No. 18-13592

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

DREW ADAMS,

Plaintiff-Appellee

v.

SCHOOL BOARD OF ST. JOHN'S COUNTY, FLORIDA,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA

EN BANC BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF PLAINTIFF-APPELLEE AND URGING AFFIRMANCE

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No. 18-13592

Adams v. *School Board of St. John's County*

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Eleventh Circuit Rules 26.1-1 to 26.1-3 and 28-1(b), counsel for *amicus curiae* United States hereby certifies that in addition to those identified in the briefs filed by appellant and *amici*, the following individuals have an interest in the outcome of this case:

1. Clarke, Kristen, U.S. Department of Justice, Civil Rights Division, counsel for the United States;
2. Hecker, Elizabeth P., U.S. Department of Justice, Civil Rights Division, counsel for the United States;
3. Robin-Vergeer, Bonnie I., U.S. Department of Justice, Civil Rights Division, counsel for the United States.

The United States certifies that no publicly traded company or corporation has an interest in the outcome of this appeal.

s/ Elizabeth P. Hecker
ELIZABETH P. HECKER
Attorney

Date: November 26, 2021

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INTEREST OF THE UNITED STATES

The United States has a significant interest in ensuring that all students, including students who are transgender, can participate in an educational environment free from unlawful discrimination and that the proper legal standards are applied to claims under Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq.* (Title IX), and the Equal Protection Clause. The United States enforces Title IX to protect students from sex discrimination in federally funded education programs and activities. The Department of Justice (DOJ) coordinates

federal agencies' implementation and enforcement of Title IX. Exec. Order No. 12,250, 3 C.F.R. 298 (1980 comp.); 28 C.F.R. 0.51. Where it serves as a federal funding agency, or upon referral from the Department of Education or other funding agencies, DOJ may enforce Title IX against recipients of federal financial assistance. 20 U.S.C. 1682. DOJ also may investigate and resolve complaints that a school board is depriving students of equal protection based on sex, 42 U.S.C. 2000c-6, and may intervene in cases of general public importance involving alleged denials of the "equal protection of the laws under the fourteenth amendment to the Constitution," 42 U.S.C. 2000h-2.

STATEMENT OF THE ISSUES

1. Whether the school board violated the Equal Protection Clause when it prohibited Drew Adams, a boy who is transgender, from using the boys' restrooms.

2. Whether the school board violated Title IX when it prohibited Adams from using the boys' restrooms.

STATEMENT OF THE CASE

1. Procedural History

In June 2017 plaintiff-appellee Drew Adams, a transgender boy, sued the School Board of St. John's County (School Board) in the U.S. District Court for the Middle District of Florida, claiming that the School Board's refusal to permit him to use the boys' restrooms violated the Equal Protection Clause and Title IX,

20 U.S.C. 1681. Doc. 192, at 3.[1] After a bench trial, the district court ruled for Adams on both his Equal Protection Clause and Title IX claims (Doc. 192, at 53, 65-69) and entered judgment in his favor. Doc. 193.

On August 7, 2020, a panel of this Court affirmed the judgment in favor of Adams on both his equal protection and Title IX claims. The School Board petitioned for rehearing en banc, and on July 14, 2021, the panel vacated its opinion and issued a new opinion, again affirming the district court's judgment on Adams's equal protection claim but declining to reach his Title IX claim. The School Board filed another petition for rehearing en banc, which this Court granted on August 23, 2021.

2. Background

a. The School Board's Restroom Policy

This case involves a challenge to the School Board's refusal to permit Drew Adams, a transgender boy, to use the boys' restrooms.[2] Schools in the St. John's County School District have long had separate restrooms for boys and girls. Doc. 192, at 14. In September 2015, the School Board adopted "Best Practices

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[1] "Doc. __, at __" refers to the docket entry and page number of documents filed on the district court's docket. "Br. __" refers to page numbers in the School Board's opening brief.

[2] The district court defined a "transgender individual" as "someone who 'consistently, persistently, and insistently' identifies as a gender different than the sex they were assigned at birth." Doc. 192, at 7.

Guidelines" addressing the treatment of transgender students. The Guidelines generally provide that transgender students should be treated in accordance with their gender identities in multiple respects, including their names, dress, pronouns, and unofficial school records. Doc. 192, at 15-16. The Guidelines also provide that "[t]ransgender students will be given access to a gender-neutral restroom and will not be required to use the restroom corresponding to their biological sex." Doc. 192, at 16-17 (alteration in original).

Although the School Board was aware that other Florida school districts had adopted policies permitting transgender students to use the restrooms corresponding with their gender identity, it decided instead that transgender students must use either the restrooms corresponding to their "biological sex" or gender-neutral, single-stall bathrooms. Doc. 192, at 16-18.[3] To determine "biological sex," the School Board uses the sex listed in the student's original school enrollment documents. Doc. 192, at 13-14. The School Board maintained that its policy was necessary to protect student privacy and safety but admitted that all restrooms had doors separating the bathroom stalls and that it had never received any complaints of transgender students engaging in inappropriate behavior in the restrooms. Doc. 192, at 20-21.

[3] The Guidelines do not define the term "biological sex." Doc. 103-1.

b. Plaintiff Drew Adams

Plaintiff Drew Adams, who was assigned female at birth, enrolled in the St. John's County School District in 2010, when he was in the fourth grade. Doc. 192, at 2, 24. At the end of eighth grade, Adams came out as transgender and, under a psychologist's care, began transitioning. Doc. 192, at 10-11. He cut his hair short, began wearing boys' clothing, asked others to refer to him using male pronouns, and began using the men's restrooms in public. Doc. 192, at 11. In 2016, under an endocrinologist's supervision, Adams began taking testosterone to make his body more masculine and birth control pills to halt menstruation. Doc. 192, at 11. In May 2017, he had a double mastectomy. Doc. 192, at 11. He also changed the sex listed on his Florida driver's license and birth certificate, both of which now identify him as male. Doc. 192, at 11-12.

Before he entered ninth grade, Adams's mother informed the School Board that Adams was transitioning and would start high school as a boy. Doc. 192, at 24-25. At first, Adams used the boys' restrooms without incident. But six weeks after school began, two girls told school officials they had seen Adams entering a boys' restroom. Doc. 192, at 25. The school informed Adams that he could no longer use the boys' restrooms but must use either the girls' restrooms or the gender-neutral restrooms. Doc. 192, at 25. Adams and his mother tried for two years to resolve the issue informally with the school but were unsuccessful. Doc.

192, at 25-26. Adams then sued the School Board in federal district court, alleging violations of the Equal Protection Clause and Title IX. Doc. 192, at 3.

c. The District Court Decision

After a three-day bench trial involving testimony from ten witnesses, the district court ruled for Adams on both his Equal Protection Clause and Title IX claims. Doc. 192, at 53, 65.

i. With respect to Adams's equal protection claim, the parties agreed that the policy was a sex-based classification and thus was subject to intermediate scrutiny. Doc. 192, at 36-37 & n.37. Applying intermediate scrutiny, the district court first held that the policy did not serve the School Board's privacy interests. The court relied in part on the fact that all restrooms at Adams's school had separate stalls with doors, so no students, including Adams, need expose their anatomy to other students. Doc. 192, at 40. The court noted that there was no evidence that a transgender student had ever invaded another student's privacy in the restroom. Doc. 192, at 39-40. Nor was there any evidence that transgender students were more curious about other students' anatomy, and in any case, any student engaged in voyeurism would be subject to discipline. Doc. 192, at 40. The court thus concluded that "[b]ased on the evidence at trial," the policy did not further student privacy. Doc. 192, at 41.

The district court similarly found that the policy did not advance the School Board's interest in student safety, as there was "no evidence that Adams encountered any safety concerns during the six weeks he used the boys' restroom"; no "evidence that transgender students might expose themselves to other students in the restroom"; and "no evidence that Adams presents any safety risk to other students or that transgender students are more likely than anyone else to assault or molest another student in the bathroom." Doc. 192, at 41, 43. The court emphasized that "[n]one of the school officials who testified had ever heard of an incident where student safety was compromised by the presence of a transgender student in the restroom that matched his or her gender identity." Doc. 192, at 43. Accordingly, the court concluded that privacy and safety concerns "simply aren't realized when transgender students use school bathrooms aligned with their gender identity." Doc. 192, at 52.

ii. The district court next held that the policy violated Title IX, which prohibits discrimination in federally funded education programs "on the basis of sex." 20 U.S.C. 1681(a); see Doc. 192, at 65. The court rejected the School Board's argument that because Title IX's implementing regulations permit schools to provide "separate toilet, locker room, and shower facilities on the basis of sex," 34 C.F.R. 106.33, the statute must permit separate restrooms on the basis of "biological sex." Doc. 192, at 58. The court explained that "Adams is not

contending that the school cannot provide separate restrooms for the sexes," only that he "should be permitted to use the boys' restrooms." Doc. 192, at 58-59.

The district court granted Adams injunctive relief and $1,000 in compensatory damages. Doc. 192, at 66-69. Holding, however, that it "ha[d] had no occasion * * * to determine what threshold of transition, if any, is necessary for the School Board to accommodate other transgender students," the court limited its injunction to Adams. Doc. 192, at 66.

The School Board appealed. Doc. 194.

d. Bostock v. *Clayton County*

While the School Board's appeal was pending, the Supreme Court decided *Bostock* v. *Clayton County*, 140 S. Ct. 1731 (2020). The Court held that firing an individual because of their sexual orientation or gender identity violates Title VII of the Civil Rights Act of 1964 (Title VII), which prohibits employers from "discriminat[ing] against any individual * * * because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. 2000e-2(a)(1).

In reaching that conclusion, the *Bostock* Court declined to adopt a definition of "sex," but assumed for the sake of argument that when Title VII was passed in 1964, the word "sex" referred "only to biological distinctions between male and female." 140 S. Ct. at 1739. The Court then analyzed the meaning of the phrase "because of * * * sex." The Court acknowledged that Title VII allows for

liability in cases where sex was a "motivating factor" in the challenged practice, but "because nothing in [the Court's] analysis depend[ed] on the motivating factor test, [the Court] focus[ed] on the more traditional but-for causation." *Id.* at 1740. The Court explained that "a but-for test directs us to change one thing at a time and see if the outcome changes. If it does, we have found a but-for cause." *Id.* at 1739. Applying this "simple test" to the facts before it, the Court concluded, "it is impossible to discriminate against a person for being * * * transgender without discriminating against that individual based on sex." *Id.* at 1741.

The Court also analyzed the term "discriminate against" in Title VII. *Bostock*, 140 S. Ct. at 1740. The Court discussed two related conceptions of the term: (1) "distinctions or differences in treatment that injure protected individuals," *id.* at 1753 (quoting *Burlington N. & Santa Fe Ry. Co.* v. *White*, 548 U.S. 53, 59 (2006)); and (2) "treating [an] individual worse than others who are similarly situated." *Id.* at 1740. Because of this emphasis on the injury to the individual, the Court concluded it was no defense for an employer to say it would have fired *both* a man and a woman for being gay or transgender. In both cases, the Court held, the employer discriminates against the individual because of their sex. *Id.* at 1741.

SUMMARY OF THE ARGUMENT

The School Board violated both the Equal Protection Clause and Title IX by prohibiting Adams, a transgender boy, from using the boys' restrooms.

1. The School Board's restroom policy with respect to transgender students is a sex-based classification and, as such, warrants intermediate scrutiny. The School Board thus must show that its decision to exclude Adams from the boys' restrooms substantially furthered an important government interest.

The district court correctly found that the School Board failed to make this showing. First, prohibiting Adams from using the boys' restrooms does not further the School Board's asserted interest in privacy because the boys' restrooms at Adams's high school have individual, private stalls that are designed to prevent exposure of a student's anatomy. The School Board failed to show that Adams was more likely than cisgender boys to infringe the privacy of other students or that existing student-discipline policies would not sufficiently address any instance of misconduct. Second, the School Board's refusal to accept updated documents in determining a transgender student's sex is arbitrary. The School Board has failed to advance a persuasive justification for rejecting updated documents or explain how doing so furthers its interest in protecting privacy.

Finally, the School Board's argument that it did not violate the Equal Protection Clause because Adams is not similarly situated to cisgender boys is

erroneous. Adams identifies and presents as a boy, meaning he lives as a boy in every aspect of his life. Any anatomical differences Adams may have from cisgender boys are irrelevant to his use of private stalls in the communal restrooms at his high school.

2. The School Board's exclusion of Adams from the boys' restrooms also violated Title IX, 20 U.S.C. 1681. Under the Supreme Court's reasoning in *Bostock* v. *Clayton County*, 140 S. Ct. 1731 (2020), the School Board discriminated against Adams on the basis of sex by treating him differently than if he had been assigned male at birth, thereby causing him harm. It also discriminated against Adams by treating him worse than cisgender boys, to whom he was similarly situated for purposes of bathroom use.

Finally, the School Board, a recipient of federal funding, argues that the Court must resolve any ambiguities in Title IX regarding the term "sex" in its favor given that the statute was enacted pursuant to Congress's spending power. The School Board forfeited this argument, but, in any event, it is misplaced. This Court has held that as long as a Spending Clause statute clearly prohibits discrimination, it need not specify every manner of that discrimination. And regardless of how "sex" is defined, the School Board's exclusion of Adams from the boys' restrooms violated Title IX by subjecting him to discriminatory injury on that basis.

ARGUMENT

As the School Board acknowledges, "Adams does not challenge the authority of the School Board to separate bathrooms on the basis of sex." Br. 11; see also Br. 22. Rather, Adams challenges only the School Board's refusal to treat him as a boy for purposes of restroom use despite treating him as a boy for all other purposes. Doc. 192, at 2, 15-16, 58-59. As the district court found, Adams has confirmed his identity as a boy socially, physically, medically, and on legal documents, such as his birth certificate. Doc. 192, at 2, 46. As discussed below, the School Board's refusal to allow Adams to use the boys' restrooms violated his rights under the Equal Protection Clause and Title IX.

I

THE SCHOOL BOARD VIOLATED THE EQUAL PROTECTION CLAUSE WHEN IT PROHIBITED ADAMS FROM USING THE BOYS' RESTROOMS

The Equal Protection Clause generally prohibits government actors "from treating differently persons who are in all relevant respects alike." *Nordlinger* v. *Hahn*, 505 U.S. 1, 10 (1992). As discussed below, the School Board's refusal to allow Adams to use the boys' restrooms at his high school violated the Equal Protection Clause.

A. Intermediate Scrutiny Applies Because The School Board's Policy Classifies Based On Sex

As the School Board agrees, its restroom policy classifies students based on sex and therefore is subject to intermediate scrutiny. Br. 11-12, 14. The School Board's policy prohibits transgender students from using the restrooms that align with their gender identity if their gender identity does not correspond to the sex listed in their original enrollment documents. As the district court held, this policy "cannot be stated without referencing sex-based classifications." Doc. 192, at 35. And treating the policy as a sex-based classification for equal-protection purposes accords with the approach of the two other courts of appeals to have examined similar bathroom policies; both courts agreed that school policies that exclude transgender students from school restrooms that correspond to their gender identity are classifications based on sex and thereby warrant intermediate scrutiny. See *Grimm* v. *Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 608 (4th Cir. 2020), cert. denied, 141 S. Ct. 2878 (2021); *Whitaker by Whitaker* v. *Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1045-1046, 1051 (7th Cir. 2017).

Where, as here, a policy classifies individuals on the basis of sex, the party seeking to uphold the policy "must carry the burden of showing an 'exceedingly persuasive justification' for the classification." *Mississippi Univ. for Women* v. *Hogan*, 458 U.S. 718, 723-724 (1982) (citation omitted). The classification "must serve important governmental objectives and must be substantially related to

achievement of those objectives," *Craig* v. *Boren*, 429 U.S. 190, 197 (1976), and its justification must not be "hypothesized," *United States* v. *Virginia*, 518 U.S. 515, 533 (1996) (*VMI*). The School Board failed to meet this burden here.

B. The Policy Fails Intermediate Scrutiny

1. The Policy Fails Intermediate Scrutiny Because It Does Not Further Student Privacy

To survive intermediate scrutiny, the justification for a policy must actually further the government's asserted interest. *VMI*, 518 U.S. at 533; *Kirchberg* v. *Feenstra*, 450 U.S. 455, 461 (1981). Where, as here, the School Board fails to proffer any evidence that its exclusion of Adams from the boys' restrooms furthers its asserted interest and instead offers only "sheer conjecture and abstraction," *Whitaker*, 858 F.3d at 1052, the policy cannot survive.

After a bench trial, the district court specifically found that Adams's presence in the boys' restrooms did not further the School Board's interest in privacy. Doc. 192, at 39-41.[4] That factual finding can be overturned only for clear error. And there was none here. The court found that "[w]hen he goes into a restroom, Adams enters a stall, closes the door, relieves himself, comes out of the stall, washes his hands, and leaves." Doc. 192, at 39. It also found that "there

[4] As stated above, the district court rejected the School Board's argument that excluding Adams from the boys' restrooms also advanced student safety. Doc. 192, at 41-43. The School Board has not reasserted that argument in its en banc brief.

were no reports of problems from any boys or boys' parents during the six weeks of his freshman year when Adams used the boys' restrooms at" school. Doc. 192, at 39. Addressing the School Board's argument that "girls may want privacy in the restrooms while talking to their peers, changing clothes (which can be done in a stall), putting on make-up, or removing stains from their clothing," the court observed that those activities do not require girls "to expose their anatomy to other students such that having a transgender student in the restroom would invade their bodily privacy." Doc. 192, at 40. Indeed, the court noted the absence of evidence that any school official "had ever heard of any incident anywhere where a transgender student using a restroom acted in a manner that invaded another student's privacy." Doc. 192, at 39-40.

As to the School Board's concern that a transgender boy could peek at other boys using the urinals, the district court found that "this is not a real concern for several reasons." Doc. 192, at 40. First, "Adams cannot use a urinal and always uses a stall." Doc. 192, at 40. Second, "there is no evidence that a transgender boy is more likely to be curious about another student's anatomy than any other boy" or that "transgender students might expose themselves to other students in the restroom." Doc. 192, at 40-41. On the contrary, the court found that "transgender students want to be discrete [sic] about their anatomy so other students do not recognize them as anything but the gender with which they identify." Doc. 192, at

41. And if the School Board were to find any student—transgender or cisgender—behaving inappropriately in a restroom, the school can and should address such behavior. Doc. 192, at 40.

Other courts similarly have held that student privacy interests are not threatened by transgender-inclusive bathroom policies. For example, in *Grimm*, the Fourth Circuit held that a policy excluding transgender students from the restrooms corresponding to their gender identity "ignores the reality of how a transgender child uses the bathroom: by entering a stall and closing the door." 972 F.3d at 613-615 (quoting *Whitaker*, 858 F.3d at 1052). The court also emphasized that there was no "evidence that a transgender student * * * is likely to be a peeping tom, rather than minding their own business like any other student." *Id.* at 614. The court explained that across the country, school districts with policies permitting transgender students to use restrooms consistent with their gender identity had found such privacy concerns to be unfounded. *Ibid.*

Similarly, in *Whitaker*, the Seventh Circuit considered the school district's "legitimate interest in ensuring that bathroom privacy rights are protected," noting that "this interest must be weighed against the facts of the case and not just examined in the abstract, to determine whether this justification is genuine." 858 F.3d at 1052. After conducting that factual inquiry, the court held that "[a] transgender student's presence in the restroom provides no more of a risk to other

students' privacy rights than * * * any other student who uses the bathroom at the same time." *Ibid.* The court stated that "[c]ommon sense tells us that the communal restroom is a place where individuals act in a discreet manner to protect their privacy and those who have true privacy concerns are able to utilize a stall." *Ibid.*

To the extent the School Board equates an interest in "privacy" to the alleged discomfort of other students, that discomfort cannot justify excluding Adams from the boys' restrooms. See *City of Cleburne* v. *Cleburne Living Ctr.*, 473 U.S. 432, 450-451 (1985); see also *Doe* v. *Boyertown Area Sch. Dist.*, 897 F.3d 518, 529 n.69 (3d Cir. 2018).[5] But even if other students' possible discomfort were a valid consideration, that consideration cuts against a policy that potentially would send Adams, who identifies and presents as a boy, to the girls' restrooms. See *Grimm*, 972 F.3d at 622 (Wynn, J., concurring). At the same time, the School Board's argument notably ignores that excluding Adams from the boys' restrooms infringes *his* privacy interests. See Doc. 192, at 44-45 (describing how Adams experienced stigma and a sense of being singled out as "different"); see also

[5] Indeed, courts have rejected privacy-based challenges brought by cisgender students objecting to sharing restrooms with transgender students. See *Parents for Privacy* v. *Barr*, 949 F.3d 1210, 1217 (9th Cir.) ("[T]here is no Fourteenth Amendment fundamental privacy right to avoid all risk of intimate exposure to or by a transgender person who was assigned the opposite biological sex at birth."), cert. denied, 141 S. Ct. 894 (2020); see also *Boyertown*, 897 F.3d at 535.

Grimm, 972 F.3d at 597 ("When being forced to use a special restroom or one that does not align with their gender, more than 40% of transgender students fast, dehydrate, or find ways not to use the restroom.") (internal citation omitted).

Finally, the School Board's concern regarding "how to reliably ensure student privacy concerns are protected with gender-fluid students whose gender identity may change from day-to-day" (Br. 5) is misplaced because this case does not concern a gender-fluid student. Doc. 192, at 46. Rather, "the question here is whether to permit a transgender boy who has taken significant social, medical and legal measures to present as a boy * * * to have access to the boys' restroom." Doc. 192, at 46. On this record, the answer is yes, as the School Board presented no evidence that Adams's presence in the boys' restroom compromised the privacy of any student.[6]

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[6] The School Board's argument (Br. 19-20) that courts must defer to school officials "in considering whether policy decisions contravene students' constitutional rights" is meritless. Although courts have found that students' Fourteenth Amendment *due process* rights may be different in public schools, the same cannot be said for students' *equal protection* rights. On the contrary, the Supreme Court has recognized that judicial deference to school boards "is fundamentally at odds with our equal protection jurisprudence." *Parents Involved in Cmty. Schs.* v. *Seattle Sch. Dist. No. 1*, 551 U.S. 701, 744 (2007); see also *West Va. Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 637 (1943) ("The Fourteenth Amendment * * * protects the citizen against the State itself and all of its creatures—Boards of Education not excepted.").

2. The Policy Fails Intermediate Scrutiny Because It Is Arbitrary

The School Board's policy also fails intermediate scrutiny because the refusal to accept updated legal documentation to determine a student's sex is unreasonable. To withstand intermediate scrutiny, sex-based classifications "must be reasonable, [and] not arbitrary." *Reed* v. *Reed*, 404 U.S. 71, 76 (1971) (quoting *Royster Guano Co.* v. *Virginia*, 253 U.S. 412, 415 (1920)).

The School Board fails to explain how it advances any student's privacy to reject Adams's current legal documentation, including his amended birth certificate, in favor of outdated documentation in his fourth-grade enrollment package. Though the School Board claims that the sex marker on a student's enrollment paperwork is a "proxy" for "biological sex" (Br. 4), it has not connected the need to use "biological sex" to its asserted interest in privacy. In other words, if the point of the policy is "insuring bathroom privacy from the opposite sex" (Br. 15), the School Board fails to demonstrate how it advances that interest to classify Adams, who identifies and presents as male, and whom the State of Florida recognizes as male, as a female for purposes of bathroom use.

The School Board counters that it "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." Br. 16. But whether or not the policy is largely "accurate"—*i.e.*, it usually succeeds in its goal to ensure "privacy from the opposite sex"—is beside

the point. The Supreme Court repeatedly has invalidated sex-based classifications whether or not they are predictively accurate. See, *e.g.*, *Craig*, 429 U.S. at 201-202; *Frontiero* v. *Richardson*, 411 U.S. 677, 688-689 (1973). As the Court has emphasized, "[p]rocedure by presumption is always cheaper and easier than individualized determination," but when a policy "explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests of" individual students. *Stanley* v. *Illinois*, 405 U.S. 645, 656-657 (1972).

Moreover, in both *Craig* and *Frontiero*, the Court found it particularly salient that, despite empirical data that purportedly justified the differential treatment, there was no evidence that the statutes actually achieved their purported goals. See *Craig*, 429 U.S. at 204; *Frontiero*, 411 U.S. at 689. The same is true here. As the district court found, based on the evidence, excluding Adams from the boys' restrooms does not further student privacy. Doc. 192, at 41.

3. The Policy Treats Adams Differently Than Cisgender Boys, To Whom He Is Similarly Situated

The School Board nonetheless argues that its policy does not violate equal-protection principles because Adams was not similarly situated to cisgender boys. Br. 10-11. This argument is unpersuasive. The Board fails to identify any sound basis for treating Adams differently than cisgender boys for purposes of using the school restrooms, even while treating him as a boy for other purposes. Doc. 192,

at 2, 15-16. As the district court found, Adams identifies and presents physically as a boy. Doc. 192, at 11.

Even if Adams has some anatomical differences from cisgender boys, those differences are not observable when Adams goes into a private bathroom stall and closes the door. To justify differential treatment, the differences must actually be *relevant* to the government's asserted justification. See *City of Cleburne*, 473 U.S. at 448; see also *Reed*, 404 U.S. at 76 ("A classification * * * must rest upon some ground of difference having a fair and substantial relation to the object of the legislation.") (internal quotation marks and citation omitted). The School Board does not explain how any differences Adams may have from cisgender boys—which no other student sees in the restroom—are more relevant for purposes of bathroom use than his *similarities* to those same boys—which other students see every day.

Because Adams's unseen anatomical differences from cisgender boys have no bearing on the School Board's privacy justification, the cases the School Board cites (Br. 17) in which the Supreme Court has upheld sex-based classifications are inapposite. See, *e.g.*, *Michael M.* v. *Superior Court of Sonoma Cnty.*, 450 U.S. 464, 471 (1981); *Parham* v. *Hughes*, 441 U.S. 347, 355 (1979). In those cases, unlike here, the differences between the sexes actually were relevant to the purposes of the sex-based classifications at issue. See Doc. 192, at 47-49.

For these reasons, the School Board's refusal to permit Adams to use the boys' restrooms violated the Equal Protection Clause.

II

THE SCHOOL BOARD VIOLATED TITLE IX WHEN IT PROHIBITED ADAMS FROM USING THE BOYS' RESTROOMS

Title IX provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. 1681(a). The Department of Education's Title IX regulation allows for sex-segregated restroom facilities. 34 C.F.R. 106.33. But the regulation does not define "sex" or speak to how it applies to transgender students. As explained below, by prohibiting Adams from using the boys' restroom, the School Board violated Title IX.

A. The School Board's Policy Discriminated Against Adams "On The Basis Of Sex" In Violation Of Title IX

The Supreme Court's reasoning in *Bostock* v. *Clayton County*, 140 S. Ct. 1731 (2020), demonstrates that the School Board violated Title IX when it excluded Adams from the boys' restrooms. See *Grimm* v. *Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 616 (4th Cir. 2020) (finding "little difficulty" after *Bostock* in "holding that a bathroom policy precluding" a transgender boy "from using the

boys restrooms discriminated against him 'on the basis of sex'" in violation of Title IX), cert. denied, 141 S. Ct. 2878 (2021).

First, *Bostock* recognized that "the term 'discriminate against' includes 'distinctions or differences in treatment that injure protected individuals.'" 140 S. Ct. at 1753 (internal quotation marks and citation omitted). Sex discrimination thus occurs when (1) a school treats a student differently than it would have if the student had been assigned a different sex at birth, *id.* at 1741; and (2) such differential treatment injures the student, *id.* at 1753; see also *Grimm*, 972 F.3d at 616.

The School Board acknowledges that, by excluding Adams from the boys' restroom, it treated him differently than it would have if he had been assigned male at birth. Br. 21. It argues, though, that "if excluding Adams from the boys' bathroom is actionable sex discrimination under Title IX," then any cisgender girl "would also have a claim for sex discrimination" under the statute. Br. 21. The School Board is wrong because there is no plausible claim that prohibiting a cisgender female student from using the boys' restrooms would *injure* that student. It is this *combination* of differential treatment and injury that, under *Bostock*, constitutes prohibited discrimination—not differential treatment alone.

It cannot seriously be disputed that prohibiting Adams from using the boys' restrooms harmed him. He testified to feeling "alienated and humiliated," stating

that "it causes him anxiety and depression to walk past the boys' restrooms on his way to a gender-neutral bathroom, knowing every other boy is permitted to use it but him." Doc. 192, at 27. The district court found that Adams "suffered emotional damage, stigmatization and shame from not being permitted to use the boys' restroom at school." Doc. 192, at 67-68. Such harm is similar to that suffered by transgender students in other cases in which courts have found a Title IX violation. See *Grimm*, 972 F.3d at 600-601; *Whitaker by Whitaker* v. *Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1045-1046 (7th Cir. 2017); *Dodds* v. *United States Dep't of Educ.*, 845 F.3d 217, 221 (6th Cir. 2016); cf. *Doe* v. *Boyertown Area Sch. Dist.*, 897 F.3d 518, 523 (3d Cir. 2018) (contrasting harm suffered by transgender students excluded from restrooms aligned with their gender identity, in rejecting Title IX claims brought by cisgender students).

The School Board insists, however, that excluding Adams from the boys' restrooms does not violate Title IX because the statute's implementing regulations "permit the School Board to separate bathrooms on the basis of biological sex." Br. 24 (citing 34 C.F.R. 106.33).[7] As the School Board acknowledges, neither

[7] The School Board also invokes Title IX and its implementing regulations' allowance for sex-separated living facilities, locker rooms, and shower facilities. Br. 22 (citing 20 U.S.C. 1686; 34 C.F.R. 106.33). This case does not involve residential facilities or use of communal locker rooms or showers. Consideration of Title IX's application to transgender students in these settings should be reserved for cases presenting the question.

Title IX nor its implementing regulations contain a definition of "sex." Br. 22. But regardless of how "sex" is defined, Section 106.33 does not give the School Board free rein to exclude Adams from the boys' restrooms. The regulation is not a statutory exemption, or "safe harbor," as the School Board terms it. Br. 24-25. Rather, it is a regulation that merely clarifies "that the act of creating sex-separated restrooms in and of itself" does not violate Title IX. *Grimm*, 972 F.3d at 618. This is, again, because requiring *cisgender* boys to use the boys' restrooms or *cisgender* girls to use the girls' restrooms does not generally *injure* those students. Far from "affect[ing] transgender and cisgender students in the same way" (Br. 12), the School Board's insistence on excluding Adams from the boys' restrooms caused him to suffer significant harm that is not similarly inflicted on cisgender students.

Furthermore, the School Board treated Adams "worse than others who are similarly situated." *Bostock*, 140 S. Ct. at 1740. As discussed above, Adams is similarly situated to cisgender boys for purposes of using the private stalls in his high school's communal restrooms. Thus, "[w]hen it comes to his use of the bathroom, the law requires that he be treated like any other boy." Doc. 192, at 3; see also *Grimm*, 972 F.3d at 618 (holding that similar policy violated Title IX because "[u]nlike the other boys, [plaintiff] had to use either the girls restroom or a single-stall option"). By prohibiting Adams from using the boys' restroom, the

School Board treated him worse than similarly-situated students, in violation of Title IX.[8]

B. That Title IX Was Enacted Under The Spending Clause Does Not Immunize The School Board From Liability Under The Statute

That Congress passed Title IX under the Spending Clause does not undermine this analysis. The School Board argues that the Court must resolve any ambiguities regarding the term "sex" in Title IX in its favor because federal-funding recipients must be informed of the terms to which they are agreeing when accepting such funding. Br. 26-27 (citing *Pennhurst State Sch. & Hosp.* v. *Halderman*, 451 U.S. 1, 17 (1981)). The School Board forfeited this argument by failing to raise it below. See *Hurley* v. *Moore*, 233 F.3d 1295, 1297 (11th Cir. 2000). In any event, it fails on the merits.

Recipients of federal financial assistance are on notice that they must comply with Title IX's nondiscrimination requirement, and "the possibility that application of [the condition] might be unclear in [some] contexts" does not render it unenforceable under the Spending Clause. *Bennett* v. *Kentucky Dep't of Educ.*,

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[8] For the same reasons, the School Board did not avoid violating Title IX by permitting Adams to use a gender-neutral restroom, when all other students are permitted to use sex-segregated restrooms. Courts have held that such a requirement "would very publicly brand all transgender students with a scarlet 'T,' and they should not have to endure that as the price of attending their public school." *Boyertown*, 897 F.3d at 530; see also *Grimm*, 972 F.3d at 618; *Whitaker*, 858 F.3d at 1045-1046.

470 U.S. 656, 665-666, 673 (1985). Unlike *Pennhurst*, where the federal law at issue was unclear regarding whether the States incurred *any obligations at all* by accepting federal funds, Title IX unambiguously conditions receipt of funds on complying with its prohibition on sex discrimination. 20 U.S.C. 1681(a); see *School Bd. of Nassau Cnty., Fla.* v. *Arline*, 480 U.S. 273, 286 n.15 (1987) (contrasting the issue in *Pennhurst* with the antidiscrimination mandate of Section 504 of the Rehabilitation Act). "[S]o long as a spending condition has a clear and actionable prohibition of discrimination, it does not matter that the manner of that discrimination can vary widely." *Benning* v. *Georgia*, 391 F.3d 1299, 1306 (11th Cir. 2004). Here, Title IX's condition barring discrimination "on the basis of sex" is not one of which the School Board is "unaware" or "unable to ascertain." *Arlington Cent. Sch. Dist. Bd. of Educ.* v. *Murphy*, 548 U.S. 291, 296 (2006) (quoting *Pennhurst*, 451 U.S. at 17).[9]

But in any case, the Court need not determine the meaning of "sex" in Title IX or its implementing regulations or whether the term is ambiguous. Regardless of how sex is defined, the School Board may not apply its bathroom policy to an individual student in a way that harmfully discriminates against him or deprives

[9] In addition to *Murphy*, the School Board cites *Gregory* v. *Ashcroft*, 501 U.S. 452, 469-470 (1991), which did not involve Spending Clause legislation, and *Dellmuth* v. *Muth*, 491 U.S. 223, 232 (1989), which involved Eleventh Amendment immunity.

him of access to equal educational opportunities. The regulation clarifies that treating the sexes differently by providing separate restrooms is not itself discriminatory; it does not endorse applying the statute in a way that treats Adams differently because his sex assigned at birth differs from his sex at the time he uses the school restroom and thereby causes him harm. See *Bostock*, 140 S. Ct. at 1746 ("By discriminating against transgender persons, the employer unavoidably discriminates against persons with one sex identified at birth and another today."). Thus, regardless of how sex is defined, the Court should reject the School Board's Spending Clause argument.

In sum, by excluding Adams from the boys' restrooms, the School Board discriminated against him on the basis of his sex, in violation of Title IX.

CONCLUSION

For the foregoing reasons, this Court should affirm.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached EN BANC BRIEF FOR UNITED STATES AS AMICUS CURIAE IN SUPPORT OF PLAINTIFF-APPELLEE AND URGING AFFIRMANCE does not exceed the type-volume limitation imposed by Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7)(B). The brief was prepared using Microsoft Office Word 2019 and contains 6,491 words of proportionally spaced text, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f). The typeface is 14-point Times New Roman font.

s/ Elizabeth P. Hecker
ELIZABETH P. HECKER
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Date: November 26, 2021

CERTIFICATE OF SERVICE

I certify that on November 26, 2021, I electronically filed the foregoing EN BANC BRIEF FOR UNITED STATES AS AMICUS CURIAE IN SUPPORT OF PLAINTIFF-APPELLEE AND URGING AFFIRMANCE with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system.

I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Elizabeth P. Hecker
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