No. 18-13592

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

DREW ADAMS,
a minor, by and through his next friend and mother, Erica Adams Kasper,
Plaintiff-Appellee

v.

SCHOOL BOARD OF ST. JOHNS COUNTY, FLORIDA,
Defendant-Appellant

TIM FORSON, et al.,
Defendants

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

EN BANC BRIEF OF *AMICI CURIAE* THE STATES OF TENNESSEE, ARIZONA, ARKANSAS, GEORGIA, INDIANA, KANSAS, KENTUCKY, LOUISIANA, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, OHIO, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, TEXAS, AND WEST VIRGINIA IN SUPPORT OF DEFENDANT-APPELLANT

HERBERT H. SLATERY III
Attorney General and Reporter
of the State of Tennessee

ANDRÉE S. BLUMSTEIN
Solicitor General

SARAH K. CAMPBELL
Associate Solicitor General
Counsel of Record

CLARK L. HILDABRAND
Assistant Solicitor General

P.O. Box 20207
Nashville, TN 37202
(615) 532-6026
Sarah.Campbell@ag.tn.gov

Additional Counsel Listed in Signature Block

CERTIFICATE OF INTERESTED PERSONS

Pursuant to Eleventh Circuit Rules 26.1-1, 28-1, and 29-2, *Amici* certify that the Certificate of Interested Persons filed by Defendant-Appellant on August 4, 2021, is complete with the following exceptions:

1. Blumstein, Andrée S. – Counsel for *Amicus Curiae* the State of Tennessee;
2. Brnovich, Mark – Counsel for *Amicus Curiae* the State of Arizona;
3. Bursch, John J. – Counsel for *Amici Curiae* Miriam Grossman, Michael Laidlaw, Quentin Van Meter, and Andre Van Mol;
4. Cameron, Daniel – Counsel for *Amicus Curiae* the Commonwealth of Kentucky;
5. Campbell, Sarah K. – Counsel for *Amicus Curiae* the State of Tennessee;
6. Carr, Christopher M. – Counsel for *Amicus Curiae* the State of Georgia;
7. Commonwealth of Kentucky – *Amicus Curiae*;
8. Fitch, Lynn – Counsel for *Amicus Curiae* the State of Mississippi;
9. Hildabrand, Clark L. – Counsel for *Amicus Curiae* the State of Tennessee;
10. Knudsen, Austin – Counsel for *Amicus Curiae* the State of Montana;

11. Landry, Jeff – Counsel for *Amicus Curiae* the State of Louisiana;

12. Morrisey, Patrick – Counsel for *Amicus Curiae* the State of West Virginia;

13. O'Connor, John M. – Counsel for *Amicus Curiae* the State of Oklahoma;

14. Paxton, Ken – Counsel for *Amicus Curiae* the State of Texas

15. Peterson, Douglas J. – Counsel for *Amicus Curiae* the State of Nebraska;

16. Ravnsborg, Jason R. – Counsel for *Amicus Curiae* the State of South Dakota;

17. Rokita, Theodore E. – Counsel for *Amicus Curiae* the State of Indiana;

18. Rutledge, Leslie – Counsel for *Amicus Curiae* the State of Arkansas;

19. Schmidt, Derek – Counsel for *Amicus Curiae* the State of Kansas;

20. Schmitt, Eric S. – Counsel for *Amicus Curiae* the State of Missouri;

21. Slatery III, Herbert H. – Counsel for *Amicus Curiae* the State of Tennessee;

22. State of Arizona – *Amicus Curiae*;

23. State of Arkansas – *Amicus Curiae*;

24. State of Georgia – *Amicus Curiae*;

25. State of Indiana – *Amicus Curiae*;

26. State of Kansas – *Amicus Curiae*;

27. State of Louisiana – *Amicus Curiae*;

28. State of Mississippi – *Amicus Curiae*;

29. State of Missouri – *Amicus Curiae*;

30. State of Montana – *Amicus Curiae*;

31. State of Nebraska – *Amicus Curiae*;

32. State of Ohio – *Amicus Curiae*;

33. State Oklahoma – *Amicus Curiae*;

34. State of South Carolina – *Amicus Curiae*;

35. State of South Dakota – *Amicus Curiae*;

36. State of Tennessee – *Amicus Curiae*;

37. State of Texas – *Amicus Curiae*;

38. State of West Virginia – *Amicus Curiae*;

39. Wilson, Alan – Counsel for *Amicus Curiae* the State of South Carolina;

40. Yost, Dave – Counsel for *Amicus Curiae* the State of Ohio.

/s/ Sarah K. Campbell
SARAH K. CAMPBELL
Associate Solicitor General

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

STATEMENT OF THE ISSUE

Whether a school district's policy of assigning bathrooms based on biological sex violates Title IX of the Education Amendments Act of 1972 or the Equal Protection Clause of the Constitution.

INTERESTS OF *AMICI CURIAE*

Amici Curiae—the States of Tennessee, Arizona, Arkansas, Georgia, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, Ohio, Oklahoma, South Carolina, South Dakota, Texas, and West Virginia[1]—have a significant interest in the issues presented in this case. As sovereign States, *Amici* must comply with the Fourteenth Amendment. *Amici* also operate educational programs and activities that receive federal funding and thus are subject to Title IX's requirements. For example, the Tennessee Department of Education directly operates state special schools that receive federal funding. Tennessee's public universities receive federal funding. And Tennessee is also home to nearly 150 local educational agencies and numerous private educational institutions that receive federal funding and thus are subject to Title IX's requirements.

Moreover, many *Amici* have exercised their sovereign lawmaking authority to protect the health, well-being, and safety of their citizens by allowing or even

[1] *Amici* file this brief pursuant to Federal Rule of Appellate Procedure 29(a)(2) and this Court's Rule 35-8.

requiring separation based on biological sex in contexts that implicate privacy and safety, such as living facilities and athletics. Some *Amici* allow or require schools and employers to maintain sex-separated living facilities. *See, e.g.*, Neb. Rev. Stat. § 79-2, 124 (providing that the "Nebraska Equal Opportunity in Education Act does not prohibit any educational institution from maintaining separate toilet facilities, locker rooms, or living facilities for the different sexes"); Okla. Admin. Code § 335:15-3-2(b)(5) (providing that "Oklahoma Law may require that separate restroom facilities be provided employees of each sex"); W. Va. Code Ann. § 21-3-12 (providing for sex-separated water closets in workplaces and specifying that "[n]o person or persons shall be allowed to use the closets assigned to the opposite sex"); *id.* § 21-3-13 (providing for separate dressing rooms and washing facilities in workplaces "for each sex"). Tennessee gives public-school students, teachers, and employees a private right of action against a school that "intentionally allow[s] a member of the opposite sex to enter [a] multi-occupancy restroom or changing facility while other persons [are] present." 2021 Tenn. Pub. Acts, c. 452, § 6. And many *Amici* allow or require public schools to separate athletic teams based on biological sex. *See, e.g.*, 2021 Tenn. Pub. Acts, c. 40, § 1 (providing that a "[a] student's gender for purposes of participation in a public middle school or high school interscholastic athletic activity or event must be determined by the student's sex at the time of the student's birth"); Ark. Code Ann. § 6-1-107(c) (providing that

sex designations for school-sponsored "athletic teams or sports" must be "based on biological sex"); Gender Integrity Reinforcement Legislation for Sports (GIRLS) Act, 2021 Ark. Act 953 (similar); Save Women's Sports Act, 2021 Mont. Laws, ch. 405 (similar). A ruling in this case that assigning bathrooms based on biological sex violates the Equal Protection Clause or Title IX would threaten the continued enforcement of these duly enacted state laws.

Finally, *Amici* have a strong interest in ensuring that the federalism and separation-of-powers principles that underlie our Constitution are respected. Because the plain language of the Equal Protection Clause and Title IX does not prohibit assigning restrooms based on biological sex, States retain the authority to make that policy choice unless or until those federal laws are amended through constitutionally prescribed means.

SUMMARY OF THE ARGUMENT

The age-old practice of assigning students to restrooms based on biological sex does not violate the Equal Protection Clause or Title IX.

I. With respect to Title IX, the plain language of the statute unambiguously allows educational institutions to "maintain[] separate living facilities for the different sexes." 20 U.S.C. § 1686. At the time Title IX was enacted, the term "sex" was commonly understood to refer to physiological differences between males and females. Section 1686 and other provisions of Title

IX, as well as Title IX's implementing regulations, confirm this understanding. Nothing in the Supreme Court's decision in *Bostock v. Clayton County, Georgia*, 140 S. Ct. 1731 (2020), requires a different interpretation.

Even if Title IX did not unambiguously allow educational institutions to maintain sex-separated living facilities, longstanding rules of statutory construction would forbid this Court from interpreting Title IX to prohibit that practice. Congress enacted Title IX pursuant to its Spending Clause authority and therefore must provide States and other funding recipients with *clear notice* of the conditions attached to the funding. Clear notice is also required because prohibiting States from maintaining sex-separated living facilities would infringe on their traditional authority to protect the health and safety of their citizens and maintain order and discipline in schools. Even if Title IX could plausibly be interpreted to require educational institutions to ignore biological sex when assigning transgender students to restrooms, the States certainly did not have clear notice of that requirement.

II. The issues presented by this case, and similar cases that are soon to follow, involve sensitive policy considerations and competing interests. Congress—not the federal judiciary—is the branch of government that is best suited to weigh and reconcile those interests. When a federal court rewrites a federal statute rather than deferring to Congress, it deprives the States of the opportunity to be heard on that question through the political process. And it impedes state-level efforts to

develop solutions in the absence of congressional action. Because *Congress* has not prohibited educational institutions from assigning students to restrooms based on biological sex, this Court should leave to Congress and the political process any decision to make a different policy choice.

ARGUMENT

Amici agree with Defendant-Appellant that assigning restrooms based on biological sex does not violate the Equal Protection Clause or Title IX. *Amici* file this brief to explain in greater detail why a contrary interpretation of Title IX is untenable and to urge the Court to leave the sensitive policy questions at issue in this case to the elected officials who are best positioned to address them.

I. Title IX Does Not Prohibit Educational Institutions from Assigning Students to Restrooms Based on Biological Sex.

Title IX unambiguously *allows* educational institutions to maintain "separate living facilities for the different sexes." 20 U.S.C. § 1686. That alone forecloses interpreting Title IX to prohibit assigning restrooms based on sex. But even if Title IX were ambiguous, longstanding rules of statutory construction further preclude that erroneous interpretation.

A. Title IX unambiguously allows educational institutions to maintain restrooms that are separated based on biological sex.

While Title IX prohibits discrimination "on the basis of sex" in the provision of educational benefits, 20 U.S.C. § 1681(a), it *expressly allows* educational

institutions to "maintain[] separate living facilities for the different sexes," *id.* § 1686; *see also* 34 C.F.R. § 106.33 (providing that a Title IX recipient "may provide separate toilet, locker room, and shower facilities on the basis of sex" as long as the "facilities provided for students of one sex" are "comparable" to the "facilities provided for students of the other sex"). As Senator Bayh, the chief sponsor of Title IX in the Senate, explained, this safe harbor was intended to "permit differential treatment by sex . . . in sports facilities or other instances where personal privacy must be preserved." 118 Cong. Rec. 5,807 (1972) (statement of Sen. Bayh).

Section 1686's safe harbor for living facilities squarely forecloses any interpretation of Title IX that would prohibit educational institutions from assigning students to bathrooms based on sex. It is no answer to say that Congress did not define the term "sex" to mean biological sex. A statute must be interpreted according to its ordinary meaning at the time of enactment. *See New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 539 (2019). When Congress enacted Title IX in 1972, "virtually every dictionary definition of 'sex' referred to the *physiological* distinctions between males and females—particularly with respect to their reproductive functions." *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 632-33 (4th Cir. 2020) (Niemeyer, J., concurring in part and dissenting in part) (collecting dictionary definitions), *cert. denied*, 141 S. Ct. 2878 (2021); *see also Adams v. Sch. Bd. of St. Johns Cnty., Fla.*, 3 F.4th 1299, 1336 (11th Cir. 2021) (W. Pryor, C.J., dissenting)

(same). This binary understanding of the term is confirmed by the fact that the safe harbor in section 1686 refers to "the different sexes." 20 U.S.C. § 1686.

Other provisions of Title IX likewise use the term "sex" in a way that makes clear the term is referring to physiological distinctions between males and females. Section 1681(a)(2) allows institutions to change "from . . . . admit[ting] only students of one sex to . . . admit[ting] students of *both sexes*." 20 U.S.C. § 1681(a)(2) (emphasis added). And section 1681(a)(6)(B) refers to organizations whose "membership . . . has traditionally been limited to persons of *one sex*." *Id.* § 1681(a)(6)(B) (emphasis added).

Title IX's implementing regulations offer further evidence that "sex" means biological sex. As the Department of Education explained in 2020, Title IX's implementing regulations "presuppose sex as a binary classification" and "expressly acknowledge[] physiological differences based on biological sex." Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30,026, 30,178 (May 19, 2020). For example, the regulations allow educational institutions to maintain "separate toilet, locker room, and shower facilities on the basis of sex" as long as the "facilities provided for students of *one sex*" are "comparable to such facilities provided for students of *the other sex*." 34 C.F.R. § 106.33 (emphases added). They also allow institutions to "operate or sponsor separate teams for members of *each*

sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport." 34 C.F.R. § 106.41(b) (emphasis added).

The Supreme Court's decision in *Bostock* does not require or permit a different interpretation of the term "sex" in Title IX. *Bostock* narrowly held that terminating an employee "simply for being homosexual or transgender" constitutes discrimination "because of . . . sex" under Title VII. 140 S. Ct. at 1737-38 (quoting 42 U.S.C. § 2000e-2(a)(1)). In reaching that conclusion, however, the Court "assum[ed]" that the term "sex" means "biological distinctions between male and female." *Id.* at 1739. And the Court made clear that its decision did not "sweep beyond Title VII to other federal or state laws that prohibit sex discrimination" or address other issues that were not before the Court such as "sex segregated bathrooms, locker rooms, and dress codes." *Id.* at 1753; *cf. Pelcha v. MW Bancorp, Inc.*, 988 F.3d 318, 324 (6th Cir. 2021) ("[T]he Court in *Bostock* was clear on the narrow reach of its decision and how it was limited only to Title VII itself.").

Nor is *Bostock*'s analysis necessarily applicable to Title IX. As the Sixth Circuit recently explained, "Title VII differs from Title IX in important respects." *Meriwether v. Hartop*, 992 F.3d 492, 510 n.4 (6th Cir. 2021). It therefore "does not follow that principles announced in the Title VII context automatically apply in the Title IX context." *Id.* Most notably, Title IX—unlike Title VII—*expressly authorizes* sex separation in certain circumstances, including restrooms and other

living facilities. *See* 20 U.S.C. § 1681(a)(1)-(9) (allowing certain single-sex educational institutions and organizations); *id.* § 1686 (allowing entities to "maintain[] separate living facilities for the different sexes"); *see also Meriwether*, 992 F.3d at 510 n.4 (identifying section 1686's safe harbor for living facilities as one of the important differences between Title VII and Title IX).

Even if *Bostock*'s analysis applied to Title IX with respect to employment termination, that analysis would not extend to decisions concerning restrooms. Discrimination requires treating certain individuals "worse than others who are similarly situated." *Bostock*, 140 S. Ct. at 1740. Providing separate but "comparable," 34 C.F.R. § 106.33, restrooms for the different sexes does not treat members of one sex worse than members of the other sex. Counsel for the plaintiffs in *Bostock* agreed, stating at oral argument that sex-separated bathrooms are "not discriminatory because" no one is "subjected to a disadvantage." Tr. of Oral Arg. at 12-13, *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020) (Nos. 17-1618, 17-1623); *see also* Reply Br. for Resp'ts at 19-21, *Altitude Express, Inc. v. Zarda*, 140 S. Ct. 1731 (2020), 2019 WL 4464222, at *19-21; Reply Br. for Pet'r at 23, *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020), 2019 WL 4464221, at *23 ("Sex-specific dress, bathroom, fitness, or other policies may be justified as bona fide occupational qualifications . . . , and they may not even be discriminatory at all because they do

not constitute '*disadvantageous* terms or conditions of employment.'" (quoting *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 118 (2d Cir. 2018))).

Nor are members of one sex "similarly situated" to members of the other sex when it comes to restrooms, locker rooms, and the like where privacy interests are at stake. *See, e.g.*, *Doe v. Luzerne Cnty.*, 660 F.3d 169, 176-77 (3d Cir. 2011) (an individual has "a constitutionally protected privacy interest in his or her partially clothed body" that is "particularly" strong "while in the presence of members of the opposite sex"). While "[a]n individual's homosexuality or transgender status *is not relevant* to employment decisions" about hiring and firing, *Bostock*, 140 S. Ct. at 1741 (emphasis added), *sex is relevant* in contexts such as restrooms where physiological differences between the sexes matter. As Justice Thurgood Marshall put it, "[a] sign that says 'men only' looks very different on a bathroom door than a courthouse door." *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 468-69 (1985) (Marshall, J., concurring in the judgment in part and dissenting in part); *see also United States v. Virginia*, 518 U.S. 515, 550 n.19 (1996) (acknowledging that admitting women to the Virginia Military Institute "would undoubtedly require alterations necessary to afford members of each sex privacy from the other sex in living arrangements").

In sum, the question whether Title IX prohibits educational institutions from assigning students to restrooms based on biological sex is not close. Title IX's

general prohibition of discrimination "on the basis of sex" does not preclude entities from maintaining sex-separated restrooms because doing so does not subject anyone to a disadvantage—let alone someone similarly situated. And even if the general prohibition *could* be interpreted in that manner, section 1686's safe harbor specifically forbids that interpretation. *See* 20 U.S.C. § 1686 ("[N]othing contained herein shall be construed to prohibit any educational institution receiving funds under this Act[] from maintaining separate living facilities for the different sexes.").

B. Even if Title IX were ambiguous, longstanding rules of statutory construction require interpreting the statute to allow separation of restrooms based on biological sex.

As explained, Title IX unambiguously allows educational institutions to assign students to restrooms based on biological sex. But even if the statute were ambiguous on that point, two longstanding rules of statutory construction would require this Court to construe that ambiguity in favor of States and other recipients of Title IX funding.

First, because Congress enacted Title IX pursuant to its Spending Clause authority, the statute's interpretation is governed by the rule that "Congress must express clearly its intent to impose conditions on the grant of federal funds so that States can knowingly decide whether or not to accept those funds." *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 24 (1981). "The legitimacy of Congress' power to legislate under the spending power . . . rests on whether the State

voluntarily and knowingly accepts the terms of the contract." *Id.* at 17 (quotation marks omitted). Thus, if "Congress intends to impose a condition on the grant of federal moneys," as it did under Title IX, "it must do so unambiguously." *Id.* Congress may not "surpris[e] participating States with post acceptance or 'retroactive' conditions." *Id.* at 25.

In applying this rule, this Court must ask whether a state official deciding whether to accept Title IX funds would have "clearly underst[oo]d" that the statute prohibits the State, in at least some instances, from assigning students to restrooms based on biological sex. *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006). Of course not. Given that section 1686 expressly *allows* institutions to maintain sex-separated living facilities and provides no different rule for transgender students, it is inconceivable that a state official would have "clearly underst[oo]d," *id.*, Title IX to require that transgender students be allowed to use their restroom of choice. Even if Congress had not included this safe harbor in Title IX, the average state official in 1972 would have understood sex as a binary biological distinction between men and women. And hardly anyone at that time would have thought it discriminatory to provide separate restrooms for the two sexes. This Court may not now impose that new requirement on the States and other funding recipients under the guise of statutory interpretation.

Second, this Court may not interpret Title IX in a manner that would intrude on the historic police powers of a sovereign State unless such an intrusion was "the clear and manifest purpose" of Congress. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Interpreting Title IX to prohibit States from maintaining sex-separated restrooms in educational institutions would interfere with the States' "traditional authority to protect the health and safety of their citizens," *Gallardo ex rel. Vassallo v. Dudek*, 963 F.3d 1167, 1175 (11th Cir. 2020) (internal quotation marks omitted), as well as their "responsib[ility]" to "maintain[] discipline, health, and safety" in the public-school environment, *Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls*, 536 U.S. 822, 830 (2002). "Across societies and throughout history, it has been commonplace and universally accepted to separate public restrooms, locker rooms, and shower facilities on the basis of biological sex in order to address privacy and safety concerns arising from the biological differences between males and females." *Grimm*, 822 F.3d at 634 (Niemeyer, J., concurring in part and dissenting in part) (listing cases). And many *Amici* have exercised their sovereign lawmaking authority to address precisely these interests. *See supra* pp. 1-3.

Nothing in Title IX even hints that Congress intended to strip States of their traditional authority to address the privacy and safety concerns that are implicated in this context. In fact, section 1686's safe harbor trumpets the opposite intent—that

Title IX *not* be construed to prohibit federal funding recipients from continuing to provide separate living facilities "for the different sexes." 20 U.S.C. § 1686.

II. Construing Title IX to Prohibit Distinctions Based on Biological Sex Would Trespass on the Legislature's Policymaking Role.

While the issue before this Court involves only restrooms, the Department of Education has made clear that it intends to enforce Title IX to impose on States and other Title IX funding recipients a host of new obligations that appear nowhere in the text of Title IX or its implementing regulations. In June 2021, the Department declared that it "interprets Title IX's prohibition on discrimination 'on the basis of sex' to encompass discrimination" based on "sexual orientation and gender identity" and vowed to "fully enforce Title IX" in that manner. Enforcement of Title IX of the Education Amendments of 1972 With Respect to Discrimination Based on Sexual Orientation and Gender Identity in Light of Bostock v. Clayton County, 86 Fed. Reg. 32,637, 32,639 (June 22, 2021). A "Fact Sheet" the Department issued shortly thereafter identifies discrete examples of purportedly discriminatory conduct the Department "can investigate." U.S. Dep't of Justice & U.S. Dep't of Educ., Confronting Anti-LGBTQI+ Harassment in Schools, https://bit.ly/3sQjZnM. That conduct includes preventing a "transgender high school girl" from competing on the "girls' cheerleading team" or using the "girls' restroom," as well as declining to use

a transgender student's preferred name or pronouns. *Id.*[2] Bathrooms are thus only the beginning.

If these new obligations are to be imposed at the federal level, they must be imposed by Congress—not by federal judges or unelected agency officials. Congress is the branch "most capable of responsive and deliberative lawmaking." *Loving v. United States*, 517 U.S. 748, 757-58 (1996). As the branch most responsive to the people, Congress is in the best position to decide "what competing values will or will not be sacrificed to the achievement of a particular objective." *Rodriguez v. United States*, 480 U.S. 522, 526 (1987). Indeed, such decisions are the "very essence of legislative choice." *Id.*

Title IX is already replete with provisions that reflect an attempt to balance and accommodate competing interests. Section 1686's safe harbor, which allows schools to maintain "separate living facilities for the different sexes," 20 U.S.C. § 1686, is a prime example. Another is section 1681, which provides that Title IX's prohibition on sex discrimination does not apply to educational institutions "controlled by a religious organization" to the extent application would be inconsistent with that organization's "religious tenets," *id.* § 1681(a)(3), or to the membership practices of "voluntary youth service organizations" whose

[2] Many *Amici* have sued the Department under the Administrative Procedure Act to prevent enforcement of this unlawful guidance. *See Tennessee v. U.S. Dep't of Educ.*, No. 3:21-cv-00308 (E.D. Tenn.).

membership has "traditionally been limited to persons of one sex," *id.* § 1681(a)(6)(B).

The restroom issue that is presented in this case and similar issues that will inevitably follow involving locker rooms, athletic teams, and pronouns involve sensitive policy considerations and myriad competing interests. Allowing a transgender student to use the locker room that corresponds to the student's gender identity has repercussions for other students who may lose the ability to change clothing in private, without being exposed to members of the opposite sex. Likewise, allowing a transgender student to compete on an athletic team consistent with the student's gender identity has repercussions for other students who may lose competitive opportunities or be subjected to an increased risk of injury. And allowing a transgender student to dictate what pronouns other students and school employees must use has significant repercussions for the First Amendment rights of those other students and employees. *See Meriwether*, 992 F.3d at 511-12 (holding that state university "flouted" the First Amendment by punishing a professor for declining to use a student's "preferred pronouns"). The federal judiciary is in no position to weigh those competing interests, let alone decide how they should be reconciled. That is a job for Congress and state legislatures. *See, e.g.*, *SAS Inst. Inc. v. Iancu*, 138 S. Ct. 1348, 1358 (2018) ("It is Congress's job to enact policy and it is this Court's job to follow the policy Congress has prescribed.").

States are uniquely harmed when federal courts impinge on Congress's policymaking authority. Judicial rewriting of the law circumvents the strictures of Article I that encourage deliberate and responsive lawmaking, including requirements like bicameralism that are designed to protect state interests and ensure consideration of state prerogatives. *See, e.g.*, Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 Tex. L. Rev. 1321, 1328-29, 1343-44 (2001); Herbert Wechsler, *The Political Safeguards of Federalism: The Role of States in the Composition and Selection of the National Government*, 54 Colum. L. Rev. 543, 546-48 (1954). Moreover, judicial rewriting that extends a statute beyond its plain language to regulate to a greater degree than Congress intended could impede state policymaking efforts, which are likely to be more responsive to local interests and concerns than a federal solution. The features of the legislative process that have prompted some to seek social change from the federal judiciary instead of Congress—procedures that "often seem clumsy, inefficient, even unworkable," *INS v. Chadha*, 462 U.S. 919, 959 (1983)—also protect federalism by ensuring that national policy will not too easily displace state and local policies. *See* Clark, *supra*, at 1323-25.

"[W]hatever its virtues or vices, Congress's prescribed policy here is clear[.]" *SAS*, 138 S. Ct. at 1358. Title IX expressly allows States and other Title IX funding

recipients to maintain separate living facilities based on biological sex. This Court must follow that policy unless and until Congress changes it.

CONCLUSION

This Court should hold that neither the Equal Protection Clause nor Title IX prohibits educational institutions from separating restrooms or other living facilities based on biological sex.

HERBERT H. SLATERY III
Attorney General and Reporter

ANDRÉE S. BLUMSTEIN
Solicitor General

/s/ Sarah K. Campbell
SARAH K. CAMPBELL
Associate Solicitor General

CLARK L. HILDABRAND
Assistant Solicitor General
P.O. Box 20207
Nashville, TN 37202
(615) 532-6026

Counsel for Amicus Curiae State of Tennessee

Counsel for additional Amici listed on the following page

October 26, 2021

Counsel for Additional *Amici Curiae*

MARK BRNOVICH
Arizona Attorney General

LESLIE RUTLEDGE
Arkansas Attorney General

CHRISTOPHER M. CARR
Georgia Attorney General

THEODORE E. ROKITA
Indiana Attorney General

DEREK SCHMIDT
Kansas Attorney General

DANIEL CAMERON
Kentucky Attorney General

JEFF LANDRY
Louisiana Attorney General

LYNN FITCH
Mississippi Attorney General

ERIC S. SCHMITT
Missouri Attorney General

AUSTIN KNUDSEN
Montana Attorney General

DOUGLAS J. PETERSON
Nebraska Attorney General

DAVE YOST
Ohio Attorney General

JOHN M. O'CONNOR
Oklahoma Attorney General

ALAN WILSON
South Carolina Attorney General

JASON R. RAVNSBORG
South Dakota Attorney General

KEN PAXTON
Texas Attorney General

PATRICK MORRISEY
West Virginia Attorney General

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because it contains 4,050 words, excluding the parts exempted by Fed. R. App. P. 32(f).

This brief also complies with the typeface and type style requirements of Fed. R. App. P. 32(a)(5)-(6) because it has been prepared in proportionally spaced typeface using Times New Roman 14-point font.

/s/ Sarah K. Campbell
SARAH K. CAMPBELL
Associate Solicitor General

October 26, 2021

CERTIFICATE OF SERVICE

I, Sarah K. Campbell, counsel for *Amicus Curiae* the State of Tennessee and a member of the Bar of this Court, certify that, on October 26, 2021, a copy of the En Banc Brief of *Amici Curiae* the States of Tennessee, Arizona, Arkansas, Georgia, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, Ohio, Oklahoma, South Carolina, South Dakota, Texas, and West Virginia in Support of Defendant-Appellant was filed electronically through the appellate CM/ECF system. I further certify that all parties required to be served have been served.

/s/ Sarah K. Campbell
SARAH K. CAMPBELL
Associate Solicitor General