

IN THE SUPREME COURT OF THE STATE OF ALASKA

X.A., a minor, by and through P.A.,)
his father and M.A., his mother,)
)
Appellant,)
)
v.)
)
Matanuska-Susitna Borough School)
District,)
)
Appellee.)

Supreme Court No. S-19582

Trial Court Case No. 3PA-24-01525CI

APPEAL FROM THE SUPERIOR COURT,
THIRD JUDICIAL DISTRICT AT PALMER,
THE HONORABLE TOM V. JAMGOCHIAN, SUPERIOR COURT JUDGE

**BRIEF OF AMICUS STATE OF ALASKA
IN SUPPORT OF APPELLEE**

STEPHEN J. COX
ATTORNEY GENERAL

/s/ Jenna M. Lorence
Jenna M. Lorence (NA21783)
Solicitor General
Jessica M. Alloway (1205045)
Deputy Solicitor General
Department of Law
1031 West Fourth Avenue, Ste. 200
Anchorage, AK 99501
(907) 269-5100

Filed in the Supreme Court
of the State of Alaska
on April _____, 2026.

MEREDITH MONTGOMERY, CLERK
Appellate Courts

By: _____
Deputy Clerk

TABLE OF CONTENTS

TABLE OF AUTHORITIES..... ii

AUTHORITIES PRINCIPALLY RELIED UPON v

ISSUE PRESENTED 1

INTERESTS OF *AMICUS CURIAE* 1

INTRODUCTION 1

ARGUMENT..... 3

 I. The district’s policy treats similarly situated people the same. 3

 A. Biological boys and biological girls are not similarly situated for the
 purpose of bathroom privacy. 4

 B. The district’s policy treats everyone the same. 5

 II. Preserving sex-specific intimate spaces does not discriminate on the basis
 of sex. 7

 III. The district’s policy protects student privacy and autonomy..... 15

 A. The policy protects all students’ rights to privacy 15

 B. The policy protects all students’ rights to autonomy. 17

 IV. The policy survives any level of scrutiny..... 20

CONCLUSION 24

TABLE OF AUTHORITIES

Cases

<i>A.C. by M.C. v. Metropolitan Sch. Dist. of Martinsville</i> , 75 F.4th 760 (7th Cir. 2023).....	8, 22
<i>Adams by & through Kasper v. Sch. Bd. of St. Johns Cnty.</i> , 57 F.4th 791 (11th Cir. 2022) (en banc).....	15, 22
<i>Alaska Dep’t of Revenue v. Cosio</i> , 858 P.2d 621 (Alaska 1993).....	20
<i>Barron v. State</i> , 823 P.2d 17 (Alaska Ct. App. 1992)	15
<i>Black v. Mun. of Anchorage, Bd. of Equalization</i> , 187 P.3d 1096 (Alaska 2008).....	3, 4
<i>Bostock v. Clayton Cnty.</i> , 590 U.S. 644 (2020)	10, 11, 12
<i>B.P.J. by Jackson v. W. Va. Bd. of Educ.</i> , 98 F.4th 542 (4th Cir. 2024).....	10
<i>Breese v. Smith</i> , 501 P.2d 159 (Alaska 1972).....	20
<i>Bridge on behalf of Bridge v. Okla. State Dep’t of Educ.</i> , 711 F.Supp.3d 1289 (W.D. Okla. 2024)	21
<i>City of Cleburne v. Cleburne Living Ctr.</i> , 473 U.S. 432 (1985)	14
<i>Craig v. Boren</i> , 429 U.S. 190 (1976)	14, 20
<i>Doe No. 1 v. Bethel Loc. Sch. Dist. Bd. of Educ.</i> , 2023 WL 5018511 (S.D. Ohio Aug. 7, 2023)	16
<i>Doe by & through Doe v. Boyertown Area Sch. Dist.</i> , 897 F.3d 518 (3d Cir. 2018).....	5, 16
<i>D.P. by A.B. v. Mukwonago Area Sch. Dist.</i> , 2025 WL 1794428 (7th Cir. June 30, 2025).....	8
<i>Frontiero v. Richardson</i> , 411 U.S. 677 (1973)	12
<i>Geduldig v. Aiello</i> , 417 U.S. 484 (1974)	9, 10

<i>Grimm v. Gloucester Cnty. Sch. Bd.</i> , 972 F.3d 586 (4th Cir. 2020).....	5, 9, 10, 15, 22
<i>K.C. v. Individual Members of Med. Licensing Bd. of Ind.</i> , 121 F.4th 604 (7th Cir. 2024).....	8
<i>Loving v. Virginia</i> , 388 U.S. 1 (1967)	14
<i>McLean v. State</i> , 583 P.2d 867 (Alaska 1978).....	21
<i>N.H. v. Anoka-Hennipin Sch. Dist. No. 11</i> , 950 N.W.2d 553 (Minn. Ct. App. 2020)	22
<i>Oncale v. Sundowner Offshore Servs., Inc.</i> , 523 U.S. 75 (1998)	11
<i>Ondo v. City of Cleveland</i> , 795 F.3d 597 (6th Cir. 2015).....	5
<i>Roe v. Critchfield</i> , 137 F.4th 912 (9th Cir. 2025).....	4, 16, 20, 23
<i>Sessions v. Morales-Santan</i> , 582 U.S. 47 (2017)	12, 13
<i>Silver Bow Const. v. State Dep’t of Admin., Div. of Gen. Servs.</i> , 330 P.3d 922 (Alaska 2014).....	3, 7
<i>Smith v. Thompson</i> , 923 P.2d 101 (Alaska 1996).....	15
<i>Sonneman v. State</i> , 969 P.2d 632 (Alaska 1998).....	18
<i>State v. Planned Parenthood of Alaska</i> , 35 P.3d 30 (Alaska 2001).....	19
<i>State v. Planned Parenthood of Alaska</i> , 171 P.3d 577 (Alaska 2007).....	19
<i>State v. Planned Parenthood of the Great N.W.</i> , 436 P.3d 984 (Alaska 2019).....	18, 19
<i>State Dep’t of Health & Soc. Servs. v. Planned Parenthood of Alaska, Inc.</i> , 28 P.3d 904 (Alaska 2001).....	19
<i>Treacy v. Mun. of Anchorage</i> , 91 P.3d 252 (Alaska 2004).....	20
<i>United States v. Skrmetti</i> , 605 U.S. 495 (2025)	5, 7, 8, 9, 10, 22

<i>United States v. Virginia</i> , 518 U.S. 515 (1996)	4, 7, 14, 20
<i>Valley Hosp. Ass’n., Inc. v. Mat-su Coalition for Choice</i> , 948 P.2d 963 (Alaska 1997)	19
<i>Watson v. State</i> , 487 P.3d 568 (Alaska 2021)	3
<i>Weinberger v. Wisenfeld</i> , 420 U.S. 636 (1975)	12
<i>Whitaker ex rel. Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.</i> , 858 F.3d 1034 (7th Cir. 2017)	8, 22

Constitutional Provisions

Alaska Const. art. I, Section 1	3
---------------------------------------	---

Other Authorities

Matanuska-Susitna Borough School District Board Policy 5134	1, 6, 17
<i>Selina S. v. Daniel Driscoll</i> , EEOC Appeal No. 2025003976 (Feb. 26, 2026)	12, 14, 23

AUTHORITIES PRINCIPALLY RELIED UPON

Constitutional provisions:

Alaska Const. art. I, § 1, Inherent Rights

This constitution is dedicated to the principles that all persons have a natural right to life, liberty, the pursuit of happiness, and the enjoyment of the rewards of their own industry; that all persons are equal and entitled to equal rights, opportunities, and protection under the law; and that all persons have corresponding obligations to the people and to the State.

ISSUE PRESENTED

Whether sex-specific intimate spaces are consistent with the Alaska Constitution's guarantees of Equal Protection, Autonomy, and Privacy.

INTERESTS OF *AMICUS CURIAE*

The State of Alaska has an interest in the proper interpretation of its constitution, consistent with its text, history, and structure. The State also has an interest in the uniform development of Alaska constitutional law. The question in this case goes to foundational issues about Alaskans' rights, and the State has an interest in weighing in on the consistent application of these constitutional principles.

INTRODUCTION

Until recently, dividing multi-occupancy bathrooms by sex was unremarkable. Sex-specific bathrooms make sense—the physical differences between men and women are “enduring,” so men and women need privacy while using the restroom because they want a private area to perform various hygiene activities without the opposite sex observing or overhearing them. This privacy interest is heightened in the school setting, as children mature and learn how to navigate bodily functions outside the home.

Policies like Matanuska-Susitna Borough School District Board Policy 5134 recognize this reality, and guarantee that all children, teachers, and others at the school will have access to a single-sex bathroom. The policy also recognizes that some people may not wish to use that multi-occupancy bathroom and provides an alternative: anyone may use a single-occupancy bathroom if they prefer.

In this case, a student is asking for an exception to this across-the-board rule. But nothing in the Alaska Constitution requires that exception. A rule that applies to everyone does not treat similarly situated students differently. Nor does it discriminate on the basis of sex, because all students have access to both a sex-specific multi-occupancy bathroom and single-occupancy bathrooms. The rule accommodates all students' rights to privacy and autonomy by avoiding any intrusive questions about gender identity or improper stereotypes based on how a person chooses to dress or wear his hair. The school's policy satisfies any level of scrutiny, and any of the proposed alternatives would raise new constitutional questions. The superior court should be affirmed.

ARGUMENT

I. The district’s policy treats similarly situated people the same.¹

This Court has a well-established framework for deciding equal protection² cases.³ The threshold question for these claims “is whether similarly situated groups are being treated differently.”⁴ If two groups “are not ‘similarly situated,’ this conclusion ‘necessarily implies that the different legal treatment of the two classes is justified by the differences between the two classes.’”⁵ And even if the groups are similarly situated, if “there is no unequal treatment, there can be no violation of the right to equal protection of law. In the absence of any evidence of disparate treatment, there is no basis for an equal protection claim.”⁶ Here, the two groups X.A. has identified (transgender-identifying boys

¹ X.A. has disclaimed any challenge to the district’s protection of single-sex spaces for “changing areas, such as locker rooms.” X.A. Br. at 2 n.2. However, X.A. does not explain why any of the equal protection or sex-discrimination arguments offered would be limited to the bathroom setting. While the State’s arguments here focus on bathrooms, these same arguments regarding the policy, equal protection, and sex discrimination apply with equal force to the other intimate areas separated by sex.

² Alaska Const. art. I, Section 1.

³ While the Alaska Constitution’s guarantee of equal protection is not the same as that in the U.S. Constitution, *Watson v. State*, 487 P.3d 568, 570 (Alaska 2021), the United States Supreme Court is currently considering a case addressing whether sex-specific sports teams violate the federal Equal Protection Clause, and a decision is expected by this summer. *Little v. Hecox*, No. 24-38 (2025) (argued Jan. 13, 2026). Regardless of how the U.S. Supreme Court resolves the case, this Court may want to wait for that decision to detail how the Alaska Constitution either aligns or diverges from the federal constitution’s guarantees.

⁴ *Black v. Mun. of Anchorage, Bd. of Equalization*, 187 P.3d 1096, 1102 (Alaska, 2008).

⁵ *Id.*

⁶ *Silver Bow Const. v. State Dep’t of Admin., Div. of Gen. Servs.*, 330 P.3d 922, 925 (Alaska 2014).

and biological boys) are not similarly situated. In any event, the policy treats all students the same, so no equal protection violation exists.

A. Biological boys and biological girls are not similarly situated for the purpose of bathroom privacy.

For an equal protection claim, the constitution requires this Court to first determine whether two groups are similarly situated.⁷ Here, biological boys and biological girls are not similarly situated for the purpose of privacy in bathrooms. As Justice Ruth Bader Ginsburg recognized in *United States v. Virginia*, the “physical differences between men and women, however, are enduring,” and “the two sexes are not fungible.”⁸ Privacy while using the bathroom is “especially important for school-aged children who are still developing mentally, physically, emotionally, and socially[.]”⁹ Asking children “to expose their bodies to students of the opposite sex (or to be exposed to the bodies of the opposite sex) brings heightened levels of stress.”¹⁰ As discussed further *infra* at 22–23, these privacy interests are implicated even in bathrooms with individual stalls. Contrary to X.A.’s assertion, people do not only “wash their hands” in the public area of a sex-specific bathroom—they might change certain items of clothing or engage in other

⁷ *Black*, 187 P.3d at 1102.

⁸ 518 U.S. 515, 533 (1996).

⁹ *Roe v. Critchfield*, 137 F.4th 912, 924 (9th Cir. 2025) (describing district court’s reasoning upholding sex-specific bathrooms and locker rooms).

¹⁰ *Id.* (quotation omitted).

medical, grooming, or hygiene activities that they would like to keep private from the opposite sex.¹¹

Sorting bathrooms by gender identity would not fulfill the goal of the regulation. Unlike sex, which is established by a person’s DNA,¹² gender identity may fluctuate over time.¹³ Even if that identity remains constant, people may have “diverse gender experiences,”¹⁴ whether they identify as the opposite sex, non-binary, or have an identity that “belie[s] gender norms.”¹⁵ Because the purpose served by the long-standing and near universal practice of single-sex multi-occupancy bathrooms is protecting the privacy of one biological sex from the other, a transgender-identifying boy or girl is not similarly situated to children who identify as their sex.

B. The district’s policy treats everyone the same.

Even if transgender-identifying boys are similarly situated to biological boys (or transgender-identifying girls to biological girls), the policy treats everyone equally. All students (and employees or visitors) have access to a bathroom “for the exclusive use of

¹¹ See *Doe by & through Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518, 531 (3d Cir. 2018).

¹² *United States v. Skrametti*, 605 U.S. 495, 550 (Barrett., J., concurring) (sex is a trait “definitively ascertainable at the moment of birth”) (quoting *Ondo v. City of Cleveland*, 795 F.3d 597, 609 (6th Cir. 2015)).

¹³ *Id.* (explaining that plaintiffs in *Skrametti* “began to experience gender dysphoria at varying ages,” and that all parties agreed that “some transgender individuals ‘detransition’ later in life”).

¹⁴ *Id.* at 551 (citing the World Professional Association for Transgender Health)

¹⁵ *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 596 (4th Cir. 2020) (citing PFLAG National Glossary of Terms (July 2019)).

the male sex” or “for the exclusive use of the female sex.”¹⁶ If “any individual” does not wish to use that bathroom, the school “shall provide a reasonable accommodation,” which is “access to a single-occupancy restroom.”¹⁷ The policy does not require that individual to offer any reason for this request. The policy applies with equal force to a student who does not want to use the girls’ bathroom because of previous bullying, a teacher who would like additional privacy from his students, a student who does not want to disclose his medical condition to classmates, or a visitor who does not want to interact with children in the communal bathroom. And the exceptions to the policy—allowing entrance to bathrooms or changing rooms of the opposite sex also apply to everyone. The policy does not apply when someone is entering for “custodial, maintenance, inspection purposes, or safety” or to “render emergency medical assistance.”¹⁸ Nothing in the policy turns on anyone’s gender identity.

X.A.’s assertion is simply incorrect, then, that the policy divides people into groups that “may use the school restrooms that are consistent with their gender identity” and those who may not.¹⁹ The policy does not address any person’s gender identity. And for some students, neither bathroom will be “consistent with their gender identity” because that identity does not fit into the male or female binary. Rather, the policy sets

¹⁶ Matanuska-Susitna Borough School District Board Policy 5134.2.

¹⁷ *Id.*

¹⁸ Board Policy 5134.3.

¹⁹ X.A. Br. at 28.

aside specific bathrooms for each sex and allows “any individual” to use a single-occupancy bathroom for any reason. Instead of making inquiries about someone’s gender identity (or worse, using improper stereotypes regarding hair length or gender expression) to decide which bathroom someone may use,²⁰ the school has set an objective standard of sex, with a universal opt-out for all people using the school’s bathrooms, regardless of their gender identity.

Because the law does not treat anyone differently, “there can be no basis for an equal protection claim.”²¹ The Court need not extend its analysis any further than to decide that there is no equal protection violation here.

II. Preserving sex-specific intimate spaces does not discriminate on the basis of sex.

1. A law discriminates on the basis of sex (triggering heightened scrutiny) only if it “prohibit[s] conduct for one sex that it permits for the other.”²² The United States Supreme Court has rejected X.A.’s argument that even if a policy treats everyone equally, it is sex-based discrimination if it merely references sex.²³ In *Skrmetti*, the Court was considering Tennessee’s law that banned using puberty blockers and hormones to treat gender dysphoria.²⁴ The Court declined to adopt the argument that the law

²⁰ *Virginia*, 518 U.S. at 541 (explaining that state actors may not rely on stereotypes to divide men and women).

²¹ *Silver Bow Const.*, 330 P.3d at 925.

²² *Skrmetti*, 605 U.S. at 514.

²³ *Id.* at 496.

²⁴ *Id.* at 515.

discriminated on the basis of sex because some biological boys could receive testosterone to treat hormone imbalances, but a biological girl could not receive the same prescription to treat gender dysphoria. Rather, under the law, “no minor may be administered puberty blockers or hormones to treat gender dysphoria, ... minors of *any sex* may be administered puberty blockers or hormones for other purposes.”²⁵ So too here. No person at the school may use a bathroom inconsistent with his or her sex. The policy applies “regardless of whether the [student] is a boy or a girl.”²⁶ And *any* person who wishes to use a bathroom other than the one consistent with his or her sex will be provided with an accommodation.

X.A. asks this Court to follow the Seventh Circuit’s opinions in *A.C. by M.C. v. Metropolitan School District of Martinsville*²⁷ and *Whitaker ex rel. Whitaker v. Kenosha Unified School District No. 1 Board of Education*.²⁸ But the reasoning in those cases cannot survive after *Skrmetti*. Once *Skrmetti* was decided, the Seventh Circuit *sua sponte* vacated its most recent opinion affirming the reasoning of *A.C.* and *Whitaker*, and granted rehearing to consider whether *Skrmetti* required the court to overrule those cases.²⁹ While the court did not ultimately reach that issue because the district court dissolved the

²⁵ *Id.*

²⁶ *K.C. v. Individual Members of Med. Licensing Bd. of Ind.*, 121 F.4th 604, 617 (7th Cir. 2024) (upholding law barring cross-sex hormones or puberty blockers to treat gender dysphoria in minors).

²⁷ 75 F.4th 760 (7th Cir. 2023).

²⁸ 858 F.3d 1034 (7th Cir. 2017).

²⁹ *D.P. by A.B. v. Mukwonago Area Sch. Dist.*, 2025 WL 1794428, at *1 (7th Cir. June 30, 2025).

preliminary injunction,³⁰ this Court should be wary of adopting reasoning that the Seventh Circuit itself sees as questionable post- *Skrmetti*.

Geduldig v. Aiello also spelled out the rule for determining whether sex discrimination exists by explaining that when a policy divides people into two groups, the question is whether either sex is part of both groups.³¹ In that case, the law limited insurance coverage for pregnancy. While only women were in the group of pregnant employees, both men and women were in the “nonpregnant” group.³² Because both men and women had access to one of the groups, there was not discrimination on the basis of sex.³³ In this case, the analogy is even more clear. The policy divides the students into two groups: students who wish to use a multi-occupancy bathroom consistent with their sex and those who wish to use a single-occupancy bathroom instead. Neither group is sex-specific: both boys and girls are part of both groups.

This type of across-the-board policy differs significantly from the practice challenged in *Grimm*, a case on which X.A. relies.³⁴ There, the school “did not create a policy” that applied to all students (or even all transgender-identifying students), it solely governed one student’s bathroom use.³⁵ The policy here is different. Like the laws in

³⁰ See Order, No. 23-2568 (7th Cir. Aug. 26, 2025) (ECF No. 87).

³¹ 417 U.S. 484, 496–97 (1974).

³² *Id.* at 496 n.20.

³³ *Id.*

³⁴ 972 F.3d at 586.

³⁵ *Id.* at 615 (noting that the policy was “not readily applicable to other students” but had been adopted only to respond to “Grimm’s presence”).

Skrmetti and *Geduldig*, the policy creates categories that contain both sexes and any gender identity. No students—whether boys, girls, students who identify as transgender, or those who identify as something else—may access the bathrooms reserved for the opposite sex. And all students—regardless of gender identity or sex—may use a single-occupancy bathroom if they do not wish to use the bathroom reserved for their sex. So the law equally burdens and benefits students belonging to different sexes and identities, demonstrating that the law does not classify based on sex or gender identity. Even if *Grimm* were analogous, it also is a tenuous precedent on which to base this Court’s decision about Alaska’s constitution. While *Grimm* has not been overruled, it formed the basis for the Fourth Circuit’s reasoning in *B.P.J. by Jackson v. West Virginia Board of Education*.³⁶ The U.S. Supreme Court has since granted certiorari.³⁷ It is likely that the opinion in that case will provide considerable guidance on whether *Grimm* remains good law.

2. Nor does a Title VII employment discrimination case—*Bostock v. Clayton County*—require this Court to apply heightened scrutiny to sex-specific bathrooms.³⁸ *Bostock* does not control the outcome here for three independent reasons. First, as X.A. notes, *Bostock* specifically abstained from “address[ing] bathrooms, locker rooms, or

³⁶ 98 F.4th 542 (4th Cir. 2024) (invalidating West Virginia law that limited girls’ sports teams by sex).

³⁷ *West Virginia v. B.P.J.*, No. 24-43 (argued Jan. 13, 2026).

³⁸ *Contra* X.A. Br. at 36–37.

anything else of the kind.”³⁹ If *Bostock*’s reasoning *necessarily* applies to bathroom and other intimate spaces, as X.A. argues,⁴⁰ it would be strange for the Supreme Court to explicitly set aside that issue for another day.

Second, *Bostock*’s reasoning was specifically tied to the text of Title VII, not the U.S. Constitution—and certainly not the Alaska constitution’s protections. Even under Title VII, discrimination only occurs when “members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.”⁴¹ But here, “members of one sex” are not “exposed to disadvantageous terms or conditions” by requiring students to use sex-specific bathrooms. Biological boys (however they identify) must use the boys’ bathroom, and biological girls (however they identify) must use the girls’ bathroom. And any student, regardless of sex, may use the single-occupancy restroom for any reason, again, however he or she identifies. The type of concern that Title VII protects against would only come up if, for example, the policy allowed male students to use sex-specific bathrooms and any single-occupancy bathroom they wanted, but denied female students the same option, forcing them to only use sex-specific bathrooms.

Third and finally, the Equal Employment Opportunity Commission, which is tasked with enforcing Title VII, has recently decided “that Title VII permits a federal

³⁹ X.A. Br. at 37 n.60 (quoting *Bostock*, 590 U.S. at 644, 681 (2020)).

⁴⁰ X.A. Br. at 36–37.

⁴¹ *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998).

agency employer to maintain single-sex bathrooms and similar intimate spaces.”⁴² While the EEOC’s interpretation is not binding, its thorough discussion explains why employment decisions are entirely different than providing sex-specific intimate spaces. In part, this is because women and girls have a heightened interest in single-sex privacy to attend to hygiene “related to menstruation, pregnancy, or lactation,” which boys and men do not experience.⁴³ The decision notes that if *Bostock*’s reasoning were extended to bathrooms and intimate spaces, “it would be unlawful to even have men’s and women’s bathrooms in the first place.”⁴⁴

3. The contrast between the remedies in cases where courts have found that sex-discrimination exists and X.A.’s proposed remedy further shows why the policy does not discriminate on the basis of sex. In most improper sex-based classification cases, the solution is to eliminate the distinction between the sexes, not to allow some people exceptions to a sex-specific policy. For example, in *Weinberger v. Wiesenfeld*, a widower challenged a law which only offered Social Security benefits to “mothers.”⁴⁵ The solution was not to reclassify the widower as a “mother,” but instead to eliminate the distinction between mothers and fathers altogether.⁴⁶ Or in *Sessions v. Morales-Santan*, immigration

⁴² *Selina S. v Daniel Driscoll*, EEOC Appeal No. 2025003976, Decision at 3, 14 (Feb. 26, 2026) (available at <https://www.eeoc.gov/sites/default/files/2026-02/2025003976.pdf>).

⁴³ *Id.* at 19.

⁴⁴ *Id.* at 7.

⁴⁵ 420 U.S. 636 (1975).

⁴⁶ *Weinberger*, 420 U.S. at 653; *see also Frontiero v. Richardson*, 411 U.S. 677, 688 (1973) (rejecting distinction in a law that assumed “female spouses of servicemen would

laws had different residency requirements for unwed fathers and mothers when attaining citizenship for persons born abroad.⁴⁷ The solution there was not to reclassify the unwed father as an unwed mother, but to eliminate any distinction between the two.⁴⁸

But here, X.A. has not requested the school eliminate the distinction between boys' and girls' bathrooms. Instead, X.A. has requested an injunction barring the school "from treating X.A. differently from other boys in any respect, including but not limited to by denying X.A. equal access to the boy's restrooms within the district on the same terms as all other boys."⁴⁹ X.A. is not objecting to dividing boys and girls into separate groups, X.A. simply wishes the school used different criteria to do so. X.A. has not argued that the differences between boys and girls are so immaterial in the bathroom context that there is no purpose in providing sex-specific spaces for children at school. Rather, X.A. is asking for a specific exception for transgender-identifying students to be the sole subset of people who may use either sex-specific bathroom in the district.⁵⁰

normally be dependent upon their husbands, while male spouses of servicewomen would not").

⁴⁷ 582 U.S. 47, 53 (2017).

⁴⁸ *Id.* at 77.

⁴⁹ Complaint at 39 (Jan. 31, 2024).

⁵⁰ X.A. does suggest (at 48) that schools *could* provide gender neutral communal bathrooms with fully enclosed individual stalls. As explained *infra*, that solution raises its own issues. But X.A. has not argued that the constitution's guarantee of equal protection bars schools from providing sex-specific bathrooms at all.

Adopting X.A.’s gender-identity rule would create more sex-discrimination and equal protection issues than it would solve. Under X.A.’s proposed rule, similarly situated biological boys would be treated differently. A boy who identifies as a boy but wants to use the girls’ bathroom because he is more comfortable in the company of his sister could not. But his classmate, a biological boy who identifies as a girl, *would* be permitted to use the bathroom the first boy is barred from. X.A. suggests that students are only “comfortable” sharing a bathroom with people who “present[.]” consistent with their sex.⁵¹ But allowing students to use a sex-specific bathroom, regardless of sex, so long as they presented as sufficiently “male” or “female” would actually create the type of “social stereotypes” long rejected as sex-discrimination.⁵² People’s clothing style, hair length, or interests do not determine their sex.

In short, the school’s across-the-board policy does not discriminate on the basis of sex.⁵³ It does not provide any benefits to one sex that it denies to another. Because there is no sex discrimination, there is also no need for the Court to provide an advisory

⁵¹ X.A. Br. at 29.

⁵² *Craig v. Boren*, 429 U.S. 190, 202 n.14 (1976).

⁵³ X.A.’s aside comparing segregated bathrooms with sex-specific bathrooms is also unavailing. X.A. Br. at 49–50. As Justice Ginsburg recognized, “[p]hysical differences between men and women . . . are enduring,” *Virginia*, 518 U.S. at 533. But any racial differences between two men or two women “are literally skin-deep” and “there can be no doubt that members of different races are similarly situated” when it comes to bathrooms. *Selina S. v. Driscoll*, Decision at 23. There is not a “legitimate overriding purpose” to segregating bathrooms by race. *Loving v. Virginia*, 388 U.S. 1, 11 (1967). But separating bathrooms by sex, with each sex’s unique privacy concerns, are different: a “sign that says ‘men only’ looks very different on a bathroom door than a courthouse door.” *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 468–69 (1985) (Marshall, J., concurring in part).

opinion to decide what level of scrutiny applies to sex discrimination claims under the Alaska Constitution.⁵⁴

III. The district’s policy protects student privacy and autonomy.

A. The policy protects all students’ rights to privacy.

Regardless of their gender identity, “students have a privacy interest in their body when they go to the bathroom.”⁵⁵ Courts in Alaska have previously recognized—in the Fourth Amendment context—that there is some expectation of privacy within a public restroom.⁵⁶ However, that privacy “is limited by the fact that the restroom is in a public area and one’s behavior is subject to the observations of others who are in the public area.”⁵⁷ So, for example, students may still notice that X.A. never used a urinal.⁵⁸ And students may still overhear private information, like alerts from a student checking his medical device, or a student’s request for menstrual products—even if all students remain within individual stalls the entire time.

This reality—that people may be observed either in some state of undress or otherwise seeking some level of privacy—is why schools have provided sex-specific areas to protect students’ interests in “shielding their bodies from the opposite sex.”⁵⁹ It is

⁵⁴ See *Smith v. Thompson*, 923 P.2d 101, 104 n.4 (Alaska 1996) (“This court need not decide an issue unnecessary to the resolution of the case.”).

⁵⁵ *Grimm*, 972 F.3d at 613.

⁵⁶ *Barron v. State*, 823 P.2d 17, 20 (Alaska Ct. App. 1992).

⁵⁷ *Id.*

⁵⁸ School District Br. at 31 (Mar. 11, 2026).

⁵⁹ *Adams by & through Kasper v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 804 (11th Cir. 2022) (en banc).

“especially important for school-aged children who are still developing” to maintain spaces separate from “students of the opposite sex.”⁶⁰ Given that “locker rooms and restrooms are spaces where it is not only common to encounter others in various stages of undress, [but] it is expected,”⁶¹ schools that do not provide sex-specific spaces for students compromise privacy and safety.⁶² Further, the lack of sex-specific spaces may raise other constitutional concerns.⁶³

In any event, the issue here is not the school district’s policy. The policy does not require any disclosure of a student’s gender identity. As explained above, any person, including any student, may access a single-use bathroom. Here, other students use the single-use bathrooms and that option is available to every student.⁶⁴ It is not even clear

⁶⁰ *Roe*, 137 F.4th at 924.

⁶¹ *Doe by & through Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518, 531 (3rd Cir. 2018).

⁶² X.A. disclaims (at 2 n.2) any challenge to sex-specific locker rooms. However, if the Court adopts XA’s position that any student’s “non-use” of a sex-specific bathroom triggers a privacy or autonomy concern, it is difficult to see why that same reasoning would not apply to any other sex-specific space, including locker rooms or housing arrangements on school trips.

⁶³ For example, some religious students may object to sharing bathrooms with opposite-sex students, regardless of gender identity. *See, e.g., Doe No. 1 v. Bethel Loc. Sch. Dist. Bd. of Educ.*, No. 3:22-cv-337, 2023 WL 5018511, at *5 (S.D. Ohio Aug. 7, 2023) (describing how “Muslim parents contend that it is a sincere part of their faith to raise their children in a manner that does not put them in contact with members of the opposite biological sex in school bathrooms”).

⁶⁴ Order Denying Injunction at 5 (July 30, 2025) (explaining that it is a “general practice” for students to use the nurses’ single-occupancy bathroom, and “a variety of students” do so).

that X.A.’s requested remedy (allowing X.A. access to the boys’ bathroom)⁶⁵ would actually stop other students from discovering X.A.’s transgender identity.⁶⁶ Any alleged instances in which X.A.’s transgender status was disclosed reflect questions of implementation, not the constitutional validity of the *policy*. If anything, the facts here counsel encouraging teachers to explain the full contours of the policy to students: people may use a single-occupancy bathroom for a variety of private reasons, and any of the students may receive that accommodation if they would like.

B. The policy protects all students’ rights to autonomy.

The policy does not implicate the Constitution’s protection of liberty and autonomy either. The policy is silent as to how students may dress, keep their hair, or express their gender identity—whether that is consistent with the student’s sex, with the opposite sex, or with some other gender identity that is neither male nor female.⁶⁷ X.A. does not dispute the district court’s conclusion that the school district has never restricted “X.A.’s outward gender presentation.”⁶⁸ Rather, X.A. argues that the policy deters students from dressing in accordance with their gender identity, even though X.A. continues to present as a boy with the policy in place.⁶⁹ That possibility of deterrence

⁶⁵ Compl. at 39.

⁶⁶ See School District Br. at 31 (explaining that students may still have questions because X.A. will never use the urinal in the boys’ bathroom).

⁶⁷ Board Policy 5134.2.

⁶⁸ X.A. Br. at 30.

⁶⁹ *Id.* at 31.

(that has not been borne out) is insufficient to infringe on the right to autonomy and trigger strict scrutiny.

Every law necessarily restricts a person’s autonomy to some degree. And while this Court has recognized that autonomy is a fundamental right, “not every burden on [a fundamental right]” (in that case, voting) “is subject to strict scrutiny.”⁷⁰ Because this Court does not subject every government action to strict scrutiny, its language regarding *burdening* a fundamental right must mean something more than merely *implicating* a fundamental right. None of the cases cited by X.A. support extending this Court’s abortion precedent to bar a school from providing sex-specific facilities for students. In each of those cases, the burden imposed by the government erected an insurmountable barrier to accessing abortions even if it did not include an outright ban on abortion. No such insurmountable barrier (like financial duress or a parental veto) to expressing one’s gender identity exists here.

For example, in *Planned Parenthood 2019*, the government’s action needed to “effectively deter[] the exercise” of the specific right to trigger heightened scrutiny—in that case, by funding childbirth but not abortion via Medicaid.⁷¹ But the “deterrent” was not as simple as causing some women to consider childbirth over abortion, rather, it made it so that “a woman who cannot afford a medical abortion *must* carry her pregnancy

⁷⁰ *Sonneman v. State*, 969 P.2d 632, 637 (Alaska 1998) (incidental burdens on the right to vote subject only to intermediate scrutiny).

⁷¹ *State v. Planned Parenthood of the Great N.W.*, 436 P.3d 984, 1001, 1003 (Alaska 2019).

to term.”⁷² The Court concluded that the law there “effectively deterred” women from abortion because it left those women with only one other option—childbirth.⁷³ Here, the exact opposite is true: X.A. has not been deterred from presenting as a boy throughout X.A.’s tenure at the current school. Or in *Planned Parenthood 2001* and *Planned Parenthood 2007*, a law “place[d] a burden on” minors’ abortions because it gave parents “veto power” over abortion decisions.⁷⁴ No one here has “veto power” over X.A.’s expression of gender identity. Or a quasi-public hospital’s decision to bar elective abortion was subject to strict scrutiny because its policy fully “preclude[d] elective abortions” there.⁷⁵ The policy here does nothing to limit students, including X.A., from expressing gender identities that differ from their sex.

If anything, X.A.’s proposed rule (allowing students to choose a bathroom based on whether the boys or girls who generally use that bathroom are “comfortable” with that use)⁷⁶ could create autonomy concerns. The government may not premise sex-specific restrictions on “overbroad generalizations about the different talents, capacities, or

⁷² *Id.* at 1003 (emphasis added).

⁷³ *See also State Dep’t of Health & Soc. Servs. v. Planned Parenthood of Alaska, Inc.*, 28 P.3d 904 (Alaska 2001) (addressing a similar funding provision).

⁷⁴ *State v. Planned Parenthood of Alaska*, 171 P.3d 577, 581, 583 (Alaska 2007); *State v. Planned Parenthood of Alaska*, 35 P.3d 30, 41 (Alaska 2001) (reviewing earlier version of parental consent law).

⁷⁵ *Valley Hosp. Ass’n, Inc. v. Mat-Su Coalition for Choice*, 948 P.2d 963, 971 (Alaska 1997).

⁷⁶ X.A. Br. at 29.

preferences of males and females.”⁷⁷ Requiring students to present as sufficiently feminine before they may use the girls’ bathroom is exactly the type of policy based on outdated, overbroad generalizations that this Court invalidated in *Breese v. Smith*.⁷⁸ The policy avoids these issues by setting no rules on how any student chooses to express their gender identity. Because there is no limit on X.A.’s autonomy to express any gender identity, there is no limit on X.A.’s right to autonomy.

IV. The policy survives any level of scrutiny.

There is no need to subject the policy to any heightened level of scrutiny. But if the Court decides to do so, the policy survives either heightened or strict scrutiny. All parties agree that the district’s interest in protecting student privacy is compelling. So the only question is whether the policy is “substantially related”⁷⁹ to that interest, or whether it is the “least restrictive means”⁸⁰ to vindicate that interest.

The policy here is substantially related to the district’s interest in protecting privacy. Like the Ninth Circuit when it denied a preliminary injunction regarding a similar bathroom policy in Idaho,⁸¹ the superior court agreed that “[t]he universally accepted principle that protecting individual privacy may sometimes necessitate

⁷⁷ *Virginia*, 518 U.S. at 533; see also *Craig*, 429 U.S. at 213 n.5 (Stevens, J., concurring) (rejecting “stereotyped attitudes” about young men and young women for purposes of alcohol sales).

⁷⁸ 501 P.2d 159 (Alaska 1972) (invalidating school policy barring boys from wearing their hair long).

⁷⁹ *Alaska Dep’t of Revenue v. Cosio*, 858 P.2d 621, 629 (Alaska 1993).

⁸⁰ *Treacy v. Mun. of Anchorage*, 91 P.3d 252, 266 (Alaska 2004).

⁸¹ *Roe*, 137 F.4th at 925–26.

separation by sex is indisputable.”⁸² That conforms with this Court’s previous caselaw regarding sex-discrimination claims. In *McLean v. State*, several women sued the state ferry system because men were hired to work on ferry system vessels over them.⁸³ The Court agreed that the women had been discriminated against on the basis of sex. However, it affirmed that the State had valid concerns about providing separate spaces for both men and women—it merely directed the State to use its “creative imagination” to shift crewmembers between vessels to ensure that both men and women had private spaces to use.⁸⁴ The policy here achieves the same goal: it ensures that all students have a sex-specific space to use the bathroom in private. And it gives anyone the option to opt for a single-use bathroom if they wish.

Likewise, the policy satisfies strict scrutiny because it is the least restrictive means to achieve the State’s privacy interest. None of X.A.’s purported alternatives would achieve the goal of protecting students’ privacy in a bathroom without implicating other serious concerns. Adopting X.A.’s proposed policy based on gender identity, not sex, “would put school officials in the position of either having to conduct a subjective analysis of the sincerity of an individual’s gender identity or merely take their word for it.”⁸⁵ Instead of following the “unremarkable—and nearly universal—practice” of

⁸² Order Denying Injunction at 15.

⁸³ 583 P.2d 867 (Alaska 1978).

⁸⁴ *Id.* at 872.

⁸⁵ *Bridge on behalf of Bridge v. Okla. State Dep’t of Educ.*, 711 F.Supp.3d 1289, 1297 (W.D. Okla. 2024).

providing sex-specific bathrooms,⁸⁶ the district would have to use sex-based stereotypes to inquire into students', teachers', and visitors' gender identities.

X.A. argues that, so long as bathrooms have stalls, those stalls “provide complete privacy.”⁸⁷ But there are three reasons why separate bathroom stalls within a sex-specific restroom do not achieve the government’s admittedly compelling interest in protecting student privacy.

First, while some bathrooms have fully enclosed stalls with no gaps between the doors and walls or floor, that is not true of the bathrooms in X.A.’s schools. Stalls provide students with some measure of privacy, but they do not provide complete privacy. Those outside the stalls may still glimpse their occupants—unintentionally or otherwise—above or below the stalls or through gaps in stall doors. Students can still hear anything that occurs within the stall. Further, men’s and boys’ restrooms include urinals outside of fully enclosed stalls (and some do not include any dividers between urinals at all), meaning that boys and men using urinals do not have the privacy protection of a stall.⁸⁸

⁸⁶ *Adams by & through Kasper v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 796 (11th Cir. 2022) (en banc).

⁸⁷ X.A. Br. at 47.

⁸⁸ X.A. again relies on *Grimm, A.C.*, and *Whitaker* to assert that bathroom stalls are private. Regardless of whether these cases remain good law, *see supra* at 8–9, there is no need for the Court to adopt the factual determinations of other courts when the Court can assess for itself whether it is true that a public bathroom stall provides “complete privacy.” And, other pre-*Skrametti* cases applying intermediate scrutiny to this issue are of little help here. *See, e.g.*, X.A. Br. at 38, n.83 (citing *N.H. v. Anoka-Hennipin Sch. Dist. No. 11*, 950 N.W.2d 553, 571 (Minn. Ct. App. 2020) (applying Minnesota state constitution guarantee of equal protection)).

Second, even if bathroom stalls did provide complete privacy, the government’s interest in protecting the privacy of the sexes is not limited only to those activities that occur within an enclosed stall. There are many reasons why someone may want privacy from the opposite sex even if he or she is not using a toilet. For example, someone may want to check a medical device, fix a broken zipper, or ask for assistance with menstrual products in a sex-specific environment. This privacy interest is especially pressing for “school-aged children who are still developing mentally, physically, emotionally, and socially.”⁸⁹ And it is also “heightened for women attending to hygiene related to menstruation, pregnancy, or lactation,” so girls and women often “expect to manage their unique needs in a space accessible only to other women.”⁹⁰ While this particular case is about an elementary-aged student, school bathrooms are not solely used by pre-pubescent children, and therefore these concerns still hamper X.A.’s proposed rule.

Third, X.A. provides two alternatives that are unworkable here. For one, it strains credulity to argue that the only way to avoid a constitutional issue regarding bathroom use is for schools to completely renovate their current bathrooms “to create gender-neutral common bathrooms with fully enclosed stalls.”⁹¹ And such a bathroom, while it could protect students’ privacy in the stall, does nothing to protect their privacy while they engage in other activities detailed above where they may wish to be shielded from the opposite sex without being in a stall with a toilet. Nor do “centrally located communal

⁸⁹ *Roe*, 137 F.4th at 924.

⁹⁰ *Selina S. v. Driscoll*, EEOC Decision at 19.

⁹¹ X.A. Br. at 48.

bathrooms” with other, sex-specific bathrooms solve the problem as X.A. frames it.⁹² If the issue is that “children are observant” and the constitution is implicated if a student notices that X.A. does not use the boys’ bathroom,⁹³ *any* sex-specific bathrooms would violate the constitution under X.A.’s test.

The policy is the least restrictive means to both protect the privacy of sex-specific spaces and provide any person access to a single-use bathroom.

CONCLUSION

The Court should affirm the decision of the superior court.

⁹² *Id.*

⁹³ X.A. Br. at 34