21-1365

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SELINA SOULE, a minor, by Bianca Stanescu, her mother; CHELSEA MITCHELL, a minor, by Christina Mitchell, her mother; ALANNA SMITH, a minor, by Cheryl Radachowsky, her mother; ASHLEY NICOLETTI, a minor, by Jennifer Nicoletti, her mother,

Plaintiffs-Appellants,

v.

CONNECTICUT ASSOCIATION OF SCHOOLS, INC. d/b/a CONNECTICUT INTERSCHOLASTIC ATHLETIC CONFERENCE; BLOOMFIELD PUBLIC SCHOOLS BOARD OF EDUCATION; CROMWELL PUBLIC SCHOOLS BOARD OF EDUCATION; GLASTONBURY PUBLIC SCHOOLS BOARD OF EDUCATION; CANTON PUBLIC SCHOOLS BOARD OF EDUCATION; DANBURY PUBLIC SCHOOLS BOARD OF EDUCATION,

Defendants-Appellees,

and

ANDRAYA YEARWOOD; THANIA EDWARDS on behalf of her daughter, T.M.; COMMISSION ON HUMAN RIGHTS AND OPPORTUNITIES,

Intervenors-Appellees.

On Appeal from the United States District Court for the District of Connecticut, Case No. 3:20-cv-00201 (RNC)

BRIEF IN SUPPORT OF APPELLANTS AND REVERSAL
SUBMITTED BY *AMICUS CURIAE* THOMAS MORE SOCIETY

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INTEREST OF *AMICUS CURIAE*[1]

The Thomas More Society ("TMS") is a national public interest law firm dedicated to restoring respect in the law for freedom of speech and religious liberty. A 501(c)(3) nonprofit incorporated in Illinois with offices in Chicago and Omaha, TMS pursues its purposes through civic education, litigation, and related activities. In this effort, TMS has represented many individuals and organizations in federal and state courts and filed numerous *amicus curiae* briefs with the aim of protecting the rights of individuals and organizations to communicate their political and social views, as well as to faithfully practice their religion, as guaranteed by the Constitution.

[1] No counsel for a party authored this brief in whole or in part, and no person other than the *amicus*, its members, or its counsel made a monetary contribution intended to fund the brief's preparation or submission. All parties have consented to the filing of this brief.

SUMMARY OF ARGUMENT

In *Bostock v. Clayton County, Georgia,* 140 S. Ct. 1731 (2020), the Supreme Court held that an employer violates Title VII, which makes it unlawful to discriminate against an individual "because of" the individual's sex, by firing an individual for being homosexual or being a transgender person.

In *Soule by Stanescu v. Connecticut Association of Schools, Inc.*, 57 F.4th 43 (2d Cir. 2022), this Court's panel opinion implied that the *Bostock* holding and Court of Appeals decisions required the "Transgender Participation" policy of the Defendants-Appellees. *Id.* at 55.

While the *en banc* Court has not requested the parties to brief the merits of the case, the comments of the panel regarding the effect of *Bostock* nevertheless lurk. The purpose of this brief is to summarize what *Bostock* said about the limits of its own reach and what the majority of circuits that have weighed in have said: specifically, that *Bostock's* interpretation of Title VII is limited to the facts and statutory provisions in that case and does not apply even to other portions of Title VII, much less to other statutes like Title IX.

This brief further argues that employment discrimination under Title VII presents issues quite different from the Title IX issues in the case at bar. Title IX embraces sex distinctions in myriad situations, including school-based athletics, performing arts, and other instances in which acknowledged differences between

males and females have been accounted for by Congress to achieve not blind equality, but equal opportunities given the physiological differences between males and females.

ARGUMENT

I. By its own terms, *Bostock* did not decide cases regarding the application of Title IX to issues such as single-sex sports, bathrooms, or locker rooms.

The understandable fear that *Bostock* would be read to sweep broadly and alter other federal civil rights legislation or preempt state laws was expressly raised and then disposed of by Justice Gorsuch for the Court. "[W]e do not purport to address bathrooms, locker rooms, or anything else of the kind." *Bostock*, 140 S. Ct. at 1753.

The Court was very specific:

> 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."

Id. The Court emphasized that *Bostock* should not be seen as determinative as to the meaning of other laws, even other Title VII provisions:

> [N]one of these other laws are before us; we have not had the benefit of adversarial testing about the meaning of their terms, and we do not prejudge any such question today. . . . Whether other policies and practices might or might not qualify as unlawful discrimination or find justification under other provisions of Title VII are questions for future cases, not these.

Id.

Noting these limitations, the Eleventh Circuit recently refused to follow the Fourth Circuit in applying the interpretive rule of *Bostock* and Title VII to Title IX. Compare *Adams by & through Kasper v. Sch. Bd. of St. Johns Cnty., Fla.,* 57 F.4th 791 (11th Cir. 2022) (en banc) (7-4 ruling) with *Grimm v. Gloucester Cnty. Sch. Bd*., 972 F.3d 586 (4th Cir. 2020), as amended (Aug. 28, 2020), and *Grimm v. Gloucester Cnty. Sch. Bd*., 976 F.3d 399 (4th Cir. 2020). The Sixth Circuit has also been vigilant in refusing to apply *Bostock* beyond Title VII. *See Pelcha v. MW Bancorp, Inc.*, 988 F.3d 318, 324 (6th Cir. 2021) (*Bostock*, by its own terms, extending no further than Title VII); *Meriwether v. Hartop*, 992 F.3d 492, 510 n.4 (6th Cir. 2021) (recognizing *Bostock* does not extend to Title IX, citing textual differences). The Second Circuit should follow suit.

II. Application of Title VII employment discrimination principles under *Bostock* to the Title IX questions presented in the case at bar makes no sense.

Title VII effects strict equality between individuals in the workplace by requiring employers to make sex-blind employment decisions. Title IX, on the other hand, provides equality of opportunity for all by requiring institutions to account for physiological differences between the sexes. So, unlike Title VII's implementation of a rule of strict *equality* for each individual,[2] Title IX

[2] Even Title VII, with all its rules of strict sexual equality, does account for women being different from men when it comes to pregnancy and childbirth. 42 U.S.C. 2000e(k).

acknowledges that single-sex sports, for example, exist in order to accommodate the typical physical *inequalities*, or at least dissimilarities, that naturally divide men and women.

In January 2023, a federal district court in *B.P.J. v. West Virginia State Board of Education*, 2023 WL 111875 (S.D. W. Va., Jan. 5, 2023), upheld a State of West Virginia law enacted to ensure equal opportunities for women in sports. The court sensibly observed:

> Whether a person has male or female sex chromosomes determines many of the physical characteristics relevant to athletic performance. Those with male chromosomes, regardless of their gender identity, naturally undergo male puberty, resulting in an increase in testosterone in the body. [The claimant] herself recognizes that "[t]here is a medical consensus that the largest known biological cause of average differences in athletic performance between [males and females] is circulating testosterone beginning with puberty." . . . While some females may be able to outperform some males, it is generally accepted that, on average, males outperform females athletically because of inherent physical differences between the sexes. This is not an overbroad generalization, but rather a general principle that realistically reflects the average physical differences between the sexes.

Id. at *7.[3] Sex similarly affects an individual's participation in the performing arts like voice,[4] dance, or theater, where the different male and female characteristics

[3] The court in *B.P.J.* went on to conclude, *inter alia*, that the word "sex" in Title IX means biological sex (male-female) and thus did not reach the plaintiff's allegations of discrimination on the basis of transgender status. *Id.* at *21-*22.

[4] *See* 34 C.F.R. 106.34(a)(4) (single-sex choir).

are both impactful and prized, and thus taken into account by Title IX in order to achieve an overall equality of opportunity.

The many differences between these two venerable civil rights acts begins with their text. Title VII prohibits discrimination "because of . . . sex," (42 U.S.C. 2000e-2(a)), whereas Title IX prohibits discrimination "on the basis of sex" (20 U.S.C. 1681(a)). Also fundamental, Title VII prohibits discrimination in employment alone (42 U.S.C. 2000e-2(e)), whereas Title IX prohibits discrimination in any "program or activity" by a recipient of "Federal financial assistance" (20 U.S.C. 1681(a)). Employment is not comparable to the involvement of Title IX in team sports or coed dating on campus or sexist behavior at fraternity parties. Title VII is an exercise by Congress of its power under the Commerce Clause whereas Title IX is an exercise by Congress of its Spending Power.[5] Title VII applies to all employers with 15 or more employees (42 U.S.C. 2000e(b)), whereas Title IX applies more narrowly by targeting only educational institutions (20 U.S.C. 1681(a)). Title VII safeguards as protected classes "race,

[5] A safeguard of our federal system is the demand that Congress provide the States with a clear statement when imposing a condition on federal funding because "legislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions." *Pennhurst State Sch. & Hospital v. Halderman*, 451 U.S. 1, 17 (1981). Thus, the "legitimacy of Congress' power to legislate under the [S]pending [Power] . . . rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.'" *Id*. (quoting *Steward Mach. Co. v. Davis*, 301 U.S. 548, 585–98 (1937)).

color, religion, sex, and national origin" (42 U.S.C. 2000e-2(a)), whereas Title IX is focused solely on equality based on "sex" (20 U.S.C. 1681(a)), which engenders physiological differences that matter when it comes to, for example, sports[6] and the performing arts.

These marked distinctions between Title IX and Title VII are easily seen in the statutory texts. Privacy, for example, is evident in Title IX's rule of construction allowing for universities to provide dormitories and Greek-letter chapter houses that are segregated by female and male. 20 U.S.C. 1686. Title IX exempts the historic practice of maintaining all-women and all-men colleges (20 U.S.C. 1681(a)(5)), exempts YMCAs and YWCAs, as well as youth character-building organizations such as Boy Scouts and Camp Fire Girls (20 U.S.C. 1681(a)(6)(B)), and exempts the longstanding American Legion programs of Boys State and Girls Nation (20 U.S.C. 1681(a)(7)). The American Legion selects promising youth leaders, locates them on a college campus during a week each summer, and puts them through a simulated program of electing and operating a state legislature and governor. Title IX exempts from the rule of sex equality father-son and mother-daughter dinners and other activities. These programs recognize a bond of shared interests between parent and a child of the same sex,

[6] *See* 34 C.F.R. 106.34(a)(1) and 106.41 (athletics at educational institutions; single-sex sports).

and that those shared interests can be enjoyed without taking away from other positive experiences. These things are not a zero-sum game and positive events need not be destroyed by unyielding egalitarianism. Finally, Title IX's text exempts beauty pageants that are a source of contestation and earned college scholarships available exclusively to young women (20 U.S.C. 1691(a)(9)). None of the forgoing exemptions and rules of construction in Title IX[7]—which celebrate and preserve distinctions between females and males—is compatible with the strict ban on sex distinctions in the workplace that is at the heart of Title VII.

The overall problem that Congress was addressing fifty years ago when enacting Title IX was that within educational institutions girls and women had fewer opportunities than boys and men. *See Cannon v. University of Chicago*, 441 U.S. 677, 681 n.2, 695 n.16, 704 n.36 (1979). It is equally true that there are physiological differences between males and females such as muscle mass and bone structure, and these differences are not learned socially or by nurture and thus are not going away. *See United States v. Virginia (VMI)*, 518 U.S. 515, 533, 540-41 (1996). So, in some instances—such as single-sex sports—to treat biological males that identify as female as equivalent to biological females is to disadvantage

[7] With respect to these exemptions and rules of construction, Congress's operative definition of "sex" in Title IX is binary. A person is either one of two sexes, male or female. For example, the text of Title IX allows transition "from being an institution which admits only students of *one sex* to being an institution which admits students of *both sexes*." 20 U.S.C. 1681(a)(2) (emphasis added).

the latter class. To interpret Title IX to require such a result undermines the statute's entire rationale of providing equal opportunities for women. The *Bostock* rationale applied to Title IX would lead to all sorts of twisted outcomes.

Applying *Bostock* to Title IX would defy common sense. It follows from the fact that Title IX's entire regulatory scheme assumes and operates with respect to differences between the sexes that Title IX's text prohibiting discrimination "on the basis of sex" does not imply a requirement that institutions ignore biological sex altogether, as is necessary under Title VII and *Bostock*. If such a step is to be taken, it is a step for Congress to take rather than the judiciary.

CONCLUSION

For at least the foregoing reasons, it is apparent that the *Bostock* decision does not support the position of the Defendants-Appellees in the case at bar.

March 30, 2023

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the word limit of Local Rules 29.1(c) and 32.1(a)(4)(A) because, excluding the portions exempted by Fed. R. App. P. 32(f), this brief contains 2,124 words.

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

March 30, 2023

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CERTIFICATE OF SERVICE

I hereby certify that on March 30, 2023, this brief was filed electronically with the Clerk of the United States Court of Appeals for the Second Circuit through the Court's electronic filing system, which will accomplish service on all counsel.

March 30, 2023

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