No. 24-60035

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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

Plaintiff-Appellant,

v.

Pearl River County School District; P.B., a minor by and through his parents; P.A., a minor by and through his parents; I.L., a minor by and through his parents; L.M., a minor by and through his parents; W.L., a minor by and through his parents; Alan Lumpkin, individually and as Superintendent; Chris Penton, individually and as employee; Austin Alexander, individually and as employee; Stephanie Morris, individually and as employee; Tracey Crenshaw, individually and as employee; Blake Rutherford, individually and as employee; John Does 1-10,

Defendants-Appellees.

On Appeal from a Final Judgment of the
United States District Court for the Southern District of Mississippi
Case No. 1:22-CV-25-HSO-BWR, Hon. Halil Suleyman Ozerden

REPLY BRIEF OF PLAINTIFF-APPELLANT M.K.

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September 4, 2024

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

Plaintiff-Appellant,

v.

Pearl River County School District, et al.,

Defendants-Appellees.

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

Defendants-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

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Todd F. Gaziano

United States

Kristen Clarke

Sydney A.R. Foster

Jason Lee

Lisa Brown

Jessica Wolland

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Donald A. Daugherty, Jr.

Martha A. Astor

State of Mississippi

Lynn Fitch

Whitney H. Lipscomb

Scott G. Stewart

Justin L. Matheny

Anthony M. Shults

State of Alabama

State of Alaska

State of Arkansas

State of Georgia

State of Idaho

State of Indiana

State of Iowa

State of Kansas

State of Louisiana

State of Missouri

State of Montana

State of Nebraska

State of New Hampshire

State of North Dakota

State of Oklahoma

State of South Carolina

State of South Dakota

State of Tennessee

State of Texas

State of Utah

State of West Virginia

September 4, 2024

/s/ Rebecca Steinberg
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Introduction and Summary of Argument

"[I]t is impossible to discriminate against a person for being homosexual … without discriminating against that individual based on sex." *Bostock v. Clayton Cnty.*, 590 U.S. 644, 660 (2020). Sexual-orientation discrimination is therefore sex discrimination. The School District asks this Court to ignore that holding, attempting to distinguish *Bostock* on two bases.

First, the School District argues that Title VII's bar on discrimination "because of" sex means something different from Title IX's bar on discrimination "on the basis of sex." That view is wrong. These phrases mean the same thing, and courts have consistently treated them that way.

Second, the School District contends that *Bostock* doesn't apply to Title IX because Title IX is a Spending Clause statute. That argument's not right either. Four decades of Spending Clause precedent establish that federal-funding recipients can be liable for conduct that is (1) intentional and (2) prohibited by a statute's plain terms. Both conditions are satisfied here.

Turning from the legal framework to its application, the School District errs again. It says the severe and pervasive harassment M.K. experienced was just normal kid behavior. There's an argument to be made on that score—though we think M.K. has the better of it—but it boils down to factual disputes, not legal ones. The School District takes issue with our characterization of the record, but it does not and cannot say that we misstate any part of it. Instead, the School District simply points to conflicting facts

and draws different inferences from the record than we do. And that's the entire point. Given the evidence, *see* Opening Br. 4-13, these disputes are for the factfinder and were improperly resolved at summary judgment.

Argument

I. Title IX prohibits sexual-orientation discrimination.

Discrimination on the basis of sexual orientation is discrimination on the basis of sex. It is therefore prohibited by Title IX's plain text and the Supreme Court's decision in *Bostock v. Clayton County*, 590 U.S. 644 (2020). The School District tries to distinguish *Bostock* by pointing to trivial textual differences between Title IX and Title VII. That effort fails because the differences do not bear on the statutes' meanings. The School District then says that *Bostock*'s holding is inapplicable because of Title IX's Spending Clause origins, but that effort runs headlong into Supreme Court precedent. When a school is deliberately indifferent to severe and pervasive harassment based on a person's sexual orientation, that school's conduct (1) is intentional, and (2) violates the clear terms of Title IX. *See Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 182-83 (2005). That is all that Spending Clause precedent requires.

A. Sexual-orientation discrimination is discrimination on the basis of sex.

1. *Bostock*. *Bostock* controls the inquiry here. The Court explained that "it is impossible to discriminate against a person for being homosexual … without discriminating against that individual based on sex." *Bostock*, 590

U.S. at 660. When a person is treated differently because he is (or is perceived to be) gay, he is treated differently on the basis of sex. A boy who is discriminated against because he is perceived to be attracted to boys is treated differently than a girl who is perceived to be attracted to boys. *See id.* He is penalized for conduct that would have been tolerated in a "materially identical" female. *Id.* As a corollary, he is also penalized for failing to conform to sex-based stereotypes about who boys should be attracted to. So, *Bostock*'s reasoning applies fully here.

Resisting this conclusion, the School District seizes on a few irrelevant textual differences between Title VII and Title IX that, in its view, impose different causation standards. Title VII prohibits discrimination "because of sex," 42 U.S.C. § 2000e-2(a)(1), and Title IX prohibits discrimination "on the basis of sex," 20 U.S.C. § 1681(a). Everybody agrees that Title VII's "because of" language requires a plaintiff to show but-for causation. *Bostock*, 590 U.S. at 656. Title IX's "on the basis of" language means the same thing. *See* Opening Br. 21-26. Just as "the words 'because of' do not mean '*solely* because of,'" *Price Waterhouse v. Hopkins*, 490 U.S. 228, 241 (1989), the words "on the basis of" do not mean "*solely* on the basis of." Rather, this language—like the analogous language in Title VII—operates consistently with "the 'default' or 'background' rule against which Congress is normally presumed to have legislated … includ[ing] when it comes to federal antidiscrimination laws," namely, that the typical causation standard is but-for. *Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media*, 589 U.S. 327, 332 (2020).

This conclusion is supported by the plain meaning of the terms. *See* "On the basis of," Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/on-the-basis-of (last visited Sept. 4, 2024) (defining "on the basis of" as "based on"). The Supreme Court has treated similar terms as different ways to articulate the same but-for standard. The statutory terms "based on," "by reason of," and "because of" all connote but-for causation. *Burrage v. United States*, 571 U.S. 204, 213 (2014); *see also Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 176 (2009) (same). While textual differences *can* connote differences in meaning, they don't necessarily do so. Congress "is permitted to use synonyms" to convey synonymous meanings. *Tyler v. Cain*, 533 U.S. 656, 664 (2001). That's the approach Congress took here.

As we have explained, *Bostock* itself repeatedly uses "because of" and "on the basis of" interchangeably. *See* Opening Br. 22 nn.3-4 (collecting examples from both the majority and the dissents). This substitution was not new to *Bostock*. For decades, the Court has repeatedly referred to Title VII's prohibition of discrimination "because of" sex as applying to discrimination "on the basis of" sex. *See* Opening Br. 23 (collecting cases). The reverse is also true—it has referred to Title IX's prohibition of discrimination "on the basis of sex" as barring discrimination "because of" sex. *See* Opening Br. 23.

The School District dismisses these references as "casual language." Resp. Br. 45. But the phrase "because of" was a "key statutory term[]" in *Bostock*, 590 U.S. at 655-56, and it makes no sense to suggest that the Court

dealt with this key term "casually." In any case, at some point, supposedly "casual language" is repeated so often that it sheds light on the term's basic meaning.

In other contexts, courts have explicitly held that both phrases impose the same but-for causation requirement. For example, "a 'but for' causation standard applies" to claims brought under the Equal Pay Act, which prohibits discriminatory pay disparities "between employees on the basis of sex." *Peters v. City of Shreveport*, 818 F.2d 1148, 1153, 1161 (5th Cir. 1987) (quoting 29 U.S.C. § 206(d)(1)). Similar language in Title VI has been interpreted the same way. *See Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 289 (2023) (Gorsuch, J., concurring) ("What does the statute's second critical phrase—'on the ground of'—mean? Again, the answer is uncomplicated: It means 'because of.'").

Consider another example where courts have held that "because of" and "on the basis of" impose an identical but-for causation standard. In 2008, Congress amended the Americans with Disabilities Act, which previously barred discrimination "because of" disability, to prohibit discrimination "on the basis of" disability. *See* ADA Amendments Act of 2008, Pub. L. No. 110-325, § 5, 122 Stat. 3553, 3557. Every federal court of appeals to reach the issue has held "that the switch from 'because of' to 'on the basis of' in the 2008 amendment to the ADA did not change or affect its but-for causation standard." *Akridge v. Alfa Ins. Cos.*, 93 F.4th 1181, 1192 (11th Cir. 2024) (collecting cases). In reaching this result, courts found "no reason to hold

that there is any meaningful difference between 'on the basis of,' 'because of,' or 'based on,' which would require courts to use a causation standard other than 'but-for.'" *Natofsky v. City of New York*, 921 F.3d 337, 349 (2d Cir. 2019).[1]

2. Title IX case law. The School District points to two cases that, it claims, distinguish Title VII's "because of" language from Title IX's "on the basis of." *See* Resp. Br. 45-46. The School District misunderstands both cases. First, *Sheppard v. Visitors of Virginia State University*, supports our position, holding that "'on the basis of sex' requires 'but-for' causation." 993 F.3d 230, 236-37 (4th Cir. 2021). The other case—*Radwan v. Manuel*—concerns an entirely separate issue: whether Title IX incorporates Title VII's motivating-factor inquiry. 55 F.4th 101, 131 (2d Cir. 2022). As discussed below (at 10), that issue has nothing to do with the question here.

Nor could the School District reasonably rely on recent appellate decisions denying the United States' requests for partial stays in ongoing Title IX litigation. Several district courts enjoined a Title IX rule that, among other things, defines "[d]iscrimination on the basis of sex" to "include[]

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[1] *See also Murray v. Mayo Clinic*, 934 F.3d 1101, 1106 & n.6 (9th Cir. 2019); *Gentry v. E.W. Partners Club Mgmt. Co.*, 816 F.3d 228, 235-36 (4th Cir. 2016); *Lewis v. Humboldt Acquisition Corp.*, 681 F.3d 312, 315, 321 (6th Cir. 2012) (en banc). The Seventh Circuit has noted the 2008 amendments but has not yet addressed their impact. *See Brooks v. Avancez*, 39 F.4th 424, 440 n.11 (7th Cir. 2022).

discrimination on the basis of sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity." 34 C.F.R. § 106.10; *see Tennessee v. Cardona*, __ F. Supp. 3d __, 2024 WL 3019146 (E.D. Ky. June 17, 2024); *Louisiana v. U.S. Dep't of Educ.*, __ F. Supp. 3d __, 2024 WL 2978786 (W.D. La. June 13, 2024). At the stay stage, the United States sought only to narrow the scope of the injunction, so the subsequent decisions did not speak (even preliminarily) to the likelihood of success on the question whether Title IX prohibits sexual-orientation discrimination. *See Dep't of Educ. v. Louisiana*, Nos. 24A78, 24A79, 603 U.S. __, 144 S. Ct. 2507 (2024); *Tennessee v. Cardona*, 2024 WL 3453880 (6th Cir. July 17, 2024); *Louisiana v. U.S. Dep't of Educ.*, 2024 WL 3452887 (5th Cir. July 17, 2024). Though the Sixth Circuit observed in passing that Title VII and Title IX present "materially different language," the merits of the Title IX claim were not at issue, and the court offered no additional analysis. *Cardona*, 2024 WL 3453880, at *3. This Court in *Louisiana* did not address this language at all (which makes sense, as the issue was not before it).[2]

[2] The scope of the United States' argument at the stay stage is discussed more fully in its briefing. *See* Emergency Motion of the United States at 2, 10-20, *Louisiana v. U.S. Dep't of Educ.*, 2024 WL 3452887 (No. 24-30399); Emergency Motion of the United States at 10-20, *Cardona*, 2024 WL 3453880 (No. 24-5588); Application for Partial Stay at 4, *Dep't of Educ. v. Louisiana*, 603 U.S. __, 144 S. Ct. 2507 (July 22, 2024) (No. 24A78); Application for Partial Stay at 5, *Cardona v. Tennessee*, 603 U.S. __, 144 S. Ct. 2507 (July 22, 2024) (No. 24A79).

A similar unpublished decision in the Eleventh Circuit is no more relevant. There, the court addressed only whether a regulation properly applies Title IX to gender identity and did not address sexual-orientation discrimination at all. *See Alabama v. U.S. Sec'y of Educ.*, 2024 WL 3981994, at *4-5 (11th Cir. Aug. 22, 2024) (per curiam). And its analysis focused on two points not at issue here: (1) whether sex means biological sex, and (2) certain statutory carveouts under Title IX. *Id.*

In contrast, when the issue presented here has been squarely presented elsewhere, appellate courts have consistently applied *Bostock* in the Title IX context. *See 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), *cert. denied*, 144 S. Ct. 683 (2024); *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 616-17 (4th Cir. 2020), *cert. denied*, 141 S. Ct. 2878 (2021); *Clark Cnty. Sch. Dist. v. Bryan*, 478 P.3d 344, 354 (Nev. 2020); Opening Br. 24.

3. Causation standard. The School District's fundamental contention—that "on the basis of" creates a "sole-cause" standard—is mistaken. This Court has already rejected the sole-cause standard in the context of Title IX retaliation claims. *See Taylor-Travis v. Jackson State Univ.*, 984 F.3d 1107, 1118-19 (5th Cir. 2021); *see also Trudeau v. Univ. of N. Tex.*, 861 F. App'x 604, 608 (5th Cir. 2021) (per curiam) (applying but-for causation standard to Title IX retaliation claim). Retaliation and harassment are both "discrimination on the basis of sex." *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 173-74 (2005); *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 281

(1998). Because both types of claims flow from the same statutory text, it makes sense that they should use the same causation standard. Put the other way around, the School District has offered no compelling reason—and certainly no textual basis—why Title IX would employ a different causation standard for some claims than for others.

Both the School District and the district court read too much into the word "the." "[S]tatutes are not read as a collection of isolated phrases[.]" *Abuelhawa v. United States*, 556 U.S. 816, 819 (2009). Instead of myopically zooming in on this one word, it makes sense to look at the phrase as a whole, which, as discussed above, creates a but-for causation standard.

In any case, fixating (improperly) on "the" doesn't help the School District. The School District seeks to impose on Title IX a "sole cause" standard that is *more* demanding than standard but-for causation. But "the" works in the opposite direction: It distinguishes Title IX's but-for causation standard from a *less* demanding one, like a motivating- or contributing-factor standard. Under these less-demanding standards, sex is not "the" reason for the adverse action. That is, even if sex were wrongly considered, the adverse action would have happened regardless. *See Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 348-49 (2013). In contrast, under "but-for" causation, sex is "the" reason a person faced discrimination because, but for his sex, he would not have faced that discrimination. *See Bostock*, 590 U.S. at 656 (but-for causation "is established whenever a particular outcome would not have happened 'but for' the purported cause"); *cf. Gross*, 557 U.S. at 176

("[T]he ordinary meaning of the ADEA's requirement that an employer took adverse action 'because of' age is that age was *the* 'reason' that the employer decided to act." (emphasis added)).

The School District also argues that *Bostock* doesn't apply because Title VII incorporates a secondary "motivating factor" causation standard, 42 U.S.C. § 2000e-2(m), though Title IX does not. This distinction leads nowhere. First, *Bostock* rejected the position advanced here by the School District, observing that "nothing in [its] analysis depend[ed] on the motivating factor test," and resting its analysis exclusively on Title VII's "more traditional but-for causation standard." *Bostock*, 590 U.S. at 657. Second, the School District overlooks that "motivating factor" is a "more forgiving standard" that creates liability "even if sex *wasn't* a but-for cause of the employer's challenged decision." *Id.* Both Title VII and Title IX use a but-for causation standard; that Title VII *also* (in carefully prescribed circumstances) incorporates a motivating-factor causation standard is irrelevant.[3]

4. Sex stereotyping. As an alternative, the harassment that M.K. encountered stemmed from his failure to conform with sex stereotypes.

[3] Even if the motivating-factor standard were relevant, it's hard to see how that would help the School District. This Court has "recently joined a growing number of circuits" that incorporate the motivating-factor standard into Title IX analysis. *Doe v. William Marsh Rice Univ.*, 67 F.4th 702, 709 (5th Cir. 2023) (citing *Doe v. Purdue Univ.*, 928 F.3d 652, 667 (7th Cir. 2019) (Barrett, J.)).

M.K.'s harassers bullied him as "gay" because he was small, wore bright colors, and was bad at videogames. ROA.219-21, 26 (RE 81-83, 86). These same traits are linked equally to perceived sexual orientation and to perceived failure to conform to sex stereotypes. *See* U.S. Br. 23-26. Put simply, "the line between a gender nonconformity claim and one based on sexual orientation . . . does not exist." *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339, 346 (7th Cir. 2017) (en banc).

The School District suggests that sex stereotyping claims are not cognizable under Title IX. This argument cannot be squared with logic or circuit precedent. This Court has already held that sex-stereotyping claims are cognizable under Title IX. In *Sewell v. Monroe City School Board*, the Court reasoned that "ask[ing] if [a student] 'was gay with "that mess" in his head' . . . could imply animus toward males who do not conform to stereotypical notions of masculinity." 974 F.3d 577, 584 (5th Cir. 2020). Thus, the plaintiff stated a valid Title IX claim. *Id.* The same logic applies here. As with sexual-orientation discrimination, a boy who is harassed for being too feminine is penalized for characteristics that would be tolerated in a "materially identical" female student. *Bostock*, 590 U.S. at 660. This constitutes discrimination on the basis of sex. *See Wolfe v. Fayetteville, Ark. Sch. Dist.*, 648 F.3d 860, 867 (8th Cir. 2011).

The School District contends that M.K. forfeited the sex-stereotype argument by not raising it below. But the School District misapprehends both M.K.'s claim and what forfeiture entails. "Once a federal claim is

properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992). M.K. brings a single Title IX sex-discrimination claim. His arguments based on sexual orientation and those based on sex stereotypes "are not separate *claims*"; rather, they are "separate *arguments* in support of a single claim"—that M.K. was discriminated against on the basis of sex. *Id.* at 535; *see* Resp. Br. 50 (agreeing that these arguments "proceed[] from the same syllogism").

Accepting for argument's sake that M.K. forfeited this argument, the Court still retains the discretion to review it. It should do so here because the issue "is a purely legal matter and failure to consider the issue will result in a miscarriage of justice." *Rollins v. Home Depot USA*, 8 F.4th 393, 398 (5th Cir. 2021) (citation omitted). M.K.'s bullies relied on sex stereotypes, their conduct constituted sex discrimination, and this Court should say so.

B. The School District's invocation of the Spending Clause is unavailing.

Seeking to inject uncertainty into Title IX's clear text, the School District eschews traditional statutory analysis, relying instead on a Spending Clause framework that the Supreme Court has rejected. The School District seizes on the analogy between Spending Clause legislation and contracts and then inflates that analogy beyond recognition. Resp. Br. 18-24. It relies on a series of contract-law (not Spending Clause) cases that focus exclusively

on the parties' understanding at the time of formation, not on a statute's plain meaning.

That pushes the contract analogy too far. No one disputes that Spending Clause legislation is "much in the nature of a contract," because recipients accept federal funds under terms set by statute. *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981). But the contract analogy is only that—an analogy. The Supreme Court has long rejected the argument that Spending Clause laws are merely "bilateral contract[s]," *Bennett v. Ky. Dep't of Educ.*, 470 U.S. 656, 669 (1985), and has cautioned against incorporating the law of contracts "wholesale," *Cummings v. Premier Rehab Keller, P.L.L.C.*, 596 U.S. 212, 226 (2022). Even when the Court has "acknowledged the contract-law analogy," it has "been clear 'not [to] imply … that suits under Spending Clause legislation are suits in contract or that contract-law principles apply to all issues they raise.'" *Sossamon v. Texas*, 563 U.S. 277, 290 (2011) (quoting *Barnes v. Gorman*, 536 U.S. 181, 189 n.2 (2002)).

To be sure, grantees must "voluntarily and knowingly accept[] the terms of the 'contract.'" *Pennhurst*, 451 U.S. at 17. But, for decades, the Supreme Court has consistently stated how courts should determine whether this requirement is met: Congress must "speak with a clear voice" when imposing conditions in Spending Clause legislation. *Id.* A funding "recipient may be held liable to third-party beneficiaries for intentional conduct that violates the clear terms of the relevant statute, but not for its

failure to comply with vague language describing the objectives of the statute." *Barnes*, 536 U.S. at 187 (citations omitted).

These rules apply to Title IX. When a funding recipient, like the School District, engages in (1) intentional conduct that (2) violates the clear terms of the statute, it can be liable for its Title IX violation. *See, e.g.*, *Jackson*, 544 U.S. at 182 ("*Pennhurst* does not preclude private suits for intentional acts that clearly violate Title IX."); *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 642 (1999) (finding liability "where the funding recipient engages in intentional conduct that violates the clear terms of the statute"); *Franklin v. Gwinnett Cnty. Pub. Schs.*, 503 U.S. 60, 74-75 (1992) ("This notice problem does not arise [when] intentional discrimination is alleged."). This approach makes sense because "[f]unding recipients have been on notice that they could be subjected to private suits for intentional sex discrimination under Title IX." *Jackson*, 544 U.S. at 182. Thus, "the Supreme Court has, throughout its Title IX jurisprudence, rejected arguments that *Pennhurst* bars a particular plaintiff's cause of action after finding that a funding recipient's conduct constituted an intentional violation of Title IX." *Hall v. Millersville Univ.*, 22 F.4th 397, 404 (3d Cir. 2022); *see C.S. v. Madison Metro. Sch. Dist.*, 34 F.4th 536, 541 (7th Cir. 2022).

So, the proper approach is straightforward: Use traditional tools of statutory interpretation, and when the statute is clear, its terms apply. *See, e.g.*, *Davis*, 526 U.S. at 644 (looking to "statute's plain language" to determine whether recipient was on notice of funding conditions). Other contract

principles come into play only if a statute is unclear. *See, e.g.*, *Barnes*, 536 U.S. at 186 (applying contract analogy where statute was silent on availability of punitive damages); *Cummings*, 596 U.S. at 220-21 (same with regard to emotional-distress damages).

This means that the relevant question is whether, under traditional statutory analysis, Title IX's prohibition on discrimination "on the basis of sex" clearly prohibits sexual-orientation discrimination. It does.

It makes no difference that *Bostock* involved Title VII, which is not a Spending Clause statute. The School District offers no real reason to think that *Bostock* would have reached a different result if the Spending Clause had been involved. *Bostock* repeatedly observed that Title VII clearly and unambiguously prohibits sexual-orientation discrimination. *See, e.g.*, *Bostock*, 590 U.S. at 651 ("The answer is clear."); *id.* at 674 ("[N]o ambiguity exists about how Title VII's terms apply to the facts before us."); *see also id.* at 688 (Alito, J., dissenting) ("According to the Court, the text is unambiguous."). To the extent that the School District seeks to distinguish *Bostock*, the Spending Clause provides no viable basis on which to do so.

Nor does it matter that Title IX does not explicitly list sexual orientation (or any other form of sex discrimination), just as it made no difference that Title IX does not explicitly list sexual harassment, *Franklin*, 503 U.S. at 75, or retaliation, *Jackson*, 544 U.S. at 175. "Because Congress did not list any specific discriminatory practices when it wrote Title IX, its failure to mention one such practice does not tell us anything." *Id.*; *see Bennett*, 470

U.S. at 666 (explaining that Congress is not expected to "identif[y] and proscribe[] in advance" every violation of the statute). Put differently, "Title IX is a broadly written general prohibition on discrimination," and the Supreme Court has "consistently interpreted Title IX's private cause of action broadly to encompass diverse forms of intentional sex discrimination." *Jackson*, 544 U.S. at 175, 183. As our opening brief explains (at 21-26), that prohibition extends to sexual-orientation discrimination.

The School District points to how the parties might have understood Title IX when it was passed. Resp. Br. 25-27. The School District is wrong to elevate the parties' understandings over the statute's plain text, but even if it were not, it is looking to the wrong time period. When the Supreme Court has relied on the contract analogy, it has said that the offer is accepted (and so the "contract" is formed) when the recipient accepts the funds, not when the statute is enacted. *See, e.g.*, *Pennhurst*, 451 U.S. at 17-18; *Cummings*, 596 U.S. at 220. The Supreme Court has explicitly looked to post-enactment developments and cases to determine that a funding recipient was on notice of statutory conditions. *See, e.g.*, *Jackson*, 544 U.S. at 183 (noting that "the Board should have been put on notice" by prior cases interpreting Title IX). This reasoning applies with full force here: By the time the School District accepted the funding, *Bostock* had put it on notice that sexual orientation discrimination is discrimination on the basis of sex.

II. M.K. suffered severe and pervasive harassment on the basis of sex.

The School District also contends that, even if Title IX prohibits sexual-orientation discrimination, M.K. did not suffer severe and pervasive harassment. Here, again, the School District is mistaken. The record establishes that M.K. endured daily harassment. To the extent that questions remain about the severity of this harassment, those are questions for the factfinder, not for summary judgment.[4]

The School District understates the severe and pervasive harassment that shaped M.K.'s school experience and deprived him of educational opportunities. When he got to school in the morning, M.K. "had a certain place to go to escape other students." ROA.245 (RE 93). When he left school in the afternoon, a relative escorted him out to help ward off bullying. ROA.245 (RE 93). In all but one of his classes, his bullies would taunt and insult him, call him "gay" and "gay boy," or sit behind him whispering to him throughout the class period that he was gay. ROA.220-22 (RE 82-84). From the beginning of the school day until the end, M.K.'s bullies harassed

[4] This Court should also reject the School District's undeveloped, footnoted suggestion that the district court could be affirmed on the alternative ground that it was not deliberately indifferent to the harassment. *See* Resp. Br. 17-18 n.1. Assuming generously that the School District's passing aside preserves the argument, *but see Hoffman v. L & M Arts*, 838 F.3d 568, 580 n.10 (5th Cir. 2016); *United States v. McMillan*, 600 F.3d 434, 457 n.75 (5th Cir. 2010), it lacks merit for the reasons explained in our opening brief (at 35-41).

him without facing any meaningful consequences. *See generally* Opening Br. 4-10, 32-35.

The School District attempts to draw a contrast with *Sanches v. Carrollton-Farmers Branch Independent School District*, 647 F.3d 156 (5th Cir. 2011), to argue that the harassment here wasn't that bad. But the comparison cuts in the other direction. The plaintiff in *Sanches* was having problems with a schoolmate who "was acting like a typical high-school girl whose ex-boyfriend began dating a younger cheerleader." *Id.* at 167. Though the behavior was uncouth, it stemmed from the "inescapable … stress" that results from high school students exploring dating and relationships. *Id.* And this Court made clear that the conduct was *not* the sort of "daily mocking" that courts elsewhere had recognized as actionable. *Id.* at 166. In contrast, here, M.K.'s harassment pervaded his entire school experience. *See* Opening Br. 4-10.

In another effort to downplay the harassment, the School District suggests that M.K. reported the bullying only a few times. Resp. Br. 62. That's misleading. First, M.K. reported the harassment around 16 or 17 times. ROA.221-22 (RE 83-84); *see* Opening Br. 6-9. Second, the number of reports does not equate to the number of incidents. For example, a student might experience daily harassment and report it once a week. So, the number of times M.K. reported the harassment, while relevant to showing that the school was on notice, says nothing about the frequency of the harassment that M.K. endured.

At any rate, the School District is wrong to suggest that only incidents when M.K. was explicitly called "gay" are relevant to the severity of the sex-based harassment. As our opening brief explains (at 30-32), incidents that are not explicitly sex-based are still properly considered part of the overall pattern of sex-based harassment. When a victim is faced with a pattern of sex-based harassment, that some incidents do not explicitly reference sex is irrelevant because they still contribute to the overall pattern, and courts have properly analyzed them that way.

For example, in *Roe v. Cypress-Fairbanks Independent School District*, this Court observed that "a reasonable jury could find" that the plaintiff's "post-assault harassment and bullying was on its own 'severe, pervasive, and objectively offensive.'" 53 F.4th 334, 343 (5th Cir. 2022). Some of the harassment was explicitly sex-based. But, in assessing the severity of this bullying, the Court also relied on evidence that the plaintiff was "called 'scum' [and] 'a horrible human being,'" insults that are not explicitly sex-based (and so wouldn't be viewed as sex-based in another context) but nonetheless contributed to the overall pattern of sex-based harassment. *Id.* Similarly, in *I.F. v. Lewisville Independent School District*, this Court considered *both* explicitly sex-based bullying *and* that other students "talked about [the victim] loudly in her presence, and excluded her during cheerleading." 915 F.3d 360, 373 (5th Cir. 2019). And in *EEOC v. WC&M Enterprises*, this Court found a cognizable pattern of harassment based on religion and national origin. 496 F.3d 393, 400-01 (5th Cir. 2007). It considered insults that explicitly

referenced religion or perceived national origin and also that one of the harassers "frequently banged on the glass partition of [the employee's] office, in order to startle him." *Id.* at 400.

The School District asserts that M.K. suffered no physical sexual harassment. That is both irrelevant and misleading. First, physical harassment is not required to render a harassment claim actionable. *See Farpella-Crosby v. Horizon Health Care*, 97 F.3d 803, 806 (5th Cir. 1996) (finding severe and pervasive hostile work environment based on verbal comments alone). Second, there *was* physical harassment: As part of the overall pattern, one of M.K.'s most persistent harassers, P.B., attempted to unzip his backpack and then shoved him into a pole. Opening Br. 8-9.

The School District also suggests that even if the harassment was severe and pervasive, it was not based on sex. Citing a decade-old article and an equally outdated blog post, the School District maintains that the term "gay" is a generic insult that does not relate to a person's sexual orientation. *See* Resp. Br. 42-43. First, the meaning of the word "gay" in 2014 says little about how schoolchildren were using the word nearly ten years later. More to the point, even if "gay" can be used as a generic pejorative, it can *also* be used to pertain to sexual orientation. How it was used here, particularly given the other evidence that M.K.'s harassers viewed M.K. as insufficiently masculine, is a fact question that is not appropriately resolved at summary judgment.

That brings us full circle, back to crux of the problem with both the School District's brief and the district court's opinion. At summary judgment, questions of fact related to the severity of M.K.'s harassment remain unresolved. To what extent were separate instances of harassment interrelated? Was the word "gay" used to insult M.K.'s perceived sexual orientation or some other attribute? How much did the harassment deprive M.K. of educational opportunities? The answers to these questions are discerned through credibility determinations and fact finding, not legal analysis. As a result, summary judgment was improper.

Conclusion

This Court should reverse the district court's grant of summary judgment on M.K.'s Title IX claim against the School District and remand for further proceedings.

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Certificate of Service

I certify that, on September 4, 2024, this brief was filed using the Court's CM/ECF system. All attorney participants in the case are registered CM/ECF users and will be served electronically via that system.

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