

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

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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. 9to5 – *Amicus Curiae*
2. AAPL – *Amicus Curiae*
3. AAUW – *Amicus Curiae*
4. A Better Balance - *Amicus Curiae*
5. Aberli, Thomas A. – *Amicus Curiae*
6. Achievement First Public Charter Schools – *Amicus Curiae*
7. ACLU of Florida – *Amicus Curiae*
8. Adams, Drew – Appellee
9. Adams, Scott – Appellee's Father
10. Adecco Group AG - Parent company for Amicus Curiae General Assembly Space, Inc.

11. Adecco, Inc. - Parent company for Amicus Curiae General Assembly Space, Inc.
12. ADL – *Amicus Curiae*
13. Advocates for Youth – *Amicus Curiae*
14. Advocate Safe House Project – *Amicus Curiae*
15. Airbnb, Inc. – *Amicus Curiae*
16. Akin Gump Strauss Hauer & Feld LLP - Counsel for *Amicus Curiae*
17. Alger, Maureen P. – Counsel for Amicus Curiae
18. Allen, Tommy – Former Board Member of Appellant
19. Alliance Defending Freedom – Counsel for Amicus Curiae
20. Alphabet, Inc. (GOOG) - Parent company for Amicus Curiae Google LLC
21. Altman, Jennifer G. – Counsel for Appellee
22. Amend, Andrew – Counsel for Amicus Curiae
23. American Academy of Child and Adolescent Psychiatry (AACAP) – *Amicus Curiae*
24. American Academy of Nursing – *Amicus Curiae*
25. American Academy of Pediatrics – *Amicus Curiae*
26. American Association of University Women (AAUW) - *Amicus Curiae*

27. American Civil Liberties Union – Counsel for *Amicus Curiae*
28. American College of Physicians – *Amicus Curiae*
29. American Medical Association – *Amicus Curiae*
30. American Medical Women’s Association – *Amicus Curiae*
31. American Nurses Association – *Amicus Curiae*
32. American School Counselor Association – *Amicus Curiae*
33. Anastasio, Morgan L. – Counsel for *Amicus Curiae*
34. Anten, Todd – Counsel for *Amicus Curiae*
35. Apple Inc. – *Amicus Curiae*
36. Arizona – *Amicus Curiae*
37. Arkansas – *Amicus Curiae*
38. Asana, Inc. – *Amicus Curiae*
39. Asian Pacific Institute on Gender-Based Violence – *Amicus Curiae*
40. Association of Medical School Pediatric Department Chairs – *Amicus Curiae*
41. Athlete Ally – *Amicus Curiae*
42. Atlanta Women for Equality – *Amicus Curiae*
43. Autistic Self Advocacy Network – Counsel for *Amicus Curiae*
44. Baker, Will – *Amicus Curiae*
45. Baker & Hostetler LLP - Counsel for *Amicus Curiae*

46. Banks, Emily – *Amicus Curiae*
47. Barday, Shireen – Counsel for *Amicus Curiae*
48. Barden, Robert Chris – Counsel for Appellant, Terminated
49. Barrera, Kelly – Board Member of Appellant
50. Barth, Morgan – *Amicus Curiae*
51. Baxter, Rosanne C. – *Amicus Curiae*
52. Bay Area Lawyers for Individual Freedom (BALIF) – *Amicus Curiae*
53. Bazer, Morgan – *Amicus Curiae*
54. BCC – *Amicus Curiae*
55. Berlow, Clifford W. – Counsel for Amicus Curiae, Terminated
56. Bertschi, Craig E. – Counsel for Amicus Curiae
57. Beth Chayim Chadashim (BCC) – *Amicus Curiae*
58. Binning, Sarah R. – Counsel for *Amicus Curiae*
59. Birnbaum Women’s Leadership Network at NYU School of Law –
Amicus Curiae
60. BlackRock, Inc. (BLK) – Beneficial owner of *Amicus Curiae* Yelp
Inc.
61. Black AIDS Institute – *Amicus Curiae*
62. Block, Joshua – Counsel for *Amicus Curiae*
63. Bluemstein, Andree – Counsel for *Amicus Curiae*

64. Bocuzzi, Carmine – Counsel for *Amicus Curiae*
65. Boies, Schiller & Flexner, LLP – Counsel for *Amicus Curiae*
66. Bond-Theriault, Candace – Counsel for *Amicus Curiae*
67. Borelli, Tara L. – Counsel for Appellee
68. Boston Area Rape Crisis Center – *Amicus Curiae*
69. Bourgeois, Roger – *Amicus Curiae*
70. Bridges Oregon – *Amicus Curiae*
71. Brnovich, Mark – Counsel for *Amicus Curiae*
72. Brown, Meredith Taylor – Counsel for *Amicus Curiae*, Terminated
73. Bruce, Diana K. – *Amicus Curiae*
74. Buckeye Region Anti-Violence Organization, a Program of Equitas Health – *Amicus Curiae*
75. Bursch, John – Counsel for *Amicus Curiae*
76. California – *Amicus Curiae*
77. California Women Lawyers – *Amicus Curiae*
78. California Women’s Law Center – *Amicus Curiae*
79. Cameron, Daniel – Counsel for *Amicus Curiae*
80. Campbell, James A. – Counsel for *Amicus Curiae*, Terminated
81. Campbell, Sarah – Counsel for *Amicus Curiae*
82. Canaday, Margot – Counsel for *Amicus Curiae*

83. Canan, Patrick – Board Member of Appellant
84. Carney, Karen – *Amicus Curiae*
85. Carr, Christopher – Counsel for *Amicus Curiae*
86. Carpenter, Christopher S., Ph.D. - *Amicus Curiae*
87. Carter, Heidi – *Amicus Curiae*
88. Casa de Esperanza: National Latina Network for Healthy Families and Communities – *Amicus Curiae*
89. Castillo, Paul David – Counsel for Appellee
90. Center for Constitutional Rights – *Amicus Curiae*
91. Center for Religious Expression – Counsel for Amicus Curiae
92. Center for Reproductive Rights – *Amicus Curiae*
93. Central Conference of American Rabbis – *Amicus Curiae*
94. Champion Women – *Amicus Curiae*
95. Chandy, Sunu P. (National Women’s Law Center) - Counsel for Amici Curiae
96. Chang, Tommy – *Amicus Curiae*
97. Chapman, Peyton – *Amicus Curiae*
98. Chaudhry, Neena (National Women’s Law Center) - Counsel for *Amici Curiae*
99. Chiasson, Judy – *Amicus Curiae*

100. Chicago Foundation for Women – *Amicus Curiae*
101. Cipolla, Matthew D. – Counsel for *Amici Curiae*
102. Clarke, Kristen – Counsel for *Amicus Curiae*
103. Cleary Gottlieb Steen & Hamilton LLP – Counsel for *Amicus Curiae*
104. Coalition of Black Trade Unionists – *Amicus Curiae*
105. Coleman Sr., Anthony E. – Board Member of Appellant
106. Coleman, Arthur - Counsel for *Amicus Curiae*
107. Collective Power for Reproductive Justice – *Amicus Curiae*
108. Colorado – *Amicus Curiae*
109. Colorado Coalition Against Sexual Assault – *Amicus Curiae*
110. Colorado Consumer Health Initiative – *Amicus Curiae*
111. Colter, Howard – *Amicus Curiae*
112. Columbia Law School Center Educational Fund, Inc. – *Amicus Curiae*
113. Columbia Law School School Center for Gender & Sexuality Law –
Amicus Curiae
114. Connecticut – *Amicus Curiae*
115. Connecticut Alliance to End Sexual Violence – *Amicus Curiae*
116. Conron, Kerith J., M.P.H., Sc.D. - *Amicus Curiae*
117. Copsey, Alan D. - Counsel for *Amicus Curiae*
118. Constitutional Accountability Center – *Amicus Curiae*

119. Corrigan, Hon, Timothy J. – United States District Judge
120. Cott, Nancy – *Amicus Curiae*
121. Credo Mobile, Inc. – *Amicus Curiae*
122. Crisis Intervention Service – *Amicus Curiae*
123. Crisis Support Network – *Amicus Curiae*
124. Cyra, Sherri – *Amicus Curiae*
125. Dasgupta, Anisha S. - Counsel for *Amicus Curiae*
126. Davis, Bryan – *Amicus Curiae*
127. Davis, Steven D. – Counsel for *Amicus Curiae*
128. Day One – *Amicus Curiae*
129. DC Coalition Against Domestic Violence – *Amicus Curiae*
130. De Nardo, Scott M. – Counsel for *Amici Curiae*
131. Delaware – *Amicus Curiae*
132. DeSelm, Lizbeth – *Amicus Curiae*
133. Deutsche Bank AG. – *Amicus Curiae*
134. Diaz, Smith, Flor – *Amicus Curiae*
135. DiBenedetto, Arthur – *Amicus Curiae*
136. Disability Rights Education and Defense Fund (DREDF) – *Amicus Curiae*
137. District of Columbia – *Amicus Curiae*

138. Diverse and Resilient – *Amicus Curiae*
139. Domestic Violence Intervention Program – *Amicus Curiae*
140. Domestic Violence Legal Empowerment and Appeals Project –
Amicus Curiae
141. Doolittle, Kirsten L. – Counsel for Appellee
142. Doran, Mary – *Amicus Curiae*
143. Doss, Eric – *Amicus Curiae*
144. Dove House Advocacy Services – *Amicus Curiae*
145. DREDF – *Amicus Curiae*
146. Dyer, Karen Caudill – Counsel for *Amicus Curiae*
147. Dwyer, John C. – Counsel for *Amicus Curiae*
148. Eaton, Mary - Counsel for Amicus Curiae
149. eBay Inc. – *Amicus Curiae*
150. Education Counsel, LLC - Counsel for *Amicus Curiae*
151. Education Law Center PA – *Amicus Curiae*
152. Empire Justice Center – *Amicus Curiae*
153. Endocrine Society – *Amicus Curiae*
154. Eppink Samuel T., Ph.D. (expected 2019) - *Amicus Curiae*
155. Equal Rights Advocates – *Amicus Curiae*
156. Equality California – *Amicus Curiae*

157. Equality New Mexico – *Amicus Curiae*
158. Erchull, Chris – Counsel for *Amicus Curiae*
159. Ewing, Gregory – *Amicus Curiae*
160. Family Equality – *Amicus Curiae*
161. Family Values @ Work – *Amicus Curiae*
162. Feldhaus, D. Matthew – Counsel for *Amici Curiae*
163. Feminist Women’s Health Center – *Amicus Curiae*
164. Ferguson, Laura N. – Counsel for *Amici Curiae*
165. Ferguson, Robert W. – Counsel for *Amici Curiae*
166. Fitch, Lynn – Counsel for *Amicus Curiae*
167. Florida Chapter of the American Academy of Pediatrics – *Amicus Curiae*
168. Florida School Boards Insurance Trust – Insurance Carrier for Appellant
169. Flores, Andrew R., Ph.D. – *Amicus Curiae*
170. Flynn, Diana K. – Counsel for Appellee
171. FORGE, Inc. – *Amicus Curiae*
172. Forson, James (Tim) – Superintendent of the St. Johns County School District
173. Fountain, Lisa Barclay – Counsel for Appellant

174. Franke, Katherine – Counsel for *Amicus Curiae*
175. Fregulia, Leah – *Amicus Curiae*
176. Futures Without Violence – *Amicus Curiae*
177. Gans, David – Counsel for *Amicus Curiae*
178. Garcia, Monica – *Amicus Curiae*
179. Gartrell, Nanette, M.D. - *Amicus Curiae*
180. Gates, Gary J., Ph.D. - *Amicus Curiae*
181. Gender Based Violence Organizations – *Amicus Curiae*
182. Gender Diversity – *Amicus Curiae*
183. Gender Justice – *Amicus Curiae*
184. Gender Spectrum – *Amicus Curiae*
185. General Assembly Space, Inc. – *Amicus Curiae*
186. Generales, Markos C. – Counsel for *Amicus Curiae*
187. Georgia – *Amicus Curiae*
188. Gibson, Dunn, & Crutcher LLP – Counsel for *Amicus Curiae*
189. Girls for Gender Equity – *Amicus Curiae*
190. Girls, Inc. – *Amicus Curiae*
191. GitHub, Inc. – *Amicus Curiae*
192. Glassdoor, Inc. – *Amicus Curiae*
193. GlaxoSmithKline LLC – *Amicus Curiae*

194. GlaxoSmithKline PLC: Parent company for *Amicus Curiae*
GlaxoSmithKline LLC
195. GLBTQ Legal Advocates & Defenders – *Amicus Curiae*
196. GLMA – Health Professionals Advancing LGBT Equality - *Amicus Curiae*
197. GLSEN – *Amicus Curiae*
198. Goldberg, Suzanne – Counsel for *Amicus Curiae*
199. Gonzales, Gilbert, Ph.D., M.H.A. - *Amicus Curiae*
200. Gonzalez-Pagan, Omar – Counsel for Appellee
201. Google LLC – *Amicus Curiae*
202. Gorod, Brianne – Counsel for *Amicus Curiae*
203. Goss Graves, Fatima (National Women’s Law Center) - Counsel for
Amicus Curiae
204. Green, Illyana A. – Counsel for *Amici Curiae*
205. Greer, Eldridge – *Amicus Curiae*
206. Grossman, Miriam – *Amicus Curiae*
207. Grijalva, Adelita – *Amicus Curiae*
208. Gurtner, Jill – *Amicus Curiae*
209. Grossman, Kyle – Counsel for *Amicus Curiae*
210. Grube, Mark – Counsel for *Amicus Curiae*

211. Haney, Matthew – *Amicus Curiae*
212. Hargis, Kellie M. – *Amicus Curiae*
213. Harmon, Terry J. – Counsel for Appellant
214. Harrington, Emily – Counsel for *Amicus Curiae*
215. Hawaii – *Amicus Curiae*
216. Haynes, Patricia - Counsel for *Amicus Curiae*
217. Healthy Families of Clallam County – *Amicus Curiae*
218. Healthy Teen Network – *Amicus Curiae*
219. Hecker, Elizabeth – Counsel for *Amicus Curiae*
220. Helping Services’ Domestic Abuse Resource Center – *Amicus Curiae*
221. Herman, Jody L., Ph.D. – *Amicus Curiae*
222. Heyer, Walt – *Amicus Curiae*
223. Hildabrand, Clark – Counsel for *Amicus Curiae*
224. Hohs, Sherie – *Amicus Curiae*
225. Holland & Knight, LLP – Counsel for *Amicus Curiae*
226. Holloway, Ian W., Ph.D., M.S.W., M.P.H. - *Amicus Curiae*
227. Human Rights Campaign – *Amicus Curiae*
228. Hughes, Paul W. (Mayer Brown) - Counsel for *Amicus Curiae*
229. IBM Corporation – *Amicus Curiae*

230. Idaho Coalition Against Sexual & Domestic Violence – *Amicus Curiae*
231. Ifill, Sherrilyn A. - Counsel for *Amicus Curiae*
232. Illinois – *Amicus Curiae*
233. Illinois Accountability Initiative – *Amicus Curiae*
234. In Our Own Voice: National Black Women’s Reproductive Justice Agenda – *Amicus Curiae*
235. Indiana – *Amicus Curiae*
236. Indiegogo, Inc. – *Amicus Curiae*
237. International Action Network for Gender Equity & Law (IANGEL) – *Amicus Curiae*
238. Iowa – *Amicus Curiae*
239. Iowa Coalition Against Sexual Assault – *Amicus Curiae*
240. Jacksonville Area Sexual Minority Youth Network, Inc. – *Amicus Curiae*
241. Jacobs, Edward J. – Counsel for *Amicus Curiae*
242. James, Letitia - Counsel for *Amicus Curiae*
243. Jenner & Block LLP – Counsel for *Amici Curiae*
244. Jewish Women International – *Amicus Curiae*
245. Johnson, Alexis – Counsel for *Amicus Curiae*

246. Journey Center for Safety and Healing – *Amicus Curiae*
247. Kaiser Foundation Health Plan, Inc. (“Kaiser Permanente”) - *Amicus Curiae*
248. Kaiser Permanente – *Amicus Curiae*
249. Kansas – *Amicus Curiae*
250. Kaplan, Aryeh L. – Counsel for Appellee
251. Kasper, Erica Adams – Appellee’s Next Friend and Mother
252. Kellum, Nathan W. – Counsel for *Amicus Curiae*
253. Kenney, Tim – *Amicus Curiae*
254. Kentucky – *Amicus Curiae*
255. Kimberly, Michael B. (Mayer Brown LLP) - Counsel for Amicus Curiae
256. Kirkland, Earl – Counsel for *Amicus Curiae*
257. Knotel, Inc. - *Amicus Curiae*
258. Knudsen, Austin – Counsel for *Amicus Curiae*
259. Kogan, Terry S. – *Amicus Curiae*
260. Kostelnik, Kevin C. – Counsel for Appellant, Terminated
261. Kunin, Ken – *Amicus Curiae*
262. Kunze, Lisa – Principal of Allen D. Nease High School
263. Laidlaw, Michael – *Amicus Curiae*

264. Lambda Legal Defense and Education Fund, Inc. – Counsel for Appellee
265. Landry, Jeff – Counsel for *Amicus Curiae*
266. Lapointe, Markenzy – Counsel for Appellee
267. Las Cruces Public Schools – *Amicus Curiae*
268. LatinoJustice PRLDEF – *Amicus Curiae*
269. Lawyers Club of San Diego – *Amicus Curiae*
270. League of Women Voters – *Amicus Curiae*
271. Lee, Jen Hee – Counsel for *Amicus Curiae*
272. Legal Aid At Work – *Amicus Curiae*
273. Legal Momentum – *Amicus Curiae*
274. Legal Voice – *Amicus Curiae*
275. Levi Strauss & Co. – *Amicus Curiae*
276. Limen – *Amicus Curiae*
277. Linden Research, Inc. d/b/a Linden Lab – *Amicus Curiae*
278. Louisiana – *Amicus Curiae*
279. Los Angeles LGBT Center – *Amicus Curiae*
280. Los Angeles Unified School District – *Amicus Curiae*
281. Louisiana Coalition for Reproductive Freedom – *Amicus Curiae*
282. Louisiana Foundation Against Sexual Assault – *Amicus Curiae*

283. Louisiana NOW – *Amicus Curiae*
284. Love, Laura H. – *Amicus Curiae*
285. Love, Lisa – *Amicus Curiae*
286. Lovelace Consulting Services, Inc. – *Amicus Curiae*
287. Lvosky, Anna – *Amicus Curiae*
288. Lyft, Inc. - *Amicus Curiae*
289. Lyric – *Amicus Curiae*
290. MacKenzie, Dominic C. – Counsel for *Amicus Curiae*
291. Maine – *Amicus Curiae*
292. Maine Coalition Against Sexual Assault – *Amicus Curiae*
293. Maine Women’s Lobby – *Amicus Curiae*
294. Majeski, Jeremy – *Amicus Curiae*
295. Mallory, Christy, J.D. - *Amicus Curiae*
296. Mapbox, Inc. - *Amicus Curiae*
297. Marin Software Incorporated (MRIN) - *Amicus Curiae*
298. Mariposa House – *Amicus Curiae*
299. Martin, Emily - Counsel for *Amicus Curiae*
300. Maryland – *Amicus Curiae*
301. Maryland Network Against Domestic Violence – *Amicus Curiae*
302. Massachusetts – *Amicus Curiae*

303. Mayer Brown LLP - Counsel for *Amici Curiae*
304. Mayeri, Serena –*Amicus Curiae*
305. McCaleb, Gary S. – Counsel for *Amicus Curiae*
306. McCalla, Craig – *Amicus Curiae*
307. McRae Bertschi & Cole, LLC – Counsel for Amicus Curiae
308. Meece, Gregory R. – *Amicus Curiae*
309. Meerkamper, Shawn – *Amicus Curiae*
310. Melody, Colleen M., – Counsel for Amicus Curiae
311. Mental Health America – *Amicus Curiae*
312. Mesa, David D. – Counsel for Amicus Curiae
313. Meyer, Ilan, H., Ph.D. – *Amicus Curiae*
314. Meyerowitz, Joanne –*Amicus Curiae*
315. Michigan – *Amicus Curiae*
316. Michigan Coalition to End Domestic & Sexual Violence – *Amicus Curiae*
317. Microsoft Corporation (MSFT): *Amicus Curiae* and parent company for *Amicus Curiae* GitHub, Inc.
318. Middle Way House, Inc. – *Amicus Curiae*
319. Mignon, Bill – Board Member of Appellant
320. Miller, William C. – Counsel for Appellee

321. Miller-Tomlinson, Wendi – *Amicus Curiae*
322. Minnesota – *Amicus Curiae*
323. Minority Recovery Collective, Inc. (MRCI) – *Amicus Curiae*
324. Minter, Shannon – Counsel for *Amicus Curiae*
325. Mississippi – *Amicus Curiae*
326. Missouri – *Amicus Curiae*
327. MOCSA – *Amicus Curiae*
328. Montana – *Amicus Curiae*
329. Morrisey, Patrick – Counsel for *Amicus Curiae*
330. Morse, James C., Sr. – *Amicus Curiae*
331. Mott- Smith, Audrey – Counsel for *Amicus Curiae*
332. Munson, Ziad W. – *Amicus Curiae*
333. Murray, Kerrel – Counsel for *Amicus Curiae*
334. NAACP Legal Defense & Educational Fund, Inc. – *Amicus Curiae*
335. NARAL Pro-Choice America – *Amicus Curiae*
336. Nardecchia, Natalie – Counsel for Appellee, Terminated
337. National Alliance to End Sexual Violence – *Amicus Curiae*
338. National Asian Pacific American Women’s Forum – *Amicus Curiae*
339. National Association of School Psychologists – *Amicus Curiae*
340. National Association of Social Workers – *Amicus Curiae*

341. National Association of Women Lawyers – *Amicus Curiae*
342. National Black Justice Coalition – *Amicus Curiae*
343. National Center for Law and Economic Justice – *Amicus Curiae*
344. National Center for Lesbian Rights – *Amicus Curiae*
345. National Center for Transgender Equality – *Amicus Curiae*
346. National Coalition Against Domestic Violence – *Amicus Curiae*
347. National Council of Jewish Women – *Amicus Curiae*
348. National Council on Independent Living – *Amicus Curiae*
349. National Crittenton – *Amicus Curiae*
350. National Domestic Violence Hotline – *Amicus Curiae*
351. National LGBTQ Task Force – *Amicus Curiae*
352. National Organization for Women Foundation – *Amicus Curiae*
353. National PTA and The American School Counselor Association –
Amicus Curiae
354. National Resource Center on Domestic Violence – *Amicus Curiae*
355. National Women’s Law Center, et al. – *Amicus Curiae*
356. National Women’s Political Caucus– *Amicus Curiae*
357. Neal, Blake – Counsel for *Amicus Curiae*
358. Neal, Luna – Counsel for *Amicus Curiae*
359. Nebraska – *Amicus Curiae*

360. Nebraska Coalition to End Domestic and Sexual Violence – *Amicus Curiae*
361. Nelson, Janai S. – Counsel for Amicus Curiae
362. Nevada – *Amicus Curiae*
363. Nevada Coalition to End Domestic and Sexual Violence – *Amicus Curiae*
364. New Hampshire Coalition Against Domestic and Sexual Violence – *Amicus Curiae*
365. New Jersey – *Amicus Curiae*
366. New Mexico – *Amicus Curiae*
367. New Mexico Coalition of Sexual Assault Programs, Inc. – *Amicus Curiae*
368. New York – *Amicus Curiae*
369. New York State Coalition Against Sexual Assault – *Amicus Curiae*
370. NIO Inc. (NIO): Parent company for *Amicus Curiae* NIO USA, Inc.
371. NIO NextEV Ltd.: Parent company for *Amicus Curiae* NIO USA, Inc.
372. NIO USA, Inc. – *Amicus Curiae*
373. North Carolina – *Amicus Curiae*
374. North Carolina Coalition Against Sexual Assault – *Amicus Curiae*

375. Northern Marianas Coalition Against Domestic & Sexual Violence –
Amicus Curiae
376. NYC Anti-Violence Project – *Amicus Curiae*
377. Oasis Legal Services – *Amicus Curiae*
378. Oath Inc. – Parent company for *Amicus Curiae* Tumblr, Inc
379. O’Connor, John – Counsel for *Amicus Curiae*
380. O’Melveny & Myers LLP – Counsel for *Amicus Curiae*
381. O’Reilly, John – *Amicus Curiae*
382. OGC Law, LLC. – Counsel for *Amicus Curiae*
383. Ohio – *Amicus Curiae*
384. Ohio Alliance to End Sexual Violence – *Amicus Curiae*
385. Oklahoma – *Amicus Curiae*
386. Oklahoma Call for Reproductive Justice – *Amicus Curiae*
387. Oregon – *Amicus Curiae*
388. Oregon Coalition Against Domestic & Sexual Violence – *Amicus Curiae*
389. Orr, Asaf – Counsel for *Amicus Curiae*
390. Our Bodies Ourselves Today – *Amicus Curiae*
391. OutReach LGBTQ + Community Center – *Amicus Curiae*
392. Palacios, Patricia – Counsel for *Amicus Curiae*

393. Palazzo, Denise – *Amicus Curiae*
394. Parent-Child Center – *Amicus Curiae*
395. Patreon, Inc. – *Amicus Curiae*
396. Paxton, Ken – Counsel for *Amicus Curiae*
397. Pediatric Endocrine Society – *Amicus Curiae*
398. Pennsylvania – *Amicus Curiae*
399. Peterson, Douglas – Counsel for *Amicus Curiae*
400. PFLAG, Inc. – *Amicus Curiae*
401. Pierce, Jerome – Counsel for *Amicus Curiae*
402. Pillsbury Winthrop Shaw Pittman LLP – Counsel for Appellee
403. Pincus, Andrew J. (Mayer Brown LLP) – Counsel for *Amicus Curiae*
404. Planned Parenthood of South, East and North Florida – *Amicus Curiae*
405. Planned Parenthood of Southwest and Central Florida – *Amicus Curiae*
406. Planned Parenthood of South Florida and the Treasure Coast, Inc. – *Amicus Curiae*
407. Project Safeguard – *Amicus Curiae*
408. Quinn Emanuel Urquhart & Sullivan, LLP – Counsel for *Amicus Curiae*

409. Pollock, Lindsey – *Amicus Curiae*
410. Portnoi, Dimitri – Counsel for *Amicus Curiae*
411. Postmates Inc. – *Amicus Curiae*
412. Powell, Wesley R. – Counsel for Record of *Amicus Curiae*
413. Purcell, Noah G. (Solicitor General for the State of Washington) –
Counsel for *Amicus Curiae*
414. Rakesh, Kilaru – Counsel for *Amicus Curiae*
415. Rakuten, Inc.: Beneficial owner of *Amicus Curiae* Lyft, Inc.
416. Ranck-Buhr, Wendy – *Amicus Curiae*
417. Rao, Devi M. – Counsel for *Amicus Curiae*, Terminated
418. Rape Crisis Center – Dane County – *Amicus Curiae*
419. Rape/Domestic Abuse Program – *Amicus Curiae*
420. Ravensborg, Jason – Counsel for *Amicus Curiae*
421. RC Barden and Associates – Counsel for Appellant, Terminated
422. Recruit Holdings Co., Ltd. (TYO 6098): Parent company for *Amicus Curiae* Glassdoor Inc.
423. Reed, Mahogane – Counsel for *Amicus Curiae*
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554. Women of Reform Judaism, and Men of Reform Judaism – *Amicus Curiae*

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557. Women's Center for Advancement – *Amicus Curiae*
558. Women's Law Project – *Amicus Curiae*
559. Women's Law Project and Young Women United – *Amicus Curiae*
560. Women Lawyers Association of Los Angeles– *Amicus Curiae*
561. Women Lawyers On Guard Inc. (“WLG”) – *Amicus Curiae*
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563. Women's Liberation Front – *Amicus Curiae*
564. Women's Institute for Freedom of the Press – *Amicus Curiae*
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- 572. Yelp Inc. (YELP) – *Amicus Curiae*
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ARGUMENT

Tellingly, Adams tells this Court it got the issues *wrong*. (Answer Br., pp. 38-39).¹ This Court's judges determine the issues. 11th Cir. I.O.P. 35-9. Adams chose not to brief them, reframing the policy into something it is not to reach a conclusion divorced from the law. The Board focuses on the issues requested to be briefed: whether its policy classifying bathrooms based on sex violates the Constitution or Title IX. It does not.

Adams' counterargument relies on a meaningless district court finding of fact: that Adams is a boy. (Answer Br., p. 38-39). Then, Adams should have been allowed to use the boys' bathroom and the dissimilar treatment from other boys is discriminatory, Adams reasons. (*Id.*). It is not that simple. The question is not whether Adams is a boy, but whether the manner in which the Board defines a boy under its bathroom policy is unlawful. The district court found Adams is a transgender male, and thus a biological female. The policy operates on that dividing line.

Regarding that line, the Supreme Court has cautioned against reducing all differences between the sexes to nothing. It has framed this notion respecting the biological differences between the sexes. Those differences are the reason for the

¹ Citations to pleadings are to the page number stamped by the court filing system. Citations to the "Answer" Brief are to Adams' En Banc Answer Brief.

policy, because members of one sex have a privacy interest in using the bathroom away from members of the other biological sex. The Board's classification directly advances that important interest. For these reasons the policy is constitutional.

Similarly, neither the policy nor its application to Adams violates Title IX. Title IX permits the Board's classification. Adams, like the district court, did not meaningfully grapple with Title IX's language, and Adams' unnuanced mechanistic interpretation of Bostock v. Clayton County misapplies that precedent.

The Board is comprised of elected members responsible to the electorate's concerns who entrust their children's care to the Board. The Board serves in an *in loco parentis* role to students in its care. Historically, this special place that school boards occupy warrants great deference to their decisionmaking, such that courts must decline to wade into conflicts involving schools, unless those conflicts sharply implicate basic constitutional values. The policy here does not, and it does not abridge Adams' rights under Title IX either.

Adams' challenge should be taken for what it is: an attempt to commandeer federal courts to effectuate political change that needs to come from elected representatives accountable to public will. The district court acted beyond its authority by legislating a policy it viewed best for St. Johns County' students. This Court must not do the same.

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

Adams was instructed not to use the boys' bathrooms at Nease High School. This was because Adams is not a biological male. It had nothing to do with gender identity and the policy does not take that into account.² Adams wants to make this case about transgender status discrimination, but shorn of the Answer Brief's rhetoric, it is not about that at all. Indeed, just because the policy draws lines based on biological sex, does not mean it discriminates based on gender identity.

The Supreme Court's reasoning in Geduldig v. Aiello, 417 U.S. 484 (1974), is instructive, contrary to Adams' assertions. Adams attempts to distinguish Geduldig arguing the instant case does not test whether classifying based on a medical condition such as pregnancy effectively discriminates based on sex. (Answer Br., p. 67). But Adams misses the relevance of Geduldig, which held that discrimination based on pregnancy did not equate to discrimination based on sex even though only women could get pregnant, because there was not a complete identity in groups classified. The classification set up two groups, pregnant and

² Again, the Best Practices is not the policy at issue. Adams' conflation of the Best Practices with the policy speaks past this appeal's gravamen. The Best Practices is Board staff's efforts to address evolving issues and provide accommodations to students (regardless of sex or gender identity) uncomfortable with using the bathroom matching their biological sex.

non-pregnant persons, one group containing only pregnant women, but the other group containing men and non-pregnant women. This, the Supreme Court reasoned, undercut any claim of sex-based discrimination. Id. at 496. Like Geduldig, the policy at issue here creates two groups—one containing biological males and one biological females—that each comprise of both cisgender and transgender students. This undercuts any claim that the policy discriminates against transgender students in violation of the Constitution. See id.

Similarly, in Bray v. Alexandria Women's Health Clinic, the Supreme Court rejected argument that discrimination against those seeking abortions was discriminatory against women because only women could receive an abortion. 506 U.S. 263, 271 (1993). The Supreme Court reaffirmed Geduldig, noting that while it is true only women can become pregnant, or obtain an abortion, it does not follow that every legislative classification concerning pregnancy or the procurement of an abortion is a sex-based classification. Likewise, while it may be true only transgender persons experience an incongruence between their biological sex and gender identity, it does not follow that every classification based on biological sex is one based on transgender status.³ For this reason, Adams' reliance on Bostock,

³ The policy does not even necessarily have the same impact on all transgender students. Adams' own expert represented that not all transgender individuals suffer from gender dysphoria, a condition where the incongruence between one's biological sex and gender identity causes distress warranting social transition

in support of the constitutional claim is inapposite. Bostock involved the converse question to the one here; whether discrimination against someone on the basis of their gender identity is sex discrimination. 140 S. Ct. 1731 (2020).

The policy is, at worst, “facially neutral” with respect transgender students, requiring *all* students to use the bathroom matching their biological sex irrespective of gender identity.⁴ Winnowed to its essence, Adams argues that the application of the facially-neutral policy results in impact of a constitutional nature. But this argument fails because proof of discriminatory intent is a prerequisite to establishing an Equal Protection claim, and this requires more than awareness of consequences. It requires action on the part of the Board *because of*, not just in spite of, awareness of adverse effects on an identifiable group. Pers. Adm’r of Mass. v. Feeney, 442 U.S. 256, 279 (1979).

Adams’ suggestion that the Best Practices shows the Board had transgender students in mind does not alter this determination. (See Answer Br., pp. 63-65).

There is no dispute the policy was not motivated by any animus towards measures including using bathrooms that align with their gender identity. (Doc 22-3, p. 9). On that point, there was no evidence presented that all transgender individuals, or even all transgender individuals in the District’s schools, wish to use the bathroom matching their gender identity.

⁴ Adams’ claim that the Board never asserted the policy is “facially neutral” is wrong. (See Answer Br., p. 63). The Board has always acknowledged that the policy classifies based on biological sex, but has continually asserted that it has nothing to do with gender identity.

transgender students when enacted and no aspect of the Best Practices establishes any action of the Board was taken because of potential adverse impact on transgender students.

Adams failed to address these practicalities, and to even address the issues this Court asked to be briefed, instead reframing the policy as one motivated by transgender status. (Answer Br., pp. 67-71). Adams' red herring aside, this Court is left to evaluate the question it asked to be briefed: does the Board's policy separating bathrooms based on sex violate the Constitution. It does not because biological boys and biological girls are not similarly situated for purposes of bathroom use, and the policy is substantially related to an important governmental interest.

The Equal Protection Clause directs state actors to treat all persons similarly situated alike. Plyler v. Doe, 457 U.S. 202, 210 (1982). Whether persons are similarly situated for the purposes of evaluating a classification's constitutionality is a threshold inquiry. S&M Brands, Inc. v. Georgia, 925 F.3d 1198, 1203 (11th Cir. 2019). It is not enough to rely on a district court finding of boyhood, as Adams does, to argue dissimilar treatment from biological boys is discrimination. (See Answer Br., pp. 59-60). Simply put, Adams is not similarly situated to a biological male using the boys' bathroom, because Adams is a biological female. Accordingly, the Board did not treat Adams differently from persons that were "in

all relevant respects alike” which is necessary to establish a constitutional violation. Nordlinger v. Hahn, 505 U.S. 1, 10 (1992).

There is nothing unlawful about this classification or its impact on Adams. The Supreme Court has repeatedly authorized dividing lines drawn by governments between men and women based on the biological differences between the sexes. See, e.g., Nguyen v. Immigration & Naturalization Serv., 533 U.S. 53, 73 (2001) ("The difference between men and women in relation to the birth process is a real one...."); Geduldig, 417 U.S. at 496 n.20 ("[I]t is true that only women can become pregnant...."); see also United States v. Virginia, 518 U.S. 515, 533 (1996) ("Physical differences between men and women, however, are enduring: [T]he two sexes are not fungible....") (internal quotation marks omitted)). The sexes are not similarly situated in certain circumstances because of these differences and that is precisely why some sex-based classifications are permissible. Michael M. v. Superior Ct. of Sonoma Cty., 450 U.S. 464, 469 (1981) (plurality opinion). That is, there are some differences between men and women occasioned by the miracle of birth warranting or permitting differential treatment.

That is precisely the issue, whether the separation of the sexes based on biological lines for bathroom use is permissible under the Constitution. The Board has always conceded its policy is a sex-based classification because it treats the biological sexes differently. But it does so for good reason, and for a reason not

based on paternalistic notions about the sexes, stereotypical views of the sexes, or as a matter of administrative convenience which would trigger constitutional liability.

Intermediate scrutiny review, which applies to sex-based classification like this one⁵, requires the government establishing the classification to show that it bears a substantial relationship to an important or legitimate state interest See Craig v. Boren, 429 U.S. 190, 197 (1976). Importantly, Adams does not argue the Board is not allowed separate bathrooms on the basis of sex. Adams functionally argues though that only a bathroom classification based on gender identity, and not sex, withstands constitutional scrutiny, and that it is impermissible to classify bathroom use based on biological sex. Adams' position is simply unsupported by constitutional jurisprudence.

As explained in the Board's En Banc Brief, separating bathrooms based on sex has been commonplace throughout recent history. The Supreme Court and circuit courts of appeal throughout the country acknowledge a privacy interest one enjoys in using the bathroom away from the opposite biological sex. The Board has already established in its En Banc Brief why that interest is important. The law permits same-sex bathrooms to effectuate that interest, and here, the policy

⁵ To be clear, intermediate scrutiny applies because the policy treats the biological sexes differently, not because it purportedly treats transgender students differently.

separates bathrooms on the basis of biological sex to advance this privacy interest. (See Board's En Banc Br., pp. 46-47).

The classification employed by the Board to advance this interest is substantially related to its achievement. As Chief Judge Pryor cogently explained in his dissent from the majority opinion in this case, the classification is a mirror image of this objective—classifying bathroom use based on biological sex to protect the privacy interests members of one biological sex have to use the bathroom outside the presence of another member of the biological sex—satisfying intermediate scrutiny. See Adams v. Sch. Bd. of St. Johns Cty., Florida, 3 F.4th 1299, 1329 (11th Cir. 2021) (Pryor, CJ, dissenting).

Adams' arguments to the contrary are without merit. First, Adams argues this case is unlike those where the Supreme Court found that the biological differences between the sexes permit their differential treatment. Adams argues that "all those cases share a different theme" that theme being that the "Equal Protection Clause's command does not wane merely because physiological differences might warrant minor alterations." (See Answer Br., p. 73). Curiously, Adams does not cite any case where the Supreme Court actually upheld a sex-based classification for this proposition, but rather points to United States v. Virginia, *supra*, and the Fourth Circuit opinion Faulkner v. Jones, 10 F.3d 226,

228-29, 232 (4th Cir. 1993), where the sex-based classifications challenged were struck down.

Adams asserts that in Virginia, the Supreme Court rejected reliance on the “physical differences” between men and women to justify women’s exclusion from the Virginia Military Institute, but required “minor alterations be made to facilitate privacy.” (See Answer Br., p. 73). Adams contends Faulkner stands for the same result. (See id.). The “theme” Adams gleans from these cases is not the theme at all, and Adams does not seek the same type of relief that the plaintiffs sought in Virginia and Faulkner. In those cases, the plaintiffs sought to strike down the exclusion of biological women from the defendant educational institutions, the sex-based classification, in *toto*. See Virginia, 518 U.S. at 523; Faulkner, 10 F.3d at 228-29.

Indeed, Adams does not challenge the Board’s authority to maintain separate boys’ and girls’ bathrooms, but rather challenges the manner in which the Board separates bathrooms. Adams does not appreciate that the plaintiffs in Virginia and Faulkner were not challenging the “minor alterations” the courts in both the cases deemed permissible, and perhaps even required by the admission of biological women into a previously all biological male space. The plaintiffs were challenging their categorical exclusion from these institutions. Both the Supreme Court and the Fourth Circuit recognized that while it was unconstitutional to exclude women

from these institutions, it would be permissible to exclude them from all-male living and bathroom facilities within the institutions to afford both sexes privacy. See Virginia 518 U.S. at 550 n.19 (“Admitting women to VMI would undoubtedly require alterations necessary to afford members of each sex privacy from the other sex in living arrangements”); Faulkner, 10 F.3d at 228-29 (noting that privacy concerns warrant separate restrooms for men and women). Here is why: exclusion of women from these institutions based on paternalistic notions or stereotypes is unlawful, but exclusion of women from private spaces where the sexes are not similarly situated due to their real and enduring differences is not unconstitutional because it is not derived from an unconstitutional stereotype. In other words, it is not a stereotype to recognize that there are differences between the sexes.

Faulkner illustrates this point perfectly, explaining that “a gender classification *is justified* by acknowledged differences, identical facilities are not necessarily mandated. Rather, the nature of the difference dictates the type of facility permissible for each gender.” 10 F.3d at 232 (emphasis in original). As the court explained “[t]he need for privacy justifies separation and the differences between the genders demand a facility for each gender that is different” and “distinctions in any separate facilities provided for males and females may be based on real differences between the sexes.” Id.

Perhaps recognizing the reality of these precedents, the Answer Brief asserts that because Adams uses a bathroom stall, the privacy interests of biological boys in the bathroom are not implicated. Frankly, the statements made regarding separation of certain living and intimate facilities in both Faulkner and Virginia would be superfluous if this reasoning were to prevail. If complete privacy is afforded to everyone by stalls such that no privacy interests are implicated, why have separate bathrooms in the first place? Under Adams' reasoning any biological girl, regardless of gender identity, can use the boys' bathroom without implicating any privacy concerns.⁶

Adams is really begging the question here. The question is not what is the appropriate value judgment in terms of what is needed to effectuate the privacy interests that Adams admits are legitimate. The question is whether the Board's judgment on how to advance these privacy interests is constitutional. That is the question this Court asked to be briefed.

Finally, Adams argues that the policy is arbitrary, and thus without justification, because students are generally required to use the bathroom matching the sex denoted on their enrollment paperwork. Adams claims that this renders the

⁶ Notably, the boys' bathrooms at the high school Adams attended had both bathroom stalls and urinals without dividers. (Doc. 192, p. 23). While the privacy interests at play in this case of course extend to the bathroom's entirety, as a practical matter, biological boys using the urinals are exposed any time one enters the bathroom or leaves a stall.

policy arbitrary because a transgender student might denote a sex different from their biological sex on that paperwork. (See Answer Br. at 69-70). This assertion, forming the basis of the majority's updated opinion which has now been vacated by this Court, misconstrues the policy and ignores the evidence.

The Board's policy is that students are required to use the bathroom matching their biological sex, and that the sex denoted on their enrollment paperwork is used as a proxy for biological sex. (See Board's En Banc Brief, p. 36). If for whatever reason school officials learned that a student was using a bathroom not matching their biological sex, irrespective of what is denoted on that student's enrollment paperwork, that situation would be addressed as it arose. The one instance in the record where a student used a bathroom not matching their enrollment paperwork or biological sex involved Adams using the boys' bathroom. That situation was addressed by the Board pursuant to the policy.⁷ Indeed, Adams was instructed to stop using the boys' bathroom consistent with the policy. But as a legal matter, any such argument ignores that the fact that Equal Protection Clause

⁷ It is unclear if Adams is arguing there needed to be documented instances of privacy violations involving transgender students for the policy to be constitutional, but the Answer Brief at least suggests that. (See Answer Br. at 54-55). Adams cites no authority for such a proposition, which was also probed at oral argument in this case. In fact, precedent instructs that the only thing required of the Board is that the policy be justified by a governmental objective not invented post-hoc or in response to litigation. See Virginia, 518 U.S. at 533. There is no evidence the Board's rationale for the policy was not genuine or invented in response to litigation.

jurisprudence disclaims any requirement that a policy work perfectly to be deemed constitutional. See, e.g., Nguyen, 533 U.S. at 70 (Intermediate scrutiny does not “require[] that the [policy] under consideration must be capable of achieving its ultimate objective in every instance.”).

The *actual* policy here, while theoretically imperfect in practice, is substantially related to student bathroom privacy as it perfectly classifies nearly every student in the District. Indeed, at the time of the trial, the Board was aware of only sixteen transgender students out of approximately 40,000. There is no evidence that even those students’ sex as denoted in their enrollment materials did not match their biological sex, and we know that was not the case with Adams. More importantly, the policy classifies all students on the basis of biological sex, without regard to gender identity. The policy does this with remarkable accuracy and no precedent suggests that a policy that achieves its goal over 99% of the time is not substantially related to its objective.

For these reasons, the policy is exactly like those classifications in Nguyen and Michael M., *supra*, in which the Supreme Court recognized that there are real differences between the biological sexes which permits differential treatment of the sexes when the differences between them are relevant to the achievement of an important government objective. Adams’ attempts to distinguish these cases misses the mark. Adams argues that Michael M., which found males and females

differently situated for the purposes of a statutory rape law, is inapposite because the differences between the sexes here, as compared to that case, are “wholly irrelevant.” (See Answer Br. at 74).

In Michael M., the Supreme Court upheld a statutory rape law that only made it unlawful for males to have sexual intercourse with females younger than 18, and not vice versa. 450 U.S. at 476. The Supreme Court reasoned that males were not similarly situated to females because only females could get pregnant. Id. at 476. This distinction warranted the differential treatment because it was a means to advance the government’s interest in controlling the problem of illegitimate teenage pregnancies. Id. at 470, 482. Adams does not explain why the physiological and anatomical distinctions between the biological sexes are “wholly irrelevant” to the bathroom privacy interests here, and certainly does not square this position with the Supreme Court’s acknowledgement in Virginia, *supra*, that privacy interests require separate living facilities for the sexes. Indeed, the biological differences between the sexes is the very reason for the separation.

Adams argues that Nguyen is not instructive because the law in that case allowed fathers to transmit citizenship to their children by “undertaking the ‘minimal’ burden of acknowledging their children born abroad” and the Board’s policy does not permit Adams to use the boys’ bathroom at all. (See Answer Br., p. 74). Adams misunderstands the relevance of Nguyen to this case and points to a

meaningless distinction between that case and the instant matter in an attempt to distinguish it.

Nguyen involved a citizenship law that automatically conferred citizenship to children born of a citizen mother and non-citizen father, but not children born of a citizen father and non-citizen mother. 533 US at 59-60. Under the law, the citizen father needed to take certain specified extra steps take to acknowledge paternity and to establish a bond with the child, for the child to gain citizenship solely by virtue of parental relation. Id. at 62, 64-65. The Court identified two important governmental interests underlying the classification; (1) to ensure a biological parent-child relationship exists; and (2) to ensure the child and the citizen parent have some demonstrated opportunity to develop a relationship that consists of the real, everyday ties that provide a connection between child and citizen parent and, in turn, the United States. Id. The Supreme Court found that both these interests were substantially related to the distinction made between men and women, because a biological relationship between a mother and child is obvious from birth itself, and a mother that gives birth to a baby has the opportunity to establish a relationship with her child that a father does not also necessarily have solely by virtue of biological sex. Id. at 62-66. As the Court pointed out, fathers need not be present for birth and might conceive a child and not even know it, but a mother obviously must be present for the birth and is given the opportunity at birth to

establish a relationship with her child by virtue of her presence at the birth and knowledge of the child's existence. Id.

Contrary to Adams' assertion, the fact that a citizen father could take steps to establish paternity of, and a relationship with, his child sufficient to confer citizenship on that child, was completely irrelevant to the Nguyen's holding. Rather, the Supreme Court held that the biological differences between the sexes were relevant to the governmental interests at issue because those biological differences simply rendered men and women dissimilar in a manner relevant to the statute's important objectives. See id. at 68, 73.

Like the law in Nguyen, the policy recognizes that boys and girls are biologically and physiologically different. Those differences are the reason that bathrooms are separate in the first place as such separation is the only way to ensure that one biological sex does not share intimate facilities with the other biological sex. Recognition of these differences is not unconstitutional and the district court's failure to appreciate the relevance of these differences to the government objective at issue was erroneous.

Ultimately, this case amounts to nothing more than Adams' attempt to constitutionalize mere disagreement with the Board's policy's impact. There is no evidence that this impact was the result of any discriminatory intent based on transgender status, but rather it was the result of the application of a policy that

recognizes that the differences between girls and boys are enduring and sometimes, including here, relevant.

Notably, the Answer Brief essentially asserts that the policy's application to Adams does not advance a governmental interest that justifies the policy generally. This is because of the manner in which Adams uses that bathroom, by using the stall. The Answer Brief frames the issues in relation to Adams' own unique circumstances purporting to seek relief only attendant to those personal circumstances. But the law does not require a challenged classification's application to each individual person to separately advance its legitimate interests. Califano v. Jobst, 434 U.S. 47, 55-56 (1977) (“broad legislative classification must be judged by reference to characteristics typical of the affected classes rather than by focusing on selected, atypical examples”); Lalli v. Lalli, 439 U.S. 259, 272-73 (1978) (holding that the equal-protection inquiry turns on the law's “relation to the state interests it is intended to promote”—not its “fairness.”). If what Adams argues was the case, then no governmental entity could rely on generally applicable classifications when legislating.

While Adams may disagree with how the policy operates, this disagreement does not arise to a conflict of constitutional magnitude. Courts must not “intervene in the resolution of conflicts which arise in the daily operation of school systems” unless “basic constitutional values” are “directly and sharply implicate[d]” in those

conflicts. Epperson v. State of Ark., 393 U.S. 97, 104 (1968). The Board’s policy does not directly or sharply implicate “basic constitutional values.” “[E]qual protection is not a license for courts to judge the wisdom, fairness, or logic of legislative choices.” FCC v. Beach Commc’ns, Inc., 508 U.S. 307, 313 (1993). The district court should not have weighed in on this conflict. It should be left to the Board and the political process fundamental to our system of governance.

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

Adams is right that Title IX prohibits sex discrimination, but the Board’s policy of separating bathrooms on the basis of biological sex does not violate Title IX because Title IX permits that separation. Adams accuses the Board of not reading Title IX holistically, but it is Adams who reads the statute in isolation to reach a result inconsistent with its plain language.

Initially, nothing in the Answer Brief rebuts the Board’s argument that Adams is not similarly situated to biological boys with respect to bathroom use. Again, the district court’s finding of fact that Adams is a boy does not mean that any differential treatment of Adams as compared to biological boys is actionable discrimination. (See Answer Br., p. 76-78). The district court also found that Adams is a biological female. And contrary to Adams’ assertions, this physiological distinction defeats any similarly situated claim given biological

males and females are not similarly situated in all relevant respects for purposes of bathroom use.

Ultimately, Adams' argument with respect to this claim rests solely on a mechanical application of the Bostock decision, which Adams misinterprets and misapplies. Adams argues that pursuant to Bostock, the Board's liability under Title IX does not turn on the outcome of the meaning of the term "sex" as used in the statute, even assuming the term meant the "biological distinctions" present at birth." (See Answer Br., p. 80, n. 9). Adams does not appreciate however that the sole issue in Bostock was merely whether it is actionable sex discrimination under Title VII to discharge someone because of their transgender status. 140 S. Ct. at 1737-38. The Court held that such an action was necessarily a form of sex discrimination because "but for" their biological sex, they would not have been terminated. Id. at 1741-42. But the Supreme Court did not reject the biological meaning of sex, did not consider whether the same action would be discriminatory if a statutory exception applied, considered an entirely different statute, and expressly disclaimed reaching the issues this Court must address. See id. at 1739, 1753.

Bostock's reasoning does not inform this Court's determination at all because this case involves the permissibility of sex-separated bathrooms under Title IX, which expressly permits that separation. See 20 U.S.C. § 1686; 34 C.F.R.

§ 106.33. Adams does nothing to rebut the Board’s well-supported argument that the ordinary common meaning of the term “sex” when Title IX was enacted referred to the biological distinctions between the sexes. Adams essentially argues that it is sex discrimination whenever a transgender boy is treated differently from a biological boy, but Bostock did not hold that.

Again, Bostock stands for the proposition, unremarkable at least as it relates to this case, that Title VII forbids terminating a transgender person because of behavior it would tolerate of a person of the opposite biological sex. That proposition is unremarkable in this case because Title IX and its implementing regulations permit, but do not necessarily require, schools to separate bathrooms based on sex, and this is exactly what the Board did. This is why Adams is wrong to argue that this Court should ignore the question of what the ordinary common meaning of the term “sex” was when Title IX was enacted. (See Answer Br., p. 80, n. 9). It is Adams who does not interpret Title IX “holistically” ignoring the key question underlying the issue requested to be briefed by this Court: does the Board’s policy of separating bathrooms based on sex violate Title IX. It does not, because Title IX and its implementing regulations permit the Board to classify bathrooms based on sex and there can be no serious argument the ordinary

common meaning of the term “sex” when Title IX was enacted meant the biological distinctions between the sexes.⁸

Indeed, Adams asks this Court to ignore what the statute says and to redefine the term “sex” as used in the statute to achieve an end the statutory scheme does not support. Obviously, this is something that only Congress, acting pursuant to a valid grant of authority, can effectuate. The statute’s plain language simply does not support Adams’ interpretation, and the fact that Congress enacted Title IX pursuant to its Spending Clause power cuts against any suggestion that the statute should be interpreted in the way Adams argues.

The Board has already explained why a reading of Title IX to prohibit the maintenance of its bathroom policy cannot be squared with the fact this condition is not clearly set forth in Title IX’s statutory language, which is required when Congress legislates pursuant to the Spending Clause. (See Board’s En Banc Br., pp. 58-60). No clear reading of Title IX suggests a school board could be held liable for doing what the statute permits.

⁸Adams argues that the regulation does not override Title IX’s sex discrimination prohibition and does not authorize the policy claiming that the regulation itself does not state which bathroom transgender students should use. (See Answer Br., p. 87). The regulation does say that though. It permits schools to separate bathrooms based on biological sex. Therefore, schools are permitted, but not required, to implement a policy classifying students based on biological sex for bathroom use. Under such a policy, like the Board’s, it is permissible to require a transgender student to use the bathroom matching their biological sex.

Contrary to Adams' assertions, the Board did not waive this argument. (Answer Br., pp. 90-91). The Board argued below that the ordinary meaning of the term "sex" in Title IX meant biological sex, and the statute itself and the safe harbor regulation authorized the policy. This was sufficient to preserve the argument for appeal. While new issues may not be raised on appeal, new arguments relating to preserved issues may. Pugliese v. Pukka Dev., Inc., 550 F.3d 1299, 1304, n. 3 (11th Cir. 2008) (holding that permutations of statutory argument not raised below could be presented on appeal because the issue was preserved).

Regardless, this Court can consider an argument first raised on appeal if it involves a pure question of law and refusal to consider it would result in a miscarriage of justice, or where it presents significant questions of general impact or of great public concern. Access Now, Inc. v. Sw. Airlines Co., 385 F.3d 1324, 1332 (11th Cir. 2004). On the first point, "where the party seeking consideration of an argument not raised in the district court 'has raised no new factual questions' and the record 'supports its legal argument,' [this Court has] held that 'refusal to consider that argument could result in a miscarriage of justice.'" Ramirez v. Sec'y, U.S. Dep't of Transp., 686 F.3d 1239, 1250 (11th Cir. 2012). The Board's Spending Clause argument involves a pure question of law fully supported by the record. On the last point, the fact that the federal government, most states, and

scores more *amici*, ranging from Fortune 100 corporations to nonprofits, have offered their perspective on this case, belies any suggestion that the issue at hand is not of great public concern or impact.

There is no clear condition in the statute providing that a governmental entity can be held liable for doing exactly what the statute and its implementing regulations permit it to do, and Adams' arguments to the contrary are unavailing. First, Adams argues that clear notice that the policy was unlawful under Title IX was provided because Title IX bans all forms of sex discrimination broadly. Adams asserts such discrimination can take the form of gender identity discrimination in light of Bostock. (Answer Br., p. 91). But again, Bostock concerned only a narrow set of facts involving whether a termination taken because of one's gender identity was impermissible sex discrimination under Title VII, which was not enacted pursuant to the Spending Clause. Unlike Title VII, Title IX expressly permits sex-separated living facilities and its implementing regulations authorize schools to separate bathrooms on the basis of sex. An understanding of "sex" to mean biological sex, and classification of toilet facilities based on that understanding is certainly not something that Title IX clearly forbids.

Frankly, Bostock undercuts Adams' position on this point. Bostock not only proceeded on an understanding of the term "sex" as used in Title VII to mean biological sex, but it expressly held that its interpretation was unexpected. 140 S.

Ct. at 1737, 1739, 1750-1753. That holding cannot be reconciled with an argument that Congress spoke clearly on this “unexpected” condition Adams asks this Court to read into Title IX. If both parties did not expect the outcome, there could be no meeting of the minds sufficient to establish liability for precisely the type of discrimination alleged here. Further, the Supreme Court in Bostock expressly disclaimed application of its reasoning to situations unlike the termination decisions it was evaluating, including where the challenged decision, policy, or practice might be justified under other provisions of Title VII. Bostock, 140 S. Ct. at 1753. Presumably, the Supreme Court was referring to Title VII’s Bona Fide Occupational Qualification (“BFOQ”) exception, which permits sex discrimination in certain circumstances. This Court is confronted by this scenario as Title IX and its implementing regulations expressly permit sex-separated bathrooms.

Adams is wrong to say the regulation permitting sex-separated bathrooms is trumped by the statute’s prohibition on sex discrimination, and that this warrants a holding that Title IX unambiguously forbids separating bathrooms based on biological sex. (See Answer Br., p. 92). Frankly, this argument is surprising because Adams conceded the regulation permits sex-separated bathrooms during supplemental briefing. (See Adams’ Supp. Br. on Bostock, p. 16). Indeed, Adams has never contended that it was impermissible to separate bathrooms based on sex. Adams borrows this argument from the majority opinion in Grimm v. Gloucester

Cty. Sch. Bd., 972 F.3d 586, 619, n. 18 (4th Cir. 2020) cert. denied, 141 S. Ct. 2878 (2021). But Grimm overlooked that the “unexpected” result reached in Bostock was in the context of legislation not passed pursuant to the Spending Clause and subject to the clear statement rule, as well as the fact that Title IX itself permits the separation of living facilities based on sex. 20 U.S.C. § 1686.⁹

Adams asks this Court to do the polar opposite of what Spending Clause jurisprudence mandates: require the Board to show a clear statement from Congress that the safe harbor in the statute and its implementing regulations protects the Board. Supreme Court precedent runs directly counter to this request. See, e.g., Dellmuth v. Muth, 491 U.S. 223, 232 (1989) (holding that a statute using broad terms under which a condition is implied, but plausible, is not enough). Indeed, this is not a situation in which a clearly prohibited action is at issue like in Gebser v. Lago Vista Indep. Sch. Dist., where the Supreme Court held that a covered entity violates the statute when it is deliberately indifferent to

⁹ Further, Title IX authorizes the Department of Education to interpret and enforce its provisions. 20 U.S.C. § 1682. The Department of Education was certainly authorized to interpret the term “living facilities” to include bathrooms. 34 C.F.R. § 106.33. When Congress delegates authority to any agency to “elucidate a specific provision of the statute by regulation, any ensuing regulation is binding on the courts unless procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute.” United States v. Mead Corp., 533 U.S. 218, 227 (2001). The Department of Education's regulation is not “arbitrary, capricious, or manifestly contrary to the statute.” It effectuates and implements Title IX’s provision allowing separate living facilities based on sex.

discrimination. 524 U.S. 274, 287-290 (1998). This situation is more similar to the one in Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy, where the Supreme Court held that a government official would not clearly understand that an obligation under the Individuals with Disabilities Education Act (“IDEA”), also Spending Clause legislation, included compensating prevailing parents for expert witness fees incurred in prosecuting IDEA actions because no language of the statute provides clear notice of this exposure. 548 U.S. 291, 297-98 (2006).

Title IX’s plain language dictates the outcome of this case. The only way the Board could be liable here is if “sex” as used in Title IX unambiguously had no connection to biological sex. No stretch of the statute provides as such.

CONCLUSION

The District Court should be reversed.

Respectfully submitted this 17th day of December, 2021.

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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 6,485 words (within the limit of 6,500) not including the parts of the brief exempted by Fed. R. App. P. 32(f).

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

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