No. 23-392

In the
Supreme Court of the United States

METROPOLITAN SCHOOL DISTRICT OF MARTINSVILLE,

Petitioner,

v.

A.C., A MINOR CHILD BY HIS NEXT FRIEND, MOTHER AND LEGAL GUARDIAN, M.C.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Despite Respondent's best efforts, there is no denying that there is a deep and entrenched circuit split over whether Title IX and the Equal Protection Clause give local schools the option of separating bathrooms on the basis of biological sex, or impose a one-size-fits-all nationwide mandate to segregate based on gender identity. That split is real, ripe, and going nowhere, as it involves an en banc decision and turns on the meaning of the statute and the Constitution, not a regulation that the Education Department has not even proposed to change. And the Seventh Circuit lies on the wrong side of the divide. Federal law does not demand a single nationwide approach to a contentious issue that schools across our diverse country have unsurprisingly handled differently. Perhaps, if given a chance, Congress or the American people will eventually settle on a considered national policy. But the Fourteenth Amendment did not remove this sensitive and divisive issue from state and local control in 1868, and neither did Title IX in 1972. The Seventh Circuit's contrary view, shared by the Fourth Circuit, is both profoundly wrong and profoundly consequential—as numerous amici have confirmed.

Respondent's efforts to shield that decision from review contradict Respondent's own representations to the courts below and are meritless. Respondent accuses the District of failing to appeal a "new" injunction that purportedly issued after A.C.'s middle-school graduation supposedly rendered the existing injunction "moot." But no new injunction ever issued, because the parties *jointly* asked the district court to

clarify that the existing injunction already covered the high school—which is equally part of the District that is the party bound by the injunction. That obviated a needlessly duplicative appeal and explains why Respondent never advised the Seventh Circuit of any mootness concerns even though A.C. graduated from middle school months before the court issued its decision.

In short, there is no obstacle to review, and unless this Court grants it, the circuits will remain deeply divided, with some schools forced to reconsider policies and retrofit facilities, while others remain free to calibrate policies to local preferences. Perpetuating that divide on this contentious issue has nothing to recommend it. This Court should grant review.

I. The Circuits Are Squarely Divided.

Respondent suggests that "any actual split in the circuits … is shallow and temporary." BIO.18 (capitalization altered). In reality, the split is deeply entrenched, and no regulatory effort will "resolve" it. *Contra* BIO.3, 19-23.

To begin, the notion that the split's existence is debatable blinks reality. The decision below forthrightly acknowledged an "Existing Circuit Split," Pet.App.17, and the Eleventh Circuit en banc majority repeatedly invoked the dissent from *Grimm v. Gloucester County School Board*, 972 F.3d 586 (4th Cir. 2020), *see Adams by & through Kasper v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 804-05 (11th Cir. 2022) (en banc), while multiple dissents invoked the *Grimm* majority's opinion, *see Adams*, 57 F.4th at 824 (Wilson, J., dissenting); *id.* at 859-60 (J. Pryor, J., dissenting). The decision below is hardly alone in

recognizing the resulting circuit split. *See, e.g.*, *Roe by & through Roe v. Critchfield*, 2023 WL 5146182, at *4 (D. Idaho Aug. 10, 2023).

The notion that the Education Department can resolve that split is equally fanciful. Respondent posits that "the only disagreement in the circuits concerns the meaning of a soon-to-be-amended Department of Education regulation," *i.e.*, 34 C.F.R. §106.33, the regulation addressing sex-separated "toilet, locker room, and shower facilities." BIO.2, 20-22, 29-30. That claim is puzzling, as the Department has not proposed any changes to 34 C.F.R. §106.33. *See* 87 Fed. Reg. 41390, 41567, 41571. Moreover, its premise is wrong. The circuits are not split on some regulatory question informed by deferential consideration of the views of Education Department officials. The questions on which the "circuits are split" are constitutional and statutory—whether the Equal Protection Clause and "Title IX permit[] a school to maintain separate bathrooms based on biological sex." *Soule v. Connecticut Ass'n of Sch., Inc.*, 2023 WL 8656832, at *20 (2d Cir. Dec. 15, 2023) (en banc) (Menashi, J., concurring in part); Pet.App.17.

To be sure, courts have recognized that Title IX's long-standing implementing regulations may inform how its language is best interpreted. But any informative value of contemporaneously adopted regulations will be unaffected by their modification more than half a century later. This is, after all, a split about what the statute (and the Constitution) permit, not about what the regulations permit—as the Eleventh Circuit made abundantly clear when it held that "*the statute* is not ambiguous." *Adams*, 57 F.4th

at 812 (capitalization altered; emphasis added). And the Education Department itself recognizes that it is powerless to prohibit what Title IX unambiguously permits. *See* 87 Fed. Reg. 41390, 41536. In short, there is no wishing away the entrenched circuit split on Title IX's meaning.

Respondent's claim that there is no split on the Equal Protection Clause question, BIO.19, is equally unsustainable. To be sure, the circuits have thus far all applied intermediate scrutiny. *But see* States Amicus.Br.20-22. But despite facing "substantially similar facts," *Critchfield*, 2023 WL 5146182, at *4, their views on the constitutional bottom line are irreconcilable, *see* Pet.14-17; *cf.* Independent Women's Forum Amicus.Br.17-19. And because the Eleventh Circuit has already squarely held that Title IX unambiguously permits sex-segregated bathrooms, *see Adams*, 57 F.4th at 812, there is no avoiding the constitutional question, *contra* BIO.22-23.

II. The Seventh Circuit's Position Is Wrong.

A. Title IX Allows Schools to Separate Bathrooms Based on Biological Sex.

The Seventh Circuit's interpretation of Title IX is profoundly wrong. "[C]ommensurate with the plain and ordinary meaning of 'sex' in 1972, Title IX allows schools to provide separate bathrooms on the basis of biological sex." *Adams*, 57 F.4th at 817; Pet.19-28; Defense of Freedom Institute Amicus.Br.14-15.

Respondent argues that *Bostock v. Clayton County*, 140 S.Ct. 1731 (2020), compels a contrary result. BIO.25-27. But *Bostock* not only expressly declined to decide whether "sex" in Title VII "refer[s] only to biological distinctions between male and

female," but explicitly declined "to address bathrooms, locker rooms, or anything else of the kind." 140 S.Ct. at 1753. A decision that went out of its way—twice—not to resolve the question presented is hardly a promising bulwark for defending the decision below. Moreover, while *Bostock* recognized that a statute is not confined to its "expected applications," *id.* at 1750, that is a far cry from interpreting a statute to compel results that its proponents expressly disclaimed. Yet that is what the Seventh Circuit accomplished. *See* 117 Cong. Rec. 30,407 (1971) (statement of Sen. Bayh) ("We are not requiring … that the men's locker room be desegregated."); *cf. Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 527 (1989) (Scalia, J., concurring in the judgment) (observing that it is "entirely appropriate to consult all public materials"—including "legislative history"—"to verify that what seems to us an unthinkable disposition … was indeed unthought of"); *Quarles v. United States*, 139 S.Ct. 1872, 1879 (2019) ("We should not lightly conclude that Congress enacted a self-defeating statute.").

Among the many problems with Respondent's heavy reliance on *Bostock* is that Title IX is spending-power legislation, which this Court has repeatedly reaffirmed does not expose local governments to unanticipated liability based on ambiguous provisions. *See* Pet.26-27. Respondent's footnoted response is unavailing. BIO.31 n.10. It is one thing for a statute, even a spending-power statute, to accomplish *more* than anticipated, but quite another for recipients of federal funds to be told decades after the fact that the statute compels things that they were explicitly assured it does not. There is no precedent for such an expectations-defying result, and no serious

argument that Title IX gave States fair "notice [that] they would have to alter their unbroken practice in accepting federal funds." States Amicus.Br.24; *see* Pet.26-27.

B. The Fourteenth Amendment Allows Schools to Separate Bathrooms Based on Biological Sex.

The Seventh Circuit's equal-protection holding is, if possible, even more profoundly wrong. The suggestion that this decidedly 21st-Century issue was definitively resolved for every locality not just in 1972, but in 1868, beggars belief. Indeed, the idea that the Fourteenth Amendment forbids separating bathrooms based on biological sex runs contrary to more than a century of history—not to mention Congress' judgment in Title IX. Pet.28-32. And while the practice of segregating public bathrooms by sex is so ubiquitous and historically rooted that heightened scrutiny may be misplaced, *see* States Amicus.Br.20-22, that long-standing practice plainly survives it, as protecting sex-specific privacy concerns based on biological differences is an important government interest that is well-served by that long-established practice, *Adams*, 57 F.4th at 804-05; States Amicus.Br.16.

Respondent derides that reasoning as "circular" and insists that "[s]ex-separated restrooms … cannot be an end unto themselves." BIO.33. But that ignores that this long-standing practice stems from biological differences. Those differences explain why it is not an Equal Protection Clause violation to equip only men's restrooms with urinals and why, even though schools provide varying levels of privacy within the boys' and

girls' locker rooms, they historically separated the two in ways that gave additional privacy protection vis-à-vis the opposite biological sex.

By ignoring that reality, Respondent likewise ignores the problem that the Seventh Circuit's logic would foreclose separating bathrooms on *any* basis, be it biological sex or gender identity. After all, if the only "non-conjectural" privacy interests at stake are fully protected by providing individual stalls, Pet.App.21-22, then it is hard to see how schools would have a legitimate interest in segregating bathrooms (or any other facilities) based on gender identity either. That is fundamentally at odds with Title IX and, in particular, with 20 U.S.C. §1686, which expressly permits sex-separated "living facilities"—an allowance that reflects and protects sex-specific privacy concerns. *See* Pet.5-6. And it is at odds with this Court's recognition in *United States v. Virginia*, 518 U.S. 515 (1996), that opening VMI to both sexes would *require* providing sex-separated facilities "to afford members of each sex privacy from the other sex." *Id.* at 550 n.19. In short, nothing in the Equal Protection Clause compels school districts to abandon the centuries-old practice of separating bathrooms based on biological sex.

III. The Question Presented Is Exceptionally Important, And This Is An Excellent Vehicle To Resolve It.

Faced with split decisions and litigation from all sides, school districts and lower courts nationwide—not to mention States, students, and parents—stand in dire need of this Court's guidance. While these issues are certainly recurring, *accord* BIO.34, that

only underscores the need for this Court's intervention *now*, not whenever courts get around to reviewing regulations that may never be promulgated. *Compare, e.g.*, *Dodds v. United States Dep't of Educ.*, 845 F.3d 217, 224 (6th Cir. 2016) (Sutton, J., dissenting) ("The Supreme Court presumably will resolve the Title IX issue in 2017."), *with Gloucester Cnty. Sch. Bd. v. G. G. ex rel. Grimm*, 580 U.S. 1168 (2017) (mem.) (vacating and remanding for reconsideration in light of new executive guidance). As numerous amici make clear, the persistent legal uncertainty is producing extraordinary costs. "[S]chools across the country are being hit from all sides with numerous, costly lawsuits." States Amicus.Br.5. And legal costs are not the only ones mounting, as refusing to acknowledge the deeply rooted privacy interests at stake does not make them go away; it just forces districts to add expensive single-user facilities to accommodate them. *Cf.* Parents Defending Education Amicus.Br.6 (noting estimated costs of $11 million to update bathrooms at just two Virginia high schools).

Moreover, the ramifications of this circuit split reach far beyond bathrooms. Title IX is perhaps best known today for the revolution in women's sports that it helped usher in. *Cf.* Thomas More Soc'y Amicus.Br.6. Yet forbidding schools from continuing to provide separate teams based on biological sex could cost women and girls the very opportunities Title IX was enacted to afford them. *See Adams*, 57 F.4th at 817-21 (Lagoa, J., specially concurring); Parents Defending Education Amicus.Br.11. And the notion that constitutional text ratified in 1868 prohibits what Title IX has been understood to permit for the past

half a century is head-spinning. If that is really what our laws mandate across the Nation, this Court should say so, rather than leave everyone confused and divided with federal mandates in the Fourth and Seventh Circuits and local control in the Eleventh.

There are thus many reasons to grant review, and Respondent fails to conjure any reason to deny it. Indeed, the best Respondent can do is to try to sow procedural confusion from sensible steps Respondent *jointly* advocated below. Respondent insists that A.C.'s graduation from middle school "mooted" the preliminary injunction under review, and that the district court subsequently entered a "new" injunction that the District failed to appeal. *See* BIO.i, 11-14, 34. That is revisionist history in the extreme.

In fact, Respondent took the opposite position in the district court, maintaining that the District was *already* required to provide A.C. with the same access in the high school (which is equally part of the District, the party bound by the injunction) as in the middle school. And the parties avoided a new round of litigation over the high school by filing a joint motion asking the district court to "clarify" that the *existing* "preliminary injunction" (*i.e.*, the one under review here) covered both the middle school and the high school. Resp.App.3; D.Ct.Dkt.86-1. That joint motion expressly acknowledged, moreover, that the District was "reserv[ing] the right to pursue all remedies to challenge the Court's preliminary injunction," thus assuring both the District and the district court that Respondent shared the view that the injunction the Seventh Circuit had affirmed nine days earlier remained live and subject to further review.

Resp.App.5. And the district court proceeded to grant that joint request, issuing a one-page entry clarifying that "*the previously issued* preliminary injunction" covers all schools in the District, including the high school. Resp.App.1 (emphasis added).

Having successfully persuaded the district court that there was no need for a new injunction, and taken no steps to alert the Seventh Circuit of a possible mooting event when A.C. graduated from middle school *before* that court issued its opinion, Respondent cannot take a "clearly inconsistent" position before this Court in an effort to shield the Seventh Circuit's decision from review. *See New Hampshire v. Maine*, 532 U.S. 742, 750 (2001). Indeed, had the District tried to put Respondent to the expense of a separate appeal of a one-page clarification that the District had just agreed would *not* "substantially and obviously alter[] the parties' pre-existing legal relationship," *Gautreaux v. Chicago Hous. Auth.*, 178 F.3d 951, 958 (7th Cir. 1999), Respondent would have justifiably cried foul.

Respondent's suggestion (at 15) that the injunction is "superfluous" vis-à-vis the high school is even more inexplicable. The parties filed the joint motion to clarify the scope of the preliminary injunction precisely because the District took the position that it would *not* let A.C. use the boys' bathroom in the high school unless the injunction compelled it to do so—as the motion made clear. *See* Resp.App.5 ("The District also desires not to waive its rights by extending to A.C. rights not intended by the

Court."). A.C.'s enrollment in high school thus in no way shields the decision below from review.[1]

Nor does it complicate this Court's review. *Contra* BIO.15-18, 34. Whether Title IX permits separating bathrooms (and other facilities) based on biological sex is a statutory-interpretation question that does not turn on any details about a school's infrastructure or plumbing. And while Respondent now claims that "the court of appeals relied on evidence concerning physical conditions at Wooden Middle School to assess both the burdens on A.C. and alternative ways to protect student privacy," BIO.16, Respondent maintained in the joint motion that the Seventh Circuit's "analysis and statutory interpretation … made no distinction between the particular school buildings," Resp.App.4. Having insisted that such distinctions were immaterial, Respondent cannot turn around and complain that there are not enough "facts" in the record to enable this Court to review the propriety of that relief—especially when the Seventh Circuit has already made abundantly clear that its answer to this question remains the same across multiple cases and contexts. *See* Pet.App.25 (deeming consolidated appeals "almost indistinguishable" from *Whitaker By Whitaker v. Kenosha Unified School*

[1] Respondent alludes to a potential state-law issue related to a court-ordered change to A.C.'s birth certificate. BIO.18 n.6. But Respondent argued below that "the issue of a gender marker change [i]s not the issue presented by this case," A.C.CA7.Resp.Br.23 n.4—likely because Respondent did not want to take on an issue that has divided Indiana courts, *see In re O.J.G.S.*, 187 N.E.3d 324, 325 (Ind. Ct. App. 2022). The Seventh Circuit's unsolicited *Erie* guesses thus supply no reason to deny review.

District Number 1 Board of Education, 858 F.3d 1034 (7th Cir. 2017)). If the answer to the question presented turned on the precise details of a school's restroom architecture, that would be news to the Fourth and Eleventh Circuits as well.

Ultimately, Respondent's arguments would not so much forestall resolution of the question presented as foreclose it. After all, every school's facilities and policies will differ in some respects at the margins, and students often move from one school to another before litigation concludes. That may create insurmountable obstacles in a case where a student graduates or moves out of a district entirely. *See, e.g.*, *Univ. of Texas v. Camenisch*, 451 U.S. 390, 394 (1981). But that is all the more reason to take up this case, where there is no jurisdictional obstacle, no prospect of mootness (especially since A.C. has multiple years of high school left and continues to seek damages based on middle school, BIO.13), and no doubt about where the Seventh Circuit stands. There is thus no reason to put off resolving this persistent circuit split that is proving profoundly disruptive for schools throughout the country.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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