No. 18-13592-EE

In the
United States Court of Appeals for the Eleventh Circuit

DREW ADAMS,

Plaintiff – Appellee,

v.

THE SCHOOL BOARD OF ST. JOHNS COUNTY, FLORIDA,

Defendant – Appellant.

On Appeal from the United States District Court
for the Middle District of Florida, Jacksonville Division
District Court No. 3:17-cv-00739-TJC-JBT

EN BANC BRIEF OF CONSTITUTIONAL ACCOUNTABILITY CENTER AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFF-APPELLEE

Elizabeth B. Wydra
Brianne J. Gorod
David H. Gans
CONSTITUTIONAL ACCOUNTABILITY CENTER
1200 18th St. NW, Suite 501
Washington, D.C. 20036
Tel.: (202) 296-6889
brianne@theusconstitution.org

Counsel for Amicus Curiae

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Eleventh Circuit Rule 26.1, I hereby certify that *amicus* is not a publicly held corporation, nor does it issue stock or have parent corporations. *Amicus* is a non-profit 501(c)(3) organization.

I also hereby certify that I am aware of no persons or entities, in addition to those listed in the party and *amicus* briefs filed in this case, that have a financial interest in the outcome of this litigation. Further, I am aware of no persons with any interest in the outcome of this litigation other than the signatory to this brief and its counsel, and those identified in the party and *amicus* briefs filed in this case.

Dated: November 23, 2021

/s/ Brianne J. Gorod
Brianne J. Gorod

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iv

INTEREST OF *AMICUS CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT 1

ARGUMENT 7

I. To Help Realize the Constitution's Promise of Equality for All, Title IX Broadly Prohibits Recipients of Federal Financial Assistance from Engaging in Gender Discrimination in Education Against Any Person .. 7

II. Spending Clause Concerns Do Not Justify Reading Transgender Persons Out of Title IX 12

A. Spending Clause Concerns Are at Their Lowest Ebb When Congress Acts to Enforce the Fourteenth Amendment 12

B. Congress Used Both Its Authority Under the Spending Clause and Section 5 of the Fourteenth Amendment in Enacting Title IX's Guarantee of Gender Equality for All Persons 16

III. The School Board's Fair Notice Argument Cannot Be Squared with the Supreme Court's Precedents Construing Title IX..... 20

CONCLUSION 23

TABLE OF AUTHORITIES

Page(s)

Cases

Atascadero State Hosp. v. Scanlon,
473 U.S. 234 (1985).....19, 20

Benning v. Georgia,
391 F.3d 1299 (11th Cir. 2004).....21

Bostock v. Clayton County,
140 S. Ct. 1731 (2020).....3, 8, 9, 10, 22

Brown v. Bd. of Educ.,
347 U.S. 483 (1954).....7

Burlington N. & Santa Fe Railway Co. v. White,
548 U.S. 53 (2006).....10

Cannon v. Univ. of Chi.,
441 U.S. 677 (1979)..... 8, 9

Crawford v. Davis,
109 F.3d 1281 (8th Cir. 1997).....18

Davis v. Monroe Cty. Bd. Of Educ.,
526 U.S. 629 (1999).....5, 9, 13, 21, 22

Dodds v. U.S. Dep't of Educ.,
845 F.3d 217 (6th Cir. 2016).....11

Doe v. Boyertown Area School Dist.,
897 F.3d 518 (3d Cir. 2018).....10

Doe v. Univ. of Ill.,
138 F.3d 653 (7th Cir. 1998).....16, 17, 18

EEOC v. Elrod,
674 F.2d 601 (7th Cir. 1982).....17

Elwell v. Oklahoma ex rel. Bd. of Regents,
693 F.3d 1303 (10th Cir. 2012).....9

TABLE OF AUTHORITIES – cont'd

Page(s)

Ex Parte Virginia,
100 U.S. 339 (1880).....5, 14, 15

Fitzgerald v. Barnstable Sch. Comm.,
555 U.S. 246 (2009).....19

Fitzpatrick v. Bitzer,
427 U.S. 445 (1976).....13, 16, 17

Franklin v. Gwinnett Cty. Pub. Sch.,
503 U.S. 60 (1992).....16

Franks v. Ky. Sch. for the Deaf,
142 F.3d 360 (6th Cir. 1998).....18

Gebser v. Lago Vista Indep. Sch. Dist.,
524 U.S. 274 (1998).....9

Glenn v. Brumby,
663 F.3d 1312 (11th Cir. 2011).....10

Grimm v. Gloucester County School Board,
972 F.3d 586 (4th Cir. 2020).....9, 12

Jackson v. Birmingham Bd. of Educ.,
544 U.S. 167 (2005).....4, 5, 9, 21, 22

Katzenbach v. Morgan,
384 U.S. 641 (1966).....15

L.A. Dept. of Water & Power v. Manhart,
435 U.S. 702 (1978).....8

Lane v. Pena,
518 U.S. 187 (1996).....20

McDonald v. City of Chicago,
561 U.S. 742 (2010).....6, 13

TABLE OF AUTHORITIES – cont'd

Page(s)

Meritor Sav. Bank v. Vinson,
477 U.S. 57 (1986).....22

Nat'l Fed'n of Indep. Bus. v. Sebelius,
567 U.S. 519 (2012).....6, 12, 13, 18

Obergefell v. Hodges,
576 U.S. 644 (2015).....12, 14

Price Waterhouse v. Hopkins,
490 U.S. 228 (1989).....10

Reed v. Reed,
404 U.S. 71 (1971).....8

Regents of the Univ. of Cal. v. Bakke,
438 U.S. 265 (1978).....8, 19

Timmer v. Mich. Dep't of Commerce,
104 F.3d 833 (6th Cir. 1997).....17

United States v. Virginia,
518 U.S. 515 (1996).....3, 9, 10

Ussery v. Louisiana,
150 F.3d 431 (5th Cir. 1998).....17

Varner v. Ill. State Univ.,
150 F.3d 706 (7th Cir. 1998).....17

Woods v. Cloyd W. Miller Co.,
333 U.S. 138 (1948).....18

Whitaker v. Kenosha Unified School Dist.,
858 F.3d 1034 (7th Cir. 2017).....11

Constitutional Provisions and Legislative Materials

20 U.S.C. § 1681(a).....2, 7

TABLE OF AUTHORITIES – cont'd

Page(s)

34 C.F.R. § 106.33 11

42 U.S.C. § 2000d 8

42 U.S.C. § 2000d-7(a)(1) 19

42 U.S.C. § 2000e-2 7

131 Cong. Rec. 22346 (1985) 20

132 Cong. Rec. 28624 (1986) 20

Cong. Globe, 39th Cong., 1st Sess. (1866) 5, 6, 15

Cong. Globe, 42nd Cong., 2nd Sess. (1872) 14

Report of the Joint Committee on Reconstruction, 39th Cong., 1st Sess. (1866) 6

S. Rep. No. 388, 99th Cong., 2d Sess. (1986) 20

Books, Articles, and Other Authorities

Akhil Reed Amar, *America's Constitution: A Biography* (2005) 15

Michael W. McConnell, *Institutions and Interpretation: A Critique of City of Boerne v. Flores*, 111 Harv. L. Rev. 153 (1997) 14

INTEREST OF *AMICUS CURIAE*[1]

Amicus Constitutional Accountability Center (CAC) is a think tank, public interest law firm, and action center dedicated to fulfilling the progressive promise of the Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and preserve the rights and freedoms it guarantees. CAC has a strong interest in ensuring that the constitutional principle of equality is properly enforced and accordingly has an interest in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

Drew Adams is a transgender boy. He has a male name, his state-issued driver's license identifies him as male, and his birth certificate currently lists him as male. In public places, he uses the men's restroom, and for his first six weeks as a ninth-grader at Nease High School, he used the boys' restroom at his school without incident. Despite all this and despite the absence of complaints from his male classmates, the St. Johns County School Board ("the School Board") insisted that Drew may not under any circumstances use the same restrooms that other boys at his school use because he is transgender. Although school officials treated Drew as a boy for all other purposes, it required him to use the multi-stall girl's bath-

[1] *Amicus* states that no counsel for a party authored this brief in whole or in part, and no person other than *amicus* or its counsel made a monetary contribution to the brief's preparation or submission. Counsel for all parties have consented to the filing of this brief.

rooms or a single-stall gender-neutral bathroom, which he found insulting, humiliating, and stigmatizing. In short, rather than treat Adams and other transgender students with equal respect, the School Board enforced a policy that discriminated against them, shunting them away from their peers and marginalizing them.

The School Board's policy cannot be squared with the guarantees of Title IX of the Education Amendments of 1972, which, in sweeping, universal language, provides that "[no] 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). Enforcing basic constitutional principles that require the government to respect the equal dignity of all persons, Title IX broadly prohibits sex discrimination by governmental and private entities that accept federal financial assistance, and thereby ensures to all people—regardless of their gender identity—"full citizenship stature—equal opportunity to aspire, achieve, participate in and contribute to society based on their individual talents and capacities." *United States v. Virginia*, 518 U.S. 515, 532 (1996).

Transgender individuals like Drew Adams are just as entitled to invoke these protections as anyone else. Title IX, like the Constitution's equal protection guarantee it enforces, applies to all persons, and ensures that "'[i]nherent differences' between men and women . . . remain cause for celebration, but not for

denigration of the members of either sex or for artificial constraints on an individual's opportunity." *Id.* at 533. Under Title IX, transgender persons must be treated with equal dignity and given access to an educational environment where they can learn, thrive, and grow free from discrimination.

Title IX, like Title VII of the Civil Rights Act of 1964, establishes a "simple and momentous" command: "An individual's . . . transgender status is not [a] relevant" basis to deny an individual equal access to benefits or opportunities. *Bostock v. Clayton County*, 140 S. Ct. 1731, 1741 (2020). "That's because it is impossible to discriminate against a person for being . . . transgender without discriminating against that individual based on sex." *Id.* As this Court recognized a decade ago, "discrimination against a transgender individual because of her gender-nonconformity is sex discrimination" because a "person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes." *Glenn v. Brumby*, 663 F.3d 1312, 1317, 1316 (11th Cir. 2011). By denying Drew Adams access to the restroom used by others boys, segregating him from the rest of the student body, and stigmatizing him, the School Board transgressed Title IX's broad mandate of sex equality and denied him the equal educational benefits and opportunities Congress sought to ensure.

The fact that Title IX is legislation enacted pursuant to the Constitution's Spending Clause is immaterial. Title IX, like many of our nation's most cherished

federal civil rights laws, is rooted both in Congress's express constitutional powers set out in Article I and in the Fourteenth Amendment's explicit grant of enforcement power, which was designed by its Framers to bring the power to enforce the Fourteenth Amendment's guarantees of liberty and equality "within the sweeping clause of the Constitution authorizing Congress to pass all laws necessary and proper." Cong. Globe, 39th Cong., 1st Sess. 2765-66 (1866). "[W]hatever legislation . . . tends to enforce submission to the prohibitions [of the Fourteenth Amendment], and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws . . . is brought within the domain of congressional power." *Ex Parte Virginia*, 100 U.S. 339, 345-46 (1880). The mere fact that Congress also relied on its power of the purse to mandate equality of educational opportunity by recipients of federal financial assistance does not give school boards a license to engage in "intentional conduct that violates the clear terms of the statute." *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 642 (1999).

The Spending Clause principles invoked by the School Board, which seek to ensure that "Spending Clause legislation does not undermine the status of the states as independent sovereigns in our federal system," *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 577 (2012), are at their lowest ebb when, as here, Congress is using its power to enforce the Fourteenth Amendment. "The constitutional

Amendments adopted in the aftermath of the Civil War fundamentally altered our country's federal system," *McDonald v. City of Chicago*, 561 U.S. 742, 754 (2010), adding to the Constitution new limits on state governments designed to secure "the civil rights and privileges of all citizens in all parts of the republic," *see Report of the Joint Committee on Reconstruction*, 39th Cong., 1st Sess., at xxi (1866), and keep "whatever sovereignty [a State] may have in harmony with a republican form of government and the Constitution of the country," Cong. Globe, 39th Cong., 1st Sess. 1088 (1866). Title IX does not impinge at all on the sovereign prerogatives of state and local governments but simply requires them to follow a rule of sex equality for all persons similar to that contained in the Constitution.

Acting to end sex discrimination by governmental and private entities that receive federal assistance to educate the American people, Congress mandated a broad rule of sex equality, extending to all persons. The School Board's policy denies transgender students the use of the restrooms used by their peers, stigmatizing and segregating them based on fear, prejudice, and sex stereotypes in violation of Title IX's broad rule of equality.

ARGUMENT

I. To Help Realize the Constitution's Promise of Equality for All, Title IX Broadly Prohibits Recipients of Federal Financial Assistance from Engaging in Gender Discrimination in Education Against Any Person.

Title IX, one of the nation's most broadly worded civil rights laws, prohibits all forms of sex discrimination in education by government and private entities that receive federal financial assistance, ensuring that the Constitution's promise of equality does not stop at the schoolhouse doors. Its text, subject to narrow exceptions not relevant here, 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).

Enacted in 1972, Title IX closed a gap in the Civil Rights Act of 1964, which permitted governmental and private actors to deny equal access to educational opportunity, a basic right that lies at the "very foundation of good citizenship," *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954), on the basis of sex. Title VII of the Civil Rights Act, 42 U.S.C. § 2000e-2, prohibits employers from discriminating "against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin," but no similar prohibition constrained the nation's public and private schools. Title VI, 42 U.S.C. § 2000d, guarantees that "[n]o per-

son in the United States shall, on the ground of race, color, or national origin," be subject to "discrimination under any program or activity receiving Federal financial assistance"—ensuring that federal funds were spent in accordance with the Equal Protection Clause's prohibition on racial discrimination, but leaving sex discrimination untouched.

Title VI was written with vital Fourteenth Amendment principles of equality in mind and was passed to "halt federal funding of entities that violate a prohibition of racial discrimination similar to that of the Constitution." *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 284 (1978). In enacting Title IX—one year after *Reed v. Reed*, 404 U.S. 71 (1971), held that a state law that discriminated against women denied them the equal protection of the laws—Congress followed this same approach, requiring public and private schools receiving federal aid to respect constitutional principles of sex equality. As the Supreme Court has observed, "Title IX was patterned after Title VI of the Civil Rights Act of 1964," *Cannon v. Univ. of Chi.*, 441 U.S. 677, 694 (1979), using language that "like that of the Equal Protection Clause" is "majestic in its sweep," *Bakke*, 438 U.S. at 284, "to avoid the use of federal resources to support discriminatory practices" and to "provide individual citizens effective protection against those practices." *Cannon*, 441 U.S. at 704; *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 286 (1998); *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 175 (2005) ("Title IX is a

broadly written general prohibition on discrimination," which "covers a wide range of intentional unequal treatment; by using such a broad term, Congress gave the statute a broad reach.").

Title IX, like Title VII, is "written in starkly broad terms," which outlaws "discrimination against individuals and not merely between groups . . . whenever sex is a but-for cause of the plaintiff's injuries." *Bostock*, 140 S. Ct. at 1753. It provides that "no person in the United States" may be denied "access to educational benefits and opportunities on the basis of gender." *Davis*, 526 U.S. at 650; *Cannon*, 441 U.S. at 691 (noting Title IX's "unmistakable focus on the benefitted class"); *Elwell v. Oklahoma ex rel. Bd. of Regents*, 693 F.3d 1303, 1311 (10th Cir. 2012) (Gorsuch, J.) ("Title IX does not limit its coverage at all, outlawing discrimination against any 'person,' broad language the Court has interpreted broadly." (citation omitted)). Because of its focus on protecting all persons, Title IX's broad language applies to men as well as women, prohibiting all "official action denying rights or opportunities based on sex," *Virginia*, 518 U.S. at 531, by governmental and private recipients of federal aid. In passing Title IX, as with Title VII and other federal civil rights statutes, "'Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.'" *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) (quoting *L.A. Dept. of Water & Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978)).

The broad sweep of Title IX, extending to all persons, plainly prohibits discrimination against transgender students such as Drew Adams. The Supreme Court's recent decision in *Bostock* effectively settles this. There, the Court held that Title VII's prohibition on sex discrimination in employment forbids transgender discrimination. "By discriminating against transgender persons, the employer unavoidably discriminates against persons with one sex identified at birth and another today." *Bostock*, 140 S. Ct. at 1746. As the *Bostock* Court recognized, "discrimination based on . . . transgender status necessarily entails discrimination based on sex; the first cannot happen without the second." *Id.* at 1747. In this respect, *Bostock* simply recognizes what this Court declared a decade ago: "discrimination against a transgender individual because of her gender-nonconformity is sex discrimination," because a "person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes." *Glenn*, 663 F.3d at 1317, 1316. *Bostock*'s holding applies equally to Title IX, which contains a broad prohibition on sex discrimination in education that is virtually indistinguishable from the text the Supreme Court interpreted in *Bostock*. *See Franklin v. Gwinnett Cty. Pub. Schs.,* 503 U.S. 60, 75 (1992) (holding that the "same rule" derived from Title VII precedent "should apply" under Title IX "when a teacher sexually harasses and abuses a student"); *Grimm v. Gloucester County School Bd.*, 972 F.3d 586, 616 (4th Cir. 2020) (holding that "*Bostock* . . .

guides our evaluation of claims under Title IX"). Thus, under settled law, transgender students like Drew Adams may invoke the promise of equal educational opportunity Title IX guarantees to all.

The School Board's policy here discriminated against Drew Adams on the basis of sex in violation of Title IX. The term "discrimination" covers "a wide range of intentional unequal treatment," *Jackson*, 544 U.S. at 175, that injures a person. *See Burlington N. & Santa Fe Railway Co. v. White,* 548 U.S. 53, 59 (2006) ("No one doubts that the term 'discriminate against' refers to distinctions or differences in treatment that injure protected individuals."); *Bostock*, 140 S. Ct. at 1753 (quoting *Burlington*'s definition).

By denying Drew Adams the right to use the bathrooms used by other boys and forcing him to use either the girl's bathroom or a single-stall gender neutral bathroom, the School District segregated him from "otherwise identical" students who identified as "[]male at birth," robbed him of his dignity, and stigmatized him. *See Bostock,* 140 S. Ct. at 1741; *Grimm*, 972 F.3d at 617-18 ("The stigma of being forced to use a separate restroom is likewise sufficient to constitute harm under Title IX, as it 'invite[s] more scrutiny and attention' from other students, 'very publicly brand[ing] all transgender students with a scarlet 'T'." (quoting *Doe v. Boyertown Area School Dist.*, 897 F.3d 518, 530 (3d Cir. 2018))); *id.* at 621 (Wynn, J., concurring) ("[T]he Board's policy produces a vicious and ineradicable stigma.

The result is to deeply and indelibly scar the most vulnerable among us—children who simply wish to be treated as equals at one of the most fraught developmental moments in their lives—by labeling them as unfit for equal participation in our society."); *Whitaker v. Kenosha Unified School Dist.*, 858 F.3d 1034, 1049-50 (7th Cir. 2017) ("A policy that requires an individual to use a bathroom that does not conform with his or her gender identity punishes that individual for his or her gender non-conformance, which in turn violates Title IX. The School District's policy also subjects Ash, as a transgender student, to different rules, sanctions, and treatment than non-transgender students, in violation of Title IX."); *Dodds v. U.S. Dep't of Educ.*, 845 F.3d 217, 221 (6th Cir. 2016) (refusing to stay injunction recognizing that "transgender students are entitled to access restrooms for their identified gender rather than their biological gender at birth").

The School Board insists that its policy is lawful because Title IX's implementing regulations "permit the School Board to separate bathrooms on the basis of biological sex." Appellant's En Banc Br. 24 (citing 34 C.F.R. § 106.33). That is not correct for the simple reason that the "term 'biological'" is "absent" from the regulations. *Whitaker*, 858 F.3d at 1047. The regulations permit school authorities to maintain separate restrooms for boys and girls, but it does not give school authorities the right to discriminate against transgender students in the provision of sex-separated restrooms by segregating transgender boys like Drew Adams from

their male peers and stigmatizing them. Nothing in Title IX or its implementing regulations authorizes shunting transgender students away from their peers and forcing them to use alternative restroom facilities designed for them and them alone. *See Grimm*, 972 F.3d at 618 ("[T]he implementing regulation cannot override the statutory prohibition against *discrimination* on the basis of sex. All it suggests is that the act of creating sex-separated restrooms in and of itself is not discriminatory—not that, in applying bathroom policies to students like Grimm, the Board may rely on its own discriminatory notions of what 'sex' means.").

II. Spending Clause Concerns Do Not Justify Reading Transgender Persons Out of Title IX.

The School Board claims that it cannot be held liable under Title IX without transgressing the Spending Clause because "[t]here is simply no clear reading of Title IX" that outlaws the School Board's policy of segregating transgender students from their peers. Appellant's En Banc Br. 27. As an initial matter, the School Board waived this argument by failing to present it to the district court. And in any event, it is meritless. Spending Clause concerns, which seek to safeguard "the status of the states as independent sovereigns in our federal system," *Nat'l Fed'n of Indep. Bus.*, 567 U.S. at 577, are at their lowest ebb when, as here, Congress acts to enforce the Fourteenth Amendment, which, by design, altered the federal-state balance and expanded the powers of Congress to ensure that states do not violate the Fourteenth Amendment's broad equality guarantee.

A. Spending Clause Concerns Are at Their Lowest Ebb When Congress Acts to Enforce the Fourteenth Amendment.

The Supreme Court's Spending Clause jurisprudence is rooted in the fact that the Spending Clause allows Congress "to implement federal policy it could not impose directly under its enumerated powers," *id.* at 578. Because of this breadth, "the Spending Clause power, if wielded without concern for the federal balance, has the potential to obliterate distinctions between national and local spheres of interest and power by permitting the Federal Government to set policy in the most sensitive areas of traditional state concern, areas which otherwise would lie outside its reach." *Davis*, 526 U.S. at 654-55 (Kennedy, J., dissenting). In run-of-the-mill Spending Clause cases, these concerns may have real force, but here they do not. Where, as here, Congress acts pursuant to both the Spending Clause *and* its Fourteenth Amendment enforcement power, Spending Clause concerns present no reason for narrowly reading a statute. After all, "Congress may, in determining what is 'appropriate legislation' for the purpose of enforcing the provisions of the Fourteenth Amendment, provide for private suits against States or state officials which are constitutionally impermissible in other contexts." *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976).

The Fourteenth Amendment "fundamentally altered our country's federal system," *McDonald*, 561 U.S. at 754, and "sanctioned intrusions by Congress, acting under the Civil War Amendments, into the judicial, executive, and legislative

spheres of autonomy previously reserved to the States." *Fitzpatrick*, 427 U.S. at 455. As the Supreme Court observed in one of its first decisions construing the Amendment, "[t]he prohibitions of the Fourteenth Amendment are directed to the States, and they are to a degree restrictions of State power. It is these which Congress is empowered to enforce, and to enforce against State action, however put forth, whether that action be executive, legislative, or judicial. Such enforcement is no invasion of State sovereignty." *Ex Parte Virginia*, 100 U.S. at 346; *see id.* ("[E]very addition of power to the general government involves a corresponding diminution of the governmental power of the States. It is carved out of them."). When Congress acts using its authority under Section 5 of the Fourteenth Amendment to require state and local governments to respect constitutional principles of equality, the federal courts have an unflagging duty to ensure its enactments are enforced as written, preventing state action that "serves to disrespect and subordinate" disfavored persons. *See Obergefell v. Hodges*, 576 U.S. 644, 675 (2015).

History shows that when the Framers of the Fourteenth Amendment drafted the Amendment's broad promise of equal protection of the laws, they wanted to ensure that Congress had the power necessary to make good on that promise. *See* Cong. Globe, 42nd Cong., 2nd Sess. 525 (1872) (noting that "the remedy for the violation" of the Fourteenth Amendment "was expressly not left to the courts"); *see also* Michael W. McConnell, *Institutions and Interpretation: A Critique of* City

of Boerne v. Flores, 111 Harv. L. Rev. 153, 182 (1997) (noting that the Fourteenth Amendment's Framers feared that "the judiciary would frustrate Reconstruction by a narrow interpretation of congressional power"). To do so, the Framers chose "language [that] authorized transformative new federal statutes to uproot all vestiges of unfreedom and inequality." Akhil Reed Amar, *America's Constitution: A Biography* 363 (2005). Introducing the Amendment in May 1866, Senator Jacob Howard explained that Section 5 brought the power to enforce the Constitution's guarantees "within the sweeping clause of the Constitution authorizing Congress to pass all laws necessary and proper." Cong. Globe, 39th Cong., 1st Sess. 2765-66 (1866). "Here is a direct affirmative delegation of power to Congress to carry out all the principles of these guarantees, a power not found in the Constitution." *Id.* at 2766. The enforcement provision, Howard said, conferred "authority to pass laws which are appropriate to the attainment of the great object of the amendment." *Id.*; *see id.* at 1124 ("When Congress was clothed with power to enforce . . . by appropriate legislation, it meant . . . that Congress should be the judge of what is necessary for the purpose of securing to [the freemen] those rights.").

Section 5 thus "enlarge[d] . . . the power of Congress," *Ex Parte Virginia*, 100 U.S. at 345, and "authoriz[ed] [it] to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment," *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966). As the Supreme

Court has long recognized, "[w]hen Congress acts pursuant to § 5, not only is it exercising legislative authority that is plenary within the terms of the constitutional grant, it is exercising that authority under one section of a constitutional Amendment whose other sections by their own terms embody limitations on state authority." *Fitzpatrick*, 427 U.S. at 456.

In short, Spending Clause concerns are at their lowest ebb when Congress acts to enforce the Fourteenth Amendment. Although the Supreme Court's cases have recognized that Congress relied on the Spending Clause in enacting Title IX, the Supreme Court has never held that that that was the *only* authority on which Congress relied. *See Franklin*, 503 U.S. at 75 n.8. Title IX is also grounded in the Fourteenth Amendment's Enforcement Clause, as the next Section demonstrates.

B. Congress Used Both Its Authority Under the Spending Clause and Section 5 of the Fourteenth Amendment in Enacting Title IX's Guarantee of Gender Equality for All Persons.

Title IX's sweeping guarantee of equality, which forbids sex discrimination by state-run entities that receive federal financial assistance, is an exercise of Congress's power to enforce the Fourteenth Amendment. "Congress, in using federal educational funds as the core of Title IX . . . use[d] its Spending Clause powers to reach private actors and its Fourteenth Amendment power to reach the States." *Doe v. Univ. of Ill.,* 138 F.3d 653, 659 (7th Cir. 1998), *vacated and remanded on other grounds*, 526 U.S. 1142 (1999), *reinstated on remand*, 200 F.3d 499 (7th Cir.

1999). Indeed, Congress has repeatedly used its Article I powers together with its authority under Section 5 of the Fourteenth Amendment when enacting the nation's landmark civil rights statutes.

For example, the prohibition on employment discrimination found in Title VII of the Civil Rights Act was initially enacted pursuant to the Commerce Clause, but subsequently applied to the states using Congress's power to enforce the Fourteenth Amendment. *See Fitzpatrick,* 427 U.S. at 445 (holding that Section 5 permitted Congress to abrogate the states' sovereign immunity and permit damages actions against state and local government employers under Title VII). Other federal statutes, such as the Equal Pay Act, "'follow[] the familiar pattern of . . . grounding prohibitions against private parties in the Commerce Clause, while reaching government conduct by the more direct route of the Fourteenth Amendment.'" *Doe*, 138 F.3d at 659 (quoting *EEOC v. Elrod*, 674 F.2d 601, 604 (7th Cir. 1982)); *see, e.g.*, *Ussery v. Louisiana*, 150 F.3d 431, 435-37 (5th Cir. 1998) (holding that Section 5 permitted abrogation of states' Eleventh Amendment immunity in suits under the Equal Pay Act); *Varner v. Ill. State Univ.*, 150 F.3d 706, 712-17 (7th Cir. 1998) (same); *Timmer v. Mich. Dep't of Commerce*, 104 F.3d 833, 837-42 (6th Cir. 1997) (same).

Title IX (as well as Title VI of the Civil Rights Act of 1964 on which it was modeled) follows this same basic pattern, using the Spending Clause together with

Section 5 of the Fourteenth Amendment to ensure that all recipients of federal financial assistance—whether government actors or not—respect fundamental principles of equality.

It does not matter that Congress did not explicitly invoke Section 5 in enacting Title IX, *see Nat'l Fed'n of Indep. Bus.*, 567 U.S. at 569-70; *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, 144 (1948), because "[s]ex discrimination by public schools is a subject within the legislative power under § 5 of the fourteenth amendment, and Congress need not catalog the grants of power under which it legislates," *Doe*, 138 F.3d at 678 (Easterbrook, J., respecting the denial of rehearing en banc). "[P]rotecting Americans against 'invidious discrimination of any sort, including that on the basis of sex,' is a central function of the federal government. Prohibiting 'arbitrary, discriminatory government conduct . . . is the very essence of the guarantee of 'equal protection of the laws' of the Fourteenth Amendment." *Id.* at 660 (citations omitted); *Franks v. Ky. Sch. for the Deaf*, 142 F.3d 360, 363 (6th Cir. 1998) ("Section 5 of the Fourteenth Amendment grants Congress the authority to enforce the Amendment's substantive provisions which proscribe, *inter alia*, gender discrimination in education. Since Title IX also proscribes gender discrimination in education, it follows that Congress had the authority, pursuant to Section 5, to make Title IX applicable to the states."); *Crawford v. Davis*, 109 F.3d 1281, 1283 (8th Cir. 1997) ("[W]e are unable to understand how a statute enacted

specifically to combat [gender] discrimination could fall outside the authority granted to Congress by § 5.").

Indeed, Congress modelled Title IX on Title VI, a statute which, as the Supreme Court has recognized, "enacted constitutional principles," *Bakke*, 438 U.S. at 285, by "halt[ing] federal funding of entities that violate a prohibition of racial discrimination similar to that of the Constitution." *Id.* at 284; *see Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 256-58 (2009) (discussing substantial overlap between Title IX and the Equal Protection Clause). Congress's decision to model Title IX on Title VI confirms Title IX's goal of ensuring that federally-funded public educational institutions respect the constitutional principle of equality contained in the Fourteenth Amendment.

Further, Congress abrogated state sovereign immunity in Title IX cases, using its Fourteenth Amendment authority to do so. The Equalization Act of 1986 provides that a "State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of . . . title IX of the Education Amendments of 1972 . . . or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance." 42 U.S.C. § 2000d-7(a)(1). Congress passed the Act in the wake of the Supreme Court's decision in *Atascadero State Hospital v. Scanlon*, 473 U.S. 234 (1985), which held that "when acting pursuant to § 5 of the Fourteenth Amend-

ment, Congress can abrogate the Eleventh Amendment without the States' consent," *id.* at 238, but concluded that the Rehabilitation Act of 1973—a statute that, like Title IX, prohibits discrimination by recipients of federal aid—"does not evince an unmistakable congressional purpose, pursuant to § 5 of the Fourteenth Amendment, to subject unconsenting States to the jurisdiction of the federal courts." *Id.* at 247. In response, Congress enacted a clear statement to abrogate the states' Eleventh Amendment immunity, using its Fourteenth Amendment enforcement authority to overcome state sovereign immunity in cases arising under Title IX as well as other similar statutes, *see* 131 Cong. Rec. 22346 (1985); 132 Cong. Rec. 28624 (1986); S. Rep. No. 388, 99th Cong., 2d Sess. 27 (1986); *see also Lane v. Pena*, 518 U.S. 187, 198 (1996) (describing the Equalization Act as "the sort of unequivocal waiver that our precedents demand").

III. The School Board's Fair Notice Argument Cannot Be Squared with the Supreme Court's Precedents Construing Title IX.

Consistent with Title IX's Fourteenth Amendment underpinnings, the Supreme Court's Title IX precedents have refused to constrict the statute's broad guarantee of equality, rejecting notice arguments similar to those pressed by the School Board here. The School Board's own arguments fare no better.

The School Board asks this Court to curb the reach of Title IX on the ground that the statute does not provide fair notice that it prohibits discrimination against transgender students in the provision of restrooms. But Congress chose to write

Title IX as an all-encompassing prohibition on discrimination rather than as a list of prohibited practices. As the Supreme Court has held, "Title IX is a broadly written general prohibition on discrimination," a term that "covers a wide range of intentional unequal treatment," followed by "specific, narrow exceptions to that broad prohibition." *Jackson*, 544 U.S. at 175. "Because Congress did not list *any* specific discriminatory practices when it wrote Title IX, its failure to mention one such practice does not tell us anything." *Id.* Indeed, the breadth of Title IX's proscription means that a school district cannot claim that it is being unfairly surprised when "the funding recipient engages in intentional conduct that violates the clear terms of the statute." *Davis*, 526 U.S. at 642; *Jackson*, 544 U.S. at 183. "[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).

In *Davis*, for example, the Supreme Court rejected a school board's claim that it could not be held liable for money damages by a student who was sexually harassed by another student while school authorities stood idly by. Given Title IX's sweeping prohibition on all forms of sex discrimination, the Court had little difficulty concluding that "recipients violate Title IX's plain terms when they remain deliberately indifferent to this form of misconduct." *Davis*, 526 U.S. at 643; *Jackson*, 544 U.S. at 174 ("Though the statute does not mention sexual

harassment, we have held that sexual harassment is intentional discrimination encompassed by Title IX's private right of action."). That is true even though that understanding of the statute had not been accepted by the courts until well after the passage of Title IX, *see Bostock*, 140 S. Ct. at 1752; *cf. Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986). Rather than following such subjective expectations, the Supreme Court applied the plain meaning of the text, observing that "[t]he statute makes clear that, whatever else it prohibits, students must not be denied access to educational benefits and opportunities on the basis of gender." *Davis*, 526 U.S. at 650.

Likewise, in *Jackson*, the Supreme Court rejected the argument that a school board could not be held liable for retaliating against a teacher who complained of sex discrimination by the school board, observing that "our cases . . . have consistently interpreted Title IX's private cause of action broadly to encompass diverse forms of intentional sex discrimination." *Jackson*, 544 U.S. at 183. It did not matter that Title IX did not specify retaliation as a proscribed form of discrimination, as Title VII of the Civil Rights Act does, or that the teacher had not been subject to adverse treatment because of his sex. Under the plain meaning of Title IX, "retaliation against individuals because they complain of sex discrimination is 'intentional conduct that violates the clear terms of the statute.'"

Id. at 183 (quoting *Davis*, 526 U.S. at 642); *id.* at 178 (observing that "the statute *itself* contains the necessary prohibition").

In short, Supreme Court precedent is clear: schools that accept federal financial assistance are on fair notice that their actions must comport with Title IX's sweeping guarantee of equality that protects all persons from sex-based discrimination. The question here, as in *Davis* and *Jackson*, is whether the Board's actions run afoul of Title IX's prohibition on discrimination. The Board's policy, which denies transgender students the use of the restrooms used by other students and stigmatizes them based on fear, prejudice, and sex stereotypes, cannot be squared with the promise of gender equality that Title IX promises to all students, including those, like Drew Adams, who are transgender.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

/s/ Brianne J. Gorod
Elizabeth B. Wydra
Brianne J. Gorod
David H. Gans
CONSTITUTIONAL
ACCOUNTABILITY CENTER
1200 18th Street NW, Suite 501
Washington, D.C. 20036
Tel.: (202) 296-6889
brianne@theusconstitution.org

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Fed. R. App. P. 29(d) because it contains 5,517 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

I further certify that the attached *amicus curiae* brief complies with the type-face requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6), because it has been prepared in a proportionally spaced typeface using Microsoft Word 2007 14-point Times New Roman font.

Executed this 23rd day of November, 2021.

/s/ Brianne J. Gorod
Brianne J. Gorod

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system on November 23, 2021.

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

Executed this 23rd day of November, 2021.

/s/ Brianne J. Gorod
Brianne J. Gorod