18-13592-EE

IN THE

United States Court of Appeals for the Eleventh Circuit

DREW ADAMS,
Plaintiff-Appellee,

v.

THE SCHOOL BOARD OF ST. JOHNS COUNTY, FLORIDA,
Defendant-Appellant.

On Appeal from the United States District Court
for the Middle District of Florida, Jacksonville Division
District Court Case No. 3:17-cv-00739-TJC-JBT

EN BANC BRIEF OF APPELLEE DREW ADAMS

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Adams v. The School Board of St. Johns County, Florida
Appeal No. 18-13592-EE

APPELLEE'S CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Eleventh Circuit Rules 26.1-1 through 26.1-3, and 28-1(b), Appellee certifies that the name of each person, attorney, association of persons, firm, law firm, partnership, and corporation that has or may have an interest in the outcome of this action—including subsidiaries, conglomerates, affiliates, parent corporations, publicly-traded companies that own 10% or more of a party's stock, and all other identifiable legal entities related to any party in the case—includes the following:

1. AAPL – *Amicus Curiae*
2. A Better Balance – *Amicus Curiae*
3. Aberli, Thomas A. – Witness for Appellee
4. Achievement First Public Charter Schools – District Court Proposed *Amicus Curiae*
5. ACLU Foundation – Counsel for *Amicus Curiae*
6. ACLU of Florida – Counsel for *Amicus Curiae*
7. Adams, Drew (now, Andrew) – Appellee
8. Adams, Scott – Appellee's Father
9. Adkins, Deanna, M.D. – Expert witness for Appellee
10. ADL – *Amicus Curiae*

11. Advocates for Youth – *Amicus Curiae*

12. Akin Gump Strauss Hauer & Feld LLP – Counsel for *Amicus Curiae*

13. Alger, Maureen P. – Counsel for *Amicus Curiae*

14. Allen, Tommy – Board Member of Appellant

15. Alliance Defending Freedom – Counsel for *Amicus Curiae*

16. Altman, Jennifer G. – Counsel for Appellee

17. Amend, Andrew W. – Counsel for *Amicus Curiae*

18. American Academy of Child and Adolescent Psychiatry (AACAP) – *Amicus Curiae*

19. American Academy of Nursing – *Amicus Curiae*

20. American Academy of Pediatrics – *Amicus Curiae*

21. American Association of Child and Adolescent Psychiatry – *Amicus Curiae*

22. American Association of University Women – *Amicus Curiae*

23. American College of Physicians – *Amicus Curiae*

24. American Medical Association – *Amicus Curiae*

25. American Medical Women's Association – *Amicus Curiae*

26. American Nurses Association – *Amicus Curiae*

27. American School Counselor Association – *Amicus Curiae*

28. Association of Medical School Pediatric Department Chairs – District Court *Amicus Curiae*

29. Atlanta Women for Equality – *Amicus Curiae*

30. Banks, Emily – District Court Proposed *Amicus Curiae*

31. Barden, Robert Chris – Counsel for Appellant, Terminated

32. Barrera, Kelly – Board Member of Appellant

33. Barth, Morgan – District Court Proposed *Amicus Curiae*

34. Baxter, Rosanne C. – Counsel for *Amicus Curiae*

35. Bazer, Beth – District Court Proposed *Amicus Curiae*

36. Bazer, Morgan – *Amicus Curiae*

37. BCC – *Amicus Curiae*

38. Bean, Daniel – Counsel for District Court *Amicus Curiae*

39. Berlow, Clifford W. – Counsel for *Amicus Curiae,* Terminated

40. Bertschi, Craig – Counsel for *Amicus Curiae*

41. Beth Chayim Chadashim – *Amicus Curiae*

42. Binning, Sara R. – Counsel for *Amicus Curiae*

43. Blau, Zachary S. – Counsel for *Amicus Curiae*

44. Block, Joshua A. – Counsel for *Amicus Curiae*

45. Blumstein, Andrée S. – Counsel for *Amicus Curiae the State of Tennessee*

46. Boies, Schiller & Flexner, LLP – Counsel for *Amicus Curiae*

47. Borelli, Tara L. – Counsel for Appellee

48. Boston Area Rape Crisis Center – *Amicus Curiae*

49. Bourgeois, Roger – *Amicus Curiae*

50. Brnovich, Mark – Counsel for *Amicus Curiae* the State of Arizona

51. Brown, Meredith Taylor – Counsel for *Appellee,* Terminated

52. Bruce, Diana K. – District Court Proposed *Amicus Curiae*

53. Brysacz, Benjamin J. – Counsel for District Court *Amicus Curiae*

54. Buckeye Region Anti-Violence Organization, a Program of Equitas Health – *Amicus Curiae*

55. Bursch, John – Counsel for *Amicus Curiae*

56. California Women Lawyers – *Amicus Curiae*

57. California Women's Law Center – *Amicus Curiae*

58. Cameron, Daniel – Counsel for *Amicus Curiae* the Commonwealth of Kentucky

59. Campbell, James A. – Counsel for *Amicus Curiae*

60. Campbell, Sarah K. – Counsel for *Amicus Curiae* the State of Tennessee

61. Canan, Patrick – Board Member of Appellant

62. Carney, Karen – *Amicus Curiae*

63. Carpenter, Christopher S., Ph.D. – *Amicus Curiae*

64. Carr, Christopher M. – Counsel for *Amicus Curiae* the State of Georgia

65. Carter, Heidi – *Amicus Curiae*

66. Casa de Esperanza: National Latina Network for Healthy Families and Communities – *Amicus Curiae*

67. Castillo, Paul D. – Counsel for Appellee

68. Cease, Caroline C. – Counsel for *Amicus Curiae*

69. Center for Constitutional Rights – *Amicus Curiae*

70. Center for Religious Expression – Counsel for *Amicus Curiae*

71. Center for Reproductive Rights – *Amicus Curiae*

72. Central Conference of American Rabbis – *Amicus Curiae*

73. Champion Women – *Amicus Curiae*

74. Chandy, Sunu P. – Counsel for *Amicus Curiae*

75. Chang, Tommy – District Court Proposed *Amicus Curiae*

76. Chapman, Peyton – District Court Proposed *Amicus Curiae*

77. Chaudhry, Neena – Counsel for *Amicus Curiae*

78. Coalition of Black Trade Unionists – *Amicus Curiae*

79. Coleman, Arthur L. – Counsel for *Amicus Curiae*

80. Coleman Sr., Anthony E. – Board Member of Appellant

81. Colter, Howard – District Court Proposed *Amicus Curiae*

82. Columbia Law School Sexuality and Gender Law Clinic – Counsel for *Amicus Curiae*

83. Commonwealth of Kentucky – *Amicus Curiae*

84. Conron, Kerith J., M.P.H., Sc.D. – *Amicus Curiae*

85. Cooley LLP – Counsel for *Amicus Curiae*

86. Copsey, Alan D. – Counsel for *Amicus Curiae*

87. Corrigan, Hon., Timothy J. – United States District Judge

88. Cyra, Sherri – *Amicus Curiae*

89. Dasgupta, Anisha S. – Counsel for *Amicus Curiae*

90. Davis, Bryan – District Court Proposed *Amicus Curiae*

91. Davis, Steven W. – Counsel for *Amicus Curiae*

92. Day One – *Amicus Curiae*

93. DC Coalition Against Domestic Violence – *Amicus Curiae*

94. DeSelm, Lizbeth – *Amicus Curiae*

95. DiBenedetto, Arthur – District Court Proposed *Amicus Curiae*

96. Disability Rights Education and Defense Fund – *Amicus Curiae*

97. District of Columbia – *Amicus Curiae*

98. Doolittle, Kirsten L. – Counsel for Appellee

99. Doran, Mary – *Amicus Curiae*

100. Doss, Eric – District Court Proposed *Amicus Curiae*

101. Dwyer, John C. – Counsel for *Amicus Curiae*

102. Dyer, Karen – Counsel for District Court Proposed *Amicus Curiae*

103. Eaton, Mary – Counsel for *Amicus Curiae*

104. Education Counsel, LLC – Counsel for *Amicus Curiae*

105. Ehrensaft, Diane, Ph.D. – Expert witness for Appellee

106. Empire Justice Center – *Amicus Curiae*

107. Endocrine Society – *Amicus Curiae*

108. Eppink, Samuel T., Ph.D. – *Amicus Curiae*

109. Equal Rights Advocates – *Amicus Curiae*

110. Equality California – *Amicus Curiae*

111. Ewing, Gregory – *Amicus Curiae*

112. Family Values @ Work – *Amicus Curiae*

113. Ferguson, Robert W. – Counsel for *Amicus Curiae*

114. Fitch, Lynn – Counsel for *Amicus Curiae* the State of Mississippi

115. Flores, Andrew R., Ph.D. – *Amicus Curiae*

116. Florida School Boards Insurance Trust – Insurance Carrier for Appellant

117. FORGE, Inc. – *Amicus Curiae*

118. Forson, James (Tim) – Superintendent of the St. Johns County School District

119. Fountain, Lisa Barclay – Counsel for Appellant

120. Flynn, Diana K. – Counsel for Appellee

121. Gartrell, M.D., Nanette – *Amicus Curiae*

122. Gates, Gary J., Ph.D. – *Amicus Curiae*

123. Gender Based Violence Organizations – *Amicus Curiae*

124. Gender Diversity – *Amicus Curiae*

125. Gender Justice – *Amicus Curiae*

126. Gender Spectrum – *Amicus Curiae*

127. Generales, Markos C. – Counsel for *Amicus Curiae*

128. Girls for Gender Equity – *Amicus Curiae*

129. Girls Inc. – *Amicus Curiae*

130. GLMA – Health Professionals Advancing LGBT Equality – *Amicus Curiae*

131. GLSEN – *Amicus Curiae*

132. Goldberg, Suzanne B. – Counsel for *Amicus Curiae*

133. Gonzalez, Gilbert, Ph.D., M.H.A. – *Amicus Curiae*

134. Gonzalez-Pagan, Omar – Counsel for Appellee

135. Goss Graves, Fatima (National Women's Law Center) – Counsel for *Amicus Curiae*

136. Graves, Fatima Goss – Counsel for *Amicus Curiae*

137. Greer, Eldridge – *Amicus Curiae*

138. Grijalva, Adelita – *Amicus Curiae*

139. Grossman, Miriam – *Amicus Curiae*

140. Gurtner, Jill – *Amicus Curiae*

141. Haney, Matthew – *Amicus Curiae*

142. Hansen, Jeffrey E. – *Amicus Curiae*

143. Hargis, Kellie M. – *Amicus Curiae*

144. Harmon, Terry J. – Counsel for Appellant

145. Harrington, Emily – Counsel for *Amicus Curiae*

146. Haynes, Patricia O. – Counsel for *Amicus Curiae*

147. Herman, Jody L., Ph.D. – *Amicus Curiae*

148. Heyer, Walt – *Amicus Curiae*

149. Hildabrand, Clark L. – Counsel for *Amicus Curiae* the State of Tennessee

150. Hohs, Sherie – *Amicus Curiae*

151. Holland & Knight, LLP – Counsel for District Court *Amicus Curiae*

152. Holloway, Ian W., Ph.D., M.S.W., M.P.H. – *Amicus Curiae*

153. Hughes, Paul W. – Counsel for *Amicus Curiae*

154. Ifill, Sherrilyn A. – Counsel for *Amicus Curiae*

155. Illinois Accountability Initiative – *Amicus Curiae*

156. In Our Own Voice: National Black Women's Reproductive Justice Agenda – *Amicus Curiae*

157. Iowa Coalition Against Sexual Assault – *Amicus Curiae*

158. Jacksonville Area Sexual Minority Youth Network, Inc. – *Amicus Curiae*

159. James, Letitia – Counsel for *Amicus Curiae*

160. Jenner & Block, LLP – Counsel for *Amicus Curiae*

161. Kaplan, Aryeh L. – Counsel for Appellee

162. Kasper, Erica Adams – Appellee's Next Friend and Mother

163. Kefford, Michelle – Principal of Charles W. Flanagan High School

164. Kellum, Nathan W. – Counsel for *Amicus Curiae*

165. Kenney, Tim – *Amicus Curiae*

166. Kimberly, Michael B. – Counsel for *Amicus Curiae*

167. Kirkland, Earl – Counsel for *Amicus Curiae*

168. Knudsen, Austin – Counsel for *Amicus Curiae* the State of Montana

169. Kogan, Terry S., Ph.D. – *Amicus Curiae*

170. Kostelnik, Kevin C. – Counsel for Appellant, Terminated

171. Kunin, Ken – *Amicus Curiae*

172. Kunze, Lisa – Principal of Allen D. Nease High School

173. Laidlaw, Michael K. – *Amicus Curiae*

174. Lambda Legal Defense and Education Fund, Inc. – Counsel for Appellee

175. Landry, Jeff – Counsel for *Amicus Curiae* the State of Louisiana

176. Lapointe, Markenzy – Counsel for Appellee

177. Las Cruces Public Schools – *Amicus Curiae*

178. LatinoJustice PRLDEF – *Amicus Curiae*

179. Law Office of Kirsten Doolittle, P.A. – Counsel for Appellee

180. Lawyers Club of San Diego – *Amicus Curiae*

181. Lee, Jin Hee – Counsel for *Amicus Curiae*

182. Legal Aid At Work – *Amicus Curiae*

183. Legal Momentum, the Women's Legal Defense and Education Fund – *Amicus Curiae*

184. Legal Voice – *Amicus Curiae*

185. Los Angeles Unified School District – *Amicus Curiae*

186. Louisiana Foundation Against Sexual Assault – *Amicus Curiae*

187. Love, Laura H. – *Amicus Curiae*

188. MacKenzie, Dominic C. – Counsel for *Amicus Curiae*

189. Majeski, Jeremy – *Amicus Curiae*

190. Mallory, Christy – *Amicus Curiae*

191. Martin, Emily – Counsel for *Amicus Curiae*

192. Mayer Brown LLP – Counsel for *Amicus Curiae*

193. McCaleb, Gary S. – Counsel for *Amicus Curiae*

194. McCalla, Craig – *Amicus Curiae*

195. McRae Bertschi & Cole LLC – Counsel for *Amicus Curiae*

196. Meece, Gregory R. – District Court Proposed *Amicus Curiae*

197. Meerkamper, Shawn – Counsel for *Amicus Curiae*

198. Melody, Colleen M. – Counsel for *Amicus Curiae*

199. Mesa, David – Counsel for *Amicus Curiae*

200. Meyer, Ilan H., Ph.D. – *Amicus Curiae*

201. Michigan Coalition to End Domestic & Sexual Violence – *Amicus Curiae*

202. Mignon, Bill – Board Member of Appellant

203. Miller, William C. – Counsel for Appellee

204. Minter, Shannon – Counsel for *Amicus Curiae*

205. Mittelstadt, Cathy Ann – Deputy Superintendent for Operations of St. Johns County School District

206. Morrisey, Patrick – Counsel for *Amicus Curiae* the State of West Virginia

207. Morse, James C., Sr. – *Amicus Curiae*

208. Munson, Ziad W. – *Amicus Curiae*

209. Murray, Kerrel – Counsel for *Amicus Curiae*

210. NAACP Legal Defense & Educational Fund, Inc. – *Amicus Curiae*

211. Nardecchia, Natalie – Counsel for Appellee, Terminated

212. National Alliance to End Sexual Violence – *Amicus Curiae*

213. National Asian Pacific American Women's Forum – *Amicus Curiae*

214. National Association of School Psychologists – *Amicus Curiae*

215. National Association of Social Workers – *Amicus Curiae*

216. National Association of Women Lawyers – *Amicus Curiae*

217. National Center for Law and Economic Justice – *Amicus Curiae*

218. National Center for Lesbian Rights – Counsel for *Amicus Curiae*

219. National Center for Transgender Equality – *Amicus Curiae*

220. National Coalition Against Domestic Violence – *Amicus Curiae*

221. National Council of Jewish Women – *Amicus Curiae*

222. National Crittenton – *Amicus Curiae*

223. National LGBTQ Task Force – *Amicus Curiae*

224. National Organization for Women Foundation – *Amicus Curiae*

225. National PTA – *Amicus Curiae*

226. National Resource Center on Domestic Violence – *Amicus Curiae*

227. National Women's Law Center – Counsel for *Amicus Curiae*

228. Nebraska Coalition to End Domestic and Sexual Violence – *Amicus Curiae*

229. Nelson, Janai S. – Counsel for *Amicus Curiae*

230. Nevada Coalition to End Domestic and Sexual Violence – *Amicus Curiae*

231. New Hampshire Coalition Against Domestic and Sexual Violence – *Amicus Curiae*

232. New Mexico Coalition of Sexual Assault Programs, Inc. – *Amicus Curiae*

233. New York State Coalition Against Sexual Assault – *Amicus Curiae*

234. Northern Marianas Coalition Against Domestic & Sexual Violence – *Amicus Curiae*

235. Oasis Legal Services – *Amicus Curiae*

236. OGC Law, LLC – Counsel for *Amicus Curiae*

237. Ohio Alliance to End Sexual Violence – *Amicus Curiae*

238. Oregon Coalition Against Domestic & Sexual Violence – *Amicus Curiae*

239. Orr, Asaf – Counsel for *Amicus Curiae*

240. O'Connor, John M. – Counsel for *Amicus Curiae* the State of Oklahoma

241. O'Melveny & Myers LLP – Counsel for *Amicus Curiae*

242. O'Reilly, John – *Amicus Curiae*

243. Palacios, Patricia – Counsel for *Amicus Curiae*

244. Palazzo, Denise – *Amicus Curiae*

245. Parent-Child Center – *Amicus Curiae*

246. Paxton, Ken – Counsel for *Amicus Curiae* the State of Texas

247. Pediatric Endocrine Society – District Court *Amicus Curiae*

248. Peterson, Douglas J. – Counsel for *Amicus Curiae* the State of Nebraska

249. PFLAG, Inc. – *Amicus Curiae*

250. Pierce, Jerome – Counsel for *Amicus Curiae*

251. Pillsbury Winthrop Shaw Pittman LLP – Counsel for Appellee

252. Pincus, Andrew J. – Counsel for *Amicus Curiae*

253. Planned Parenthood Federation of America, Inc.: Parent company of Planned Parenthood of South, East and North Florida and Planned Parenthood of Southwest and Central Florida – *Amicus Curiae*

254. Planned Parenthood of South, East and North Florida – *Amicus Curiae*

255. Planned Parenthood of Southwest and Central Florida – *Amicus Curiae*

256. Pollock, Lindsey – *Amicus Curiae*

257. Portnoi, Dimitri D. – Counsel for *Amicus Curiae*

258. Powell, Wesley R. – Counsel for *Amicus Curiae*

259. Purcell, Noah G. – Counsel for *Amicus Curiae*

260. Ranck-Buhr, Wendy – *Amicus Curiae*

261. Rao, Devi M. – Counsel for *Amicus Curiae*

262. Rape/Domestic Abuse Program – *Amicus Curiae*

263. Ravnsborg, Jason R. – Counsel for *Amicus Curiae* the State of South Dakota

264. RC Barden and Associates – Counsel for Appellant, Terminated

265. Retzlaff, Pamela – *Amicus Curiae*

266. Reynolds, Andrew, Ph.D. – *Amicus Curiae*

267. Rivaux, Shani – Counsel for Appellee

268. Robertson, Cynthia Cook – Counsel for Appellee

269. Rokita, Theodore E. – Counsel for *Amicus Curiae* the State of Indiana

270. Rothfeld, Charles A. – Counsel for *Amicus Curiae*

271. Rutledge, Leslie – Counsel for *Amicus Curiae* the State of Arkansas

272. Samuels, Jocelyn – *Amicus Curiae*

273. San Diego Cooperative Charter Schools – District Court Proposed *Amicus Curiae*

274. Santa, Rachel – *Amicus Curiae*

275. SASA Crisis Center – *Amicus Curiae*

276. Schaffer, Brian – *Amicus Curiae*

277. Schmidt, Derek – Counsel for *Amicus Curiae* the State of Kansas

278. Schmitt, Eric S. – Counsel for *Amicus Curiae* the State of Missouri

279. Scholars Who Study The Transgender Population – *Amicus Curiae*

280. Schommer, Monica – *Amicus Curiae*

281. School District of South Orange and Maplewood – District Court Proposed *Amicus Curiae*

282. Sears, R. Bradley – *Amicus Curiae*

283. Segal, Richard M. – Counsel for Appellee

284. Shah, Paru – *Amicus Curiae*

285. Shirk, Sarah – *Amicus Curiae*

286. SisterReach – *Amicus Curiae*

287. Slanker, Jeffrey D. – Counsel for Appellant

288. Slatery III, Herbert H. – Counsel for *Amicus Curiae* the State of Tennessee

289. Slavin, Alexander – Counsel for *Amicus Curiae*

290. Slough, Beverly – Board Member of Appellant

291. Smith, Nathaniel R. – Counsel for Appellee

292. Smith, Sallyanne – Former Director of Student Services for St. Johns County School District

293. Sniffen, Robert J. – Counsel for Appellant

294. Sniffen & Spellman, P.A. – Counsel for Appellant

295. Spellman, Michael P. – Counsel for Appellant

296. Spital, Samuel – Counsel for *Amicus Curiae*

297. Spryszak, Delois Cooke – District Court Proposed *Amicus Curiae*

298. SSAIS.org – *Amicus Curiae*

299. State of Arizona – *Amicus Curiae*

300. State of Arkansas – *Amicus Curiae*

301. State of California – *Amicus Curiae*

302. State of Connecticut – *Amicus Curiae*

303. State of Delaware – *Amicus Curiae*

304. State of Georgia – *Amicus Curiae*

305. State of Hawai'i – *Amicus Curiae*

306. State of Illinois – *Amicus Curiae*

307. State of Indiana – *Amicus Curiae*

308. State of Iowa – *Amicus Curiae*

309. State of Kansas – *Amicus Curiae*

310. State of Louisiana – *Amicus Curiae*

311. State of Maine – *Amicus Curiae*

312. State of Maryland – *Amicus Curiae*

313. State of Massachusetts – *Amicus Curiae*

314. State of Michigan – *Amicus Curiae*

315. State of Minnesota – *Amicus Curiae*

316. State of Mississippi – *Amicus Curiae*

317. State of Missouri – *Amicus Curiae*

318. State of Montana – *Amicus Curiae*

319. State of Nebraska – *Amicus Curiae*

320. State of New Jersey – *Amicus Curiae*

321. State of New Mexico – *Amicus Curiae*

322. State of New York – *Amicus Curiae*

323. State of Ohio – *Amicus Curiae*

324. State Oklahoma – *Amicus Curiae*

325. State of Oregon – *Amicus Curiae*

326. State of Pennsylvania – *Amicus Curiae*

327. State of Rhode Island – *Amicus Curiae*

328. State of South Carolina – *Amicus Curiae*

329. State of South Dakota – *Amicus Curiae*

330. State of Tennessee – *Amicus Curiae*

331. State of Texas – *Amicus Curiae*

332. State of Vermont – *Amicus Curiae*

333. State of Virginia – *Amicus Curiae*

334. State of Washington – *Amicus Curiae*

335. State of West Virginia – *Amicus Curiae*

336. Steptoe & Johnson LLP – Counsel for *Amicus Curiae*

337. Stop Sexual Assault in Schools (SSAIS.org) – *Amicus Curiae*

338. SurvJustice – *Amicus Curiae*

339. Sutherland, Emily – District Court Proposed *Amicus Curiae*

340. Taymore, Cyndy – *Amicus Curiae*

341. Teufel, Gregory H. – Counsel for *Amicus Curiae*

342. The American Academy of Pediatrics – *Amicus Curiae*

343. The Impact Fund – *Amicus Curiae*

344. The Law Office of Kirsten Doolittle, P.A. – Counsel for Appellee

345. The School Board of St. Johns County, Florida – Appellant

346. The Southwest Women's Law Center – *Amicus Curiae*

347. The Women's Law Center of Maryland – *Amicus Curiae*

348. Tilley, Daniel B. – Counsel for *Amicus Curiae*

349. Toomey, Joel – Magistrate Judge

350. Trans Youth Equality Foundation – *Amicus Curiae*

351. Transgender Law Center – Counsel for *Amicus Curiae*

352. Tyler & Bursch, LLP – Counsel for *Amicus Curiae*

353. Tyler, Robert H. – Counsel for *Amicus Curiae*

354. Tysse, James E. – Counsel for *Amicus Curiae*

355. Underwood, Barbara D. – Counsel for *Amicus Curiae*

356. Union for Reform Judaism – *Amicus Curiae*

357. UniteWomen.org – *Amicus Curiae*

358. Upchurch, Bailey & Upchurch, P.A. – General Counsel to Appellant

359. Upchurch, Frank D. – General Counsel to Appellant

360. Valbrun-Pope, Michaelle – Executive Director of Student Support Initiative for Broward County Public Schools

361. Van Meter, Quentin L. – *Amicus Curiae*

362. Van Mol, Andre – *Amicus Curiae*

363. Vannasdall, David – *Amicus Curiae*

364. Vaughn, Craig – *Amicus Curiae*

365. Vermont Network Against Domestic & Sexual Violence – *Amicus Curiae*

366. Virginia Sexual & Domestic Violence Action Alliance – *Amicus Curiae*

367. Vitale, Julie – District Court Proposed *Amicus Curiae*

368. Voices of Hope – *Amicus Curiae*

369. Wallace, Matthew M. – Counsel for *Amicus Curiae*

370. Washoe County School District – *Amicus Curiae*

371. Weber, Thomas – *Amicus Curiae*

372. Weisel, Jessica M. – Counsel for *Amicus Curiae*

373. Wilkens, Scott B. – Counsel for District Court *Amicus Curiae*

374. Williams Institute, UCLA School of Law – *Amicus Curiae*

375. Willkie Farr & Gallagher LLP – Counsel for *Amicus Curiae*

376. Wilson, Alan – Counsel for *Amicus Curiae* the State of South Carolina

377. Wilson, Bianca D.M., Ph.D. – *Amicus Curiae*

378. Wisconsin Coalition Against Sexual Assault – *Amicus Curiae*

379. Women of Reform Judaism, and Men of Reform Judaism – *Amicus Curiae*

380. Women Lawyers on Guard Inc. – *Amicus Curiae*

381. Women's Bar Association of the District of Columbia – *Amicus Curiae*

382. Women's Bar Association of the State of New York – *Amicus Curiae*

383. Women's Center for Advancement – *Amicus Curiae*

384. Women's Law Project – *Amicus Curiae*

385. Women's Law Project and Young Women United – *Amicus Curiae*

386. Women Lawyers On Guard Inc. – *Amicus Curiae*

387. Women's Legal Defense and Education Fund – *Amicus Curiae*

388. Women's Liberation Front – *Amicus Curiae*

389. Wong, Kyle – Counsel for *Amicus Curiae*

390. Wyoming Coalition Against Domestic Violence and Sexual Assault – *Amicus Curiae*

391. Yost, Dave – Counsel for *Amicus Curiae* the State of Ohio

392. Young Women United – *Amicus Curiae*

The undersigned certifies that no publicly-traded company or corporation has an interest in the outcome of the case or appeal. The undersigned has previously entered this information into the web-based stock ticker symbol CIP, indicating that there is nothing to declare, and that web-based certification remains accurate as of the submission of this brief.

Dated: November 26, 2021

/s/ Tara L. Borelli
Tara L. Borelli
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STATEMENT REGARDING ORAL ARGUMENT

Oral argument will be conducted the week of February 21, 2022 in Atlanta, Georgia.

TABLE OF CONTENTS

APPELLEE'S CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT C-1

STATEMENT REGARDING ORAL ARGUMENT i

TABLE OF CONTENTS..... ii

TABLE OF AUTHORITIES v

STATEMENT OF ISSUES 1

STATEMENT OF THE CASE.....2

I. COURSE OF PROCEEDINGS AND DISPOSITIONS BELOW.....3

II. STATEMENT OF FACTS.....4

A. Medical Care for Transgender Adolescents.....5

B. Andrew's Identity and Transition. 7

C. Defendant Expels Andrew From the Boys' Restrooms.....9

1. Defendant's Written Guidelines.....10

2. Defendant's Unwritten Policy that Boys Use the Boys' Restrooms and Girls Use the Girls' Restrooms 12

D. The Harms Visited on Andrew by Defendant's Restroom Policy.....15

E. Defendant's Purported Governmental Interests 17

F. Testimony from Officials at Schools with Policies That Treat Transgender Students Equally 19

III. STANDARD OF REVIEW 20

SUMMARY OF THE ARGUMENT 21

ARGUMENT 22

I. TREATING ANDREW DIFFERENTLY FROM OTHER BOYS BY EXCLUDING HIM FROM THE BOYS' RESTROOMS VIOLATED ANDREW'S RIGHT TO EQUAL PROTECTION 22

A. Andrew is Similarly Situated to Other Boys in Every Material Respect with Regard to the Use of Boys' Restrooms. 22

B. Defendant's Exclusion of Andrew from the Boys' Restroom Discriminates Against Him Both Expressly and Intentionally.....26

C. Heightened Scrutiny Applies 30

1. The Exclusion Discriminates Against Andrew Based on Sex.....31

2. The Exclusion Discriminates Against Andrew Based on Transgender Status.....33

II. THE DISTRICT COURT PROPERLY APPLIED HEIGHTENED SCRUTINY AND REJECTED DEFENDANT'S PURPORTED GOVERNMENTAL INTEREST 34

III. *BOSTOCK'S* REASONING MUST ALSO DIRECT THIS COURT'S ANALYSIS UNDER TITLE IX 39

A. The District Court Correctly Found That Defendant Violated Title IX by Subjecting Andrew to Sex Discrimination.....40

B. Defendant's Policy Subjected Andrew to Worse Treatment Than Other Boys 43

C. Andrew Suffered Objective, Individualized Harm From Being Excluded From the Boys' Restroom 45

D. Title IX's Regulation Authorizing Separate Facilities Does Not Permit Sex Discrimination Against Transgender Students.....49

E. Defendant Advances the Same Errors Rejected in *Bostock*.....51

F. Recognizing That Title IX Protects Transgender Students Does Not Violate the Spending Clause 53

CONCLUSION 55

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT, TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS 57

CERTIFICATE OF SERVICE 58

TABLE OF AUTHORITIES

Page(s)

Cases

Adkins v. City of New York,
143 F. Supp. 3d 134 (S.D.N.Y. 2015) 34

Anderson v. Bessemer City,
470 U.S. 564 (1985).....44

Baumann v. Savers Federal Sav. & Loan Ass'n,
934 F.2d 1506 (11th Cir. 1991) 54

Bennett v. Ky. Dep't of Educ.,
470 U.S. 656 (1985).....54

Benning v. Georgia,
391 F.3d 1299 (11th Cir. 2004) 54

Bd. of Educ. of the Highland Loc. Sch. Dist. v. United States Dep't of Educ.,
208 F. Supp. 3d 850 (S.D. Ohio 2016) 34

**Bostock v. Clayton Cty.*,
140 S. Ct. 1731 (2020)..... passim

Bowers v. Bd. of Regents of Univ. Sys. of Ga.,
509 F. App'x 906 (11th Cir. 2013) (per curiam) 39-40

Bray v. Alexandria Women's Health Clinic,
506 U.S. 263 (1993).....30

**Burlington Northern & Santa Fe Railway Co. v. Sheila White*,
548 U.S. 53 (2006)..... 45, 48

Chaney v. Plainfield Healthcare Ctr.,
612 F.3d 908 (7th Cir. 2010) 37

City of Cleburne, Tex. v. Cleburne Living Ctr.,
473 U.S. 432 (1985).....23

City of Los Angeles. v. Patel,
135 S. Ct. 2443 (2015) 22

City of Los Angeles Dept. of Water and Power v. Manhart,
435 U.S. 702 (1978) 25

Cruzan v. Special Sch. Dist., #1,
294 F.3d 981 (8th Cir. 2002) (per curiam) 36

Cumbey v. Meachum,
684 F.2d 712 (10th Cir. 1982) 37

Davis v. Monroe Cty. Bd. of Educ.,
526 U.S. 629 (1999) ..... passim

Dodds v. United States Dep't of Educ.,
845 F.3d 217 (6th Cir. 2016) 36, 47

Doe v. Boyertown Area School Dist.,
897 F.3d 518 (3d Cir. 2018) 36, 48

Eggleston v. Bieluch,
203 Fed. Appx. 257 (11th Cir. 2006) 44

Elllis v. Gen. Motors Acceptance Corp.,
160 F.3d 703 (11th Cir. 1998) 50

Evancho v. Pine-Richland Sch. Dist.,
237 F. Supp. 3d 267 (W.D. Pa. 2017) 34

F.V. v. Barron,
286 F. Supp. 3d 1131 (D. Idaho 2018) 34

Fabian v. Hosp. of Cent. Connecticut,
172 F. Supp. 3d 509 (D. Conn. 2016) 25

Faulkner v. Jones,
10 F.3d 226 (4th Cir. 1993) 36

Flack v. Wis. Dep't of Health Servs.,
328 F. Supp. 3d 931 (W.D. Wis. 2018) 34

Flanigan's Enterprises, Inc. of Ga. v. City of Sandy Springs, Ga.,
868 F.3d 1248 (11th Cir. 2017) 3

Franklin v. Gwinnett Cty. Pub., Schs.,
503 U.S. 60 (1992).....39

Frontiero v. Richardson,
411 U.S. 677 (1973).....29

Gebser v. Lago Vista Indep. Sch. Dist.,
524 U.S. 274 (1998).....41

Geduldig v. Aiello,
417 U.S. 484 (1974).....30

**Glenn v. Brumby*,
663 F.3d 1312 (11th Cir. 2011) 31, 32

Graham v. Long Island R.R.,
230 F.3d 34 (2d Cir. 2000).....44

**Grimm v. Gloucester Cty. Sch. Bd.*,
972 F.3d 586 (4th Cir. 2020) ..... passim

**Grimm v. Gloucester Cty. Sch. Bd.*,
976 F.3d 399 (4th Cir. 2020) 46

J.E.B. v. Alabama ex rel. T.B.,
511 U.S. 127 (1994).....29

**Jackson v. Birmingham Bd. of Educ.*,
544 U.S. 167 (2005).....54

Karnoski v. Trump,
926 F.3d 1180 (9th Cir. 2019) 33

Kroma Makeup EU, LLC v. Boldface Licensing + Branding, Inc.,
920 F.3d 704 (11th Cir. 2019) 20

Lewis v. City of Union City, Georgia,
918 F.3d 1213 (11th Cir. 2019) 24, 43-44

Lincoln v. Bd. of Regents of Univ. Sys. of Georgia,
697 F.2d 928 (11th Cir. 1983) 23

Loving v. Virginia,
388 U.S. 1 (1967).....30

Lyng v. Castillo,
477 U.S. 635 (1986).....33

M.A.B. v. Bd. of Educ. of Talbot Cty.,
286 F. Supp. 3d 704 (D. Md. 2018).....34

Massachusetts Bd. of Ret. v. Murgia,
427 U.S. 307 (1976).....33

McLaughlin v. State of Fla.,
379 U.S. 184 (1964).....52

Michael M. v. Superior Court of Sonoma Cty.,
450 U.S. 464 (1981).....37

Mississippi Univ. for Women v. Hogan,
458 U.S. 718 (1982).....29

Morrissette-Brown v. Mobile Infirmary Med. Ctr.,
506 F.3d 1317 (11th Cir. 2007) 20

Nguyen v. I.N.S.,
533 U.S. 53 (2001).....37

North Haven Bd. of Educ. v. Bell,
456 U.S. 512 (1982).....53

Obergefell v. Hodges,
576 U.S. 644 (2015).....29

Oncale v. Sundowner Offshore Servs., Inc.,
523 U.S. 75 (1998)..... 48, 53

Parents for Priv. v. Barr,
949 F.3d 1210 (9th Cir. 2020) 36, 47

Parents for Priv. v. Dallas Sch. Dist. No. 2,
326 F. Supp.3d 1075 (D. Or. 2018) 47

Peltier v. Charter Day Sch., Inc.,
8 F.4th 251 (4th Cir. 2021) 47, 48

Pennhurst State School & Hospital v. Halderman,
451 U.S. 1 (1981).....53

Pers. Adm'r of Massachusetts v. Feeney,
442 U.S. 256 (1979)..... 27, 28

Phillips v. Martin Marietta Corp.,
400 U.S. 542 (1971).....25

Plyler v. Doe,
457 U.S. 202 (1982)..... 33, 38

Reed v. Reed,
404 U.S. 71 (1971).....23

Roberts v. Clark Cty. Sch. Dist.,
215 F. Supp. 3d 1001 (D. Nev. 2016).....25

Rosa v. Park W. Bank & Tr. Co.,
214 F.3d 213 (1st Cir. 2000).....32

Schwenk v. Hartford,
204 F.3d 1187 (9th Cir. 2000) 32

Singleton v. Wulff,
428 U.S. 106 (1976)..... 53-54

Smith v. City of Salem,
378 F.3d 566 (6th Cir. 2004) 32

United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd.,
484 U.S. 365 (1988).....41

United States v. Gordon,
638 F.2d 886 (5th Cir. 1981) 50

United States v. Vargas,
848 F.3d 971 (11th Cir. 2017) 20

United States v. Virginia,
518 U.S. 515 (1996) 29, 30, 36, 38

**Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*,
858 F.3d 1034 (7th Cir. 2017) ..... passim

Women Prisoners of D.C. Dep't of Corr. v. D.C.,
93 F.3d 910 (D.C. Cir. 1996) 37

Statutes

20 U.S.C. § 1681 ..... 1, 3, 42

20 U.S.C. § 1681(a) ..... passim

20 U.S.C. § 1681(a)(1)-(9).....39

20 U.S.C. §§ 1681(a)(2)-(9)..... 49, 50

20 U.S.C. § 1686.....50

42 U.S.C. § 2000e-2(a)(1)-(2).....39

Fla. Stat. § 1003.22 13

Fla. Stat. § 1003.22(1).....13

U.S. Const. amend. XIV, § 1 3

Rules

Fed. R. App. P. 32(a)(5).....57

Fed. R. App. P. 32(a)(6).....57

Fed. R. App. P. 32(a)(7)(B) 57

Fed. R. App. P. 32(f).....57

Regulations

34 C.F.R. § 106.31(b)(4).....45

34 C.F.R. § 106.33 49

Florida Administrative Code Rule 6A-6.024(1).....14

STATEMENT OF ISSUES

The Court's September 16, 2021 Memorandum states that the Court "desires for counsel to focus their briefs on the following issues":

A. "Does the School District's policy of assigning bathrooms based on sex violate the Equal Protection Clause of the Constitution?"

B. "Does the School District's policy of assigning bathrooms based on sex violate Title IX of the Education Amendments Act of 1972, 20 U.S.C. § 1681 *et seq*.?"

Appellee Drew Adams ("Andrew")[1] respectfully submits that the questions above are unrelated to his claims and not presented by this appeal. Andrew submits that the questions raised by this appeal instead are:

A. Whether, in light of the district court's factual findings regarding Andrew's social, medical, and legal transition, Defendant violated Andrew's rights under the Equal Protection Clause by treating him differently from other boys by excluding him from the boys' restroom.

B. Whether, in light of the district court's factual findings regarding Andrew's social, medical, and legal transition, Defendant violated Andrew's rights

[1] Andrew has changed his legal first name from Drew to Andrew.

under Title IX of the Education Amendments of 1972 by treating him differently from other boys by excluding him from using the boys' restroom.

STATEMENT OF THE CASE

This appeal reviews a narrow, as-applied judgment finding that the School Board of St. Johns County ("Defendant") treated Andrew Adams differently from other boys because he is transgender, which the Supreme Court has confirmed is inescapably discrimination because of sex. The district court, sitting as trier of fact, found that Andrew's identity as a boy is no less consistent, persistent, or insistent than any other boy. By the time of the ruling, Andrew had socially, medically, and legally transitioned, living consistently with his male identity in all aspects of life. The trial court found that Andrew is similar to other boys in every material respect for use of the boys' restroom, and that Defendant caused him to suffer emotional damage, stigmatization, and shame among other harms by treating him differently than other boys. The trial court's extensive factual findings, entered after a three-day bench trial and the court's in-person inspection of Andrew's high school campus, Doc. 192 at 3-5, cannot be disturbed absent clear error. But Defendant has not previously—and does not now—argue that any findings were erroneous.

Defendant instead argues that it "is free to establish a policy in its schools prohibiting boys from using the girls' bathrooms and girls from using the boys' bathrooms." En Banc Br. of Appellant (October 26, 2021) ("Br.") 8. Andrew does

not contest that. As the trial court noted, "[e]veryone agrees that boys should use the boys' restroom at [school] and that girls should use the girls' restroom." Doc. 192 at 2. The issue is whether Defendant can treat Andrew differently because he is transgender, which the Supreme Court has clarified constitutes discrimination based on sex. Defendant cannot demonstrate any adequate basis for reversal of the trial court's narrow ruling, which should be affirmed.

I. COURSE OF PROCEEDINGS AND DISPOSITIONS BELOW

In June 2017, Andrew filed suit pursuant to the Fourteenth Amendment's Equal Protection Clause, U.S. Const. amend. XIV, § 1, and Title IX of the Education Amendments of 1972 ("Title IX"), 20 U.S.C. § 1681, *et seq.* Doc. 1. Andrew sought declaratory and injunctive relief, and nominal damages. *Id.* Andrew moved for a preliminary injunction, Doc. 22, which the district court denied but "set an expedited schedule so the matter could quickly be brought to trial." Doc. 192 at 3-4. Following the decision in *Flanigan's Enterprises, Inc. of Ga. v. City of Sandy Springs, Ga.*, 868 F.3d 1248, 1270 (11th Cir. 2017) (en banc), Andrew amended his complaint to seek compensatory damages. Doc. 60 at 22.

The district court held a three-day bench trial on December 11-13, 2017. Doc. 192 at 4. Judge Corrigan subsequently conducted an in-person inspection, "visiting every restroom on campus." *Id.* at 4-5. In a 70-page opinion, the court made extensive factual findings and conclusions of law, holding that the exclusion of

Andrew from the boys' restroom violates the Equal Protection Clause and Title IX. Doc. 192. The court permanently enjoined Defendant from excluding Andrew from the boys' restroom and awarded $1,000 in damages. Doc. 193. Defendant did not seek to stay the judgment, which has remained in effect since July 2018. *Id.*

II. STATEMENT OF FACTS

Andrew is a boy; like his peers, his identity is male. Doc. 192 at 2 ("At trial, [Andrew] testified: 'I am a boy and I know that with every fiber of my being.'"); *id.* at 1-2 (Andrew "consistently, persistently, and insistently" identifies as a boy) (quotation marks omitted). By the time Andrew entered Nease High School ("Nease"), he was living as the young man that he is in every aspect of his life. *Id.* at 10-11. Defendant itself treated him as male in nearly all respects. *Id.* at 2 ("Even the St. Johns County School Board regards Adams as a boy in every way, except for which bathroom he can use."). As he did in all settings outside of school, Andrew initially used the boys' restroom at Nease, consistent with the advice of his medical provider. *Id.* ("Other than at his school, Adams uses the men's bathroom wherever he goes, including in this federal courthouse during trial."); Doc. 166-2, 28:10-17; *id.* 33:8-11.

Andrew did so without incident for six weeks until he was pulled out of class and instructed that he could not use the boys' restroom at school any longer. Doc.

192 at 25. Defendant summarily barred him from the restrooms his male peers used, treating him as unsuitable to share common spaces with them. *Id.*

A. Medical Care for Transgender Adolescents

Andrew introduced evidence from two experts who testified about the standards of care for treatment of transgender adolescents, including developmental and clinical psychologist Dr. Ehrensaft and pediatric endocrinologist Dr. Adkins. *Id.* at 5, 6 n.12. The court determined both were qualified to testify on those matters. *Id.* at 6 n.12. Defendant introduced no expert testimony—either to support its case in chief or to rebut the testimony of Andrew's experts.

As explained by Dr. Ehrensaft, each person has a number of sex-related characteristics, *e.g.*, internal and external sex organs, chromosomal sex, gonadal sex, fetal hormonal sex, hypothalamic sex, pubertal hormonal sex, neurological sex, and gender identity. *Id.* at 5. One's sex is typically recorded at birth based only on external genitalia. *Id.* at 6. For most people, the various sex-related characteristics are congruent, and their birth-assigned sex is accurate. *Id.* at 6. For others, however, including transgender people, not all sex-related characteristics align, and external genitalia are not an accurate proxy to determine sex. *Id.*; Doc. 166-3 ¶ 19-20.

Andrew is a boy. Doc. 192 at 2. He is also transgender, meaning that he was incorrectly designated female at birth. Doc. 166-3 ¶ 19. A transgender person is someone who "consistently, persistently, and insistently identifies as a gender

different than the sex they were assigned at birth." Doc. 192 at 7 (internal quote omitted); Doc. 119-1 at 7. Gender identity is not a choice and cannot be voluntarily altered. Doc. 192 at 9-10; Doc. 166-2, 14:10-13; Doc. 166-3 ¶¶ 21-22, 26. The lack of alignment between a transgender individual's identity and birth-assigned sex can cause significant distress. Doc. 192 at 7; Doc. 166-2, 15:8-12; *id.* 15:24-16:5; Doc. 166-3 ¶¶ 27-28. Gender dysphoria is the diagnosis for this distress, as recognized by the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders, Doc. 192 at 7-8, and the World Health Organization's International Classification of Diseases, Doc. 166-3 ¶ 28.

Authoritative medical standards provide treatment protocols to relieve this distress and care for transgender individuals, Doc. 166-2, 24:6-25:5, including the World Professional Association for Transgender Health Standards of Care, Version 7, Doc. 166-3 ¶ 13; Doc. 192 at 8; and treatment guidelines from the Endocrine Society, Doc. 166-2, 17:17-24; Doc. 151-4.

The standards of care for treatment of gender dysphoria include living consistently with one's identity in all aspects of one's life. Doc. 166-2, 22:25-23:12; *id.* 27:12-20; Doc. 166-3 ¶ 41. To accomplish this, transgender people undertake a process of social, legal, and medical transition. Doc. 192 at 8; Doc. 166-2, 22:25-24:5; Doc. 166-3 ¶¶ 33-37.

B. Andrew's Identity and Transition

Andrew's parents noticed that from a young age he rejected stereotypically feminine behaviors and attributes. Doc. 192 at 10. When Andrew reached puberty, he "hated" the aspects of his body that were becoming feminized. *Id.*; Doc. 166-2, 19:21-21:15. He experienced depression and anxiety, and began seeing a therapist and psychiatrist. Doc. 192 at 10.

Through therapy, Andrew came to understand that his distress was the result of the lack of alignment between his identity and birth-assigned sex; he realized he was transgender and told his parents, who suspected as much. *Id.*; Doc. 160, 217:5-218:20; Doc. 161, 87:13-24. Andrew was diagnosed with gender dysphoria by his therapist, Doc. 192 at 11, which his endocrinologist's office confirmed. Doc. 166-2, 16:8-12.

Andrew's mother and father consulted with mental health and medical professionals about the best course of action, and they prescribed treatment for Andrew's social and medical transition. Doc. 151-16; Doc. 160, 89:25-90:7; *id.* 91:7-23; *id.* 93:12-94:8; *id.* 98:25-100:18; *id.* 105:7-106:3; *id.* 220:21-222:4; *id.* 227:25-228:16; *id.* 230:9-233:5; *id.* 238:7-18; Doc. 161, 88:6-12. Andrew socially transitioned, including cutting his hair, wearing typically male clothing, using male pronouns, wearing a chest binder (a garment which flattens breast tissue), and using male restrooms. Doc. 192 at 10-11.

"The Endocrine Society Clinical Practice Guideline considers the standard of care … to include hormone treatment which, for a transgender male, will alter the appearance of the genitals, suppress menstruation, and produce secondary sex characteristics such as increased muscle mass, increased body hair on the face, chest, and abdomen, and a deepening of the voice." *Id.* at 9. Andrew's medical transition included carefully-monitored hormone therapy, and eventually a mastectomy in 2017 to create a typically masculine chest. *Id.* at 11.

Andrew's legal transition included correcting his driver's license and birth certificate to reflect his male gender, pursuant to guidelines established by the Florida Department of Highway Safety and Motor Vehicles and the Florida Department of Health Office of Vital Statistics, respectively. *Id.* at 11-12; Doc. 147. Andrew testified that updating his birth certificate "corrected a mistake that has been impacting my life since I was born," and means the State "recognizes me as who I am, a boy, and that means everything to me." Doc. 160, 109:15-20; *id.* 110:21-25.

The milestones in Andrew's transition have been "the happiest moments of [his] life." *Id.* 106:4-11; *id.* 106:24-107:9; *id.* 237:18-21. According to Andrew's mother, coming out brought on an "absolutely remarkable" change in Andrew. *Id.* 220:8-11. "He went from this quiet, withdrawn, depressed kid to this very outgoing, positive, bright, confident kid. It was a complete 180." *Id.* 220:9-11. With every

step, Andrew felt even better: "I don't hate myself anymore. And I don't hate the person I am. I don't hate my body anymore." *Id.* 106:8-9.

Andrew is widely known and accepted as male in all aspects of his life. *Id.* 109:21-23. This included at Nease, where he experienced support and respect from other students as a boy. Doc. 151-17, RFA 52; Doc. 160, 111:23-112:8; *id.* 127:11-14. Nease staff used male pronouns and treated Andrew as male in every respect except access to restrooms. Doc. 192 at 27; Doc. 160, 170:16-25; Doc. 151-17, RFA 55.

C. Defendant Expels Andrew From the Boys' Restrooms

Andrew used the boys' restrooms during his freshman year for approximately six weeks. Doc. 192 at 25; Doc. 160, 112:22-113:3; *id.* 113:16-18. Andrew uses the men's restroom in every setting outside Nease, always using a stall and without any problems. Doc. 160, 118:10-13; *id.* 202:18-22; *id.* 229:11-15. "When Adams uses the men's restroom, he walks in and enters a stall, closes and locks the door, relieves himself, exits the stall, washes his hands, and leaves." Doc. 192 at 11. Andrew is not aware of any problems with his restroom use during his first six weeks at Nease, Doc. 160, 113:19-24, and some statements in Defendant's brief require correction in this regard.

Despite Defendant's allusions to a "documented complaint" regarding Andrew's restroom use, Br. 7, no boy or boy's parent complained. Doc. 162, 95:2-

12; *id.* 102:7-24. Instead, the school received a report from two female students that they had seen Andrew enter the boys' restroom. Doc. 192 at 25. The two female students were never identified in discovery or at trial, *id.*, nor was their report to the school ever described, but Defendant confirmed that neither student expressed privacy or safety concerns. Doc. 162, 16:13-17:9. No one ever claimed that Andrew had engaged in any misconduct while in the boys' restroom. Doc. 151-17, RFA 25-26, 31-32; Doc. 160, 113:19-114:9. Nor was anyone unclothed when he used the restrooms. Doc. 160, 113:25-114:2.

Defendant invoked two sources for its exclusion of Andrew from boys' restrooms: (1) written guidelines entitled "St. Johns County School District Guidelines for LGBT Students–Follow Best Practices" (the "guidelines" or "policy"), Doc. 152-6; and (2) an unwritten policy, Doc. 162, 11:8-13.

1. Defendant's Written Guidelines

Defendant's guidelines state that no law requires it to provide transgender students restroom access in accordance with their consistently-asserted identity, and that they will instead be given access to a gender-neutral restroom. Doc. 152-6; Doc. 161, 171:22-172:5; *id.* 247:21-248:1.[2] The guidelines were developed after then-

[2] Defendant introduced exhibits showing its corporate representative had redlined the section about restrooms so that it was specifically directed at "transgender students." Docs. 152-20, 152-26 (showing change from "gender identity" to

Director of Student Services Sallyanne Smith formed a task force to study the issue. Doc. 192 at 15. Ms. Smith characterized the task force's research as robust. *Id.*; Doc. 161, 147:6-7. Ms. Smith admitted that the task force uncovered no privacy or safety issues in schools with policies that treat transgender students equally. Doc. 161, 219:18-220:10; Doc. 162, 15:13-16:8; *id.* 31:1-5.

Although the guidelines do not respect transgender students' identity for restrooms, they recognize their identity in a variety of other ways, requiring schools to: use respectful pronouns, Doc. 192 at 15-16; Doc. 152-6 at 1; update the name and gender on student records upon receipt of a court order, Doc. 192 at 16, Doc. 152-6 at 1; use a student's chosen name on unofficial records, Doc. 192 at 16, Doc. 152-6 at 1; and allow transgender students to wear clothing matching their identity, Doc. 192 at 16, Doc. 152-6 at 2.

Defendant's witnesses conceded that the guidelines treat Andrew differently (i) from other boys, who can use restrooms matching their male identity; and (ii) from non-transgender students, since the policy in effect relegates him solely to gender-neutral restrooms. Doc. 162, 32:6-11; *id.* 33:21-24; *id.* 118:10-13; *id.* 136:17-137:2.

"transgender identity," and "students" to "transgender students"); Doc. 162, 56:12-60:23; *id.* 108:16-109:6.

2. Defendant's Unwritten Policy that Boys Use the Boys' Restrooms and Girls Use the Girls' Restrooms

Defendant also invoked an unwritten policy that it claims requires students to use restrooms matching their "biological sex." Doc. 152-6. The testimony at trial, however, established that "biological sex" is not a medically accurate term. Because a person's sex-related characteristics may not all be aligned, the Endocrine Society advises that the term "biological sex" is "imprecise and should be avoided." Doc. 151-4 at 7; Doc. 192 at 6 n.13; *see also* Doc. 166-2, 48:9-49:12 (expert testimony that "biological sex" is not medically precise or accurate). Defendant introduced no evidence to the contrary.

Nor is "biological sex" an accurate representation of how Defendant's policy for restroom use operates. Each new student submits enrollment forms requiring the student to designate their sex. Doc. 192 at 13. This information is accepted "at face value" to determine "biological sex," *id.* at 22; Doc. 162, 50:24-51:1, even though the forms allow students only to indicate whether they are male or female, and none refer to "biological sex" or transgender status. Doc. 192 at 13, 22; Docs. 152-28, 152-29, 152-30; Doc. 162, 12:19-21. Defendant admits that its policy "requires students to use the bathroom matching the sex identified on their enrollment paperwork …." Br. 4.

Defendant's brief tries to recharacterize the enrollment form as a "proxy" for "biological sex," Br. 4, but the form does not request any information about sex-related characteristics of students. Defendant does not track students' chromosomes or internal or external sex organs, Doc. 151-17, RFA 62-68, or inspect students' anatomy before they use school restrooms, *id.* RFA 69. Nor do its enrollment forms request that information. Doc. 192 at 13. Defendant does not learn about the presence of transgender students in its schools unless it is reported, such as by self-disclosure. Doc. 161, 235:15-18; Doc. 162, 53:18-21.

Defendant claims that Andrew's enrollment materials included "medical documentation which required a physical examination conducted by a health professional, reflect[ing] Adams' biological sex …." Br. 6 (citing Fla. Stat. § 1003.22). Here again Defendant's brief requires correction. To the extent Defendant suggests there was a physical examination of Andrew's genitalia, or that the school district received any such documentation, this is incorrect. The statute simply requires that parents provide "certification" that a health exam was performed within one year of enrollment. Fla. Stat. § 1003.22(1).[3] Defendant requests this information on a form that must be completed by the parent, containing nothing more than a box for the parent to self-report their child's "sex." Doc. 162

[3] Neither the statute nor the record establishes that a health exam involves physical examination of a student's genitalia or reproductive organs.

at 50:16-18 (Defendant's 30(b)(6) witness testifying: "There is a – two boxes on that – sort of the cover sheet of the form. And it says M/F. And the student checks – the student's parent checks one.").

Defendant also relies on Florida Administrative Code Rule 6A-6.024(1) as requiring that a health professional certify that a health examination was completed. Br. 6. Although Defendant never produced this form for Andrew, the regulation supplies a URL for the form. *See* Fla. Admin. Code R. 6A-6.024(1) (http://www.floridahealth.gov/programs-and-services/childrens-health/school-health/_documents/school-health-entry-exam-form-dh3040-chp-07-2013.pdf). The provider completes Part II of the form, which makes no reference to the child's sex whatsoever, let alone the child's genitalia or reproductive organs.

Defendant's policy creates two classes of transgender students. If a transgender student enrolls with paperwork matching their gender identity, Defendant "accept[s] the student as being of that gender." Doc. 192 at 14. "[U]nless there was a complaint, a transgender student could use the restroom matching his or her gender identity until he or she graduated, and the school would be none the wiser." *Id.* at 22. Asked whether this raises any concern, Defendant's corporate representative answered, "As a practical matter, I would say no. The district does not play bathroom cop." *Id.*; Doc. 162, 53:5-14. But if a transgender student indicates their birth-assigned sex on enrollment forms, that is "set in stone," and the

student can never access restrooms matching their identity. Doc. 192 at 14; Doc. 161, 235:10-14; Doc. 162, 12:24-13:12. Thus, a transgender student who enrolled in the school system before being diagnosed with gender dysphoria can *never* correct their gender with the school.

D. The Harms Visited on Andrew by Defendant's Restroom Policy

Social transition requires "using restrooms and other single-sex facilities consistent with that identity." Doc. 192 at 8 (quote omitted). The experts testified that failing to recognize a transgender student's gender sends a message—both to the transgender student and others—that the transgender student is different from their peers and needs to be isolated from them in restrooms, causing the transgender student to experience shame, and other harms as well. Doc. 166-3 ¶¶ 41-48; Doc. 160, 116:21-24; *id.* 117:17-21; *id.* 204:5-206:6; *id.* 204:19-20 (Andrew's testimony that "it feels like the school doesn't think I'm even worthy of occupying the same space as my classmates"); *id.* 205:2-4 ("because I'm using a special bathroom and I'm oftentimes passing a men's bathroom, everybody knows I'm different, and I just want to fit in"); *see also id.* 56:8-14; Doc. 192 at 25, 27.

The experts testified that refusing to allow a transgender person to use restrooms aligned with their identity is detrimental and interferes with social transition. Doc. 166-2, 33:3-15; Doc. 166-3 ¶ 41; Doc. 160, 116:11-16 (Andrew felt shocked, confused, and angry after being barred from the boys' restroom because,

"I was living in every aspect of my life as a boy and now they're taking that away from me."); *id.* 278:14-17 (testimony of Andrew's mother that the restroom exclusion "brings that social transition to sort of a screeching halt"; "everywhere else and every other aspect in his life he can be a normal boy. At school, he can't."). The Pediatric Endocrine Society recognizes that "not allowing students to use the restroom matching their identity promotes further discrimination and segregation of a group that already faces discrimination and safety concerns." Doc. 192 at 8; Doc. 151-6.

Andrew's medical provider prescribed that Andrew complete his social transition by living consistently with his identity in all aspects of life, including restroom use. Doc. 166-2, 28:10-17; *id.* 33:8-11. Denying Andrew access to the boys' restroom interferes with his prescribed medical treatment. *Id.* 33:12-15; *id.* 38:17-39:21. Being relegated to a gender-neutral restroom does not reduce the harm or stigma of being banned from the restroom matching one's identity. Doc. 166-2, 33:22-34:13; Doc. 166-3 ¶ 47.

Andrew testified that using the boys' restroom at school was profoundly important to him because "[i]t's a statement to everyone around me that I am a boy. It's confirming my identity and confirming who I am, that I'm a boy. And it means a lot to me to be able to express who I am with such a simple action because I'm just–I'm just like every other boy …." Doc. 160, 107:18-25. In contrast, being

barred from the boys' restroom felt "humiliating" and "like a slap in the face." *Id.* 116:14; *id.* 117:4; *id.* 117:4-7; *id.* 277:25-278:4; *see also* Doc. 192 at 25. Andrew said that walking past the boys' restroom to access the gender-neutral restroom felt "like a walk of shame," because "I know that the school sees me as less of a person, less of a boy, certainly, than my peers." Doc. 160, 204:10-12. Andrew's father testified that Andrew was "devastated" after the school barred him from the boys' restroom. Doc. 161, 92:13-22; *id.* 92:20-22; *see also* Doc. 166-2, 38:17-25.

Andrew thought about his exclusion from restrooms every day from the moment he woke up, restricting his liquid consumption to limit his restroom use and avoid the stigmatization of a gender-neutral restroom. Doc. 192 at 26; Doc. 160, 119:6-10; *id.* 277:20-22. Andrew also held his bladder to avoid having to use the gender-neutral restroom, making it harder to concentrate in class. Doc. 192 at 26; Doc. 160, 173:16-174:5; *id.* 277:16-18.

E. Defendant's Purported Governmental Interests

At trial, Defendant offered no concrete privacy concerns with Andrew's use of the boys' restroom—only speculation that non-transgender *female* students using restrooms to "refresh [their] makeup" and "talk to other girls" may feel "uncomfortable" sharing a restroom with a transgender *girl* or want privacy to clean a stain on their clothing. Doc. 192 at 20. But Andrew is a transgender boy denied access to the boys' restroom and, as the trial court found, "the evidence is that Drew

Adams poses no threat to the privacy or safety of any of his fellow students." *Id.* at 2-3. All common restrooms at Nease contain stalls with locking doors, Doc. 162, 31:22-25; *id.* 114:1-8; Doc. 151-17, RFA 57, which Defendant admitted provide privacy. Doc. 192 at 20. While Defendant has not yet installed urinal partitions, Defendant admitted it could and disclaimed any cost-related interest. Doc. 161, 67:25-68:5; Doc. 162, 32:12-15; Doc. 192 at 20 n.25, 23. Any male student who wants additional privacy in the boys' restroom can use a stall, and all students can use gender-neutral restrooms for additional privacy. Doc. 162, 31:22-32:8; *id.* 114:18-115:4; Doc. 151-17, RFA 59.

Despite the task force's research, Defendant's witnesses conceded they had learned of no privacy violations involving transgender students. Doc. 161, 219:18-220:10; Doc. 162, 15:13-16:8; *id.* 31:1-5. There were no instances of privacy breaches when Andrew used the boys' restroom. Doc. 192 at 27.

Defendant now emphasizes a privacy interest in not requiring students to "share bathrooms with members of the opposite sex." Br. 8. Defendant's application of its own policy directly undermines this interest. When Andrew was expelled from the boys' restrooms, he was informed he could use either gender neutral or *girls'* restrooms. Doc. 192 at 25. The policy thus places a boy who happens to be transgender in a restroom with girls—despite the fact that Andrew had medical treatment giving him masculine secondary sex characteristics. *Id.* at 9, 11.

Although this is unrelated to Andrew, Doc. 192 at 46-47, Defendant references students who identify as gender-fluid. Br. 5. In addition to being wholly irrelevant to Andrew, who consistently, persistently, and insistently identifies as male, Doc. 192 at 1-2, the trial revealed nothing but speculation on this point. As the Court noted, Defendant's task force had not heard of any concerns related to gender-fluid students, Doc. 192 at 17, 21, and Defendant provided no evidence on this point. Doc. 162, 155:18-156:16.

F. Testimony from Officials at Schools with Policies That Treat Transgender Students Equally

Plaintiff introduced testimony from three school administrators who had implemented policies providing equal treatment to transgender students. Doc. 192 at 28. Dr. Thomas Aberli served as Principal at a high school in Louisville, Kentucky, when the school adopted a policy of equal treatment in 2014. Doc. 160, 20:4-15, *id.* 21:1-4, *id.* 22:11-21; Docs. 151-18, 151-19. Michaelle Valbrun-Pope was the Executive Director for Student Support Initiatives for Broward County Public Schools ("BCPS") in Florida, which adopted a policy five years before trial to provide equal treatment to transgender students. Doc. 192 at 29; Doc. 161, 51:12-20; Doc. 151-8. BCPS is the sixth largest district nationally, with more than 340,000 students. Doc. 192 at 29; Doc. 161, 53:2-21. Michelle Kefford was Principal of a

high school within BCPS. Doc. 161, 97:11-13. Both helped develop BCPS's non-discrimination rules regarding transgender students. *Id.* 54:5-6; *id.* 99:5-16.

Dr. Aberli, Ms. Pope, and Principal Kefford each testified that policies allowing students access restrooms consistent with their identity were neither difficult nor costly to implement. *See* Doc. 192 at 29-32 (reviewing the testimony of each school administrator). None experienced problems under their policies with privacy or safety. *Id.*

III. STANDARD OF REVIEW

Conclusions of law are reviewed *de novo*, while factual findings must be reviewed for "clear error." *United States v. Vargas*, 848 F.3d 971, 973 (11th Cir. 2017). "Clear error is a highly deferential standard of review." *Morrissette-Brown v. Mobile Infirmary Med. Ctr.*, 506 F.3d 1317, 1319 (11th Cir. 2007) (quote omitted). "A factual finding is clearly erroneous when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Id.* (quote omitted). "The district court's judgment can be affirmed on any ground supported by the record, regardless of the basis for the initial decision." *Kroma Makeup EU, LLC v. Boldface Licensing + Branding, Inc.*, 920 F.3d 704, 707 (11th Cir. 2019).

SUMMARY OF THE ARGUMENT

This case is about whether Defendant has a right to banish Andrew from boys' restrooms at school simply because he is transgender. After three days of trial, the district court issued painstakingly detailed factual findings, acknowledging that schools have an interest in protecting their students, and that parents similarly want to ensure that their children are safe. But the court also found that Andrew's use of the restroom is just like that of other boys in every material respect; and while treating Andrew equally harms no one else, discriminating against Andrew inflicts profound injuries on him, treating him as unfit to share common restrooms with his male peers.

Defendant contests none of the district court's factual findings, instead arguing that its exclusion of Andrew should be viewed as mere disparate impact, justified by privacy interests. But the district court correctly understood that Andrew challenges Defendant's decision to treat him differently from other boys, not sex-separated restrooms themselves. After an exacting review of the record, the court also found that Defendant's exclusion of Andrew purportedly based on privacy is "only conjectural." Doc. 192 at 44. Finally, the district court applied well-established principles of statutory construction, further confirmed by *Bostock v. Clayton Cty.*, 140 S. Ct. 1731 (2020), to determine that Title IX also protects Andrew

from discrimination based on his sex. Defendant offers no basis to disturb the court's well-supported factual findings and conclusions.

ARGUMENT

I. TREATING ANDREW DIFFERENTLY FROM OTHER BOYS BY EXCLUDING HIM FROM THE BOYS' RESTROOMS VIOLATED ANDREW'S RIGHT TO EQUAL PROTECTION.

Equal protection review examines whether government discrimination can be appropriately justified as to the group harmed by the challenged exclusion. "The proper focus … is the group for whom the law is a restriction, not the group for whom the law is irrelevant." *City of Los Angeles. v. Patel*, 135 S. Ct. 2443, 2451 (2015) (quote omitted). Defendant's policy of separating boys and girls in restrooms—which is not at issue, Br. 8—does not restrict any non-transgender boy or non-transgender girl's use of the restrooms. Instead, Andrew challenges Defendant's decision to treat him differently from other boys because he is transgender.

A. Andrew is Similarly Situated to Other Boys in Every Material Respect with Regard to the Use of Boys' Restrooms.

Defendant distorts the required analysis, arguing that because Andrew purportedly is not similarly situated to other boys, the classification at issue is the exclusion of "females" from the boys' restroom. Br. 12. Not so. As the district court found, "Drew Adams says he is a boy," he has "undergone extensive surgery

to conform his body to his gender identity," "medical science says he is a boy," and "the State of Florida says so, (both Adams' Florida birth certificate and Florida driver's license say he is a male)." Doc. 192 at 2. "There is no evidence to suggest that his identity as a boy is any less consistent, persistent and insistent than any other boy." *Id.* at 47. The hormone therapy that Andrew received "alter[s] the appearance of the genitals, suppress[es] menstruation, and produce[s] secondary sex characteristics such as increased muscle mass, increased body hair on the face, chest, and abdomen, and a deepening of the voice." *Id.* at 9; *see also* Doc. 166-2, 30:7-21.[4]

Andrew thus is similarly situated to other boys in every *material* respect for purposes of using boys' restrooms at Nease. The government cannot defeat a claim by pointing to *any* distinction between the favored majority and the excluded minority, or every equal protection claim would fail. A "classification must … rest upon some ground of difference having a fair and substantial relation to the object of the legislation …." *Reed v. Reed*, 404 U.S. 71, 76 (1971) (quotation marks omitted); *see also City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 448 (1985) (although people with differences of intellectual development "are indeed

[4] Given the "absence of conflicting testimony" regarding these factual findings, which Defendant does not challenge, this Court "cannot hold [them] clearly erroneous" and must accept them on this appeal. *Lincoln v. Bd. of Regents of Univ. Sys. of Georgia*, 697 F.2d 928, 942 (11th Cir. 1983).

different from others," the "difference is largely irrelevant" for purposes of a group home permit); *Lewis v. City of Union City, Georgia*, 918 F.3d 1213, 1218 (11th Cir. 2019).

But regardless of the meaning of sex, the district court's ruling must be affirmed for this reason: There has never been a dispute that Andrew is transgender; and he is treated differently from other boys and excluded from the boys' restroom because he is transgender—*i.e.*, because he was "identified as a [fe]male at birth but … now identifies as a []male." *Bostock*, 140 S. Ct. at 1741. *Bostock* makes clear that this discriminates "inescapably" because of sex, and this alone requires that the judgment be affirmed. *Id.* at 1742.

Defendant baldly asserts that physiological differences have "obvious relevance … on bathroom privacy." Br. 17. But Defendant adduced no such evidence at trial, and Andrew's physiological characteristics that are visible to his peers led to Ms. Smith's candid admission that the policy does not work on its own terms: transgender students who have medically transitioned should not use the restroom matching their sex designated at birth. Doc. 161, 218:23-219:1-2. The district court thus was correct in holding that there is no "difference [that] is relevant here." Doc. 192 at 49. The stalls lock the same way, toilets flush the same way, and faucets work the same way, regardless of whether the boy using them is transgender.

Nor can Defendant disguise its discrimination by claiming that it merely distinguishes students based on "biology" and "reproductive functions." Br. 23. *See Roberts v. Clark Cty. Sch. Dist.*, 215 F. Supp. 3d 1001, 1015 (D. Nev. 2016) (finding argument that discrimination is "based on [plaintiff's] genitalia, not his status as a transgender person, [] is a distinction without a difference"). Discrimination based on sex is "discrimination because of the *properties or characteristics* by which individuals may be classified as male or female." *Fabian v. Hosp. of Cent. Connecticut*, 172 F. Supp. 3d 509, 526 (D. Conn. 2016). Nor is assessing and sorting students with respect to "biological sex" what Defendant actually does, since it does not ask any student about their physiology, Doc. 151-17, RFA 62-68—relying instead solely on an undefined self-report of the child's "sex." Doc. 192 at 13, 22.

Stated differently, "it's irrelevant what [a defendant] might call its discriminatory practice, how others might label it, or what else might motivate it." *Bostock*, 140 S. Ct. at 1744. Efforts to recast Defendant's policy as "biology" or "physiology" discrimination can no more succeed than had the employer in *City of Los Angeles Dept. of Water and Power v. Manhart*, 435 U.S. 702 (1978), called its sex-based retirement benefits "life expectancy" discrimination, or the employer in *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971), called its policy "motherhood" discrimination. *Bostock*, 140 S. Ct. at 1744. "[J]ust as labels and additional intentions or motivations didn't make a difference in *Manhart* or *Phillips*,

they cannot make a difference here." *Id.*

B. Defendant's Exclusion of Andrew from the Boys' Restroom Discriminates Against Him Both Expressly and Intentionally.

For all the reasons above, the exclusion of Andrew does not merely have an "adverse impact" on him, but deliberately targeted him for different treatment from other boys because he is transgender. Br. 13. "Of course," as Defendant said in its opening brief to this Court, "when a policy facially discriminates, *like the School Board's policy*, there does not need to be independent evidence of discriminatory intent." Initial Br. of Appellant (Dec. 20, 2018) at 16-17 (emphasis added); *see also* Suppl. Br. of Appellant (July 2, 2020) at 7 (conceding "the classification in this case draws lines based on sex" and that "intermediate scrutiny applies"); Doc. 192 at 37 n.37 ("defendant agrees that its bathroom policy makes distinctions based on sex and is subject to intermediate scrutiny"). Defendant's newly-minted argument that its policy is "facially-neutral," Br. 13, is belied not only by its prior position, but also by Defendant's description of the policy throughout its brief. *See, e.g.*, Br. 8 (describing the "dispute" here as "how to define sex for purposes of such a policy"); *id.* 22 ("Adams challenges how the policy classifies" students' sex).

Nonetheless, even if the Court considers intent, the result is the same. Intent merely requires that a government actor "selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon

an identifiable group." *Pers. Adm'r of Massachusetts v. Feeney*, 442 U.S. 256, 279 (1979). At every turn, Defendant has reaffirmed its intent to exclude Andrew from the restrooms matching his legal sex because he is transgender, which the Supreme Court has held "necessarily and intentionally" involves application of a "sex-based" rule. *Bostock*, 140 S. Ct. at 1745.

Defendant also crafted a specific written policy for transgender students in its "Best Practices Guidelines." Doc. 192 at 15; Doc. 152-6. The trial court asked Ms. Smith, who helped develop them, whether the task force considered adopting an inclusive policy. Doc. 161, 215:23-216:13. "Yes, they did," she answered, *id.* 216:14—but that option was rejected in favor of relegating transgender students to gender-neutral restrooms. Doc. 152-6. Eliminating all doubt about their target, drafts showed the corporate representative had redlined the restroom section to refer specifically to "transgender students." Docs. 152-20, 152-26 (both drafts change "gender identity" to "*transgender* identity," and "students" to "*transgender* students") (emphasis added); Doc. 162, 56:12-60:23; *id.* 108:16-109:6.

While that suffices to demonstrate both facial and intentional discrimination, Defendant also pulled Andrew out of class and specifically banned him from the boys' restrooms. Doc. 192 at 25; Doc. 160, 115:21-116:10. Defendant further affirmed during the litigation that violating its policy is punishable as misconduct. Doc. 162, 17:14-18. Defendant's affirmative steps to exclude Andrew from the

boys' restroom because he is transgender more than demonstrate that Defendant acted "at least in part" because he is transgender. *Feeney*, 442 U.S. at 279.

Defendant's statement that "[e]ven the District Court recognized that the School Board's bathroom policy 'did not have transgender students in mind when it originally established separate" restrooms misrepresents the evidence. Br. 13. The court found that because Defendant's policy makes express sex-based distinctions, a showing of intent was unnecessary. Doc. 192 at 37 n.37. But "to the extent it's necessary," the court found Andrew had "made the threshold showing" because Defendant "itself acknowledges" that it "applies [its policy] differently to transgender students." *Id.* This is because a "student whose sex assigned at birth is female is subject to discipline if the student identifies as a male and uses the boys' restroom, whereas the same student would be free to use the boys' restroom if his sex assigned at birth was male …." *Id.*

Defendant's claim that it merely "failed to update its policies" for transgender students, Br. 13, thus is counterfactual: in fact, Defendant *created* its "Best Practices Guidelines" after its staff realized that "we needed to come up with some policy [for transgender students] because we didn't have any." Doc. 161, 151:3-4; *id.* 151:8-10 ("We all sat around the table and I explained this was an issue that we needed to start looking into and to come up with a policy for that.").

Defendant's claim that there is no evidence of "discriminatory animus towards" Andrew does not alter the analysis. Br. 12. Again, because the policy expressly involves sex-based distinctions, examining intent is unnecessary. Regardless, Defendant need not intend to be mean-spirited to be liable—Defendant simply must intend to exclude Andrew purposefully. Even distinctions designed to put one sex on a "pedestal" cannot be justified on that basis. *See, e.g.*, *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973) (plurality opinion); *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 727 (1982) (desire to compensate women for discrimination not sufficient to justify exclusion of male nursing students).

Nor does the discrimination disappear because Defendant can point to others for whom the restriction is irrelevant. Br. 12 (discussing non-transgender girls). "At the heart of … equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a … sexual ... class." *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 152-53 (1994) (Kennedy, J., concurring) (quote omitted). The proper inquiry is whether the exclusion discriminates against Andrew based on sex. *See Obergefell v. Hodges*, 576 U.S. 644, 675 (2015) (striking down marriage restrictions for same-sex couples, even though heterosexuals were equally constrained from entering a same-sex marriage); *United States v. Virginia*, 518 U.S. 515, 542 (1996) (finding women's exclusion from Virginia Military Institute unlawful even though "many men would not want

to be educated in such an environment") (quote omitted); *cf. Loving v. Virginia*, 388 U.S. 1, 8 (1967) (rejecting "notion that the mere 'equal application' of a statute containing racial classifications" removes it from equal protection scrutiny).

Defendant's policy thus does *not* "affect[] transgender and cisgender students in the same way," Br. 12, and Defendant's own authorities illustrate why. As *Bray v. Alexandria Women's Health Clinic* observed, a "tax on wearing yarmulkes is a tax on Jews." 506 U.S. 263, 270 (1993). Banning transgender boys from the boys' restroom has no effect on non-transgender girls, just as a tax on yarmulkes has no effect on people who are not Jewish.[5]

C. Heightened Scrutiny Applies.

Heightened scrutiny applies to Defendant's exclusion of Andrew from the boys' restroom at school for two reasons. First, discrimination based on transgender status discriminates based on sex, which requires heightened scrutiny. *See Virginia*, 518 U.S. at 524 (sex-based classification must be substantially related to an important governmental objective). Second, discrimination against transgender people independently meets the test for government conduct that must be given heightened scrutiny.

[5] *Geduldig v. Aiello*, 417 U.S. 484 (1974), does not help Defendant either. Andrew's claims do not ask whether classifying based on a medical condition such as pregnancy in effect discriminates based on sex.

1. The Exclusion Discriminates Against Andrew Based on Sex.

The district court correctly found that Defendant discriminated based on Andrew's sex for multiple reasons. First, the policy "cannot be stated without referencing sex-based classifications." Doc. 192 at 35-36. No matter how one describes the policy—whether as being about access to sex-separated restrooms, or as designating Andrew's sex for restroom use—it is undeniably about sex. *See Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1051 (7th Cir. 2017) (policy barring transgender students from sex-specific restrooms matching their identity "cannot be stated without referencing sex"); *see also Grimm v. Gloucester Cty. Sch. Bd.*, 972 F.3d 586, 608 (4th Cir. 2020), *as amended* (Aug. 28, 2020), *cert. denied*, 141 S. Ct. 2878 (2021) (same).

Second, correctly anticipating *Bostock*'s guidance, the court found that the policy discriminates against Andrew because his identity differs from his sex designated at birth.[6] *Bostock* found that if an employer has two employees "who now identif[y] as a female," and retains the one who "was identified as female at birth" while firing the other because she "was identified as a male at birth," the

[6] *Bostock* guides the sex discrimination analysis for both constitutional and statutory claims. This Court has previously relied interchangeably on statutory and constitutional jurisprudence to analyze sex discrimination claims. *See, e.g.*, *Glenn v. Brumby*, 663 F.3d 1312, 1316 (11th Cir. 2011).

employer discriminates based on sex. *Id.* at 1741. The district court applied the same analysis: under Defendant's policy, a "student [who] identifies as male" is "free to use the boys' restroom if his sex assigned at birth was male," but "subject to discipline" if his "sex assigned at birth is female." Doc. 192 at 37 n.37. "Any way you slice it," an action taken because a person is transgender is "because of the affected individuals' sex." *Bostock*, 140 S. Ct. at 1746.

Alternatively, Defendant's exclusion of Andrew from the boys' restroom relies on impermissible stereotypes. "[T]he very acts that define transgender people as transgender are those that contradict stereotypes of gender-appropriate appearance and behavior." *Glenn*, 663 F.3d at 1316 (quote omitted). Other Circuit Courts agree. *See Whitaker*, 858 F.3d at 1048-49 (excluding transgender person from restroom conforming to his identity "punishes that individual for his … gender non-conformance"); *Smith v. City of Salem*, 378 F.3d 566, 573-75 (6th Cir. 2004); *Rosa v. Park W. Bank & Tr. Co.*, 214 F.3d 213, 215-16 (1st Cir. 2000); *Schwenk v. Hartford*, 204 F.3d 1187, 1201-02 (9th Cir. 2000).

Finally, Defendant's policy creates two classes of transgender students. Defendant accepts the gender of a student who enrolls with paperwork matching their identity. Doc. 192 at 14, 22; Doc. 162, 53:5-14. But if a transgender student indicates their birth-assigned sex on enrollment forms, the student can never access

restrooms matching their identity. Doc. 192 at 14; Doc. 161, 235:10-14; Doc. 162, 12:24-13:12. No justification exists for such an arbitrary sex-based distinction.

2. The Exclusion Discriminates Against Andrew Based on Transgender Status.

Although the district court found it unnecessary to reach Plaintiff's argument that discrimination based on transgender status also requires heightened scrutiny, Doc. 192 at 38 n.38, the district court's application of heightened scrutiny should be affirmed for this alternative reason. *See Grimm*, 972 F.3d at 610 ("transgender people constitute at least a quasi-suspect class"); *Karnoski v. Trump*, 926 F.3d 1180, 1201-02 (9th Cir. 2019). The Supreme Court consistently has applied some form of heightened scrutiny where the classified group has suffered a history of discrimination, and the classification has no bearing on a person's ability to perform in society. *See, e.g.*, *Massachusetts Bd. of Ret. v. Murgia*, 427 U.S. 307, 313-14 (1976). The Supreme Court has also sometimes considered whether the group is a minority or relatively politically powerless, and whether the characteristic is defining, or "immutable" in the sense of being beyond one's control or not one the government has a right to insist that an individual try to change. *See, e.g.*, *Lyng v. Castillo*, 477 U.S. 635, 638 (1986). While not all considerations need be present, *see Plyler v. Doe*, 457 U.S. 202, 216 n.14 (1982), all warrant heightened scrutiny for transgender status discrimination.

As the district court noted, there is a "documented history of discrimination against transgender individuals." Doc. 192 at 8 (citing Doc. 114); *id.* at 8-9 n.15; *see also Whitaker*, 858 F.3d at 1051; *M.A.B. v. Bd. of Educ. of Talbot Cty.*, 286 F. Supp. 3d 704, 720 (D. Md. 2018); *Flack v. Wis. Dep't of Health Servs.*, 328 F. Supp. 3d 931, 953 (W.D. Wis. 2018).

There also is "obviously no relationship between transgender status and the ability to contribute to society." Doc. 166-2, 13:2-5; Doc. 166-3 ¶ 32; *see also Grimm*, 972 F.3d at 612; *Evancho v. Pine-Richland Sch. Dist.*, 237 F. Supp. 3d 267, 288 (W.D. Pa. 2017); *Bd. of Educ. of the Highland Loc. Sch. Dist. v. United States Dep't of Educ.*, 208 F. Supp. 3d 850, 874 (S.D. Ohio 2016); *Adkins v. City of New York*, 143 F. Supp. 3d 134, 139 (S.D.N.Y. 2015). A person's gender identity is an innate, immutable characteristic that cannot be expected to change as a condition of equal treatment. Doc. 166-2, 12:23-13:1; Doc. 166-3 ¶ 26. Finally, "transgender people are unarguably a politically vulnerable minority." *F.V. v. Barron*, 286 F. Supp. 3d 1131, 1145 (D. Idaho 2018); *see also Grimm*, 972 F.3d at 613; *Evancho*, 237 F. Supp. 3d at 288.

II. THE DISTRICT COURT PROPERLY APPLIED HEIGHTENED SCRUTINY AND REJECTED DEFENDANT'S PURPORTED GOVERNMENTAL INTEREST.

Conceding that Defendant must "carry its burden justifying the policy under intermediate scrutiny review," Defendant advances a singular governmental interest:

protecting privacy. Br. 14-19. When weighing this interest, the district court understood its obligation to consider "the evidence at trial," Doc. 192 at 41, "weighed against the facts … and not just examined in the abstract." *Id.* (quote omitted). The evidence showed that "allowing transgender students to use the restrooms that match their gender identity does not affect the privacy protections already in place." *Id.* at 39. This is because Andrew always uses a stall and has never encountered problems using male restrooms in public, no male students complained when he used the boys' restroom, nor had Defendant's task force ever heard through its extensive research of privacy problems caused by treating transgender students equally in other schools. *Id.* at 30-40.

In fact, Defendant's description of the privacy interest invokes a singular concern: ensuring "bathroom privacy from the opposite sex." Br. 15. But nothing about Andrew's use of boys' restrooms brought non-transgender girls into the restroom, so this reduces to nothing more than an objection to his presence. Objecting to the "mere presence" of a transgender boy in restrooms is not a sufficient justification under any level of review, let alone the exacting scrutiny required here. Doc. 192 at 41 (excluding Andrew "does nothing to protect the privacy rights of each individual student" and "ignores the practical reality" of how he "uses the bathroom: by entering a stall and closing the door.") (quote omitted). In fact, Defendant's argument conflicts with at least five Circuit Court rulings, three of

which the Supreme Court has declined to review, as well as numerous district court rulings, and no Circuit Court has contrary authority. *See, e.g.*, *Parents for Priv. v. Barr*, 949 F.3d 1210, 1225 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 894 (2020); *Grimm*, 972 F.3d at 613-14; *Doe v. Boyertown Area School Dist.*, 897 F.3d 518, 531 (3d Cir. 2018), *cert. denied*, 139 S. Ct. 2636 (2019); *Whitaker*, 858 F.3d at 1053; *Dodds v. United States Dep't of Educ.*, 845 F.3d 217, 221-22 (6th Cir. 2016); *Cruzan v. Special Sch. Dist., #1*, 294 F.3d 981, 984 (8th Cir. 2002) (per curiam).

Defendant claims that various Supreme Court decisions authorize differential treatment of transgender students based on physiological differences, Br. 15, 18, but those cases all share a different theme: The Equal Protection Clause's command does not wane merely because physiological differences might warrant minor alterations. For example, when Virginia argued that privacy justified excluding women from the Virginia Military Institute, *Virginia*, 518 U.S. at 522, 524-25, the Court *rejected* reliance on "physical differences" to justify women's exclusion and required that minor alterations be made to facilitate privacy. *Id.* at 533, 550 n.19. The same result followed in *Faulkner v. Jones*, which struck down the exclusion of women from South Carolina's male-only military college. 10 F.3d 226, 228-29, 232 (4th Cir. 1993). Here, of course, no alterations are needed because Andrew's use of a stall affects no one else's privacy.

Defendant's reliance on *Michael M. v. Superior Court of Sonoma Cty.*, 450 U.S. 464 (1981), and *Nguyen v. I.N.S.*, 533 U.S. 53 (2001), is misplaced. Br. 16-17. While finding males and females differently situated for purposes of a statutory rape law, *Michael M.* reaffirmed that when "differences between the sexes are … wholly irrelevant," "the discrimination should be treated as presumptively unlawful." 450 U.S. at 497 n.4. Nor is this case similar to *Nguyen*, which allowed fathers to transmit citizenship by undertaking the "minimal" burden of acknowledging their children born abroad. 533 U.S. at 70. By contrast, Defendant would never allow Andrew to use the boys' restroom, no matter how well-documented his legal sex and medical transition. *See also* Doc. 192 at 47-49 (district court's analysis distinguishing *Michael M.*, *Nguyen*, and *Virginia*).[7] The unremarkable fact that "the law tolerates same-sex restrooms," *Chaney v. Plainfield Healthcare Ctr.*, 612 F.3d 908, 913 (7th Cir. 2010), does not license discrimination in how boys—transgender or not—might access them.

Defendant argues that excluding Andrew "is not a means to some greater end, but an end in itself." Br. 15 (quote omitted). But this does nothing "more than justify

[7] Cases involving separating prisoners by sex or avoiding involuntary exposure of one's genitals in prison do not apply here, in the enclosed setting of a restroom, where any student may seek the privacy of a stall as Andrew always does. Br. 15 (citing *Cumbey v. Meachum*, 684 F.2d 712 (10th Cir. 1982) and *Women Prisoners of D.C. Dep't of Corr. v. D.C.*, 93 F.3d 910 (D.C. Cir. 1996)); *see also* Doc. 192 at 43 n.40.

its classification with a concise expression of an intention to discriminate." *Plyler*, 457 U.S. at 227. *Virginia* rejected the same tautology. Like Defendant's claim that the objective is single-sex restrooms, the state argued there that its goal was "[s]ingle-sex education." 518 U.S. at 545. *Virginia* easily rejected this "notably circular" argument. *Id.*

Finally, Defendant argues that the district court failed to defer appropriately to the school district's role. Def.'s Br. 19-20. But the district court was "mindful that … a federal court should tread lightly when asked to contravene a policy established by a local school board." Doc. 192 at 33. Fourteenth Amendment guarantees do not recede simply because the entity engaged in discrimination is a school. *Id.* at 1 (school boards "are best situated to set school policy," but the court "has a solemn obligation: to uphold the Constitution and laws of the United States."). Defendant's cited authorities, examining urinalysis testing under a "reasonableness" standard, Br. 20, do not shed light on the Equal Protection violation here. Acknowledging the school's expertise is precisely what the district court did by holding a trial to receive evidence from Defendant, and personally touring the school with Nease's principal. Defendant had every opportunity to share its expertise at trial, and its failure to persuade the trier of fact does not create legal error.

III. *BOSTOCK*'S REASONING MUST ALSO DIRECT THIS COURT'S ANALYSIS UNDER TITLE IX.

Bostock held that, under the plain text of Title VII, discriminating against a transgender employee *is* discrimination because of such individual's sex. 140 S. Ct. at 1740. "For an employer to discriminate against employees for being … transgender, the employer must intentionally discriminate against individual men and women in part because of sex. That has always been prohibited by Title VII's plain terms—and that 'should be the end of the analysis.'" *Id.* at 1743.

Title IX's expansive, remedial structure makes clear that that sex discrimination has no greater place in our schools than our workplaces. Title IX is structured even more broadly than Title VII, with a sweeping prohibition of sex discrimination, 20 U.S.C. § 1681(a), and narrow carve-outs, 20 U.S.C. § 1681(a)(1)-(9). Title VII, in contrast, lists proscribed conduct. *See, e.g.*, 42 U.S.C. § 2000e-2(a)(1)-(2). As *Bostock* stated, "when Congress chooses not to include any exceptions to a broad rule, courts apply the broad rule." *Id.* at 1747. Moreover, courts have long applied Title VII jurisprudence to analyze a range of claims under Title IX. *See, e.g.*, *Franklin v. Gwinnett Cty. Pub. Schs.*, 503 U.S. 60, 75 (1992) (holding that because sexual harassment is intentional discrimination because of sex under Title VII, "the same rule should apply" under Title IX); *Bowers v. Bd. of*

Regents of Univ. Sys. of Ga., 509 F. App'x 906, 910 (11th Cir. 2013) (per curiam) (noting that this Court "appl[ies] Title VII case law to assess [a] Title IX claim.").

The reasoning in *Bostock* applies with considerable, if not decisive, force to Title IX. 140 S. Ct. at 1740. First, *Bostock* is the Supreme Court's most recent pronouncement of statutory interpretation principles applicable to an anti-discrimination statute that prohibits discrimination based on sex. Second, *Bostock* applies a straightforward test to conclude that transgender status is "inextricably bound up with sex" and "necessarily entails discrimination based on sex; the first cannot happen without the second." *Id.* at 1742, 1747. Third, Defendant's arguments replicate the same "repackage[d] errors" that *Bostock* and other Supreme Court "precedents have already rejected." *Id.* at 1744-1745. That the Supreme Court addressed only Title VII and reserved judgment about sex-segregated restrooms is of no consequence. The Supreme Court's reasoning in *Bostock* provides the necessary guideposts for this Court to apply Title IX to affirm the judgment based on the district court's evidentiary findings.

A. The District Court Correctly Found That Defendant Violated Title IX by Subjecting Andrew to Sex Discrimination.

Title IX provides that "[n]o 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). Consistent with Congress's expansive purpose and recognizing the harm discrimination can impose on young people, the Supreme Court consistently has construed Title IX broadly, to bar any practice that, on the basis of sex, denies students equal access to educational opportunities. *See, e.g.*, *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 633 (1999); *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 277 (1998).

"Statutory construction … is a holistic endeavor." *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988). Yet Defendant focuses on the term "sex" in isolation seeking to avoid Title IX liability. Defendant ignores *Bostock*'s guidance that "[t]he question isn't just what 'sex' meant, but what [Title IX] says about it." 140 S. Ct. at 1739. Defendant "cannot escape liability by demonstrating that it treats males and females comparably as groups." *Id.* at 1744. Nor can Defendant disregard *Bostock* or its "lessons," *id.*, to justify the intentional exclusion of Andrew from the boys' restroom by claiming "biology, and nothing else" matters. Br. 21. Doing so ignores both the provisions of Title IX and the district court's uncontested factual findings that Defendant fails to argue meet the high bar of being clearly erroneous—most notably, that Andrew "identifies as a boy, is identified by others as a boy, is legally deemed by the state of Florida to be a boy, lives as a boy, uses the men's restroom outside of the school setting, and is otherwise

treated as a boy—except when it comes to his use of the school bathrooms." Doc. 192 at 36.

Title IX makes clear that students must not be denied access to educational benefits and opportunities on the basis of sex. *Davis*, 526 U.S. at 650. The district court found that Andrew had established all the elements of a Title IX violation: (1) Andrew was subjected to discrimination in an educational program or activity; (2) the discrimination was "on the basis of sex"; (3) Defendant receives federal funding; and (4) the discrimination caused Andrew harm.[8] *See Grimm*, 972 F.3d at 616.

When Defendant prohibited Andrew from using the same restroom as other boys, it discriminated against him "on the basis of sex" under Title IX. 20 U.S.C. § 1681. Specifically, Defendant's exclusionary restroom policy—though presented as a neutral measure that sorts students based on their sex assigned at birth—in fact subjected Andrew to discrimination on the basis of sex based on his transgender status. *See* Part II(C) of Statement of Facts, *supra*. Title IX, like Title VII, "asks simply whether sex was a but-for cause." *Bostock*, 140 S. Ct. at 1745. It is irrelevant that "two causal factors may be in play—*both* the individual's sex *and* … the sex … with which the individual identifies." *Id.* at 1742. For transgender people, the two factors "are inextricably bound up with sex." *Id.* Even ascribing the meaning of

[8] Defendant stipulated that it receives federal funding and does not contest that restroom access is an education program or activity under Title IX. Doc. 192 at 54.

"sex" pressed by Defendant,[9] *Bostock*'s reasoning applies the same way: if one discriminates because someone is transgender, that decision "inescapably intends to rely on sex[.]" *Id.* at 1742 (emphasis omitted).[10]

B. Defendant's Policy Subjected Andrew to Worse Treatment Than Other Boys.

Title IX's "subjected to discrimination" prong asks whether an individual is treated "worse than others who are similarly situated" because of sex. *Grimm*, 972 F.3d at 618 (quoting *Bostock*, 140 S. Ct. at 1740). In response, Defendant claims that purported "physiological differences" between Andrew and other boys are dispositive on the question of whether he experienced any discrimination. Br. 28. In essence, Defendant argues that Andrew, a transgender boy, is not similarly situated in all material respects to non-transgender boys, that is, boys whose identity matches the sex they were assigned at birth. But in *Lewis v. City of Union City, Georgia*, this Court rejected the need for a "perfect apples-to-apples identity." 918

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[9] Defendant discusses "common usage" and "[d]ictionary definitions of the term 'sex" at the time Congress enacted Title IX in 1972[.]" Br. 23-24. Even assuming (as the Supreme Court did in *Bostock*) that "sex" meant certain "biological distinctions" present at birth, Title IX liability does not "turn[] on the outcome" of that term. *See Bostock*, 140 S. Ct. at 1739.

[10] No matter how it is viewed—that Defendant intentionally discriminates based on sex, transgender status, gender nonconformity, or gender transition—Andrew was subjected to discrimination on the basis sex. *See* Part I(C) of the Argument Section, *supra*.

F.3d at 1225-26 (explaining "perfect identity is a nonstarter" and "[e]xact correlation is neither likely nor necessary.").

Despite Defendant's pleas to the contrary, "determining whether individuals are similarly situated is generally a factual issue" for the trier of fact. *See Eggleston v. Bieluch*, 203 Fed. Appx. 257, 264 (11th Cir. 2006); *accord Graham v. Long Island R.R.*, 230 F.3d 34, 39 (2d Cir. 2000). The district court, sitting as trier of fact, found that Andrew is similarly situated in all material respects to other boys assigned male at birth. *See, e.g.*, Doc. 192 at 47 ("There is no evidence to suggest that [Andrew's] identity as a boy is any less consistent, persistent and insistent than any other boy."); *id.* at 66 ("[Andrew] has undergone social, medical, and legal transitions to present himself as a boy.").[11] Yet, Andrew is treated worse because, unlike other boys, Defendant prohibited him from using the restroom corresponding with his identity. For Defendant, Andrew's sex plays an "unmistakable and impermissible role" in its decision to exclude him from the boys' restroom and he was treated worse than other boys. *Bostock*, 140 S. Ct. at 1741-42. Thus, Defendant subjected him to discrimination.

[11] When the district court is "sitting without a jury" and its "account of the evidence is plausible ... the court of appeals may not reverse it even though convinced ... it would have weighed the evidence differently." *Anderson v. Bessemer City*, 470 U.S. 564, 573–574 (1985).

Title IX not only protects individuals from discrimination, but also shields persons from being "excluded from participation in" or "denied the benefits of" a recipient's "education program or activity" on the basis of sex. 20 U.S.C. § 1681(a). These alternative ways of showing deprivation are rooted in the statute. *See Davis*, 526 U.S. at 650-51, 654 (noting physical exclusion as a form of deprivation). The question here is whether Defendant's policy excluded Andrew, as a transgender male student, from participation, denied the education benefits *or* "treated [him] worse than similarly situated students." *Grimm*, 972 F. 3d at 618. Even if this Court were to disagree that Defendant subjected Andrew to "discrimination," he has nonetheless been deprived of educational opportunities or benefits after Defendant denied him physical entry into the boys' restrooms based on his transgender status. *See* Br. 7 (acknowledging Andrew was "not permitted to use the boys' bathroom"). Defendant subjected Andrew, "as a transgender student, to different rules, sanctions, and treatment than non-transgender students, in violation of Title IX." *Whitaker*, 858 F.3d at 1049-50; *see also* 34 C.F.R. § 106.31(b)(4).

C. Andrew Suffered Objective, Individualized Harm From Being Excluded From the Boys' Restroom.

Importantly, "[n]o one doubts that the term 'discriminate against' refers to distinctions or differences in treatment that *injure* protected individuals." *Burlington Northern & Santa Fe Railway Co. v. Sheila White*, 548 U.S. 53, 59-60 (2006)

(emphasis added); *see also Bostock*, 140 S. Ct. at 1753. The severe emotional distress caused by Defendant's decision to exclude Andrew from the boys' restroom had a "concrete, negative effect" on his ability to secure educational opportunities and benefits in the same manner as his non-transgender peers. *See Davis*, 526 U.S. at 654. For example, Andrew personally suffered "anxiety and depression" from "walk[ing] past the boys' restroom on his way to a gender-neutral bathroom, knowing every other boy is permitted to use it but him." Doc. 192 at 27. He was "alienated" and made to feel "different" from other boys because he is transgender. *Id.* Additionally, using the girls' restroom at school hindered his clinical treatment for gender dysphoria. Doc. 166-2, 28:10-17; *id.* 33:8-15; *id.* 38:17-39:21. Andrew testified that, because of the policy, "I know that the school sees me as less of a person, less of a boy, certainly, than my peers." Doc. 160-1, 204:11-12. Based on expert and fact witness testimony, including Andrew's,[12] the district court found that Andrew "suffered emotional damage, stigmatization and shame from not being permitted to use the boys' restroom at school." Doc. 192 at 67-68.

These consequences transgender students experience are well-recognized as injurious. *See Grimm v. Gloucester Cty. Sch. Bd.*, 976 F.3d 399, 403 (4th Cir. 2020)

[12] At trial, the district court found Andrew, "on the stand, was honest, forthright" "[a]nd in terms of quality of witnesses, in terms of answers in response to cross-examination," among "the top 10 percent of witnesses" it had ever heard. Doc. 162 at 6:11-19.

(Wynn, J., concurring in denial of en banc review) ("This discrimination caused significant physical, mental, emotional, and social harm to Grimm[.]"); *Whitaker*, 858 F.3d at 1045-46 (affirming a finding of irreparable harm because excluding a transgender boy from the boys' restroom "stigmatized" the student and caused him "significant psychological distress" including "depression and anxiety"); *Dodds*, 845 F.3d at 221 (affirming a finding of irreparable harm because excluding a transgender girl "from the girls' restrooms has already had substantial and immediate adverse effects on [her] daily life[,] ... health[,] and well-being"); *see also Parents for Privacy v. Dallas Sch. Dist. No. 2*, 326 F. Supp.3d 1075, 1106 (D. Or. 2018) ("Forcing transgender students to use facilities inconsistent with their gender identity would undoubtedly harm those students and prevent them from equally accessing educational opportunities and resources."), *aff'd sub nom. Parents for Priv.*, 949 F.3d at 1239-40.

Defendant's false assertion that the "policy affects transgender and cisgender students in the same way" cannot be reconciled with Title IX's prohibition of sex *discrimination*, which requires a plaintiff to demonstrate they are worse off than similarly situated students and that they suffered objective, individualized harm. *Peltier v. Charter Day Sch., Inc.*, 8 F.4th 251, 274 (4th Cir. 2021), *reh'g en banc granted on other grounds*, 2021 WL 4892153 (4th Cir. Oct. 19, 2021) (noting that "*Grimm* and *Bostock* both involved objective, individualized harm"). Defendant's

assertion that "any biological female regardless of gender identity would have a claim for sex discrimination under Title IX by virtue of the exclusion" is not only incorrect, but it fails to meet this test. Br. 12, 21.

Additionally, the statutory term "discrimination" might mean one thing "in one context" and "something different in another context." *See Bostock*, 140 S. Ct. at 1750; *cf. Burlington*, 548 U.S. at 68-69 ("A schedule change in an employee's work schedule may make little difference to many workers, but may matter enormously to a young mother with school-age children."). An "act that would be immaterial in some situations is material in others." *Id*. at 69. Harm that rises to the level of a Title IX violation "depends on a constellation of surrounding circumstances." *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81-82 (1998). A non-transgender girl precluded from entry into the boys' restroom does not experience the injury a transgender boy like Andrew does. The "biological female" who identifies as a girl does not suffer "debilitating distress and anxiety" of gender dysphoria. She is also not "alienated" or otherwise made to feel different walking past the boys' restroom. Nor does Defendant's policy brand her with a "scarlet letter" by requiring her to use the girls' restroom or a single-user restroom. *Cf. Boyertown*, 897 F.3d at 530. Put simply, "[i]t is not enough that a plaintiff subjectively claims to be worse off"—although there are no such claims by non-transgender girls in the record. *Peltier*, 8 F.4th at 274. Unlike a transgender student,

the hypothetical non-transgender girl does not experience sex discrimination under Defendant's policy because, unlike Andrew, she suffers no objective harm from it.[13]

D. Title IX's Regulation Authorizing Separate Facilities Does Not Permit Sex Discrimination Against Transgender Students.

Defendant nevertheless argues that its policy as applied to Andrew is immunized from liability under Title IX because one of its implementing regulations states that schools "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. This restroom regulation, which does not address at all which sex-segregated facilities transgender students should use, does not—and cannot—create an exception to the statute's ban on "discrimination." In other words, the regulation is not a "safe harbor" from the statute's nondiscrimination guarantee. Section 1681(a) categorically provides that no person shall "be excluded from participation in, be denied the benefits of, or be subjected to discrimination" at school. 20 U.S.C. § 1681(a). Unlike statutory exemptions in 20 U.S.C. §§ 1681(a)(2)-(9), the restroom

[13] During argument this Court asked about a non-transgender girl who is delayed by longer lines in girls' restrooms. But waiting longer to use the restroom is not an injury that flows from the exclusion of the non-transgender girl from the boys' restroom; it is an injury that flows from inequitable facilities between boys and girls. In such an instance, the remedy is not to permit the non-transgender girl access to the boys' restroom but to provide comparable facilities.

regulation merely authorizes schools to "provide separate toilet facilities ... on the basis of sex," while leaving the statutory prohibition on "discrimination" undisturbed.[14] When a school provides restrooms on the basis of sex, it must do so in a manner that does not subject individual students to unequal treatment that causes harm.

There is no inherent conflict between providing restrooms "on the basis of sex" and allowing transgender boys and girls to use the same restrooms as non-transgender boys and girls. The regulation must, therefore, be read consistently with the statute's prohibition on subjecting students to "discrimination." *See Elllis v. Gen. Motors Acceptance Corp.*, 160 F.3d 703, 709 (11th Cir. 1998) ("[r]egulations cannot trump the plain language of the statutes") (quote omitted); *United States v. Gordon*, 638 F.2d 886, 888 (5th Cir. 1981) ("Whatever effect the agency regulation may have under other circumstances, it cannot supersede a statute …."), *cert. denied*, 452 U.S. 909 (1981). The mere existence of permissible sex-separated facilities that sort students by sex *as a group* cannot save Defendant from its discriminatory

[14] Similarly, the statutory provision authorizing schools to "maintain[] separate living facilities for the different sexes," 20 U.S.C. § 1686, which also does not address which separate facilities transgender students belong in, does not declare that the prohibition on discrimination "shall not apply." *Cf.* 20 U.S.C. § 1681(a)(2)-(9).

exclusion of Andrew from the boys' restroom that subjects *him* to harm based on his *transgender status*.

E. Defendant Advances the Same Errors Rejected in *Bostock*.

In advancing its arguments, Defendant relies upon the same "repackage[d] errors" expressly rejected in *Bostock*. 140 S. Ct. at 1744. For example, Defendant emphasizes its policy as evenhanded treatment of boys and girls as groups. Br. 8. (explaining that the policy "prohibits biological boys from using the girls' bathroom and biological girls from using the boys' bathroom"). But like Title VII, Title IX expresses concern for individual harm, not group inequality. *See* 20 U.S.C. § 1681(a). The policy "intentionally penalizes" Andrew, a transgender boy whose identity as a boy does not match his sex assigned at birth, "for traits or actions that it tolerates" in non-transgender boys whose identity as boys matches their sex assigned at birth. *Bostock*, 140 S. Ct. at 1741. In other words, Defendant is "liable for treating *this* [boy] worse in part because of [his] sex." *Id*. By intentionally discriminating against Andrew for his transgender status, Defendant "unavoidably discriminates against persons with one sex identified at birth and another today." *Id.* at 1746. *Bostock* forecloses Defendant's assertion that its policy does not "harm one sex or the other as a class." *Id.* at 1745; *see also* Part I(A) of the Argument Section, *supra*.

Second, intentional sex discrimination "is no more permissible when it is prompted by some further intention (or motivation)," such as providing comparable restrooms for boys and girls. *Bostock*, 140 S. Ct. at 1743. Defendant's reframing of its policy as treating all its students equally based on their "biological and physiological differences," Br. 21, does nothing to insulate Defendant from Title IX liability. Defendant "musters no better a defense" by responding that its policy prohibits "male *and* female [students] who are … transgender" from entering restrooms matching their identity. *Bostock*, 140 S. Ct. at 1742; *cf. McLaughlin v. State of Fla.*, 379 U.S. 184, 191 (1964) ("Judicial inquiry … does not end with a showing of equal application among the members of the class defined by the legislation."). Rather than eliminating Title IX liability, Defendant doubles it. *Bostock*, 140 S. Ct. at 1741. It is "irrelevant" what Defendant "might call its discriminatory practice, how others might label it, or what else might motivate it." *Id.* at 1744. Despite Defendant's repeated emphasis on Andrew's birth-assigned sex, Defendant nevertheless "necessarily and intentionally applie[d] sex-based rules" when it prohibited him, a transgender boy, from using the boys' restroom and "that should be the end of the analysis." *Id.* at 1743, 1745.

Finally, Defendant abandons Title IX's text and attempts to shift the focus to nothing more than "assumptions and policy." *Bostock*, 140 S. Ct. at 1749. For example, Defendant emphasizes that Congress could not have intended allowing a

transgender boy into the boys' restroom. *See, e.g.*, Br. 25. However framed, "'it is ultimately the provisions of' those legislative commands 'rather than the principal concerns of our legislators by which we are governed.'" *Id*. at 1749 (quoting *Oncale*, 523 U.S. at 79). Defendant is "not free to overlook plain statutory commands on the strength of nothing more than suppositions about intentions or guesswork about expectations." *Bostock*, 140 S. Ct. at 1754. Ultimately, the Supreme Court has rejected any notion that Title IX's protections are limited to achieving applications foreseen at the time of its enactment. *See North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 521 (1982) ("There is no doubt that if we are to give Title IX the scope that its origins dictate, we must accord it a sweep as broad as its language.") (quotation marks omitted).

F. Recognizing That Title IX Protects Transgender Students Does Not Violate the Spending Clause.

Defendant also argues—for the first time on appeal—that if Title IX protects transgender people from discrimination in restrooms and other sex-separated facilities, the statute offends the Spending Clause's requirement to provide fair notice of its conditions. *See* Br. 26-28 (citing *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1 (1981)). But "[i]t is the general rule … that a federal appellate court does not consider an issue not passed upon below," and this Court should decline to consider Defendant's argument. *Singleton v. Wulff*, 428 U.S. 106,

120 (1976); *see also Baumann v. Savers Federal Sav. & Loan Ass'n*, 934 F.2d 1506, 1512 (11th Cir. 1991).

Defendant's assertions that it is unconstitutional for the government to bar discrimination against transgender people in accessing restrooms matching their identity are meritless in any case. Recipients of federal funds have clear notice that Title IX encompasses *all* forms of sex discrimination. *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 175, 182-83 (2005); *Davis*, 526 U.S. at 638-39. By arguing that Title IX must explicitly refer to "gender identity" to provide "adequate notice" under *Davis*, Defendant misreads *Pennhurst* and its progeny. *Pennhurst* does *not* require Congress to "prospectively resolve every possible ambiguity concerning particular applications" of a statute. *Bennett v. Ky. Dep't of Educ.*, 470 U.S. 656, 669 (1985). Nor must each violation be "specifically identified and proscribed in advance." *Id.* at 666. "[S]o long as a spending condition has a clear and actionable prohibition of discrimination, it does not matter that the manner of that discrimination can vary widely." *Benning v. Georgia*, 391 F.3d 1299, 1306 (11th Cir. 2004).

Moreover, the Fourth Circuit recently rejected the precise Spending Clause argument Defendant belatedly seeks to Plaintiffs raise here. In *Grimm*, the school board claimed that the Spending Clause required that the word "sex" in Title IX be construed to bar application of the statute to gender identity "in order to give the

Board fair notice." 972 F.3d at 619 n.18. The Fourth Circuit rejected this argument, holding that "*Bostock* forecloses that 'on the basis of sex' is ambiguous as to discrimination against transgender individuals." *Id.* It further explained that "the Board knew or should have known that the separate facilities regulation did not override the broader statutory protection against discrimination." *Id.*

CONCLUSION

Faced with arguments that treating transgender plaintiffs equally in the workplace would also require treating them equally in restrooms, *Bostock* noted, "[g]one here is any pretense of statutory interpretation; all that's left is a suggestion we should proceed without the law's guidance to do as we think best." 140 S. Ct. at 1753. But the courts' "role is limited to applying the law's demands … faithfully," and the same "judicial humility that requires us to refrain from adding to statutes requires us to refrain from *diminishing* them." *Id.* (emphasis added). Here, the district court understood that banning Andrew from boys' restrooms would diminish the equal educational opportunity promised to him by the Fourteenth Amendment and Title IX and inflict profound harms on him. The district court rightly refused to hollow out those guarantees. This Court should do the same and affirm the judgment below.

Respectfully submitted on November 26, 2021.

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT, TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS

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Dated: November 26, 2021

/s/ Tara L. Borelli

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of Court for the U.S. Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system on November 26, 2021. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system. A true and accurate copy of the foregoing will be dispatched for overnight delivery via Federal Express to counsel for Defendant.

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David J. Smith
Clerk of Court
U.S. Court of Appeals for the 11th Circuit
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