

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA

ANDREW BRIDGE, *et al.*,

Plaintiffs,

v.

OKLAHOMA STATE DEPARTMENT OF
EDUCATION, *et al.*

Defendants.

No. CIV-22-787-JD

**STATE DEFENDANTS' SURREPLY IN RESPONSE TO
PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR
PRELIMINARY INJUNCTION**

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In support of their preliminary injunction demand, Plaintiffs submitted with their reply brief a supplemental declaration of Sue Stiles, Doc. 62-1, a supplemental expert declaration from Stephanie Budge, Doc. 62-2, and two 2016 declarations from a different case, *United States v. North Carolina*, No. 16-cv-425 (M.D.N.C.), Doc. 62-3. In response to State Defendants' objection to this new evidence, this Court granted State Defendants "a limited surreply that raises no new issues and responds only to the new matters in the reply brief identified by State Defendants." Doc. 67 at 4. In accordance with this, State Defendants now submit this surreply.

Plaintiffs' new evidentiary materials only confirm that this challenge amounts to nothing more than a policy disagreement over a valid legislative choice to separate certain school facilities based on biological sex. That is to say, "equal protection is not a license for courts to judge the wisdom, fairness, or logic of legislative choices[,]" and none of Plaintiffs' new evidentiary materials establish a clear entitlement to the extraordinary injunctive relief they request. *F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993); *see also* Doc. 54 at 6-7. For the additional reasons set forth herein, this Court should deny Plaintiffs' motion for preliminary injunction.

I. THE SUPPLEMENTAL DECLARATION OF SUE STILES DOES NOT ESTABLISH PLAINTIFFS' ENTITLEMENT TO INJUNCTIVE RELIEF.

The Supplemental Declaration of Sue Stiles, Doc. 62-1, criticizes her child's school for allegedly offering additional time to use the single-occupancy restroom—*i.e.*, a reasonable accommodation on top of the reasonable accommodation already enshrined in SB 615. According to Stiles, the availability and use of this additional accommodation itself constitutes irreparable harm. *See also* Doc. 62 at 15-16. Stiles' supplement makes it apparent that no good faith effort to accommodate Plaintiffs is acceptable, and that Plaintiffs will use every such

attempt as a club to wield against the State. That is to say, Stiles’ supplemental declaration makes clear that Plaintiffs will accept nothing short of total capitulation, at the expense of every other school child’s privacy right and safety concerns.¹

Most significantly, Stiles’ supplement is speculative and fails to establish irreparable harm. *See also* Doc. 54 at 20-23; *Lippoldt v. Cole*, 468 F.3d 1204, 1217 (10th Cir. 2006) (“Plaintiffs ‘seeking prospective relief must show more than past harm or speculative future harm.’” (citation omitted)); *City of Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983) (plaintiffs must establish a “likelihood of substantial and immediate irreparable injury” (citation omitted)). As with Plaintiffs’ other declarations, Stiles’ complaints amount to mere speculation that the accommodation may lead to *feelings* of “anxiety[,]” “worr[y,]” “embarrass[ment,]” or “stigma . . .” Doc. 62-1 at ¶¶ 7-11. None of her speculation is concrete, measurable, or imminent. *See Cont’l Grp., Inc. v. Amoco Chemicals Corp.*, 614 F.2d 351, 359 (3d Cir. 1980) (“[I]njunctive relief will not be issued merely to allay the fears and apprehensions or to soothe the anxieties of the parties.” (citation omitted)).

For example, Stiles hypothesizes that her child’s use of this accommodation may lead students to “realize she is transgender” or “assume she has medical issues requiring special treatment[,]” which may then lead them to “bully her for that.” *Id.* at ¶ 9; *see also id.* at ¶ 11. This requires multiple levels of speculation and supposition. First, it requires speculating that

¹ Incredibly, in the midst of deriding accommodations, Plaintiffs suggest that the harm an injunction would cause other students could be cured through “an adequate accommodation in single-user restrooms.” Doc. 62 at 17 n.7. Plaintiffs do not explain why this would not likewise “put[] a spotlight on [those students’] restroom use[,]” which Sue Stiles describes as “embarrassing and cruel.” Doc. 62-1 at ¶ 10; *see also id.* at ¶ 13 (complaining that the restroom accommodation “simply provides another way in which students can single out others.”).

the child will be identified as a transgender by other students. This itself involves a number of additional assumptions: (1) that the child's transgender status is not already known to peers or even the public (via, for example, social media) for reasons having nothing to do with the State or SB 615, (2) that the child's use of the accommodation will be known to other students,² and (3) that other students will somehow conclude the child's use of the accommodation (to the extent they're even aware of SB 615) is because of transgender status in particular and not because of the many other health or personal reasons that might necessitate such an action.

Assuming an accommodation will lead to identification also ignores that identification could just as easily occur *without* the accommodation or Senate Bill 615. For example, if a biological female were to make exclusive use of the stalls in the boys' restroom, as opposed to the urinals, other students may "put two and two together and realize she is transgender[,]” or assume the student has some embarrassing gastric condition, which, according to Stiles, could result in bullying. Doc. 62-1 at ¶ 9. And the chance of identification increases dramatically once locker rooms and showers are brought into the mix. Plaintiffs have tried to artificially cabin their request to restrooms only, but their overall logic clearly includes those facilities, as well. In short, what is more likely: that a student would be outed as transgender by being allowed to use a single-stall facility, or that a student would be outed by using multiple-occupancy lockers and showers reserved for the opposite sex?

Second, even assuming that it has somehow been shown here that the alleged accommodation will result in identification, the Court would still have to speculate that

² Stiles admits that the alleged accommodation was communicated by a teacher in private. *See* Doc. 62-1 at ¶ 5; *see also* Doc. 62 at 16.

knowledge of the child's transgender status, or students' assumptions about some other medical condition, will automatically lead to bullying from the classmates in question. That, after all, is precisely what Stiles claims. *See, e.g.*, Doc. 62-1, ¶ 9 (Stiles: "even if students do not realize that Sarah has an exception because she is transgender, they will assume she has medical issues requiring special treatment and bully her for that"). Nothing supports this baseless accusation against her child's classmates. That this Plaintiff may have been bullied in the past by different individuals at a different school district does not validate impugning the character of current classmates.

In sum, the harm alleged by Stiles is entirely conjectural—not concrete or imminent. Stiles has not established that any harm alleged is imminent or *likely* to occur. *See, e.g., Sierra Club v. U. S. Army Corps of Eng'rs*, 990 F. Supp. 2d 9, 41 (D.D.C. 2013) ("[I]t is bedrock law that injunctions 'will not issue to prevent injuries neither extant nor presently threatened, but only merely feared.'" (citation omitted)). Moreover, the supposed harm is not even alleged to be directly inflicted by SB 615, but by an independent action—student bullying—that cannot be attributed to the State or SB 615.

On the other hand, the State has provided ample evidence of actual harms that would result to other school children if this Court granted Plaintiffs their desired relief. *See* Doc. 54 at 23-25; Doc. 54-1, Doc. 54-2, Doc. 54-3. The fact that these parents' children attend different school districts from Plaintiffs does not render their harms irrelevant, nor alter the nature of Plaintiffs' state-wide, facial challenge to the enforcement of SB 615. *Contra* Doc. 62 at 15; *see also* Doc. 1 at ¶ 7. As Plaintiffs recognize when it suits them, the interests of all Oklahoma students are implicated by their sweeping requested relief. *See* Doc. 62 at 16-17 (arguing, *sans*

particularized evidence, that “other transgender students would experience the same irreparable harm”); *see also id.* at 1 (characterizing their request for injunctive relief as applying to all “Oklahoma transgender students”).

II. THE SUPPLEMENTAL EXPERT DECLARATION OF STEPHANIE BUDGE, PH.D., DOES NOT ESTABLISH PLAINTIFFS’ ENTITLEMENT TO INJUNCTIVE RELIEF.

Dr. Budge’s supplemental declaration begins with a critique of the qualifications of the State Defendants’ experts, Drs. Cantor and Soh. Although Dr. Budge seemingly intended to unveil supposed flaws in the credentials of Drs. Cantor and Soh, her critique mostly consists of her touting her own credentials as far better. Dr. Budge repeatedly boasts, for example, that “[i]n contrast” to the State’s experts, “I am an associate editor[,]” “I was the co-chair of [a committee,]” or “have received numerous awards” Doc. 62-2 at ¶ 5 nn.1-2, ¶ 6 n.3; *see also id.* at ¶¶ 19-20. Dr. Budge does complain that Dr. Cantor has never “treated a minor with gender dysphoria[,]” or “diagnosed a child or adolescent with gender dysphoria[,]” *id.* at ¶ 5, but participation in clinical transition services for children or adolescents is not required to form an objective and reliable opinion based on the assessment of medical literature. *See Daubert*, 509 U.S. at 592 (“[A]n expert is permitted wide latitude to offer opinions, including those that are not based on firsthand knowledge or observation.”). Rather, as Dr. Cantor notes, people engaged in providing clinical services can be biased in favor of arguing that their services are effective, which is why outside observers are often involved in systematic reviews of debatable practices. *See Ex. 1, Cantor Supp. Decl.* at ¶¶ 9-10.

Dr. Budge also seems to believe that Drs. Soh and Cantor are not qualified because their CVs aren’t identical to hers, nor do they attend the same conferences she does. *See, e.g., Doc. 62-2 at ¶ 5.* The assumption that Dr. Budge and her professional activities are the

measuring stick by which experts are apparently supposed to be judged is simply not true. The State Defendants’ experts bring their own unique experiences and qualifications to the table.³ And, of course, experts don’t all have to share the same exact credentials and experiences. *See, e.g., Bratt v. W. Air Lines*, 155 F.2d 850, 854 (10th Cir. 1946) (“The testimony of a country doctor concerning the sanity of his patient is as readily admissible as the testimony of the most renowned psychiatrist.” (citation omitted)). In fact, the sciences benefit greatly from diversity of credentials and experiences, which aids objectivity. *See* Ex. 1 at ¶¶ 8-10.

Next, Dr. Budge and the Plaintiffs argue that opinions “on the social transition of transgender children and the appropriate treatment of individuals with gender dysphoria . . . have absolutely no relevance to the Students’ claims” Doc. 62 at 8; *see also* Doc. 62-2 at ¶ 12 (“[N]one of the commentary that either Drs. Cantor or Soh provide about the SOC v.8 is relevant regarding the use of restrooms by transgender youth.”). This argument is surprising, given that Dr. Budge spent over nine pages in her first declaration describing “background information on gender identity and gender dysphoria[,]” lengthy opinions on proper social and

³ *See* Doc. 54-5 at pp. 12-17; Doc. 54-6 at pp. 1-4, Appx. 1. For example, in addition to holding a PhD, Dr. Soh is a neuroscientist with “11 years of experience conducting research on human sexuality, including on the subject of biologically-based sex differences, gender, and sexual offending.” Doc. 54-5 at p. 1. Dr. Soh is also a science journalist who educates the public on “a scientific approach to understanding gender identity, gender dysphoria, biological sex, and the politicization of gender medicine” through an acclaimed book (the audiobook holding the #14 Amazon Best Seller spot in LGBTQ+ Demographic Studies), appearances on a variety of renowned television programs, and writing that appears in equally prominent news media publications. *Id.* at 1-2. Dr. Cantor, likewise a neuroscientist holding a PhD, has authored “over 50 peer-reviewed articles, spanning the development of sexual orientation, gender identity, hypersexuality, and atypical sexualities collectively referred to as paraphilias” and “the gender identity and atypical sexualities chapter of the *Oxford Textbook of Psychopathology*.” Doc. 54-6 at ¶ 1. Dr. Cantor also served as Senior Scientist and Psychologist and several clinics and was on the Faculty of Medicine at the University of Toronto for 15 years, serving as Editor-in-Chief of the peer-reviewed *Sexual Abuse* journal. *Id.* at ¶ 2.

medical transition/treatment of gender dysphoria, and how a part of that medical transition apparently requires compelling third parties to permit transgender individuals to use the restroom of the opposite sex. *See* Doc. 24-7 at 6-15, 21-22. In Dr. Budge’s supplemental declaration, she likewise spends several pages defending hormone therapy, puberty blockers, and surgical intervention as necessary treatments for gender dysphoria, while denouncing treatments such as psychotherapy. *See* Doc. 62-2 at ¶¶ 9-13, 16, 19-20.

Although the State would be inclined to agree with Plaintiffs that these topics should be largely irrelevant to Plaintiffs’ claims as to what the U.S. Constitution and Title IX require—as they are far more fitting for a debate in the halls of a legislature or medical institution—it is Plaintiffs and their experts who regarded the subject as relevant enough to explore in-depth in their initial submissions to this Court. The State’s experts merely rebutted and responded to Plaintiffs’ own opinions and arguments. To the extent the State’s rebuttal expert opinions are irrelevant to this Court’s determination, so too are Dr. Budge’s opinions on the same.⁴

As to Dr. Budge’s bold accusations that the State Defendants’ experts “misrepresented science[,]” “misrepresent[ed] scientific studies[,]” and “misrepresent[ed] data[,]” Doc. 62-2 at ¶¶ 2, 5-6, Dr. Budge fails to back up these claims. Instead, Dr. Budge presents a disagreement about the proper interpretation and weight of scientific materials cited by the State Defendants’ experts, which Dr. Cantor’s supplemental expert declaration rebuts once again.

⁴ Dr. Budge’s attempt to distinguish her lengthy opinions on the same subjects as merely “attempting to provide information[,]” which is somehow “very different” from what the State’s experts did, is nonsensical. Doc. 62-2 at ¶ 13. Dr. Budge’s disagreement with the State’s experts does not render their opinions irrelevant nor different in kind from the opinions Dr. Budge offers.

Compare Doc. 62-2 at ¶¶ 5-9, *with* Ex. 1 at ¶¶ 13-26.⁵ Dr. Budge’s seeming inability to discern the difference between a misrepresentation and merely arriving at a different conclusion undermines her credibility.

Throughout Dr. Budge’s supplemental declaration, she pushes a narrative that the opinions, qualifications, and cited scientific literature from the State’s experts are “outdated.” *See* Doc. 62-2 at ¶¶ 5-6, 13, 14. Although she doesn’t perceive it as such, this is quite a significant concession. By using the term “outdated” and acknowledging that “20 years ago (2002-2003) [] the field of transgender science was barely emerging,” *id.* at ¶ 5, Dr. Budge implicitly confirms that until very recently, the views of the State’s experts were prevalent and widely accepted. Put differently, sharp rhetoric aside, even Dr. Budge concedes in a roundabout way that the debate here is lively, legitimate, and of recent vintage.

Dr. Budge’s emphasis on the recent emergence of the “field of transgender science” cuts against her in other ways, as well. Perhaps most notably, Dr. Budge’s admission undermines her strident position that the science is somehow settled on this subject, a claim that flies in the face of millennia of unwavering recognition of the fact of biological sex.⁶ *See* Doc. 62-2 at ¶¶ 12, 16-18 (declaring that “the data are clear[,]” the State’s experts’ opinions are “false[,]” and “there is **irrefutable** evidence that a person’s gender identity cannot be

⁵ Among other things, Dr. Cantor rebuts Dr. Budge’s claim that studies cited by Dr. Cantor on the desistence of gender identity in children and adolescents “have significant flaws” that disqualify them from consideration. *Compare* Doc. 62-2 at ¶ 7, *with* Ex. 1 at ¶ 13.

⁶ Dr. Budge asserts that “‘sex assigned at birth’ is [now] commonly used terminology in the scientific community[,]” with over 2,930 references in a current Google Scholar search, Doc. 62-2 at ¶ 18, but she ignores that a mere two decades ago, the same search would yield only 87 results. Before the phrase “sex assigned at birth” rose to prevalence in the last two decades, the commonly used terminology was simply: biological sex. *See, e.g.*, Doc. 54-5 at pp. 3-4, 6; Doc. 54-6 at ¶¶ 10-12; Ex. 1 at ¶¶ 34-37.

changed” (emphasis added)). That something so significant can be settled to the extent that no debate remains in a matter of years strains credulity, and conflicts with the scientific process. *See* Ex. 1 at ¶ 37.

For example, Dr. Budge relies heavily on sources from 2018 (e.g., Temple Newhook et al., Steensma & Cohen-Kettinis, Spizzirri, Nguyen et al., Johns et al., *id.* at ¶¶ 7-8, 15), 2020 (e.g., Turban et al, Ashley, Restar, Bauer et al., *id.* at ¶¶ 9, 16), 2021 (e.g., Rouse & Hamilton, Lee et al., Veale et al., Durwood et al., Price-Feeney et al., *id.* at ¶¶ 15-17, 21), and 2022 (e.g., Coleman et al., Heiden-Roots et al., Austin et al., McGuire et al., *id.* at ¶¶ 14, 16-17, 21)—*i.e.*, sources appearing only the last *five years*. And yet she claims that the evidence is “irrefutable.” Practically overnight, no debate is allowed.

It seems highly unlikely that a novel scientific hypothesis or subject matter could possibly be settled after one year, five years, or even twenty years. For example, the early twentieth century saw a sharp increase in consumer tobacco consumption, despite a growing awareness of links between tobacco and cancer by academics and researchers in the 1920s and 1930s. *See* U.S. DEP’T OF HEALTH AND HUM. SERVS., *The Health Consequences of Smoking—50 Years of Progress, A Report of the Surgeon General* at 17 (Jan. 2014).⁷ It wasn’t until a wave of research and epidemiological studies decades later (in the 1950s), culminating in a 1964 Surgeon General Report, that the public tide on tobacco use began to turn. *Id.* at 19-21. Notably: “[a]lthough many individual physicians rapidly accepted the smoking and health findings, [the American Medical Association (AMA)], the leading professional medical organization, took more than two decades to take a clear stand on the issue.” *Id.* at 26. This

⁷ Available at <https://www.ncbi.nlm.nih.gov/books/NBK294310/#> (last visited Jan. 4, 2023)

position was likely influenced by political considerations like the AMA’s “need for support from congressional allies, particularly in southern tobacco-growing states” *Id.* Dr. Budge repeatedly relies on this same organization (the AMA) to support her opinions and theories, *see* Doc. 62-2 at ¶¶ 14, 18, and evidence of the AMA’s political biases continue to this day. As Dr. Cantor points out, the 2018 AMA document cited by Dr. Budge expressly observed that in defining sex, the organization took into account that a different “definition of sex would have public health consequences for the transgender population” Ex. 1 at ¶ 34. This is policy, not science.

Moreover, as Dr. Cantor explains, “[i]n science, again, recency is not how studies are evaluated[,]” and scientific studies are not “supplanted by other studies . . . for being more recent, but for being higher quality.” Ex. 1 at ¶ 29. For instance, “[o]bservations from high powered telescopes do not get replaced by observations with the naked eye just because the naked eye observations were more recent.” *Id.* at ¶ 30. On the other hand, “[b]ecause low quality research is faster and cheaper than [high quality] research, . . . low quality research is often more frequent and recent[,]” and therefore “withstanding the test of time is a demonstration of the strength of a scientific conclusion.” *Id.* at ¶ 29.

In sum, Dr. Budge’s critique of the age of certain authorities cited by State Defendants’ experts is misplaced. Moreover, this Court should be wary of relying on opinions that are admittedly based entirely on new, novel, and unsubstantiated authorities, which may easily be “debunked in the scientific community” in the years to come. *See, e.g.*, Doc. 62-2 at ¶ 9 (contending that a five-year old study cited by the State’s experts has now “been heavily critiqued” and “debunked”). On the other hand, the undeniable fact of biological sex has

the backing of millennia of human understanding and experience, common sense, and—most relevant here—the U.S. Supreme Court. *See* Doc. 54 at 2-5, 10-13; Doc. 54-5 at pp. 3-4, 6; Doc. 54-6 at ¶¶ 10-12; Ex. 1 at ¶¶ 33-36. Along these lines, it is also worth mentioning that Dr. Budge’s cited authorities do not actually support her conclusion that sex is defined by or identical with gender identity or that sex is composed of anything other than objective features. *See* Ex. 1 at ¶¶ 34-36.

Finally, Dr. Budge and Plaintiffs’ obvious disagreement with the opinions of the State Defendants’ experts hardly renders their approach “not the product of reliable principles and methods.” Doc. 62 at 9; *see also* Doc. 62-2 at ¶ 2. Even ignoring the inapplicability of the Federal Rules of Evidence at this juncture,⁸ the Supreme Court explains that Fed. R. Evid. 702 is “flexible” and that “[t]he focus, of course, must be solely on principles and methodology, not on the conclusions that they generate.” *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 595 (1993). Moreover, a party “need not prove that the expert is undisputably correct or that the expert’s theory is ‘generally accepted’ in the scientific community.” *Mitchell v. Gencorp Inc.*, 165 F.3d 778, 781 (10th Cir. 1999) (citation omitted). State Defendants have shown that Drs. Cantor and Soh offer scientifically sound and reliable opinions. As Dr. Cantor emphasizes, neither Plaintiffs’ submissions nor Dr. Budge’s supplemental declaration indicate which principles or methods were allegedly unreliable. *See* Ex. 1 at ¶¶ 1-2. Dr. Cantor further notes that systematic reviews (which are the strongest evidence in medical science) conducted by three international health departments support his conclusions—not Dr. Budge’s. *Id.* at ¶

⁸ *See* Doc. 64 at 5 (citing *Heideman v. South Salt Lake City*, 348 F.3d 1182, 1188 (10th Cir. 2003), for the proposition that “[t]he Federal Rules of Evidence do not apply to preliminary injunction hearings.”).

3. Dr. Budge “instead cit[es] professional associations that have not engaged in such reviews.”

Id. at ¶¶ 4-5.

III. THE TWO DECLARATIONS FROM *UNITED STATES V. NORTH CAROLINA*, NO. 16-CV-425 (M.D.N.C.) DO NOT SUPPORT INJUNCTIVE RELIEF.

The declarations from Michael Miner and Chris Magnus, which Plaintiffs pulled from another case, *United States v. North Carolina*, No. 16-cv-425 (M.D.N.C.), have limited relevance and persuasive value, and they fail to establish that the Plaintiffs here are entitled to extraordinary injunctive relief. *See* Doc. 62-3. As an initial matter, Plaintiffs cherry-picked two declarations out of a wealth of evidence presented in the 2016 North Carolina case. In that case, the State of North Carolina alone submitted declarations from six experts, a “detransitioner” (*i.e.*, an individual who formerly identified as transgender), four parents, one student, and one concerned citizen. And as is apparent from their explicit language, Miner’s and Magnus’s declarations were not standalone submissions, but rather prepared in direct rebuttal to two of North Carolina’s law enforcement experts: Kenneth Lanning and Tim Hutchison. As such, for fairness, reading comprehension, and completeness, State Defendants attach Lanning’s and Hutchison’s declarations from 2016 as Exhibits 2 and 3, respectively.⁹ It is also notable that Lanning and Hutchison both anticipate and refute many of the arguments lodged against them by Miner and Magnus.

Lanning has over 30 years of experience working as a Special Agent for the FBI and has developed extensive expertise on criminal sexual behavior and sex crimes developed over

⁹ State Defendants contacted Lanning and Hutchison: both verified that the documents here are the original and complete reports that they submitted in North Carolina, and they stand by their opinions reached after reviewing material for that case. *Cf.* Doc. 64 at 5 n.1.

decades of teaching, training, researching, investigating, and consulting. *See* Ex. 2 at ¶¶ 3-10. He has been published dozens of times, provided instruction to over 50,000 law enforcement personnel, and has given presentations at dozens of organizations and governmental agencies, including the American Psychological Association cited by Dr. Budge. *Compare id.* at ¶¶ 10-13 *with* Doc. 62-2 at ¶ 18. Lanning’s report provides a thorough explanation of the various types of sex offenses, the behavior patterns of sex offenders, and the motives, behaviors, and psychology of male sex offenders. *See* Ex. 2 at ¶¶ 22-37. Based on his extensive experience and knowledge, Lanning then opined that sexual offenses in and around multiple-occupancy public facilities would likely increase as a result of Gender-Identity-Based Access Policies (“GIBAPs”).¹⁰ This is because “allowing a man, based only on his claim to be transgendered woman, to have unlimited access to women’s rest rooms, locker rooms, changing rooms, showers, etc. will make it easier for the type of sex offense behavior previously described to happen to more women and children.” *Id.* at ¶ 44; *see also id.* at ¶¶ 38-43.

Lanning also compiled a list of then-recent media-reported incidents involving restrooms and cited the history of male-on-male sexual offenses occurring in similar facilities, as well as the fact “most male sex offenders against adults prefer female victims” *Id.* at ¶ 39 & Ex. C. Lanning further explained that “[t]hose dismissing the possibility of GIBAPs being exploited by sex offenders also overlook the reality that many serious sex offenses are not committed in an overt and violent manner by individuals fitting common stereotypes[.]” *Id.* at ¶ 42, and explained why existing laws would not adequately address the problems created

¹⁰ The North Carolina law was much broader than Oklahoma’s law, covering all public facilities—for adults and children. *See* Ex. 3 at p.5, ¶¶ 1-5.

by the increased access to vulnerable women and children in such spaces. *See id.* at ¶¶ 53-57 (describing, among many things, that “nuisance” sex offenses “are typically a low investigative priority and difficult to identify and prove in court[,]” that “the vast majority of peeping and indecent exposure offenses appear to go unreported[,]” and that “North Carolina statutes governing indecent exposure, voyeurism, and trespassing . . . will have limited effect in protecting victims.”). Finally, Lanning explained the value of laws providing objective standards for sex-separated bathrooms “in protecting safety and privacy, especially for women and girls[,]” in contrast to policies that have “no objective, independent criteria” *Id.* at ¶ 64, 67; *see also id.* at ¶¶ 68-74 (describing the importance of “objective standards . . . to effective law enforcement.”).

Hutchison has over 33 years of extensive law enforcement experience, serving from 1990 to 2007 as the Chief Law Enforcement Officer in Knox County, Tennessee. *See* Ex. 3 at pp. 2-5. Hutchison opined that “GIBAPs” posed a genuine and serious public safety and privacy threat: “[p]ublic restrooms are crime attractors, and have long been well-known areas in which offenders seek out victims in a planned and deliberate way[.]” *Id.* at p. 6, ¶ 1. Moreover, he wrote, GIBAPs “create real and significant public safety and privacy risks, especially in women’s and children’s restrooms/dressing rooms.” *Id.* at p. 7, ¶ 1. Hutchison cited examples of incidents of “abuses against women and children” in restrooms, statistics on sex offenses and under-reporting of sex offenses, and his experience as a Sheriff, to support his opinions. *Id.* at pp. 7-10, ¶¶ 3-5, 13-28. Hutchison provided an in-depth discussion about why “existing laws prohibiting trespassing, indecent exposure, peeping, and other sex offenses” will not adequately address the problems created by GIBAPs. *Id.* at pp. 11-12, ¶¶

37-43. In addition, Hutchison concluded that laws providing for sex-separated bathrooms “are a reasonable and much needed response to the public safety issues[,]” and “create an objective baseline for facility access, as opposed to GIBAPs,” which lack objective measures and are instead “determined entirely by the individual’s ‘internal sense’ of gender.” *Id.* at pp. 12-13, ¶¶ 44-45, 47; *see also id.* at pp. 12-13, ¶¶ 46, 48-53. Similarly, Hutchison concluded that laws providing for sex-separated bathrooms advance and protect privacy interests of women and children. *Id.* at pp. 13-14 ¶¶ 54-57.

At the State Defendants’ request, local law enforcement expert Kim Davis has now read the declarations of Miner, Magnus, Lanning, and Hutchison. Not only does she generally agree with Lanning and Hutchison, but she has also prepared her own short rebuttal declaration to Miner and Magnus, which is attached here as Exhibit 4. Davis’s declaration, and Lanning and Hutchison’s older materials, rebut the testimony of Miner and Magnus.

For starters, Miner and Magnus’s specific criticisms of Lanning and Hutchison are often shallow and conclusory. Despite being expressly styled as rebuttal affidavits, they do surprisingly little direct and in-depth rebuttal work. They can also be somewhat hypocritical. For example, at one point Miner says that there is “little seeming connection between the [professional] experiences [Lanning and Hutchison] describe and the conclusions they draw.” Doc. 62-3, Ex. A at ¶ 16. This statement could quite easily be re-directed back at Miner, who is a psychologist purporting to critique experts from an different field of expertise—on-the-ground law enforcement.¹¹ In similar fashion, Miner and Magnus repeatedly argue that North

¹¹ In another example, Miner attempts to undermine the credibility of Lanning and Hutchison by noting “professional judgment about risk, especially in situations such as this, tends to be

Carolina’s law was not “supported by any data, empirical evidence, or scientific research[,]” *Id.* at ¶ 24, and that “there was no data, let alone good data, supporting the need for” North Carolina’s public accommodation law. Doc. 62-3, Ex. B at ¶ 29. Yet, neither Magnus nor Miner cite any empirical data to *disprove* the need for the law either. Miner instead admits that the “empirical questions . . . have yet to be evaluated” and that he is “aware of no such study, nor any expression of the need for such a study.” *Id.* at ¶ 29-30. The Constitution surely does not require a state to conduct extensive scientific experimentation, nor provide a certain level of empirical data, before it enacts public policies substantially related to legitimate state interests—and especially not when the policies simply enshrine longstanding and common-sense practices. *See* Doc. 54 at 15-18. And when the science is uncertain or underdeveloped, the Constitution grants state legislatures *even more* deference to act in the public good. *See id.* at 6 (citing *Gonzalez v. Carhart*, 550 U.S. 124, 163, (2007)).

Remarkably, much of Miner’s testimony is based on the proposition that “there is a tendency in the media, general public, and amongst mental health and law enforcement professionals to overestimate the incidence and prevalence of sexual crimes.” Doc. 62-3, Ex. A at ¶ 18. Miner repeatedly refers to this as a “moral panic.” *Id.* at ¶¶ 23-24. Magnus similarly espouses a policy preference for reaction, *i.e.*, responding to crimes already committed, rather than prevention, *i.e.* attempting to prevent crimes before they take place. *See* Doc. 62-3, Ex. B at ¶ 36 (emphasizing the “adaptability and responsiveness of law enforcement agencies to work with *victims*”); *id.* at ¶ 19.

flawed, due to certain cognitive and motivational biases.” Doc. 62-3, Ex. A at ¶ 37. Miner apparently fails to realize his own observation can equally be applied to him.

While Miner and Magnus are entitled to their views, the State is by no means required by the Constitution or federal law to accept them and stand down from efforts to protect some of its most vulnerable citizens from some of the most heinous and invasive crimes imaginable. *See, e.g.*, Ex. 4, Supp. Decl. of Kim Davis, at ¶ 2 (“I find [Magnus’s and Miner’s] approach to be far too reactive, rather than proactive, in protecting children . . . I would rather put laws in place that result in fewer opportunities for someone to victimize someone, resulting in fewer victims.”). Courts have instead been particularly deferential to the policy decisions of states in, for example, enacting strict sex offender regulations to protect children. *Compare, e.g.*, Doc. 62-3, Ex. A at ¶ 29 (Miner: “Much of the public concern about sexual offenders is disproportionate to the risk they actually pose.”), *with Shaw v. Patton*, 823 F.3d 556, 576 (10th Cir. 2016) (upholding an Oklahoma law prohibiting sex offenders from living within 2,000 feet of a school, playground, park, or child care center in part because the State “could reasonably try to advance” the goal of “reduc[ing] temptations and opportunities for sex offenders to prey on children . . . by creating a categorical rule for sex offenders.”).

Miner also advances a number of related arguments that have no relevance here, and some that even cut in favor of State Defendants. For example, Miner asserts that North Carolina’s focus on public restrooms is misplaced because most sex crimes “are committed by individuals known to the victim and that . . . take place in residential and other private environments.” Doc. 62-3, Ex. A at ¶ 18; *see also id.* at ¶ 32. But a school restroom *is* a private environment, and presumably many students at a school will know each other. Even ignoring that gaping hole in Miner’s logic, it is an unreasonable leap to conclude that because most sex crimes occur in a different environment a State has no legitimate interest in ensuring that sex

crimes don't occur in school multiple-occupancy restrooms and changing rooms. *See* Ex. 4 at ¶ 3 (“No solution is perfect. But if female students know there is a rule that male students cannot enter their bathrooms or locker rooms at all, they are given more preventive and proactive options.”); *see also id.* at ¶ 6. States can walk and chew bubble gum at the same time, and the Constitution certainly doesn't prohibit States from doing so.

Furthermore, many of Magnus's opinions would not apply in the public school context at issue here, where the State is acting *in loco parentis*—and not with regard to the general public. *See, e.g., Adams v. Sch. Bd. of St. Johns Cnty., Fla.*, No. 18-13592, 2022 WL 18003879, at *6 (11th Cir. Dec. 30, 2022) (en banc) (“Schools operate in loco parentis to students and are ‘permit[ted] a degree of supervision and control that could not be exercised over free adults.’” (citing *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 655 (1995))); *see also* Ex. 4 at ¶ 6 (describing the specialized risks arising in the school environment). For example, Magnus argues that North Carolina's law is “virtually unenforceable” because police officers don't have the resources to check birth certificates or credentials for all public bathrooms. Doc. 62-3, Ex. B at ¶ 31; *see also id.* at ¶ 33. But the difficulty of enforcing a law can almost always be made to sound taxing if over-the-top rhetoric is used, and the difficulty of enforcing a law surely is not a constitutional defect as much as a practical one. In any event, even under Magnus's own critique, enforcement is a much easier proposition for public schools, who should have records for all children in attendance already. *See, e.g., OKLA. STAT. tit. 70, § 18-111* (requiring proof of age in the form of birth certificates, if obtainable); *OKLA. ADMIN. CODE § 210:10-1-5*.

Magnus also argues that a law restricting all public restrooms based on biological sex is unnecessary because there are already laws that could be used to prosecute harassment, assault,

etc. *See, e.g.*, Doc. 62-3, Ex. B at ¶ 17. Again, Lanning and Hutchison already anticipated this argument, and thoroughly rebuffed it. *See* Ex. 2 at ¶¶ 53-63; Ex. 3 at pp. 11-12 ¶¶ 37-43. Magnus’s speculation and equivocations do little to diminish their persuasive testimony. For example, he argues that existing laws and policies “are *typically* adequate to deal with this conduct” and such crimes “most *likely*” would be reported to law enforcement and “*could be* the focus of bona fide police investigations with meaningful criminal justice system consequences.” Doc. 62-3, Ex. B at ¶¶ 17-18 (emphases added). “Typically” is not “always,” “likely” is not “certainly,” “could be” is not comforting, and “adequate” is not a particularly high standard.

Nor does Magnus ever confront a primary concern of Lanning and Hutchison (and Davis): the subjectiveness underlying the more permissive approach to restrooms. For example, while Magnus declares that an “individual ‘falsely’ representing themselves as transgender” could be found in violation of other laws, he never explains how law enforcement (or a jury) could ever tell, objectively, when a representation of transgender status was *false*. *Compare id.* at ¶ 17 *with* Ex. 4 at ¶ 4. Magnus does concede, however, that “[w]ithout question” there “have been, and will always be” people who break the law by “entering public or private accommodations intended for women[.]” including school-age individuals committing pranks, as well as those with “nefarious intentions[.]” *id.* at ¶ 17, and that restroom users have “personal privacy interests.” *Id.* at ¶ 18. But overall, “Magnus and Miner downplay the harm that is done to the privacy of those who are denied access to a single-sex bathroom, even if there is no crime committed.” Ex. 4 at ¶ 5. Here, SB 615 directly and substantially

advances those legitimate personal privacy and safety interests, in a place where vulnerable school-age children regularly disrobe, change, or perform bodily functions.

Respectfully submitted,

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