



June 7, 2022

VIA CM/ECF

Ms. Catherine O'Hagan Wolfe
Clerk of the Court
United States Court of Appeals for the Second Circuit
Thurgood Marshall United States Courthouse
40 Foley Square
New York, NY 10007

Re: Supplemental Authority
***Soule v. Connecticut Association of Schools et al.*, No. 21-1365**

Dear Ms. O'Hagan Wolfe:

On June 1, 2022, Intervenor-Defendants Andraya Yearwood and Terry Miller brought to this Court's attention the Ninth Circuit's recent decision in *Doe v. Snyder*, 28 F.4th 103 (9th Cir. 2022). But *Doe* has little to do with this case. At most, *Doe* says—in dicta—that the reasoning the Supreme Court used in *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), was not limited to Title VII claims. 28 F.4th at 114. But the Ninth Circuit did *not* extend *Bostock*'s reasoning to Title IX; it merely chided the district court for reading *Bostock* too narrowly and remanded for further proceedings. *Id.*

There are good reasons to conclude that the logic of *Bostock* does not alter the meaning of “sex” in Title IX. First, the Court in *Bostock* “proceed[ed] on the assumption that ‘sex’ . . . refer[s] only to biological distinctions between male and female.” Second, the Court directed that its analysis did not extend outside the Title VII context: non-Title VII issues were “questions for future cases, not these.” 140 S. Ct. at 1739, 1753. Third, *Bostock* maps poorly onto Title IX. Title IX's implementing regulations and authoritative interpretations expressly authorize schools to differentiate on the basis of sex through, among other things, sex-separated athletic programs and showers. 20 U.S.C. § 1686; 34 C.F.R. § 106.33; *id.* § 106.41(c). Title VII does not.

Though the issues of *Bostock*'s applicability to Title IX are collateral to the justiciability questions that are the only issues on appeal, they highlight the need for this Court to reverse and remand to a different judge expeditiously. Both the

confusion in *Doe* and the federal government's flip-flopping regarding *Bostock's* relevance to Title IX underscore the urgency for this Court to act quickly. See U.S. Dept. of Ed., Office for Civil Rights, Revised Letter of Impending Enforcement Action (Aug. 31, 2020) (concluding that Defendants' actions here violate Plaintiffs-Appellants' Title IX rights, even when accounting for *Bostock*). Doing so will allow the parties to brief and resolve the merits of these important issues in the district court and, if necessary, return to this Court for a merits analysis.

Sincerely,

s/ Roger G. Brooks _____

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CERTIFICATE OF SERVICE

I certify that on June 7, 2022, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/ Roger G. Brooks
Roger G. Brooks
Attorney for Appellants