

No. 18-13592

**IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

DREW ADAMS,
a minor, by and through his next friend and mother, Erica Adams Kasper,
Plaintiff-Appellee

v.

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

TIM FORSON, et al.,
Defendants

On Appeal from the United States District Court for the
Middle District of Florida
(No. 3:17-cv-00739-TJC-JBT)

**EN BANC BRIEF OF *AMICI CURIAE* THE STATES OF TENNESSEE,
ARIZONA, ARKANSAS, GEORGIA, INDIANA, KANSAS, KENTUCKY,
LOUISIANA, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA,
OHIO, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, TEXAS,
AND WEST VIRGINIA IN SUPPORT OF DEFENDANT-APPELLANT**

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~~No. 18-13592~~
CERTIFICATE OF INTERESTED PERSONS

IN THE UNITED STATES COURT OF APPEALS

Pursuant to Eleventh Circuit Rules 26-1, 28-1, and 29-2, *Amici* certify that
FOR THE ELEVENTH CIRCUIT

the Certificate of Interested Persons filed by Defendant-Appellant on August 4,
DREW ADAMS,

2021, is in compliance with the following exceptions: mother, Erica Adams Kasper,
Plaintiff-Appellee

1. Blumstein, Andrée S. – Counsel for *Amicus Curiae* the State of
v.

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

2. Brnovich, Mark – Counsel for *Amicus Curiae* the State of Arizona;
TIM FORSON, et al.,

3. Bursch, John J. – Counsel for *Amicus Curiae* Miriam Grossman,
Defendants

Michael Laidlaw, Quentin Van Meter, and Andre Van Mol;
On Appeal from the United States District Court for the

4. Cameron, Daniel – Counsel for *Amicus Curiae* the Commonwealth of
Middle District of Florida
(No. 3:17-cv-00739-TJC-JBT)

Kentucky;

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

Tennessee;

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

Georgia;

7. Commonwealth of Kentucky – *Amicus Curiae*;

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

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

Tennessee;

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

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

IN THE UNITED STATES COURT OF APPEALS

12. Morrissey, Patrick – Counsel for *Amicus Curiae* the State of West

FOR THE ELEVENTH CIRCUIT

Virginia;

DREW ADAMS,

a minor, by and through John M. Kasper and another, Erica Adams Kasper,

Plaintiff-Appellee

Oklahoma;

v.

14. Paxton, Ken – Counsel for *Amicus Curiae* the State of Texas
SCHOOL BOARD OF ST. JOHNS COUNTY, FLORIDA,

Defendant-Appellant

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

TIM FORSON, et al.,

Nebraska;

Defendants

16. Ravensborg, Jason R. – Counsel for *Amicus Curiae* the State of South
On Appeal from the United States District Court for the

Dakota; Middle District of Florida

(No. 3:17-cv-00739-TJC-JBT)

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

Indiana;

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

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

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

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

Tennessee;

22. State of Arizona – *Amicus Curiae*;

23. State of Arkansas – *Amicus Curiae*;

24. State of Georgia – *Amicus Curiae*;

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25. State of Indiana – *Amicus Curiae*;
- IN THE UNITED STATES COURT OF APPEALS**
26. State of Kansas – *Amicus Curiae*
FOR THE ELEVENTH CIRCUIT
27. State of Louisiana – *Amicus Curiae*;
DREW ADAMS,
a minor, State and Mississippi – *Amicus Curiae*,
and Erica Adams Kasper, mother, Erica Adams Kasper,
Plaintiff-Appellee
29. State of Missouri – *Amicus Curiae*;
v.
30. State of Montana – *Amicus Curiae*;
SCHOOL BOARD OF ST. JOHNS COUNTY, FLORIDA,
Defendant-Appellant
31. State of Nebraska – *Amicus Curiae*;
TIM FORSON, et al.,
Defendants
32. State of Ohio – *Amicus Curiae*
33. State Oklahoma – *Amicus Curiae*;
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Middle District of Florida
34. State of South Carolina – *Amicus Curiae*;
(No. 3:17-cv-00739-TJC-JBT)
35. State of South Dakota – *Amicus Curiae*;
36. State of Tennessee – *Amicus Curiae*;
37. State of Texas – *Amicus Curiae*;
38. State of West Virginia – *Amicus Curiae*;
39. Wilson, Alan – Counsel for *Amicus Curiae* the State of South
Carolina;
40. Yost, Dave – Counsel for *Amicus Curiae* the State of Ohio.

/s/ Sarah K. Campbell

SARAH K. CAMPBELL
Associate Solicitor General

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STATEMENT OF THE ISSUE

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Whether ~~IN THE UNITED STATES COURT OF APPEALS~~ **FOR THE ELEVENTH CIRCUIT** on biological sex violates Title IX of the Education Amendments Act of 1972 or the Equal

Protection Clause of the Constitution. **DREW ADAMS**,
a minor, by and through his next friend and mother, Erica Adams Kasper,

Plaintiff-Appellee
INTERESTS OF AMICI CURIAE

Amici Curiae—the States of Tennessee, Arizona, Arkansas, Georgia, Indiana,
SCHOOL BOARD OF ST. JOHNS COUNTY, FLORIDA,
Kansas, Kentucky, Louisiana, ~~Mississippi, Missouri,~~ *Defendant-Appellant* Montana, Nebraska, Ohio,

Oklahoma, South Carolina, **TIM FORSON**, Texas, and West Virginia¹—have a
Defendants

significant interest in the issues presented in this case. As sovereign States, *Amici*

must comply with the Fourteenth Amendment. *Amici* also operate educational
On Appeal from the United States District Court for the
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programs and activities that receive federal funding and thus are subject to Title IX's
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requirements. For example, the Tennessee Department of Education directly operates state special schools that receive federal funding. Tennessee's public universities receive federal funding. And Tennessee is also home to nearly 150 local educational agencies and numerous private educational institutions that receive federal funding and thus are subject to Title IX's requirements.

Moreover, many *Amici* have exercised their sovereign lawmaking authority to protect the health, well-being, and safety of their citizens by allowing or even

¹ *Amici* file this brief pursuant to Federal Rule of Appellate Procedure 29(a)(2) and this Court's Rule 35-8.

requiring separation based on biological sex in contexts that implicate privacy and

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safety, such as living facilities. **IN THE UNITED STATES COURT OF APPEALS**

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and employers to maintain sex-separated living facilities. *See, e.g.*, Neb. Rev. Stat.

§ 79-2, 124 (providing that the “Nebraska Equal Opportunity in Education Act does a minor, by and through his next friend and mother, Erica Adams Kasper,

DREW ADAMS

Plaintiff-Appellee

not prohibit any educational institution from maintaining separate toilet facilities,

locker rooms, or living facilities for the different sexes”); Okla. Admin. Code

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§ 335:15-3-2(b)(5) (providing that “Oklahoma Law may require that separate

Defendant-Appellant

restroom facilities be provided employees of each sex”); W. Va. Code Ann. § 21-3-

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12 (providing for sex-separated water closets in workplaces and specifying that “[n]o

person or persons shall be allowed to use the closets assigned to the opposite sex”);

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id. § 21-3-13 (providing for separate dressing rooms and washing facilities in

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workplaces “for each sex”). Tennessee gives public-school students, teachers, and

employees a private right of action against a school that “intentionally allow[s] a

member of the opposite sex to enter [a] multi-occupancy restroom or changing

facility while other persons [are] present.” 2021 Tenn. Pub. Acts, c. 452, § 6. And

many *Amici* allow or require public schools to separate athletic teams based on

biological sex. *See, e.g.*, 2021 Tenn. Pub. Acts, c. 40, § 1 (providing that a “[a]

student’s gender for purposes of participation in a public middle school or high

school interscholastic athletic activity or event must be determined by the student’s

sex at the time of the student’s birth”); Ark. Code Ann. § 6-1-107(c) (providing that

sex designations for school-sponsored “athletic teams or sports” must be “based on biological sex.” **IN THE UNITED STATES COURT OF APPEALS**

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Act, 2021 Ark. Act 953 (similar); Save Women’s Sports Act, 2021 Mont. Laws, ch. 405 (similar). A ruling in this case that assigning bathrooms based on biological sex a minor, by and through his next friend and mother, Erica Adams Kasper, violates the Equal Protection Clause of Title IX would threaten the continued

enforcement of these duly enacted state laws.

SCHOOL BOARD OF ST. JOHNS COUNTY, FLORIDA,
Finally, *Amici* have a strong interest in ensuring that the federalism and

separation-of-powers principles that underlie our Constitution are respected.

Because the plain language of the Equal Protection Clause and Title IX does not

prohibit assigning restrooms based on biological sex, States retain the authority to

make that policy choice unless or until those federal laws are amended through constitutionally prescribed means.

SUMMARY OF THE ARGUMENT

The age-old practice of assigning students to restrooms based on biological sex does not violate the Equal Protection Clause or Title IX.

I. With respect to Title IX, the plain language of the statute unambiguously allows educational institutions to “maintain[] separate living facilities for the different sexes.” 20 U.S.C. § 1686. At the time Title IX was enacted, the term “sex” was commonly understood to refer to physiological differences between males and females. Section 1686 and other provisions of Title

IX, as well as Title IX's implementing regulations, confirm this understanding.

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Nothing in the Supreme Court's decision in *Boynton v. Virginia*, 356 U.S. 464 (1958),

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140 S. Ct. 1731 (2020), requires a different interpretation.

Even if Title IX did not unambiguously allow educational institutions to a minor, by and through his next friend and mother, Erica Adams Kasper, maintain sex-separated living facilities, longstanding rules of statutory construction

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Plaintiff Appellee

would forbid this Court from interpreting Title IX to prohibit that practice. Congress

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enacted Title IX pursuant to its Spending Clause authority and therefore must

is Spending Clause
Defendant Appellant

provide States and other funding recipients, with *clear notice* of the conditions attached to the funding. Clear notice is also required because prohibiting States from

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maintaining sex-separated living facilities would infringe on their traditional authority to protect the health and safety of their citizens and maintain order and

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discipline in schools. Even if Title IX could plausibly be interpreted to require educational institutions to ignore biological sex when assigning transgender students to restrooms, the States certainly did not have clear notice of that requirement.

II. The issues presented by this case, and similar cases that are soon to follow, involve sensitive policy considerations and competing interests. Congress—not the federal judiciary—is the branch of government that is best suited to weigh and reconcile those interests. When a federal court rewrites a federal statute rather than deferring to Congress, it deprives the States of the opportunity to be heard on that question through the political process. And it impedes state-level efforts to

develop solutions in the absence of congressional action. Because *Congress* has not

prohibited educational institutions from assigning students to restrooms based on

biological sex, this Court should leave to Congress and the political process any

decision to make a different policy choice.
a minor, by and through his next friend and mother, Erica Adams Kasper,

Plaintiff-Appellee
ARGUMENT

Amici agree with Defendant-Appellant that assigning restrooms based on
biological sex does not violate the Equal Protection Clause or Title IX. *Amici* file

this brief to explain in greater detail why a contrary interpretation of Title IX is
untenable and to urge the Court to leave the sensitive policy questions at issue in this

case to the elected officials who are best positioned to address them.
Middle District of Florida

I. Title IX Does Not Prohibit Educational Institutions from Assigning Students to Restrooms Based on Biological Sex.

Title IX unambiguously *allows* educational institutions to maintain “separate living facilities for the different sexes.” 20 U.S.C. § 1686. That alone forecloses interpreting Title IX to prohibit assigning restrooms based on sex. But even if Title IX were ambiguous, longstanding rules of statutory construction further preclude that erroneous interpretation.

A. Title IX unambiguously allows educational institutions to maintain restrooms that are separated based on biological sex.

While Title IX prohibits discrimination “on the basis of sex” in the provision of educational benefits, 20 U.S.C. § 1681(a), it *expressly allows* educational

institutions to “maintain[] separate living facilities for the different sexes,” *id.*

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§ 1686; *see also* ~~IN THE UNITED STATES COURT OF APPEALS~~

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separate toilet, locker room, and shower facilities on the basis of sex” as long as the

“facilities provided for students of one sex” are “comparable” to the “facilities
a minor, by and through his next friend and mother, Erica Adams Kasper,

DREW ADAMS

provided for students of the other sex.” (statement of Sen. Bayh, the chief sponsor of Title

Plaintiff Appellee

IX in the Senate, explained, this safe harbor was intended to “permit differential

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treatment by sex . . . in sports facilities, or other instances where personal privacy

Defendant Appellant

must be preserved.” 118 Cong. Rec. 5,807 (1972) (statement of Sen. Bayh).

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Defendants

Section 1686’s safe harbor for living facilities squarely forecloses any

interpretation of Title IX that would prohibit educational institutions from assigning
students to bathrooms based on sex.” It is no answer to say that Congress did not

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define the term “sex” to mean biological sex. A statute must be interpreted according

to its ordinary meaning at the time of enactment. *See New Prime Inc. v. Oliveira*,

139 S. Ct. 532, 539 (2019). When Congress enacted Title IX in 1972, “virtually

every dictionary definition of ‘sex’ referred to the *physiological* distinctions between

males and females—particularly with respect to their reproductive functions.”

Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 632-33 (4th Cir. 2020)

(Niemeyer, J., concurring in part and dissenting in part) (collecting dictionary

definitions), *cert. denied*, 141 S. Ct. 2878 (2021); *see also Adams v. Sch. Bd. of St.*

Johns Cnty., Fla., 3 F.4th 1299, 1336 (11th Cir. 2021) (W. Pryor, C.J., dissenting)

(same). This binary understanding of the term is confirmed by the fact that the safe harbor in section 1681(a)(2) of Title IX is limited to organizations whose membership is limited to persons of one sex. *See* 20 U.S.C. § 1681(a)(2) (emphasis added).

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Other provisions of Title IX likewise use the term “sex” in a way that makes clear the term is referring to physiological distinctions between males and females. Section 1681(a)(2) allows institutions to change from . . . admit[ting] only students

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Plaintiff-Appellee

of one sex to . . . admit[ting] students of *both sexes*.” 20 U.S.C. § 1681(a)(2) (emphasis added). And section 1681(a)(6)(B) refers to organizations whose

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Defendants

“membership . . . has traditionally been limited to persons of *one sex*.” *Id.* § 1681(a)(6)(B) (emphasis added).

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biological sex. As the Department of Education explained in 2020, Title IX’s implementing regulations “presuppose sex as a binary classification” and “expressly acknowledge[] physiological differences based on biological sex.” Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30,026, 30,178 (May 19, 2020). For example, the regulations allow educational institutions to maintain “separate toilet, locker room, and shower facilities on the basis of sex” as long as the “facilities provided for students of *one sex*” are “comparable to such facilities provided for students of *the other sex*.” 34 C.F.R. § 106.33 (emphases added). They also allow institutions to “operate or sponsor separate teams for members of *each*

~~sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport.~~
~~IN THE UNITED STATES COURT OF APPEALS~~

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The Supreme Court's decision in *Bostock* does not require or permit a different interpretation of the term "sex" in Title IX. *Bostock* narrowly held that a minor, by and through his next friend and mother, Erica Adams Kasper, terminating an employee "simply for being homosexual or transgender" constitutes

discrimination "because of . . . sex" under Title VII. 140 S. Ct. at 1737-38 (quoting *SCHOOL BOARD OF ST. JOHNS COUNTY, FLORIDA*, 42 U.S.C. § 2000e-2(a)(1)). ~~In reaching that conclusion, however, the Court~~

"assum[ed]" that the term "sex" means biological distinctions between male and female." *Id.* at 1739. And the Court made clear that its decision did not "sweep

beyond Title VII to other federal or state laws that prohibit sex discrimination" or address other issues that were not before the Court such as "sex segregated

bathrooms, locker rooms, and dress codes." *Id.* at 1753; *cf. Pelcha v. MW Bancorp, Inc.*, 988 F.3d 318, 324 (6th Cir. 2021) ("[T]he Court in *Bostock* was clear on the narrow reach of its decision and how it was limited only to Title VII itself.").

Nor is *Bostock*'s analysis necessarily applicable to Title IX. As the Sixth Circuit recently explained, "Title VII differs from Title IX in important respects." *Meriwether v. Hartop*, 992 F.3d 492, 510 n.4 (6th Cir. 2021). It therefore "does not follow that principles announced in the Title VII context automatically apply in the Title IX context." *Id.* Most notably, Title IX—unlike Title VII—*expressly authorizes* sex separation in certain circumstances, including restrooms and other

living facilities. See 20 U.S.C. § 1681(a)(1)-(9) (allowing certain single-sex educational institutions to “maintain[] separate living facilities for the different sexes”); see also *Meriwether*, 992 F.3d at 510 n.4 (identifying section 1686’s safe harbor for living facilities as one of the important differences between Title VII and Title IX).

Even if *Bostock*’s analysis applied to Title IX with respect to employment termination, that analysis would not extend to decisions concerning restrooms.

Discrimination requires treating certain individuals “worse than others who are similarly situated.” *Bostock*, 140 S. Ct. at 1740. Providing separate but “comparable” restrooms for the different sexes does not treat members of one sex worse than members of the other sex.

Counsel for the plaintiffs in *Bostock* agreed, stating at oral argument that sex-separated bathrooms are “not discriminatory because” no one is “subjected to a disadvantage.” Tr. of Oral Arg. at 12-13, *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020) (Nos. 17-1618, 17-1623); see also Reply Br. for Resp’ts at 19-21, *Altitude Express, Inc. v. Zarda*, 140 S. Ct. 1731 (2020), 2019 WL 4464222, at *19-21; Reply Br. for Pet’r at 23, *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020), 2019 WL 4464221, at *23 (“Sex-specific dress, bathroom, fitness, or other policies may be justified as bona fide occupational qualifications . . . , and they may not even be discriminatory at all because they do

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not constitute “disadvantageous terms or conditions of employment.” (quoting

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Nor are members of one sex “similarly situated” to members of the other sex

when it comes to restrooms, locker rooms, and the like where privacy interests are a minor, by and through his next friend and mother, Erica Adams Kasper, at stake. *See, e.g., Doe v. Luzerne City*, 660 F.3d 169, 176-77 (3d Cir. 2011) (an

individual has “a constitutionally protected privacy interest in his or her partially clothed body” that is “particularly strong while in the presence of members of the

opposite sex”). While “[a]n individual’s nonsexual or transgender status *is not relevant* to employment decisions” about hiring and firing, *Bostock*, 140 S. Ct. at

1741 (emphasis added), *sex is relevant* in contexts such as restrooms where physiological differences between the sexes matter. As Justice Thurgood Marshall

put it, “[a] sign that says ‘men only’ looks very different on a bathroom door than a courthouse door.” *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 468-69 (1985) (Marshall, J., concurring in the judgment in part and dissenting in part); *see also United States v. Virginia*, 518 U.S. 515, 550 n.19 (1996) (acknowledging that admitting women to the Virginia Military Institute “would undoubtedly require alterations necessary to afford members of each sex privacy from the other sex in living arrangements”).

In sum, the question whether Title IX prohibits educational institutions from assigning students to restrooms based on biological sex is not close. Title IX’s

general prohibition of discrimination “on the basis of sex” does not preclude entities

from maintaining separate restrooms. *See* 20 U.S.C. § 1686 (subject anyone

to a disadvantage—let alone someone similarly situated. And even if the general

prohibition *could* be interpreted in that manner, section 1686’s safe harbor a minor, by and through his next friend and mother, Erica Adams Kasper, specifically forbids that interpretation. *See* 20 U.S.C. § 1686 (“[N]othing contained

herein shall be construed to prohibit any educational institution receiving funds under this Act[] from maintaining separate living facilities for the different sexes.”). *See* 20 U.S.C. § 1686

B. Even if Title IX were ambiguous, longstanding rules of statutory construction require interpreting the statute to allow separation of restrooms based on biological sex.

As explained, Title IX unambiguously allows educational institutions to assign students to restrooms based on biological sex. But even if the statute were

ambiguous on that point, two longstanding rules of statutory construction would require this Court to construe that ambiguity in favor of States and other recipients of Title IX funding.

First, because Congress enacted Title IX pursuant to its Spending Clause authority, the statute’s interpretation is governed by the rule that “Congress must express clearly its intent to impose conditions on the grant of federal funds so that States can knowingly decide whether or not to accept those funds.” *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 24 (1981). “The legitimacy of Congress’ power to legislate under the spending power . . . rests on whether the State

voluntarily and knowingly accepts the terms of the contract.” *Id.* at 17 (quotation

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federal moneys,” as it did under Title IX, “it must do so unambiguously.” *Id.*

Congress may not “surpris[e] participating States with post acceptance or a minor, by and through his next friend and mother, Erica Adams Kasper, ‘retroactive’ conditions.” *Id.* at 25. **DREW ADAMS**
Plaintiff-Appellee

In applying this rule, this Court ^{v.} must ask whether a state official deciding **SCHOOL BOARD OF ST. JOHNS COUNTY, FLORIDA,** whether to accept Title IX funds would have “clearly underst[oo]d” that the statute *Defendant-Appellant*

prohibits the State, in at least some instances, from assigning students to restrooms **TIM FORSON, et al.**
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based on biological sex. *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S.

291, 296 (2006). ^{On Appeal from the United States District Court for the} Of course, not. ^{Middle District of Florida} Given that section 1686 expressly *allows*

institutions to maintain sex-separated living facilities and provides no different rule ^(No. 3:17-cv-00739-TJC-JBT)

for transgender students, it is inconceivable that a state official would have “clearly underst[oo]d,” *id.*, Title IX to require that transgender students be allowed to use

their restroom of choice. Even if Congress had not included this safe harbor in Title IX, the average state official in 1972 would have understood sex as a binary

biological distinction between men and women. And hardly anyone at that time would have thought it discriminatory to provide separate restrooms for the two

sexes. This Court may not now impose that new requirement on the States and other funding recipients under the guise of statutory interpretation.

Second, this Court may not interpret Title IX in a manner that would intrude

on the historic police power of the States. *See* *Shaw v. Reno*, 509 U.S. 630, 645 (2003). The clear and manifest purpose” of Congress. *Rice v. Santa Fe Elevator Corp.*, 331 U.S.

218, 230 (1947). Interpreting Title IX to prohibit States from maintaining sex-a
minor, by and through his next friend and mother, Erica Adams Kasper,
separated restrooms in educational institutions would interfere with the States’

“traditional authority to protect the health and safety of their citizens,” *Gallardo ex*
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rel. Vassallo v. Dudek, 963 F.3d 1167, 1175 (11th Cir. 2020) (internal quotation

marks omitted), as well as their responsibility to “maintain[] discipline, health,
and safety” in the public-school environment, *Bd. of Educ. of Indep. Sch. Dist. No.*

92 v. Earls, 536 U.S. 822, 830 (2002). Across societies and throughout history, it
has been commonplace and universally accepted to separate public restrooms, locker

rooms, and shower facilities on the basis of biological sex in order to address privacy
and safety concerns arising from the biological differences between males and
females.” *Grimm*, 822 F.3d at 634 (Niemeyer, J., concurring in part and dissenting
in part) (listing cases). And many *Amici* have exercised their sovereign lawmaking
authority to address precisely these interests. *See supra* pp. 1-3.

Nothing in Title IX even hints that Congress intended to strip States of their
traditional authority to address the privacy and safety concerns that are implicated
in this context. In fact, section 1686’s safe harbor trumpets the opposite intent—that

Title IX *not* be construed to prohibit federal funding recipients from continuing to provide separate restrooms for transgender students. 42 U.S.C. § 1686.

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II. Construing Title IX to Prohibit Distinctions Based on Biological Sex Would Trespass on the Legislature’s Policymaking Role.

DREW ADAMS,

a minor, by and through his next friend and mother, Erica Adams Kasper,
Plaintiff-Appellee

Education has made clear that it intends to enforce Title IX to impose on States and

other Title IX funding recipients the best of laws obligations that Florida, nowhere in
Defendant-Appellant

the text of Title IX or its implementing regulations. In June 2021, the Department
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declared that it “interprets Title IX’s prohibition on discrimination ‘on the basis of

sex’ to encompass discrimination” based on “sexual orientation and gender identity”
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and vowed to “fully enforce Title IX” in that manner. Enforcement of Title IX of
Middle District of Florida
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the Education Amendments of 1972 With Respect to Discrimination Based on

Sexual Orientation and Gender Identity in Light of *Bostock v. Clayton County*, 86

Fed. Reg. 32,637, 32,639 (June 22, 2021). A “Fact Sheet” the Department issued

shortly thereafter identifies discrete examples of purportedly discriminatory conduct

the Department “can investigate.” U.S. Dep’t of Justice & U.S. Dep’t of Educ.,

Confronting Anti-LGBTQI+ Harassment in Schools, <https://bit.ly/3sQjZnM>. That

conduct includes preventing a “transgender high school girl” from competing on the

“girls’ cheerleading team” or using the “girls’ restroom,” as well as declining to use

a transgender student’s preferred name or pronouns. *Id.*² Bathrooms are thus only

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If these new obligations are to be imposed at the federal level, they must be imposed by Congress—not by federal judges, or unelected agency officials. a minor, by and through his next friend and mother, Erica Adams Kasper, Congress is the branch “most capable of responsive and deliberative lawmaking.”

DREW ADAMS

Plaintiff-Appellee

Loving v. United States, 517 U.S. 748, 757-58 (1996). As the branch most responsive to the people, Congress is in the best position to decide “what competing

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values will or will not be sacrificed to the achievement of a particular objective.”

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Rodriguez v. United States, 480 U.S. 522, 526 (1987). Indeed, such decisions are

the “very essence of legislative choice.” *Id.* On Appeal from the United States District Court for the Middle District of Florida

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Title IX is already replete with provisions that reflect an attempt to balance and accommodate competing interests. Section 1686’s safe harbor, which allows schools to maintain “separate living facilities for the different sexes,” 20 U.S.C. § 1686, is a prime example. Another is section 1681, which provides that Title IX’s prohibition on sex discrimination does not apply to educational institutions “controlled by a religious organization” to the extent application would be inconsistent with that organization’s “religious tenets,” *id.* § 1681(a)(3), or to the membership practices of “voluntary youth service organizations” whose

² Many *Amici* have sued the Department under the Administrative Procedure Act to prevent enforcement of this unlawful guidance. See *Tennessee v. U.S. Dep’t of Educ.*, No. 3:21-cv-00308 (E.D. Tenn.).

membership has “traditionally been limited to persons of one sex,” *id.*

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The restroom issue that is presented in this case and similar issues that will inevitably follow involving locker rooms, athletic teams, and pronouns involve a minor, by and through his next friend and mother, Erica Adams Kasper, sensitive policy considerations and myriad competing interests. Allowing a

transgender student to use the locker room that corresponds to the student’s gender identity has repercussions for other students who may lose the ability to change

clothing in private, without being exposed to members of the opposite sex.

Likewise, allowing a transgender student to compete on an athletic team consistent

with the student’s gender identity has repercussions for other students who may lose competitive opportunities or be subjected to an increased risk of injury. And

allowing a transgender student to dictate what pronouns other students and school employees must use has significant repercussions for the First Amendment rights of those other students and employees. *See Meriwether*, 992 F.3d at 511-12 (holding that state university “flouted” the First Amendment by punishing a professor for declining to use a student’s “preferred pronouns”). The federal judiciary is in no position to weigh those competing interests, let alone decide how they should be reconciled. That is a job for Congress and state legislatures. *See, e.g., SAS Inst. Inc. v. Iancu*, 138 S. Ct. 1348, 1358 (2018) (“It is Congress’s job to enact policy and it is this Court’s job to follow the policy Congress has prescribed.”).

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Plaintiff-Appellee

v.

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Defendant-Appellant

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States are uniquely harmed when federal courts impinge on Congress's policymaking. **IN THE UNITED STATES COURT OF APPEALS**

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Article I that encourage deliberate and responsive lawmaking, including requirements like bicameralism that are designed to protect state interests and ensure a minor, by and through his next friend and mother, Erica Adams Kasper, consideration of state prerogatives. *See, e.g.,* Bradford R. Clark, *Separation of*

Powers as a Safeguard of Federalism, 79 Tex. L. Rev. 1321, 1328-29, 1343-44

SCHOOL BOARD OF ST. JOHNS COUNTY, FLORIDA, (2001); Herbert Wechsler, *The Political Safeguard of Federalism: The Role of*

States in the Composition and Selection of the National Government, 54 Colum. L. Rev. 543, 546-48 (1954). Moreover, judicial rewriting that extends a statute beyond

its plain language to regulate to a greater degree than Congress intended could impede state policymaking efforts, which are likely to be more responsive to local interests and concerns than a federal solution. The features of the legislative process that have prompted some to seek social change from the federal judiciary instead of Congress—procedures that “often seem clumsy, inefficient, even unworkable,” *INS v. Chadha*, 462 U.S. 919, 959 (1983)—also protect federalism by ensuring that national policy will not too easily displace state and local policies. *See* Clark, *supra*, at 1323-25.

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“[W]hatever its virtues or vices, Congress’s prescribed policy here is clear[.]”

SAS, 138 S. Ct. at 1358. Title IX expressly allows States and other Title IX funding

recipients to maintain separate living facilities based on biological sex. This Court

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must follow the public policy of the United States.

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CONCLUSION

This Court should hold that neither the Equal Protection Clause nor Title IX a minor, by and through his next friend and mother, Erica Adams Kasper, prohibits educational institutions from separating restrooms or other living facilities

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based on biological sex.

v.

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Defendant-Appellant
HERBERT H. SLATERY III
Attorney General and Reporter
TIM FORSON, et al.,
Defendants
ANDRÉE S. BLUMSTEIN
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(No. 3:17-cv-00739-TJC-JBT)
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a minor, by and through his next friend and mother, Erica Adams Kasper,

CHRISTOPHER M. CARR **DAVE YOST**
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v.

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CERTIFICATE OF COMPLIANCE
~~No. 18-13592~~

I certify that this brief complies with the provisions of Fed. R. App. P. 29(a)(5) because it contains 4,050 words, excluding the parts exempted by Fed. R. App. P. 32(f).

DREW ADAMS,
a minor, by and through his next friend and mother, Erica Adams Kasper,

This brief also complies with the typeface and type style requirements of Fed. R. App. P. 32(a)(5)-(6) because it has been prepared in proportionally spaced typeface using Times New Roman 14 point font.

SCHOOL BOARD OF ST. JOHNS COUNTY, FLORIDA,
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TIM FORSON, et al.,

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October 26, 2021

CERTIFICATE OF SERVICE

No. 18-13592

I, Sarah K. Campbell, **IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT**

a member of the Bar of this Court, certify that, on October 26, 2021, a copy of the

En Banc Brief of *Amici Curiae* the States of Tennessee, Arizona, Arkansas, Georgia, a minor, by and through his next friend and mother, Erica Adams Kasper,

Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska,

Ohio, Oklahoma, South Carolina, South Dakota, Texas, and West Virginia in

SCHOOL BOARD OF ST. JOHNS COUNTY, FLORIDA, Support of Defendant-Appellant was filed electronically through the appellate

CM/ECF system. I further certify that all parties required to be served have been served.

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