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,	:	
	:	No. 24-60035
Plaintiff-Appellants,	:	
v.	:	
PEARL RIVER COUNTY SCHOOL DISTRICT, et al.,	:	
Defendant-Appellees.	:	

DEFENDANT-APPELLEES' BRIEF-IN-CHIEF

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
1:22-CV-25-HSO-BWR
HON. HALIL SULEYMAN OZERDEN

Oral Argument Is Requested

July 29, 2024

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made so that the judges of this Court may evaluate possible disqualification or recusal.

Plaintiff-Appellant

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

Defendant-Appellees

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

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Lisa Brown, General Counsel, U.S. Dept. of Education
Jessica Wolland, Attorney, U.S. Dept. of Education

Respectfully,

/s/ Caleb Kruckenberg
Caleb Kruckenberg

Counsel for Defendant-Appellees

STATEMENT REGARDING ORAL ARGUMENT

Defendant-Appellees request that this Court hold oral argument in this case. The principal issue presented is one of first impression in the Fifth Circuit, and is one that has divided the other circuits. Additionally, the United States has filed a brief in support of Plaintiff-Appellants as amicus curiae. Undersigned counsel anticipate that additional amici will file briefs in support of Defendant-Appellees. Given the complex issues, substantial nationwide importance of the issues presented, and potential ramifications of this case, oral argument would benefit the Court in its resolution of this matter.

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COUNTERSTATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. Whether sexual-orientation discrimination is actionable under Title IX, which includes two sub-issues:

A. Whether the "bargain" struck between Congress and the States in the enactment of Title IX pursuant to the Spending Clause in 1972—which analysis focuses on the reasonable understanding of the parties—encompassed liability for sexual-orientation discrimination.

B. Whether the holding in *Bostock v. Clayton County*, 590 U.S. 644 (2020), changes the Spending Clause analysis.

II. Whether the facts of record—M.K.'s isolated allegations of being called "gay" by some of his sixth-grade classmates over the course of an approximate six-week period—would enable a reasonable jury to find severe and pervasive sexual harassment that deprived M.K. of an equal educational opportunity.

COUNTERSTATEMENT OF THE CASE AND FACTS

M.K. is a minor who at the relevant time was a student at Pearl River County public schools. *See* ROA.15-16. M.K. had been homeschooled through fourth grade, and most of his fifth-grade instruction also took place at home due to COVID restrictions. ROA.218. In his complaint, M.K. says he "was socially awkward as he learned to adapt to middle school." ROA.16.

When M.K. was in fifth grade, he and his friends would play games on their Google Chromebooks during recess. ROA.218. The other students would tease him for "being bad at the game." ROA.218-19. But when asked whether he "considered that anybody was bullying him when he was in fifth grade," M.K. responded, "Not really." ROA.219 (simplified). He testified that some other students would call him "dog water," "a common insult to people who are bad at games." ROA.219. "And there was also a kid that made fun of [him] just a little bit for being short." ROA.219.

In sixth grade, M.K. said that there was an increase in the teasing behavior. ROA.220. In his science class, he was mocked for losing video games and for being short. ROA.221. When asked, "Did they say any

other things about you in science class, other than just dog water, referring to the video games?" M.K. responded, "I think one of them called me Trash." ROA.221. But M.K. was not called any other names in science class. ROA.221.

In his band class, however, M.K. said that other students "would call him 'gay,'" as an insult, which he reported to his teacher "about like one or two times." ROA.221-22. He reported doing so "in front of other people," presumably the rest of the class, but he also said that the other students were "talking and not paying attention to anything" when he did so. ROA.222.

In M.K.'s math class, fellow student I.L. would call him "Gay and Gay Boy," along with "[s]hort." ROA.222. M.K. told his math teacher "[m]aybe like three times." ROA.222. In response, the teacher told all of the students that "she didn't want to hear it anymore," which M.K. took to mean both that "she didn't want to hear [him] talk about [I.L. calling him gay] anymore," and that "she didn't want [I.L.] to" continue insulting him. ROA.222. M.K. did not witness the teacher speak with I.L. individually about his behavior. ROA.222.

In language arts, M.K. had "[a]bout the same problems [he] had in math class" with I.L. ROA.222-23. M.K. informed his teacher "[m]aybe like two times." ROA.223. Eventually, the teacher "noticed that [he and I.L.] were fighting a lot," and then she moved I.L.'s seat "all the way to the other side of the room." ROA.223. By "fighting," M.K. meant "[a]rguing" about topics, including "how [M.K. was] not gay." ROA.223.

M.K. testified that he believed the other students called him "gay" "[m]aybe because [he], like, dressed up in like blue and red most of the time, like, maybe bright colors at first." ROA.226. At some point, he responded by trying to "show[] an example of what gay is," "[l]ike blowing kisses," to try to "show[] them, like, what gay is and that I am not gay." ROA.226.

M.K. also retaliated against the other students several times. First, after one student, W.L., called him "gay" in the hallway, M.K. responded by "cursing at him." ROA.224-25. M.K.'s math teacher "heard it," and M.K. "got written up" for the cursing. ROA.225.

Second, M.K. and his fellow students "were walking on the sidewalk before [class] and [one student], like, unzipped [another's] backpack and then . . . unzipped [M.K.'s]." ROA.223. "So [M.K.] decided [he'd] slap [the

student] in the face," though he "didn't slap [him] full on." ROA.223. The student responded by shoving M.K. into a post, and M.K. scraped his elbow on the concrete sidewalk when he fell. ROA.223-24. M.K. reported the incident to a teacher, whom he described as "second in command," or an "assistant principal." ROA.224. M.K. reported the shoving incident only after he got in trouble for cursing at W.L. ROA.224. M.K. later heard that teacher call the student who shoved him to the office, but M.K could not otherwise remember how the school handled the shoving incident. ROA.224. M.K. thought he reported the incident to his "next class teacher" as well. ROA.224.

Finally, matters culminated in October of the sixth-grade year when M.K. exposed his genitals to another student in the boy's bathroom. ROA.278. In his complaint, M.K. had alleged he did so as an apparent attempt to prove that he was "not a girl." ROA.17. In his later deposition M.K. denied that he exposed himself on purpose, claiming instead that the other student had simply seen M.K. after he used the urinal while he was still zipping his fly, and that he was not doing anything "intentional," and that it was an "accident." ROA.226-27.

As set forth in the complaint, the school concluded that M.K. had intentionally exposed himself, and he was disciplined for the bathroom incident with a six-week reassignment to an alternative school. ROA.31-33. M.K.'s parents homeschooled him for six weeks instead. ROA.229-30. When the school would not readmit M.K. without his spending six weeks in the alternative school, M.K.'s parents withdrew him from school entirely. ROA.229-30.

Through his parents, M.K. sued the District based on the school's alleged deliberate indifference to student-on-student harassment because of M.K.'s perceived sexual orientation. ROA.16, 21-22.

Following discovery, the District moved for summary judgment. which included a statement of undisputed material facts with supporting evidence. ROA.305, 306-08. M.K. opposed the motion, but he neither objected to the District's statement of undisputed facts nor provided a counter-statement of facts. *See* ROA.324-25.

The district court granted summary judgment for the District. ROA.344. First, the court made factual findings consistent with the District's statement. *See* ROA.348-54. The court then held that "as written, the language of Title IX does not cover sexual-orientation

discrimination," and that this interpretation was necessary because the statute would otherwise be constitutionally suspect under the Spending Clause. ROA.360-63. Alternatively, the district court held that the harassment allegedly suffered by M.K. was not severe, pervasive, and objectively offensive. ROA.363-66.

On appeal, M.K. relies on "facts" that appear nowhere in the record to challenge both holdings. This Court need not even **entertain** this presentation now, as M.K.'s trial counsel "fail[ed] even to refer to it in the response to the motion for summary judgment," and thus any such "evidence [was] not properly before the district court." *See Smith ex rel. Estate of Smith v. United States*, 391 F.3d 621, 625 (5th Cir. 2004) (citation omitted). Rather, it is the district court's finding of facts that this Court must consider on appeal. *See id.*

Regardless, even if it considered the assertions in M.K.'s appellate brief, this Court should reject many (if not most) of the allegations as either unsupported or outright foreclosed by the record evidence.

Appellate counsel introduce the sixth-grade year by asserting that M.K. was "soon subjected to nonstop homophobic bullying. *See* ROA.349-51." Appellant's Br. at 4. But the record citations are to the district court's

opinion, which made no such finding. Instead, the district court found that the record established only "name-calling over the course of a month or two," which mostly focused on teasing of M.K. for being short and bad at games. ROA.364 n.2, 365.

It gets worse. Appellate counsel assert: "Though M.K. does not identify as gay, this sex-based harassment soon shifted to other students calling him 'gay' and 'gay boy' incessantly, and, on one occasion, 'fag.' ROA.226[]; ROA.249." Appellant's Br. at 5. But the latter term was only mentioned in the record during the deposition of **M.K.'s father**, who claimed to have an "understanding of the whole situation" in which other students allegedly called M.K. "gay, they're calling him little, they're calling him girl or whatever, fag or something they called him one time." ROA.249. But **M.K. himself** disputed this "understanding," testifying that did not remember anyone "saying anything else that was like sexual in nature or anything inappropriate" "other than gay." ROA.229. And there is a vast difference between the asserted "incessant" "harassment" and the few instances to which M.K. pointed where other students "call[ed him] gay." *See* ROA.226.

M.K.'s appellate counsel also presents "a typical school day" of "torment[]," Appellant's Br. at 6, which is cobbled together from sources that contradicted many of the supposed supporting facts. Counsel claim that at school drop-off in the morning, M.K. typically "had a certain place to go to escape other students," and specifically had "to avoid I.L. and W.L., who stood by a fence like 'predator[s] waiting to pounce on something.' ROA.245." Appellant's Br. at 6. As before, these assertions are drawn from M.K.'s father's deposition, which was never even mentioned by M.K.'s counsel below. Even in the father's own telling, the other students "were waiting to pick on various students," not just M.K., and they picked on M.K. only because he "was small in stature and a target." ROA.245.

Appellate counsel say that in M.K.'s science class "the bullying would begin immediately," (implying that he was called "gay" during that class), and that M.K. "reported their behavior to his Science teacher about ten times, and although she instructed the students to stop, it did not help. ROA.221." Appellant's Br. at 6. But counsel do not dispute the district court's finding that "M.K. did not testify that his classmates called him 'gay' during Science." ROA.349 (citing ROA.220).

Appellate counsel now insist that other students in band class "relentlessly called him 'gay' and 'gay boy'" and that the "bullying during Math class was particularly merciless because I.L. sat 'right behind [M.K.] whispering, calling [him] gay.' ROA.222." Appellant's Br. at 7. M.K.'s testimony establishes only that he reported being called these names "about like one or two times" in band class, and "[m]aybe like three times" in math. ROA.222. Counsel also now claim "relentless harassment" in language arts, and say that the environment was so routinely bad that M.K.'s niece "would sometimes wait for him and escort him out of the school to provide additional protection. ROA.245." Appellant's Br. at 8. But M.K. said his problems in language arts were "[a]bout the same problems [he] had in math," ROA.222-23, and the reference to M.K.'s niece walking him home was about a different student who, in M.K.'s father's opinion, was possibly targeting M.K. because he "was smaller in stature." ROA.245.

Counsel go on: "After several weeks of nonstop verbal abuse, the harassment became physical when M.K. tried to stand up for himself." Appellant's Br. at 8. They then refer to an "assault"—M.K.'s being pushed into a pole and injuring himself after slapping another student in the

face. *See* Appellant's Br. at 8-9. But the testimony refutes that allegation. M.K. testified that another student unzipped someone else's backpack, and in response, M.K. "hit him," "on the cheek," and the other student responded by "shov[ing]" M.K. into a pole. ROA.223. Meanwhile, M.K.'s father testified that he was not aware that M.K. had slapped the other student before he was shoved. ROA.246.

Counsel next claims that "M.K.'s mother raised the nonstop harassment" with a teacher after M.K. was punished for cursing at another student. Appellant's Br. at 10. However, M.K.'s mother testified that she spoke to "his science teacher about his behavior and paying attention in class," as well as "people calling him names," but said that she did not recall that "[she] ever said anything about gay, though." ROA.278. In fact, M.K.'s mother said that M.K. "did not tell me that they were calling him gay until right when—the same week of the bathroom incident." ROA.278.

Appellate counsel also invent a showdown of sorts, claiming that "[a]fter more than six weeks of relentless harassment," including incidents where a student "waited outside the school at the start of the day 'like a predator,' and harassed M.K. throughout Band, Math, and

Language Arts," M.K. was pushed to expose himself to another boy in the bathroom, "to show him that he wasn't gay because he thought gay meant that a boy thought he was a girl. ROA.278." Appellant's Br. at 10-11. But M.K. specifically denied that the other student was picking on him before the incident and insisted that the "bathroom incident" was not an example of him responding to the alleged teasing. ROA.226-27. He also testified that he didn't intentionally expose himself, ROA.226, although his mother testified that M.K. had "admitted [to her] that he did expose himself," ROA.278, so the record is, at best, hopelessly muddled.

Finally, appellate counsel claim that M.K. "was frightened by Endeavor's metal detectors and the students there. ROA.228," claim it "was a 'little homemade prison'" and argue that "M.K. and his parents visited the Endeavor School and found it entirely unsatisfactory in terms of safety and educational opportunities." Appellant's Br. at 13. M.K. said, however, "Like, honestly, like, when I first saw [Endeavor] I was like I thought it was kind of fine, like it would be fine with me," but said that his parents "insisted that I should be homeschooled." ROA.229. And when asked what he wanted, M.K. said, "I want to be back in a public school, period." ROA.228.

In the end, a consistent theme appears. M.K. experienced unfortunate teasing as he transitioned from being homeschooled and entered public school. The District responded, intervening when necessary, but M.K. also retaliated against the other students, eventually acting in a way that forced the school to temporarily separate him from his peers. Now he "want[s] to be back in public school, period." *See* ROA.228. Yet rather than listen to his own account and his own wishes, his advocates have distorted this case beyond recognition.

SUMMARY OF ARGUMENT

In 1972, the United States Congress proposed a bargain to the states through Title IX. In exchange for federal funding, the states agreed to address historical "discrimination" "on the basis of sex" in educational programs. At the time, both Congress and the states reasonably, objectively, and universally, understood that "sex" discrimination meant traditional gender discrimination only. No one thought it included considerations of actual or perceived sexual orientation, and that certainly was not clearly and unmistakenly included.

When Congress uses its spending power to condition state action in exchange for federal funds, as it did with Title IX, it may only enforce conditions that the states "unmistakably" accepted. Indeed, unlike typical federal legislation, such statutes must be read narrowly, with any uncertainty read **against** expanding the conditions on the original agreement to provide funding. In this way, courts preserve the Constitution's deliberate limitations of federal interference in local matters, such as education policy and discipline.

Now, more than 50 years later, Appellants ask this Court to reject these principles of limited federal power, and radically expand Title IX's

scope in ways that **neither** Congress nor the states anticipated. They ask this Court to conclude that, not only did Title IX's text implicitly encompass discrimination based, in any small part, on a student's perceived sexual orientation, but it so obviously did so that any state's contrary understanding in 1972 was patently **unreasonable**. As the district court rightly concluded, however, not only does that textual parsing of Title IX fail, but its very novelty means that such an expansive theory of liability fails the clear-statement rule.

The kind of teasing that M.K. suffered from some of his classmates was unacceptable, and the District does not condone it in any manner. But that doesn't mean that a federal lawsuit relying on Title IX is an available remedy. Congress and the states **could** always alter aspects of Title IX's remedial scheme as circumstances change, but this Court cannot accept M.K.'s invitation to reinvent the bargain.

Moreover, even if Appellants' expansive theory of Title IX's potential liability was defensible, the district court also correctly held that the alleged conduct did not rise to Title IX's objective threshold of severe and pervasive harassment. Precisely because issues surrounding discipline and classroom management have always concerned highly-

specific questions that federal courts should rarely second-guess, not every incident of teasing gives rise to federal liability. The isolated insults that M.K. asserts he suffered from some of his classmates cannot, as a matter of law, constitute actionable discrimination on the basis of M.K.'s sex.

ARGUMENT

Title IX provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a).

Under Title IX, "school districts may be liable for, among other things, student-on-student sexual harassment if: (1) the District had actual knowledge of the harassment; (2) the harasser was under the District's control; (3) the harassment was based on the victim's sex; (4) the harassment was so severe, pervasive, and objectively offensive that it effectively barred the victim's access to an educational opportunity or benefit; and (5) the District was deliberately indifferent to the harassment." *Roe v. Cypress-Fairbanks Indep. Sch. Dist.*, 53 F.4th 334, 341 (5th Cir. 2022) (cleaned up). The district court ruled for the District on elements three and four (and did not rule on five). *See* ROA.361-63.[1]

[1] While the district court did not rule on the issue, the District also argued that M.K. failed to demonstrate deliberate indifference. *See* ROA.317-18. This Court may affirm the judgment on this basis as well. *See United States v. Gonzalez*, 592 F.3d 675, 681 (5th Cir. 2009) ("A reviewing court may affirm for any reason supported by the record, even if not relied on by the lower court.") (cleaned up). "Deliberate indifference is an extremely high standard to meet." *Domino v. Tex. Dep't of Crim. Just.*, 239 F.3d 752, 756 (5th Cir. 2001). "Actions and decisions by officials that are merely inept, erroneous, ineffective, or negligent do not amount to deliberate indifference." *I.F. v. Lewisville Indep. Sch. Dist.*, 915 F.3d 360, 369 (5th Cir. 2019) (citation omitted). Thus,

This Court "review[s] a grant of summary judgment de novo, applying the same standard as the district court." *Haverda v. Hays County*, 723 F.3d 586, 591 (5th Cir. 2013).

I. SEXUAL ORIENTATION DISCRIMINATION IS NOT ACTIONABLE UNDER TITLE IX.

The district court correctly declined to extend Title IX liability to alleged discrimination that was motivated only in part by perceived sexual orientation. Such liability was not part of the original bargain struck when the statute was enacted in 1972, and nothing in *Bostock v. Clayton County*, 590 U.S. 644 (2020), changes that conclusion.

A. THE "BARGAIN" STRUCK BETWEEN CONGRESS AND THE STATES IN THE ENACTMENT OF TITLE IX PURSUANT TO THE SPENDING CLAUSE IN 1972—WHICH FOCUSES ON THE REASONABLE UNDERSTANDING OF THE PARTIES—DID NOT ENCOMPASS LIABILITY FOR SEXUAL-ORIENTATION DISCRIMINATION.

1. The framework for analyzing Spending Clause legislation is distinct.

As "was understood" for "nearly all of our Nation's history," "there is a fundamental difference between the exercise of Congress' sovereign

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even when a student tells administrators that he was "severely bullied," this does not necessarily put them on notice of sexual harassment. *See id.* at 377. As argued below, M.K. can't meet this high burden, because when he reported being called "gay" by his classmates, his teachers responded by talking to the other students, and moving assigned seats to separate the students. *See* ROA.221-23.

legislative powers, on the one hand, and the exercise of its power to spend money and to attach conditions to the receipt of that money, on the other." *Health & Hosp. Corp. v. Talevski*, 599 U.S. 166, 196 (2023) (Thomas, J., dissenting). The Supreme Court has "repeatedly treated Title IX as legislation enacted pursuant to Congress' authority under the Spending Clause." *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 640 (1999). "When Congress acts pursuant to its spending power, it generates legislation much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions." *Id.* Statutes enacted pursuant to the Spending Clause memorialize "the terms on which [Congress] disburses federal funds," which terms are enforceable through revocation of federal payment for noncompliance. *Cummings v. Premier Rehab Keller, PLLC*, 142 S. Ct. 1562, 1568 (2022).

While legislation "imposes obligations on regulated parties with the force of law," spending statutes are "no more than a disposition of funds. As such, a conditional exercise of the spending power is nothing more than a contractual offer; any 'rights' that may flow from that offer are 'secured' only by the offeree's acceptance and implementation, not federal law itself." *Health & Hosp. Corp.*, 599 U.S. at 196 (Thomas, J.,

dissenting). "In a Spending Clause case, the key is not what a majority of the Members of both Houses intend but what the States are clearly told regarding the conditions that go along with the acceptance of those funds." *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 304 (2006).

This distinction has significant implications for how the Court interprets spending legislation. Given that 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,'" the Supreme Court "insist[s] that Congress speak with a clear voice" when it imposes conditions. *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981). "[I]f Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously," which "enable[s] the States to exercise their choice [to accept federal funds] knowingly, cognizant of the consequences of their participation." *Id.*

The Spending Clause thus applies a "substantive canon"—a "rule[] of construction that advance[s] values external to a statute." *See Biden v. Nebraska*, 143 S. Ct. 2355, 2376 (2023) (Barrett, J., concurring). Indeed, because it involves both "constitutional avoidance," and a "clear-

statement federalism rule[]," it is an especially "strong-form canon [that] counsels a court to strain statutory text to advance a particular value." *Id.*; *see also Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) ("If Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute."). "This 'clear statement' requirement means that the better interpretation of a statute will not necessarily prevail. Instead, if the better reading leads to a disfavored result (like provoking a serious constitutional question), the court will adopt an inferior-but-tenable reading to avoid it. So to achieve an end protected by a strong-form canon, Congress must close all plausible off ramps." *Biden*, 143 S. Ct. at 2377 (Barrett, J., concurring) (citations omitted).

A state has agreed "to comply with, and its liability is determined by, the legal requirements in place when the grants were made." *Bennett v. Ky. Dep't of Educ.*, 470 U.S. 656, 670 (1985). A state can be bound only by conditions "ascertainable on the face of the **statute**." *W. Va. v. U.S. Dep't of Treasury*, 59 F.4th 1124, 1148 (11th Cir. 2023).

An important corollary of this point is that an **agency regulation** cannot supply the necessary clarity. In an analogous context, this Court has considered whether, under the *Pennhurst* test, "the clarity required for a [decision to waive sovereign immunity] to be 'knowing' can be met by regulations clarifying an ambiguous statute." *Tex. Educ. Agency v. Usde*, 992 F.3d 350, 361 (5th Cir. 2021).[2] The Court held that the "needed clarity cannot be so provided—it must come directly from the statute." *Id.* Congress must "place conditions on the States' receipt of federal funds unambiguously," but "regulations that interpret statutes are valid only if they either match Congress's unambiguous command or are clarifying a statutory ambiguity." *Id.* (cleaned up). "Relying on regulations to present the clear condition, therefore, is an acknowledgment that Congress's condition was not unambiguous, so that method of analysis would not meet the requirements of [a knowing waiver]." *Id.* "In other words, regulations cannot divest a statute of the very feature that permitted those regulations in the first place." *Texas v. Yellen*, 105 F.4th 755, 2024

[2] A waiver of sovereign immunity is often part of the bargain involved with spending conditions, and the analysis for whether a state knowingly waived immunity is identical to the question whether the federal government adequately informed the state of its obligations under the Spending Clause. *See Gruver v. La. Bd. of Supervisors*, 959 F.3d 178, 182 (5th Cir. 2020).

U.S. App. LEXIS 15436, at *31 (5th Cir. June 25, 2024). Moreover, "the ability to place conditions on federal grants ultimately comes from the Spending Clause, which empowers Congress, not the Executive, to spend for the general welfare," and so "regulations cannot provide the clarity needed to render the state's waiver of sovereign immunity knowing." *Tex. Educ. Agency*, 992 F.3d at 362.

Thus, a state must have "been put on notice clearly and unambiguously by the federal **statute** that the state's particular conduct or transaction will subject it to federal court suits brought by individuals." *Pace v. Bogalusa City Sch. Bd.*, 403 F.3d 272, 282 (5th Cir. 2005) (emphasis added; citation omitted); *accord Edelman v. Jordan*, 415 U.S. 651, 673 (1974) ("[W]e will find waiver [of 11th Amendment immunity] only where stated by the most express language or by such overwhelming implications from the text as will leave no room for any other reasonable construction.") (cleaned up). The immunity concern is involved here, as "Congress has successfully codified a statute which clearly, unambiguously, and unequivocally conditions receipt of federal funds under Title IX on the State's waiver of Eleventh Amendment Immunity." *Pederson v. La. State Univ.*, 213 F.3d 858, 876 (5th Cir. 2000).

Title IX's **entire bargain** thus depends on whether Mississippi was on notice in 1972 that the "particular conduct or transaction" alleged by M.K. "will subject it to federal court suits brought by individuals." *See Pace*, 403 F.3d at 282.[3]

2. Spending statutes require adherence to the reasonable understanding of the parties at the time of enactment.

Recall that when "Congress acts pursuant to its spending power, it generates legislation much in the nature of a contract." *Davis*, 526 U.S. at 640. The distinction between contract-based analysis and ordinary legislative interpretation makes all the difference: while legislative interpretation looks to the **ordinary public consequences** of the language used, contract interpretation focuses on the **parties' objectively reasonable understanding** at the time of formation.

The "Court normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment." *Bostock*, 590 U.S. at 654. This is so even if "a new application emerges that is both unexpected and important." *Id.* at 676. Thus, while "[o]ne

[3] As a municipal entity, the District does not itself have Eleventh Amendment immunity. However, because Title IX's interpretation must be consistent regardless of the relevant defendant, this issue will affect the many institutions that do have such immunity.

could easily contend that legislators only intended expected applications or that a statute's purpose is limited to achieving applications foreseen at the time of enactment," the Court does not ordinarily read statutes that way. *Id.*

A contract, on the other hand, requires **an agreement**, which turns on the parties' objectively reasonable understanding at the time of the agreement. *See Restatement (Second) of Contracts* § 201 cmt. a (contract "language is interpreted in accordance with its generally prevailing meaning" at the time of the agreement). The Supreme Court has long considered the parties' expectations as determinative. *See Howard v. Stillwell & Bierce Mfg. Co.*, 139 U.S. 199, 206 (1891) (scope of contract remedies look to what "may be reasonably presumed [to be] within the intent and mutual understanding of both parties at the time it was entered into"); *United States v. Winstar Corp.*, 518 U.S. 839, 911 (1996) (Breyer, J., concurring) ("[u]nder ordinary principles of contract law," a court is bound to construe a contract "in terms of the parties' intent, as revealed by language and circumstance"). "Mutual understanding" is key: "the objective of interpretation in the general law of contracts is to carry out the understanding of the parties rather than to impose

obligations on them contrary to their understanding." *Restatement (Second) of Contracts* § 201 cmt. c. While the parties typically "know of meanings in general usage" at the time of formation, the parties' intent doesn't **depend** on common understanding and doesn't **change** based on later usage. *Id.* § 201 cmt. b.

Crucially, if the parties' understanding does not keep pace with changing usage, the original understanding nevertheless controls. *See Alvin, Ltd. v. United States Postal Serv.*, 816 F.2d 1562, 1566–67 (Fed. Cir. 1987) ("unanticipated" change in law that significantly altered effect of plain contract terms required reformation in accordance with "the original bargain"). Indeed, it is a "truism that how the parties act under the arrangement, before the advent of controversy, is often more revealing than the dry language of the written agreement by itself." *Id.* at 1566 (citation omitted).

The parties' intent at the time of formation also follows Occam's Razor—the understanding based on the fewest assumptions is probably the one accepted by the parties. *See Dispatch Automation, Inc. v. Richards*, 280 F.3d 1116, 1119 (7th Cir. 2002) ("Parties to contracts may prefer simple-minded textualism to costly disputes later on."); *Fishman*

v. LaSalle National Bank, 247 F.3d 300, 302 (1st Cir. 2001) ("Common sense is as much a part of contract interpretation as is the dictionary or the arsenal of canons.") (citations omitted); *Deviney Constr. Co. v. Ace Util. Boring & Trenching, LLC*, 2014 U.S. Dist. LEXIS 88658, at *12 (S.D. Miss. June 30, 2014) ("[I]n order to carry out the contracting parties' intention, the contract's words may be interpolated, transposed, or even rejected.") (citing 11 *Williston on Contracts* § 32:9 (4th ed.)).

3. Title IX's bargain did not encompass liability for sexual orientation discrimination.

These principles make it clear that the **parties' understanding** of Title IX at the time of its passage was not consistent with liability for sexual orientation discrimination. At the time of its passage, Congress considered the law to be a remedy for intentional discrimination against **women**. Title IX began as the "Women's Educational Equality Act," introduced in September 1971 to "guarantee that women, too, enjoy the educational opportunity every American deserves." 117 Cong. Rec. 32413, 32476 (Sept. 1971) (Sen. Bayh). A month later, the House Committee on Education and Labor reported on the Higher Education Act of 1971, which included Senator Bayh's proposed language, to

address "discrimination against women in our institutions of higher education." H.R. Rep. No. 92-554, at 51 (1971).

Both chambers eventually passed competing legislation on this issue, and in May 1972, a conference committee released a report and the final text of what became Title IX. S. Rep. No. 92-798, at 148 (1972). Representative Bella Abzug of New York described the legislation as "the initial step in eradicating the rampant discrimination against women in higher education." 118 Cong. Rec. 20307, 20332 (Feb. 1972). Title IX was signed into law on June 23, 1972.

No published court decision would even address whether Title IX extended to perceived sexual orientation for another 28 years. In *Montgomery v. Indep. Sch. Dist. No. 709*, 109 F. Supp. 2d 1081, 1090 (D. Minn. 2000), the court observed that no prior court had "addressed this issue in the context of a Title IX claim," and it held that "to the extent that plaintiff asserts Title IX claims based on discrimination due to his sexual orientation or perceived sexual orientation, these claims are not actionable and must be dismissed." *See also* Julie A. Baird, *Playing It Straight*, 17 Berkeley Women's L.J. 31, 63 (2002) (contemporaneously

observing that "amending Title IX to include sexual orientation may be incompatible with the original purpose of the statute").

Meanwhile, at the time of Title IX's passage, Title VII's similar prohibitions were universally understood to not extend to perceived sexual orientation or gender identity. Although the Supreme Court has since adopted a different interpretation of that text, the Court still acknowledged it would have been an "unexpected" reading of the statute at the time of its passage. *See Bostock*, 590 U.S. at 654. Shortly after enactment, this Court, quite unsurprisingly, joined other courts in concluding that discrimination based on sexual orientation or even the perceived failure to conform to gender stereotypes was not actionable sex discrimination. *See, e.g.*, *Willingham v. Macon Tel. Pub. Co.*, 507 F.2d 1084, 1092 (5th Cir. 1975) (en banc) (discrimination based on failure to meet "sexual stereotypes" was not actionable under Title VII); *Blum v. Gulf Oil Corp.*, 597 F.2d 936, 938 (5th Cir. 1979) ("Discharge for homosexuality is not prohibited by Title VII or Section 1981."). This was not an outlier position: by 1978, this Court's "position in *Willingham* ha[d] been adopted by the Second, Fourth, and Eighth Circuits." *Smith v. Liberty Mut. Ins. Co.*, 569 F.2d 325, 327 n.1 (5th Cir. 1978). At the time,

the "EEOC itself ha[d] ruled that adverse action against homosexuals is not cognizable under Title VII," and "[t]wo district courts also have held that Title VII does not protect transsexuals." *Id.* (collecting cases). As Judge Ho wrote in 2019: "No one seriously contends that, at the time of enactment, the public meaning and understanding of Title VII included sexual orientation or transgender discrimination." *Wittmer v. Phillips 66 Co.*, 915 F.3d 328, 334 (5th Cir. 2019) (Ho, J., concurring). "It was not until 40 years after Congress enacted Title VII that a federal court of appeals first construed it to prohibit transgender discrimination — and 53 years after enactment that a federal court of appeals first construed it to prohibit sexual orientation discrimination" *Id.* at 336 (citation omitted).

Though America now rightly rejects the bigoted views of the 1960s and 1970s, legislation of that era was enacted against a backdrop that "homosexuality was thought to be a mental disorder, and homosexual conduct was regarded as morally culpable and worthy of punishment." *Bostock*, 590 U.S. at 709 (Alito, J., dissenting). Courts had even blessed firing federal employees for their sexual orientation. *See*, *e.g.*, *Anonymous v. Macy*, 398 F.2d 317, 318 (5th Cir. 1968). Most regrettably, in 1972,

homosexual conduct remained a **crime** in many States. *See, e.g.*, *Lawrence v. Texas*, 539 U.S. 558, 579 (2003) (striking down Texas criminal conviction for private homosexual conduct) While modern observers rightly condemn these shameful decisions and judgments, they're still powerful evidence that the agreement between Congress and the States when Title IX was enacted did not include heightened protections against sexual orientation discrimination.

In the context of public schools, moreover, the prevailing understanding in 1972 was that schools had a legitimate interest in enforcing gender stereotypes. In 1968, for example, this Court had already considered and rejected a form of the argument that sex discrimination encompassed the failure to conform to gender stereotypes. In *Ferrell v. Dall. Indep. Sch. Dist.*, 392 F.2d 697, 698 (5th Cir. 1968), students challenged a public school policy that prohibited male students from having "'Beatle' type haircuts." This Court rejected a wide array of arguments, including the contention "that the school regulation is discriminatory under the Civil Rights Act." *Id.* at 704. Meanwhile, an article written in 1979 "reported that '[a]ll states have statutes that permit the revocation of teaching certificates (or credentials) for

immorality, moral turpitude, or unprofessionalism,' and, the survey added, '[h]omosexuality is considered to fall within all three categories.'" *Bostock*, 590 U.S. at 711 (Alito, J., dissenting) (quoting Rhonda R. Rivera, *Our Straight-Laced Judges*, 30 Hastings L. J. 799, 861 (1979)).

It is little wonder then, that advocates have consistently advanced **legislative** efforts to amend federal anti-discrimination law to extend to sexual orientation. *See, e.g.*, Civil Rights Amendments Act of 1975, H.R. 166, 94th Cong., 1st Sess. (1975). States and municipalities have also enacted their own anti-discrimination measures. *See, e.g.*, Bruce J. Winick, *The Dade County Human Rights Ordinance of 1977: Testimony Revisited in Commemoration of Its Twenty-Fifth Anniversary*, 11 Law & Sex. 1, 2 (2002) (describing passage of city ordinance prohibiting "discrimination based on sexual orientation" in 1977). These legislative efforts have continued even after *Bostock*. *See, e.g.*, Equality Act, H.R. 5, 117th Cong., 1st Sess. (2021).

When the States were presented with Title IX's bargain in 1972, the statute did not **obviously** prohibit discrimination based on a student's perceived sexual orientation. The opposite was true. It would have been almost unthinkable for a federal government that itself

discriminated against employees because of their sexual orientation and states that criminally punished homosexual acts to have mutually and reasonably understood Title IX to have suddenly upended all of these policies in education. Given the settled law at the time, it would have been completely **unreasonable** for Mississippi, or for any other state, to understand the scope of Title IX any differently. The district court therefore correctly recognized that the extension of liability under Title IX to these unexpected applications was improper. *See* ROA.362-63; *accord Kansas v. U.S. Dep't of Educ.*, --- F. Supp. 3d ----, 2024 U.S. Dist. LEXIS 116479, at *42 (D. Kan. July 2, 2024); *Tennessee v. Cardona*, --- F. Supp. 3d ----, 2024 U.S. Dist. LEXIS 106559, at *44 (E.D. Ky. June 17, 2024), stay denied 2024 U.S. App. LEXIS 17600 (6th Cir. July 17, 2024); *Louisiana v. U.S. Dep't of Educ.*, 2024 U.S. Dist. LEXIS 105645, at *41–42 (W.D. La. June 13, 2024), *stay denied* No. 24-30399 (5th Cir. July, 17, 2024) (unpublished order).

B. *BOSTOCK*'S HOLDING DOES NOT APPLY HERE.

M.K. argues, however, that the Supreme Court's decision in *Bostock* requires the conclusion that Title IX prohibits discrimination tinged, in any part, by animus concerning sexual orientation. M.K. observes that

Bostock "held that sex discrimination under Title VII includes discrimination 'on the basis of homosexuality or transgender status.'" Appellant's Br. at 21 (quoting 590 U.S. at 680). He asserts categorically that because "[s]ex discrimination means the same thing under Title IX," the district court erred. *Id*.

Although this assertion has superficial appeal, it is wrong. First, the *Bostock* majority itself recognized that its holding yielded "**unexpected** applications" of Title VII's decades-old text. 590 U.S. at 674 (emphasis added). The majority also recognized that the notion that sex discrimination encompasses discrimination based on gender identity or sexual preference remained far outside the mainstream understanding well into the 21st Century, and long after Title IX's bargain was fixed in 1972. *See id.* at 674-75. How then could the states and the federal government be said to have **reasonably and mutually** understood that Title IX would encompass such types of discrimination in 1972? Obviously, they could not, and they certainly did not.

At least two other considerations support this conclusion—(1) the textual differences between Title VII and Title IX; and (2) the Spending Clause's clear-statement rule.

1. The Statutes Have Different Causation Standards

Title VII prohibits discrimination in employment "because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). Like Title IX, Title VII uses the term "sex," which is not limited to discrimination against women. The Supreme Court has concluded that Title VII applies to "sexual harassment of any kind that meets the statutory requirements." *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 79–80 (1998). Discrimination in employment under that statute can therefore occur for "same-sex" conduct. *Id.* at 79. And while the language of the two statutes differs in other ways, this Court has held that, "in light of *Oncale*'s holding, same-sex sexual harassment is actionable under Title IX as well as under Title VII." *Doe ex rel. Doe v. Dall. Indep. Sch. Dist.*, 153 F.3d 211, 219 (5th Cir. 1998).

But this holding does not answer the more complex question at issue in this case. The Supreme Court itself has observed that "Title VII, however, is a vastly different statute from Title IX," and "the comparison" between the two statutes "is therefore of limited use." *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 175 (2005). *Oncale* addressed the meaning of the term "discrimination," and it dealt with direct and

severe sexual harassment in the form of an actual or threatened sexual violence from a group of male workers on an offshore oil rig against one of their co-workers. *See* 523 U.S. at 77. The Supreme Court had little trouble determining that actual sexual assaults constituted "discrimination," even when the victim was the same sex as the perpetrator. *See id.* As the Court later observed with respect to Title IX, "'Discrimination' is a term that covers a wide range of intentional unequal treatment," including sexual harassment. *Jackson*, 544 U.S. at 175. This Court has applied *Oncale* to Title IX, but it has declined invitations to do so based on theories about sexual orientation, identity or even sex stereotypes, concluding simply that "sexual assault," such as the "removal of a person's underwear without their consent on numerous occasions plausibly constitutes pervasive harassment of a sexual character." *Carmichael v. Galbraith*, 574 Fed. Appx. 286, 290 (5th Cir. 2014) (unpublished); *see also id.* ("we have no need at the present time to address" "animus related to 'gender-based stereotypes'").

M.K. insists that *Bostock* answered this latter question as well, but that insistence ignores key textual differences between the statutes. *Bostock* first dealt with the obvious question of what "sex" meant to the

drafters of Title VII in 1964 when the statute was enacted. 590 U.S. at 655. Pointing to then-existing dictionary definitions, the Court "proceed[ed] on the assumption that 'sex' . . . referr[ed] only to biological distinctions between male and female." *Id.* M.K. does not argue now that this baseline definition is wrong.[4]

Bostock went beyond this "starting point," opining that the "question isn't just what 'sex' meant, but what Title VII says about it." 590 U.S. at 656. Title VII, in turn, does not require proximate cause based on gender: it establishes liability whenever an employer "intentionally fires an individual employee based **in part** on sex. It doesn't matter if other factors besides the plaintiff's sex contributed to the decision." *Id.* at 659 (emphasis added). Because the statute premises liability based on the mere contribution of gender, the Court held that Title VII also prohibits discrimination on the basis of sexual orientation or gender identity, because "discrimination based on homosexuality or transgender status necessarily entails discrimination based on sex; the first cannot happen without the second." *Id.* at 669. For such discrimination, the

[4] As other courts have noted, using ordinary dictionary definitions from 1972, "the term 'sex discrimination' only included discrimination against biological males and females at the time of enactment." *Louisiana*, 2024 U.S. Dist. LEXIS 105645, at *28; *accord Tennessee*, 2024 U.S. Dist. LEXIS 106559, at *25–26.

motivation is, at least **in part**, based on contrast with expectations or assumptions about sex. *Id.*

But that reasoning does not dictate the result for coverage under Title IX. Assuming, as the *Bostock* Court did, that "sex" means one's gender, and not one's sexual orientation, the precise issue here is whether Title IX also prohibits discrimination motivated, in any small part on gender because discrimination based on sexual orientation necessarily involves, at some abstract level, judgments about gender. But Title IX's more demanding causation standard forecloses liability.

First, the statutes use different language of causation: Title VII prohibits discrimination "because of" sex, whereas Title IX's remedy for past discrimination against women prohibits discrimination "on the basis of sex." After Title VII's enactment, courts wrestled with the meaning of its "because of" sex language, and what happened when "an employment decision resulted from a mixture of legitimate and illegitimate motives." *Price Waterhouse v. Hopkins*, 490 U.S. 228, 232 (1989) (plurality). At the time, this "question [had], to say the least, left the Circuits in disarray." *Id.* at 238 n.2 (collecting cases). A plurality concluded, however, that "to construe the words 'because of' as colloquial shorthand for 'but-for

causation,' . . . is to misunderstand them." *Id.* at 240. This was in part because Congress had "specifically rejected an amendment that would have placed the word 'solely' in front of the words 'because of.'" *Id.* at 241 n. 7. Instead, the plurality concluded that liability under Title VII was established whenever "gender played a motivating part in an employment decision." *Id.* at 258. Justices White and O'Connor concurred on narrower grounds, though, concluding that a plaintiff would need to show at least that "the unlawful motive was a **substantial** factor in the adverse employment action," to avoid unlimited liability for employers. *Id.* at 259 (White, J., concurring).

By contrast, Title IX prohibits discrimination "on **the** basis of sex," which suggests that sex must be "the" primary or predominant basis. *See Cochise Consultancy, Inc. v. United States ex rel. Hunt*, 587 U.S. 262, 272 (2019) (where a statute referred to "the official of the United States," the "use of the definite article 'the' suggests that Congress did not intend for any and all private relators to be considered"); *Rumsfeld v. Padilla*, 542 U.S. 426, 434 (2004) ("use of the definite article . . . indicates that there is generally only one" person covered). Accordingly, Title IX requires a more direct showing of causation.

But this is not the only textual difference between the two statutes. Because *Price Waterhouse* left significant uncertainty about the meaning of Title VII's causation standard, Congress responded with § 107 of the Civil Rights Act of 1991, codified at 42 U.S.C. § 2000e-2(m). That section clarifies that "an unlawful employment practice is established when the complaining party demonstrates that ... sex ... was **a motivating factor** for any employment practice, even though other factors also motivated the practice" (emphasis added). Crucially, Congress amended **only** Title VII in 1991, and it has **never** added the motivating factor language to Title IX. "Congress is presumed to be aware of court decisions construing statutes and may, of course, amend a statute as a result." *Jacobs v. Nat'l Drug Intelligence Ctr.*, 548 F.3d 375, 378 (5th Cir. 2008). But when Congress "has not done so," this also suggests acquiescence to existing interpretation. *Id.*; *cf. United States v. Moore*, 71 F.4th 392, 399 (5th Cir. 2023) ("Congress's choice to amend part of [of a statute] but not all of it may be a sign of Congressional acquiescence in the existing judicial interpretation of the phrase" that was not amended."); *see also Sheppard v. Visitors of Va. State Univ.*, 993 F.3d 230, 237 n.7 (4th Cir. 2021) ("But in the absence of congressional intervention as in the Civil Rights Act of

1991, which expressly amended Title VII to include a motivating factor standard, we are constrained to the text of Title IX and our binding precedent" to require but-for causation.).[5]

Thus, as the district court correctly held, the key factor in *Bostock*'s analysis—Title VII's expansive notion of causation—is absent from Title IX. "Because the student's sex must be **the** basis of Title IX harassment, *Bostock*'s reasoning that sexual-orientation discrimination entails sex discrimination because the employee's sex is one of 'multiple but-for causes' of the discrimination, cannot apply." ROA.360. *Bostock* accepted that discrimination based on sexual orientation was not direct discrimination related to "sex," but was instead a kind of derivative discrimination based on how one perceived a person departing from expectations about their gender. *See* 590 U.S. at 660. Because Title IX requires sex to be "the" cause of the discrimination, though, this derivative type of sex discrimination cannot be actionable.[6]

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[5] There is yet another relevant textual difference that proves that *Bostock*'s analysis does not apply. "Title IX explicitly provides exceptions to the nondiscrimination mandate ... Therefore, it is clear from the statutory language that the term 'sex' refers to the traditional binary concept of biological sex." *Kansas*, 2024 U.S. Dist. LEXIS 116479, at *29-30. Title IX's comprehensive scheme to remedy past discrimination against women would fall apart without that binary conception.

[6] The *Bostock* majority asserted that "nothing in our analysis depends on the motivating factor test." 590 U.S. at 657. However, it relied on Title VII's "sweeping

M.K.'s factual allegations prove why his expansive reading of causation is a poor fit for Title IX. Much of the alleged teasing involved students calling M.K. "dog water," which was a reference to him losing at video games, and other teasing was directed at his small size. *See* ROA.219-20. Though decidedly uncivil, these insults have no relationship to M.K.'s "sex." The use of "gay" as a pejorative was thus incidental to the main teasing, but using the term "gay" in this sense is in no way inherently discriminatory, or premised on M.K.'s **sex**. Though the term used as an insult is certainly inappropriate, even advocacy organizations like the Anti-Defamation League have recognized that the "phrase 'that's so gay' has persisted as a way for students to describe things they do not like, find annoying or generally want to put down," and the "phrase is used so commonly that many students no longer recognize it as homophobic because it is 'what everyone says.'" ADL, *'That's So Gay': Language That Hurts, and How to Stop It* (Jan. 21, 2014), https://www.adl.org/resources/blog/thats-so-gay-language-hurts-and-how-stop-it; *see also* Mark McCormack, *Maybe 'that's so gay' is actually*

standard" and lack of limiting terms (such as the word "solely") for its decision, and it noted the 1991 amendment showed that "[i]f anything, Congress has moved in the" direction of even more expansive liability under Title VII. *Id.* The absence of these factors in Title IX therefore suggests quite the opposite meaning.

ok for young people to say, The Conversation (July 4, 2014), https://theconversation.com/maybe-thats-so-gay-is-actually-ok-for-young-people-to-say-28687 (depending on context, "gay ha[s] two distinct meanings" — "when it refers to sexual identity and when it refers, separately, to something being 'rubbish'").

The only evidence that M.K.'s perceived sexual orientation was ever involved was M.K.'s testimony that he "sometimes" thought if another student "called [him] gay it meant he thought [M.K. was] a girl." ROA.226. M.K. also testified that he believed the other students called him "gay" "[m]aybe because [he], like, dressed up in like blue and red most of the time, like, maybe bright colors at first," and later responded by trying to "show[] an example of what gay is," "[l]ike blowing kisses," to try to "show[] them, like, what gay is and that I am not gay." ROA.226. Taking these allegations as true, they suggest at most that M.K.'s perceived sexual orientation was one possible factor in the teasing; but they fall far short of proving that it was the primary, or even an important, cause of the alleged conduct. M.K.'s theory therefore relies on Title IX's "on the basis of sex" standard being met by conduct that, in any

attenuated way, **touches on** sexual orientation. That reading is inconsistent with Congress's choice of statutory text.

M.K. argues, however, that the statutory phrases found in both statutes "are synonymous" because the Supreme Court has sometimes used the phrase "on the basis of sex" when describing Title VII. Appellant's Br. at 23. This is an odd form of textual analysis: descriptions about the meaning of statutory language displace the language itself. But "[j]udicial opinions must not be confused with statutes, and general expressions must be read in light of the subject under consideration." *United States v. Skoien*, 614 F.3d 638, 640 (7th Cir. 2010) (en banc).

Although M.K. cites multiple authorities that roughly equate discrimination "because of" sex with discrimination "on the basis of" sex in a rhetorical sense, *see* Appellant's Br. at 23-34, none of those sources addressed the causation question, much less the meaning of Title IX's language. For example, M.K. notes that in *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 64 (1986), the Court opined that "when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex." But *Meritor* did not construe statutory language concerning whether discrimination

derivative of sexual bias was actionable; rather, it simply concluded that sexual harassment might constitute "discrimination." *See id.*

M.K.'s similar citations of *City of Los Angeles Department of Water & Power v. Manhart*, 435 U.S. 702, 708 (1978); *Jackson*, 544 U.S. at 174, *University of Texas Southwestern Medical Center v. Nassar*, 570 U.S. 338, 359-60 (2013); *Bostock* itself; and 29 C.F.R. § 1604.11(a), are just more examples of authorities using casual language while drawing legal conclusions on issues distinct from the one now confronting this Court. None of the cited language was essential to a judgment of the Supreme Court, and thus it is not binding on this Court. Indeed, it is quite a stretch to even describe these passages as dicta, as opposed to merely casual descriptions of matters not at issue. At the same time, M.K. ignores much more pertinent authority—never addressing either the Supreme Court's *Price Waterhouse* opinion or the 1991 amendment to Title VII. [7]

M.K. also argues that "[n]o appellate court to consider a Title IX sexual-harassment claim post-*Bostock* has drawn a distinction between

[7] For these same reasons, M.K.'s reliance on out-of-Circuit decisions that allegedly support his argument is unconvincing. *See* Appellant's Br. at 24–25 (citing *Grabowski v. Ariz. Bd. of Regents*, 69 F.4th 1110, 1116 (9th Cir. 2023); *A.C. v. Metro. Sch. Dist. of Martinsville*, 75 F.4th 760, 769 (7th Cir. 2023), *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 616 (4th Cir. 2020); and *Adams v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 814 (11th Cir. 2022) (en banc)).

the 'because of' language in Title VII and the 'on the basis of' language in Title IX." Appellant's Br. at 24. That is inaccurate: both the Fourth Circuit in *Sheppard*, 993 F.3d at 236 n.7, and the Second Circuit in *Radwan v. Manuel*, 55 F.4th 101, 131 (2d Cir. 2022), cited *Bostock* while drawing this precise distinction between the two statutes.

The United States as amicus curiae meanwhile argues that the textual differences are irrelevant, claiming that "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." Br. of U.S. at 17 (citing *Taylor-Travis v. Jackson State Univ.*, 984 F.3d 1107, 1119 (5th Cir. 2021)). The United States significantly oversells the holding in *Taylor-Travis*. That case involved a Title IX retaliation complaint, specifically a challenge to a jury instruction that "Taylor may prevail if the jury finds 'that she was terminated solely as a consequence of complaints alleging noncompliance with the substantive provisions of Title IX.'" *Taylor-Travis*, 984 F.3d at 1117-18. Pointing to earlier precedent concerning anti-retaliation regulations, this Court simply recognized that, generally speaking, "the anti-retaliation provision of title IX is similar to those of title VII and the

ADEA and should be accorded a similar interpretation." *Id.* at 1118–19 (citing *Lowrey v. Texas A&M Univ. Sys.*, 117 F.3d 242, 252 n.23 (5th Cir. 1997)). This Court also recognized that no precedent had settled the issue conclusively. *See id.* And rather than determining the absolute scope of liability, this Court affirmed the district court's judgment against Taylor, because the challenged jury instruction "'substantially covered' the correct standard: that there must be a 'causal connection' between the Title IX complaint and the adverse employment action." *Id.* at 1119. This Court declined, however, to say what exactly were the boundaries of that "causal connection." *See id.*

To be sure, as the United States has argued, this Court has sometimes spoken imprecisely, often equating the Title VII and Title IX standards, and even setting out a form of the "motivating factor" test in the context of Title IX disciplinary proceedings. *See* Br. of U.S. at 11–12 (citing *Doe v. William Marsh Rice Univ.*, 67 F.4th 702, 709 (5th Cir. 2023); and *Lakoski v. James*, 66 F.3d 751, 756 & n.3 (5th Cir. 1995)). But none of these cases turned on the causation standard. *Doe*, for instance, required proof that "sex was a motivating factor" for a challenged disciplinary proceeding, but then this Court explained that the relevant

outcome must have been "infected with bias," such that "gender bias was **the** motivating force behind" the outcome, and the plaintiff was required to "demonstrate a causal connection between the flawed outcome and gender bias." 67 F.4th at 709 (citation omitted). This suggests a much stronger causation standard than the one described for Title VII by the *Bostock* majority, despite the isolated terminology adopted from other court decisions. This Court's observation in *Lakoski* that "both Title VII and Title IX protect individuals from employment discrimination on the basis of sex," 66 F.3d at 756, meant only that plaintiffs lack a second cause of action under 42 U.S.C. § 1983 for conduct covered by Title IX. That casual observation does not purport to constitute a definitive explication of Title IX's causation standard.

Finally, almost as an aside, M.K. raises a new theory of liability, suggesting that "a reasonable jury could conclude that the bullies targeted M.K. and sought to punish him because he did not conform to their **stereotypical views** on sex." Appellant's Br. at 30 (emphasis added). The United States goes farther, asserting that "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**,"

even as it concedes that the "district court did not address this alternative basis." Br. of U.S. at 23 (emphasis added). The district court did not "address" this theory precisely because M.K. neither pled it nor litigated it, and the facts cannot possibly support it. The theory also fails as a matter of law.

When an appellant argues a "new factual theory [that] was not raised in [his] complaint, nor raised in [his] opposition to [the a]ppellee's motion for summary judgment," this Court will "decline to consider [the a]ppellant's new arguments raised for the first time on appeal." *Cutrera v. Bd. of Supervisors*, 429 F.3d 108, 113 (5th Cir. 2005). Indeed, rather than merely **waiving** the argument, an appellant **forfeits** a theory of recovery by not presenting it to the trial court. *See United States v. Zuniga*, 860 F.3d 276, 284 n.9 (5th Cir. 2017). M.K. never even hinted at this theory below. The complaint never mentioned it, it never came up in the summary judgment briefing, and the district court was never asked to consider it. *See* ROA.16, 21-22, 305, 324-25, 344. It was conclusively forfeited, and this Court should refuse to consider the argument now, particularly as it was raised primarily by the United States as a non-party amicus curiae.

Even if not forfeited, this theory makes no sense in this case. The only evidence even arguably touching on gender was M.K.'s own speculation that he was teased "[m]aybe because [he], like, dressed up in like blue and red most of the time, like, maybe bright colors at first," and he tried to "show[] an example of what gay is," "[l]ike blowing kisses." ROA.226. There's no evidence to suggest that dressing in bright colors is related in any way to a gender stereotype, rather than assumptions about being gay, and the reference to "blowing kisses" again deals solely with the issue of sexual orientation instead of stereotypes about female behavior. *See id.* The theory was not raised below because it has no record support.

The argument fails as a matter of law in any event. It adds nothing new because it proceeds from the same syllogism urged by M.K.: (1) discrimination for failure to conform to gender stereotypes is actionable under Title VII as "a subset of sex discrimination"; and (2) Title IX is often interpreted the same as Title VII; therefore (3) this theory should apply here. *See* Br. of U.S. at 24-25 (quoting *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 119 (2d Cir. 2018) (en banc)). But this syllogism necessarily acknowledges that this kind of discrimination is a mere

"subset" of actionable discrimination, just as discrimination based on perceived sexual orientation is derivative of sex discrimination; however, neither is sex discrimination itself. *See Bostock* 590 U.S. at 655. This theory thus fails because of the distinct causation language in Title IX.

2. The Spending Clause's clear-statement rule requires that any doubt be resolved against extending liability.

Even if M.K.'s textual argument was plausible, the district court correctly refused "to extend *Bostock*'s reasoning to Title IX"; because the statute lacked "a **clear statement** that it covers sexual-orientation discrimination." ROA.359, 361. In other words, even ignoring the textual differences, the *Bostock* majority's parsing of Title VII cannot be transferred wholesale to spending legislation. Because Congress altered the constitutional balance between the states and the federal government in enacting Title IX and its waiver of state immunity for monetary damages, M.K. must show more than merely that his reading is "the better interpretation" of Title IX; he must show that Congress "close[d] all plausible off ramps" to **avoid** his interpretation and its intrusion into state sovereignty. *See Biden*, 143 S. Ct. at 2377 (Barrett, J., concurring).

Therefore, whatever the merit of the textual analysis in *Bostock* and its possible application to Title IX, it cannot be gainsaid that "[n]o one seriously contends that, at the time of enactment, the public meaning and understanding of [either law] included sexual orientation or transgender discrimination." *Wittmer*, 915 F.3d at 334 (Ho, J., concurring). There is simply no question that when Congress struck Title IX's bargain with the states in 1972, M.K.'s proffered reading of the statute would have been unthinkable to either side of the agreement. *See Bostock*, 590 U.S. at 708 (Alito, J., dissenting). As this Court recently noted: "If ambiguity makes knowing acceptance impossible, then the condition is unenforceable, and the bargain is invalid." *Texas*, 2024 U.S. App. LEXIS 15436, at *22. And when "[c]ourts across the country have likewise struggled" with a statute's meaning, this supplies good evidence of such ambiguity. *Id.* at *27.

M.K. says virtually nothing about the clear-statement requirement, insisting ipse dixit that "this requirement was satisfied because sexual orientation discrimination has 'always been prohibited' by Title IX's plain terms." Appellant's Br. at 26 (quoting *Bostock*, 590 U.S. at 662). But *Bostock*'s interpretation of a different statute cannot alter the agreement

involved in Title IX. Although statutes can sometimes take on unforeseen meanings when read literally, the point of a clear-statement rule is to avoid **constitutional doubt** by requiring more. *See Arlington Cent. Sch. Dist.*, 548 U.S. at 304. Even if M.K.'s strained reading of Title IX could be accepted, there is no doubt that neither Congress nor the states reasonably anticipated such a reading in 1972. Rather than create a constitutional problem by forcing the states to retroactively accept terms to which they never agreed, this Court must reject this novel reading of Title IX.

The United States raises no compelling counterpoints, primarily echoing the incorrect view that the text of Title IX is so pellucidly clear that the States should have understood its expansive reach. *See* Br. of U.S. at 18.[8]

[8] The Fourth Circuit's similar view that "*Bostock* foreclose[d the argument] that 'on the basis of sex' is ambiguous," *Grimm*, 972 F.3d at 619 n.18, reads the fair notice requirement completely out of the Supreme Court's precedents. Of the other courts to have applied *Bostock* to Title IX, only *Grimm* even touched on the Spending Clause's clear-statement rule, holding that the rule was satisfied because the states "knew or should have known" that *Bostock*'s interpretation of Title VII automatically updated the meaning of Title IX. *Id.* If that reasoning were correct, though, then the Supreme Court's precedents invalidating regulations because they were not part of the original bargain would make no sense because every case involved a **possible** reading of the statutory text. *See, e.g.*, *NFIB v. Sebelius*, 567 U.S. 519, 583–84 (2012) (where Congress reserved the "right to alter, amend, or repeal any provision" in the statute, subsequent major change to the overall regulatory scheme nevertheless failed the Spending Clause's clear-statement requirement); *Pennhurst*, 451 U.S. at

The United States also points to *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167 (2005), in which the Supreme Court dismissed Spending Clause concerns when inferring an implied right of action for retaliation under Title IX. Br. of U.S. at 21. *Jackson* is distinguishable. In that case, a five-Justice majority concluded that, as of 2005, the states were on notice that Title IX's broad prohibition on "discrimination" also included intentional retaliation based on complaints of discrimination. 544 U.S. at 183. But rather than asserting that any new interpretation of Title IX would pass the relevant test, the Court pointed to actions both before and after Title IX's enactment that would have put the states on notice by the time of that suit.

First, the Court observed that "Title IX was enacted in 1972, three years after our decision in *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969)," which had held that 42 U.S.C. § 1982's similar prohibitions included claims for "retaliation," and the Court "presume[d] that

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19 (Congressional statement of purpose and "findings" were insufficient to bind states under the Spending Clause). Furthermore, other courts of appeals have rightly rejected the notion that Title VII and Title IX are interchangeable and the notion that *Bostock* applies outside of Title VII, meaning that *Grimm*'s major premise is also faulty. *See, e.g.*, *L.W. v. Skrmetti*, 83 F.4th 460, 464 (6th Cir. 2023) *cert. granted* 2024 U.S. LEXIS 2780 (June 24, 2024); *Eknes-Tucker v. Alabama*, 80 F.4th 1205, 1229 (11th Cir. 2023).

Congress was thoroughly familiar with *Sullivan* and that it expected its enactment of Title IX to be interpreted in conformity with it." *Jackson*, 544 U.S. at 172 (cleaned up). Second, the Court pointed to several of its post-enactment decisions as evidence that "[f]unding recipients have been on notice that they could be subjected to private suits for intentional sex discrimination under Title IX since 1979, when we decided" *Cannon v. University of Chicago*, 441 U.S. 677 (1979), and two later cases, *Gebser v. Largo Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998), and *Davis v. Monroe County Bd. of Educ.* 526 U.S. 629 (1999), which "have consistently interpreted Title IX's private cause of action broadly to encompass diverse forms of intentional sex discrimination." *Jackson*, 544 U.S. at 182–83. Third, the "regulations implementing Title IX clearly prohibit retaliation and have been on the books for nearly 30 years." *Id*. at 182. Collectively, the majority viewed these three facts as providing sufficient notice that intentional retaliation was also actionable under Title IX. *Id*.

Extending Title IX's reach to perceived sexual orientation discrimination breaks new ground in ways that are significantly different from *Jackson*. Most importantly, there is nothing like the 1969 *Sullivan* decision that predated Title IX's enactment that would have informed

Congress and the states that sexual orientation was within the purview of Title IX. As documented above, both before and long after Title IX was enacted, **every** court had rejected expansion of both Title VII and Title IX to sexual orientation discrimination. To the extent that post-enactment notice could be relevant, there are simply no regulations clearly informing the states for more than 30 years that the precise conduct at issue fell under the statute, and likewise no series of decisions addressing the term "sex" in the same statute. To the contrary, the only form of notice ever presented here is the very recent interpretation of a different statute in *Bostock*. *See Tennessee*, 2024 U.S. Dist. LEXIS 106559, at *44–45 (rejecting identical argument made by the United States, because *Jackson* "looked to Title IX and determined, based on its plain language and the relevant case law, that 'intentional discrimination on the basis of sex' includes retaliation," and concluding that "[n]either *Jackson* nor any of the cases it cites indicates the statute should be read to expand the traditional definition of 'on the basis of sex'").

Furthermore, the Supreme Court has subsequently cast doubt on whether post-enactment notice can ever satisfy the clear-statement rule,

emphasizing that "[t]hough Congress' power to legislate under the spending power is broad, it does not include surprising participating States with postacceptance or retroactive conditions." *NFIB*, 567 U.S. at 584 (quoting *Pennhurst*, 451 U.S. at 25). Thus, *NFIB* held that a broad statutory provision authorizing Congress to "'alter' or 'amend' the Medicaid program" did not authorize Congress to "dramatically" "transform" the program "in kind, not merely degree." *Id.* at 583–84. Only those rules "in place when the grants were made" could possibly be relevant for the Spending Clause analysis. *Bennett*, 470 U.S. at 670.

The United States' argument also suggests "an inescapable dilemma" that the government fails to appreciate. *See Texas*, 2024 U.S. App. LEXIS 15436, at *33. The United States notes that the "Department of Education recently released amendments to its Title IX regulations . . . which are scheduled to become effective August 1, 2024" and which reinterpret Title IX and impose new definitions for "sex-based harassment." Br. of U.S. at 1; *see also* 34 C.F.R. § 106.10. Although these amendments are necessarily irrelevant to the question of notice, *Bennett*, 470 U.S. at 670, they do suggest that even the agency believes that Title IX lacks the clear statement required by the Spending Clause. In order

for the agency to have any regulatory authority to expand the scope of actionable discrimination in a substantive rule, the statutory term must be "ambiguous." *Tex. Educ. Agency*, 992 F.3d at 361. But "[r]elying on regulations to present the clear condition [for the Spending Clause], therefore, is an acknowledgment that Congress's condition was not unambiguous." *Id.* Either Title IX is ambiguous, and it necessarily fails the clear-statement requirement, or the United States lacks the authority to issue regulatory definitions at all because there is no statutory gap to fill. That the agency **did** issue regulations bolsters the conclusion that applying the statute to alleged sexual orientation discrimination is impermissible under the Spending Clause: "Indeed, in leaning so heavily throughout their argument on the clarifications provided by the regulations instead of the clarity contained within the statutory text, the federal [government] implicitly reveal[s] the fatal ambiguity." *Texas*, 2024 U.S. App. LEXIS 15436, at *32.[9]

* * *

[9] It is no wonder then that at least four district courts have preliminarily enjoined these regulations as being likely unlawful, in part because of the Spending Clause's clear statement rule. *See Carroll Indep. Sch. Dist. v. U. S. Dep't of Educ.*, 2024 U.S. Dist. LEXIS 122716, at *10 n.30 (N.D. Tex. July 11, 2024); *Kansas*, 2024 U.S. Dist. LEXIS 116479, at *42; *Tennessee*, 2024 U.S. Dist. LEXIS 106559, at *44; *Louisiana*, 2024 U.S. Dist. LEXIS 105645, at *41–42.

Title IX's remedial efforts to end discrimination in schools "on the basis of sex" cannot be extended to create private liability any time a public-school student faces teasing that touches, in any small part, on perceptions about that student's sexual orientation. Such a reading ignores the statute's careful language about causation and its pointed omission of Title VII's more expansive language. But even if *Bostock*'s larger observations about the scope of discrimination motivated by "sex" could be grafted onto Title IX, the universal rejection of such a reading at the time of Title IX's enactment, coupled with the ensuing history of rejecting M.K.'s proffered reading, proves that the statute lacked the unmistakable clarity required of Spending Clause legislation.

II. THE RECORD CANNOT ESTABLISH SEVERE AND PERVASIVE SEXUAL HARASSMENT.

The district court's alternative holding that M.K. failed to demonstrate severe and pervasive harassment that deprived him of educational opportunities is also correct. *See* Appellant's Br. at 32.

Although sexual harassment can in certain circumstances constitute discrimination under Title IX, anti-discrimination laws must not be expanded into "a general civility code." *Oncale*, 523 U.S. at 81 (interpreting Title VII); *accord Doe*, 153 F.3d at 219 (applying *Oncale*'s

definition of "discrimination" to Title IX). A "plaintiff must establish sexual harassment of students that is so severe, pervasive, and objectively offensive, and that so undermines and detracts from the victims' educational experience, that the victim-students are effectively denied equal access to an institution's resources and opportunities." *Davis*, 526 U.S. at 651. "Courts, moreover, must bear in mind that schools are unlike the adult workplace and that children may regularly interact in a manner that would be unacceptable among adults. . . . It is thus understandable that, in the school setting, students often engage in insults, banter, teasing, shoving, pushing, and gender-specific conduct that is upsetting to the students subjected to it. Damages are not available for simple acts of teasing and name-calling among school children, however, even where these comments target differences in gender." *Id.* at 651–52.

Applying these standards, this Court has concluded that allegations of school teasing and bullying much more severe than what M.K. has alleged fail to constitute actionable discrimination. In *Sanches v. Carrollton-Farmers Branch Indep. Sch. Dist.*, 647 F.3d 156, 162 (5th Cir. 2011), the Court considered same-sex student-on-student

harassment that was allegedly motivated by Sanches's gender. Sanches, a female high school student, claimed that her alleged harasser (J.H.) "started a rumor that Sanches 'had a hickey on her boob'"; "'cornered' Sanches in the hallway during a passing period" and "'told [her] that she [J.H.] was having sex with'" Sanches's boyfriend before "wiping the tears from [Sanches's] eyes"; and "slapped [Sanches's boyfriend's] buttock as she walked by Sanches and [Sanches's boyfriend]." *Id*. Emphasizing that "students are still learning how to interact appropriately with their peers," this Court held that the harassment failed the relevant objective threshold for liability. *Id.* at 167 (citation omitted).

Comparing the allegations in *Sanches* with those claimed by M.K., the district court properly held that the complained-of conduct was neither severe nor pervasive. M.K. alleged that he was teased by other students—called "dog water" because he was bad at video games, teased for being short, once called "Trash," and occasionally called "gay" by other students. *See* ROA.220-22. Even under M.K.'s expansive theory, Title IX does not make every insult actionable, and so being called "dog water" or mocked for his height reflects "personal animus" that is outside Title IX's reach. *Sanches*, 647 F.3d at 167. The record further reveals that the only

times M.K. reported being called "gay"—which is the only insult that even theoretically could have touched on gender—were "about like one or two times" in band class, ROA.220-21; "[m]aybe like three times" in math, ROA.222; and "[m]aybe like two times" in language arts. ROA.222.

As summed up by the district court, "M.K.'s deposition testimony supports that he was called gay by several other students in three of his sixth-grade classes during the first month or two of the school year," and that M.K. reported this to his band teacher "one or two times" and to his math "teacher three times." ROA.364. In context, this teasing seems to have been an insult that did not refer to sexual identity at all. *See* McCormack, *supra*. But even if it did, the conduct alleged by M.K. cannot be reconciled with the Supreme Court's admonition that "[d]amages are not available for simple acts of teasing and name-calling among school children . . . even where these comments target differences in gender." *Davis*, 526 U.S. at 652. Compared with the overt sexual insults alleged by Sanches that were not actionable, the isolated conduct to which M.K. points, does not clear the high bar for severe and pervasive sexual harassment. *See Sanches*, 647 F.3d at 162.

Crucially, M.K. points to no physical sexual harassment. Sanches, by contrast, claimed that she was "'cornered' . . . in the hallway during a passing period" by another student, who physically wiped "tears from [Sanches's] eyes" and "slapped [Sanches's boyfriend's] buttock." *Id.* But none of that conduct was actionable. The only arguable physical harassment in this case came from M.K. himself, who once "slap[ped another student] in the face" in retaliation for having his backpack unzipped, ROA.223, and who exposed his genitals to another student in the boy's bathroom. ROA.278. Only the latter incident could be viewed as being related in any way to sex, but M.K. obviously cannot hold the school liable for his own conduct.

Unable to answer this point with facts, M.K.'s appellate counsel retreat to hyperbole and fabrication. Tellingly, counsel fail to mention *Sanches*'s holding concerning severe and pervasive harassment. Instead, counsel assert that for "nearly all of sixth grade, this incessant harassment shaped M.K.'s school day from the moment he entered school to the moment he left." Appellant's Br. at 34. As discussed, however, M.K.'s own accounts hardly resemble this overwrought rhetoric, instead revealing only a handful of insults. And rather than point to physical

harassment, M.K's attorneys insist that his act of exposing himself to another student was just "an insignificant bathroom accident," while simultaneously claiming that it might actually have been an "another attempt" by the student to whom M.K. exposed himself "to torment M.K." *Id.* at 35. Yet in his deposition, M.K. denied exposing himself to the other student, while his mother testified that M.K. had "admitted [to her] that he did expose himself." ROA.226, 278. No evidence suggests that the other student was the perpetrator though, and counsel's bizarre efforts to recast the facts must fail.

CONCLUSION

The judgment of the district court should be affirmed.

July 29, 2024

Respectfully,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), I hereby certify that this document complies with Federal Rule of Appellate Procedure 32(a)(7)(B)(i). It is printed in Century Schoolbook, a proportionately spaced font, and includes 12715 words, excluding items enumerated in Rule 32(f). I relied on my word processor, Microsoft Word, to obtain the count.

Respectfully,

/s/ Caleb Kruckenberg
Caleb Kruckenberg

CERTIFICATE OF SERVICE

I hereby certify that, on July 29, 2024, this document was electronically filed using the Court's CM/ECF system, which sent notification of such filing to all counsel of record.

Respectfully,

/s/ Caleb Kruckenberg
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