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

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

TERRY J. HARMON
Florida Bar No.: 0029001
E-mail: tharmon@sniffenlaw.com

JEFFREY D. SLANKER
Florida Bar No.: 0100391
E-mail: jslanker@sniffenlaw.com

ROBERT J. SNIFFEN
Florida Bar No.: 000795
E-mail: rsniffen@sniffenlaw.com

MICHAEL P. SPELLMAN
Florida Bar No.: 937975
E-mail: mspellman@sniffenlaw.com

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

Counsel for Appellant, the School Board of St. John's County Florida

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to this Court's Local Rules 26.1-1 through 26.1-3, 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 – Former 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. Berlow, Clifford W. – Counsel for Amicus Curiae, Terminated
42. Bertschi, Craig E. – Counsel for Amicus Curiae
43. Beth Chayim Chadashim (BCC) - *Amicus Curiae*
44. Binning, Sarah R. – Counsel for Amicus Curiae
45. BlackRock, Inc. (BLK) - Beneficial owner of Amicus Curiae Yelp Inc.
46. Boies, Schiller & Flexner, LLP – Counsel for Amicus Curiae

47. Borelli, Tara L. – Counsel for Appellee

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

49. Bourgeois, Roger – *Amicus Curiae*

50. Brown, Meredith Taylor – Counsel for Amicus Curiae, Terminated

51. Bruce, Diana K. – *Amicus Curiae*

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

53. Bursch, John – Counsel for Amicus Curiae

54. California – *Amicus Curiae*

55. California Women Lawyers – *Amicus Curiae*

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

57. Campbell, James A. – Counsel for Amicus Curiae, Terminated

58. Canan, Patrick – Board Member of Appellant

59. Carney, Karen – *Amicus Curiae*

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

61. Carter, Heidi – *Amicus Curiae*

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

63. Castillo, Paul David – Counsel for Appellee

64. Center for Constitutional Rights – *Amicus Curiae*

65. Center for Religious Expression – Counsel for Amicus Curiae

66. Center for Reproductive Rights – *Amicus Curiae*

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

68. Champion Women – *Amicus Curiae*

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

70. Chang, Tommy – *Amicus Curiae*

71. Chapman, Peyton – *Amicus Curiae*

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

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

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

75. Coleman, Arthur - Counsel for Amicus Curiae

76. Colter, Howard – *Amicus Curiae*

77. Connecticut – *Amicus Curiae*

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

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

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

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

82. Cyra, Sherri – *Amicus Curiae*

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

84. Davis, Bryan – *Amicus Curiae*

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

86. Day One – *Amicus Curiae*

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

88. Delaware – *Amicus Curiae*

89. DeSelm, Lizbeth – *Amicus Curiae*

90. Deutsche Bank AG. – *Amicus Curiae*

91. DiBenedetto, Arthur – *Amicus Curiae*

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

93. District of Columbia – *Amicus Curiae*

94. Doolittle, Kirsten L. – Counsel for Appellee

95. Doran, Mary – *Amicus Curiae*

96. Doss, Eric – *Amicus Curiae*

97. DREDF – *Amicus Curiae*

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

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

100. Eaton, Mary - Counsel for Amicus Curiae

101. eBay Inc. – *Amicus Curiae*

102. Education Counsel, LLC - Counsel for *Amicus Curiae*

103. Empire Justice Center – *Amicus Curiae*

104. Endocrine Society – *Amicus Curiae*

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

106. Equal Rights Advocates – *Amicus Curiae*

107. Equality California – *Amicus Curiae*

108. Ewing, Gregory – *Amicus Curiae*

109. Family Values @ Work – *Amicus Curiae*

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

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

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

113. Flynn, Diana K. – Counsel for Appellee

114. FORGE, Inc. – *Amicus Curiae*

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

116. Fountain, Lisa Barclay – Counsel for Appellant

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

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

119. Gender Based Violence Organizations – *Amicus Curiae*

120. Gender Diversity – *Amicus Curiae*

121. Gender Justice – *Amicus Curiae*

122. Gender Spectrum – *Amicus Curiae*

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

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

125. Girls for Gender Equity – *Amicus Curiae*

126. Girls, Inc. – *Amicus Curiae*

127. GitHub, Inc. – *Amicus Curiae*

128. Glassdoor, Inc. – *Amicus Curiae*

129. GlaxoSmithKline LLC – *Amicus Curiae*

130. GlaxoSmithKline PLC: Parent company for *Amicus Curiae* GlaxoSmithKline LLC

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

132. GLSEN – *Amicus Curiae*

133. Goldberg, Suzanne – Counsel for *Amicus Curiae*

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

135. Gonzalez-Pagan, Omar – Counsel for Appellee

136. Google LLC – *Amicus Curiae*

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

138. Greer, Eldridge – *Amicus Curiae*

139. Grossman, Miriam – *Amicus Curiae*

140. Grijalva, Adelita – *Amicus Curiae*

141. Gurtner, Jill – *Amicus Curiae*

142. Haney, Matthew – *Amicus Curiae*

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

144. Harmon, Terry J. – Counsel for Appellant

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

146. Hawaii – *Amicus Curiae*

147. Haynes, Patricia - Counsel for *Amicus Curiae*

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

149. Heyer, Walt – *Amicus Curiae*

150. Hohs, Sherie – *Amicus Curiae*

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

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

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

154. IBM Corporation – *Amicus Curiae*

155. Ifill, Sherrilyn A. - Counsel for *Amicus Curiae*

156. Illinois – *Amicus Curiae*

157. Illinois Accountability Initiative – *Amicus Curiae*

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

159. Indiegogo, Inc. – *Amicus Curiae*

160. Iowa – *Amicus Curiae*

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

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

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

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

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

166. Kaiser Permanente – *Amicus Curiae*

167. Kaplan, Aryeh L. – Counsel for Appellee

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

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

170. Kenney, Tim – *Amicus Curiae*

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

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

173. Knotel, Inc. - *Amicus Curiae*

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

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

176. Kunin, Ken – *Amicus Curiae*

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

178. Laidlaw, Michael – *Amicus Curiae*

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

180. Lapointe, Markenzy – Counsel for Appellee

181. Las Cruces Public Schools – *Amicus Curiae*

182. LatinoJustice PRLDEF – *Amicus Curiae*

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

184. Lee, Jen Hee – Counsel for Amicus Curiae

185. Legal Aid At Work – *Amicus Curiae*

186. Legal Momentum – *Amicus Curiae*

187. Legal Voice – *Amicus Curiae*

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

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

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

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

192. Love, Laura H. – *Amicus Curiae*

193. Lyft, Inc. - *Amicus Curiae*

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

195. Maine – *Amicus Curiae*

196. Majeski, Jeremy – *Amicus Curiae*

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

198. Mapbox, Inc. - *Amicus Curiae*

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

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

201. Massachusetts – *Amicus Curiae*

202. Mayer Brown LLP - Counsel for *Amici Curiae*

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

204. McCalla, Craig – *Amicus Curiae*

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

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

207. Meerkamper, Shawn – *Amicus Curiae*

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

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

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

211. Michigan – *Amicus Curiae*

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

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

214. Mignon, Bill – Board Member of Appellant

215. Miller, William C. – Counsel for Appellee

216. Minnesota – *Amicus Curiae*

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

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

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

220. Murray, Kerrel – Counsel for Amicus Curiae

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

222. Nardecchia, Natalie – Counsel for Appellee, Terminated

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

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

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

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

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

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

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

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

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

232. National Crittenton – *Amicus Curiae*

233. National LGBTQ Task Force – *Amicus Curiae*

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

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

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

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

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

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

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

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

242. New Jersey – *Amicus Curiae*

243. New Mexico – *Amicus Curiae*

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

245. New York – *Amicus Curiae*

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

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

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

249. NIO USA, Inc. – *Amicus Curiae*

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

251. Oasis Legal Services – *Amicus Curiae*

252. Oath Inc. – Parent company for *Amicus Curiae* Tumblr, Inc

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

254. O'Reilly, John – *Amicus Curiae*

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

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

257. Oregon – *Amicus Curiae*

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

259. Orr, Asaf – Counsel for Amicus Curiae

260. Palacios, Patricia – Counsel for Amicus Curiae

261. Palazzo, Denise – *Amicus Curiae*

262. Parent-Child Center – *Amicus Curiae*

263. Patreon, Inc. – *Amicus Curiae*

264. Pediatric Endocrine Society – *Amicus Curiae*

265. Pennsylvania – *Amicus Curiae*

266. PFLAG, Inc. – *Amicus Curiae*

267. Pierce, Jerome – Counsel for Amicus Curiae

268. Pillsbury Winthrop Shaw Pittman LLP – Counsel for Appellee

269. Pincus, Andrew J. (Mayer Brown LLP) – Counsel for Amicus Curiae

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

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

272. Pollock, Lindsey – *Amicus Curiae*

273. Portnoi, Dimitri – Counsel for Amicus Curiae

274. Postmates Inc. – *Amicus Curiae*

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

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

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

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

279. Rao, Devi M. – Counsel for Amicus Curiae, Terminated

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

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

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

283. Replacements, Ltd. – *Amicus Curiae*

284. Retzlaff, Pamela – *Amicus Curiae*

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

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

287. Rhode Island – *Amicus Curiae*

288. Rivaux, Shani – Counsel for Appellee

289. Robertson, Cynthia C. – Counsel for Appellee

290. Rose, Nicholas M. (Baker & Hostetler LLP) – Counsel for Amicus Curiae

291. Rothfield, Charles – Counsel for Amicus Curiae

292. Samuels, Jocelyn, J.D. – *Amicus Curiae*

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

294. Santa, Rachel – *Amicus Curiae*

295. SASA Crisis Center – *Amicus Curiae*

296. Sears, R. Bradley, J.D. – *Amicus Curiae*

297. Schaffer, Brian – *Amicus Curiae*

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

299. Schommer, Monica – *Amicus Curiae*

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

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

302. Segal, Richard M. – Counsel for Appellee

303. Shah, Paru – *Amicus Curiae*

304. Shirk, Sarah – *Amicus Curiae*

305. Shutterstock, Inc. (SSTK) – *Amicus Curiae*

306. SisterReach – *Amicus Curiae*

307. Slanker, Jeffrey D. – Counsel for Appellant

308. Slavin, Alexander – Counsel for Amicus Curiae

309. Slough, Beverly – Board Member of Appellant

310. Smith, Nathaniel R. – Counsel for Appellee

311. Sniffen, Robert J. – Counsel for Appellant

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

313. Spellman, Michael P. – Counsel for Appellant

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

315. Spotify AB – Parent company for *Amicus Curiae* Spotify USA Inc.

316. Spotify Technology S.A. – Parent company for *Amicus Curiae* Spotify USA Inc

317. Spotify USA Inc. – *Amicus Curiae*

318. Spryszak, Delois Cooke – *Amicus Curiae*

319. SSAIS.org – *Amicus Curiae*

320. Steptoe & Johnson LLP – Counsel for Amicus Curiae

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

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

323. SurvJustice – *Amicus Curiae*

324. Sutherland, Emily – *Amicus Curiae*

325. Taymore, Cyndy – *Amicus Curiae*

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

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

328. The Impact Fund – *Amicus Curiae*

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

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

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

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

333. Toomey, Joel – Magistrate Judge

334. Trans Youth Equality Foundation – Amicus Curiae

335. Tumblr, Inc. – *Amicus Curiae*

336. Twitter Inc. (TWTR) – *Amicus Curiae*

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

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

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

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

341. Union for Reform Judaism – *Amicus Curiae*

342. UniteWomen.org – *Amicus Curiae*

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

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

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

346. Van Meter, Quentin – *Amicus Curiae*

347. Van Mol, Andre – *Amicus Curiae*

348. Vannasdall, David – *Amicus Curiae*

349. Vaughn, Craig – *Amicus Curiae*

350. Verizon Communications Inc. (VZ) – Parent company for *Amicus Curiae* Tumblr, Inc.

351. Vermont – *Amicus Curiae*

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

353. Virginia – *Amicus Curiae*

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

355. Vitale, Julie – *Amicus Curiae*

356. Voices of Hope – *Amicus Curiae*

357. Wallace, Matthew M. – Counsel for Amicus Curiae, Terminated

358. Washington – *Amicus Curiae*

359. Washoe County School District – *Amicus Curiae*

360. Wasick, Joanna (Baker & Hostetler LLP) – Counsel for Amicus Curiae

361. Weber, Thomas – *Amicus Curiae*

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

363. Williams Institute at UCLA School of Law – *Amicus Curiae*

364. Willkie Farr & Gallagher LLP – Counsel for Amicus Curiae

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

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

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

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

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

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

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

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

373. Women Lawyers On Guard Inc. ("WLG") – *Amicus Curiae*

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

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

376. Wong, Kyle – Counsel for Amicus Curiae

377. Working Assets, Inc. – Parent company for *Amicus Curiae* CREDO Mobile, Inc.

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

379. Xerox Corporation (XRX) – *Amicus Curiae*

380. Yelp Inc. (YELP) – *Amicus Curiae*

381. 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.

STATEMENT REGARDING ORAL ARGUMENT

Oral argument has been scheduled to be conducted the week of February 21, 2022.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

DECISIONAL AUTHORITY

STATUTES, REGULATIONS & CONSTITUTIONAL PROVISIONS

RULES

OTHER MATERIALS

STATEMENT OF JURISDICTION

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

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

STATEMENT OF THE ISSUES

The Court has requested briefing on the following issues:

1) Does the School District's policy of assigning bathrooms based on sex violate the Equal Protection Clause of the Constitution?
2) Does the School District's policy of assigning bathrooms based on sex violate Title IX of the Education Amendments Act of 1972, 20 U.S.C. § 1681 *et seq*.?

STATEMENT OF THE CASE[1]

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

I. COURSE OF PROCEEDINGS AND DISPOSITION IN THE COURT BELOW

Adams commenced this action by filing a Complaint for Declaratory and Injunctive Relief and Nominal Damages against the School Board, Tim Forson in his official capacity as Superintendent of the St. Johns County School District, and Lisa Kunze in her official capacity as Principal of Allen D. Nease High School ("Nease High School" or "Nease"). [Doc. 1]. Adams' Complaint alleged violations of the Equal Protection Clause and Title IX. [Doc. 1]. Adams later voluntarily dismissed Superintendent Forson and Principal Kunze from the case. [Doc. 45].

[1] Citations are to the document and page number established by the District Court filing system.

The factual basis of the complaint is that the School Board prohibited Adams, a biological female that identifies as male, from using the boys' bathroom at Nease High School by operation of its policy that biological boys may not use the girls' bathrooms and biological girls may not use the boys' bathrooms. [Doc. 1]. After filing the complaint, Adams filed a Motion for Preliminary Injunction seeking access to the boys' bathrooms during the pendency of the proceedings. [Doc. 22]. The School Board filed a response [Docs. 41-1 through 41-7 and 42] to which Adams filed a reply. [Doc. 48]. Following a hearing, the District Court denied Adams' Motion for Preliminary Injunction. [Doc. 50].

The School Board moved to dismiss Adams' Title IX claim on the grounds that the statute did not permit the claim to go forward as pled. [Doc. 54]. The School Board Answered the Complaint as to Adams' Equal Protection Clause claim. [Doc. 56].

Adams later filed an amended complaint. [Doc. 60]. The Amended Complaint contained the same causes of action as the original; however, Adams added a demand for compensatory damages. [Doc. 60]. The School Board Answered and interposed Affirmative Defenses to the Amended Complaint. [Doc. 63]. By Order of the District Court, the School Board's Motion to Dismiss Adams' Title IX claim was carried with the case. [Docs. 59, 64].

Prior to trial, the parties submitted Preliminary Findings of Fact and Conclusions of Law. [Docs. 137, 138]. Thereafter, a three-day, non-jury trial was held. [Docs. 148-150]. The parties then filed post-trial proposed Findings of Fact and Conclusions of Law, and the District Court heard closing arguments. [Docs. 172-175, 184].

The District Court issued Findings of Fact and Conclusions of Law and a Final Judgment in favor of Adams on all counts. [Docs. 192, 193]. The District Court held that the School Board's policy requiring biological boys to use the boys' bathrooms and biological girls to use the girls' bathrooms, which operated to exclude Adams from the boys' bathrooms, violated Adams' right to Equal Protection of the Laws and Title IX's sex discrimination prohibitions. [Doc. 192]. This appeal followed. [Doc. 195].

II. STATEMENT OF FACTS

The School Board is an elected body responsible for the operation, control, and supervision of all public schools in St. Johns County, Florida. Art. IX, § IV, Fla. Const.; Fla. Stat §§ 1001.30, 1001.32(2). The School Board is tasked with providing "proper attention to [the] health, safety, and other matters relating to the welfare of students." Fla. Stat. § 1001.42(8)(a); see also Fla. Stat. § 1006.07.

There are approximately 40,000 students enrolled in the School Board's 36 schools. [Doc. 161 at Tr. 254-355]. High school students' ages range from 13 to 21.

[Doc. 161 Tr. at 256]. At the time of the trial in this matter, only 16 of the 40,000 students enrolled (.04%) in the District identified as transgender. [Doc. 162 at Tr. 106-107]. At the time of the trial, there were 2,450 students that attended Nease High School. [Doc. 162 at Tr. 132].

To protect student privacy rights, the School Board requires biological boys to use the boys' bathrooms and biological girls to use the girls' bathrooms. [Docs. 161 at Tr. 149, 227; 162 at Tr. 11-12, 34-35, 44-45]. The longstanding, unwritten policy has separated student bathrooms throughout the District's schools based on the anatomical differences between the sexes without issue. [Docs. 161 at Tr. 248-249; 162 at Tr. 45-46, 99-100]. This policy, enforced District-wide, contemplates that persons of different biological sexes will not share bathrooms together. [Doc. 162 at Tr. 67-68, 184 at pp. 11-12].

Generally, the School Board requires students to use the bathroom matching the sex identified on their enrollment paperwork with that marker being a proxy for biological sex. [Doc. 161 at Tr. 205, 234]. Nonetheless, that a student might enroll in the District with a sex marker on their enrollment paperwork not matching their biological sex does not alter the policy, as such situations would be addressed as they arise. [Doc. 162 at Tr. 52-55]. This method of determining student sex has not presented a problem. [Doc. 162 at Tr. 54-55].

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

The Best Practices document, consistent with the School Board's longstanding bathroom policy, requires students to use the bathroom matching their

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

biological sex, but permits any student to use a gender-neutral bathroom, regardless of their biological sex. [Doc. 152-6; 161 at Tr. 61-62, 237, 199]. The Best Practices document accommodates gender-fluid students, gender non-binary students (students who do not identify as a particular gender), and transgender students who may not want to use the bathroom matching their biological sex through the provision of gender neutral, single-user bathrooms. [Doc. 162 at Tr. 70-71].

Adams' use of bathrooms in District schools, and specifically at Nease High School, is at the center of this case. [Doc. 1; 160 at Tr. 79]. Adams is a biological female who identifies as male. [Docs. 160 at Tr. 83, 195; 166-2]. Adams' enrollment materials, including medical documentation which required a physical examination conducted by a health professional, reflected Adams' biological sex as female. [Docs. 152-28 through 152-31; 161 at Tr. 229-234, 253; 162 at Tr. 50].[3]

Adams used the boys' bathrooms at Nease from August through September of 2015, during freshman year. [Doc. 160 at Tr. 112-114]. Within a month of school starting (September 2015), students complained to Nease administrators that Adams was using the boys' bathrooms. [Docs. 160 at Tr. 114-115, 117; 161 at Tr. 34]. Nease staff thereafter instructed Adams to use the gender-neutral or girls' bathrooms, not

[3] Section 1003.22 of the Florida Statutes and Florida Administrative Code Rule 6A-6.024(1) require that students undergo a health examination by a licensed health professional prior to enrollment in a Florida public school. The licensed health professional must certify that such health examinations have been completed.

the boys' bathrooms. [Docs. 152-7; 160 at Tr. 114-115, 117; 161 at Tr. 34]. Adams was not permitted to use the boys' bathrooms based on the School Board's policy of separating bathrooms on the basis of biological sex. [Docs. 160 at Tr. 255; 161 at Tr. 185]. To be sure, it was this unwritten policy that excluded Adams from the boys' bathroom as opposed to the Best Practices document. [Docs. 160 at Tr. 255; 161 at Tr. 185]. Aside from bathroom use and official school records, the School Board treated Adams as a male. [Doc. 160 at Tr. 170].

Nease has five sets of gang-style, sex-separated bathrooms on campus. [Doc. 162 at Tr. 131]. There are two stalls in each boys' bathroom for a total of 10 on campus. [Doc. 162 at Tr. 132-133]. There are 11 single-stall, gender-neutral bathrooms located on the first floor of Nease. [Doc. 162 at Tr. 133-134]. The boys' bathrooms at Nease have urinals and stalls with doors, but there are no partitions between the urinals. [Doc. 162 at Tr. 132-133].

While there was one documented complaint regarding a student using a bathroom that did not correspond to their biological sex, which concerned Adams' use of the boys' bathrooms, parents of students and students in the School District object to a policy allowing students to use a bathroom matching their gender identity as opposed to their biological sex, because it would violate the bodily privacy rights of students and risk their safety and welfare. [Doc. 116 at p. 11].

III. STANDARD OF REVIEW

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

SUMMARY OF THE ARGUMENT

That a school board is free to establish a policy in its schools prohibiting boys from using the girls' bathrooms and girls from using the boys' bathrooms is not controversial. There is no dispute in this case that school boards are permitted to do so and that students have a privacy interest in not being forced to share bathrooms with members of the opposite sex. The dispute is how to define sex for purposes of such a policy. The School Board's definition of sex is based on the anatomical and physiological differences between boys and girls and, as such, its policy prohibits biological boys from using the girls' bathrooms and biological girls from using the boys' bathrooms. Adams contends that the School Board's definition of sex violates the Equal Protection Clause and Title IX. It does not.

The School Board's policy withstands constitutional scrutiny because it is based on the real and enduring differences between the sexes. To recognize these differences when making policy decisions is not a form of sex-based stereotyping. The School Board's policy is simply not the type of stereotype-driven classification that the Equal Protection Clause forbids.

To that end, the policy is of course substantially related to the important governmental interest of protecting student privacy in bathrooms. Excluding members of one biological sex from a bathroom designated for the other biological sex is perhaps the only way to afford such privacy. That students can use bathroom stalls does not ameliorate the privacy interests even Adams and the District Court recognized, and the suggestion obviates the need for sex-separated bathroom facilities at all. The School Board's decision to advance the privacy interests of students by classifying students based on their biological sex for bathroom use advances this goal, and there is no evidence in the record that the policy does not effectuate its intended result perfectly – even though the law does not demand perfection.

The policy also does not violate Title IX's ban on sex discrimination. It cannot seriously be disputed that in 1972, at the time Title IX was enacted, that the plain meaning of the term "sex" meant whether one is biologically and anatomically a male or a female. This is important because while Title IX prohibits sex discrimination, the statute and its implementing regulations explicitly permit schools to separate bathrooms on the basis of sex. The policy of the School Board is simply not something that Title IX prohibits.

Government classifications that merely recognize the differing natures of men and women occasioned by birth have long been recognized as lawful. The reason is

clear – men and women have unique, physiological differences that are enduring. If this Court were to reject the School Board's policy, the decision would not only impact the School Board's ability to separate students in bathrooms, locker rooms, and showering facilities based on their biological sex, but the practical reality is that such a decision would have wide-reaching ramifications into the lives of school children and citizens throughout Florida, Georgia, and Alabama

ARGUMENT

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

The Equal Protection Clause of the Fourteenth Amendment directs state actors to treat all persons similarly situated alike. U.S. Const. amend. XIV, § 1; Plyler v. Doe, 457 U.S. 202, 210 (1982). The School Board's policy requiring students to use the bathroom matching their biological sex did not violate Adams' right to equal protection under the law.

With respect to student bathroom use, Adams was treated the same as all other persons similarly situated. The Equal Protection Clause "simply keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike." Nordlinger v. Hahn, 505 U.S. 1, 10 (1992). Indeed, a "threshold inquiry" in an equal-protection case is whether the challenged law differentiates between "persons similarly situated." S&M Brands, Inc. v. Georgia, 925 F.3d 1198, 1203

(11th Cir. 2019) (quoting City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439 (1985)).

Adams' claims fail to meet this basic requirement. Adams simply was not similarly situated to biological boys permitted to use the boys' bathrooms. Of course, Adams identifies as male, and did so while attending Nease, but it is undisputed that Adams was anatomically different from biological males at that time. [Docs. 160 at Tr. 83, 195; 160 at Tr. 36; 166-2]. These anatomical and physiological differences between the sexes are the reason why bathrooms are separate in the first place. Accordingly, the School Board did not treat Adams differently from persons that were "in all relevant respects alike" which is necessary to establish a constitutional violation. Nordlinger, 505 U.S. at 10.

Indeed, Adams does not challenge the authority of the School Board to separate bathrooms on the basis of sex but complains that the manner of separation, based on a definition of sex founded in the anatomical and physiological differences between boys and girls, is discriminatory. Adams though cannot reconcile this position with why it is acceptable for schools to provide separate bathrooms for boys and girls in the first place. This alone shows that the decision to separate males and females into separate bathrooms based on biology was not biased.

If anything, the School Board's Policy makes a classification based on biological sex and this is what Adams challenges. Simply stated, the policy prohibits

the two sexes from using bathrooms that do not align with their biological sex. Classifications based on sex are subject to intermediate scrutiny review. See Craig v. Boren, 429 U.S. 190, 197 (1976). A party seeking to uphold government action based on sex must establish an "exceedingly persuasive justification" for the classification. Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982). Intermediate scrutiny review requires the government establishing the classification to show that it bears a substantial relationship to an important or legitimate state interest. Craig, 429 U.S. at 197.

Under the policy, all students are required to use the bathroom that aligns with their biological sex regardless of their gender identity. Even if one could argue heightened scrutiny review applies to classifications based on gender identity or transgender status, the policy does not classify in this way. Both Adams, who identifies as male, as well as other biological females including those that self-identity as male or female, are not permitted to use the boys' bathrooms. Because the policy affects transgender and cisgender students in the same way, there is a lack of identity between the classes meaning the policy does not classify based on transgender status. See Geduldig v. Aiello, 417 U.S. 484 (1974) and Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 271 (1993)).

Further, there is no evidence the policy was motivated by a discriminatory animus towards Adams or transgender students sufficient to establish a

constitutional claim based on any adverse impact Adams might have suffered by operation of a facially-neutral policy. Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 274 (1979); see also Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265 (1977) ("Proof of . . . discriminatory intent or purpose is required to show a violation of the Equal Protection Clause."). Even the District Court recognized that the School Board's bathroom policy "did not have transgender students in mind when it originally established separate multi-stall restrooms for boys and girls…". [Doc. 192 at p. 37, n. 37]. It is not enough to find discriminatory intent, as the District Court did, based on its assertion that the School Board failed to update its policies when, according to the District Court, it became "aware of the need to treat transgender students the same as other students." [Doc. 192 at p. 37, n. 37]. This is because "[d]iscriminatory purpose ... implies more than ... awareness of consequences." E.g., Bray, 506 U.S. at 760 (internal quotation marks omitted); Feeney, 442 U.S. at 279 (internal quotation marks omitted). Indeed, a finding of discriminatory purpose requires that the School Board act "at least in part 'because of,' not merely 'in spite of,' ... adverse effects upon an identifiable group." Feeney, 442 U.S. at 279.

Importantly, Adams agrees that the School Board is permitted under federal law to separate bathrooms on the basis of sex but argues that the School Board's policy separating bathrooms based on biological sex violates the Equal Protection

Clause. However, the School Board has presented sufficient evidence to carry its burden justifying the policy under intermediate scrutiny review. United States v. Virginia, 518 U.S. 515, 533 (1996). To withstand constitutional scrutiny when a government classification rests on a quasi-suspect class (i.e. sex), the government must first prove that the "classification serves important governmental objectives." Id. (internal quotation marks omitted). For an objective to be "important," it cannot stem from "overbroad generalizations about the different talents, capacities, or preferences of males and females." Id. The objective must also be "genuine, not hypothesized or invented post hoc in response to litigation." Id. In addition to proving that its policy serves important objectives, the government must prove that "the discriminatory means employed are substantially related to the achievement of those objectives." Id. (internal quotation marks omitted).

Adams and the District Court recognize that there is a privacy interest in bathrooms and that protecting this privacy is an important governmental interest. Indeed, separating bathrooms based on sex has been commonplace across societies and throughout history and "dates back as far as written history will take us." W. Burlette Carter, Sexism in the "Bathroom Debates," 37 Yale L. & Pol'y Rev. 227, 287-88 (2018). The Supreme Court and circuit courts of appeal throughout the United States acknowledge the clear privacy interest in using the bathroom away from the opposite sex. As noted by the Supreme Court in United States v. Virginia,

admission of women into the Virginia Military Institute, then, and historically, an all-male institution, "would undoubtedly require alterations necessary to afford members of each sex privacy from the other sex in living arrangements." Virginia, 518 U.S. at 550 n.19. Simply put, "the law tolerates same-sex restrooms ... to accommodate privacy needs." Chaney v. Plainfield Healthcare Ctr., 612 F.3d 908, 913 (7th Cir. 2010); accord Faulkner v. Jones, 10 F.3d 226, 232 (4th Cir. 1993); Cumbey v. Meachum, 684 F.2d 712, 714 (10th Cir. 1982); see also, e.g., Women Prisoners of the D.C. Dep't of Corr. v. District of Columbia, 93 F.3d 910, 926 (D.C. Cir. 1996) ("[S]egregation of inmates by sex is unquestionably constitutional.").

The School Board's policy separating bathrooms on the basis of biological sex is substantially related to achieving the important governmental objective of protecting the privacy of students in its school bathrooms. The policy separates bathrooms based on sex to achieve a result, insuring bathroom privacy from the opposite sex, that can only be achieved by separating bathrooms based on sex. The policy "is not a means to some greater end, but an end in itself." Barnes v. Glen Theatre, Inc., 501 U.S. 560, 572 (1991) (plurality opinion). Intermediate scrutiny is satisfied here where the policy directly achieves the objective itself. See id.

For all that might be said about the policy, it certainly achieves the fit between classification and objective necessary to withstand constitutional scrutiny. Surely, a justification for a sex-based classification "must be genuine, not hypothesized or

invented *post hoc* in response to litigation." Virginia, 518 U.S. at 533. But, this means that 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. Id.; accord Trimble v. Gordon, 430 U.S. 762, 776 (1977) ("[W]e will not hypothesize an additional state purpose ..."). The School Board's rationale for the policy was not invented in response to litigation. The uncontroverted record shows that the School Board's concerns regarding student privacy pre-dated Adams' use of the boys' bathroom and that the policy of separating bathrooms based on biological sex is unwritten and woven into the fabric of the District's longstanding practices.

The School Board is not required to show that the policy is a perfect fit with its objective or that the policy achieves its stated goal in every instance. Nguyen v. Immigration & Naturalization Serv., 533 U.S. 53, 70 (2001); see also Michael M. v. Super. Ct. of Sonoma Cty., 450 U.S. 464, 473 (1981) (plurality opinion) ("The relevant inquiry ... is not whether the statute is drawn as precisely as it might have been..."). Nevertheless, there is no evidence in the record to support that the policy does not work perfectly as intended. In fact, the only complaint in the record concerning a violation of the policy, one concerning Adams no less, was addressed by school administration.

The School Board's policy is truly unremarkable. It is not a reflection of discriminatory animus or outdated notions about the sexes. Rather, it is a reflection of the real anatomical and physiological differences between the sexes and the obvious relevance those differences have on bathroom privacy. While a governing body may not "make overbroad generalizations based on sex which are entirely unrelated to any differences between men and women or which demean the ability or social status of the affected class" Parham v. Hughes, 441 U.S. 347, 354 (1979) (plurality opinion of Stewart, J.), the Equal Protection Clause does not "demand that a statute necessarily apply equally to all persons" " or require "'things which are different in fact ... to be treated in law as though they were the same.'" Rinaldi v. Yeager, 384 U.S. 305, 309 (1966), *quoting* Tigner v. Texas, 310 U.S. 141 (1940).

The Supreme Court has repeatedly upheld statutes that classify sexes, where that classification is not invidious, but rather reflects the fact the sexes are not similarly situated in certain circumstances. Parham , 441 U.S. at 355; Schlesinger v. Ballard, 419 U.S. 498, 508 (1975); Kahn v. Shevin, 416 U.S. 351, 355-56 (1974); Michael M., 450 U.S. at 469. In that vein, binding precedent acknowledges and permits distinctions based on sex when driven by the different physiological characteristics between the two sexes. See, e.g., id.; Nguyen, 533 U.S. at 71 (upholding policy classifying genders because classification was based on biological differences between males and females). This is for the straightforward reason that

that "[p]hysical differences between men and women . . . are enduring" and that "the two sexes are not fungible." See Virginia, 518 U.S. at 533 (citing Ballard v. United States, 329 U.S. 187, 193 (1946)). No decision of the Supreme Court has recognized that the Equal Protection Clause extends to situations in which legitimate distinctions are made between males and females based on biological sex, but an individual disagrees with how the government classifies his or her sex.

This is simply not a case where a challenged classification is built on a stereotype about the sexes, thus implicating the Equal Protection Clause. As the Supreme Court held in Nguyen v. I.N.S., a classification built on a stereotype is one built on a "frame of mind resulting from irrational or uncritical analysis." 533 U.S. at 68. According to the Supreme Court:

> [t]o fail to acknowledge even our most basic biological differences ... risks making the guarantee of equal protection superficial, and so disserving it. Mechanistic classification of all our differences as stereotypes would operate to obscure those misconceptions and prejudices that are real.

Id. at 73. If this Court were to strike down the policy, it would do just what the Supreme Court in Nguyen counseled against and make every difference between the sexes a stereotype.

The policy here is not like the one challenged in Frontiero v. Richardson, where a distinction was made between men and women based on stereotypical notions about the earning power and ability of the sexes. 411 US 677, 688-91 (1973).

It is also unlike the policy in United States v. Virginia, where the classification between men and women was based on stereotypical and paternalistic notions about women. 518 U.S. at 549-51. Conversely, this is a case where the real differences in biology and physiology of the sexes were used to advance the important governmental interest of maintaining privacy in student bathrooms, and there is no evidence that some other benign classification could serve that interest just as well or at all.

A decision that affirms the District Court's finding that the policy is unconstitutional would obviously run afoul of Supreme Court precedent, but it would also supplant the judgment calls of the judiciary for that of the School Board. The School Board is in a unique position to assess and weigh the privacy interests of its students as it serves *in loco parentis* to students enrolled in its schools. The uniqueness of the setting bears on both the nature of the rights students enjoy as well as the deference courts must afford to the decision-making of school officials.

The constitutional rights of students, including "Fourteenth Amendment rights, are different in public schools than elsewhere." Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 656 (1995). Schools have a "custodial and tutelary" power over minor students, "permitting a degree of supervision and control that could not be exercised over free adults." Id. at 655. Deference to school officials is thus routinely afforded in considering whether policy decisions contravene students'

constitutional rights. Id. at 665. Such deference is warranted because, "in a public school environment... the State is responsible for maintaining discipline, health, and safety." Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie Cty. v. Earls, 536 U.S. 822, 830 (2002); see also § 1001.42(8)(a), Fla. Stat. (School boards are responsible for "control of students at school, and for proper attention to health, safety, and other matters relating to the welfare of students").

For as long as anyone can remember, the School Board has protected student privacy in bathrooms by separating bathrooms on the basis of biological sex. That policy decision withstands constitutional scrutiny. The School Board's policy must not be disturbed, and the District Court's substitution of its judgment for the School Board's must be reversed. Any decision otherwise authorizes similar means-end analyses that transgress judicial authority and supplant judgments made by the local governments for those of the judiciary. See Osborn v. Bank of the United States, 22 U.S. 738, 866 (1824) ("Judicial power is never exercised for the purpose of giving effect to the will of the Judge," but "always for the purpose of giving effect … to the will of the law.").

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

Title IX prohibits educational institutions that receive federal funding from discriminating against students "on the basis of sex." 20 U.S.C. § 1681(a). The

School Board's bathroom policy simply does not violate this provision for a host of reasons.

First, the bathroom policy does not discriminate on the basis of sex, because no student is treated differently on the basis of their sex under the policy. "Discriminate" means to treat someone "worse than others who are similarly situated." Bostock v. Clayton Cty., Ga., 140 S. Ct. 1731, 1740 (2020). At bottom, the biological and physiological differences between the sexes renders the sexes not similarly situated with respect to bathroom use.

Indeed, Adams is not similarly situated to boys that use the boys' bathroom. Adams is not a biological male and biology, and nothing else, forms the basis of the policy. It is true that Adams is treated differently than biological males solely because of biological sex. But if excluding Adams from the boys' bathroom is actionable sex discrimination under Title IX, then any biological female regardless of her gender identity would also have a claim for sex discrimination under Title IX by virtue of the exclusion. That hypothetical student is also prohibited from using the boys' bathroom because of biological sex and thus this interpretation would render sex-separated bathrooms impermissible under Title IX.

The logical disconnect between Adams' argument that the policy is actionable sex discrimination under Title IX and continued insistence that the general practice of separating bathrooms on the basis of sex is unobjectionable beguiles Adams'

actual complaint which involves a dispute over classification, not "discrimination." Indeed, Adams does not ask this Court to strike down the practice of separating bathrooms on the basis of sex. Rather, Adams challenges how the policy classifies students. But, Title IX does not prohibit "misclassification." The plain language of Title IX only prohibits discrimination.

Even if the bathroom policy "discriminates" based on sex because it treats males and females differently, such a form of discrimination is permissible under Title IX. Title IX and its implementing regulations expressly allow educational institutions to provide "separate living facilities ***for the different sexes***" (20 U.S.C. § 1686) and "separate toilet, locker room, and shower ***facilities on the basis of sex***…" 34 C.F.R. § 106.33 (emphasis added). Consistent with Title IX and its regulations, the School Board has long interpreted the term "sex" to mean biological sex. The ultimate determination in this case is dependent on what "sex" means under Title IX.

Statutory interpretation starts and ends with the statute's text if it is unambiguous. BedRoc Ltd. v. United States, 541 U.S. 176, 183 (2004). Although Title IX does not define "sex," a statute is not ambiguous because a term is undefined. See United States v. Sepulveda, 115 F.3d 882, 886 n.9 (11th Cir. 1997) ("[A] statute is not ambiguous merely because it contains a term without a statutory definition.").

When a term is undefined, this Court must look to the common usage of the word at the time the statute was enacted to determine its plain meaning. Koch Foods, Inc. v. Sec'y, U.S. Dep't. of Labor, 712 F.3d 476, 480 (11th Cir. 2013) ("Where the statute does not expressly define a term, 'we look to the common usage of words for their meaning.'"); see also Sumpter v. Sec'y of Labor, 763 F.3d 1292, 1296 (11th Cir. 2014) ("We also interpret the words of a statute by 'taking their ordinary, contemporary, common meaning' at the time Congress enacted the statute."). The ordinary meaning is derived from the dictionary definitions at the time the statute with the un-defined term was enacted. Sumpter, 763 F.3d at 1296 (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). Nothing about the term "sex" is ambiguous and its plain meaning at the time of Title IX's enactment is obvious.

Dictionary definitions of the term "sex" at the time Congress enacted Title IX in 1972 squarely focused on the biological and physiological differences between men and women – not gender identity. See e.g., The Random House College Dictionary 1206 (rev. ed. 1980) ("either the male or female division of a species, esp. as differentiated with reference to the reproductive functions"); American Heritage Dictionary 1187 (1976) ("the property or quality by which organisms are classified according to their reproductive functions"); The American College

Dictionary 1109 (1970) ("the sum of the anatomical and physiological differences with reference to which the male and the female are distinguished…")); Webster's Third New International Dictionary 2081 (1971) ("the sum of the morphological, physiological, and behavioral peculiarities of living beings that subserves biparental reproduction with its concomitant genetic segregation and recombination which underlie most evolutionary change. …"); 9 Oxford English Dictionary 578 (1961) ("The sum of those differences in the structure and function of the reproductive organs on the ground of which beings are distinguished as male and female, and of the other physiological differences consequent on these."). The dictionary definitions of "sex" are determinative of the outcome of Adams' Title IX claim.

The School Board's policy does not violate Title IX for the simple reason that the statute itself and implementing regulations permit the School Board to separate bathrooms on the basis of biological sex. Indeed, the School Board's policy falls squarely within the exception or safe harbor for sex-separated intimate facilities permissible under the statute. See 20 U.S.C. § 1686; 34 C.F.R. §§ 106.32(b), 106.33. The term "sex" as referenced in this exception built into the statute and its implementing regulations means biological sex based on the plain meaning of the term when the statute was enacted. That meaning must be consistently applied to that term whenever it is referenced. See Cochise Consultancy, Inc. v. U.S. ex rel.

Hunt, 139 S. Ct. 1507, 1512 (2019) ("In all but the most unusual situations, a single use of a statutory phrase must have a fixed meaning.").

Accordingly, just because any student, including Adams, might have a gender identity that diverges from their biological characteristics determined at birth, does not render a policy that draws lines based on biological characteristics impermissible, given that such a policy falls within the safe harbor. If Adams was right, and that it was permissible to allow a student to use a bathroom that does not align with their biological sex because of their gender identity, the implementation of this practice would run contrary to the very basis for the separation.

The Supreme Court's decision in Bostock, 140 S. Ct. 1731, does not compel a different result. The Bostock Court proceeded under the assumption that the term "sex" as used in Title VII of the Civil Rights Act of 1964, meant biological sex. Id. at 1739. Even so, Bostock involved a claim of employment discrimination under Title VII and not discrimination in educational programs or activities in violation of Title IX. There is no provision of Title VII or any regulation or guidance issued by the Equal Employment Opportunity Commission that expressly permits the type of discrimination found unlawful in the Bostock case; that is, termination due to an employee's sexual orientation or gender identity. Of course, that is the opposite of the case here, where Title IX and its implementing regulations expressly permit the

policy Adams challenges. This Court's decision in Glenn v. Brumby, 663 F. 3d 1312 (11th Cir. 2011) is not controlling for the same reasons.

Further, this case is unlike any case that arises under Title VII, because Congress enacted Title IX, and not Title VII, pursuant to the Spending Clause. Compare Davis, *ex rel*. Lashonda D. v. Monroe County Bd. of Educ., 526 U.S. 629, 640 (1999) (recognizing that Title IX was passed pursuant to the spending clause) with Fitzpatrick v. Bitzer, 427 U.S. 445, 458 (1976) (Brennan, J. concurring)(recognizing that Title VII was passed pursuant to the Commerce clause and § 5 of the Fourteenth Amendment). Any ambiguities in the term "sex," which is the only way that Adams can prevail on this statutory argument by suggesting an ambiguity must be resolved in favor of finding that the term "sex" is conflated with "gender identity," must cut in favor of the School Board's interpretation because of Congress' limited ability to subject entities to federal jurisdiction for breaches of Spending Clause legislation.

When Congress acts pursuant to the Spending Clause, it creates legislation "much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions." Pennhurst State Sch. and Hosp. v. Halderman, 451 U.S. 1, 17, (1981). Thus, in interpreting Spending Clause legislation, courts must insist "that Congress speak with a clear voice." Id. "There can, of course, be no knowing acceptance [of the terms of the contract] if a State is

unaware of the conditions [of the legislation] or is unable to ascertain what is expected of it." Id. at 24–25. To find such a knowing acceptance, the Court must determine "whether Congress spoke so clearly that it can fairly say that the State could make an informed choice." Id. at 25. This is referred to as a Clear Statement Rule.

Congress cannot use Spending Clause legislation to impose conditions on federal funds recipients through broad or vague terms interpreted on a case-by-case basis. Spending Clause legislation is fundamentally different from language passed pursuant to some other grant of authority given that it conditions a waiver of immunity on the acceptance of federal funds. A clear statement is necessary not only for the statute to apply at all, but to also apply in the way one is claiming. Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy, 548 U.S. 291, 296 (2006); Gregory v. Ashcroft, 501 U.S. 452, 460–70 (1991). A statute using broad terms under which a condition is implied, but plausible, is not enough. Dellmuth v. Muth, 491 U.S. 223, 232 (1989).

There is simply no clear reading of Title IX that even remotely suggests that a federal funding recipient may be liable for sex discrimination by separating bathrooms on the basis of biological sex, a practice expressly permitted by the plain terms of the statute and its implementing regulations. Even if it could be said that the meaning of the term "sex" was ambiguous and that it contemplated a definition

founded in one's own gender identity, imposing liability based on that ambiguity is foreclosed by the Clear Statement Rule. Under these circumstances, it is certainly "not immediately obvious what the grantee's obligations under the federal program were and it is surely not obvious that the grantee was aware that it was administering the program in violation of the statute or regulations." See Guardians Ass'n v. Civil Serv. Comm'n of City of New York, 463 U.S. 582, 598 (1983). Simply put, it is a fallacy to suggest that Congress intended to penalize school boards for interpreting "sex" under Title IX to refer to anything other than the physiological differences between men and women.

If this Court were to hold that the School Board's policy of separating bathrooms in its schools on the basis of biological sex violates Title IX, the decision would have wide-reaching jurisprudential and practical impacts. From a jurisprudential standpoint, such a holding countenances treating statutory terms with a plain meaning like a chameleon, subject to differing interpretations depending on judicial vagaries. It would also run headlong into the limited constitutional role of the judiciary by authorizing courts to impose liability on federal funding recipients when the conditions leading to that liability are anything but clear and where there is no other basis to impose that liability.

Practically, such a holding would also abolish any recognition that biology is relevant in the application of Title IX to the programs and activities operated by

educational institutions receiving federal funds, which to be sure represents all public and many private educational institutions throughout the United States. A holding affirming the District Court necessarily makes sex-separated locker rooms, living facilities, showers, and sports teams at schools, where that separation is based on the real physical and anatomical differences between the sexes, unlawful.

This case is about much more than just one school, one student, and one policy. The impacts of this case are wide-reaching. The plain language of the statute and its implementing regulations must be given effect. That plain language simply does not make the School Board's policy unlawful.

CONCLUSION

This Court should reverse the District Court's judgment for Adams.

Respectfully submitted this 26th day of October, 2021.

/s/ Jeffrey D. Slanker
JEFFREY D. SLANKER
Florida Bar No.: 0100391
E-mail: jslanker@sniffenlaw.com
/s/ Terry J. Harmon
TERRY J. HARMON
Florida Bar No.: 0029001
E-mail: tharmon@sniffenlaw.com
ROBERT J. SNIFFEN
Florida Bar No.: 000795
E-mail: rsniffen@sniffenlaw.com
MICHAEL P. SPELLMAN
Florida Bar No.: 937975
E-mail: mspellman@sniffenlaw.com

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

Counsel for the School Board

CERTIFICATE OF COMPLIANCE

I CERTIFY that this brief complies with the page and type-volume limitation set forth in Fed. R. App. P. 32(a)(7). This brief contains 6,868 words (within the limit of 13,000) not including the parts of the brief exempted by Fed. R. App. P. 32(f).

I FURTHER CERTIFY that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6). This brief has been prepared in a proportionally spaced typeface using Microsoft Word Version 2016 in 14 point Times New Roman.

/s/ Jeffrey D. Slanker
JEFFREY D. SLANKER

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 Federal Express Overnight Mail.

Fifteen copies of this brief with Blue covers have been delivered via Federal Express Overnight Mail to:

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

/s/ Jeffrey D. Slanker
JEFFREY D. SLANKER