

APPEAL NO. 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 No. 3:17-cv-00739-TJC-JBT

INITIAL BRIEF OF APPELLANT
THE SCHOOL BOARD OF ST. JOHNS COUNTY, FLORIDA

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CERTIFICATE OF INTERESTED PERSONS AND
CORPORATE DISCLOSURE STATEMENT

Pursuant to this Court's Local Rules 26.1-1 through 26.1-3 and 28-1(b), Appellant 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 is limited to the following:

1. Aberli, Thomas A. – *Amicus Curiae*
2. Achievement First Public Charter Schools – *Amicus Curiae*
3. Adams, Drew – Appellee
4. Adams, Scott – Appellee's Father
5. Allen, Tommy – Board Member of Appellant
6. Altman, Jennifer G. – Counsel for Appellee
7. American Academy of Child and Adolescent Psychiatry – *Amicus Curiae*
8. American Academy of Nursing – *Amicus Curiae*
9. American College of Physicians – *Amicus Curiae*

10. American Medical Association – *Amicus Curiae*
11. American Medical Women’s Association – *Amicus Curiae*
12. American Nurses Association – *Amicus Curiae*
13. Association of Medical School Pediatric Department Chairs – *Amicus Curiae*
14. Banks, Emily – *Amicus Curiae*
15. Barden, Robert Chris – Counsel for Appellant, Terminated
16. Barrera, Kelly – Board Member of Appellant
17. Barth, Morgan – *Amicus Curiae*
18. Baxter, Rosanne C. – Counsel for *Amicus Curiae*
19. Bazer, Morgan – *Amicus Curiae*
20. Boies, Schiller & Flexner, LLP – Counsel for *Amicus Curiae*
21. Borelli, Tara L. – Counsel for Appellee
22. Bourgeois, Roger – *Amicus Curiae*
23. Bruce, Diana K. – *Amicus Curiae*
24. Canan, Patrick – Board Member of Appellant
25. Carney, Karen – *Amicus Curiae*
26. Carter, Heidi – *Amicus Curiae*

27. Castillo, Paul David – Counsel for Appellee
28. Chang, Tommy – *Amicus Curiae*
29. Chapman, Peyton – *Amicus Curiae*
30. Colter, Howard – *Amicus Curiae*
31. Corrigan, Hon, Timothy J. – United States District Judge
32. Cyra, Sherri – *Amicus Curiae*
33. Davis, Bryan – *Amicus Curiae*
34. DeSelm, Lizbeth – *Amicus Curiae*
35. DiBenedetto, Arthur – *Amicus Curiae*
36. Doolittle, Kirsten L. – Counsel for Appellee
37. Doran, Mary – *Amicus Curiae*
38. Doss, Eric – *Amicus Curiae*
39. Dyer, Karen Caudill – Counsel for *Amicus Curiae*
40. Endocrine Society – *Amicus Curiae*
41. Ewing, Gregory – *Amicus Curiae*
42. Florida School Boards Insurance Trust – Insurance Carrier for Appellant

43. Forson, James (Tim) – Superintendent of the St. Johns County School District
44. Fountain, Lisa Barclay – Counsel for Appellant
45. GLMA – Health Professionals Advancing LGBT Equality - *Amicus Curiae*
46. Gonzalez-Pagan, Omar – Counsel for Appellee
47. Greer, Eldridge – *Amicus Curiae*
48. Grijalva, Adelita – *Amicus Curiae*
49. Gurtner, Jill – *Amicus Curiae*
50. Haney, Matthew – *Amicus Curiae*
51. Hargis, Kellie M. – *Amicus Curiae*
52. Harmon, Terry J. – Counsel for Appellant
53. Hohs, Sherie – *Amicus Curiae*
54. Holland & Knight, LLP – Counsel for *Amicus Curiae*
55. Kaplan, Aryeh L. – Counsel for Appellee
56. Kasper, Erica Adams – Appellee’s Next Friend and Mother
57. Kenney, Tim – *Amicus Curiae*
58. Kostelnik, Kevin C. – Counsel for Appellant

59. Kunin, Ken – *Amicus Curiae*
60. Kunze, Lisa – Principal of Allen D. Nease High School
61. Lambda Legal Defense and Education Fund, Inc. – Counsel for Appellee
62. Lapointe, Markenzy – Counsel for Appellee
63. Las Cruces Public Schools – *Amicus Curiae*
64. Los Angeles Unified School District – *Amicus Curiae*
65. Love, Laura H. – *Amicus Curiae*
66. MacKenzie, Dominic C. – Counsel for *Amicus Curiae*
67. Majeski, Jeremy – *Amicus Curiae*
68. McCalla, Craig – *Amicus Curiae*
69. Meece, Gregory R. – *Amicus Curiae*
70. Mignon, Bill – Board Member of Appellant
71. Miller, William C. – Counsel for Appellee
72. Morse, James C., Sr. – *Amicus Curiae*
73. Munson, Ziad W. – *Amicus Curiae*
74. Nardecchia, Natalie – Counsel for Appellee
75. O'Reilly, John – *Amicus Curiae*

76. Palazzo, Denise – *Amicus Curiae*
77. Pediatric Endocrine Society – *Amicus Curiae*
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81. RC Barden and Associates – Counsel for Appellant, Terminated
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83. Rivaux, Shani – Counsel for Appellee
84. Sand Diego Cooperative Charter Schools – *Amicus Curiae*
85. Santa, Rachel – *Amicus Curiae*
86. Schaffer, Brian – *Amicus Curiae*
87. Schommer, Monica – *Amicus Curiae*
88. School Administrators from 29 States and the District of Columbia –
Amicus Curiae
89. School District of South Orange and Maplewood – *Amicus Curiae*
90. Segal, Richard M. – Counsel for Appellee
91. Shah, Paru – *Amicus Curiae*
92. Shirk, Sarah – *Amicus Curiae*

93. Slanker, Jeffrey D. – Counsel for Appellant
94. Slough, Beverly – Board Member of Appellant
95. Smith, Nathaniel R. – Counsel for Appellee
96. Sniffen, Robert J. – Counsel for Appellant
97. Sniffen & Spellman, P.A. – Counsel for Appellant
98. Spellman, Michael P. – Counsel for Appellant
99. Spryszak, Delois Cooke – *Amicus Curiae*
100. Sutherland, Emily – *Amicus Curiae*
101. Taymore, Cyndy – *Amicus Curiae*
102. The American Academy of Pediatrics – *Amicus Curiae*
103. The Law Office of Kirsten Doolittle, P.A. – Counsel for Appellee
104. The School Board of St. Johns County, Florida – Appellant
105. Toomey, Joel – Magistrate Judge
106. Upchurch, Bailey & Upchurch, P.A. – General Counsel to Appellant
107. Upchurch, Frank D. – General Counsel to Appellant
108. Valbrun-Pope, Michaelle – *Amicus Curiae*
109. Vannasdall, David – *Amicus Curiae*
110. Vaughn, Craig – *Amicus Curiae*

111. Vitale, Julie – *Amicus Curiae*

112. Washoe County School District – *Amicus Curiae*

113. Weber, Thomas – *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 will enter this information into the web-based CIP contemporaneous with the filing of this Certificate of Interested Persons and Corporate Disclosure Statement.

STATEMENT REGARDING ORAL ARGUMENT

Appellant, the School Board of St. Johns County, Florida, respectfully requests oral argument. This case involves novel issues that would benefit from oral argument.

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STATEMENT OF JURISDICTION

The District Court had jurisdiction over the underlying dispute pursuant to federal question jurisdiction, 28 U.S.C. § 1331, because the matters in controversy arose under the Constitution and the laws of the United States. The District Court also had jurisdiction pursuant to 28 U.S.C. § 1343.

This Court has jurisdiction over the appeal as it is from a final decision of a district court disposing of all claims entered on July 26, 2018, and judgment entered by a district court on July 26, 2018. [Docs. 192 and 193]; 28 U.S.C. § 1291. The appeal was timely filed on August 23, 2018. [Doc. 194]; Fed. R. App. P. 4(a)(1)(A).

STATEMENT OF THE ISSUE

The District Court found that the School Board's longstanding policy of separating student bathrooms based on biological sex was not substantially related to the important governmental interest of maintaining students' privacy rights in its school bathrooms. The District Court reached this conclusion in the absence of any binding precedent, textual support, tradition or history supporting that the Equal Protection Clause or Title IX were meant to contemplate discrimination based on gender identity, and also in the absence of any intentional discrimination against Adams due to his gender identity. Was the District Court authorized to interpret Title IX and the Equal Protection Clause in a manner not supported by text and precedent to supplant the decisions of School Board personnel, informed by its constituency, expertise and duty to care for all 40,000 students in the School District?

STATEMENT OF THE CASE

This is an appeal of the District Court’s Findings of Fact and Conclusions of Law entered on July 26, 2018, and the judgment entered on July 26, 2018. [Docs. 192, and 193].

I. COURSE OF PROCEEDINGS AND DISPOSITION IN THE COURT BELOW

On June 28, 2017, Adams commenced this action by filing a Complaint for Declaratory and Injunctive Relief and Nominal Damages against the School Board, Tim Forson in his official capacity as Superintendent of Schools for the St. Johns County School District, and Lisa Kunze in her official capacity as Principal of Allen D. Nease High School (“Nease”). [Doc. 1].¹ Adams’ Complaint alleged violations of the Equal Protection Clause (Count I) and Title IX (Count II). [Doc. 1].

On July 19, 2017, Adams filed a Motion for Preliminary Injunction and Supporting Memorandum of Law seeking to enjoin the School Board from prohibiting him from using the boys’ bathrooms at Nease. [Doc. 22]. The School Board filed a response to Adams’ Motion for Preliminary Injunction on August 4, 2017, with supporting evidence [Docs. 41-1 through 41-7 and 42], to which Adams

¹ On August 8, 2017, Plaintiff dismissed Forson and Kunze from the case. [Doc. 45].

filed a reply on August 8, 2017. [Doc. 48]. On August 10, 2017, following a hearing on Adams' Motion for Preliminary Injunction, the District Court entered an Order denying Adams' Motion for Preliminary Injunction. [Doc. 50].

On August 18, 2017, the School Board filed a Motion to Dismiss Adams' Complaint as to Count II (Title IX). [Doc. 54]. The School Board Answered the Complaint as to Count I on August 22, 2017. [Doc. 56].

On September 7, 2018, Adams filed a First Amended Complaint for Declaratory, Injunctive, and Other Relief. [Doc. 60]. Adams' First Amended Complaint contained the same causes of action as the original Complaint; however, Adams added a demand for compensatory damages. [Doc. 60]. The School Board filed its Answer and Affirmative Defenses on September 21, 2017. [Doc. 63]. By Order of the District Court, the School Board's Motion to Dismiss Count II of Adams' original Complaint [Doc. 54] was carried with the case. [Docs. 59, 64].

On December 1, 2017, the parties attended a Final Pretrial Conference. [Doc. 135]. On December 7, 2017, the parties submitted Preliminary Findings of Fact and Conclusions of Law. [Docs. 137, 138].

A three-day, non-jury trial was held December 11 through 13, 2017. [Docs. 148-150]. The parties filed post-trial proposed Findings of Fact and Conclusions of Law on February 2, 2017. [Docs. 172-175]. Two months later, the District Court heard closing arguments. [Docs. 184].

On July 26, 2018, the District Court issued Findings of Fact and Conclusions of Law and a Final Judgment in favor of Adams on all counts. [Docs. 192, 193]. This timely appeal followed. [Doc. 195].

II. STATEMENT OF FACTS

a. The School Board

The School Board is the elected body of the St. Johns County School District, a K-12 school district responsible for the operation, control, and supervision of all public schools located in St. Johns County, Florida. Art. IX, § IV, Fla. Const.; Fla. Stat §§ 1001.30, 1001.32(2). Authorized to exercise any power not expressly prohibited by law, Fla. Stat. § 1001.32(2), the School Board is comprised of five members elected from geographic districts within St. Johns County, Florida. Among its obligations, the School Board provides “proper attention to [the] health, safety, and other matters relating to the welfare of students.” Fla. Stat. § 1001.42(8)(a); see also Fla. Stat. § 1006.07. The School Board is also required to “[e]nsure that all plans and specifications for buildings provide adequately for the safety and well-being of students...” Fla. Stat. § 1001.42(11)(b)8.

There are approximately 40,000 students enrolled in the School Board’s 36 schools. [Doc. 161 at Tr. 254-355]. High school students’ ages range from 13 to 21. [Doc. 161 Tr. at 256]. Only 16 of the 40,000 students enrolled (.04%) identify

as transgender. [Doc. 162 at Tr. 106-107]. There are 2,450 students at Nease. [Doc. 162 at Tr. 132].

To protect student privacy rights, the School Board requires biological boys to use the boys' bathrooms and biological girls to use the girls' bathrooms. [Docs. 161 at Tr. 149, 227; 162 at Tr. 11-12, 34-35, 44-45]. The longstanding, unwritten policy has successfully separated student bathrooms based on the anatomical differences between the sexes without issue. [Docs. 161 at Tr. 248-249; 162 at Tr. 45-46, 99-100]. This practice contemplates that an expectation of privacy begins at the bathroom door and guarantees for students and parents that persons of different biological sexes will not share the bathroom. [Doc. 162 at Tr. 67-68]. The policy is enforced district-wide. [Doc. 184 at pp. 11-12].

The sex of a student is determined by a student's identified sex in their enrollment documents. [Doc. 161 at Tr. 205, 234]. The School Board accepts the sex of students as represented in enrollment documents and treats students consistent with that sex for purposes of bathroom use. [Docs. 161 at Tr. 234-235; 162 at Tr. 53]. This method of determining student sex has not been a problem. [Doc. 162 at Tr. 54-55].

From 2012 through 2015, School Board staff engaged in an extensive and process to analyze issues related to LGBTQ students.² School Board personnel finalized a “Best Practices” document for teachers and staff outlining guidelines related to LGBTQ students in August or early September of 2015. [Docs. 152-6; 161 at Tr. 242-243, 246-247; 162 at Tr. 110]. The School Board considered student safety and privacy issues, since bathrooms are unsupervised areas where students in high schools as young as 13 may be sharing space with much older students. [Doc. 161 at Tr. 172-173, 212, 248]. Concerns included privacy and safety, students changing clothes (inside and outside of stalls), students going to the bathroom, and gender-fluid students (students whose gender changes on potentially a daily basis). [Doc. 161 at Tr. 212-215, 221-223, 248].³ The issue of gender-fluid students “came up several times” during the development of the Best Practices. [Doc. 161 at Tr. 213, 216]. Particularly problematic was how to reliably ensure student privacy concerns are protected with these students whose gender identity may change from day-to-day. [Doc. 161 at Tr. 213, 216].⁴

² [Docs. 161 at Tr. 146-147, 150-152, 158-159, 161-163, 170-172, 174-180, 201-202; Docs. 152-4 through 152-5, 152-15 through 152-21, 152-23, 152-25 through 152-26, 152-32 through 152-34, 152-36 through 152-38, 152-39, 152-40 through 152-41, 152-44 through 152-58].

³ The “boys” and “girls” bathroom signs are located on the outside of each group bathroom. [Doc. 161 at Tr. 221-222].

⁴ See also Doc. 151-8 at p. 1587 for an explanation of gender fluidity under the definition of “genderqueer.”

Under the Best Practices, students may use a gender-neutral bathroom or the bathroom matching their biological sex. [Doc. 152-6;161 at Tr. 199]. The Best Practices preserve the School Board's longstanding policy founded in fundamental concerns about students' safety and privacy. [Doc. 161 at Tr. 61-62, 247]. The Best Practices also accommodate gender-fluid students, gender non-binary students (students who do not identify as a particular gender), and transgender students who may not want to use the bathroom matching their gender identity through the provision of gender neutral, single-user bathrooms. [Doc. 162 at Tr. 70-71].

b. Drew Adams

Adams was born a female and has a vagina. [Docs. 160 at Tr. 83, 195; 166-2]. Adams was identified as a female in the enrollment materials submitted to the School Board and is identified as a female in the School Board's official school records. [Docs. 152-28 through 152-31; 161 at Tr. 234, 253]. He did not present the School Board with any evidence that he is a biological boy. [Doc. 162 at Tr. 36]. Aside from bathroom use and official school records, the School Board has treated Adams as a boy. [Doc. 160 at Tr. 170]. Adams is a student at Nease and has attended Nease for all of high school. [Doc. 160 at Tr. 79].

Adams used the girls' bathroom throughout middle school. [Doc. 160 at Tr. 129]. During the summer of 2015 following his eighth grade year, Adams started referring to himself using male pronouns and using boys' public bathrooms. [Doc.

160 at Tr. 96]. He notified Nease during the summer that he would be presenting as a male beginning his freshman year. [Doc. 160 at Tr. 112]. Adams was never told he could use the boys' bathrooms. [Doc. 160 at Tr. 155].

Adams testified he used the boys' bathrooms at Nease from August through September of 2015. [Doc. 160 at Tr. 112-114]. Students complained to Nease administrators in September 2015 that Adams was using the boys' bathroom. [Docs. 160 at Tr. 114-115, 117; 161 at Tr. 34]. Nease staff thereafter instructed Adams to use the gender-neutral or girls' bathrooms but not the boys' bathrooms. [Docs. 152-7; 160 at Tr. 114-115, 117; 161 at Tr. 34]. Adams was not permitted to use the boys' bathrooms based on the School Board's policy of separating bathrooms on the basis of biological sex. [Docs. 160 at Tr. 255; 161 at Tr. 185]. From September 2015 through the trial in this case, Adams used the gender-neutral bathrooms at Nease. [Doc. 161 at Tr. 118].

c. The Bathrooms at Nease

Nease has five sets of gang-style, sex-separated bathrooms on campus. [Doc. 162 at Tr. 131]. There are two stalls in each boys' bathroom for a total of 10 on campus. [Doc. 162 at Tr. 132-133]. There are 11 single-stall, gender-neutral bathrooms located on the first floor of Nease. [Doc. 162 at Tr. 133-134].

The boys' bathrooms at Nease have urinals and stalls with doors, but there are no partitions between the urinals. [Doc. 162 at Tr. 132-133]. The gender-

neutral bathrooms are “more modern than the multi-stall single-sex bathrooms.” [Doc. 192 at p. 24]. The boys’ locker room has an open floor plan with no privacy for students while changing, no curtains or dividers, and “is visible to other areas of the locker room.” [Doc. 192 at p. 24].

d. Other Concerns from Other Students and Parents

Parents of students and students in the School District object to a policy allowing students to use a bathroom matching their gender identity as opposed to their biological sex, because it would violate the bodily privacy rights of students and risk their safety and welfare. [Doc. 116 at p. 11].

III. STANDARD OF REVIEW

This Court reviews the District Court’s conclusions of law *de novo* and factual findings for clear error. Tartell v. S. Florida Sinus & Allergy Ctr., Inc., 790 F.3d 1253, 1257 (11th Cir. 2015).

SUMMARY OF THE ARGUMENT

Despite uncontroverted evidence of the School Board's longstanding and successful policy protecting student privacy interests, and based upon an overextension of this Court's decision in Glenn v. Brumby, 663 F.3d. 1312 (11th Cir. 2011), the District Court erred in finding that the School Board's policy separating student bathrooms based on the real anatomical differences between the sexes violated the Constitution. The District Court similarly read non-existent ambiguity into the clear language of Title IX.

The District Court improperly found that the policy treated Adams differently from those similarly situated to him. The School Board treated Adams the same way as all other biological females, and the District Court's order improperly invalidated the School Board's policy on a challenge not directed toward the authority to separate, but the manner in which the School Board decided to separate.

The District Court recognized the important governmental interest in protecting students' privacy in bathrooms, but improperly found this interest was not implicated in Adams' use of the boys' bathrooms and that the School Board's policy was not substantially related to that interest. In so doing, the District Court ignored Supreme Court precedent recognizing that the two sexes are not similarly situated in all relevant respects and that differences founded in the different

biology of the sexes can be the basis of government classification so long as they are not based on stereotypes. The School Board's policy is not based on stereotypes, but rather the real differences in anatomy between boys and girls and the privacy interest this implicates.

The District Court similarly erred in finding Title IX's prohibition of sex discrimination encompassed discrimination based on gender identity. The plain meaning of the text and regulation at issue do not support the District Court's interpretation. It is undisputed that at the time Title IX was enacted, dictionaries, and even the Supreme Court, defined sex to mean whether one is biologically and anatomically a male or a female. The District Court's decision to graft gender identity on to sex does not consider the broader context of Title IX and renders regulations interpreting Title IX and permitting sex-based segregation invalid. This reading of the statute also ignores the rule requiring Congress to explicitly speak to requirements for the receipt of federal funds when enacting legislation pursuant to the Spending Clause, like Title IX. The District Court's finding in this regard, and the record below, is wholly devoid of a finding and evidence of discriminatory animus, a threshold requirement to successfully prevail on a Title IX claim.

The District Court, as other courts around the country have done,⁵ overextended this Court's holding in Glenn. This case presents an opportunity for this Court to clearly define what constitutes impermissible sex discrimination and clarify its holding in Glenn. Binding precedent, the separation of powers, and the text of the Constitution and Title IX counsel against these courts' widespread overextension.

ARGUMENT

I. THE SCHOOL BOARD'S POLICY OF SEPARATING STUDENT BATHROOMS ON THE BASIS OF BIOLOGICAL SEX DOES NOT VIOLATE THE CONSTITUTION'S EQUAL PROTECTION CLAUSE

The Equal Protection Clause of the Fourteenth Amendment essentially directs state actors to treat all persons similarly situated alike. Plyler v. Doe, 457 U.S. 202, 210 (1982). The District Court missed the boat in finding the School Board's policy requiring students to use the bathroom of their biological sex violated Adams' right to equal protection of the laws. This policy did not

⁵ See Whitaker By Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ., 858 F.3d 1034, 1051 (7th Cir. 2017), cert. dismissed sub nom. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ. v. Whitaker ex rel. Whitaker, 138 S. Ct. 1260 (2018); Evancho v. Pine-Richland Sch. Dist., 237 F. Supp. 3d 267, 289 (W.D. Pa. 2017).

discriminate against Adams and was substantially related to an important governmental interest.

a. The School Board did Not Discriminate Against Adams on the Basis of His Gender Identity and it is Not the Province of this Court or the District Court to Legislate Rights Unsupported by the Constitution's Text

The School Board did not discriminate against Adams; rather, it treated him the same as all other similarly situated individuals. Adams, as a biological female with female reproductive organs, was not permitted to use the boys' bathrooms at Nease. The use of the boys' bathrooms is limited by policy to biological males. Adams is not a biological male and has presented no evidence that he has the reproductive organs of a male⁶ and thus was not permitted to use the boys' bathrooms - plain and simple. This policy, and the application of this policy, is not discriminatory to Adams in any way, shape or form.

The School Board's bathroom policy does not consider gender identity. It is solely based on the physiological characteristics of students as identified in their enrollment paperwork. The policy makes reasonable, and explicitly lawful,

⁶ Predictably, Adams will argue that not all individuals born as biological boys have a penis thereby diminishing the School Board's position. This is a red herring with which the Court need not concern itself. As the District Court recognized, most people are born with external genitalia leading to a "singular conclusion that an individual is either a male or a female." [Doc. 192 at p. 6]. Nothing in this Court's, or the Supreme Court's, Equal Protection jurisprudence requires that a governmental entity's policy concern itself with every possible distinction, subclass or subpart, of persons.

distinctions based on sex. See infra, Section II (explaining that Title IX explicitly permits schools to separate bathrooms based on sex); 20 U.S.C. § 1703 (prohibiting segregation in schools within a district on the basis of race, sex, and other protected classes, but only prohibiting segregation within a single school on the basis of race, color or national origin); United States v. Hinds Cty. Sch. Bd., 560 F.2d 619, 624 (5th Cir. 1977) (interpreting 20 U.S.C. § 1703 to permit “sex-segregation to continue in instances similar to those in the past such as physical education and home economics classes.”).⁷

Discriminating on the basis of gender identity would require a policy that students whose gender identity matches their biological sex could use the school science labs, but those that identify with a sex other than their biological sex cannot. This type of policy would take a student’s transgender status into account where it has no relation to the program or activity.

The School Board’s policy on bathroom use is fundamentally different and merely requires that entrance to bathrooms be determined on the basis of biology. Whether intended or not, the District Court over-simplified the issue by effectively finding that outward expressions and representations of sex necessitate separate bathrooms. Separate bathrooms are not separate because of one’s internal sense of

⁷ The Eleventh Circuit has adopted as binding decisions of the former Fifth Circuit rendered prior to October 1, 1981. Bonner v. City of Prichard, 661 F.2d 1206 (11th Cir. 1981) (en banc).

gender; rather, they are separate because of real and enduring physical differences between the sexes.

The Supreme Court has consistently recognized that the Fourteenth Amendment does not deny States the power to treat different classes of persons in different ways. See, e.g., Barbier v. Connolly, 113 U.S. 27, 32 (1885). Likewise, the Supreme Court has upheld statutes that classify sexes, where that classification is not invidious, but rather reflects the fact the sexes are not similarly situated in certain circumstances. Parham v. Hughes, 441 U.S. 347, 355 (1979); Schlesinger v. Ballard, 419 U.S. 498, 508 (1975); Kahn v. Shevin, 416 U.S. 351, 355-56 (1974). No decision of the Supreme Court has recognized that the Equal Protection Clause extends to situations in which legitimate distinctions are made between males and females based on biological sex, but an individual disagrees with how the government classifies his or her sex.

Indeed, Adams did not challenge the School Board's ability to separate boys and girls into different bathrooms on the basis of sex, and the District Court did not hold that such separation was impermissible. Instead, Adams argued the School Board discriminated against him by defining him as a girl. The problem with this premise is that a female student who wishes to use the boys' bathroom for some other reason, or no reason at all, could also claim discrimination in violation of the Constitution. Like Adams, any student could challenge the School Board's

determination of their sex and exclusion and prevail under the same logic employed by Adams and the District Court. This undercuts any claim that Adams was discriminated against because he was transgender and, in fact, the logical result would be to make sex-separated bathrooms impermissible in *toto*.

An opening statement by the District Court in its Findings of Facts and Conclusions of Law encapsulates this issue and the fundamental error that permeates its entire decision. The District Court opined, “[e]veryone agrees that boys should use the boys’ restroom at Nease and that girls should use the girls’ restroom. The parties disagree over whether Drew Adams is a boy.” [Doc. 192 at p. 2]. The District Court erred because the issue is not whether Adams is boy or a girl. The determinative issue is whether the classification of Adams as a girl for purposes of bathroom use is substantially related to an important governmental interest.⁸

The District Court improperly discounted the lack of evidence that students similarly situated to Adams were treated less favorably or differently when it explained that discriminatory intent is not necessary when a policy or practice facially discriminates. [Doc. 192 at p. 37, n. 37]. Of course, when a policy facially

⁸This is so regardless of whether Adams’ retained experts, *amici curiae*, administrators from other school districts, the Florida Departments of Motor Vehicles and Health, the Florida High School Athletics Association, or the District Court itself disagrees with how the School Board classifies Adams.

discriminates, like the School Board's policy, there does not need to be independent evidence of discriminatory intent, see, e.g., City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985), but equally true is the fact that a plaintiff must make a threshold showing that he was similarly situated to those that received more favorable or different treatment to assert a valid equal protection claim. See, e.g., Campbell v. Rainbow City, 434 F.3d 1306, 1314-1317 (11th Cir. 2006). This threshold showing of different or more favorable treatment to non-biological females was wholly unaddressed by the District Court.

In that vein, the District Court's reliance on this Court's decision in Glenn v. Brumby is misplaced. Glenn involved an employer that terminated a transgender female employee because she did not conform to sex stereotypes, to-wit: wearing female clothing and informing her employer she intended to transition from male to female. 663 F.3d. at 1318-20. Glenn did not involve bathroom use by a transgender student, let alone the use of bathrooms in schools by children with wide-ranging ages and in the care of School Board personnel. In fact, in its defense, the employer attempted to justify the termination on the "purported concern that other women might object to Glenn's restroom use." Id. at 1321. This Court, noting the record evidence that all of the restrooms were "single-occupancy," agreed with the trial court's rejection of this conjecture, which was

based on a single statement in a deposition, in light of “overwhelming[]” contradictory evidence manifesting the employer’s intent for termination. Id.

Wholly lacking in this case, and unlike Glenn, is any evidence anyone that the School Board treated Adams with any animus because he identified as transgender. Glenn’s application is especially suspect given the lack of any evidence in the record that the School Board prohibited Adams from using the boys’ bathroom because he did not conform to any sex stereotype.

Although not binding, a recent district court decision in Louisiana illustrates the point. In Williams v. Kelly, No. CV 17-12993, 2018 WL 4403381, at *12–13 (E.D. La. Aug. 27, 2018), report and recommendation adopted, No. CV 17-12993, 2018 WL 4386178 (E.D. La. Sept. 14, 2018), a transgender inmate suffering from gender dysphoria complained she was denied sex reassignment surgery while biological female inmates suffering from cystocele (a prolapsed or dropped bladder) or rectocele (a herniation of the front wall of the rectum into the back wall of the vagina) were provided with surgical treatments for their conditions. The district court held the plaintiff was not similarly situated to the other inmates and thus her equal protection claim was without merit. The distinguishing fact: a biological female has a vagina and a transgender female does not. The district court held that it was lawful for the institution to employ a different decision-

making process for inmate medical care to two separate classes of people in relevant biological respects. Id.

Time and again, the Supreme Court has held the physical differences between men and women are real and governments are permitted to enact laws accounting for and reflective of those differences. See Section I(b), *supra*. To hold otherwise, especially here, where there is no evidence of dissimilar treatment, would usurp a school board's right to regulate and operate schools based on its expertise and the input of the constituencies it serves.

That is exactly the effect of the District Court's decision. This Court, and the District Court, are not legislatures. Whether permitting students to use the bathroom matching their gender identity or those consistent with their biology should have been no concern to the District Court. "Under the Constitution, judges should have been no concern to the District Court. "Under the Constitution, judges have power to say what the law is, not what it should be." Obergefell v. Hodges, 135 S. Ct. 2584, 2611 (2015) (Roberts, C.J. dissenting). The people who ratified the Constitution authorized courts to exercise "neither force nor will but merely judgment." The Federalist No. 78, p. 465 (C. Rossiter ed. 1961) (A. Hamilton) (capitalization altered).

The District Court's decision robs the people of St. Johns County of the most important liberty asserted in the Declaration of Independence: the right to govern themselves. See Obergefell, 135 S. Ct. at 2627 (Alito J. dissenting). When

terms such as equal protection are vague, it is not for courts to substitute their view on the matters in place of the electorate, especially when tradition and history (and even Supreme Court precedent recognizing the validity of sex-based distinctions based on biological differences between the genders), dictate otherwise.

It is unquestionable that the policy challenged in this case was not something those who ratified the Fourteenth Amendment understood to be impermissible and the policy was universal and uncontroversial for years after ratification. Terry S. Kogan, Sex-Separation in Public Restrooms: Law, Architecture, and Gender, 14 Mich. J. Gender & L. 1, 39–40 (2007) (explaining that starting in 1887 and up to 1920, nearly every state in the nation enacted laws separating bathrooms on the basis of sex). The District Court’s finding that the School Board’s policy was applied in a discriminatory manner towards Adams is unsupported by legal precedent, history, and tradition.

b. There is an Important Governmental Interest in Protecting the Privacy Rights of Students in School Bathrooms

Assuming Adams was treated differently, the School Board’s policy on bathroom use, and its application to Adams, was entirely constitutional. Section 5 of the Fourteenth Amendment empowers Congress to enforce the Equal Protection Clause’s mandate that all persons similarly situated should be treated alike, but absent controlling congressional direction, the courts have themselves devised standards for determining the validity an action challenged as denying equal

protection. Cleburne, 473 US at 440-41. When a law implicates a *quasi* suspect class, such as sex, the government must satisfy an “intermediate” level of scrutiny, which requires a substantial relationship to an important or a legitimate state interest. See Craig v. Boren, 429 U.S. 190, 197 (1976). A party seeking to uphold government action based on sex must establish an “exceedingly persuasive justification” for the classification. Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982).

Here, intermediate scrutiny applies because the School Board’s policy requires biological females to use girls’ bathrooms and biological males to use boys’ bathrooms. While the policy arguably discriminates on the basis of sex, it draws those lines based on acknowledged differences in the physiology of males and females, which has been repeatedly held appropriate by the Supreme Court and lower courts.

While a legislature may not “make overbroad generalizations based on sex which are entirely unrelated to any differences between men and women or which demean the ability or social status of the affected class” Parham v. Hughes, 441 U.S. 347, 354 (1979) (plurality opinion of Stewart, J.), it does not “demand that a statute necessarily apply equally to all persons” or require ““things which are different in fact ... to be treated in law as though they were the same.”” Rinaldi v. Yeager, 384 U.S. 305, 309 (1966), *quoting* Tigner v. Texas, 310 U.S. 141 (1940).

State action that classifies sex in a manner reflecting the fact the sexes are not similarly situated in certain circumstances has been recurrently upheld by the Supreme Court. Michael M. v. Superior Court of Sonoma Cty., 450 U.S. 464, 469 (1981). The Supreme Court has routinely permitted discrimination against a certain sex when that discrimination is designed to accommodate differences between the sexes rooted in biology. See Id. at 498 (Stevens, J., dissenting) (upholding statutory rape law applying only to men, because women are different from men because biologically they are able to get pregnant); Rostker v. Goldberg, 453 U.S. 57, 76-79 (1981) (finding women's physical makeup, as opposed to men's makes them ineligible for combat).

There is no question the protection of bodily privacy is an important government interest and that the government may promote this interest by excluding members of the opposite sex from places where individuals are likely to engage in intimate bodily functions. See, e.g., Faulkner v. Jones, 10 F.3d 226, 232 (4th Cir. 1993) ("The point is illustrated by society's undisputed approval of separate public rest rooms for men and women based on privacy concerns. The need for privacy justifies separation and the differences between the genders demand a facility for each gender that is different."); Lee v. Downs, 641 F.2d 1117, 1119 (4th Cir. 1989) ("Most people, however, have a special sense of privacy in their genitals, and involuntary exposure of them in the presence of

people of the other sex may be especially demeaning and humiliating”); see also Doe v. Luzerne Cty., 660 F.3d 169, 176–77 (3d Cir. 2011) (explaining that several courts have found “a constitutionally protected privacy interest in [one’s] partially clothed body”); Sepulveda v. Ramirez, 967 F.2d 1413, 1416 (9th Cir. 1992) (explaining, “[t]he right to bodily privacy is fundamental” and “common sense” and “decency” protect the right of a parolee not to be observed by a member of the opposite sex while producing a urine sample); York v. Story, 324 F.2d 450, 455 (9th Cir. 1963) (“The desire to shield one’s unclothed figure from view of strangers, and particularly strangers of the opposite sex, is impelled by elementary self-respect and personal dignity.”). This interest is even more pronounced here because minors are involved. See, e.g., Beard v. Whitmore Lake Sch. Dist., 402 F.3d 598, 604 (6th Cir. 2005) (“Students of course have a significant privacy interest in their unclothed bodies.”); Doe v. Renfrow, 631 F.2d 91, 92–93 (7th Cir. 1980) (explaining it “does not require a constitutional scholar to conclude that a nude search of a thirteen-year-old child is an invasion of constitutional rights of some magnitude”).

Privacy can be reasonably expected in public restrooms. See Hernandez v. Univ. of St. Thomas, 793 F. Supp. 214, 217-18 (D. Minn. 1992) (finding that females had a legitimate privacy interest in using the restroom without male invasion in holding that it was not sex discrimination to refuse to hire a male

janitor to clean female restrooms). In fact, no court has found that segregating bathrooms on the basis of sex was itself impermissible. See, e.g., Kastl v. Maricopa Cnty. Cmty. Coll. Dist., 325 Fed. App'x. 492 (9th Cir. 2009); Etsitty v. Utah Transit Auth., 502 F.3d 1215 (10th Cir. 2007); Sullivan v. City of Cleveland Heights, 869 F.2d 961 (6th Cir. 1989). As Justice Marshall reasoned: “A sign that says ‘men only’ looks very different on a bathroom door than a courthouse door.” Cleburne, 473 U.S. at 468-69 (Marshall, J., dissenting).

Ultimately, the District Court recognized this privacy interest, but gave it short shrift, summarily concluding that the School Board’s policy was not substantially related to that interest, a finding unsupported by the record.

c. The School Board’s Policy is Substantially Related to Safeguarding the Privacy of its Students

In finding that the School Board’s policy was not substantially related to the recognized privacy interest of students in school bathrooms, the District Court applied standards inconsistent with intermediate scrutiny and Supreme Court precedent. “Unlike strict scrutiny, the government is not required to show that the law is the ‘least intrusive means of achieving the relevant government objective...[i]n other words, the fit needs to be reasonable; a perfect fit is not required.’” Carcaño v. McCrory, 203 F. Supp. 3d 615, 640 (M.D.N.C. 2016) (internal citations omitted); see also Peightal v. Metropolitan Dade Cty., 26 F.3d 1545, 1557 (11th Cir. 1994) (holding that to survive strict scrutiny, the remedy

must offer the least intrusive method to accomplish its compelling governmental objective). Indeed, the Supreme Court has held that in analyzing a claim under the Equal Protection Clause under intermediate scrutiny, a classification need not be rejected just because it is less demanding to satisfy and not entirely effective so long as there is an important governmental interest and the classification substantially relates to that interest. See Tuan Anh Nguyen v. I.N.S., 533 U.S. 53, 69-70 (2001). To pass Constitutional muster, the District Court improperly required a “perfect fit,” not the reasonable fit the School Board policy supplies.

First, the District Court held, “allowing transgender students to use the restrooms that match their gender identity does not affect the privacy protections in place.” [Doc. 192 at p. 39]. In support of its conclusion, the District Court notes Adams used a stall when using bathrooms, because he could not use urinals. [Doc. 192 at pp. 39-40]. The District Court discounted the privacy concern implicated by the fact that the boys’ bathrooms at Nease have urinals without dividers, claiming this is a non-issue because Adams could not use the urinals and there was no evidence that a transgender boy is more likely to be more curious about other boys than a non-transgender boy. [Doc. 192 at p. 40]. The District Court also claimed

any such incidents could be addressed through Nease's discipline code.⁹ [Doc. 192 at p. 40].

But privacy interests are not limited to what takes place behind the closed door of a bathroom stall. Courts have held that individuals have a privacy right not to have a member of one sex enter a bathroom while a member of the opposite sex is present. Norwood v. Dale Maint. Sys., 590 F. Supp. 1410, 1423 (N.D. Ill. 1984) (explaining that the privacy rights of a male using a restroom would be violated if a female entered the bathroom while a male was in it); see also Brooks v. ACF Indus., 537 F. Supp. 1122, 1132 (S.D.W. Va. 1982) (same). The district court in Carcaño, in considering North Carolina's bill prohibiting individuals from using public restrooms aligned with their gender identity, held that the privacy interest implicated extends to the entire of the bathroom, regardless of the privacy afforded by stalls. 203 F. Supp. 3d at 645.

Second, regardless of how the Court wishes to define Adams, he is not a biological boy. The privacy interest repeatedly articulated by courts in this context is the right to be free from exposing one's private and personal space and unclothed and partially clothed body to members of the opposite sex. Defining sex

⁹ Disciplining a student for violating another student's privacy hardly ameliorates the privacy violation. The District Court's explanation is inconsistent with the deference that should be afforded to school boards to manage the education environment to minimize disruption and ensure the safety and welfare of *all* students, not just Adams.

to include one's internal sense of gender does nothing to further this interest. It is not a fit at all.

Third, this reasoning fails to account for the nature of the privacy interest and the potential exposure of students to privacy infringement under the District Court's holding. For example, when Adams enters a boys' bathroom and there is a biological boy using the urinal, that biological boy's privacy rights have been violated. The School Board has the right to enact a policy to ensure this does not happen. This is particularly true as parents of students and students in the St. Johns County School District object to a policy or practice allowing students to use a bathroom matching their gender identity as opposed to their biological sex, as they believe such a practice would violate student bodily privacy rights. [Doc. 116 at p. 11].

Next, the District Court lumped much of the articulated rationale for the policy into a section entitled "Additional Considerations." [Doc. 192 at pp. 44-53]. The District Court first stated that the policy infringed on Adams' constitutional rights despite the fact that Adams could avail himself of gender-neutral and girls' bathrooms throughout Nease, because Adams' asserted stigma in using such bathrooms violated his Equal Protection rights. [Doc. 192 at pp. 44-46]. However, sex is not a suspect class that is entitled to strict scrutiny review. It does not require a government to use the least restrictive means possible to achieve its important

governmental interest. The District Court improperly imposed a greater requirement on the School Board to justify its policy, especially in light of the fact that Adams proffered absolutely no sex-neutral alternatives to the School Board's policy. See, e.g., Nguyen., 533 U.S. at 78 (O'Connor, J. Dissenting) *citing* Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142, 151 (1980), which invalidated a sex-based classification where a sex-neutral approach would completely serve the needs of both classes.

The District Court, while paying credence to the concern of School Board officials in addressing the privacy concerns of students implicated by gender-fluid students, discounted that concern because the case only involved Adams. [Doc. 192 at p. 46]. However, if it is a Constitutional violation to prohibit a student from using the bathroom matching their gender identity, the School Board's interests are nonetheless implicated. Further, this alone provides justification for the School Board's policy. The same holds true for the District Court's dismissal of the potential for a non-transgender student to pose as a gender-fluid student to access the bathroom. [Doc. 192 at p. 46]. As much as the District Court appeared to want to make this a case about Adams only, the holding has a much wider reach.

Finally, the District Court erred when it concluded that the number of Supreme Court cases holding that classifications based on the real differences between the sexes do not support a finding that the School Board's policy

substantially furthers a legitimate interest. In this regard, the District Court held the School Board's policy was different from these cases because:

[e]veryone is subject to the same rule-both boys and girls must use the bathroom that aligns with their sex assigned at birth (or a gender-neutral one), and both boys and girls would be subject to discipline for disobeying the policy. The school bathroom policy ***does not depend on something innately different between the bodies of boys and girls or what they do in the bathroom.***

[Doc. 192 at p. 48] (emphasis added). The District Court concluded that biological differences between boys and girls are not relevant to important privacy interests.

[Doc. 192 at p. 49, n. 44].

This conclusion ignores cases recognizing a privacy interest in not being exposed to members of the ***opposite sex***, making distinctions based on biological and physiological differences between the sexes relevant. It also ignores cases holding that gender classifications based on real biological differences between the sexes are permissible. In fact, the Supreme Court has held that sex “is an immutable characteristic determined solely by the accident of birth.” Frontiero v. Richardson, 411 U.S. 677, 686–87 (1973).

Along these same lines, many cases acknowledge and permit distinctions based on sex when driven by different physiological characteristics between the two sexes. See, e.g., Michael M., *supra*; Nguyen, 533 U.S. at 71 (upholding policy classifying genders because classification was based on biological differences between males and females). In United States v. Virginia, the Supreme Court

recognized that “[p]hysical differences between men and women . . . are enduring” and that “the two sexes are not fungible; a community made up exclusively of one [sex] is different from a community composed of both.” 518 U.S. 515, 533 (1996); *citing* Ballard v. United States, 329 U.S. 187, 193 (1946). The Supreme Court even recognized that these physical differences would compel alterations to the physical facilities. Virginia, 518 U.S. at 540; (“And it is uncontested that women’s admission would require accommodations, primarily in arranging housing assignments and physical training programs for female cadets.”).

As the Supreme Court has held, governmental classifications based on sex may not “employ[] gender as an inaccurate proxy for other, more germane bases of classification.” Craig, 429 U.S. at 198; Mississippi Univ. for Women, 458 U.S. at 726. Neither Adams nor the District Court established a sex-neutral alternative to the policy, and the District Court order does not elucidate what germane classification, apart from one based on biological sex, furthers the privacy interest that it recognizes.

The District Court cited Glenn for the proposition that this case is different from those cited herein. The District Court found that there was unequal treatment in violation of the Constitution, because Adams identified as a transgender boy and this motivated the School Board to treat him different. [Doc. 192 at pp. 50-51]. This misses the mark though, because, as the record reflects, Adams was treated

differently not because he identified as a boy, but because he is not biologically a boy and lacks the characteristics of biological boys.

Glenn holds that “discrimination against a transgender individual because of her gender-nonconformity is sex discrimination.” Glenn, 663 F.3d at 1317. However, and importantly, there is no evidence that Adams was treated differently because of his failure to conform to gender norms. Instead, Adams was treated differently because he is not anatomically similar to other boys who have a privacy interest in not being exposed to members of the other biological sex in the bathroom. To be sure, this Court’s decision in Glenn does not foreclose a finding that state action motivated by a concern over a transgender individual’s use of a bathroom that does not align with their biological sex is permissible. This Court in Glenn suggested that if such a concern was legitimate, it might have reached a different conclusion. As stated, there was no evidence in Glenn that such a concern was legitimate, Glenn, 663 F.3d at 1321.¹⁰ This is different from the case here,

¹⁰ It is noted this Court observed in Glenn that:

A person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes. The 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 (internal citations and punctuation omitted). It does not stand to reason though that any time a transgender person is treated differently it is ipso facto discrimination because of gender non-conformity and the District Court’s interpretation of Glenn to provide as much is unfounded. Differences in

where the District Court recognized the School Board has an interest in protecting the privacy rights of students in bathrooms. This interest accentuated the needs of the School Board to ensure the privacy of students with wide age ranges sharing the most intimate spaces on a school campus.¹¹

The District Court ultimately refused to confront the hard truths the School Board confronted in the educational trenches as it implemented the policy. The District Court failed to give appropriate deference to the role of a school district in making difficult decisions, deference which the Supreme Court has repeatedly recognized and understood.¹² “The constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings.” Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 682 (1986). Truly, the Supreme Court

anatomy are not stereotypes. Given the extensive direct evidence of animus due to gender non-conformity in the Glenn case, which is wholly lacking in this case, this observation is nonbinding dictum, not necessary to the decision in Glenn. See In re BFW Liquidation, LLC, 899 F.3d 1178, 1186 (11th Cir. 2018).

¹¹ For these same reasons, the District Court’s rejection of Carcaño as persuasive authority for being “out of step” with Glenn was inappropriate and does not appreciate the Supreme Court precedent relied on by the district court in Carcaño and as set forth herein. [Doc. 192 at pp. 49-50].

¹² The District Court recognized that schools are traditionally locally controlled and that courts should tread lightly when asked to contravene a policy established by a local school board, especially as minor children are involved and the policy concerns bathrooms where privacy considerations are at their peak. [Doc. 192 at p. 33]. The special circumstances that arise in schools go much beyond this and compel a finding that the separation of bathrooms based on biological sex is substantially related to the important governmental interest of protecting the privacy rights of students.

has affirmed, time and again, the comprehensive authority of local school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools. See Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 507 (1969); New Jersey v. T.L.O., 469 U.S. 325, 341 (1985) (recognizing there is a substantial need of teachers and administrators for freedom to maintain order in the schools).

The District Court did not afford the School Board's policy decision this deference. It ignored the School Board's judgment that the real differences between the sexes matter with respect to privacy rights in the bathroom. It further ignored how those differences require the policy to draw lines based on biological sex to ensure student privacy rights are protected. The District Court repeatedly cited the alleged lack of evidence of privacy implications throughout its decision, but this improperly placed too high a burden on the School Board.

Again, there need only be a reasonable fit between the state action and the important governmental interest under the intermediate scrutiny analysis. A justification that sustains a sex-based classification "must be genuine, not hypothesized or invented *post hoc* in response to litigation." Virginia, *supra*, at 533. However, Supreme Court precedent does not require specific instances or allegations of privacy violations and, even if it did, the record contains such complaints by both students and parents concerned about the prospect that they or

their children might have their privacy rights violated by a policy permitting students to use the bathroom consistent with their gender identity.

The School Board did not invent this reason in response to litigation. It considered its students and their privacy and safety, and came to the conclusion that restricting bathroom use to the bathroom consistent with one's biological sex appropriately addressed these concerns and was the only way to advance student privacy rights to be free from sharing a bathroom with members of the opposite biological sex.¹³ The School Board reached this policy decision based on its view of what is best for its students and constituents, fulfilling the unique role as caretaker for thousands of students across all of its schools. The policy simply does not violate Adams' Constitutional rights.

II. THE SCHOOL BOARD'S POLICY OF SEPARATING STUDENT BATHROOMS ON THE BASIS OF BIOLOGICAL SEX DOES NOT VIOLATE TITLE IX

Title IX prohibits educational institutions that receive federal funding from discriminating against students and others "on the basis of sex" in educational programs or activities. 20 U.S.C. § 1681(a); 34 C.F.R. § 106.31; Palmer ex rel. Palmer v. Santa Rosa Cty. Sch. Bd., Case No. 3:05CV218/MCR, 2005 WL 3338724, at *4 (N.D. Fla. Dec. 8, 2005). "Congress enacted Title IX in response to

¹³ The School Board's policy of separating bathrooms on the basis of biological sex existed long before Adams.

its finding—after extensive hearings held in 1970 by the House Special Subcommittee on Education—of pervasive discrimination against women with respect to educational opportunities.” Cohen v. Brown Univ., 101 F.3d 155, 165 (1st Cir. 1996); see also Neal v. Bd. of Trs. of California State Univ.’s, 198 F.3d 763, 766 (9th Cir. 1999).

Importantly, Title IX and its implementing regulations allow educational institutions to provide “separate living facilities *for the different sexes*” (20 U.S.C. § 1686) and “separate toilet, locker room, and shower *facilities on the basis of sex...*” 34 C.F.R. § 106.33 (emphasis added). The School Board has long interpreted the term “sex” under Title IX and its implementing regulations to mean biological sex. The District Court improperly found that the term “sex” under Title IX encompassed the concept of “gender identity.”

a. Sex Under Title IX Unambiguously Means Biological Sex

“Sex” under Title IX, contrary to the District Court’s finding, is not “ambiguous as applied to transgender students.” [Doc. 192 at p. 55]. In finding ambiguity, the District Court reasoned that the term “sex” is not defined in Title IX or its implementing regulations and other courts “have struggled with this exact question.” [Doc. 192 at p. 55]. The District Court resolved the alleged ambiguity by concluding “sex” in Title IX includes “gender identity” but reached this

determination without adhering to well-established principals of statutory construction.

Statutory interpretation starts and ends with the statute's text if it is unambiguous. BedRoc Ltd. v. United States, 541 U.S. 176, 183 (2004). There is no question that Title IX does not define "sex". As this Court has repeatedly found, courts must look to common usage of the word at the time the statute was enacted. Koch Foods, Inc. v. Sec'y, U.S. Dep't. of Labor, 712 F.3d 476, 480 (11th Cir. 2013) ("Where the statute does not expressly define a term, 'we look to the common usage of words for their meaning.'"); see also Sumpter v. Sec'y of Labor, 763 F.3d 1292, 1296 (11th Cir. 2014) ("We also interpret the words of a statute by 'taking their ordinary, contemporary, common meaning' at the time Congress enacted the statute."). In determining common usage, courts are also guided by dictionary definitions. Koch Foods Inc., 712 F.3d at 480.

Dictionary definitions of the term "sex" at the time Title IX was enacted squarely focused on the biological and physiological differences between men and women – not gender identity. See Conley v. Northwest Florida State Coll., 145 F. Supp. 3d 1073, 1076-1077, n. 6 (N.D. Fla. 2015) (Collecting authorities and definitions and interpreting sex as used in Title IX and concluding, "[t]he common thread running through these definitions is a focus on reproduction, including the 'structural' and 'functional' differences between typical male and female

bodies”).¹⁴ Even the United States Supreme Court in 1973 concluded that “sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth...”. Frontiero, 411 U.S. at 686 (emphasis added).

The District Court’s definition of “sex” (a person’s internal sense of being male, female, or another gender)¹⁵, based on uncorroborated, unsworn, hearsay testimony from an *Amicus Brief* filed two weeks before trial, is also at odds with Congressional intent when Title IX was adopted. There is no question Congress did not intend “sex” to mean a person’s internal, subjective identification as a male, female, or “another gender.”¹⁶ See Texas v. United States, 201 F. Supp. 3d

¹⁴ See also Judge Niemeyer’s dissent in G.G. ex rel., Grimm v. Gloucester Cty. Sch. Bd., 822 F.3d 709, 736 (4th Cir. 2016) vacated and remanded, 137 S.Ct. 1239 (2017) (noting dictionaries contemporaneous to Title IX’s enactment relied on biological distinctions to define sex, and including the following, among other examples: The Random House College Dictionary 1206 (rev. ed. 1980) (“either the male or female division of a species, esp. as differentiated with reference to the reproductive functions”); American Heritage Dictionary 1187 (1976) (“the property or quality by which organisms are classified according to their reproductive functions”); The American College Dictionary 1109 (1970) (“the sum of the anatomical and physiological differences with reference to which the male and the female are distinguished...”).

¹⁵ If anything, the District Court’s definition of “sex” creates ambiguity by suggesting there is “another gender” in addition to males and females.

¹⁶ When Congress intended to include gender identity in legislation, it has done so expressly. See 18 U.S.C. §249(a)(2), 34 U.S.C. §12291(b)(13)(A), and 20 U.S.C § 1092(f)(1)(F)(ii). Congress has rejected attempts to amend Title IX (the Student Non-Discrimination Act of 2015, S. 439 (114th Cong. 2015)) and Title VII (the Equality Act, S. 1858 (114th Cong. 2015) and S. 106 (115th Cong. 2016)) to include gender identity as a prohibited basis of discrimination.

810, 832–33 (N.D. Tex. 2016), order clarified, 7:16-CV-00054-O, 2016 WL 7852331 (N.D. Tex. Oct. 18, 2016) (holding, “the plain meaning of the term sex as used in § 106.33 when it was enacted by DOE following passage of Title IX meant the biological and anatomical differences between male and female students as determined at their birth.”); Johnston v. Univ. of Pittsburgh of Com. Sys. of Higher Educ., 97 F. Supp. 3d 657, 676 (W.D. Pa. 2015) (holding, “the term ‘on the basis of sex’ in Title IX means nothing more than male and female, under the traditional binary conception of sex consistent with one's birth or biological sex”).

The District Court cited to Robinson v. Shell Oil Co., 519 U.S. 337, 341 (1997) for the proposition that statutory interpretation is unnecessary “if the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case.” [Doc. 192. At p. 55]. However, Robinson also mandates that “[t]he plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.” Id. at 341; see also Edison v. Douberly, 604 F.3d 1307, 1310 (11th Cir. 2010) (“We too have long recognized that our authority to interpret statutory language is constrained by the plain meaning of the statutory language in the context of the entire statute, as assisted by the canons of statutory construction...we do not look at one word or term in isolation but rather look to the entire statute and its context.”) (internal citations

omitted). The District Court erred by not addressing how defining “sex” to mean “gender identity” applies in the specific context in which it was used in Title IX or in the context of Title IX as a whole.

The legislative history of Title IX clearly mandates the specific framework in which the language “sex” was used and the broader context of the statute as a whole was intended to address discrimination plaguing biological women in education – at the time it was enacted. See Conley, 145 F. Supp. 3d at 1077-1078, which summarized the comments made by Senator Birch Bayh¹⁷ on the Congress’ floor on the day Title IX was enacted as follows:

Senator Birch Bayh, the sponsor of Title IX, specifically cited as an example of this “social evil” the fact that on college campuses “[m]any students are denied leave for pregnancy and childbirth.” 118 Cong. Rec. 5811. He criticized the logic of those in higher education who would deny a woman admission to graduate school because: “ ‘If she's NOT married, she'll get married.’ ‘If she *is* married, then she'll probably have children.’ ‘If she has children, she can't possibly be committed to study.’ ‘If her children are older, then she's too old to begin training, and what a pity it is that she didn't start sooner.’ ” *Id.* And he highlighted the shortage of women in university faculty positions, citing the belief of some in academia that women have a greater rate of absenteeism, despite the fact that the Women's Bureau of the Department of Labor found that “men lose more time off the

¹⁷ “Although the statements of one legislator made during debate may not be controlling... Senator Bayh's remarks, as those of the sponsor of the language ultimately enacted, are an authoritative guide to the statute’s construction.” N. Haven Bd. of Ed. v. Bell, 456 U.S. 512, 526–27 (1982) (internal citations omitted).

job because of hernias than do women because of child birth and pregnancy.”

There is nothing about Senator Bayh’s comments that suggest “gender identity” was on Congress’ radar when Title IX was enacted. In fact, the opposite is true. Senator Bayh’s comments directly focused on how women were perceived and treated differently in higher education because of, among other things, biological issues specific to women, including pregnancy and child birth. Neither the District Court nor Adams cited to any legislative history even remotely suggesting “sex” under Title IX intended to encompass a person’s internal, subjective sense of their gender.

Rather than confront how replacing “sex” with “gender identity” may apply in the specific and broader context of Title IX, the District Court sidestepped the issue and concluded, “the Court’s analysis of Adams’ claims does not include consideration of his use of the boys’ locker room or shower facilities and the Court’s rulings do not apply to those spaces.” [Doc. 192 at p. 32, n. 34 and p. 46 (“...the question here is whether to permit a transgender boy who has taken significant social, medical and legal measures to present as a boy (and who never intends to use a girls’ restroom) to have access to the boys’ restroom...this case is only about permitting one transgender boy to use the boys’ restroom”), at p. 66 (“...the Court has had no occasion in the context of this case to determine what

threshold of transition, if any, is necessary for the School Board to accommodate other transgender students, nor did the parties ask the Court to do so”)].

Title IX, and the regulation at issue in this case, are not just about school bathrooms. Title IX covers every aspect of education, including when students disrobe in locker rooms and showering facilities. By concluding that sex includes a person’s internal sense of being a male, female, or “another gender,” the District Court removed from Title IX and its regulations any suggestion that the biological differences between males and females matters. Even more, the District Court did not address how the presence of “another gender” separate from males and females applies in the context of Title IX. The mere suggestion that more than two sexes were contemplated at the time Title IX was enacted is not supported by the express language of the particular regulation at issue in this case or Supreme Court precedent. See 34 C.F.R. §106.33, which states as follows:

A recipient may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students *of one sex* shall be comparable to such facilities provided for students *of the other sex*.

(emphasis added).¹⁸ Other regulations implementing Title IX also make clear that there are only two sexes. See 34 C.F.R. § 106.32(B)(2) (“Housing provided by a recipient to students of one sex, when compared to that provided to students of the

¹⁸ The District Court likewise refused to address the School Board’s concerns regarding gender-fluid students. [Doc. 192 at pp. 17-18, n. 23].

other sex, shall be as a whole...); 34 C.F.R. § 106.34(a)(3) (“*Human sexuality classes*. Classes or portions of classes in elementary and secondary schools that deal primarily with human sexuality may be conducted in separate sessions for boys and girls”); 34 C.F.R. § 106.37; 34 C.F.R. § 106.41.

Supreme Court precedent recognizes there are two sexes. Virginia, 518 U.S. at 533 (“Physical differences between men and women ... are enduring: ‘[T]he two sexes are not fungible.’”), *quoting* Ballard, 329 U.S. at 193. See also Carcaño, 203 F. Supp. 3d at 642 (“Although the Supreme Court has never had an occasion to explicitly explain which differences between men and women justify the decision to provide sex-segregated facilities, the Court has generally assumed that the sexes are primarily defined by their differing physiologies”).

Simply stated, the District Court erred when it found “sex” under Title IX to be ambiguous and by concluding that it refers to something other than the structural and functional differences between the bodies of males and females.

b. Even if the Term “Sex” is Ambiguous, the District Court’s Reliance on Title VII Case Law to Resolve the Ambiguity was Misplaced

Assuming *arguendo*, the term “sex” in Title IX is ambiguous and the clear legislative history does not resolve the ambiguity, the District Court erred when it relied on Title VII and Glenn. The School Board does not dispute that Title VII prohibits employers from discriminating against employees for their failure to

conform to sex stereotypes. Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) (superseded by statute on other grounds); Evans v. Georgia Reg'l Hosp., 850 F.3d 1248, 1254-55 (11th Cir. 2017); Glenn, 663 F.3d at 1316-17 (citing cases). The School Board likewise recognizes that this Court held in Glenn that “discrimination against a transgender individual because of [] gender-nonconformity is sex discrimination, whether it’s described as being on the basis of sex or gender” and observed that “[a] person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes.” Glenn, 663 F. 3d at 1316-1317.

The distinctions between this case and Glenn is that the policy (and Title IX regulation) at issue has nothing to do with sex stereotyping and schools are a wildly different environment than the workplace. See Section I(a) & (c), *infra*. Glenn involved an employer taking action against an employee because the employee did not act or dress in conformance with her sex. As with the District Court’s overextension of Glenn to its findings on the Equal Protection claim, it also overextends Glenn in analyzing Adams’ Title IX claim.

The evidentiary record does not support the District Court’s conclusion that Adams was prohibited from using the boys’ bathroom because of his failure to act in conformance with his sex. The unrefuted evidence is that Adams is structurally, biologically, and physically a female. [Docs. 161 at Tr. 184-185, 249; 162 at Tr.

34-36]. It was for this reason alone that Adams was prohibited from using the boys' bathroom. [Docs. 162 at Tr. 45-46; 184 at Tr. 11-12; 192 at p. 14].¹⁹

Finally, as a practical matter, relying on a law regulating the conduct of adults in the workplace is not appropriate because school boards, unlike employers who regulate their employees, are tasked with safeguarding the health, safety and welfare of developing students with varying ages and maturity levels, including ages from as young as five and as old as 22. Labor regulations do not provide the answer for how students should be regulated—that is the province of local governmental officials, held accountable by their constituents.

c. The District Court Failed to Give Appropriate Consideration to OCR's Guidance and the School Board's Responsibility to Develop Educational Policy

Neither DOE nor DOJ take the position that “sex” under Title VII and Title IX is analogous to “gender identity.” [Docs. 106-2, 106-4, 152-59, 152-61]. Nonetheless, the District Court summarily dismissed the positions of these federal agencies. [Doc. 192 at pp. 55, 59-61, 65, and n. 55]. With respect to DOE, the District Court concluded that its 2017 guidance “does not provide any

¹⁹ The District Court concluded that the School Board's position that Adams may use the gender-neutral bathrooms or the girls' bathroom seemed “disingenuous,” because “Adams presents as a boy and continues to exhibit more masculine physical features as his medical treatment continues.” [Doc. 192 at p. 28, n. 30]. The School Board submits that requiring students to use the bathroom corresponding to how they look as opposed to their strict biological sex would be a form of sex stereotyping.

interpretation of Title IX from the Department of Education.” [Doc. 192 at p. 59]. The District Court rejected DOJ’s position as contrary to the position of the EEOC and other legal precedent, including this Court’s decision in Glenn. [Doc. 192 at p. 65, n. 55].

While the District Court’s was correct that DOE’s 2017 guidance did not provide an interpretation of Title IX, the 2017 guidance still expressly withdrew earlier guidance equating “sex” with “gender identity” under Title IX, suggesting that such a proclamation is not supported by DOE. Essentially, when the opportunity arose for DOE to affirm that “sex” under Title IX includes an individual’s gender identity, it declined to do so. DOE also made clear that “there must be due regard for the primary role of States and local school districts to establish educational policy.” [Doc. 152-59]. Regarding the development of educational policy, case law is clear that education is not among the federal government’s enumerated powers but rather one of the powers reserved to the states and the people, absent a constitutional restriction:

[S]tate governments do not need constitutional authorization to act. The States thus can and do perform many of the vital functions of modern government—punishing street crime, *running public schools*, and zoning property for development, to name but a few—even though the Constitution’s text does not authorize any government to do so.

Nat’l Fed’n of Indep. Bus. v. Sebelius, 567 U.S. 519, 535 (2012) (emphasis added); see also Texas v. United States, 201 F. Supp. 3d at 815 (“the Constitution

assigns ... policy choices [such as bathroom use] to the appropriate elected and appointed officials” even if the issue required balancing the protection of students’ rights and that of personal privacy when using school bathrooms ... while ensuring that no student is unnecessarily marginalized while attending school)”; Grimm, 822 F.3d at 724 (where the court decided to “leave policy formulation to the political branches”).

The District Court recognized that school boards “are best situated to set school policy” and that the School Board is required to educate approximately 40,000 students in grades K-12. [Doc. 192 at p. 1, 13].²⁰ Despite this recognition, the District Court declared the School Board’s policy in violation of Title IX without addressing the numerous rationales for the policy that extend beyond just Adams’ situation. The District Court’s failure to address and respond to all of the reasons for the School Board’s policy is exactly why case law mandates judicial restraint. See Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 72-74 (1976); Ginsberg v. New York, 390 U.S. 629, 639-40 (1968); Prince v. Massachusetts, 321 U.S. 158, 172 (1944); Epperson v. Arkansas, 393 U.S. 97, 104 (1968); Students v. U.S. Dep’t. of Educ., No. 16-cv-4945, 2016 WL 6134121 at *24 (N.D. Ill. Oct. 18, 2016).

²⁰ Further, the School Board, which stands *in loco parentis*, is directly responsible for the health, safety, and welfare of St. Johns County children who attend its schools. Morse v. Frederick, 551 U.S. 393, 416 (2007) (Thomas, J. concurring).

For example, the District Court recognized that the School Board’s Best Practices document accommodates gender-fluid students but went on to proclaim that Adams’ is not gender-fluid and, as a result, it needed not “address how schools should handle this complicated issue.” [Doc. 192 at pp. 17-18 and n. 23].²¹ The District Court also avoided addressing locker rooms and showers. [Doc. 192 at p. 32, n. 32]. The School Board cannot properly function if it develops policies with only one student in mind. It must be proactive, consider all possible scenarios, and implement policies that protect the privacy rights of all children in its charge.

d. The District Court’s Decision Conflicts with the Limitations Imposed by the Spending Clause

Title IX was enacted pursuant to Congress’ Spending Clause. Davis, ex rel. Lashonda D. v. Monroe County Bd. of Educ., 526 U.S. 629, 640 (1999). The District Court, in assuming that gender identity is encompassed within the term sex, ignored the clear spending rule, a limitation of liability for legislation enacted pursuant to the spending clause. Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981). The clear statement rule requires “Congress [to] speak with a clear voice” and “unambiguously” put state funding recipients on notice of the conditions of federal funds. Id.

²¹ Unlike the District Court, the School Board did not sidestep this issue when it developed its Best Practices. [Doc. 192 at pp. 17-18].

Title IX does not provide that an educational institution can be found liable for not making bathrooms available to students based on their gender identity as opposed to their biological sex. Holding the School Board liable under Title IX for not including “gender identity” in its interpretation of “sex” under Title IX is in direct conflict with the limitations imposed by the Spending Clause. This is for good reason because, in interpreting language in spending legislation, “[t]here can, of course, be no knowing acceptance [of the terms of the putative contract] if a State is unaware of the conditions [imposed by the legislation] or is unable to ascertain what is expected of it.” Davis, 526 U.S. at 640. The District Court did not interpret Title IX consistent with the clear spending rule and read into the statute a condition not expressly stated therein.

e. The School Board did Not Intentionally Discriminate Against Adams

To establish liability under Title IX, Adams was required to prove that the School Board acted with a discriminatory intent. GP ex rel. v. Lee Cty. Sch. Bd., 737 Fed. App’x. 910, 913–14 (11th Cir. 2018) (“A private action for damages under Title IX requires a showing of discriminatory intent...”). The District Court erred when it found in favor of Adams under this Title IX claim, because there was no evidence of discriminatory intent. In fact, the opposite is true. The District Court concluded, “the teachers and administrators of Nease High School and the St. Johns County School District are caring professionals who have the best

interests of their students at heart.” [Doc. 192 at p. 69]. Simply stated, there was no evidence to support a finding of discriminatory intent on the part of the School Board under Title IX.

CONCLUSION

For the foregoing reasons, this Court should reverse the District Court’s Final Judgment in favor of Appellee.

Respectfully submitted this 20th day of December, 2018.

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CERTIFICATE OF COMPLIANCE

I CERTIFY that this brief complies with the type-volume limitation set forth in Fed. R. App. P. 32(a)(7)(B). This brief contains 11,783 words (within the limit of 13,000) not including the parts of the brief exempted by Fed. R. App. P. 32(f).

I FURTHER CERTIFY that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6). This brief has been prepared in a proportionally spaced typeface using Microsoft Word Version 2007 in 14 point Times New Roman.

/s/ Terry J. Harmon
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CERTIFICATE OF SERVICE

I hereby certify one true and accurate copy of the foregoing document has been furnished by electronic means to all counsel of record as well as by U.S. Certified Mail, Postage Prepaid and Return Receipt Requested.

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