No. 19-1952

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

GAVIN GRIMM

Plaintiff-Appellee,

v.

GLOUCESTER COUNTY SCHOOL BOARD,

Defendant-Appellant.

On Appeal from the United States District Court
for the Eastern District of Virginia
Newport News Division

SUPPLEMENTAL BRIEF OF PLAINTIFF-APPELLEE GAVIN GRIMM

Eden B. Heilman (VSB No. 93554)
Jennifer Safstrom (VSB No. 93746)
Nicole Tortoriello (VSB No. 91129)
AMERICAN CIVIL LIBERTIES UNION
OF VIRGINIA FOUNDATION, INC.
701 E. Franklin Street, Suite 1412
Richmond, Virginia 23219
Phone: (804) 644-8080
Fax: (804) 649-2733
eheilman@acluva.org
jsafstrom@acluva.org
ntortoriello@acluva.org

Joshua A. Block
Leslie Cooper
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION
125 Broad Street, 18th Floor
New York, New York 10004
Phone: (212) 549-2593
Fax: (212) 549-2650
jblock@aclu.org
lcooper@aclu.org

Counsel for Plaintiff-Appellee

TABLE OF CONTENTS

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

INTRODUCTION 1

ARGUMENT 2

I. *Bostock* Confirms that Discriminating Against a Student Because He Is Transgender Is Discrimination "On the Basis of Sex" Under Title IX. 2

II. Under *Bostock* the Permissibility of Restroom Exclusions Depends on Whether They "Injure Protected Individuals." 3

III. *Bostock* Confirms that *Pennhurst* Does Not Provide a Defense to the Board's Discrimination. 5

CONCLUSION 6

CERTIFICATE OF COMPLIANCE 7

CERTIFICATE OF SERVICE 8

TABLE OF AUTHORITIES

Cases

Bostock v Clayton County,
No. 17-1618, 2020 WL 3146686 (U.S. June 15, 2020)..... passim

Burlington N. & S.F.R. v. White, 548 U.S. 53 (2006) 4

Franklin v. Gwinnett Cty. Pub. Schs., 503 U.S. 60 (1992).....2

G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd., 822 F.3d 709 (4th Cir. 2016)....2, 5

Gentry v. E. W. Partners Club Mgmt. Co., 816 F.3d 228 (4th Cir. 2016).....3

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

Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1 (1981).....1, 5

Statutes

20 U.S.C. § 1681(a) 1, 2, 3

42 U.S.C. § 2000e–2(a)(1).....2, 3

INTRODUCTION

The Supreme Court held in *Bostock v. Clayton County* that, under the plain text of Title VII, discriminating against a transgender employee is discrimination because of such individual's sex. No. 17-1618, 2020 WL 3146686 (U.S. June 15, 2020). As discussed below, *Bostock* established that:

- Discriminating against a person for being transgender is discrimination that would not occur "but for" the person's sex. *Cf.* Pl.'s Br. 45-46.

- In determining whether policies regarding sex-separated facilities constitute discrimination on the basis of sex, the key question is whether the policies "injure protected individuals." *Cf.* Pl.'s Br. 46-47 (articulating the same standard).

- Discriminating against a person for being transgender is intentional discrimination that violates the plain statutory text. *Cf.* Pl.'s Br. 50-51 (rebutting the Board's assertion that *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1 (1981) forecloses relief).

Applying these principles to the plain text of Title IX and the undisputed facts of this case, *Bostock* confirms that when the Gloucester County School Board (the "Board") enacted a policy to prohibit Gavin Grimm ("Gavin") from using the same restrooms as other boys, it discriminated against Gavin "on the basis of sex" under Title IX. 20 U.S.C. § 1681(a); *see* Pl.'s Br. 45-51.

ARGUMENT

I. *Bostock* Confirms that Discriminating Against a Student Because He Is Transgender Is Discrimination "On the Basis of Sex" Under Title IX.

As this Court has already recognized, federal courts "look to case law interpreting Title VII of the Civil Rights Act of 1964 for guidance in evaluating a claim brought under Title IX." *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 718 (4th Cir. 2016), *vacated and remanded*, 137 S. Ct. 1239 (2017); *see Franklin v. Gwinnett Cty. Pub. Schs.*, 503 U.S. 60, 75 (1992) (holding that because sexual harassment is discrimination because of sex under Title VII, "the same rule should apply when a teacher sexually harasses and abuses a student" under Title IX).

Bostock held that, under the plain text of Title VII, discriminating against a transgender employee is discrimination because of that individual's sex. The Court explained that this conclusion was dictated by "Congress's key drafting choices—to focus on discrimination against individuals and not merely between groups and to hold employers liable whenever sex is a but-for cause of the plaintiff's injuries." *Bostock*, 2020 WL 3146686, at *17.

Bostock's analysis of Title VII applies with equal force to the plain text of Title IX. Both statues focus on discriminatory treatment of individuals, not groups: Title VII protects "[a]ny individual," 42 U.S.C. § 2000e–2(a)(1); Title IX protects "[a]ny person," 20 U.S.C. § 1681(a). And both statutes require merely "but for"

causation: Title VII prohibits discrimination "because of" sex, 42 U.S.C. § 2000e–2(a)(1); Title IX prohibits discrimination "on the basis of" sex, 20 U.S.C. § 1681(a). *See Gentry v. E. W. Partners Club Mgmt. Co.*, 816 F.3d 228, 235-36 (4th Cir. 2016) ("We see no 'meaningful textual difference' between [the term 'on the basis of'] and the terms 'because of,' 'by reason of,' or 'based on'—terms that the Supreme Court has explained connote 'but-for' causation.").

Because both Title VII and Title IX contain the same "key drafting choices—to focus on discrimination against individuals and not merely between groups and to hold [defendants] liable whenever sex is a but-for cause of the plaintiff's injuries"—both statutes prohibit discrimination against a person for being transgender. *Bostock*, 2020 WL 3146686, at *17.

II. Under *Bostock* the Permissibility of Restroom Exclusions Depends on Whether They "Injure Protected Individuals."

Although *Bostock* left "future cases" to decide how its holding applied in the context of restrooms, the decision identified the key question that those cases must answer. *Bostock*, 2020 WL 3146686, at *17. The Court explained that "Title VII does not concern itself with everything that happens 'because of' sex. The statute imposes liability on employers only when they 'fail or refuse to hire,' 'discharge,' 'or otherwise ... discriminate against' someone because of a statutorily protected characteristic like sex." *Id.* at *5. The permissibility of sex-separated restrooms

under Title VII thus depends on whether the differential treatment constitutes "discriminat[ion]":

> [W]e do not purport to address bathrooms, locker rooms, or anything else of the kind. The only question before us is whether an employer who fires someone simply for being homosexual or transgender has discharged or otherwise discriminated against that individual "because of such individual's sex." As used in Title VII, the term "'discriminate against'" refers to "distinctions or differences in treatment that injure protected individuals." *Burlington N. & S.F.R. [v. White]*, 548 U.S. [53,] 59 [(2006)]. Firing employees because of a statutorily protected trait surely counts. Whether other policies and practices might or might not qualify as unlawful discrimination or find justifications under other provisions of Title VII are questions for future cases, not these.

Id. at *17. Under this framework, the key question for the Court to resolve when analyzing a restroom exclusion is whether the exclusion is a "distinction[] or difference[] in treatment that injure[s] protected individuals." *Id.*

Bostock thus requires the same analysis set forth in Plaintiff's brief. *See* Pl.'s Br. 46-47. The mere act of providing separate restrooms for boys and girls is compatible with Title IX's prohibition on "discrimination" because those restrooms are understood to differentiate on the basis of sex without generally harming individuals or treating them unequally. But, in this case, the undisputed facts showed that the Board's exclusion of Gavin from the same restroom as other boys singled him out for different treatment in a way that was stigmatizing and harmful. The Board's policy did not simply differentiate based on sex; it did so in a manner that

"injure[d] [a] protected individual[]." *Bostock*, 2020 WL 3146686, at *17. The policy thus violated Title IX's prohibition on "discrimination."

Bostock also instructs that courts may not refuse to apply the plain terms of the statute based on their own assumptions and intuitions that doing so would lead to "undesirable policy consequences." *Id*. "Judges are not free to overlook plain statutory commands on the strength of nothing more than suppositions about intentions or guesswork about expectations." *Id.*; *cf. G.G.*, 822 F.3d at 724 ("To the extent the dissent critiques the result we reach today on policy grounds, we reply that . . . we leave policy formulation to the political branches.").

III. *Bostock* Confirms that *Pennhurst* Does Not Provide a Defense to the Board's Discrimination.

Bostock also forecloses the Board's argument that holding the Board liable for violating Title IX would deprive it of fair notice under *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1 (1981). As *Bostock* explained, the plain text of Title VII—and, by extension, Title IX—"virtually guaranteed that unexpected applications would emerge over time." *Bostock*, 2020 WL 3146686, at *17. Both statutes unambiguously "prohibit[] all forms of discrimination because of sex, however they may manifest themselves or whatever other labels might attach to them." *Id.* at *11; *cf. Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 182-83 (2005) (Title IX funding recipients "have been put on notice by the fact that cases . . . have

consistently interpreted Title IX's private cause of action broadly to encompass diverse forms of intentional sex discrimination"). The discrimination in this case is no different. *See* Pl.'s Br. 50-51.

CONCLUSION

The district court's decision should be affirmed.

Respectfully submitted,

/s/ Joshua A. Block

Eden B. Heilman (VSB No. 93554)
Jennifer Safstrom (VSB No. 93746)
Nicole Tortoriello (VSB No. 91129)
AMERICAN CIVIL LIBERTIES UNION OF VIRGINIA FOUNDATION, INC.
701 E. Franklin Street, Suite 1412
Richmond, Virginia 23219
Phone: (804) 644-8080
Fax: (804) 649-2733
eheilman@acluva.org
jsafstrom@acluva.org
ntortoriello@acluva.org

Joshua A. Block
Leslie Cooper
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street, 18th Floor
New York, New York 10004
Phone: (212) 549-2500
Fax: (212) 549-2650
jblock@aclu.org
lcooper@aclu.org

Dated: June 18, 2020

CERTIFICATE OF COMPLIANCE

1. This brief complies with type-volume limits because, excluding the parts of the document exempted by Fed. R. App. R. 32(f) (cover page, disclosure statement, table of contents, table of citations, statement regarding oral argument, signature block, certificates of counsel, addendum, attachments):

[x] this brief or other document contains 1,225 words

[ ] this brief uses monospaced type and contains [state number of] lines

2. This brief complies with the typeface and type style requirements because:

[x] this brief or other document has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in in 14-point Times New Roman.

[ ] this brief or other document has been prepared in a monospaced typeface using [identify word processing program]

Dated: June 18, 2020

/s/ Joshua A. Block
Counsel for Plaintiff-Appellee

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of June, 2020, I filed the foregoing Supplemental Brief with the Clerk of the Court using the CM/ECF system, which will automatically serve electronic copies upon all counsel of record.

/s/ Joshua A. Block
Counsel for Plaintiff-Appellee