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

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

Terry J. Harmon FBN 0029001
Jeffrey D. Slanker FBN 0100391
Robert J. Sniffen FBN 000795
Michael P. Spellman FBN 937975
Kevin C. Kostelnik FBN 0118763

SNIFFEN & SPELLMAN, P.A.
123 North Monroe Street
Tallahassee, Florida 32301
Telephone: (850) 205-1996
Fax: (850) 205-3004
Counsel for Appellant

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. AAPL – *Amicus Curiae*
2. AAUW – *Amicus Curiae*
3. A Better Balance - *Amicus Curiae*
4. Aberli, Thomas A. – *Amicus Curiae*
5. Achievement First Public Charter Schools – *Amicus Curiae*
6. Adams, Drew – Appellee
7. Adams, Scott – Appellee's Father
8. Adecco Group AG - Parent company for Amicus Curiae General Assembly Space, Inc.
9. Adecco, Inc. - Parent company for Amicus Curiae General Assembly Space, Inc.
10. ADL – *Amicus Curiae*

11. Advocates for Youth – *Amicus Curiae*
12. Airbnb, Inc. – *Amicus Curiae*
13. Akin Gump Strauss Hauer & Feld LLP - Counsel for Amici Curiae
14. Alger, Maureen P. – Counsel for Amicus Curiae
15. Allen, Tommy – Board Member of Appellant
16. Alliance Defending Freedom – Counsel for Amicus Curiae
17. Alphabet, Inc. (GOOG) - Parent company for Amicus Curiae Google LLC
18. Altman, Jennifer G. – Counsel for Appellee
19. Amend, Andrew – (New York State Office of the Attorney General) - Counsel for Amicus Curiae
20. American Academy of Child and Adolescent Psychiatry (AACAP) – *Amicus Curiae*
21. American Academy of Nursing – *Amicus Curiae*
22. American Academy of Pediatrics – *Amicus Curiae*
23. American Association of University Women (AAUW) - *Amicus Curiae*
24. American College of Physicians – *Amicus Curiae*
25. American Medical Association – *Amicus Curiae*
26. American Medical Women's Association – *Amicus Curiae*

27. American Nurses Association – *Amicus Curiae*

28. American School Counselor Association – *Amicus Curiae*

29. Apple Inc. – *Amicus Curiae*

30. Asana, Inc. – *Amicus Curiae*

31. Association of Medical School Pediatric Department Chairs – *Amicus Curiae*

32. Atlanta Women for Equality – *Amicus Curiae*

33. Baker & Hostetler LLP - Counsel for Amicus Curiae

34. Banks, Emily – *Amicus Curiae*

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

36. Barrera, Kelly – Board Member of Appellant

37. Barth, Morgan – *Amicus Curiae*

38. Baxter, Rosanne C. – Counsel for Amicus Curiae

39. Bazer, Morgan – *Amicus Curiae*

40. BCC – *Amicus Curiae*

41. Bertschi, Craig E. – Counsel for Amicus Curiae

42. Beth Chayim Chadashim (BCC) - *Amicus Curiae*

43. Binning, Sarah R. – Counsel for Amicus Curiae

44. BlackRock, Inc. (BLK) - Beneficial owner of Amicus Curiae Yelp Inc.

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

46. Borelli, Tara L. – Counsel for Appellee

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

48. Bourgeois, Roger – *Amicus Curiae*

49. Bruce, Diana K. – *Amicus Curiae*

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

51. California – *Amicus Curiae*

52. California Women Lawyers – *Amicus Curiae*

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

54. Campbell, James A. – Counsel for Amicus Curiae

55. Canan, Patrick – Board Member of Appellant

56. Carney, Karen – *Amicus Curiae*

57. Carpenter, Christopher S., Ph.D - *Amicus Curiae*

58. Carter, Heidi – *Amicus Curiae*

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

60. Castillo, Paul David – Counsel for Appellee

61. Center for Constitutional Rights – *Amicus Curiae*

62. Center for Religious Expression – Counsel for Amicus Curiae

63. Center for Reproductive Rights – *Amicus Curiae*

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

65. Champion Women – *Amicus Curiae*

66. Chandy, Sunu P. (National Women's Law Center) - Counsel for Amici Curiae

67. Chang, Tommy – *Amicus Curiae*

68. Chapman, Peyton – *Amicus Curiae*

69. Chaudhry, Neena (National Women's Law Center) - Counsel for Amici Curiae

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

71. Coleman, Arthur - Counsel for Amicus Curiae

72. Colter, Howard – *Amicus Curiae*

73. Connecticut – *Amicus Curiae*

74. Conron, Kerith J., M.P.H., Sc.D - *Amicus Curiae*

75. Copsey, Alan D. (Washington State Office of the Attorney General) - Counsel for Amicus Curiae

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

77. Credo Mobile, Inc. – *Amicus Curiae*

78. Cyra, Sherri – *Amicus Curiae*

79. Dasgupta, Anisha S. (New York State Office of the Attorney General) - Counsel for Amicus Curiae

80. Davis, Bryan – *Amicus Curiae*

81. Davis, Steven D. – Counsel for Amici School Administrators

82. Day One – *Amicus Curiae*

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

84. Delaware – *Amicus Curiae*

85. DeSelm, Lizbeth – *Amicus Curiae*

86. Deutsche Bank AG. – *Amicus Curiae*

87. DiBenedetto, Arthur – *Amicus Curiae*

88. Disability Rights Education and Defense Fund (DREDF) – *Amicus Curiae*

89. District of Columbia – *Amicus Curiae*

90. Doolittle, Kirsten L. – Counsel for Appellee

91. Doran, Mary – *Amicus Curiae*

92. Doss, Eric – *Amicus Curiae*

93. DREDF – *Amicus Curiae*

94. Dyer, Karen Caudill – Counsel for *Amicus Curiae*

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

96. Eaton, Mary - Counsel for Amicus Curiae

97. eBay Inc. – *Amicus Curiae*

98. Education Counsel, LLC - Counsel for Amicus Curiae

99. Empire Justice Center – *Amicus Curiae*

100. Endocrine Society – *Amicus Curiae*

101. Eppink Samuel T., Ph.D. (expected 2019) - *Amicus Curiae*

102. Equal Rights Advocates – *Amicus Curiae*

103. Equality California – *Amicus Curiae*

104. Ewing, Gregory – *Amicus Curiae*

105. Family Values @ Work – *Amicus Curiae*

106. Ferguson, Robert W. (Attorney General for the State of Washington) - Counsel for Amici Curiae

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

108. Flores, Andrew R., Ph.D. - *Amicus Curiae*

109. Flynn, Diana K. – Counsel for Appellee

110. FORGE, Inc. – *Amicus Curiae*

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

112. Fountain, Lisa Barclay – Counsel for Appellant

113. Gartrell, Nanette, M.D. - *Amicus Curiae*

114. Gates, Gary J., Ph.D. - *Amicus Curiae*

115. Gender Based Violence Organizations – *Amicus Curiae*

116. Gender Diversity – *Amicus Curiae*

117. Gender Justice – *Amicus Curiae*

118. Gender Spectrum – *Amicus Curiae*

119. General Assembly Space, Inc. – *Amicus Curiae*

120. Generales, Markos C. – (Akin Gump Strauss Hauer & Feld LLP) Counsel for Amicus Curiae

121. Girls for Gender Equity – *Amicus Curiae*

122. Girls, Inc. – *Amicus Curiae*

123. GitHub, Inc. – *Amicus Curiae*

124. Glassdoor, Inc. – *Amicus Curiae*

125. GlaxoSmithKline LLC – *Amicus Curiae*

126. GlaxoSmithKline PLC: Parent company for Amicus Curiae GlaxoSmithKline LLC

127. GLMA – Health Professionals Advancing LGBT Equality - *Amicus Curiae*

128. GLSEN – *Amicus Curiae*

129. Goldberg, Suzanne – Counsel for Amicus Curiae

130. Gonzales, Gilbert, Ph.D., M.H.A. - *Amicus Curiae*

131. Gonzalez-Pagan, Omar – Counsel for Appellee

132. Google LLC – *Amicus Curiae*

133. Goss Graves, Fatima (National Women's Law Center) - Counsel for Amicus Curiae

134. Greer, Eldridge – *Amicus Curiae*

135. Grossman, Miriam – *Amicus Curiae*

136. Grijalva, Adelita – *Amicus Curiae*

137. Gurtner, Jill – *Amicus Curiae*

138. Haney, Matthew – *Amicus Curiae*

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

140. Harmon, Terry J. – Counsel for Appellant

141. Harrington, Emily – Counsel for Amicus Curiae

142. Hawaii – *Amicus Curiae*

143. Haynes, Patricia - Counsel for Amicus Curiae

144. Herman, Jody L., Ph.D. - *Amicus Curiae*

145. Heyer, Walt – *Amicus Curiae*

146. Hohs, Sherie – *Amicus Curiae*

147. Holland & Knight, LLP – Counsel for Amicus Curiae

148. Holloway, Ian W., Ph.D., M.S.W., M.P.H. - *Amicus Curiae*

149. Hughes, Paul W. (Mayer Brown) - Counsel for Amicus Curiae

150. IBM Corporation – *Amicus Curiae*

151. Ifill, Sherrilyn A. - Counsel for Amicus Curiae

152. Illinois – *Amicus Curiae*

153. Illinois Accountability Initiative – *Amicus Curiae*

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

155. Indiegogo, Inc. – *Amicus Curiae*

156. Iowa – *Amicus Curiae*

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

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

159. Jacobs, Edward J. – Counsel for Amicus Curiae

160. James, Letitia (Attorney General for the State of New York) - Counsel for Amicus Curiae

161. Kaiser Foundation Health Plan, Inc. ("Kaiser Permanente") - *Amicus Curiae*

162. Kaiser Permanente – *Amicus Curiae*

163. Kaplan, Aryeh L. – Counsel for Appellee

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

165. Kellum, Nathan W. – Counsel for Amicus Curiae

166. Kenney, Tim – *Amicus Curiae*

167. Kimberly, Michael B. (Mayer Brown LLP) - Counsel for Amicus Curiae

168. Kirkland, Earl – Counsel for Amicus Curiae

169. Knotel, Inc. - *Amicus Curiae*

170. Kogan, Terry S. – *Amicus Curiae*

171. Kostelnik, Kevin C. – Counsel for Appellant

172. Kunin, Ken – *Amicus Curiae*

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

174. Laidlaw, Michael – *Amicus Curiae*

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

176. Lapointe, Markenzy – Counsel for Appellee

177. Las Cruces Public Schools – *Amicus Curiae*

178. LatinoJustice PRLDEF – *Amicus Curiae*

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

180. Lee, Jen Hee – Counsel for Amicus Curiae

181. Legal Aid At Work – *Amicus Curiae*

182. Legal Momentum – *Amicus Curiae*

183. Legal Voice – *Amicus Curiae*

184. Levi Strauss & Co. - *Amicus Curiae*

185. Linden Research, Inc. d/b/a Linden Lab – *Amicus Curiae*

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

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

188. Love, Laura H. – *Amicus Curiae*

189. Lyft, Inc. - *Amicus Curiae*

190. MacKenzie, Dominic C. – Counsel for Amicus Curiae

191. Maine – *Amicus Curiae*

192. Majeski, Jeremy – *Amicus Curiae*

193. Mallory, Christy, J.D. - *Amicus Curiae*

194. Mapbox, Inc. - *Amicus Curiae*

195. Marin Software Incorporated (MRIN) - *Amicus Curiae*

196. Martin, Emily (National Women's Law Center) - Counsel for Amicus Curiae

197. Massachusetts – *Amicus Curiae*

198. Mayer Brown LLP - Counsel for Amici Curiae

199. McCaleb, Gary S. – Counsel for Amicus Curiae

200. McCalla, Craig – *Amicus Curiae*

201. McRae Bertschi & Cole, LLC – Counsel for Amicus Curiae

202. Meece, Gregory R. – *Amicus Curiae*

203. Meerkamper, Shawn – *Amicus Curiae*

204. Melody, Colleen M., (Washington State Office of the Attorney General) - Counsel for Amicus Curiae

205. Mesa, David D. – Counsel for Amicus Curiae

206. Meyer, Ilan, H., Ph.D. - *Amicus Curiae*

207. Michigan – *Amicus Curiae*

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

209. Microsoft Corporation (MSFT): *Amicus Curiae* and parent company for *Amicus Curiae* GitHub, Inc.

210. Mignon, Bill – Board Member of Appellant

211. Miller, William C. – Counsel for Appellee

212. Minnesota – *Amicus Curiae*

213. Minter, Shannon – Counsel for Amicus Curiae

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

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

216. Murray, Kerrel – Counsel for Amicus Curiae

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

218. Nardecchia, Natalie – Counsel for Appellee (terminated)

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

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

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

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

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

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

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

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

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

228. National Crittenton – *Amicus Curiae*

229. National LGBTQ Task Force – *Amicus Curiae*

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

231. National PTA and The American School Counselor Association – *Amicus Curiae*

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

233. National Women's Law Center, et al. – *Amicus Curiae*

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

235. Nelson, Janai S. – Counsel for Amicus Curiae

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

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

238. New Jersey – *Amicus Curiae*

239. New Mexico – *Amicus Curiae*

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

241. New York – *Amicus Curiae*

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

243. NIO Inc. (NIO): Parent company for *Amicus Curiae* NIO USA, Inc.

244. NIO NextEV Ltd.: Parent company for *Amicus Curiae* NIO USA, Inc.

245. NIO USA, Inc. - *Amicus Curiae*

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

247. Oasis Legal Services – *Amicus Curiae*

248. Oath Inc. - Parent company for *Amicus Curiae* Tumblr, Inc

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

250. O'Reilly, John – *Amicus Curiae*

251. OGC Law, LLC. – Counsel for Amicus Curiae

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

253. Oregon – *Amicus Curiae*

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

255. Orr, Asaf – Counsel for Amicus Curiae

256. Palacios, Patricia – Counsel for Amicus Curiae

257. Palazzo, Denise – *Amicus Curiae*

258. Parent-Child Center – *Amicus Curiae*

259. Patreon, Inc. - *Amicus Curiae*

260. Pediatric Endocrine Society – *Amicus Curiae*

261. Pennsylvania – *Amicus Curiae*

262. PFLAG, Inc. – *Amicus Curiae*

263. Pierce, Jerome – Counsel for Amicus Curiae

264. Pillsbury Winthrop Shaw Pittman LLP – Counsel for Appellee

265. Pincus, Andrew J. (Mayer Brown LLP) - Counsel for Amicus Curiae

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

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

268. Pollock, Lindsey – *Amicus Curiae*

269. Portnoi, Dimitri – Counsel for Amicus Curiae

270. Postmates Inc. - *Amicus Curiae*

271. Powell, Wesley R. – Counsel for Record of Amicus Curiae

272. Purcell, Noah G. (Solicitor General for the State of Washington) - Counsel for Amicus Curiae

273. Rakuten, Inc.: Beneficial owner of *Amicus Curiae* Lyft, Inc.

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

275. Rao, Devi M. – Counsel for Amicus Curiae

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

277. RC Barden and Associates – Counsel for Appellant (terminated)

278. Recruit Holdings Co., Ltd. (TYO 6098): Parent company for *Amicus Curiae* Glassdoor Inc.

279. Replacements, Ltd. - *Amicus Curiae*

280. Retzlaff, Pamela – *Amicus Curiae*

281. Reynolds, Andrew, Ph.D. - *Amicus Curiae*

282. RGF OHR USA, Inc.: Parent company for Amicus Curiae Glassdoor Inc.

283. Rhode Island – *Amicus Curiae*

284. Rivaux, Shani – Counsel for Appellee

285. Robertson, Cynthia C. – Counsel for Appellee

286. Rose, Nicholas M. (Baker & Hostetler LLP) - Counsel for Amicus Curiae

287. Rothfield, Charles - Counsel for Amicus Curiae

288. Samuels, Jocelyn, J.D. - *Amicus Curiae*

289. San Diego Cooperative Charter Schools – *Amicus Curiae*

290. Santa, Rachel – *Amicus Curiae*

291. SASA Crisis Center – *Amicus Curiae*

292. Sears, R. Bradley, J.D. - *Amicus Curiae*

293. Schaffer, Brian – *Amicus Curiae*

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

295. Schommer, Monica – *Amicus Curiae*

296. School Administrators from 29 States and the District of Columbia – *Amicus Curiae*

297. School District of South Orange and Maplewood – *Amicus Curiae*

298. Segal, Richard M. – Counsel for Appellee

299. Shah, Paru – *Amicus Curiae*

300. Shirk, Sarah – *Amicus Curiae*

301. Shutterstock, Inc. (SSTK) - *Amicus Curiae*

302. SisterReach – *Amicus Curiae*

303. Slanker, Jeffrey D. – Counsel for Appellant

304. Slavin, Alexander – Counsel for Amicus Curiae

305. Slough, Beverly – Board Member of Appellant

306. Smith, Nathaniel R. – Counsel for Appellee

307. Sniffen, Robert J. – Counsel for Appellant

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

309. Spellman, Michael P. – Counsel for Appellant

310. Spital, Samuel (counsel for LDF) – Counsel for Amicus Curiae

311. Spotify AB - Parent company for *Amicus Curiae* Spotify USA Inc.

312. Spotify Technology S.A. - Parent company for *Amicus Curiae* Spotify USA Inc

313. Spotify USA Inc. - *Amicus Curiae*

314. Spryszak, Delois Cooke – *Amicus Curiae*

315. SSAIS.org – *Amicus Curiae*

316. Steptoe & Johnson LLP – Counsel for Amicus Curiae

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

318. Stork, Victoria Lynn – (Baker & Hostetler LLP) - Counsel for Amicus Curiae

319. SurvJustice – *Amicus Curiae*

320. Sutherland, Emily – *Amicus Curiae*

321. Taymore, Cyndy – *Amicus Curiae*

322. Teufel, Gregory H. – Counsel for Amicus Curiae

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

324. The Impact Fund – *Amicus Curiae*

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

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

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

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

329. Toomey, Joel – Magistrate Judge

330. Trans Youth Equality Foundation – Amicus Curiae

331. Tumblr, Inc. - *Amicus Curiae*

332. Twitter Inc. (TWTR) - *Amicus Curiae*

333. Tyler & Bursch, LLP. – Counsel for Amicus Curiae

334. Tyler, Robert H. – Counsel for Amicus Curiae

335. Tysse, James E. – (Akin Gump Strauss Hauer & Feld LLP) – Counsel for Amicus Curiae

336. Underwood, Barbara D. (Solicitor General for the State of New York) - Counsel for Amici Curiae

337. Union for Reform Judaism – *Amicus Curiae*

338. UniteWomen.org – *Amicus Curiae*

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

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

341. Valbrun-Pope, Michaelle – *Amicus Curiae*

342. Van Meter, Quentin – *Amicus Curiae*

343. Van Mol, Andre – *Amicus Curiae*

344. Vannasdall, David – *Amicus Curiae*

345. Vaughn, Craig – *Amicus Curiae*

346. Verizon Communications Inc. (VZ) - Parent company for *Amicus Curiae* Tumblr, Inc.

347. Vermont – *Amicus Curiae*

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

349. Virginia – *Amicus Curiae*

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

351. Vitale, Julie – *Amicus Curiae*

352. Voices of Hope – *Amicus Curiae*

353. Wallace, Matthew M. – Counsel for Amicus Curiae

354. Washington – *Amicus Curiae*

355. Washoe County School District – *Amicus Curiae*

356. Wasick, Joanna (Baker & Hostetler LLP) - Counsel for Amicus Curiae

357. Weber, Thomas – *Amicus Curiae*

358. Weisel, Jessica M. – (Akin Gump Strauss Hauer & Feld LLP) Counsel for Amicus Curiae

359. Williams Institute at UCLA School of Law - *Amicus Curiae*

360. Willkie Farr & Gallagher LLP - Counsel for Amicus Curiae

361. Wilson, Bianca, D.M., Ph.D. - *Amicus Curiae*

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

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

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

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

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

367. Women's Law Project - *Amicus Curiae*

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

369. Women Lawyers On Guard Inc. ("WLG") - *Amicus Curiae*

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

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

372. Wong, Kyle – Counsel for Amicus Curiae

373. Working Assets, Inc. - Parent company for *Amicus Curiae* CREDO Mobile, Inc.

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

375. Xerox Corporation (XRX) - *Amicus Curiae*

376. Yelp Inc. (YELP) - *Amicus Curiae*

377. Young Women United - *Amicus Curiae*

The undersigned certifies that included in this CIP is a list of the publicly traded companies and corporations that have indicated an interest in the outcome of the case or appeal through their appearance as an *Amicus Curiae*. Upon information and belief, the undersigned is not required to enter this information into the web-based CIP.

Aside from those appearing as *Amicus Curiae*, the undersigned is unaware of any publicly traded companies or corporations that have 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.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

DECISIONAL AUTHORITY

STATUTES AND CONSTITUTIONS

OTHER AUTHORITIES

ARGUMENT

The District Court's interpretation of Glenn v. Brumby, to permit discrimination claims based on transgender status, is a misreading of this Court's precedent and extends Glenn beyond its holding. The District Court misinterpreted Glenn to stand for the proposition that gender identity is, in essence, a super-protected class.

Likewise, fundamental to the doctrine of the separation of powers, the province of the courts is to interpret, not make law. Significant policy decisions like those implicated by the School Board's policy should be left to governing bodies that are accountable to the people they serve. The District Court improperly made law in this case.

Finally, The District Court read the plain language of Title IX in a manner unsupported by its text. The ordinary meaning of Title IX's prohibition of discrimination based on sex does not extend to discrimination based on gender identity. Nothing in the text or broader context of the statute supports a contrary interpretation. Congress remains accountable to the electorate to amend Title IX – not the District Court.

I. THE SCHOOL BOARD'S POLICY DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE

a. The Policy Does Not Treat Similarly Situated Students Differently

The School Board's definition of sex along biological lines is not invidious discrimination prohibited by the Equal Protection Clause; rather, it is a recognition of the legitimate differences between the sexes. The School Board's policy makes a distinction in how it defines sex. It is not disputed that the Constitution permits sex-segregated bathrooms. The dispute lies in how the parties define sex and which definition advances the important interests necessitating same-sex bathrooms. Adams testified at trial that he was a boy. However, Adams concedes he is not "just like" any other boy. Anatomically, physiologically and biologically, Adams is different.

Adams suggests that the School Board has asked this Court to disregard its holding in Glenn, but the School Board does no such thing. The School Board asks this Court to refine the outer limits of its holding in Glenn, a holding that has been bastardized by circuit courts throughout the United States, as well as the District Court, and expanded beyond its holding. In fact, the cases cited by Adams in his Answer Brief that stand for the proposition that the policy amounts to invidious discrimination rely on an improper interpretation of Glenn. See Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Edu., 858 F.3d 1034 (7th Cir. 2017); Evancho v. Pine-Richland Sch. Dist., 237 F. Supp. 3d 267 (W.D. Penn. 2017);

G.G. v. Gloucester Cty. Sch. Bd., 822 F.3d 709, 736 (4th Cir. 2016) vacated and remanded, 137 S.Ct. 1239 (2017); Bd. of Edu. of Highland Local Sch. Dist. v. U.S. Dept. of Edu., 208 F. Supp. 3d 850 (S.D. Ohio 2016).

Adams posits the District Court rightly decided that Glenn held discrimination based on an individual's transgender status is sex discrimination, but this argument is based on *dicta* in Glenn and not its precedential holding. That *dicta* cites academics suggesting that the mere status of being transgender is inherently gender non-conforming regardless of behavior. Glenn, at 1316. Adams asks this Court to hold that Glenn stands for the proposition that discrimination against a transgender person for being transgender is discrimination on the basis of gender non-conformity and therefore sex discrimination.

But Glenn does not go that far. Contrary to Adams' position, Glenn does not hold that discrimination against a transgender individual is inherently discrimination because of sex. To the contrary, Glenn's holding is that "discrimination against a transgender individual because of her gender non-conformity is sex discrimination, whether it's described as being on the basis of sex or gender." Id. at 1317. As Glenn held, the protection that all individuals have against discrimination based on gender non-conformity cannot be denied to a transgender individual, because "[t]he nature of the discrimination is the same; it

may differ in degree but not in kind." Id. at 1318–19. This holding is inconsistent with the District Court's ruling.

Indeed, this Court rejected the District Court's logic in Evans v. Georgia Reg'l Hosp., 850 F.3d 1248, 1254 (11th Cir. 2017). Evans held that Glenn stands for the proposition that discrimination against a person because of gender non-conformity is sex discrimination - and nothing more. The case involved allegations of sex discrimination violative of Title VII brought by a lesbian. Id. at 1250. The plaintiff in Evans argued, citing Glenn, that discrimination because of sexual orientation was *per se* discrimination based on gender non-conformity, because sexual attraction to a member of the same sex was contrary to a stereotypes about to whom members of a certain sex should be attracted. Id. at 1254-55. This Court held that because there was no evidence of gender non-conformity beyond Ms. Evans' status as a lesbian, she could not prevail on her sex discrimination claim. Id. Gender non-conformity discrimination is not just another way to claim discrimination based on sexual orientation, but rather is a distinct avenue of relief. Id. at 1255.

Such claims, based solely on status and not behavioral gender non-conformity, are also foreclosed by binding precedent in this Circuit. Id. at 1255 (citing Blum v. Gulf Oil Corp., 597 F.2d 936, 938 (5th Cir. 1979)). Under the prior precedent rule, this Court is "bound to follow a binding precedent in this Circuit

unless and until it is overruled by this court en banc or by the Supreme Court." Offshore of the Palm Beaches, Inc. v. Lynch, 741 F.3d 1251, 1256 (11th Cir. 2014) (internal quotations omitted). Furthermore, this Court has already rejected the argument that Price Waterhouse v. Hopkins, 490 U.S. 228 (1989), and Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75 (1998), support a cause of action for sexual orientation discrimination under Title VII based on status, because they are neither clearly on point, nor contrary to, Blum.

Just as this Court rejected Ms. Evans' status-based sexual orientation claim, it is bound by Blum, Glenn and Evans, to reject the status-based claims that the District Court adopted in error. The reality here is that transgender and non-transgender students are treated equally under the School Board's policy – they both must use the bathroom of their biological sex. There is no evidence this requirement is due to any sex-stereotyping towards transgender students.[1]

Adams' claim can only prevail under one of two theories. Either sex-segregated bathrooms are inherently unlawful and the act of excluding a biological female who wishes to use a boys' bathroom for any reason is actionable gender non-conformity – a theory not advanced. Or, Adams' status as a transgender student entitles him to protection merely by virtue of his transgender status which

[1] The record is replete with uncontroverted evidence that the School Board took steps to affirm Adams' gender identity in contexts outside of bathroom use.

is inherently non-conforming. This argument advanced by Adams is foreclosed by Blum, Evans and Glenn. See also Bostock v. Clayton Cty. Bd. of Com'rs, 894 F. 3d 1335 (11th Cir. 2018).[2]

Adams also asks this Court to do what no other circuit has done and reach a conclusion that the District Court did not; that is, to find that discrimination based on transgender status is *per se* entitled to heightened scrutiny. Again, the policy does not make distinctions on transgender status, and its operation does not result in discrimination against Adams because he is transgender. Thus, this Court need not accept Adams' invitation to explore whether discrimination based on transgender is a quasi-suspect class.

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[2] Adams argues that "discrimination based on gender transition is also discrimination based on sex…". [Adams Answer Brief at p. 24] citing Schroer v. Billington, 577 F. Supp. 2d 293, 306 (D.D.C. 2008); Macy v. Holder, Appeal No. 0120120821, 2012 WL 1435995, at *11 (E.E.O.C. Apr. 20, 2012). But unlike the facts in Schroer, Adams was not treated disparately because he transitioned. He was not permitted in the boys' bathroom because he is not a biological male. Furthermore, the analogy from Schroer regarding religious conversion and discrimination is inapposite. If a Christian converts to Judaism and is subjected to an adverse action for the conversion, it does not automatically mean that the adverse action was due to religion despite treating each religion the same. For example, if such a person was discharged by an employer because they could not work on Saturday given their religious conversion, so long as the application of a policy requiring Saturday work was evenly applied, there would not even be an inference of discriminatory intent. Greenfield v. City of Miami Beach, Fla., 844 F. Supp. 1519, 1526 (S.D. Fla. 1992), aff'd sub nom. Greenfield v. City of Miami Beach, 20 F.3d 1174 (11th Cir. 1994)(Finding no discrimination because plaintiff did not proffer non-Jewish comparator treated less favorably). There is no evidence of dissimilar treatment here.

Even so, Adams' argument in this regard also fails for a myriad of reasons. First, Adams does not clearly state the elements for recognizing a quasi-suspect class which requires a group to show the following: (1) they have suffered a history of discrimination; (2) they exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group; and (3) they show that they are a minority or politically powerless. Bowen v. Gilliard, 483 U.S. 587, 602–03 (1987). Just as Evans, *supra* held that sexual orientation does not always result in gender non-conforming behavior, there is no evidence in the record that transgender individuals always engage in gender non-conforming behavior.[3] This makes transgender individuals not the type of group exhibiting "obvious, immutable, or distinguishing" characteristics entitled to quasi-suspect class status. See also Lofton v. Sec'y of the Dep't of Child. & Fam. Servs., 358 F.3d 804, 818 (11th Cir. 2004)(holding that homosexuals are not a quasi-suspect class). Furthermore, there is not sufficient record evidence to make this holding as Adams cites no record evidence that transgender individuals are a minority or politically powerless. As heightened scrutiny requires an exacting investigation of legislative choices, the "respect for the separation of powers" should make courts reluctant to establish new suspect classes. City of Cleburne, TX v. Cleburne Living Ctr., 473

[3] In fact, Adams argues he is a boy just like any other boy.

U.S. 432, 441 (1985). Indeed, numerous authorities hold that transgender status or sexual orientation is not a quasi-suspect class.[4]

Ultimately, just as a biological girl seeking to use the boys' bathroom cannot recover for discrimination based on gender identity or non-conformity, a transgender boy, without some evidence of invidious discrimination, for sex-stereotyping may not either. Indeed, Glenn's holding centered on the fact that the plaintiff was discriminated against for presenting as a woman even though she was born a male. A non-transgender male would be protected under the same circumstances.

A biological girl would not be protected from discrimination if she attempted to use the boys' bathroom in St. Johns County schools, because her exclusion from the boys' bathroom has nothing to do with her gender identity; rather, it is because of her physiological and biological traits. Adams asks this Court to extend its precedent to hold that transgender status, regardless of

[4] See Druley v. Patton, 601 F. App'x 632, 635 (10th Cir. 2015) ("To date, this court has not held that a transsexual plaintiff is a member of a protected suspect class for purposes of Equal Protection claims." (citing Etsitty v. Utah Transit Auth., 502 F.3d 1215, 1227-28 (10th Cir. 2007); Brown v. Zavaras, 63 F.3d 967, 972 (10th Cir. 1995))); Bostic v. Schaefer, 760 F.3d 352, 397 (4th Cir. 2014) (Niemeyer, J., dissenting) (indicating that the Fourth Circuit has determined that "rational-basis review applies to classifications based on sexual orientation" and that "[t]he vast majority of other courts of appeals have reached the same conclusion" (citations omitted)).

behavior, is gender non-conformity discrimination. The District Court accepted this invitation and over-extension in error.[5]

b. The School Board's Policy is Substantially Related to an Important Governmental Interest

Assuming Adams can show invidious discrimination, the School Board's policy nevertheless survives heightened scrutiny. The School Board's policy makes classifications based on sex, but it does so along biological lines to advance the undisputed important governmental interest of student privacy in bathrooms. To be sure, a classification of "boys" and "girls" rooted in biology has been held appropriate by the Supreme Court numerous times. [School Board Initial Brief at p. 22].[6]

[5] The School Board attorney's revisions to the Best Practices guidance is not evidence of discriminatory intent. The long-standing bathroom policy was enacted well before the issuance and revisions to the Best Practices guidance. Further, the policy makes distinctions based solely on biological sex – nothing more. Regardless, Adams is still required to make an initial showing that he is similarly situated to those who received more favorable treatment, which he cannot do. [School Board Initial Brief at pp. 16-17].

[6]Adams' Answer Brief explains how certain medical professionals define the appropriate standards of care for transgender adolescents, how these individuals define "sex," and Adams' experience as a transgender. However, none of this is relevant to the analysis of the issues on appeal. Adams cannot recast the judgment of the School Board in evaluating what is best for its students based on medical doctors, when it is the School Board's policy at issue. The only issue relevant on appeal is whether the manner in which the School Board's policy classifies sex is substantially related to an important governmental interest.

Adams argues the District Court properly found that the School Board's interest in protecting student privacy is not at issue when transgender students use the bathroom of their gender identity. Adams argues this is so based on (1) the lack of a documented incident implicating students' privacy interests in the bathroom, and (2) Adams' actions in the bathroom. [Adams Answer Brief at pp. 37-44]. These arguments are unavailing.

The School Board recognizes that a justification that sustains a sex-based classification "must be genuine, not hypothesized or invented *post hoc* in response to litigation" U.S. v. Virginia, 518 U.S. 515, 533 (1996). It satisfies this burden. Adams contends that because no privacy violations have occurred in the St. Johns County School District related to transgender students, the School Board's asserted governmental interest in protecting student privacy by separating bathrooms on the basis of biological sex is hypothesized and without merit.[7] Adams' argument in

[7] Adams attempts to negate the School Board's privacy argument by citing new evidence in his Answer Brief that was not before the District Court. Adams asks this Court to take to take judicial notice of a best practices guideline revised by School Board personnel after the District Court's ruling. [Adams Answer Brief at p. 43 n. 15]. Taking judicial notice is a highly limited process. Lodge v. Kondaur Captial Corp., 750 F. 3d 1263, 1273 (11th Cir. 2014). Scientific facts, matters of geography, and matters of political history are appropriate subjects for judicial notice. Shahar v. Bowers, 120 F.3d 211, 214 (11th Cir. 1997). The best practices guideline is not the type of document subject to judicial notice on appeal. Further, the School Board did not seek a stay on appeal and implemented the revised guidance to comply with the District Court's order during the pendency of the appeal. To suggest that the document indicates anything about the privacy

this regard is legally unsound. Adams and the District Court read this requirement too broadly.

Under Equal Protection Clause jurisprudence, the governmental interest for the classification proffered merely must have been the government's actual purpose rather than a conceivable purpose hypothesized after the fact by an attorney or judge. Virginia, 518 U.S. at 533; accord Trimble v. Gordon, 430 U.S. 762, 776 (1977) ("[W]e will not hypothesize an additional state purpose ...). There is no requirement of evidence of evils or harms necessitating the policy for it to withstand intermediate scrutiny.[8]

The policy is not being defended on hypothesized reasons generated *ex post facto*. The uncontroverted record shows that the School Board's concerns regarding student privacy pre-dated Adams' use of the boys' bathroom.

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justifications and experiences of students in the School Board's schools is speculative and says nothing about the merits of the issues on appeal.

[8] Under rational basis review, a statute will be upheld based on a hypothesized reason even if it was not the government's reason for the classification. Such classifications will be upheld if there is any reasonable set of facts that can provide a rational basis for the classification. Heller v. Doe, 509 U.S. 312, 319–320 (1993) (quoting FCC v. Beach Communications, Inc., 508 U.S. 307, 313 (1993)). Intermediate scrutiny requires courts to inquire into the actual purposes of the discrimination, for "a tenable justification must describe actual state purposes, not rationalizations for actions in fact differently grounded." Virginia, 518 U.S. at 533, 535–536 (1996); Weinberger v. Wiesenfeld, 420 U.S. 636, 648 (1975); Califano v. Goldfarb, 430 U.S. 199, 212–217 (1977) (plurality opinion). But this is not the same as requiring a governmental entity establish the justification be grounded in concrete evidence that the interest has been implicated.

Practically, Adams' argument overlooks the role of school boards in protecting students under the law. The School Board is directly responsible for the health, safety, and welfare of its schoolchildren. See Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 654 (1995). In meeting this responsibility, the School Board is permitted to be proactive in adopting policies to prevent disruptions that may impact the educational environment. See Heinkel v. Sch. Bd. of Lee Cty., Fla., 194 F. App'x 604, 609 (11th Cir. 2006) citing Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969).

Furthermore, even accepting Adams' unsupported interpretation of Constitutional jurisprudence, his contention that there was no evidence supporting the privacy justification of the policy is without merit. The parties stipulated to the fact that parents and students felt that allowing students to use a bathroom matching their gender identity as opposed to their biological sex would violate their bodily privacy. [Doc. 116 at p. 11].

This evidence is not merely the opinion of the "body politic" as Adams contends. Adams relies on Cleburne, 473 U.S. at 448 for this point, but that case is distinguishable. Cleburne involved a dispute over a zoning ordinance and the fear and negative attitudes of certain individuals concerning the construction of a home for the intellectually disabled. In Cleburne, the Supreme Court held that the ordinance was unconstitutional despite the views of that segment of the population.

Id. at 448. But the School Board does not use the concerns of parents and students as a means to establish that the policy itself is justified; rather, the School Board argues that the stipulation is evidence that the privacy concerns motivating its policy were not illusory.

Indeed, Adams cannot dispute that an individual's privacy is violated when they are required to expose themselves or their partially clothed body to a member of the opposite sex. See School Board Initial Brief at pp. 22-23. The privacy right is even more significant here as it involves minor children. See School Board Initial Brief at p. 23; Palmore v. Sidoti, 466 U.S. 429, 433 (1984).

Just as Adams misreads the burden with respect to the justification required to survive intermediate scrutiny, he also misreads the School Board's burden to show that its policy is substantially related to that interest. A perfect fit between the policy and the interest is not required under intermediate scrutiny. All that is required is a showing that the fit is reasonable. E.g., Bd. of Trustees of State Univ. of N.Y. v. Fox, 492 U.S. 469, 480 (1989) (holding that the fit between the government's objective and regulation need not be "necessarily perfect, but reasonable"; the government need "not necessarily [employ] the least restrictive means."). Adams asks this Court to find that the School Board did not employ the least restrictive means possible in implementing its policy, a burden reserved in

cases involving strict scrutiny. McCullen v. Coakley, 573 U.S. 464, 478 (2014). The District Court erred when it accepted this invitation.

The District Court found that the policy was not substantially related to students' privacy interests because of the manner in which Adams uses the bathroom. It may be true that Adams uses a stall in the boys' bathroom and that other students can use stalls or gender-neutral bathrooms if they desire more privacy. However, this does not ameliorate student privacy interests in the bathroom to the point that the policy cannot be said, as a matter of law, to substantially advance student privacy.

Indeed, the District Court failed to appreciate the School Board's argument that privacy extends to the entirety of the bathroom.[9] Adams' mere presence in the

[9] Adams' attempt to distinguish precedent in Virginia, *supra* and Faulkner, *supra* misconstrues those cases. Adams contends that those cases stand for the proposition that where equal access can be provided across sexes, it must be, regardless of whether physiological differences warrant accommodations. Virginia however concerned female access to the adversative program at Virginia Military Institute and suggested that alterations to the actual physical structures of the school would have to be made to accommodate privacy interests of women but still allow them to participate in the school's programs. It was the stereotypical notion that women were weak, and thus should be excluded from the school that the Supreme Court found unlawful in Virginia. In fact, counsel for the United States in Virginia represented at oral argument that privacy reasons necessitated sex-segregated bathrooms. Transcript of Oral Argument at 5, United States v. Virginia, 518 U.S. 515, 516 (1996) (No. 94-1941)("I think the main... there is, for example, general agreement that for privacy reasons, if women were admitted to VMI there would have to be an opportunity for women and men to go to the toilet, to shower, to dress, without being seen by members of the opposite sex."). Similarly, Faulkner

boys' bathroom impinges the rights of biological boys, based on his biological and physiological sex.[10]

To be sure, intermediate scrutiny requires a much tighter fit than rational basis review, but it does not require the kind of demanding and least restrictive fit advocated by Adams and to which the District Court improperly held the School Board. Because of this, the existence of sex-neutral alternatives to advance the interest necessitating the classification is highly probative as to whether the classification violates the Equal Protection Clause. While Adams argues it is not his burden to proffer a sex-neutral alternative, and the School Board does not argue this, Adams failure to do so significantly militates against finding that the policy is unconstitutional. The School Board posits that the only way to protect students' privacy interest in not having their unclothed or partially unclothed bodies or personal bodily functions exposed to members of the opposite sex is to segregate bathrooms based on biological sex. The lack of sex-neutral alternatives to this

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required sex-segregated bathrooms as they were not based on stereotypes of the sexes. Faulkner v. Jones, 10 F.3d 226 (4th Cir. 1993). There is no evidence that any stereotypical notions of sex motivated the School Board in enacting its policy.

[10] Adams and the District Court improperly evaluated the policy only with respect to Adams. Gender-fluid students, students "identifying" as a gender to gain access to facilities designed for the opposite sex, and other problems in adopting a policy advocated by Adams are real and not hypothetical concerns of the School Board. The District Court improperly stepped in the shoes of administrators and told them what was the best way to run a school while ignoring all of the factors that go into creating a policy.

policy is further evidence the policy is not unconstitutional. See, e.g., Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142, 151 (1980) (invalidating a sex-based classification where a sex-neutral approach would completely serve the needs of both classes); Orr v. Orr, 440 U.S. 268, 281 (1979) (finding "no reason, therefore, to use sex as a proxy for need" where the alimony statute already provided for individualized hearings that took financial circumstances into account); Weinberger, 420 U.S. at 653 (finding a gender-based distinction to be "gratuitous" where "without it, the statutory scheme would only provide benefits to those men who are in fact similarly situated to the women the statute aids").

Ultimately, the School Board's policy is Constitutional and permissibly delimits sex based on biology and physiology.

II. THE POLICY DOES NOT VIOLATE TITLE IX

a. "Sex" Under Title IX Does Not Encompass "Gender Identity"

Statutory interpretation starts and ends with the text of a statute if it is unambiguous. BedRoc Ltd. v. United States, 541 U.S. 176, 183 (2004). In evaluating the meaning of the term "sex" under Title IX, this Court is required to look at the common usage of the word by taking into account its ordinary, contemporary, and common meaning. Koch Foods, Inc. v. Sec'y, U.S. Dep't. of Labor, 712 F.3d 476, 480 (11th Cir. 2013). This is because, as the District Court points out, Title IX does not include a definition of "sex." Consolidated Bank,

N.A. v. U.S. Dep't of Treasury, 118 F.3d 1461, 1464 (11th Cir. 1997) ("In the absence of a statutory definition of a term, we look to the common usage of words for their meaning"); In re Griffith, 206 F.3d 1389, 1393 (11th Cir. 2000) (en banc) ("In interpreting the language of a statute, we generally give the words used their ordinary meaning.") (citations and quotations omitted). The ordinary meaning is derived from the dictionary definitions at the time the statute with the un-defined term was enacted. Sumpter v. Sec'y of Labor, 763 F.3d 1292, 1296 (11th Cir. 2014) citing Perrin v. United States, 444 U.S. 37, 42 (1979); Day v. Persels & Assocs., LLC, 729 F.3d 1309, 1317 (11th Cir. 2013)(adopting the fixed-meaning canon).

The District Court improperly found, and Adams advances, the flawed reasoning that the definition of "sex" was not necessarily uniform at the time Title IX was enacted. See Adams Answer Brief at p. 50; Doc. 192 at 56-67 citing G.G., 822 F.3d at 721. However, neither Adams nor the District Court cite to any binding authority that conflated "gender identity" with "sex" at the time Title IX was enacted. To the contrary, the overwhelming number of dictionary definitions of the term "sex" cited in the School Board's Initial Brief all support the notion that "sex" at the time Title IX was enacted meant the biological differences between men and women and not gender identity. [School Board Initial Brief at pp. 36-38]. See also Doe 2 v. Shanahan, 2019 WL 1086495 at *26 n. 6 (D.C. Cir. March 9,

2019)(Williams, S, concurring) (citing to Wittmer v. Phillips 66 Co., 915 F.3d 328, 333 (5th Cir. 2019) (Ho, J., concurring)(for the proposition that the common usage of the term sex does not mean transgender status).

To support his contention that dictionary definitions of "sex" were neither uniform nor unambiguous, Adams, like the District Court, relies on a line of cases all built on the Fourth Circuit's decision in G.G. G.G., however, was constrained by the requirement that the Department of Education's interpretation of the term "sex" to include gender identity be given deference, an interpretation that has since been withdrawn. [Docs. 106-2, 106-4, 152-59, 152-61]. Even more, G.G. relied on a single dictionary definition to find that the Department of Education's interpretation should be given deference. G.G., 822 F. 3d at 721-722. When not guided by the requirement to give agency deference, Adams' argument has failed. See Conley v. NW. Florida State Coll., 145 F. Supp. 3d 1073, 1077 (N.D. Fla. 2015)(after applying the canons of statutory construction to the term "sex" in Title IX, reaching the conclusion that "[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").

Adams also argues in his Answer Brief that the District Court properly considered the aim of Title IX in an attempt to rebut the fact that the broader context of Title IX compels a finding that Congress did not intend for "sex" to

encompass "gender identity." [Adams Answer Brief at pp. 50-51]. Adams posits that "Title IX's legislative history does not circumscribe Title IX's protections…" [Adams Answer Brief at p. 50] and, in support, cites Oncale, 523 U.S. 75, 79. While Oncale does note that "statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils," it also concludes that it is "ultimately the provisions of our laws . . . by which we are governed." Id. Adams' suggestion that discrimination based on gender identity is a "reasonably comparable evil" to sex discrimination is unsound.

In Oncale, the Supreme Court held that actionable sexual harassment under Title VII could include same-sex harassment. Id. at 82. The Supreme Court held that nothing in Title VII, which prohibits employment discrimination based on sex, foreclosed this interpretation. Id. at 82. Indeed, the decision in Oncale was a reflection of a fidelity to the text of Title VII which prohibits sex discrimination, regardless of the source. Id. at 78-81. While Congress might not have been ultimately concerned with same-sex harassment, it was a reasonably comparable evil that was prohibited under the plain terms of the statute. Id. at 79.

That is entirely distinguishable from the District Court's interpretation of "sex" to include, what is in essence, an entirely new super-protected class—gender identity. Discrimination based on gender identity is not a "reasonably comparable evil" to sex discrimination. Such an argument, unlike the interpretation of Title VII

in Oncale, is completely divorced from the ordinary meaning of the text of Title IX. This Court held as much in Evans when it rejected status-based, gender non-conformity claims that Adams advances and the District Court improperly adopted. See section I(a), *supra*.

To that point, Adams asks this Court to hold that discrimination against someone who is transgender is *per se* sex discrimination, because transgender individuals inherently do not act in congruence with their gender identity. Adams also claims it is "analytically impossible to discriminate based on transgender status without being motivated, at least in part, by sex." [Adams Answer Brief at pp. 49-50]. Adams again relies on Glenn again for this proposition, but this is an overextension of Glenn. Furthermore, this Court has rejected a nearly identical argument since Glenn; that is, sexual orientation discrimination status alone is a protected class. See Evans, Bostock *supra*. This Court's precedent holds behavior, and not status, entitles one to protection in the context of gender non-conformity claims.

There is simply no evidence that Congress intended for "sex" under Title IX to include discrimination based on gender identity.[11] The ordinary meaning of the

[11] To the extent that Adams suggests that any reliance of the District Court on how medical professionals define the term sex in contemporary parlance was proper, such an argument is unavailing. Obviously, the practice of statutory construction is designed to divine Congress' intent. The opinions of anyone outside of Congress

statute supports this determination. The broader context of the statute and legislative history also supports this interpretation as the School Board highlighted in its Initial Brief. [School Board Initial Brief at pp. 38-42]. Further, the "omitted-case canon" also supports this interpretation as, under that canon, a matter not covered in a statute (here gender identity) is treated as not covered. See Samak v. Warden, FCC Coleman-Medium, 766 F.3d 1271, 1289 (11th Cir. 2014)(adopting omitted-case canon from Antonin Scalia & Bryan Garner, Reading Law: The Interpretation of Legal Texts 93 (2012)). In fact, interpreting Title IX to create a super-protected class based merely on the status of being transgender when such a reading is not plainly supported by the text is improper. Whitman v. American Trucking Associations, 531 U.S. 457, 468 (2001)(holding that Congress "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions – it does not, one might say, hide elephants in mouseholes").[12]

on the proper definition of sex is immaterial to this undertaking. Kelly v. Robinson, 479 U.S. 36, 50 (1986)(no significance or deference afforded to individuals' statements regarding the meaning of a statutory provision who are not members of Congress).

[12] To be sure, while there are exceptions to the plain meaning rule, none of them are applicable here. Those exceptions arise when (1) the statute's language is ambiguous; (2) applying it according to its plain meaning would lead to an absurd result; or (3) there is clear evidence of contrary legislative intent. United States v. DBB, Inc., 180 F.3d 1277, 1281 (11th Cir. 1999).

b. This Court Must Consider Title IX's Language in Light of the Fact that it is Spending Clause Legislation

Adams argues this Court should disregard the School Board's Spending Clause arguments because they were not preserved; however, these arguments are a permutation of the School Board's argument that Congress did not intend sex to encompass "gender identity" when it enacted Title IX. A party may take a different approach to an issue preserved for appeal, and the manner in which an argument is made need not be precisely the same as the argument made before the District Court. See Bradshaw v. Reliance Standard Life Ins. Co., 707 Fed. Appx. 599, 605 (11th Cir. 2017). The issue of Congress' intent when it enacted Title IX was undoubtedly before the District Court, and this approach was thus preserved for review.[13]

[13] Regardless, even if this Court finds that this is a "newly minted" argument, the Court has discretion to, and should, consider it. Singleton v. Wulff, 428 U.S. 106, 120 (1976). This issue is a pure question of law and refusal to do so would result in a miscarriage of justice, the interest of substantial justice is at stake, and the issue, the proper interpretation of Title IX, will affect schools at all levels throughout the Circuit that accept federal funds. Baumann v. Savers Federal Savings & Loan Ass'n, 934 F.2d 1506, 1512 (11th Cir. 1991) (citing Dean Witter Reynolds, Inc. v. Fernandez, 741 F.2d 355, 360-61 (11th Cir. 1984). In fact, the interpretation of Title IX adopted by this Court can, and likely will, be extended by other courts to other contexts including the employment context in interpreting Title VII. This Court's decision will have wide-reaching impacts in this Circuit and because of this, the Court should exercise its discretion to consider this argument, even if it was not preserved.

Adams contends that entities obtaining federal funds have notice that Title IX prohibits all forms of sex discrimination, including the theory of sex discrimination advanced in this case and adopted by the District Court. However, Title IX does not provide notice that it prohibits discrimination based upon gender identity. Congress is required to speak clearly when it conditions receipt of federal funds on some condition. It is a matter of contract between the federal government and fund recipient where the federal government is the contract drafter and must speak clearly on conditions of the contract.

Adams' citation to Bennett v. Kentucky Dep't of Educ., is inapposite. 470 U.S. 656 (1985). Bennett concerned whether the Kentucky Department of Education misused federal grant funds in violation of the grant's intended purposes under Title I. Id. Recognizing that grant agreements cannot "prospectively resolve every possible ambiguity concerning particular applications of Title I's requirements," the Supreme Court reasoned that "the requirements of Title I should be informed by statutory provisions, regulations, and other guidelines provided by the Department [of Education]…". Id. at 657, 770. Applying Bennett to the instant matter, and as argued extensively, Title IX's interpreting regulations expressly permit the School Board to separate bathrooms on the basis of sex. Current "administrative guidelines" do not posit that "sex" under Title IX encompasses "gender identity." [Docs. 106-2, 106-4, 152-59, 152-61]. To hold the School Board

liable for violating Title IX by separating bathrooms on the basis of biological sex when it is permissible under interpreting regulations would run afoul of the restrictions on interpreting Spending Clause legislation. This is dissimilar to the type of specific vagaries that the Supreme Court held in Bennett did not have to be prospectively addressed. The creation of a new protected class, out of whole cloth, is certainly the type of condition that Congress should be expected to clearly set forth in Spending Clause legislation.

Adams also relies on Benning v. Georgia, 391 F.3d 1299, 1306 (11th Cir. 2004) for the proposition that "so 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." [Adams Answer Brief at p. 54]. For that proposition, Benning cites Davis v. Monroe Cnty. Bd. of Edu., where the Supreme Court upheld the prohibition of sexual harassment in schools that receive federal funds, under Title IX, even though "the level of actionable 'harassment' ... 'depends on a constellation of surrounding circumstances, expectations, and relationships,' ... including but not limited to, the ages of the harasser and the victim and the number of individuals involved...." Id. citing Davis ex rel LaShonda D. v. Monroe Cnty. Bd. of Educ., 526 U.S. 629,651 (1999). The clear prohibition of discrimination in Title IX provided adequate notice to the recipients of federal funds that severe student-on-student harassment was actionable according to the

Court. Id. But, this is factually distinguishable from the instant matter. The issue in Davis was that while there may not have been clarity on when a harassment claim was actionable, it was certainly clear that Title IX prohibited a sexual harassment claim itself. While the manner in which sexual harassment could vary, the prohibition did not.

Here, Adams asks this Court to create a status-based claim of sex discrimination by reading transgender discrimination congruently with gender non-conformity discrimination. This is not a different manner of a prohibition but a different prohibition altogether.[14] Congress, as elected representatives, should be held accountable for placing such significant conditions on the receipt of federal funds. Their failure to do so militates against finding that it intended to interpret Title IX the way the District Court did.

Respectfully submitted this 14th day of March, 2019.

[14] For these reasons, Adams' citation to Henrietta D. v. Bloomberg, 331 F.3d 261, 285 (2d Cir. 2003) and Jackson v. Birmingham Bd. of Edu., 544 U.S. 167, 174 (2005) are also inapposite because they concern the manner in which liability could be assessed for a claim and not whether a new claim itself was available.

/s/ Terry J. Harmon
Terry J. Harmon FBN 0029001
Jeffrey D. Slanker FBN 0100391
Robert J. Sniffen FBN 000795
Michael P. Spellman FBN 937975
Kevin C. Kostelnik FBN 0118763

SNIFFEN & SPELLMAN, P.A.
123 North Monroe Street
Tallahassee, FL 32301
Telephone: (850) 205-1996
Fax: (850) 205-3004

Counsel for The School Board of St. Johns County, Florida

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)(i) and (ii). This brief contains 6,406 words (within the limit of 6,500) 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
TERRY J. HARMON

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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David J. Smith, Clerk
U.S. Court of Appeals for the 11th Circuit
56 Forsyth St. N.W.
Atlanta, GA 30303

/s/ Terry J. Harmon
TERRY J. HARMON