No. 22-13626

In the United States Court of Appeals for the Eleventh Circuit

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HOUSTON COUNTY, GEORGIA, AND
HOUSTON COUNTY SHERIFF CULLEN TALTON,
IN HIS OFFICIAL CAPACITY,

Defendants-Appellants,

v.

ANNA LANGE,

Plaintiff-Appellee.

Appeal from the United States District Court
for the Middle District of Georgia
Dist.Ct. Docket No. 5:19-cv-00392-MTT

BRIEF ON THE MERITS OF THE AMERICAN CIVIL RIGHTS PROJECT AS AMICUS CURIAE IN SUPPORT OF DEFENDANTS-APPELLANTS AND REVERSAL

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RULE 29(A)(4)(A) CORPORATE DISCLOSURE STATEMENT AND CERTIFICATE OF INTERESTED PERSONS

The American Civil Rights Project (the "ACR Project") is a nonprofit corporation organized under the laws of Texas. The ACR Project issues no stock, and is neither owned by or the owner of any corporate entity in whole or in part.

Counsel certifies that all interested persons known to *amicus curiae* appear in previously-filed CIPs in this appeal.

Respectfully submitted,

/s/ Daniel I. Morenoff
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Dated: September 30, 2024

TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PERSONS AND RULE 29(A)(4)(A) CORPORATE DISCLOSURE STATEMENT C-1-of-1

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

STATEMENT OF THE ISSUE iv

INTEREST OF AMICUS CURIAE v

SUMMARY OF THE ARGUMENT 1

ARGUMENT 2

I. *BOSTOCK*'S HOLDING DOES NOT APPLY 2

II. *BOSTOCK*'S *REASONING* DOES APPLY AND REQUIRES REVERSAL 6

III. THE PANEL'S ERROR COMMITS THIS COURT TO ANALAGOUS ERRORS ACROSS A VAST SWATH OF LAW 8

IV. THE PANEL DECISION PUTS THIS CIRCUIT ON *BOTH* SIDES OF CIRCUIT SPLIT OVER *BOSTOCK*'S MEANING 9

CONCLUSION 11

CERTIFICATE OF COMPLIANCE 11

CERTIFICATE OF SERVICE 12

TABLE OF AUTHORITIES

CASES

A.C. v. Metropolitan School District of Martinsville,
75 F.4th 760 (7th Cir. 2023) ---------- 10-11

Adams v. Sch. Bd. of St. Johns Cnty,
57 F.4th 791 (11th Cir. 2022) ---------- 2, 7, 10-11

Bostock v. Clayton Co.,
140 S. Ct. 1731 (2020) ---------- 1-11

Dep't. of Educ. v. La.,
2024 U.S. LEXIS 2983 (2024) ---------- 10

Grimm v. Gloucester Co. Sch. Bd.,
972 F.3d 586 (4th Cir. 2020) ---------- 10

L.W. ex rel. Williams v. Skrmetti,
84 F.4th 460 (6th Cir. 2023) ---------- 10

Lange v. Houston Cnty.,
101 F.4th 793 (11th Cir. 2024) ---------- 3, 11

Lange v. Houston Cnty.,
608 F.Supp.3d 1340 (M.D. Ga. 2022) ---------- 3, 4

Tennessee v. Cardona,
2024 U.S. App. LEXIS 17600 (6th Cir. 2024) ---------- 10

STATUTES

Fair Housing Act ---------- 10

Title IX of the Education Amendments of 1972 ---------- 1, 10-11

Title VII of the Civil Rights Act of 1964 ---------- 1-3, 5-11

OTHER AUTHORITIES

American Psychiatric Association. (2013),
Diagnostic and Statistical Manual of Mental Disorders (5th ed.). Washington, DC: Author ---------- 5

Dep't of Justice Br. in
Tenn. v. U.S. Dep't. of Educ.,
6th Cir. Case No.: 22-5807, Dkt. 27, pp. 6-8 (Dec. 15, 2022) ---------- 1

Dist. Ct. Dkt. 155-1 ---------- 5

World Health Organization. (2022),
6C21 and 6C2Z. *ICD-11: International classification of diseases* (11th revision). https://icd.who.int/ ---------- 5

REGULATIONS

34 CFR 106, 88 Fed. Reg. 22860 (Apr. 13, 2023) ---------- 1

34 CFR 106, 89 Fed. Reg. 33474 (Apr. 29, 2024) ---------- 1

STATEMENT OF THE ISSUE

Whether Title VII of the Civil Rights Act of 1964 dictates that an employer-provided health insurance policy which does not cover other psychologically-driven surgical treatments for body dysmorphia must cover "sex change" surgery.

INTEREST OF AMICUS CURIAE[1]

The ACR Project is a public-interest law firm dedicated to protecting and where necessary restoring the equality of all Americans before the law. The ACR Project believes its expertise will benefit the Court in its consideration of this case.

This case interests the ACR Project because it involves the appropriate application of one of America's foundational non-discrimination laws as interpreted by the Supreme Court. The ACR Project has invested substantial time and resources investigating the meaning of this enactment, as interpreted by the Supreme Court, and believes its analysis will benefit the Court's consideration of this matter.

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[1] No counsel for a party authored any part of this brief. And no one other than the ACR Project financed the preparation or submission or this brief.

SUMMARY OF THE ARGUMENT

Since the Supreme Court announced *Bostock v. Clayton Co.*, 140 S. Ct. 1731 (2020), many—like the Plaintiff, the District Court, and the panel-majority in this case—have contended that its interpretation of Title VII of the Civil Rights Act of 1964 ("Title VII") decided, for all American employers, a whole host of contentious issues that were not before the Court. Most of those—including the U.S. Departments of Justice and Education—have contended that a straight-line extension of *Bostock* to the nondiscrimination requirements of the Title IX of the Education Amendments of 1972 ("Title IX") simultaneously resolved all purportedly related issues for all federal funding recipients.[2]

The *en banc* Court should reverse the district court for three interrelated reasons. First, the panel-majority's conclusion that *Bostock* straightforwardly decides this case is wrong—its holding is inapplicable and the Court should foreclose the panel's attempt to bind the Circuit to its error. Second, to underscore the importance of that error-correction, *Bostock*'s *reasoning* strongly supports the panel-dissent's conclusion that the Defendants have complied with Title VII. Third, the threatened ramifications of the panel majority's error extend beyond the economy-wide

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[2] *E.g.*, 34 CFR 106, 89 Fed. Reg. 33474 (Apr. 29, 2024); 34 CFR 106, 88 Fed. Reg. 22860 (Apr. 13, 2023); and Dep't of Justice Br. in *Tenn. v. U.S. Dep't. of Educ.*, 6th Cir. Case No.: 22-5807, Dkt. 27, pp. 6-8 (Dec. 15, 2022) (DOJ explaining that the Equal Employment Opportunity Commission and Department of Education so reinterpret Title VII and Title IX, respectively, nominally based on *Bostock*).

sweep of employer-employee relations—given the wide-berth the Administration and some advocates have taken with a misinterpretation of *Bostock*, if undisturbed, the panel-majority's error would echo across other areas of law.

In *Adams v. Sch. Bd. of St. Johns Cnty*,[3] , after investing substantial time and effort in properly construing *Bostock*, the *en banc* Court rejected the purported, gnostic interpretation of *Bostock* adopted by that panel in service of the other side of an existing circuit split. To preserve that good work, the Court must now reverse the decision below.

ARGUMENT

I. *BOSTOCK*'S HOLDING DOES NOT APPLY

The District Court and the panel-majority contend that *Bostock* requires that all employers maintain health insurance that covers sex-change surgery to comply with Title VII.[4] The District Court maintained this was "clear" because the relevant insurance policy covers mastectomies when required to fight cancer, but not when sought by a biological woman as part of a sex change.[5] According to the District Court, because the same procedure was either insured or not based on the sex of an employee, "*Bostock* covers" this fact pattern, declaring any "discrimination

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[3] 57 F.4th 791 (11th Cir. 2022).

[4] *Lange v. Houston Cnty.*, 101 F.4th 793, *8-*12 (11th Cir. 2024); *Lange v. Houston Cnty.*, 608 F.Supp.3d 1340, 1356-59 (M.D. Ga. 2022).

[5] *Id*. at 1357.

on the basis of transgender status" to be "discrimination on the basis of sex" in "violation of Title VII."[6] The panel-majority briskly agreed.[7]

The panel decision was built on two primary errors. *First*, it badly misread *Bostock*'s reasoning to extend *Bostock's* holding past any point it can coherently follow. *Second*, the panel majority failed to grasp *the* material difference between its cancer hypothetical and the case before it: the relationship between the sex of the person seeking a procedure and the procedure that person seeks.

With regard to the first error, Justice Gorsuch was well aware that some might construe *Bostock* more broadly than the Court did. He expressly wrote that:

> we have not had the benefit of adversarial testing of [the lawfulness of other policies] and we do not prejudge any such question today. Under Title VII, too, we 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 … transgender has … discriminated against that individual "because of such individual's sex."[8]

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6 *Id.* at 1359.

7 *Lange*, 101 F. 4th at *10-*12.

8 *Bostock*, 140 S.Ct. at 1753.

The Supreme Court left all other questions for another day. The District Court and the panel-majority's insistence that *Bostock* shuts down all counters cannot survive this fact.

When it came to the second error, the panel relied on a hypothetical analogue doesn't track this case's facts in *the* material respect. The Plaintiff is a biological man who identifies as—and seeks surgery to better resemble—a woman.[9] Accepting *arguendo* the psychological needs of the dysphoric, the difference from a cancer patient remains plain.

The proper parallel is not a cancerous woman. It is a dysmorphic *man* who is *not* transgender. Such a man may have an equally real psychological drive to rid himself of a leg.[10] He might suffer equally legitimate dysmorphic distress due to the appearance of his sex organs, and seek analogously affirming cosmetic surgery. A sex-flipped analogue would be a dysmorphic woman who is *not* transgender, but whose very real psychological distress compels her to seek breast augmentation or reduction.[11]

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[9] *Lange*, 608 F.Supp.3d at 1346.

[10] *See* "body integrity dysphoria" & "disorder[ ] of bodily distress or bodily experience, unspecified," American Psychiatric Association. (2013), *Diagnostic and Statistical Manual of Mental Disorders* (5th ed.). World Health Organization. (2022), 6C21 and 6C2Z. *ICD-11: International classification of diseases* (11th revision). https://icd.who.int/.

[11] *See* "body dysmorphic disorder," DSM-V; ICD-11.

The plan exclusion challenged here specifically prevents insurance coverage of the surgery the Plaintiff seeks. Another exclusion in the same policy, though, would prevent these logically-indistinguishable hypothetical employees of both sexes from obtaining similarly-motivated, psychologically driven surgeries on the employer's dime.[12] The policy includes the challenged exclusion, but also the broader latter exclusion that independently forecloses coverage of the same surgery.

Neither Title VII nor *Bostock* says anything about whether an employer must ensure coverage of any of these treatments, or whether an employer like the Defendants, whose policies cover none of these treatments, has done anything wrong. As explained in more depth below in no sense is *sex* a but-for cause of the denial of treatment for any of these earnestly sought, but elective and cosmetic, body-modification surgeries. Without such a statutory basis (like the one on which *all* of *Bostock* hung), the policy at issue does not implicate and cannot violate Title VII.

II. *BOSTOCK*'S *REASONING* DOES APPLY AND REQUIRES REVERSAL

On the other hand, the *reasoning* of *Bostock* does apply to these facts, and it points unambiguously toward reversal.

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[12] The relevant exclusion for "services … meant to … change … how you look or … given for social reasons" including "treatments to … change the size, shape or look of … body features" is Exclusion 14, found in the record at Dist. Ct. Dkt. 155-1, p. 68.

Bostock did not hold that when Title VII says "sex," it really means "sex or sexual orientation or gender identity." Instead, it assessed the treatment of employees exhibiting the same behavior and correctly noted that Title VII bans ***sex*** discrimination: if an employer would allow a biological woman to wear a dress, then it must not differently treat an otherwise comparable biological man. Whatever its weaknesses, this approach is perfectly coherent and provides a clear rule for evaluating employer decisions for *sex* discrimination.

This *en banc* Court has already recognized this point, holding that "*Bostock* actually 'proceed[ed] on the assumption' that the term 'sex,' as used in Title VII, 'refer[red] only to *biological* distinctions between male and female.'"[13] *Bostock* reasoned that if Stephens is a biological man who prefers to act and be treated in ways generally associated with being female, and Employer fires Stephens but wouldn't fire an actual female who preferred to be treated and behave identically, that's sex discrimination!

Yes, it is. And it violated Title VII.

But the Court did not hold that Stephens *was* a woman. Stephens won precisely because Stephens remained a man and *not* a woman. The plaintiff's gender identification was relevant only as a behavior the employer accepted from a woman, but not from a man, not as an additional form of

[13] *Adams*, 57 F.4th at 813.

discrimination whose prohibition had been newly discovered in Title VII's more-than-half-century-old text.[14]

If it had so held, it would have spoiled Stephens' argument. Title VII doesn't forbid discrimination between different categories of women (transgender vs. cisgender) or men (transgender vs. cisgender). Whatever one chooses to call this kind of discrimination, it can't be called *sex* discrimination, because—accepting a hypothetical transgender plaintiff's assertion of their *true* identity—it would remain discrimination between individuals stipulated to share the same sex. *Bostock*—like Congress—continues to make differential treatment *because of sex* the signature feature of a Title VII claim.

That reasoning simply dictates a different result in the situation before the Court than it did in *Bostock*. A transgender individual's invocation of *Bostock*, alone, has no talismanic effect; it, alone, yields no legitimacy to a Title VII claim.

The Plaintiff simply has no valid Title VII claim, because the Defendants' insurance policy covers *no* parallel procedures to that sought by the Plaintiff, regardless of whether a biological woman or a biological man seeks such treatment. Yes, the Defendants' policy denies surgical coverage to the Plaintiff—it also denies coverage of a "top" surgery for a

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[14] *Id.* at 1739 (noting that "[t]he *only* statutorily protected characteristic at issue in today's cases is '*sex*,'" and stipulating that "sex" in Title VII "refer[s] *only* to biological distinctions between male and female" (emphasis added)).

biologically female employee. The defendants' policy covers no biological woman's proposed, elective "bottom" surgeries to produce allegedly more pleasingly appearing female sex organs (whether labiaplasties, clitoral hood reductions, labia majora augmentations, or other so-called "vaginal rejuvenations"), no matter how earnestly sought or psychologically driven—it also denies the Plaintiff coverage of a potential "bottom" surgery to produce female sex organs of matching appearance.

Bostock retains cross-sex differentials in treatment as the signature predicate for a valid Title VII claim. The Defendants treat *precisely no one* differently because of their sex. Lacking that "but-for" element, this case requires reversal.

III. THE PANEL'S ERROR WOULD COMMIT THIS COURT TO ANALAGOUS ERRORS ACROSS A VAST SWATH OF LAW

Above and beyond the inherent importance of this case to the parties and to the development of the Circuit's Title VII jurisprudence, the nationwide effort of some to apply the panel-majority's broad-reading of *Bostock* beyond Title VII raises the stakes for the Court's decision further. As long as this error stands, parties will cite it for the propriety of reading *Bostock* more broadly than the Supreme Court wrote it to answer Title VII questions the Supreme Court expressly did not address. But the baleful impact of the panel-majority's error would go further.

Across agencies, the current Administration maintains that, post-*Bostock*, statutes prohibiting sex discrimination must be read to cover

gender-identity, even at the expense of real women and their spaces that such statutes were explicitly intended to protect.[15] As a result, were the panel-majority's error to stand, the Court should expect to see parties cite it, in at least Title IX and Fair Housing Act cases, as proof of the propriety of a far-broader reading of *Bostock*.

What happens in Vegas will not stay in Vegas. This Court will hear all about it in other cases where parties will try to extend *Bostock* to compel answers to questions unanswered by Congress in Title VII.

IV. THE PANEL'S ERROR WOULD PUT THIS CIRCUIT ON *BOTH* SIDES OF CIRCUIT SPLIT OVER *BOSTOCK*'S MEANING

Most pertinently, those parties will argue that *en banc* adoption of the panel-majority's error overrules this Court's careful *en banc* work in *Adams*,[16] moving the Circuit to the opposite side of the worsening circuit split over how *Bostock* should be understood and applied.[17]

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[15] *See* n. 2, *supra*.

[16] *See generally Adams*, 57 F.4th 791.

[17] For that circuit split on how broadly to read *Bostock*, see, on the one hand: *A.C. v. Metropolitan School District of Martinsville*, 75 F.4th 760, 770 (7th Cir. 2023); *Grimm v. Gloucester Co. Sch. Bd.*, 972 F.3d 586, 618 (4th Cir. 2020); and, on the other, *Tennessee v. Cardona*, 2024 U.S. App. LEXIS 17600, *7-*9 (6th Cir. 2024) (citing, for propriety of skepticism "of attempts to export Title VII's expansive meaning of sex discrimination to other settings" *L.W. ex rel. Williams v. Skrmetti*, 84 F.4th 460, 484 (6th Cir. 2023)), and *Adams*, generally, 57 F.4th 791. *See also*, *Dep't. of Educ. v. La.*, 2024 U.S. LEXIS 2983, *2 and *4 (2024) (announcing in *per curiam* opinion that "all Members of the Court today accept" propriety of "preliminary injunctive relief as to three provisions of

In *Adams*, the *en banc* Court faced and rejected the argument that "*Bostock* equated 'sex' to 'transgender status[.]"[18] Yet, here, the panel-majority nonetheless held that "[t]he Supreme Court clarified in *Bostock* that [all] 'discrimination based on … transgender status necessarily entails discrimination based on sex' as prohibited under Title VII."[19]

Those conclusions directly conflict.[20] The panel-majority has taken the side of the Fourth and Seventh Circuits against the *en banc* Court.

The Court cannot allow such confusion of the Circuit's precedents. The panel-majority's error cannot stand. Nor, given the existing and deepening split between circuits, should the *en banc* Court reverse itself, even if it now concludes the panel's reasoning was stronger than its own.[21] The *en banc* Court should reverse to maintain the integrity of the Circuit's decisional law.

[the Administration's Title IX rule], including the central provision that newly defines sex discrimination to include discrimination on the basis of sexual orientation and gender identity", with express agreement of dissent as to position of "Every Member of the Court").

[18] *Adams*, 57 F.4th at 813.

[19] *Lange*, 101 F. 4th at *8.

[20] As emphasized in n.17, supra, the panel's conclusion appears to also conflict with the unanimous Supreme Court's reading of *Bostock*.

[21] *Metro. Sch. Dist. of Martinsville*, 75 F.4th at 775 (7th Cir. 2023, J. Easterbrook, concurring) (recognizing same circuit split and concluding that 11th Circuit's *Adams* decision "is closer to the mark in concluding "sex" in Title IX has a genetic sense, given that word's normal usage when the statute was enacted[,]" but nonetheless concurring in the judgment, because: (a) the circuit had already spoken; (b) a "conflict

CONCLUSION

The Court should reverse the district court's rogue opinion.

Respectfully submitted,

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among the circuits will exist no matter what happens in the current suit[;]" and (c) only the "Supreme Court or Congress could produce a nationally uniform approach; we cannot.").

CERTIFICATE OF COMPLIANCE

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Dated: September 30, 2024

CERTIFICATE OF SERVICE

I certify that this document has been filed with the clerk of the court and served by ECF upon all counsel of record.

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Dated: September 30, 2024