern is precisely what the vagueness doctrine aims to prevent—criminal statutes that “vest[] virtually complete discretion in the hands of the police” and allow them to “pursue their personal predilections.” *Kolender*, 461 U.S. at 357-58.

Remedy. Finally, Defendants argue that if the exceptions are vague, then this Court should strike only the exceptions—leaving the law’s central prohibition enforceable. As noted below, that prohibition too is impermissibly vague. But even if it wasn’t, Defendants are wrong.

Under Idaho law, “[i]f an unconstitutional portion of a statute or ordinance is integral or indispensable, it is not severable, and the entire measure must fall.” *Boundary Backpackers v. Boundary Cnty.*, 128 Idaho 371, 378 (1996); *see also Planned Parenthood of Idaho, Inc. v. Wasden*, 376 F.3d 908, 935-36 (9th Cir. 2004) (adopting this approach for a federal constitutional challenge). The exceptions at issue are key to defining the scope of conduct being criminalized here. To eliminate them and leave the ban in place plainly ignores the intent of the Idaho Legislature—and would allow, and indeed require, prosecutors to impose criminal consequences where the Legislature did not intend them to exist. The Idaho Legislature (subject to constitutional limits) is free to write a clearer statute, but this Court should not sever critical exceptions that protect against criminal consequences for acts that the Legislature did not label unlawful in the first place. *Cf. id.* at 937 (holding that state’s attempt to remove certain language from a statute would “defeat the obvious purpose of the relevant provisions by removing

indispensable qualifications the Idaho Legislature intended to put[.]”)³ Idaho cites no case to the contrary: each of the three cases it cites involved a civil, not criminal law. *See* PI Opp. at 7.

B. H.B. 752’s Central Prohibition Is Also Impermissibly Vague.

Defendants’ explanation of why H.B. 752’s core prohibition is not impermissibly vague is also unpersuasive. As a starting point, H.B. 752 never defines the term “biological sex” or the broader phrase “designated for use by the opposite biological sex.” § 18-4117(1); *compare* § 33-6602(3) (S.B. 1100’s definition of the term “sex”). Significantly, the law does not require that covered entities designate restroom signs by “biological sex”; nor does it require covered entities with restroom signs designated by gender identity to take any action. Defendants nevertheless argue that dictionary definitions and social context show that the words “men” and “women” on restroom signs must *always* mean that those restrooms are designated for that particular “*biological sex*” only. To the contrary, for years and in many Idaho establishments, such signs were present and did not exclude Plaintiffs from using restrooms aligned with their gender.

Defendants fare no better with the word “designate.” Use of the word “design” is not the same as “designate,” PI Opp. at 6, and, in any event, the caselaw Defendants cite addressed the term “design” in contexts that have no application here. *See Vill. of Hoffman Ests. v. Flipside, Hoffman Ests., Inc.*, 455 U.S. 489, 500-01 (1982) (whether item is designed for illegal drug use); *United States v. Kuzma*, 967 F.3d 959, 969 (9th Cir. 2020) (whether weapon is designed to shoot). The definition of “designate” includes nothing that suggests it is necessarily and exclusively objective, especially where, as here, a sign’s content may mean multiple things. *See*

³ With penal statutes, courts applying the same rule as in Idaho are generally disinclined to sever an unconstitutional provision and consistently hold that as goes one, so goes the whole. *See, e.g., Doe v. Burk*, 513 P.2d 643, 645 (Wyo. 1973); *Day v. Armstrong*, 362 P.2d 137, 149 (Wyo. 1961); *State v. Cudahy Packing Co.*, 82 P. 833, 837 (Mont. 1905); *Wheeler v. State*, 281 Md. 593, 608 (1977).

“Designate,” Black’s Law Dictionary (12th ed. 2024) (“To choose (someone or something) for a particular job or purpose.”).

Even if the law’s central prohibition did provide “ordinary people” with “fair notice” of what conduct is criminalized, Pl. Opp. at 4, the potential for “arbitrary and discriminatory enforcement” is independently fatal. *Kolender*, 461 U.S. at 357. H.B. 752 does not provide enforceable standards that officers can use to assess a person’s “biological sex.” And regardless, the law would still be impossible to enforce. As IFPA Rep. Sgt. Lovell stated, it is “very, very difficult” for officers in the field “to determine someone’s gender right there and make a lawful arrest” and “[i]t’s not reasonable” to “make people undress and check for those things.” Groves Decl., ¶ 19(b). The Idaho Chiefs of Police Association representative Anthony Dahlinger (“ICPA Rep. Dahlinger”) also testified that the law “[w]ould place an unrealistic and absurd burden on Idaho law enforcement officers to somehow know, or be able to readily identify visually [the] biological sex of another human being.” *Id.* ¶ 19(a).⁴ The Legislature ignored law enforcement’s calls for “clearer guidance to responding deputies regarding what specific conduct constitutes a violation,” *see* Groves Decl., Ex. 5, and Defendants offer no answer to these concerns.⁵

II. Plaintiffs Are Likely to Succeed on Their Equal Protection Claim.

A. Plaintiffs’ Relief Is Consistent With the Full Equal Protection Claim Pled.

⁴ ICPA Rep. Dahlinger explained that using “documentation and questioning” is unrealistic because “[i]ndividuals in the state of Idaho are allowed... under the law [to] change their, what their driver’s license or other documents say is what their biological sex is, or what their sex is on paper.” Groves Decl., ¶ 19(a).

⁵ Defendants’ throwaway argument that H.B. 752’s scienter requirement cures these vagueness defects is incorrect. *See Forbes v. Napolitano*, 236 F.3d 1009, 1013 (9th Cir. 2000), *amended*, 247 F.3d 903 (9th Cir. 2000), and *amended*, 260 F.3d 1159 (9th Cir. 2001) (holding that a statute’s scienter requirement did not clarify an otherwise vague term because a doctor may “knowingly” engage in conduct that the doctor believed was permissible under the law “but which the state considers to be impermissible”).

Although Defendants concede that Plaintiffs may seek preliminary relief narrower than the relief ultimately sought, PI Opp. at 11, they nevertheless argue that Plaintiffs have failed to address the equal protection claim pled. They are wrong. Relying on mostly First Amendment cases, Defendants argue that “Plaintiffs cannot prevail on the facial claim they brought by showing that H.B. 752 is unconstitutional in two isolated circumstances.” *Id.* at 10. But Plaintiffs have argued that under binding *equal protection* precedent, Defendants are unlikely to show that H.B. 752 substantially advances an important governmental interest as applied to restrooms. This Court should not accept Defendants’ attempt to short-circuit its review.

Defendants wrongly insist that Plaintiffs brought a *facial* challenge to H.B. 752. Plaintiffs’ complaint alleges an “as-applied” challenge on behalf of a putative class, Compl. ¶¶ 152, 169, 170, with specific reference to seeking narrower preliminary relief. *Id.* ¶ 170 n. 41. Just as the Ninth Circuit contemplated in *NetChoice, LLC v. Bonta*, 170 F.4th 744 (9th Cir. 2026), Plaintiffs’ “prime concern” is H.B. 752’s effect on the putative class members’ restroom use and so have brought an “as-applied” challenge to that portion of the law. *Id.* at 759-60. Plaintiffs’ request for narrower preliminary relief focuses on the contexts involving the most acute harms. *Moody v. NetChoice, LLC*, 603 U.S. 707 (2024) offers no guidance to an as-applied case.⁶ There, the Court vacated and remanded lower court injunctions with directions to ensure “the facial analysis proceeds on the right path in the courts below” as opposed to the prior analysis, which was too limited to a narrow set of contexts by the law. *Id.* at 726.

⁶ *Moody* as well as *NetChoice, LLC v. Bonta* involved the unique context of First Amendment facial challenges and are not instructive more broadly to an as-applied equal protection claim. Defendants’ other cases are similarly inapposite. See *Familias Unidas por la Justicia, AFL-CIO v. U.S. Dep’t of Lab.*, 795 F. Supp.3d 1325 (W.D. Wash. 2025) (involving attempt to sneak a motion to enforce a preliminary injunction into an APA claim); *Simon v. City & Cnty. of San Francisco*, 135 F.4th 784 (9th Cir. 2025) (involving facial separation-of-powers challenge).

Even if Defendants are correct that Plaintiffs must show a likelihood of success as to the “full range” of applications (they are not), Plaintiffs have done just that. PI Opp. at 11 (citing *NetChoice, LLC v. Bonta*, 170 F.4th at 759-60).⁷ Plaintiffs’ opening brief argues that H.B. 752 does not substantially advance the government’s asserted interests in safety or privacy. *See, e.g.*, PI Mot. at 15 (caselaw rejecting safety interest applicable to H.B. 752 as a whole); *id.* at 16 (safety risk to transgender people applicable to H.B. 752 as a whole); *id.* at 17-18 (undermining privacy interest because of how Plaintiffs express themselves); *id.* at 18-19 (law motivated by animus). To be sure, Plaintiffs strongly *emphasize* why emergency relief is appropriate in the two narrow circumstances for which they seek a preliminary injunction. But the fact that Plaintiffs have shown the law is particularly harmful in these circumstances does not mean that Plaintiffs must also plead that subset of applications as a separate *claim* in their Complaint.

B. H.B. 752 Triggers Heightened Scrutiny.

Binding precedent has established that a restroom restriction like H.B. 752 triggers heightened scrutiny because it “discriminates...on the basis of sex.” *Roe v. Critchfield*, 137 F.4th 912, 923 (9th Cir. 2025). *Roe* controls here, even if Defendants disagree with it. That defendants there *agreed* that such laws trigger heightened scrutiny based on sex does not make the issue “not litigated,” PI Opp. at 13, or the court’s holding any less binding. *Roe* also held that restroom restrictions like H.B. 752 trigger heightened scrutiny for the additional reason that they discriminate “on the basis of transgender status.” *Roe*, 137 F.4th at 923.

Roe is not “clearly irreconcilable” with *United States v. Skrametti*, 605 U.S. 495 (2025). PI

⁷ Defendants also cite *Roe*, 137 F.4th at 924–25 & n.9. *Roe* never held that there was a purported mismatch between the Complaint and injunctive relief sought. *Roe* simply treated the injunction request as purely facial. After the Ninth Circuit issued its opinion, plaintiffs sought an as-applied injunction below without amending their Complaint. *See Sexuality & Gender All. v. Critchfield* (“SAGA”), No. 1:23-CV-00315-DCN, 2025 WL 2325628, at *2 (D. Idaho Aug. 12, 2025).

Opp. at 13; *see Jones v. Critchfield*, 803 F. Supp. 3d 1078, 1090 (D. Idaho 2025); *SAGA*, 2025 WL 2256884, at *5–6. *Skrmetti* involved an equal protection challenge to a state law regulating medical treatment. The Court explained that “mere reference[s] to sex” do not trigger heightened scrutiny “especially ... in the *medical* context,” because certain diagnoses and treatments are “uniquely bound up in sex.” *Skrmetti*, 605 U.S. at 512 (emphasis added). H.B. 752 does not differentiate based on medical condition and does not “merely reference[] sex.” Its criminal prohibition hinges *directly on* a person’s sex. Under H.B. 752, a person’s culpability for entering a particular restroom is determined by that *individual’s* “biological” sex. If two individuals who identify and live as men named Michael go into a men’s bathroom, the Michael with a “biological sex” of female is subject to criminal penalties, but the Michael with a “biological sex” of male is not. That type of disparate treatment based on sex triggers heightened scrutiny.

Defendants maintain that H.B. 752 is not discriminatory because it equally bars both men and women (as well as transgender and cisgender people) from using “opposite-sex” restrooms. *See* PI Opp. at 12. But the Equal Protection Clause is concerned with “the rights of *individuals*, not groups.” *Latta v. Otter*, 771 F.3d 456, 483 (9th Cir. 2014) (Berzon, J., concurring) (quoting *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 152 (1994) (Kennedy, J., concurring)) (emphasis added); *see J.E.B.*, 511 U.S. at 141–42 n.13 (sex-based peremptory strikes are discriminatory even “if each side uses its peremptory challenges in an equally discriminatory fashion”).

Defendants attempt to revive an argument that has long been relegated to the dustbin of history: that the state can shield discriminatory laws from constitutional review so long as they describe it in “neutral” ways, e.g., that anti-miscegenation laws applied equally because all racial groups were identically restricted from interracial marriage. *See Latta*, 771 F.3d at 482–483 (Berzon, J., concurring) (listing cases rejecting an equal application argument).

C. H.B. 752 Likely Fails Heightened Equal Protection Scrutiny.

History. As an initial matter, Plaintiffs do not challenge the constitutionality of sex-separated restrooms generally; their claim addresses only H.B. 752’s criminalization of transgender people’s use of restrooms that align with their gender identity. Still, Defendants assert that a “long and consistent historical practice...should be dispositive of [H.B. 752’s] constitutionality.” PI Opp. at 15 (cleaned up). That is not the standard for an Equal Protection challenge. If it were, then many “longstanding and consistent historical practice[s]” like bans on interracial marriage would remain constitutional today. *See Latta*, 771 F.3d at 475-76 (upholding laws based on history or tradition is “circular reasoning, not analysis”).

But even assuming history alone guides the analysis, historical evidence does not reveal the consistent presence of sex-separated public facilities at the time of ratification as Defendants claim, let alone the *verification* of the biological sex of restroom users that H.B. 752’s enforcement would require. Defendants’ own sources make clear that nineteenth-century public restrooms were meant to “protect[] shared environments from uncivilized individuals” and often did not accommodate women at all. Peter C. Baldwin, *Public Privacy: Restrooms in American Cities, 1869–1932*, 48 J. of Soc. Hist. 264, 266 (2014).

Privacy. Defendants fail to show that the law substantially advances any important privacy interest. Defendants ask this Court to skip over the context-specific analysis that is critical when assessing a privacy interest. *See Byrd v. Maricopa Cnty. Sheriff’s Dep’t*, 629 F.3d 1135, 1142 (9th Cir. 2011) (explaining difference in privacy interest is relative to context of bodily exposure such as cross-gender strip search versus cross-gender pat down).

First, as to multi-user restrooms, Defendants contest the Ninth Circuit’s observation that stalls protect those with “true privacy concerns.” *Roe*, 137 F.4th at 924 (quoting *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1052 (7th Cir. 2017)) (contrasting

restrooms with showers that lacked curtains or stalls). Without providing any evidence, Defendants claim stalls cannot protect privacy because “[m]ost stalls have gaps” through which the “inside [of] the stall” is visible. PI Opp. at 16. The Ninth Circuit has previously considered and rejected the idea that stall gaps implicate an independent right to bodily privacy. *See Parents for Privacy v. Barr*, 949 F.3d 1210, 1218-19 (9th Cir. 2020).⁸

Similarly, Defendants cannot explain how criminalizing single-user restroom use by transgender people would advance a privacy interest. Defendants argue that H.B. 752 serves a privacy interest that arises when the “restroom door locks...fail” or are “forg[otten].” PI Opp. at 20. But in those cases, *anyone* standing near the restroom could observe the occupant in a state of undress, even if the person opening the unlocked door is of the same “biological sex.” H.B. 752’s sweeping criminal prohibition is also not justified by an alleged risk of “hidden cameras and voyeurism” in single-user restrooms based on one news story involving a shared restroom in a *residence*. *See* PI Opp. at 20.⁹ This is especially true where a more specific Idaho statute already criminalizes such conduct. § 18-6605.

Safety. Defendants cannot carry their burden to demonstrate that H.B. 752 advances Idaho’s goal of preventing violent crimes against women perpetrated by men. Undoubtedly, protecting women, and everyone, from violence is an important governmental interest. But as ICPA Rep. Dahlinger testified opposing the bill, H.B. 752 “would create more problems rather

⁸ Defendants suggest that the law advances an interest in “audial privacy,” which seems to arise from a disputed anecdote in a different case. *See* PI Opp. at 16 (citing *SAGA*, 2025 WL 2256884, at *6 n.12). Defendants have not shown that maintaining audial privacy is an important governmental interest or how H.B. 752 meaningfully advances it. Defendants also cannot square their arguments with *Jones*, which recognized that forcing transgender people to use multi-user restrooms inconsistent with their gender identity “could make them and/or those in *that* restroom uncomfortable,” which could “caus[e] privacy concerns.” 803 F. Supp. 3d at 1091 n.13.

⁹ Video voyeurism is a difficult crime to quantify, but research in this area reveals that this crime is “overwhelmingly committed by cisgender men against women.” Calkins Decl. ¶ 28.

than solutions.” Groves Decl. ¶ 19(a). And as IFPA Rep. Sgt. Lovell confirmed, existing statutes “already provides tools to address inappropriate or disruptive behavior in restrooms.” *Id.*, Ex. 4.

Defendants assert without support that a “growing number of cases of violence against women and children in restrooms across the country” justifies H.B. 752. PI Opp. at 17. There is no evidence that public restrooms are where violent offenses commonly occur. Calkins Decl. ¶ 31. In Idaho, just one percent of all sexual violence cases are committed by a stranger, and three-quarters of those cases occurred inside a residence. *Id.* ¶ 36. Defendants cite eight instances of restroom violence over a nine-year period that occurred *outside* Idaho, including one *outside* the United States. PI Opp. at 17 n.7. This does not show a “growing number” of such cases.

To the extent Defendants suggest that specifically excluding transgender people from restrooms will protect women and children, their claims are even less supported. There is no evidence at all that transgender people are more likely to commit crime than non-transgender people.¹⁰ Calkins Decl. ¶¶ 25, 38. And forcing transgender people into a restroom that does not align with how they present and identify just puts them at more risk of violence. *Id.* ¶¶ 26, 39-43; Dkt. 3-2 (“Ettner Opening Decl.”) ¶¶ 49-53. Thus, Idaho’s safety interest is no less “unclear, exaggerated, or speculative” than it was for school restrooms. *SAGA*, 2025 WL 2256884, *7.

As Applied Challenge. Defendants allege that Plaintiffs cannot succeed on their as-applied claim because such claims ultimately require Defendants to perfectly tailor sex- or transgender-based classifications. Partially enjoining H.B. 752 does not require the Legislature to engage in perfect tailoring; it simply stops unconstitutional applications of a particular law while

¹⁰ Defendants’ anecdotes makes no difference. See PI Opp. at 2. Only one incident, from over ten years ago, involved a transgender person. That person was prosecuted under existing Idaho law, and the officer involved (IFPA Rep. Lovell) later testified against H.B. 752. See *Transgender woman arrested for voyeurism at Target*, East Idaho News (July 12, 2016), <https://perma.cc/SX4Q-7MX6>.

allowing the remainder to take effect. Indeed, the Supreme Court has long held that an as-applied equal protection challenge is “the preferred course of adjudication since it enables courts to avoid making unnecessarily broad constitutional judgments.” *City of Cleburne, Tex v. Cleburne Living Ctr.*, 473 U.S. 432, 447 (1985). And contrary to Defendants’ characterization, the Ninth Circuit recognizes such as-applied challenges. *See Doe v. Horne*, 115 F.4th 1083, 1097 (9th Cir. 2024).

D. H.B. 752 Lacks Rational Basis Because It Was Motivated by Animus.

The breadth of H.B. 752’s criminal prohibition on restroom use is “so far removed from [the] particular justifications” claimed to support it that it is “impossible to credit them” and the law fails under any standard of review. *Romer v. Evans*, 517 U.S. 620, 633 (1996). Not only does the law grossly fail to advance the interests it purportedly serves; the “sheer breadth” of its intrusion into transgender Idahoans’ public lives proves that it was driven by animus. *Id.* at 632. Unlike other transgender restroom restrictions, H.B. 752 imposes severe criminal penalties and offers no accommodation for transgender people. This rejection of transgender people as part of the broader civic community is also confirmed by legislative testimony reflecting animus towards transgender people. *See* PI Mot. at 18.

III. Plaintiffs Are Likely to Succeed on Their Informational Privacy Claim.

Plaintiffs are likely to succeed in demonstrating that H.B. 752 violates their right to informational privacy.¹¹ Defendants first argue that the constitutional basis of this right is “dubious.” PI Opp. at 22. To the contrary, “[w]hile the Supreme Court has expressed uncertainty

¹¹ Defendants argue Plaintiffs “did not plead any claim applied to the[] circumstances” that fit their request for preliminary relief. PI Opp. at 22. To the contrary, Plaintiffs alleged that H.B. 752 causes the involuntary disclosure of their transgender status when they need to use a restroom, Compl. ¶¶ 158-166, explained that they are often unable to locate a gender-neutral restroom, e.g., *id.*, ¶¶ 12, 16, 20, 25, 29, 33, and outlined the resulting risks from using a sex-designated restroom under the new law, e.g. *id.*, ¶¶ 90, 97, 105, 121, 129.

regarding the precise bounds of the constitutional ‘zone of privacy,’ its existence is firmly established.” *In re Crawford*, 194 F.3d 954, 958 (9th Cir. 1999); *see also Doe v. Bonta*, 101 F.4th 633, 637 (9th Cir. 2024) (reiterating an individual’s informational privacy right to avoid disclosure of highly sensitive personal information).

Defendants are wrong to suggest that the law does not compel disclosure of a person’s transgender status. PI Opp. at 23. Any time a person must use a restroom that does not match their expressed gender identity, as compelled by H.B. 752 and basic human needs, their *only* defense against arrest or potential violence will be to explain to other users or law enforcement that they are transgender: their status is the reason why—by complying with the new law—they look like they are violating it. Ettner Opening Decl., ¶¶ 54-55.

Because H.B. 752 compels disclosure of transgender status to strangers in various public settings and thus gives rise to a substantial risk of bodily harm, it is a deprivation of informational privacy of the most serious type. *Kallstrom v. City of Columbus*, 136 F.3d 1055, 1064 (6th Cir. 1998) (where release of private information places person at substantial risk of serious bodily harm, the magnitude of violation “strips the very essence of personhood”). The evidence of this risk is undisputed. Ettner Opening Decl. ¶¶ 54-58; *F.V. v. Barron*, 286 F. Supp. 3d 1131, 1137 (D. Idaho 2018) (transgender people who present mismatched identification are verbally harassed, physically assaulted, and denied service or benefits).

Finally, Defendants argue that a person’s transgender status cannot be protected from disclosure because it is not deeply rooted in our Nation’s history and tradition. PI Opp. at 23-24. As with HIV status, genetic code, or other modern medical advances, the relevant inquiry is not whether a particular piece of information was understood or known at the Founding or when the Fourteenth Amendment was ratified, but whether the information is inherently sensitive or

intimate. *In re Crawford*, 194 F.3d at 960. Protecting personal and intimate information *is* firmly rooted in history and tradition. If rights are defined at the level of specificity Defendants propose, rights to privacy would inevitably erode as medical knowledge advances.

IV. The Remaining Factors Favor a Preliminary Injunction.

Defendants fail to rebut Plaintiffs’ evidence demonstrating irreparable harm. First, as explained above, H.B. 752 violates Plaintiffs’ constitutional rights, a *per se* irreparable harm. Second, Defendants ignored evidence that H.B. 752 goes against accepted standards of medical care for transgender individuals and will cause them “significant psychological harm” such as “anxiety, distress, and emotional dysregulation.” *See* Ettner Opening Decl. ¶¶34-36, 46-49, 63; Dkt. 3-4 (“Jackson-Edney Decl.”) ¶ 13; Dkt. 3-5 (“Doe Decl.”) ¶ 11; Dkt. 3-6 (“Fable Decl.”) ¶ 13; Dkt. 3-7 (“Milette Decl.”) ¶ 13, 16; Dkt. 3-8 (“Poe Decl.”) ¶ 12; Dkt. 3-9 (“Wagner Decl.”) ¶ 12. Third, Defendants ignore evidence that transgender individuals “are disproportionately subjected to mistreatment in public settings, including verbal harassment and physical assault” and that policies such as H.B. 752 increase this risk. Ettner Opening Decl. ¶¶ 56-57; Calkins Decl. ¶¶ 39-41; Groves Decl., Exs. 20-30. Fourth, H.B. 752 will strip Plaintiffs of the autonomy to decide whether to disclose their gender identity to strangers in public restrooms, even if some putative class members are “out” in some aspects of their lives.

Defendants’ last-gasp attempt to manufacture purported “reciprocal harms” posed to other restroom users’ bodily privacy relies on language from *Roe* discussing changing rooms, not restrooms. And because Plaintiffs request a preliminary injunction limited to two specific contexts, the state’s interest in enforcing its laws do not outweigh the harm that the law’s application to Plaintiffs in those contexts.

CONCLUSION

For the foregoing reasons, Plaintiffs ask the Court to grant their Motion.

DATED: May 29, 2026

Respectfully Submitted

Emily Croston
Paul Southwick
ACLU OF IDAHO FOUNDATION

By: /s/ J. Max Rosen

Barbara Schwabauer
Eleanor Matheson
Chase Strangio
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION

J. Max Rosen
Katherine M. Forster
Kyle A. Groves
Qian Zhe (Danny) Zhang
Jannet Gomez
MUNGER TOLLES & OLSON LLP

Peter C. Renn
Kell L. Olson
Tara L. Borelli
Pelecanos
A.D. Sean Lewis
Charlie Ferguson
LAMBDA LEGAL DEFENSE & EDUCATION FUND

Samuel L. Linnet
ALTURAS LAW GROUP, PLLC