

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 Case No. 3:17-cv-00739-TJC-JBT

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**APPELLEE’S CERTIFICATE OF INTERESTED PERSONS AND
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Pursuant to Eleventh Circuit Rules 26.1-1 through 26.1-3, and 28-1(b), Appellee 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 – includes the following:

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3. Achievement First Public Charter Schools – District Court Proposed
Amicus Curiae
4. Adams, Drew – Appellee
5. Adams, Scott – Appellee’s Father
6. Adkins, Deanna, M.D. – Expert witness for Appellee
7. ADL – *Amicus Curiae*
8. Advocate for Youth – *Amicus Curiae*
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16. American Academy of Pediatrics – *Amicus Curiae*
17. American Association of Child and Adolescent Psychiatry – *Amicus Curiae*
18. American Association of University Women – *Amicus Curiae*
19. American College of Physicians – *Amicus Curiae*
20. American Medical Association – *Amicus Curiae*
21. American Medical Women’s Association – *Amicus Curiae*
22. American Nurses Association – *Amicus Curiae*
23. American School Counselor Association – *Amicus Curiae*
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25. Atlanta Women for Equality – *Amicus Curiae*
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71. Cyra, Sherri – *Amicus Curiae*
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75. Day One – *Amicus Curiae*
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90. Endocrine Society – *Amicus Curiae*
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93. Equality California – *Amicus Curiae*
94. Ewing, Gregory – *Amicus Curiae*
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130. Holloway, Ian W., Ph.D., M.S.W., M.P.H. – *Amicus Curiae*
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133. Illinois Accountability Initiative – *Amicus Curiae*
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190. National Association of Social Workers – *Amicus Curiae*
191. National Association of Women Lawyers – *Amicus Curiae*
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210. Oasis Legal Services – *Amicus Curiae*
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268. State of Iowa – *Amicus Curiae*
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270. State of Maryland – *Amicus Curiae*
271. State of Massachusetts – *Amicus Curiae*
272. State of Minnesota – *Amicus Curiae*
273. State of New Jersey – *Amicus Curiae*
274. State of New Mexico – *Amicus Curiae*
275. State of New York – *Amicus Curiae*
276. State of Oregon – *Amicus Curiae*
277. State of Pennsylvania – *Amicus Curiae*
278. State of Rhode Island – *Amicus Curiae*
279. State of Vermont – *Amicus Curiae*
280. State of Virginia – *Amicus Curiae*

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288. The Impact Fund – *Amicus Curiae*
289. The School Board of St. Johns County, Florida – Appellant
290. The Southwest Women’s Law Center – *Amicus Curiae*
291. The Women’s Law Center of Maryland – *Amicus Curiae*
292. Toomey, Joel – Magistrate Judge
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306. Vannasdall, David – *Amicus Curiae*
307. Vaughn, Craig – *Amicus Curiae*
308. Vermont Network Against Domestic & Sexual Violence – *Amicus Curiae*
309. Virginia Sexual & Domestic Violence Action Alliance – *Amicus Curiae*
310. Vitale, Julie – District Court Proposed *Amicus Curiae*
311. Voices of Hope – *Amicus Curiae*
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319. Wilson, Bianca D.M., Ph.D. – *Amicus Curiae*
320. Wisconsin Coalition Against Sexual Assault – *Amicus Curiae*
321. Women of Reform Judaism, and Men of Reform Judaism – *Amicus Curiae*
322. Women Lawyers on Guard Inc. – *Amicus Curiae*
323. Women’s Bar Association of the District of Columbia – *Amicus Curiae*
324. Women’s Bar Association of the State of New York – *Amicus Curiae*
325. Women’s Center for Advancement – *Amicus Curiae*
326. Women’s Law Project – *Amicus Curiae*
327. Women’s Liberation Front – *Amicus Curiae*
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329. Wyoming Coalition Against Domestic Violence and Sexual Assault – *Amicus Curiae*
330. Young Women United – *Amicus Curiae*

The undersigned certifies that no publicly-traded company or corporation has an interest in the outcome of the case or appeal. The undersigned has previously entered this information into the web-based stock ticker symbol CIP,

indicating that there is nothing to declare, and that web-based certification remains accurate as of the submission of this brief.

Dated: July 14, 2020

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INTRODUCTION

In *Bostock v. Clayton County, Georgia*, the Supreme Court decided whether Aimee Stephens’ employer unlawfully discriminated because of sex when it fired her because she was transgender. 140 S. Ct. 1731, 1738 (2020). The answer: yes. The Court found that Title VII’s message for purposes of Ms. Stephens’ case was “simple and momentous”: one’s “transgender status is not relevant to employment decisions. That’s because it is impossible to discriminate against a person for being ... transgender without discriminating against that individual based on sex.” *Id.* at 1741.

Although equal access to restrooms was not addressed in *Bostock, id.* at 1753, its reasoning inexorably supports the judgment below. *Bostock*’s holding is unequivocal: if one discriminates because someone is transgender, that decision “inescapably intends to rely on sex[.]” *Id.* at 1742 (emphasis omitted). Foreshadowing *Bostock*, this Court’s ruling in *Glenn v. Brumby* similarly concluded that because of the inherent “congruence between discriminating against transgender” people and “gender-based ... norms,” such discrimination necessarily is sex discrimination. 663 F.3d 1312, 1316-17 (11th Cir. 2011). *Bostock* confirms the district court was correct to apply *Glenn* to this case.

Bostock requires that the trial court’s judgment be upheld for several reasons. First, *Bostock* controls the statutory analysis here because courts rely

heavily on Title VII jurisprudence to interpret Title IX. Second, *Bostock* affirms the district court’s understanding of sex discrimination under both Title IX and the Fourteenth Amendment’s Equal Protection Clause. Third, *Bostock* affirms the district court was correct to compare Drew to other boys, and to examine whether banning him from common restrooms inflicted injury. And finally, *Bostock* definitively answers Defendant-Appellant’s (also “Defendant”) untimely argument it lacked notice of its potential liability under *Pennhurst*.

Despite the clarity and breadth of *Bostock*’s analysis and holding, Defendant tries to stand the decision on its head. While *Bostock* expressly held that discrimination based on transgender status is necessarily unlawful sex discrimination, Defendant claims that the decision regards the concepts as wholly separate and independent. From this, Defendant suggests that the Supreme Court endorsed what it expressly condemned. While *Bostock* explicitly ruled that one cannot escape the statutory prohibition of sex discrimination by offering its own characterization of the term “sex,” Defendant does exactly that. Thus, Defendant insists that courts should limit Title IX’s sex discrimination prohibition based on Defendant’s own characterization of the term “biological sex” – a term found nowhere in either Title VII or Title IX. Moreover, Defendant offers a view of that extra-statutory term directly contradicted by the district court’s detailed findings in this case. And while the Supreme Court respectfully treated Aimee Stephens as a

woman and contrasted her treatment to that of other women when it found sex discrimination, Defendant somehow reads the case as an endorsement rather than an express prohibition of treating people differently based on their sex assigned at birth. Of course, if defendant's arguments were correct, *Bostock* would have come out differently. This Court need not pause long to rehash Defendant's arguments. A clear reading of *Bostock* demonstrates that the Supreme Court has squarely rejected them.

ARGUMENT

I. *BOSTOCK* CONFIRMS THAT DEFENDANT'S POLICY DISCRIMINATES BASED ON SEX.

A. *Bostock's* Reasoning Under Title VII Must Guide This Court's Analysis Under Title IX.

Courts have long applied Title VII case law to analyze a broad range of claims under Title IX. *See, e.g., Franklin v. Gwinnett Cty. Pub. Schs.*, 503 U.S. 60, 75 (1992) (holding that because sexual harassment is intentional discrimination because of sex under Title VII, "the same rule should apply when a teacher sexually harasses a student" under Title IX); *Bowers v. Bd. of Regents of Univ. Sys. of Ga.*, 509 F. App'x 906, 910 (11th Cir. 2013) (per curiam) (noting that this Court "appl[ies] Title VII case law to assess [a] Title IX claim."); *GP by & through JP v. Lee Cty. Sch. Bd.*, 737 F. App'x 910, 916 (11th Cir. 2018) (analyzing Title IX disparate treatment claim under Title VII); *Kocsis v. Fla. State Univ. Bd. of*

Trustees, 788 F. App'x 680, 686 (11th Cir. 2019) (analyzing Title IX retaliation claim under Title VII). Indeed, courts draw upon a common body of law to analyze sex discrimination claims under the Equal Protection Clause, Title VII, and Title IX. *See, e.g., Glenn*, 663 F.3d at 1316 (relying on both Equal Protection and Title VII authorities to find that “the very acts that define transgender people as transgender are those that contradict stereotypes of gender-appropriate appearance and behavior”) (quotation omitted).

Application of Title VII case law to interpret Title IX is bolstered by the statutes’ textual similarity. Both statutes focus on discriminatory treatment of individuals rather than groups: Title VII protects “[a]ny individual,” 42 U.S.C. § 2000e–2(a)(1); and Title IX protects “[a]ny person,” 20 U.S.C. § 1681(a). And both statutes require merely “but for” causation: Title VII prohibits discrimination “because of” sex, 42 U.S.C. § 2000e–2(a)(1); and Title IX prohibits discrimination “on the basis of” sex, 20 U.S.C. § 1681(a). *See also Franklin*, 503 U.S. at 75 (using “on the basis of” and “because of” interchangeably, and applying a Title VII case, *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986), to analyze Title IX liability). *Bostock*’s ruling under Title VII accordingly must be applied to Drew’s sex discrimination claims here.

Defendant quotes Plaintiff-Appellee’s (also “Drew” or “Plaintiff”) response to the Court’s question at argument about whether a decision in this case should

wait until the ruling *Bostock*, which is now moot. Suppl. Br. of Appellant The Sch. Bd. of St. Johns Cty., Fla. (July 2, 2020) (“Def.’s Suppl. Br.”) at 1-2. Defendant oddly suggests that Plaintiff’s response “foreclose[s]” the Court from applying *Bostock* here. *Id.* at 1. Of course, counsel could never “foreclose” this Court from applying binding Supreme Court precedent. In any event, Plaintiff’s response was that Title IX is a “much broader [statute than Title VII] in many ways,” and to the extent *Bostock* might focus narrowly on how to “ferret out discriminatory intent by a decisionmaker,” that was not necessary to analyze the facially discriminatory policy challenged here. *Id.* at 1. But, in fact, *Bostock*’s ruling is sweeping. Now that *Bostock* has settled that discrimination based on transgender status is discrimination based on sex prohibited by Title VII – a statute that is narrower in various ways than Title IX – it is nonsensical that this Court cannot apply *Bostock*’s guidance to the broader prohibition of sex discrimination in Title IX.

Title IX’s expansive, remedial structure makes clear that that sex discrimination has no greater place in our schools than our workplaces. Title IX is structured even more broadly than Title VII, with a sweeping prohibition of sex discrimination, 20 U.S.C. § 1681(a), and narrow carve-outs, 20 U.S.C. § 1681(a)(1)-(9). Title VII, in contrast, lists proscribed conduct. *See, e.g.*, 42 U.S.C. § 2000e-2(a)(1)-(2). As *Bostock* stated, “when Congress chooses not to include any exceptions to a broad rule, courts apply the broad rule.” *Id.* at 1747.

This Court should apply that guidance here, and affirm the judgment below.

B. *Bostock* Explains That Discrimination Because an Individual is Transgender is “Necessarily” and “Unavoidably” Because of Sex, and Rejects Defendant’s Key Arguments in This Appeal.

Bostock confirms the district court’s understanding of impermissible sex discrimination under both Title IX and the Fourteenth Amendment’s Equal Protection Clause. As *Bostock* explains, it is simply impossible to describe a transgender person “without considering sex.” 140 S. Ct. at 1746. Accordingly, “[b]y discriminating against transgender persons,” one “unavoidably discriminates against persons with one sex identified at birth and another today.” *Id.* “Any way you slice it,” an action taken because a person is transgender is “because of the affected individuals’ sex.” *Id.*

Defendant whistles past the graveyard, claiming that *Bostock* somehow supports its position, rather than *Drew*. See, e.g., Def.’s Suppl. Br. at 1. But *Bostock*’s analysis directly refutes the key arguments in Defendant’s briefing before this Court. To illustrate just how clearly Defendants’ arguments are negated by *Bostock*, they are summarized below, with *Bostock*’s response.

1. **Defendant:** Courts are “guided by dictionary definitions” at the time of enactment, which “focused on the biological and physiological differences between men and women.” Initial Br. of Appellant The Sch. Bd. of St. Johns Cty., Fla. (Dec. 20, 2018) (“Def.’s Initial Br.”) at 36.

a. **Bostock:** “[N]othing in our approach ... turns on the outcome of the parties’ debate” about dictionary definitions. The “question isn’t just what ‘sex’ meant, but what [the law] says about it.” 140 S. Ct. at 1739.

2. **Defendant:** “The School Board’s bathroom policy does not consider gender identity. It is solely based on the physiological characteristics of students ...” Def.’s Initial Br. at 13.

a. **Bostock:** “... it’s irrelevant what an employer might call its discriminatory practice, how others might label it, or what else might motivate it.” 140 S. Ct. at 1744; *see also id.* (observing that *Manhart*’s policy could have been relabeled as being merely about “life expectancy,” and *Phillips*’s policy could have been described as merely about “motherhood”). Those “labels and additional intentions or motivations ... cannot make a difference” and do not erase impermissible sex discrimination. *Id.* Discrimination against an employee for being transgender “necessarily and intentionally discriminates against that individual in part because of sex.” *Id.* “Title VII prohibits all forms of discrimination because of sex, however they may manifest themselves or whatever other labels might attach to them.” 140 S. Ct. at 1747.

3. **Defendant:** “Adams asks this Court to hold that discrimination against someone who is transgender is *per se* sex discrimination,” claiming it is “analytically impossible to discriminate based on transgender status without being

motivated, at least in part, by sex.” Reply Br. of Appellant The Sch. Bd. of St. Johns Cty., Fla. (March 14, 2019) (“Def.’s Reply Br.”) at 20 (quote omitted). “[B]ut this is an overextension of *Glenn*,” and a similar analytical approach was rejected by this Court with respect to sexual orientation. *Id.*

a. ***Bostock***: A person’s “transgender status [is] inextricably bound up with sex,” 140 S. Ct. at 1742, and discrimination on that basis “necessarily and intentionally discriminates against that individual in part because of sex,” *id.* at 1744. *See also id.* at 1747 (“discrimination based on ... transgender status necessarily entails discrimination based on sex; the first cannot happen without the second”). The same is true for sexual orientation. *Id.*

4. **Defendant**: “There is simply no evidence that Congress intended for ‘sex’ under Title IX to include discrimination” against transgender people. Def.’s Reply Br. at 20.

a. ***Bostock***: “Those who adopted the Civil Rights Act might not have anticipated their work would lead to this particular result [recognizing that transgender status discrimination is inherently sex discrimination]. ... But the limits of the drafters’ imagination supply no reason to ignore the law’s demands. When the express terms of a statute give us one answer and extratextual considerations suggest another, it’s no contest. Only the written word is the law, and all persons are entitled to its benefit.” 140 S. Ct. at 1737.

5. **Defendant:** The “omitted case canon” doctrine supports Defendant’s position that transgender students are not protected based on “the status of being transgender,” because Congress does not “hide elephants in mouseholes.” Def.’s Reply Br. at 21.

a. ***Bostock*:** “This elephant” – that discrimination based on transgender status is inherently sex-based discrimination – “has never hidden in a mousehole; it has been standing before us all along.” 140 S. Ct. at 1753. Accordingly, the “elephants-in-mouseholes” canon “has no relevance here.” *Id.*

C. Defendant Fundamentally Misinterprets *Bostock*.

Defendant’s primary argument about *Bostock* rests on a key mischaracterization of the decision. Defendant seizes on the straightforward statement in *Bostock* that transgender status is a distinct concept from sex, distorting that to suggest that protection from sex discrimination under *Bostock* extends no further than an individual’s anatomy. Def.’s Suppl. Br. at 4; *see also id.* at 4-5 (mischaracterizing *Bostock*’s holding as protecting people from sex discrimination based solely on their “physiological differences”); *id.* at 6 (claiming *Bostock* has “implicitly, if not explicitly recognized, that sex means [so-called] biological sex”).¹ That is incorrect. The Supreme Court was making the

¹ As the district court found, “biological sex” is a misnomer that should be avoided. *See Br. of Appellee* (Feb. 21, 2019) (“Appellee’s Br.”) at 4 n.2.

unremarkable observation that designating someone as “male” or “female” does not indicate whether they are transgender, and saying that someone is “transgender” does not indicate whether they are male or female, because the concepts are “distinct.” 140 S. Ct. at 1746. In fact, that same passage makes clear *Bostock* was not making any pronouncement about how to understand the sex of transgender people, in part because the Court spoke about sexual orientation in the same breath: “We agree that homosexuality and transgender status are distinct concepts from sex.” *Id.* at 1746-47. More importantly, the Court’s analysis was a direct response to a different argument raised by the employers:

Because homosexuality and transgender status can’t be found on [the] list [of protected traits in Title VII] and because they are conceptually distinct from sex, the employers reason, they are implicitly excluded from Title VII’s reach. Put another way, if Congress had wanted to address these matters in Title VII, it would have referenced them specifically.

But that much does not follow. We agree that homosexuality and transgender status are distinct concepts from sex. But, as we’ve seen, discrimination based on homosexuality or transgender status necessarily entails discrimination based on sex; the first cannot happen without the second.

Id. In other words, *Bostock* makes clear that while being gay or transgender is distinct from whether one is male or female, discrimination based on either is inherently based on sex and prohibited under Title VII.

Defendant next stunningly suggests that *Bostock* enshrines in law a refusal to accept transgender men as men, or transgender women as women – instead

relegating transgender people to nothing more than the sum of their external genitalia at birth. Def.'s Suppl. Br. at 3 (“The entirety of the holding, and the reasoning that flows from it, are built on the premise that ... a transgender man – is a woman.”). This offensive argument strips transgender people of their very identity and humanity. *See, e.g.*, Doc. 192 at 2 (“At trial, [Drew] testified: ‘I am a boy and I know that with every fiber of my being.’”); Doc. 160, 204:10-12 (Drew’s testimony that walking past the boys’ restroom to access the gender-neutral restroom felt “like a walk of shame,” because “I know that the school sees me as less of a person, less of a boy, certainly, than my peers”). Second, as the trial record shows, Defendant’s assertion is not just wrong as a matter of human dignity, but also as a matter of science. *See, e.g.*, Doc. 192 at 6; Doc. 166-3 ¶ 20 (expert testimony that neurological sex and related gender identity are the determinative factors of one’s gender). Defendant’s claim is also antithetical to the respectful treatment of Ms. Stephens and transgender people that runs throughout *Bostock*.

Defendant’s argument is particularly discontinuous with the Supreme Court’s guidance because *Bostock* expressly disavowed deciding what constitutes sex – finding it unnecessary because nothing in its approach “turns on the outcome of the parties’ debate [about the definition of sex].” 140 S. Ct. at 1739. Because “the employees *concede[d] the point for argument’s sake*,” *Bostock* proceeded on an “*assum[ed]*” definition of sex. *Id.* at 1739 (emphasis added). *Bostock*

acknowledged that it did not have “the benefit of adversarial testing.” *Id.* at 1753. In contrast, the district court here insisted that the parties’ evidence and arguments be tested rigorously through trial. The district court received extensive, unrebutted expert testimony and made post-trial factual findings. But this Court need not even rely on those findings to uphold the judgment below. The district court’s treatment of Drew parallels precisely how *Bostock* treated Ms. Stephens.

The district court understood Drew must be compared to other boys, not girls, and *Bostock* confirms it was right to do so. Where *Bostock* compared transgender people to cisgender people, it did so by respecting their gender identity – *i.e.*, by comparing transgender women to other women. *Id.* at 1741 (stating that where an employer “fires a transgender” woman, but “retains an otherwise identical employee who was identified as female at birth” – *i.e.*, a cisgender woman – that is impermissible discrimination). Defendant claims that *Bostock* relies on the difference between a transgender person’s birth-assigned sex and his gender identity, and endorses differential treatment on that basis. Def.’s Suppl. Br. at 4. But *Bostock* did exactly the opposite. While the decision recognizes the incongruence with birth-assigned sex as a signifier of being transgender, 140 S. Ct. at 1741 (noting a transgender woman is a “person who was identified as a male at birth but who now identifies as a female”), it also says repeatedly and unmistakably that discrimination on that basis is impermissible sex discrimination.

Id. at 1741-42 (holding that in such a scenario, “the individual employee’s sex plays an unmistakable and impermissible role” in the discriminatory conduct). Nothing about *Bostock* suggests that Ms. Stephens could be treated as the woman she is in some contexts, while being demeaned by being treated as “male” in others. Rather than suggesting that discrimination based on birth-assigned sex is permissible, *Bostock* illustrates how it is prohibited. “By discriminating against transgender persons, the employer unavoidably discriminates against persons with one sex identified at birth and another today.” *Id.* at 1746.

Additionally, the “traditional but-for causation standard” that applies equally to Title VII and Title IX “means a defendant cannot avoid liability just by citing some *other* factor that contributed” to its discriminatory conduct – such as one’s anatomy. *Id.* at 1739. “So long as the plaintiff’s sex was one but-for cause of that decision, that is enough to trigger” a statute such as Title IX. *Id.* That is precisely what happened to Drew, and that is sex discrimination.

It is no excuse that a defendant can “point[] to some other, nonprotected trait and insist[] it was the more important factor” in the discriminatory conduct. *Id.* at 1744; *see also id.* (it is of “no significance here if another factor ... might also be at work, or even play a more important role” in the differential treatment). That is because “it’s irrelevant what an employer might call its discriminatory practice, how others might label it, or what else might motivate it.” *Id.* In the same way that

the employer in *Los Angeles Dept. of Water and Power v. Manhart*, 435 U.S. 702 (1978), might have called its sex-based retirement benefits mere “life expectancy” discrimination, and the employer in *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971), might have called its policy mere “motherhood” discrimination, Defendant here tries to dress its policy up as “anatomy” discrimination. *Bostock*, 140 S. Ct. at 1744. “[J]ust as labels and additional intentions or motivations didn’t make a difference in *Manhart* or *Phillips*, they cannot make a difference here.” *Id.*

What, then, separates this case from this Court’s question at oral argument about a cisgender female student who faces long lines in the girls’ restroom, causing her to be late to class? There are at least two differences. **First**, any claim this girl might bring is unaffected by *Bostock*, because she faces no discrimination based on her transgender status. The overcrowding of the restroom has nothing to do with whether she is (or is not) transgender. **Second**, there must be injury and, as with all claims, the nature of the injury determines the remedy.² As “sweeping as even the but-for causation standard can be, Title VII does not concern itself with

² Defendant incorrectly suggests that “harm is not part of Equal Protection Clause jurisprudence.” Def.’s Suppl. Br. at 9. But injury is crucial to proving an Equal Protection claim. *See, e.g., Concrete Works of Colorado, Inc. v. City & Cty. of Denver, Colo.*, 540 U.S. 1027, 557 (2003) (“Our Equal Protection Clause jurisprudence establishes that ‘whenever the government treats any person unequally because of his or her race, that person has suffered an injury that falls squarely within the language and spirit of the Constitution’s guarantee of equal protection.’”) (quoting *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 229-230 (1995)).

everything that happens ‘because of’ sex.” *See id.* at 1740. Instead, Title VII’s prohibition on discrimination requires “distinctions or differences in treatment that injure protected individuals.” *See id.* at 1753 (quote omitted). Here, the trial court made extensive factual findings of the injury inflicted on Drew by shunting him out of the common restrooms the other boys – his peers – use. *See Appellee’s Br.* at 13-16. In contrast, to the extent this hypothetical girl experiences injury, it is not because she cannot access the boys’ restroom, or because of a categorical school policy rejecting her gender identity. It is because the girls’ restroom is an unequal facility, and *that* is what must be remedied in that hypothetical.

D. *Bostock* Offers No Support for Defendant’s Claims About Title IX’s Restroom Regulation.

Defendant’s only other argument about Title IX is that the regulation permitting separate restrooms for boys and girls is a “key distinction between the statutory schemes.” Def.’s Suppl. Br. at 3 (citing 34 C.F.R. § 106.33); *see also* Def.’s Suppl. Br. at 5-6. But Title VII also permits separate restrooms. In a decision binding on every U.S. Equal Employment Opportunity Commission (“EEOC”) office in the country because it was issued by the Commission itself, the EEOC ruled that Title VII required that a transgender woman be able to access the female restrooms at work. *See Lusardi v. McHugh*, Appeal No. 0120133395, 2015 WL 1607756, at *1 (E.E.O.C. Apr. 1, 2015). The EEOC stated, “[o]n this record,

there is no cause to question that Complainant – who was assigned the sex of male at birth but identifies as female – *is* female.” *Id.* at *8. That has been the EEOC’s national rule for adjudicating Title VII charges for more than five years. Contrary to Defendant’s argument that permitting Drew to use the boys’ restroom would lead to “the abolition of sex-separated restrooms,” Def.’s Suppl. Br. at 8, the EEOC has not abolished separate restrooms in workplaces across the nation.

Nor did schools throughout Indiana, Wisconsin, and Illinois suffer that fate after the Seventh Circuit decided *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034 (7th Cir. 2017). And schools throughout the 20 states and the District of Columbia with policies requiring equal treatment of transgender students continue to maintain separate restrooms. *See* Br. for the States of New York, et al., as Amici Curiae in Support of Appellee (Feb. 28, 2019).

Further, as previously argued, Appellee’s Br. at 52-53, the Title IX regulation allowing separate restrooms neither mandates nor endorses discrimination against transgender students. 34 C.F.R. § 106.33. The regulation does not even require schools to maintain separate restrooms – they are simply permitted to do so. *Id.* (schools “*may* provide separate toilet ... facilities on the basis of sex”) (emphasis added). Nothing about the regulation requires schools to discriminate against transgender students, and nothing in *Bostock* approves discrimination of that kind. In fact, to the extent the district court can be faulted for

finding the term sex ambiguous in Title IX, the fault is in being overly cautious. Using the same statutory interpretation tools *Bostock* applied to Title VII, this Court must conclude that Title IX’s message is “simple and momentous: ... it is impossible to discriminate against a person for being ... transgender without discriminating against that individual based on sex.” 140 S. Ct. at 1741.

E. *Bostock* Supports the District Court’s Equal Protection Ruling.

Defendant’s Equal Protection arguments are premised on the same faulty reading of *Bostock* discussed above. Def.’s Suppl. Br. at 7 (arguing *Bostock*’s “reasoning that sex is distinct from transgender status again supports reversal in this case”). Beyond that unfounded claim, Defendant’s brief simply rehashes its prior arguments. Defendant does concede, as it must, that “the classification in this case draws lines based on sex,” and that “intermediate scrutiny applies.” Def.’s Suppl. Br. at 7. The burden to produce an exceedingly persuasive justification for Defendant’s discriminatory policy belongs to Defendant – but its brief offers nothing new. *See id.* at 9-10. The district court’s Equal Protection ruling should be upheld for the same reasons Plaintiff previously explained. Appellee’s Br. at 22-32.³

³ Defendant incorrectly represents that medical documentation submitted at the time of Drew’s enrollment identified his anatomy. Def.’s Suppl. Br. at 7 n.1. The school form does nothing of the sort, as Defendant’s counsel conceded at argument:

II. *BOSTOCK* MAKES CLEAR THAT *PENNHURST* CANNOT EXCUSE DEFENDANT’S DISCRIMINATORY POLICY.

Defendant’s argument that it lacked notice that transgender plaintiffs could invoke Title IX’s broad protection from sex discrimination was always unpersuasive – particularly in the Circuit that decided *Glenn* – but *Bostock* definitively disposes of that argument.⁴ Defendant previously claimed that “Title IX does not provide notice that it prohibits discrimination based upon gender identity,” *i.e.*, transgender status. Def.’s Reply Br. at 23. “The creation of a new protected class, out of whole cloth,” Defendant argued, is “the type of condition that Congress should ... clearly set forth in Spending Clause legislation.” Def.’s Reply Br. at 24. But as *Bostock*, 140 S. Ct. at 1750-51, explains,

Mr. Slanker: I just looked at the form with my co-counsel, and we don’t see anything on there that necessarily indicates that there was an examination affirmed by a medical doctor. There’s a signature for a parent.

The Court: What is it? It’s a parent?

Mr. Slanker: Yes, Your Honor ... there’s a signature from a parent.

Oral argument at 35:32-35:54. In fact, the undisputed evidence shows that the school district does *not* ask students about their anatomy. *See, e.g.*, Doc. 192 at 13, 22; Docs. 152-28, 152-29, 152-30; Doc. 162, 12:19-21 (enrollment forms allow students only to indicate whether they are male or female; none refer to “biological sex” or transgender status). The school does not know who its transgender students are unless they identify themselves to school officials, Doc. 161, 235:15-18; Doc. 162, 53:18-21; and transgender students who enter the system with documents reflecting their gender identity may never be known to the school, and can use corresponding restrooms until they graduate. Doc. 192 at 14, 22.

⁴ This argument is also untimely. *See* Appellee’s Br. at 53-54.

The employers assert that “no one” in 1964 or for some time after would have anticipated today’s result. But is that really true? Not long after the law’s passage, gay and transgender employees began filing Title VII complaints, so at least *some* people foresaw this potential application. ... Why isn’t that enough to demonstrate that today’s result isn’t totally unexpected? How many people have to foresee the application for it to qualify as “expected”?

Indeed, “lurking just behind” arguments such as those made by Defendant, “resides a cynicism that Congress could not *possibly* have meant to protect a disfavored group.” *Id.* at 1751. But to refuse enforcement just “because the parties before us happened to be unpopular at the time of the law’s passage, would not only require us to abandon our role as interpreters of statutes; it would tilt the scales of justice in favor of the strong or popular and neglect the promise that all persons are entitled to the benefit of the law’s terms.” *Id.* The district court declined Defendant’s invitation to construe Title IX on those terms, and this Court should affirm. And although Title VII is not Spending Clause legislation, *Bostock*’s explanation applies with no less force to the later-enacted Title IX.

Importantly, *Bostock* confirms that the law’s protection for transgender plaintiffs has never been “hidden,” even if the law has produced “unexpected applications” – or at least, unexpected “in the view of those on the receiving end of them.” 140 S. Ct. at 1753. “Congress’s key drafting choices – to focus on discrimination against individuals and not merely between groups and to hold employers liable whenever sex is a but-for cause of the plaintiff’s injuries –

virtually guaranteed that unexpected applications would emerge over time.” *Id.* Title IX shares both of those features of Title VII. *Cf. Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 182-83 (2005) (Title IX funding recipients “have been put on notice by the fact that cases ... have consistently interpreted Title IX’s private cause of action broadly to encompass diverse forms of intentional sex discrimination”). Both statutes unambiguously “prohibit[] all forms of discrimination because of sex, however they may manifest themselves or whatever other labels might attach to them.” *Bostock*, 140 S. Ct. at 1747.

CONCLUSION

Faced with arguments that treating Aimee Stephens equally in the workplace would also require treating employees equally in restrooms, *Bostock* noted, “[g]one here is any pretense of statutory interpretation; all that’s left is a suggestion we should proceed without the law’s guidance to do as we think best.” 140 S. Ct. at 1753. But the courts’ “role is limited to applying the law’s demands ... faithfully,” and the same “judicial humility that requires us to refrain from adding to statutes requires us to refrain from *diminishing* them.” *Id.* (emphasis added). Here, the district court understood that banning Drew from common restrooms would diminish the equal educational opportunity promised by Title IX and the Fourteenth Amendment. The district court rightly refused to hollow out those guarantees. This Court should do the same, and affirm the judgment below.

Respectfully submitted on July 14, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of Court for the U.S. Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system on July 14, 2020. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system. A true and accurate copy of the foregoing will be dispatched for delivery via Federal Express to counsel for Defendant.

I further certify that seven paper copies of the brief with tan covers and backing will be dispatched for delivery via Federal Express to:

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

/s/ Tara L. Borelli
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