No. 24-60035

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

M.K., a minor by and through his father and next friend, Gregg Koepp,

Plaintiff-Appellant

v.

PEARL RIVER COUNTY SCHOOL DISTRICT; P.B., a minor by and through his parents; P.A., a minor by and through his parents; I.L., a minor by and through his parents; L.M., a minor by and through his parents; W.L., a minor by and through his parents; ALAN LUMPKIN, individually and as Superintendent; CHRIS PENTON, individually and as employee; AUSTIN ALEXANDER, individually and as employee; STEPHANIE MORRIS, individually and as employee; TRACEY CRENSHAW, individually and as employee; BLAKE RUTHERFORD, individually and as employee; JOHN DOES 1-10,

Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PLAINTIFF-APPELLANT

LISA BROWN
General Counsel

JESSICA WOLLAND
Attorney
U.S. Department of Education
Office of the General Counsel
400 Maryland Ave., S.W.
Washington, D.C. 20202-0001

KRISTEN CLARKE
Assistant Attorney General

SYDNEY A.R. FOSTER
JASON LEE
Attorneys
U.S. Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, D.C. 20044-4403
(202) 305-1915

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES: **PAGE**

CASES (continued): **PAGE**

CASES (continued): **PAGE**

CONSTITUTION:

STATUTES:

STATUTES (continued): **PAGE**

RULE:

REGULATIONS:

MISCELLANEOUS:

INTEREST OF THE UNITED STATES

The United States has a substantial interest in this appeal, which concerns Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq.*, and the scope of its prohibition on sex discrimination in education programs and activities operated by recipients of federal funding. The Department of Justice coordinates the implementation and enforcement of Title IX across federal executive agencies, Exec. Order No. 12,250, 3 C.F.R. 298 (1980 comp.); enforces Title IX administratively against recipients of its funding, *see* 20 U.S.C. 1682; 28 C.F.R. 54.605; and enforces the statute in federal court against recipients of funding from any agency, *see ibid.* Other federal agencies providing financial assistance for education programs or activities—most significantly, the Department of Education—likewise administratively enforce Title IX with respect to their funding recipients. *See* 20 U.S.C. 1682; *see also, e.g.*, 34 C.F.R. 106.81.

Additionally, Congress directed all agencies extending financial assistance to education programs and activities to issue regulations implementing the statute. *See* 20 U.S.C. 1682. The Department of Education recently released amendments to its Title IX regulations, which are scheduled to be published in the Federal Register on April 29, 2024, and which are scheduled to become effective August 1, 2024. *See* U.S. Dep't of Educ., *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance* 1

(unofficial version released on Apr. 19, 2024), https://perma.cc/U3UP-TWLN. The arguments made here are consistent with these regulations. *See id.* at 1211-1212, 1224-1228, 1237-1238, 1241-1242, 1522.

The United States also has a strong interest in combatting discrimination based on sexual orientation and gender identity. Consistent with this interest, the President issued an Executive Order recognizing the right of all people to be "treated with respect and dignity" and receive "equal treatment under the law" regardless of sexual orientation or gender identity. Exec. Order No. 13,988, § 1, 86 Fed. Reg. 7023 (Jan. 20, 2021). Under its delegated authority to coordinate federal agencies' implementation of Title IX, 28 C.F.R. 0.51, the Department of Justice's Civil Rights Division has notified agencies of its conclusion that Title IX prohibits "discrimination on the basis of gender identity and sexual orientation," Memorandum from Pamela S. Karlan to Federal Agency Civil Rights Directors and General Counsels 2 (Mar. 26, 2021), https://perma.cc/Y43R-M5RG.

The United States files this brief under Federal Rule of Appellate Procedure 29(a)(2).

STATEMENT OF THE ISSUE

The United States addresses the following issue:

Whether Title IX's prohibition against discrimination "on the basis of sex" encompasses discrimination on the basis of sexual orientation.

STATEMENT OF THE CASE

A. Statutory Background[1]

1. Title IX states 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). As the Supreme Court has emphasized, "to give [Title IX] the scope that its origins dictate," courts "must accord it a sweep as broad as its language." *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 521 (1982) (alteration in original) (quoting *United States v. Price*, 383 U.S. 787, 801 (1966)).

Under Title IX, a recipient of federal funding may be liable in a private damages action when it responds "with deliberate indifference to known acts of [sex-based] harassment in its programs or activities." *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 633 (1999). For such an action to lie, the harassment must be "so severe, pervasive, and objectively offensive that it denies its victims the equal access to education that Title IX is designed to protect." *Id.* at 652.

2. Courts frequently interpret Title IX's prohibition on sex discrimination consistently with a similar prohibition in Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* *See, e.g.*, *Franklin v. Gwinnett Cnty. Pub. Schs.*, 503 U.S.

[1] Pertinent statutes are reproduced in the addendum to this brief.

60, 75 (1992) (citing Title VII case law when analyzing Title IX). Title VII bars covered employers from "discriminat[ing] against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex." 42 U.S.C. 2000e-2(a)(1). In *Bostock v. Clayton County*, 590 U.S. 644 (2020), the Supreme Court explained that "Title VII's 'because of' test incorporates the simple and traditional standard of but-for causation." *Id.* at 656 (internal quotation marks and citation omitted).[2] Applying that but-for-causation standard, the Court concluded that "it is impossible" to discriminate against a person for being gay "without discriminating against that individual based on sex." *Id.* at 660. Accordingly, the Court held that discrimination based on sexual orientation constitutes impermissible sex discrimination under Title VII. *Id.* at 651-652.

[2] Title VII separately permits liability where sex is merely "a motivating factor for an[] employment practice," 42 U.S.C. 2000e-2(m), although plaintiffs satisfying only that more forgiving standard are entitled to more limited relief. *See* 42 U.S.C. 1981a(a)(1), 2000e-5(g). *Bostock* explained, however, that "nothing in [its] analysis depend[ed] on the motivating factor test"; instead, the Court "focus[ed]" on the "because of" language in the statute that also "afford[s] a viable . . . path to relief." 590 U.S. at 657.

B. Factual and Procedural Background[3]

1. M.K., a heterosexual boy, began suffering harassment shortly after starting sixth grade at Pearl River Central Middle School. ROA.345, 356.[4] Classmates "mocked" him for being "short" and bad at video games. ROA.349. They also repeatedly called him "gay" and "[g]ay [b]oy." ROA.349-350, 352. This harassment occurred in multiple classes, was perpetrated by multiple classmates, and was reported to multiple teachers. ROA.349-350. M.K. believed that those students called him "gay" because, "most of the time," he wore clothes with "bright colors." ROA.351 (citation omitted).

At some point, M.K. attempted to show his harassers "what gay is and that [he] [was] not gay." ROA.351 (citation omitted). When they called him "gay," M.K. would mimic what he believed was "gay" behavior by "blowing kisses." ROA.351 (citation omitted). This response, however, simply caused the students to "pick[] on [him] more." ROA.351 (citation omitted). After M.K. was suspended for an incident involving one of those students, M.K.'s parents decided to homeschool him. ROA.352-353.

---

[3] Because this appeal arises from a grant of summary judgment, these facts are recited in the light most favorable to M.K., who was the nonmovant below. *See, e.g.*, *Wallace v. Performance Contractors, Inc.*, 57 F.4th 209, 217 (5th Cir. 2023).

[4] "ROA.__" refers to the page numbers of the Record on Appeal.

2. M.K. filed suit under Title IX seeking damages against the Pearl River County School District. ROA.21-23. In his complaint, M.K. alleged that school officials "knew or should have known" that he was being subjected to harassment that violated "federal law," but that they "took [no] action to intervene and deter the . . . discriminatory violations." ROA.22. The district court granted the school district summary judgment. ROA.344-369.

The district court first noted that "M.K. does not claim to be gay, and in fact denied during his deposition that he is gay." ROA.356. Nonetheless, the court "proceed[ed] under the assumption that . . . 'harassment due to a victim's perceived homosexuality is sufficient to constitute' harassment on the basis of the victim's sexual orientation, 'regardless of whether the victim is in fact gay.'" ROA.356 (quoting ROA.326).

The district court concluded, however, that Title IX does not prohibit discrimination on the basis of sexual orientation. It rejected M.K.'s reliance on *Bostock*, declining to follow that decision because Title VII uses the phrase "because of," which requires but-for causation, while Title IX uses the phrase "on *the basis of*," which the court apparently interpreted as requiring *sole* or *primary* causation. ROA.359-360. The court further reasoned that, unlike Title VII, Title IX was enacted under the Spending Clause and assertedly includes no "clear

statement" putting federal-funding recipients on notice that the statute reaches sexual-orientation discrimination. ROA.362.

In the alternative, the district court granted the school district summary judgment on the ground that a reasonable jury could not find that the harassment was so severe, pervasive, and objectively offensive that it denied M.K. equal access to educational opportunities. ROA.363-367. M.K. timely appealed. ROA.370.

SUMMARY OF ARGUMENT

If it reaches the issue, this Court should hold that Title IX's prohibition against discrimination "on the basis of sex," 20 U.S.C. 1681(a), encompasses discrimination on the basis of sexual orientation. The Supreme Court concluded in *Bostock v. Clayton County*, 590 U.S. 644 (2020), that affording differential treatment based on sexual orientation "necessarily" involves the "appli[cation] [of] sex-based rules." *Id.* at 667. Consequently, the Court held that sexual-orientation discrimination violates Title VII's prohibition against discrimination "because of . . . sex," 42 U.S.C. 2000e-2(a)(1), on a "straightforward application of [the statute's] legal terms." *Bostock*, 590 U.S. at 662.

Bostock's reasoning applies here and makes clear that sexual-orientation discrimination constitutes impermissible sex discrimination under Title IX, just as it does under Title VII. That conclusion follows from the similar text in the two

statutes, which employ causation language that the Supreme Court and this Court have used interchangeably; precedent establishing that Title IX's "on the basis of" standard is no more stringent than Title VII's "because of" standard; courts' longstanding practice of relying on Title VII case law to interpret similar text in Title IX; and decisions of three other circuits applying *Bostock*'s reasoning to Title IX. The district court's contrary interpretation of Title IX was based on an errant view of the statute as requiring sole or primary causation, and on a failure to recognize that the statute provides sufficient notice under the Spending Clause that it reaches intentional sexual-orientation discrimination.

Alternatively, this Court can reach the same conclusion—that the sexual-orientation discrimination at issue here is sex discrimination under Title IX—by holding that it amounts to discrimination based on a failure to conform with gender stereotypes. It is well established that discrimination based on gender-nonconforming behavior is "sex" discrimination prohibited by both Title IX and Title VII.

ARGUMENT

Title IX prohibits discrimination on the basis of sexual orientation.

A. *Bostock*'s reasoning establishes that Title IX, like Title VII, bars discrimination on the basis of sexual orientation.

The Supreme Court's reasoning in *Bostock v. Clayton County*, 590 U.S. 644 (2020), applies with equal force to Title IX. Under that reasoning, Title IX's

prohibition against discrimination "on the basis of sex," 20 U.S.C. 1681(a), encompasses discrimination based on sexual orientation.

1. *Bostock* held that Title VII's prohibition against discrimination because of sex encompasses discrimination based on sexual orientation.

In *Bostock*, the Supreme Court held that an employer discriminates "because of . . . sex," 42 U.S.C. 2000e-2(a)(1), within the meaning of Title VII if it discriminates based on sexual orientation or transgender status. 590 U.S. at 651-652, 669. In reaching this conclusion, the Court began by explaining that Title VII's "because of" language "incorporates the 'simple' and 'traditional' standard of but-for causation." *Id.* at 656 (quoting *University of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 350 (2013)). Under this standard, sex is a but-for cause of discrimination "if changing the employee's sex would have yielded a different choice by the employer." *Id.* at 659-660.

The Court explained that when an employer discriminates against gay or transgender employees, "sex is necessarily a but-for cause" of that conduct because "it is impossible" to discriminate against someone for being gay or transgender "without discriminating against that individual based on sex." *Bostock*, 590 U.S. at 660-661 (emphasis omitted). This is true even if one assumes that the word "sex" in Title VII "refer[s] only to biological distinctions between male and female." *Id.* at 655. For example, if an employer "fires [a] male employee for no reason other

than the fact he is attracted to men, the employer discriminates against him for traits or actions it tolerates in his female colleague." *Id.* at 660. In other words, the employer would not have taken such action if the employee's sex had been different—if the employee had been a *woman* attracted to men instead of a *man* attracted to men. Accordingly, because discrimination based on sexual orientation "requires an employer to intentionally treat individual employees differently because of their sex," this conduct violates Title VII. *Id.* at 661.

2. *Bostock*'s analysis applies equally to Title IX and establishes that it, too, bars discrimination based on sexual orientation.

Bostock's reasoning is fully applicable to Title IX, which proscribes discrimination "on the basis of sex" in covered education programs and activities. 20 U.S.C. 1681(a). Even assuming, as was the case in *Bostock*, that the word "sex" in Title IX "refer[s] only to biological distinctions between male and female," 590 U.S. at 655, the statute's prohibition on sex discrimination necessarily encompasses discrimination because of sexual orientation.

Bostock's reasoning applies to Title IX because Title IX's causal standard is no more stringent than but-for causation. This conclusion follows from the fact that the statute's "on the basis of sex" language, 20 U.S.C. 1681(a), closely resembles Title VII's "because of . . . sex" language, 42 U.S.C. 2000e-2(a)(1). Indeed, this Court has emphasized "Title IX's similarity to Title VII," explaining that, "[a]lthough phrased differently, both Title VII and Title IX protect individuals

from . . . discrimination *on the basis of sex*." *Lakoski v. James*, 66 F.3d 751, 756 & n.3 (5th Cir. 1995) (emphasis added; footnote omitted) (addressing employment-discrimination claims asserted under Title IX). Other decisions of this Court have likewise used the phrase "on the basis of" to paraphrase Title VII's "because of" language. *See, e.g.*, *Braidwood Mgmt., Inc. v. EEOC*, 70 F.4th 914, 918 (5th Cir. 2023) (explaining *Bostock*'s holding that Title VII bars discrimination based on sexual orientation because it is "discrimination . . . 'on the basis of sex'" (citation omitted)); *see also id.* at 940 n.59.

This Court's decisions are in accord with those of the Supreme Court, which has long used the phrase "on the basis of" interchangeably with Title VII's "because of" language when discussing Title VII's causation standard. *See, e.g.*, *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986) (explaining that, under Title VII, "when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex" (alteration in original)); *Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702, 715 (1978) (holding that the city "discriminate[d] on the basis of sex" in violation of Title VII). Indeed, *Bostock* itself used the term "on the basis of" when describing Title VII's "because of" standard throughout the opinion. *See, e.g.*, 590 U.S. at 650 ("[I]n Title VII, Congress outlawed discrimination in the workplace on the basis of . . . sex."); *id.* at 664 ("An employer's intentional discrimination on the

basis of sex is no more permissible when it is prompted by some further intention (or motivation)."); *id.* at 680 ("[E]mployers are prohibited from firing employees on the basis of homosexuality or transgender status."); *see also Doe v. Snyder*, 28 F.4th 103, 114 (9th Cir. 2022) (observing that *Bostock* used the phrases "because of sex" and "on the basis of sex" "interchangeably").

Given Title IX's close textual similarity to Title VII, this Court has recognized that but-for causation suffices to state a claim under Title IX. *See Taylor-Travis v. Jackson State Univ.*, 984 F.3d 1107, 1119 (5th Cir. 2021) (explaining that, under circuit precedent, "the causation standard for Title IX [retaliation] claims" under 20 U.S.C. 1681(a) "should be the same as the causation standard for Title VII claims"); *Trudeau v. University of N. Tex.*, 861 F. App'x 604, 608 (5th Cir. 2021) (applying but-for causation in Title IX retaliation case); *see also Lakoski*, 66 F.3d at 757 (concluding that "the prohibitions of discrimination on the basis of sex [in] Title IX and Title VII are the same").[5] Other courts have done so, as well. *See, e.g.*, *Radwan v. Manuel*, 55 F.4th 101,

[5] This Court has recited an even more forgiving causation standard—the motivating-factor standard—in Title IX cases brought by students alleging they were subjected to discriminatory discipline. *See, e.g.*, *Doe v. William Marsh Rice Univ.*, 67 F.4th 702, 709 (5th Cir. 2023) (explaining that Title IX prohibits disciplinary action "where gender is a motivating factor in [a] decision" to impose sanctions); *see also Bostock*, 590 U.S. at 657 (explaining that sex can be a "motivating factor" within the meaning of Title VII "even if sex wasn't a but-for cause of the" challenged action (emphasis omitted)); note 2, *supra*.

130-132 (2d Cir. 2022); *Sheppard v. Visitors of Va. State Univ.*, 993 F.3d 230, 236-237 (4th Cir. 2021); *Doe v. Columbia Coll. Chi.*, 933 F.3d 849, 857 (7th Cir. 2019).

It thus makes perfect sense to look to *Bostock* when construing Title IX's prohibition on discrimination "on the basis of sex"—an approach that accords with courts' well-established practice of relying on Title VII case law when interpreting similar text in Title IX. *See, e.g.*, *Franklin v. Gwinnett Cnty. Pub. Schs.*, 503 U.S. 60, 75 (1992) (citing *Meritor Savings Bank*, a Title VII case, when analyzing a Title IX claim); *Carder v. Continental Airlines, Inc.*, 636 F.3d 172, 180 (5th Cir. 2011) ("Based on its legislative history, this court has interpreted Title IX as being intended to prohibit a wide spectrum of discrimination . . . in the same manner as Title VII."); *see also, e.g.*, *Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518, 534 (3d Cir. 2018); *Gossett v. Oklahoma*, 245 F.3d 1172, 1176 (10th Cir. 2001).

Under *Bostock*'s reasoning, sexual-orientation discrimination "inescapably" entails sex discrimination under Title IX, just as it does under Title VII. 590 U.S. at 661. Indeed, education-based analogues of the employment-based examples *Bostock* used to illustrate its reasoning make this clear. Just as it constitutes sex discrimination to fire a gay employee "for no reason other than the fact he is attracted to men," *id.* at 660, so too is it sex discrimination for a university to deny a gay student a scholarship because he is attracted to men. In both situations, the

affected individual has been "intentionally single[d] out . . . based in part on [his] sex" because such treatment would not have occurred if he had been a *woman* attracted to men. *Ibid.* Therefore, "sex is a but-for cause of" the discrimination suffered. *Ibid.* *Bostock*'s conclusion that discrimination based on sexual orientation "necessarily entails discrimination based on sex" carries equal force in the Title IX context. *Id.* at 669.[6]

Other courts of appeals have agreed that *Bostock*'s analysis fully applies in the Title IX context. Just last year, the Ninth Circuit considered whether Title IX proscribes sexual-orientation discrimination, and relying on *Bostock*, the court confirmed that "discrimination on the basis of sexual orientation is a form of sex-based discrimination under Title IX." *Grabowski v. Arizona Bd. of Regents*, 69 F.4th 1110, 1116-1117 (9th Cir. 2023). The court noted *Bostock*'s conclusion that

[6] The fact that other students harassed M.K. because they *perceived* him as gay, even though he is not in fact gay (*see* ROA.351, 356), does not alter this analysis because "discrimination on the basis of perceived sexual orientation is actionable under Title IX," *Grabowski v. Arizona Bd. of Regents*, 69 F.4th 1110, 1118 (9th Cir. 2023). Such conduct subjects a person to differential treatment based on a purported "attribute[]" that the discriminator "would [have] tolerate[d] in an individual of another sex." *Bostock*, 590 U.S. at 658. And this Court has adopted a similar approach under Title VII, explaining that because the applicable analysis "focus[es] on the alleged harasser's subjective perception of the victim," an employer's "wrong or ill-informed assumptions about its employee may form the basis of a discrimination claim." *EEOC v. Boh Bros. Constr. Co.*, 731 F.3d 444, 456 (5th Cir. 2013) (en banc); *see also EEOC v. WC&M Enters., Inc.*, 496 F.3d 393, 401 (5th Cir. 2007).

"discriminating against someone because of sexual orientation . . . occurs 'in part because of sex'" under Title VII. *Id.* at 1116-1117 (quoting *Bostock*, 590 U.S. at 662). And given the Supreme Court's practice of "look[ing] to its Title VII interpretations of discrimination in illuminating Title IX," the Ninth Circuit concluded that "the same result [from *Bostock*] applies to Title IX." *Id.* at 1116 (citation omitted); *see also Snyder*, 28 F.4th at 113-114 (holding that *Bostock* is not limited to the Title VII context and explaining that the court "construe[s] Title IX's protections consistently with those of Title VII").

The Fourth and Seventh Circuits similarly applied *Bostock*'s reasoning in concluding that discrimination based on transgender status contravenes Title IX's prohibition on sex discrimination. *See Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 616 (4th Cir.) (finding "little difficulty" in concluding that, under *Bostock*, a school policy that discriminates against transgender students "discriminate[s] against [those students] 'on the basis of sex'"), *reh'g en banc denied*, 976 F.3d 399 (4th Cir. 2020), *cert. denied*, 141 S. Ct. 2878 (2021); *A.C. v. Metropolitan Sch. Dist. of Martinsville*, 75 F.4th 760, 769 (7th Cir. 2023) ("Applying *Bostock*'s reasoning to Title IX, we have no trouble concluding that discrimination against transgender persons is sex discrimination for Title IX purposes, just as it is for Title VII purposes."), *cert. denied*, 144 S. Ct. 683 (2024). These decisions demonstrate that sexual-orientation discrimination violates Title

IX for the same, straightforward reasons the Supreme Court identified in *Bostock* when interpreting Title VII.

The Eleventh Circuit's opinion in *Adams v. School Board of St. Johns County*, 57 F.4th 791 (11th Cir. 2022) (en banc), is not to the contrary. Although *Adams* rejected a Title IX claim by a transgender student seeking to use restrooms that aligned with his gender identity, *id.* at 798, the decision was not premised on any conclusion that *Bostock*'s reasoning is inapplicable to Title IX. Rather, the Eleventh Circuit found the school's policy permissible in light of what it termed "statutory and regulatory carve-outs" permitting schools to provide sex-segregated restrooms and locker rooms, *id.* at 811-815—none of which is relevant here to the question of whether Title IX prohibits sexual-orientation discrimination.

B. The district court's contrary conclusion is premised on mistaken legal analysis.

The district court offered two reasons for finding Title IX inapplicable to sexual-orientation discrimination. Both reasons rest on legally flawed premises and should be rejected.

1. Title IX's causation standard is not stricter than Title VII's.

First, the district court pointed out that the requirement of but-for causation in "Title VII's use of the phrase 'because of' formed a key component of *Bostock*'s reasoning that sexual-orientation discrimination necessarily entails consideration of sex." ROA.359. The court then seemed to conclude that Title IX's use of the

phrase "on the basis of sex" requires a closer causal relationship than that required under Title VII. Specifically, the court appeared to hold that "the use of the []definite article . . . 'the'" in the phrase "on the basis of sex" requires that sex have been a *sole* or *primary* cause of alleged discrimination under Title IX. ROA.359 (emphasis omitted) (quoting 20 U.S.C. 1681(a)); *see also* ROA.359 (concluding that "the student's sex must be *the* basis of Title IX harassment"). Based on its belief that Title VII and Title IX employ different causal standards, the court determined that *Bostock*'s "reasoning that sexual-orientation discrimination entails sex discrimination . . . cannot apply" under Title IX. ROA.359.

The district court misapprehended Title IX's causation standard. Indeed, this Court has already rejected the contention that "a sole causation standard" governs Title IX retaliation claims, which are brought under the same statutory language at issue here. *Taylor-Travis*, 984 F.3d at 1119. Moreover, the Supreme Court has explained that "but-for causality has not been restricted to statutes using the term 'because of.'" *Burrage v. United States*, 571 U.S. 204, 213 (2014). Rather, similar phrases like "based on" and "by reason of" can also "indicate[] a but-for causal relationship." *Ibid.* (citations omitted). As discussed above, the phrase "on the basis of" is yet another formulation the Supreme Court and this Court have used when describing but-for causation, despite the phrase's use of the definite article "the." *See* pp. 10-12, *supra*. Consistent with that usage, this Court

and others have recognized that but-for causation suffices to state a claim under Title IX. *See* pp. 12-13 & note 5, *supra*. The district court thus erred in distinguishing *Bostock* on the ground that Title IX's "on the basis of" language requires a tighter causal connection than Title VII's "because of" language.

2. Title IX provides adequate notice for Spending Clause purposes that it proscribes discrimination based on sexual orientation.

The district court also was wrong to conclude that, under the Spending Clause, Title IX provides inadequate notice that recipients of federal funding may be liable in damages for sexual-orientation discrimination.

The Spending Clause grants Congress "broad power . . . to set the terms on which it disburses federal funds." *Cummings v. Premier Rehab Keller, P.L.L.C.*, 596 U.S. 212, 216 (2022). Specifically, the Clause vests Congress with the authority to "pay the Debts and provide for the common Defence and general Welfare of the United States." U.S. Const. Art. I, § 8, Cl. 1. Legislation enacted pursuant to this authority "is much in the nature of a contract: in return for federal funds, the [recipients] agree to comply with federally imposed conditions." *Cummings*, 596 U.S. at 216 (alteration in original) (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)). Thus, to ensure recipients have "adequate notice" that, by accepting federal funds, they may be liable for damages when engaging in certain prohibited conduct, the Supreme Court has required that

"Congress speak with a clear voice" when imposing such conditions. *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 640 (1999) (quoting *Pennhurst*, 451 U.S. at 17).

Congress speaks with a sufficiently clear voice when a statute unambiguously prohibits certain conduct, even if the covered conduct can take different forms. As the Supreme Court has emphasized, the Spending Clause does not require that every potential violation of a statute be "specifically identified and proscribed in advance." *Bennett v. Kentucky Dep't of Educ.*, 470 U.S. 656, 666 (1985). To the contrary, where "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); *see also id.* at 1307 (explaining *Pennhurst*'s conclusion that adequate notice was lacking when a law "was unclear as to whether the states incurred *any obligations at all* by accepting federal funds"; and holding, by contrast, that the antidiscrimination statute under consideration provided adequate notice because it made "clear that states incur an obligation when they accept federal funds, even if the method for compliance is left to the states" (emphasis added)).

Here, the district court concluded that, for Spending Clause purposes, Title IX lacks "a clear statement" that sexual-orientation discrimination is prohibited under the statute. ROA.361 (emphasis omitted). The court encapsulated its

reasoning in a single sentence: "The statute's language exclusively discusses discrimination on the basis of sex, and sex is a different concept from sexual orientation." ROA.362. That analysis is flawed.

Title IX provides adequate notice under the Spending Clause here by making clear that all forms of intentional sex discrimination are impermissible in covered education programs and activities in the absence of an applicable statutory exception. Under the statute, funding recipients may not discriminate "on the basis of sex" in "any education program or activity receiving Federal financial assistance." 20 U.S.C. 1681(a); *see also ibid.* (listing certain exceptions not relevant here). Given this broad proscription, the Supreme Court has rejected objections based on the Spending Clause to damages liability "throughout its Title IX jurisprudence" where the "funding recipient's conduct constituted an intentional violation of Title IX." *Hall v. Millersville Univ.*, 22 F.4th 397, 404 (3d Cir. 2022). As the Supreme Court has "[s]imply put" it, "*Pennhurst* does not bar a private damages action under Title IX where the funding recipient engages in intentional conduct that violates the clear terms of the statute." *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 183 (2005) (citation omitted).

For example, the Supreme Court held in *Jackson* that the Spending Clause posed no obstacle to damages liability under Title IX's prohibition against discrimination "on the basis of sex," 20 U.S.C. 1681(a), where funding recipients

retaliated because of complaints about sex discrimination. *Jackson*, 544 U.S. at 181-184. *Jackson* concluded that recipients had adequate notice because, although Title IX does not specifically proscribe retaliation, the Court has "interpreted Title IX's private cause of action broadly to encompass diverse forms of intentional sex discrimination," and retaliation is "always—by definition—intentional." *Id.* at 183. The Supreme Court similarly rejected Spending Clause arguments in the context of Title IX claims that recipients had responded with deliberate indifference to known acts of student-on-student sexual harassment, even though the statute does not specifically mention that form of discrimination, either. *See Davis*, 526 U.S. at 640-653. The Court again reasoned that such conduct by a recipient can constitute "an intentional violation of Title IX," and thus the statute provides sufficient notice for Spending Clause purposes. *Id.* at 643, 650; *see also Jackson*, 544 U.S. at 182 (discussing *Davis*).

Likewise, funding recipients have sufficient notice that Title IX prohibits intentional discrimination on the basis of sexual orientation because, as *Bostock* explained when analyzing Title VII's similar language, such conduct constitutes intentional action that violates the statute's clear prohibition on sex discrimination. Even assuming, as the district court did (ROA.362), that the term "sex" in Title IX refers only to a person's sex assigned at birth, and that sexual orientation is a "distinct concept[] from sex," intentional discrimination based on sexual

orientation contravenes Title IX because it "intentionally penalizes" a person for "traits" that would have been "tolerate[d]" if the person's sex had been different. *Bostock*, 590 U.S. at 655, 660, 669; *see also id.* at 661 (noting that an employer that discriminates based on sexual orientation "inescapably *intends* to rely on sex in its decisionmaking"). This interpretation of the statute follows from a "straightforward application of legal terms with plain and settled meanings," which shows that intentional discrimination based on sexual orientation is necessarily discrimination based on sex under Title IX's "express terms." *Id.* at 653, 662.

The district court thus erred in its analysis under the Spending Clause because this interpretation of Title IX is one that funding recipients would have been "[]able to ascertain." *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006) (citation omitted); *see also Grimm*, 972 F.3d at 619 n.18 (rejecting a Spending Clause argument under Title IX because "*Bostock* forecloses that 'on the basis of sex' is ambiguous as to discrimination against transgender persons"); *Students & Parents for Priv. v. United States Dep't of Educ.*, No. 16-cv-4945, 2016 WL 6134121, at *20 (N.D. Ill. Oct. 18, 2016) (finding no likelihood of success on Spending Clause argument in suit challenging the Department of Education's interpretation of Title IX as barring discrimination based on gender

identity), *report and recommendation adopted*, 2017 WL 6629520 (N.D. Ill. Dec. 29, 2017).[7]

C. Alternatively, the sexual-orientation discrimination at issue here is sex discrimination under Title IX because it is based on the failure to conform with gender stereotypes.

Title IX also bars the sexual-orientation discrimination at issue here because it amounts to discrimination based on a failure to conform to gender stereotypes. The district court did not address this alternative basis for concluding that M.K.'s Title IX claim implicates the statute's prohibition against discrimination on the basis of sex, but this Court may resolve the legal question on this basis alone.

In *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), a plurality of the Supreme Court held that an employer that discriminates based on "sex stereotyp[es]"—for example, "a belief that a woman cannot be aggressive, or that she must not be"—discriminates "on the basis of gender," in violation of Title VII. *Id.* at 250. Explaining that Congress enacted the statute to "strike at the entire spectrum of disparate treatment of men and women resulting from sex

---

[7] The Eleventh Circuit's decision in *Adams* is not to the contrary. As explained, *Adams* held that Title IX does not require schools to grant transgender students access to bathrooms that align with their gender identities, reasoning in part that reading Title IX as the plaintiff did would be permissible under the Spending Clause only if "'sex' unambiguously meant something other than biological sex" under Section 1681 and other provisions governing sex-separated facilities. 57 F.4th at 816. As explained above (at 10-14), however, Title IX's text clearly reaches sexual-orientation discrimination even if the Court assumes that "sex" means sex assigned at birth.

stereotypes," the plurality held that Title VII prevents employers from "insisting that [employees] match[] the stereotype associated with their" sex. *Id.* at 251 (citation omitted). Similarly, *Bostock* explained that Title VII bars discrimination against a female employee based on the belief that she is "insufficiently feminine," just as it does for a male employee seen as "insufficiently masculine." 590 U.S. at 659. And this Court, sitting en banc, has "recognized that a plaintiff can satisfy Title VII's because-of-sex requirement with evidence of a plaintiff's perceived failure to conform to traditional gender stereotypes." *EEOC v. Boh Bros. Constr. Co.*, 731 F.3d 444, 454-455 (5th Cir. 2013) (en banc); *see also id.* at 457 (finding sufficient evidence of sex-based harassment where an employee was subjected to "sex-based epithets" (including "fa—ot"), "tireless[]" taunts, and other denigrating behavior based on the perception that he was "not a manly-enough man").

Relying on this rationale, courts have held that discrimination based on sexual orientation represents impermissible gender-stereotyping under Title VII because it is "almost invariably rooted in stereotypes about men and women"—specifically, that "'real' men should date women, and not other men." *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 119-122 (2d Cir. 2018) (en banc) (citation omitted), *aff'd sub nom. Bostock*, 590 U.S. 644; *see also Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339, 346 (7th Cir. 2017) (en banc) (explaining that because

heterosexuality generally is viewed "as the norm," being gay can represent "the ultimate case[s] of failure to conform to [gender] stereotype[s]").

The "lens of gender stereotyping" thus provides an additional basis for concluding that the discrimination alleged here "is a subset of sex discrimination" under Title IX. *Zarda*, 883 F.3d at 119; *see also Hively*, 853 F.3d at 346 (concluding that "the line between a gender nonconformity claim and one based on sexual orientation . . . does not exist at all"). As discussed, courts frequently look to Title VII authority when interpreting Title IX, and that approach is particularly appropriate when evaluating whether actions should be classified as based on "sex." *See* p. 13, *supra*.

In accordance with this authority, multiple courts of appeals have found gender-nonconformity claims to be viable under Title IX, and two of those courts have concluded that discrimination based on sexual orientation or transgender status is actionable under a gender-nonconformity rationale. *See Grabowski*, 69 F.4th at 1117 (perceived sexual orientation); *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1049 (7th Cir. 2017) (transgender status), *cert. dismissed*, 583 U.S. 1165 (2018); *see also Wolfe v. Fayetteville, Ark. Sch. Dist.*, 648 F.3d 860, 867 (8th Cir. 2011). This Court has recognized the related principle that schools may not provide female students unequal athletic opportunities based on "paternalism and stereotypical assumptions about their

interests and abilities." *Pederson v. Louisiana State Univ.*, 213 F.3d 858, 880 (5th Cir. 2000). This Court should therefore hold that Title IX reaches the sexual-orientation discrimination at issue here because it amounts to discrimination based on a failure to conform to gender stereotypes.

CONCLUSION

For the foregoing reasons, this Court should hold that Title IX prohibits discrimination on the basis of sexual orientation.

Respectfully submitted,

LISA BROWN
General Counsel

JESSICA WOLLAND
Attorney
U.S. Department of Education
Office of the General Counsel
400 Maryland Ave., S.W.
Washington, D.C. 20202-0001

KRISTEN CLARKE
Assistant Attorney General

s/ Jason Lee
SYDNEY A.R. FOSTER
JASON LEE
Attorneys
U.S. Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, D.C. 20044-4403
(202) 305-1915

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7)(B)(i) because it contains 5985 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f). This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5) and (6) because it was prepared in Times New Roman 14-point font using Microsoft Word for Microsoft 365.

s/ Jason Lee
JASON LEE
Attorney

Date: April 22, 2024

ADDENDUM

ADDENDUM: TABLE OF CONTENTS

PAGE

20 U.S.C. 1681. Sex.

(a) Prohibition against discrimination; exceptions

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, except that:

(1) Classes of educational institutions subject to prohibition

in regard to admissions to educational institutions, this section shall apply only to institutions of vocational education, professional education, and graduate higher education, and to public institutions of undergraduate higher education;

(2) Educational institutions commencing planned change in admissions

in regard to admissions to educational institutions, this section shall not apply

(A) for one year from June 23, 1972, nor for six years after June 23, 1972, in the case of an educational institution which has begun the process of changing from being an institution which admits only students of one sex to being an institution which admits students of both sexes, but only if it is carrying out a plan for such a change which is approved by the Secretary of Education or

(B) for seven years from the date an educational institution begins the process of changing from being an institution which admits only students of only one sex to being an institution which admits students of both sexes, but only if it is carrying out a plan for such a change which is approved by the Secretary of Education, whichever is the later;

(3) Educational institutions of religious organizations with contrary religious tenets

this section shall not apply to an educational institution which is controlled by a religious organization if the application of this subsection would not be consistent with the religious tenets of such organization;

(4) Educational institutions training individuals for military services or merchant marine

this section shall not apply to an educational institution whose primary purpose is the training of individuals for the military services of the United States, or the merchant marine;

(5) Public educational institutions with traditional and continuing admissions policy

in regard to admissions this section shall not apply to any public institution of undergraduate higher education which is an institution that traditionally and continually from its establishment has had a policy of admitting only students of one sex;

(6) Social fraternities or sororities; voluntary youth service organizations

this section shall not apply to membership practices—

> (A) of a social fraternity or social sorority which is exempt from taxation under section 501(a) of Title 26, the active membership of which consists primarily of students in attendance at an institution of higher education, or
>
> (B) of the Young Men's Christian Association, Young Women's Christian Association, Girl Scouts, Boy Scouts, Camp Fire Girls, and voluntary youth service organizations which are so exempt, the membership of which has traditionally been limited to persons of one sex and principally to persons of less than nineteen years of age;

(7) Boy or Girl conferences

this section shall not apply to—

> (A) any program or activity of the American Legion undertaken in connection with the organization or operation of any Boys State conference, Boys Nation conference, Girls State conference, or Girls Nation conference; or
>
> (B) any program or activity of any secondary school or educational institution specifically for—
>
> > (i) the promotion of any Boys State conference, Boys Nation conference, Girls State conference, or Girls Nation conference; or
> >
> > (ii) the selection of students to attend any such conference;

(8) Father-son or mother-daughter activities at educational institutions

this section shall not preclude father-son or mother-daughter activities at an educational institution, but if such activities are provided for students of one sex, opportunities for reasonably comparable activities shall be provided for students of the other sex; and

(9) Institution of higher education scholarship awards in "beauty" pageants

this section shall not apply with respect to any scholarship or other financial assistance awarded by an institution of higher education to any individual because such individual has received such award in any pageant in which the attainment of such award is based upon a combination of factors related to the personal appearance, poise, and talent of such individual and in which participation is limited to individuals of one sex only, so long as such pageant is in compliance with other nondiscrimination provisions of Federal law.

. . . .

42 U.S.C. 2000e-2. Unlawful employment practices.

(a) Employer practices

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate 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; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

. . . .