No. 23-2807

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REBECCA ROE, by and through her parents and next friends, Rachel and Ryan Roe, *et al.*,

Plaintiffs-Appellees,

v.

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

Defendants-Appellants.

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

BRIEF OF AMICUS CURIAE THE AMERICAN CIVIL RIGHTS PROJECT IN SUPPORT OF DEFENDANTS-APPELLEES AND AFFIRMANCE

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DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, *amicus curiae* The American Civil Rights Project certifies that it is not a subsidiary or affiliate of any publicly owned corporate, has no parent company, and has not issued stock. *Amicus* knows of no public corporation not party to this appeal or an amicus that has any financial interest in the outcome of this case.

Date: December 27, 2023

Joseph A. Bingham

/s/ Joseph A., Bingham
Joseph A. Bingham
Attorney for Amicus Curiae The American Civil Rights Project

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INTEREST OF AMICUS CURIAE

The American Civil Rights Project (the "ACR Project") is a public-interest law firm, dedicated to protecting and where necessary restoring the equality of all Americans before the law.

This case interests the ACR Project because it focuses on the proper interpretation of some of America's most important civil rights enactments.

Pursuant to Fed. R. App. P. 29(a)(4)(E), amicus affirms that no party or party's counsel authored this brief in whole or in part, and no person or entity other than amicus curiae or its counsel contributed money for the preparation or submission of this brief. All parties have consented to the filing of this brief.

SUMMARY OF THE ARGUMENT

Plaintiffs' interpretation of Title IX of the Education Amendments of 1972 ("Title IX") is misguided.

Plaintiffs' reliance on *Bostock v. Clayton Co.*, 140 S. Ct. 1731 (2020), to justify their preferred outcome is incoherent. *Bostock* explicitly declines to reach the bathroom issue.[1] Moreover, it does not hold that Title VII bans discrimination

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[1] *Id.* at 1753 (of "other federal or state laws prohibit[ing] sex discrimination" and "sex-segregated bathrooms, locker rooms, and dress codes[,]" noting that "none of these other laws are before us;" "we do not purport to address bathrooms, locker rooms, or anything else of the kind[;]" and concluding that "[w]hether

based on gender identity. Rather, it correctly notes that Title VII bans ***sex*** discrimination. Its analysis proceeds this way: If a biological woman identifying as a woman can keep her job, then an otherwise comparable biological man identifying as a woman must also be able to do so. This is a perfectly coherent approach.

Presumptively, the same approach can be applied to Title IX. It, too, bans ***sex*** discrimination, not discrimination based on gender identity.[2] Thus, *unless an exception to the sex discrimination prohibition applies*, if a biological girl identifying as a girl can attend a school as a student, then a biological boy identifying as a girl must also be able to do so as well.[3]

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other policies and practices might not qualify as unlawful discrimination or find justifications under other provisions of [even] Title VII are questions for future cases, not these.").

[2] The distinction between sex and gender identity was recognized by the original interpretive community for Title IX. Indeed, precisely this distinction drove the coining of the term "transgender" to contrast with the older "transsexual" – "transgender" was intended to describe individuals who had adopted the traits of the opposite sex *without* having actually attempted to cross over into "becoming" a member of the opposite sex (through the body's surgical alteration). In 1969, Virginia Prince, an anatomical man who lived as a female, wrote in the underground magazine Transvestia: "I, at least, know the difference between sex and gender and have simply elected to change the latter and not the former. If a word is necessary, I should be termed a 'transgenderal.'" Virginia Prince, *Change of Sex or Gender*, 10 Transvestia 53, 60 (1969), quoted in Richard Elkins & Dave King, The Transgender Phenomenon 82 (2006).

[3] For such an exception, see, 20 U.S.C. § 1681(a)(5), which exempts from Title IX's prohibition on sex discrimination the admissions policies of "any public institution of undergraduate higher education which … traditionally and

But a crucial distinction between *Bostock* and cases such as this one, which concerns bathrooms, locker rooms, and showers persists: Title IX expressly ***allows*** separation by sex for these purposes. Put differently, Title IX includes a governing ***exception*** to the basic rule that discrimination (including separation) by sex is illegal. 20 U.S.C. § 1686 and 34 C.F.R. § 106.33 (1975) (the "1975 Regulation").

For the sake of argument, though, suppose that's wrong. Suppose that Title IX contained no exception expressly allowing for separation by sex in access to bathrooms, locker rooms, or showers. If so, that would mean the general prohibition on separations would apply and that ***all*** biological men, not just those who identify as women, would be able to use the women's facilities. And vice versa. It would mean that Title IX would require ***unisex*** facilities. There is no basis for any other reading.

Counsel has diligently searched for evidence that anybody thought that Title IX mandated unisex bathrooms, locker rooms, and showers when it passed in 1972. We found no such evidence. The argument that a "transgender boy" (i.e., a biological girl who identifies as a boy) really is a boy for the purposes of Title IX

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continually from its establishment has had a policy of admitting only students of one sex[.]"

doesn't strengthen its argument. Indeed, it spoils it. Title IX does not prohibit discrimination between ***different kinds*** of boys.

It is important to note that while Title IX ***does not require*** federally funded schools to assign transgender individuals to the bathrooms, locker rooms, or showers of the gender they identify as, the statutory text arguably ***does not prohibit*** them from doing so if they wish. Since there is no federal law forbidding gender-identity discrimination, there is no need for a law that expressly *authorizes* such separation. Just as schools may legally separate by left- and right-handedness, they may be able to legally separate by gender identity.

Admittedly, this case comes before the Court at a moment when a split of authority on this question has emerged. Two Courts of Appeals have misread Title IX and *Bostock* to bar federal funding recipients from maintaining separate-sex bathrooms, while another has correctly rejected this argument. The Supreme Court has not resolved this split. Understanding that this Court's decision can only deepen the existing split, the Court should affirm the District Court's ruling and reject Plaintiffs' call to join the wrong side when it does so.

ARGUMENT

Our argument with respect to Title IX proceeds in 10 steps.

I. STEPS 1-5: TITLE IX AND ITS REGULATIONS CANNOT MEAN WHAT PLAINTIFFS CONTEND

1. With only inapplicable exceptions,[4] Title IX forbids federally funded education programs or activities from engaging in sex discrimination. Its key provision states: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance…." 20 U.S.C. § 1681(a). There is no other section of Title IX that forbids other kinds of discrimination. *If it isn't sex discrimination, it isn't forbidden by Title IX.*

2. Title IX contains an important exception to its sweeping rule against sex discrimination. "[N]othing contained herein shall be construed to prohibit any educational institution … from maintaining separate living facilities for the different sexes." 20 U.S.C. § 1686. Congress expressly directs that, even if a recipient's policies of maintaining separate living facilities for the different sexes would otherwise qualify as sex discrimination, Title IX "shall [not] be construed to prohibit" that policy.

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[4] *E.g.,* n. 3, *supra*.

3. Without § 1686, *any* boarding-school boy (not just one who identifies as a girl) would be able to point to a girls' dorm and say, "if I were a girl, I would be allowed to sleep there. But since I am a boy, my school bars me from doing so. That's sex discrimination!" And he would be right; *it would be* sex discrimination. Indeed, it *is* sex discrimination. But given § 1686, it is *lawful* sex discrimination.

4. Soon after the passage of Title IX, President Ford approved the 1975 Regulation, clarifying § 1686.[5] The 1975 Regulation reads: "A recipient may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex." 34 C.F.R. §106.33.

5. Note that the 1975 Regulation is simply an interpretation of § 1686. It clarifies, (though no clarification was needed) that "living facilities" includes "toilet, locker room, and shower facilities." This was not controversial in 1975 and has never been controversial since. We have searched and have found no examples of anyone: (a) interpreting § 1686 between Congress's passage of Title IX and President Ford's approval of the 1975 Regulation as requiring the abolition of single-sex bathrooms,

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[5] § 1682 of Title IX requires that regulations promulgated under the statute receive direct Presidential approval in order to take effect.

locker rooms, and showers;[6] or (b) contending in the years since that President Ford overstepped his regulatory authority or misinterpreted § 1686 in issuing the 1975 Regulation.[7] Indeed, as the Eleventh Circuit has held, § 1686 and the 1975 Regulation permit schools to maintain separate intimate living facilities (specifically, separate bathrooms, locker rooms, and showers) for the two sexes. *Adams v. Sch. Bd. of St. John's C'ty*., 57 F.4th 791, at 811-815 (11th Cir. 2022). Simply put, no one has ever contended that Title IX requires every school in America to host the co-ed shower scenes from *Starship Troopers*.[8]

II. STEPS 6-7: *BOSTOCK* IS ENTIRELY CONSISTENT WITH A PROPER READING OF STATUTE

6. That includes the Supreme Court's *Bostock* majority. *Bostock* was a Title VII case. It did not hold that when Title VII says "sex," it really means "sex or sexual orientation or gender identity." To the contrary, it held that Congress's prohibition

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[6] Indeed, we have been unable to identify either: (a) any court case whatsoever referencing § 1686 prior to 1995; (b) any article or treatise referencing § 1686 at all, published prior to 1985; or (c) (b) any article or treatise referencing § 1686 in conjunction with bathrooms, locker rooms, or showers prior to 1995.

[7] Even when the Fourth and Seventh Circuit Courts of Appeals applied what they wrongly described as *Bostock*'s reasoning to find that sex-specific restrooms violate Title IX, they did so by side-stepping the 1975 Regulation, rather than by contending that the 1975 Regulation was arbitrary or capricious. *See Metropolitan Sch. Dist. of Martinsville v. A.C.*, 75 F.4th 760, 770 (7th Cir. 2023); *Grimm v. Gloucester Co. Sch. Bd.*, 972 F.3d 586, 618 (4th Cir. 2020).

[8] Verhoven, Paul, director. *Starship Troopers*. Sony Pictures, 1997.

on sex discrimination prohibited discrimination based on sex – "an employer who fires a transgender person who was identified as a male at birth but who now identifies as female" while "retain[ing] an otherwise identical employee who was identified as female at birth … penalizes" the fired employee "for traits or actions that it tolerates in an employee identified as female at birth. [That] employee's sex plays an unmistakable and impermissible role in the discharge decision." *Bostock*, 140 S.Ct. at 1742.

The transgender plaintiff prevailed in *Bostock* ***precisely because***, however the plaintiff "identified," the plaintiff's sex had not changed.[9] Title VII only applied because an employer who fires a biological *male* employee who identifies as a woman, but would not have fired a biological *female* employee identifying as a woman, definitionally makes the fired employee's sex a "but-for cause" of the termination. *Bostock*, 140 S.Ct. at 1741-42. The plaintiff's gender identification was relevant only as a behavior the employer accepted from a woman, but not from

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[9] The Southern District of West Virginia has recognized the same truth in the Title IX context. That court held that a state statute requiring students to participate on the athletic teams designated for their biological sex did not violate Title IX, because Title IX applies to biological sex, not gender. *B.P.J. v. W.Va. State Bd. of Ed.*, 2023 U.S. Dist. LEXIS 1820, at *28 (S.D. W.Va. 2023) ("There is no serious debate that Title IX's endorsement of sex separation in sports refers to biological sex. . . . transgender girls are biologically male.") (stayed by the Court of Appeals, at *B.P.J. v. W.Va. State Bd. of Ed.*, 2023 U.S. App. LEXIS 8379 (4th Cir. 2023), but not reversed or vacated).

a man, not as an additional form of discrimination whose prohibition had been newly discovered in Title VII's 56-year-old text. *Id.* at 1739 (noting that "The *only* statutorily protected characteristic at issue in today's cases is '*sex*,'" and stipulating that "sex" in Title VII "refer[s] *only* to biological distinctions between male and female" (emphasis added)).

7. *Bostock*'s logic is entirely consistent with the analysis above. Like the hypothetical boarding-school student, a hypothetical transgender boy[10] would be entirely right to say: "I am a biological girl who identifies as a boy, but am not allowed to use the showers, locker rooms, and bathrooms my school provides for boys. If I were a biological boy who identified as a boy, I would be able to use them. That is sex discrimination!" That student would be correct. It is sex discrimination. But it is precisely the kind of sex discrimination expressly authorized by Congress in § 1686 and by President Ford in the 1975 Regulation, and that type of sex discrimination does not violate Title IX. That distinguishes it from *Bostock.*

III. STEP 8: REINTERPRETING "SEX" TO MEAN "GENDER IDENTITY" WOULDN'T HELP

8. It would be no answer for that hypothetical transgender boy to insist that "I really *am* a boy, who should have access to my school's single-sex boys' showers,

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[10] Again, this example would work precisely the same with all roles reversed.

locker rooms, and bathrooms." *Title IX prohibits sex discrimination, not discrimination between different kinds of boys (or different kinds of girls).* Whatever one chooses to call this kind of discrimination, it can't be called *sex* discrimination, because—even accepting the hypothetical transgender individual's assertion—it would remain discrimination between individuals stipulated to share the same sex. It cannot, then, violate Title IX.

IV. STEP 9: RE-INTERPRETING "SEX" TO MEAN "GENDER-IDENTITY" COULD NOT BE LIMITED AS THE PLAINTIFFS PROPOSE

9. If—as various lower courts contend—Title IX prohibits as "sex discrimination" the exclusion of a biological girl (who identifies as a boy) from the boys' facilities, then it follows that *all* girls must be allowed to use the boys' facilities. Title IX would then prohibit the maintenance of single-sex facilities *entirely* and *require* that all facilities be unisex.

It is of no moment that the plaintiffs in these cases have not sought to do away with boys' and girls' bathrooms, locker rooms, and showers. Whatever they've asked for, Title IX allows no third construction. Either: (1) it allows schools to maintain separate facilities for the biological sexes under § 1686 and the 1975 Regulation; or (2) those exceptions somehow don't apply, and Title IX forbids them from maintaining separate facilities for the biological sexes.

V. STEP 10: READING TITLE IX TO ALLOW FEDERAL FUNDING RECIPIENTS TO PURSUE DIFFERENT BATHROOM POLICIES

10. It is worth noting that while we read Title IX not to *require* federal funding recipients to assign transgender individuals to the facilities set aside for the sex they identify with, simultaneously, it arguably does not *constrain* the ability of any federal funding recipient to: (a) do so; (b) establish solely unisex bathrooms; or (c) separate bathrooms, locker rooms, and showers on any other basis. Should a school choose to establish separate bathrooms for the left- and right-handed or for students whose surnames all begin with particular letters, those decisions might be odd, but they wouldn't entail sex discrimination, so Title IX would have nothing to say about the matter.[11]

CONCLUSION

Plaintiffs, and the court of appeals who have similarly erred, simply misstate governing statutory law and the relevance of *Bostock*'s. This Court should affirm the District Court, rather than embracing its sister courts' error.[12]

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[11] Given established racial and national-origin disparities in handedness and in the distribution of surnames across their first letters, such policies could be indicative of the kind of intentional discrimination forbidden by Title VI. Gail L. Heriot, *Title VII Disparate Impact Liability Makes Almost Everything Presumptively Illegal*, 14 NYU J.L.& Liberty 1 (Jan 1, 2020). We are unaware of any documented sex-differences in the allocation of handedness or surnames that would make such policies implicate Title IX.

[12] Plaintiffs' opening brief (at 16) misleadingly characterizes this Court's holding in *Grabowski v. Ariz. Bd. of Regents*, 69 F.4th 1110 (9th Cir. 2023). There, a panel

This Court should reject Plaintiffs' call to join the wrong side of the circuit split.

Date: December 27, 2023

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of this Court held that sexual-orientation discrimination is a form of "sex discrimination" under Title IX. *Id.* at 1116. That holding is wholly consistent with the argument laid out in this brief, since Title XI (unlike Title VII) permits sex discrimination in the bathroom context.

CERTIFICATE OF COMPLIANCE

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