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

BRIEF OF THE AMERICAN CIVIL RIGHTS PROJECT, AS AMICUS CURIAE, SUPPORTING THE PETITIONER

DANIEL I. MORENOFF
Counsel of Record
JOSEPH A. BINGHAM
THE AMERICAN CIVIL
RIGHTS PROJECT
P.O. Box 12207
Dallas, Texas 75225
(214) 504-1835
dan@americancivilrights
project.org
joe@americancivilrights
project.org

GAIL HERIOT
4830 Hart Drive
San Diego, California 92116

PETER N. KIRSANOW
BENESCH, FRIEDLANDER,
COPLAN & ARONOFF, LLP
200 Public Square
Suite 2300
Cleveland, Ohio 44114
(216) 363-4500
pkirsanow@beneschlaw.com

Counsel for Amicus Curiae

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

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INTEREST OF AMICUS CURIAE[1]

The American Civil Rights Project (the "ACR Project") is a public-interest law firm, dedicated to protecting and where necessary restoring the equality of all Americans before the law.

This case interests the ACR Project because it focuses on the proper interpretation of some of America's most important civil rights enactments.

SUMMARY OF ARGUMENT

The Seventh Circuit Court of Appeals' interpretation of Title IX of the Education Amendments of 1972 ("Title IX") is remarkably misguided.

The appellate court's reliance on *Bostock v. Clayton Co.*, 140 S. Ct. 1731 (2020), to justify its preferred policy outcome is ideologically driven and incoherent. *Bostock* explicitly declines to reach the bathroom issue.[2] Moreover, it does not hold that Title VII bans

[1] No counsel for a party authored any part of this brief. No one other than the amicus curiae, its members, or its counsel financed the preparation or submission of this brief. The amicus curiae provided counsel of record timely notice under Rule 37.2 of its intent to file this brief.

[2] *Id.* at 1753 (of "other federal or state laws prohibit[ing] sex discrimination" and "sex-segregated bathrooms, locker rooms, and dress codes[,]" noting that "none of these other laws are before us;" "we do not purport to address bathrooms, locker rooms, or anything else of the kind[;]" and concluding that "[w]hether other policies and practices might not qualify as unlawful

discrimination based on gender identity. Rather, it correctly notes that Title VII bans ***sex*** discrimination. Its analysis proceeds this way: If a biological woman identifying as a woman can keep her job, then an otherwise comparable biological man identifying as a woman must also be able to do so. This is a perfectly coherent approach.

Presumptively, the same approach can be applied to Title IX. It, too, bans ***sex*** discrimination, not discrimination based on gender identity.[3] Thus, *unless an exception to the sex discrimination prohibition applies*, if a biological girl identifying as a girl can attend a school as a student, then a biological boy identifying as a girl must also be able to do so as well.[4]

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discrimination or find justifications under other provisions of [even] Title VII are questions for future cases, not these.").

[3] The distinction between sex and gender identity was recognized by the original interpretive community for Title IX. Indeed, precisely this distinction drove the coining of the term "transgender" to contrast with the older "transsexual" – "transgender" was intended to describe individuals who had adopted the traits of the opposite sex *without* having actually attempted to cross over into "becoming" a member of the opposite sex (through the body's surgical alteration). In 1969, Virginia Prince, an anatomical man who lived as a female, wrote in the underground magazine Transvestia: "I, at least, know the difference between sex and gender and have simply elected to change the latter and not the former. If a word is necessary, I should be termed a 'transgenderal.'" Virginia Prince, *Change of Sex or Gender*, 10 Transvestia 53, 60 (1969), quoted in Richard Elkins & Dave King, The Transgender Phenomenon 82 (2006).

[4] For such an exception, see, 20 U.S.C. § 1681(a)(5), which exempts from Title IX's prohibition on sex discrimination the admissions policies of "any public institution of undergraduate

But here's the crucial distinction between *Bostock* and the cases at issue in the circuit split concerning bathrooms, locker rooms, and showers that the petitioner asks the court to resolve: Title IX expressly ***allows*** separation by sex for these purposes. Put differently, Title IX includes a governing ***exception*** to the basic rule that discrimination (including separation) by sex is illegal. 20 U.S.C. § 1686 and 34 C.F.R. § 106.33 (1975) (the "1975 Regulation").

For the sake of argument, though, suppose that's wrong. Suppose that Title IX's exception does not expressly allow for separation by sex for the purpose of bathrooms, locker rooms, or showers. If so, that would mean the general prohibition on separations applies and that ***all*** biological men, not just those who identify as women, would be able to use the women's facilities. And vice versa. It would mean that Title IX requires ***unisex*** facilities. There is no basis for any other reading.

Counsel has diligently searched for evidence that anybody thought that Title IX mandated unisex bathrooms, locker rooms, and showers when it passed in 1972. We found no such evidence. The court of appeals' argument that a "transgender boy" (i.e., a biological girl who identifies as a boy) really is a boy for the purposes of Title IX doesn't strengthen its argument.

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higher education which . . . traditionally and continually from its establishment has had a policy of admitting only students of one sex[.]"

Indeed, it spoils it. Title IX does not prohibit discrimination between ***different kinds*** of boys.

It is important to note that while Title IX ***does not require*** federally funded schools to assign transgender individuals to the bathrooms, locker rooms, or showers of the gender they identify as, the statutory text arguably ***does not prohibit*** them from doing so if they wish. Since there is no federal law forbidding gender-identity discrimination, there is no need for a law that expressly *authorizes* such separation. Just as schools may legally separate by left- and right-handedness, they may be able to legally separate by gender identity.

This Court needs to take this case to resolve the deepening circuit split over the proper application of Title IX. The Court should grant the petition for certiorari to clarify that American law leaves schools and systems the flexibility to handle the situations their transgender students face as specific circumstances require. It should grant certiorari to clarify that the court of appeals' one-size-fits-all approach is a misinterpretation of the law, untethered to any enactment with democratic legitimacy.

ARGUMENT

I. Title IX and Its Regulations Cannot Mean What the Court of Appeals Concluded

Our argument with respect to Title IX proceeds in 10 steps:

1. With certain exceptions,[5] Title IX forbids federally funded education programs or activities from engaging in sex discrimination. Its key provision states: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance. . . ." 20 U.S.C. § 1681(a). There is no other section of Title IX that forbids other kinds of discrimination. *If it isn't sex discrimination, it isn't forbidden by Title IX.*

2. Title IX contains an important exception to its sweeping rule against sex discrimination. "[N]othing contained herein shall be construed to prohibit any educational institution . . . from maintaining separate living facilities for the different sexes." 20 U.S.C. § 1686. Congress expressly directs that, even if a recipient's policies of maintaining separate living facilities for the different sexes would otherwise qualify as sex discrimination, Title IX "shall [not] be construed to prohibit" that policy.

3. Without § 1686, *any* boarding-school boy (not just one who identifies as a girl) would be able to point

[5] *See* n. 4, supra.

to a girls' dorm and say, "if I were a girl, I would be allowed to sleep there. But since I am a boy, my school bars me from doing so. That's sex discrimination!" And he would be right; *it would be* sex discrimination. Indeed, it *is* sex discrimination. But, given § 1686, it is *lawful* sex discrimination.

4. Soon after the passage of Title IX, President Ford approved the 1975 Regulation, clarifying § 1686.[6] The 1975 Regulation reads: "A recipient may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex." 34 C.F.R. § 106.33.

5. Note that the 1975 Regulation is simply an interpretation of § 1686. It clarifies, (though no clarification was needed) that "living facilities" includes "toilet, locker room, and shower facilities." This was not controversial in 1975 and has never been controversial since. We have searched and have found no examples of anyone: (a) interpreting § 1686 between Congress's passage of Title IX and President Ford's approval of the 1975 Regulation as requiring the abolition of single-sex bathrooms, locker rooms, and showers;[7] or

[6] Section 1682 of Title IX requires that regulations promulgated under the statute receive direct Presidential approval in order to take effect.

[7] Indeed, we have been unable to identify either: (a) any court case whatsoever referencing § 1686 prior to 1995; (b) any article or treatise referencing § 1686 at all, published prior to

(b) contending in the years since then that President Ford overstepped his regulatory authority or misinterpreted § 1686 in issuing the 1975 Regulation.[8] Indeed, as the Eleventh Circuit has held, § 1686 and the 1975 Regulation permit schools to maintain separate intimate living facilities (specifically, separate bathrooms, locker rooms, and showers) for the two sexes. *Adams v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, at 811-15 (11th Cir. 2022). Simply put, no one has ever contended that Title IX requires every school in America to host the shower scenes from *Starship Troopers*.[9]

6. That includes this Court's *Bostock* majority. *Bostock* was a Title VII case. It did not hold that when Title VII says "sex," it really means "sex or sexual orientation or gender identity." To the contrary, it held that Congress's prohibition on sex discrimination prohibited discrimination based on sex – "an employer who fires a transgender person who was identified as a male at birth but who now identifies as female" while "retain[ing] an otherwise identical employee who was

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1985; or (c) any article or treatise referencing § 1686 in conjunction with bathrooms, locker rooms, or showers prior to 1995.

[8] Even when the Fourth and Seventh Circuit Courts of Appeals applied what they wrongly described as *Bostock*'s reasoning to find that sex-specific restrooms violate Title IX, they did so by side-stepping the 1975 Regulation, rather than by contending that the 1975 Regulation was arbitrary or capricious. *See Metropolitan Sch. Dist. of Martinsville v. A.C.*, 75 F.4th 760, 770 (7th Cir. 2023); *Grimm v. Gloucester Co. Sch. Bd.*, 972 F.3d 586, 618 (4th Cir. 2020).

[9] Verhoven, Paul, Director, *Starship Troopers*, Sony Pictures, 1997.

identified as female at birth . . . penalizes" the fired employee "for traits or actions that it tolerates in an employee identified as female at birth. [That] employee's sex plays an unmistakable and impermissible role in the discharge decision." *Bostock*, 140 S.Ct. at 1742.

The transgender plaintiff prevailed in *Bostock* ***precisely because***, however the plaintiff "identified," the plaintiff's sex had not changed.[10] Title VII only applied because an employer who fires a biological *male* employee who identifies as a woman, that would not have fired a biological *female* employee identifying as a woman, definitionally makes the fired employee's sex a "but-for cause" of the termination. *Bostock*, 140 S.Ct. at 1741-42. 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 discrimination whose prohibition had been newly discovered in Title VII's 56-year-old text. *Id.* at 1739 (noting that "The *only* statutorily protected characteristic at issue in today's cases is 's*ex*,'" and stipulating that "sex" in Title VII "refer[s] *only* to biological

[10] The Southern District of West Virginia has recognized the same truth in the Title IX context. That court held that a state statute requiring students to participate on the athletic teams designated for their biological sex did not violate Title IX, because Title IX applies to biological sex, not gender. *B.P.J. v. W.Va. State Bd. of Ed.*, 2023 U.S. Dist. LEXIS 1820, at *28 (S.D. W.Va. 2023) ("There is no serious debate that Title IX's endorsement of sex separation in sports refers to biological sex. . . . transgender girls are biologically male.") (stayed by the Court of Appeals, at *B.P.J. v. W.Va. State Bd. of Ed.*, 2023 U.S. App. LEXIS 8379 (4th Cir. 2023), but not reversed or vacated).

distinctions between male and female" (emphasis added)).

7. *Bostock*'s logic is entirely consistent with our analysis above. Like the hypothetical boarding-school student, a hypothetical transgender boy[11] would be entirely right to say: "I am a biological girl who identifies as a boy, but am not allowed to use the showers, locker rooms, and bathrooms my school provides for boys. If I were a biological boy who identified as a boy, I would be able to use them. That is sex discrimination!" That student would be correct. It is sex discrimination. But it is precisely the kind of sex discrimination expressly authorized by Congress in § 1686 and by President Ford in the 1975 Regulation, so it does not violate Title IX. That distinguishes it from *Bostock*.

8. It would be no answer for that hypothetical transgender boy to insist that "I really *am* a boy, who should have access to my school's single-sex boys' showers, locker rooms, and bathrooms." *Title IX prohibits sex discrimination, not discrimination between different kinds of boys (or different kinds of girls).* Whatever one chooses to call this kind of discrimination, it can't be called sex discrimination, because – by its own terms – it is discrimination between individuals who have been defined as having the same sex. It cannot, then, violate Title IX.

9. If – as the lower courts contend – Title IX prohibits as "sex discrimination" the exclusion of a

[11] Again, this example would work precisely the same with all roles reversed.

biological girl (who identifies as a boy) from the boys' facilities, then it follows that *all* girls must be allowed to use the boys' facilities. Title IX would then prohibit the maintenance of single-sex facilities *entirely* and *require* unisex facilities.

It is of no moment that the plaintiffs in these cases have not *sought* to do away with separate-sex bathrooms, locker rooms, and showers. Whatever they've asked for, Title IX allows no third construction. Either: (1) it allows schools to maintain separate facilities for the biological sexes under § 1686 and the 1975 Regulation; or (2) those exceptions somehow don't apply and Title IX forbids them from maintaining separate facilities for the biological sexes.

10. It is worth noting that while we read Title IX not to *require* federal funding recipients to assign transgender individuals to the facilities set aside for the sex they identify with, simultaneously, it arguably does not *constrain* the ability of any federal funding recipient to: (a) do so; (b) establish solely unisex bathrooms; or (c) separate bathrooms, locker rooms, and showers on any other basis. Should a school choose to establish separate bathrooms for the left- and right-handed or for students whose surnames all begin with particular letters, those decisions might be odd, but they wouldn't entail sex discrimination, so Title IX should have nothing to say about the matter.[12]

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[12] Given established racial and national-origin disparities in handedness and in the distribution of surnames across their first letters, such policies could be indicative of the kind of intentional

The court of appeals simply misstates governing statutory law and the relevance of the holding of *Bostock*. The Court should accordingly grant certiorari in order to vacate the district court's preliminary injunction and reverse the Seventh Circuit's error.

CONCLUSION

The Fourth and Seventh Circuits have relied on a misreading of *Bostock* to adopt a logically untenable version of Title IX. For reasons that we will be happy to brief once review is granted, they have also wrongly extended this Court's equal protection jurisprudence to impose their preferred policy answer in a debate that the Constitution does not resolve. They were wrong to do both. The Court should grant the petition for certiorari in order to reverse the Seventh Circuit on

discrimination forbidden by Title VI. Gail L. Heriot, *Title VII Disparate Impact Liability Makes Almost Everything Presumptively Illegal*, 14 NYU J.L. & Liberty 1 (Jan. 1, 2020). We are unaware of any documented sex-differences in the allocation of handedness or surnames that would make such policies implicate Title IX.

the merits and restore the rule of law to this divided area.

Respectfully submitted,

DANIEL I. MORENOFF
Counsel of Record
JOSEPH A. BINGHAM
THE AMERICAN CIVIL RIGHTS PROJECT
P.O. Box 12207
Dallas, Texas 75225
(214) 504-1835
dan@americancivilrights project.org
joe@americancivilrights project.org

GAIL HERIOT
4830 Hart Drive
San Diego, California 92116

PETER N. KIRSANOW
BENESCH, FRIEDLANDER, COPLAN & ARONOFF, LLP
200 Public Square
Suite 2300
Cleveland, Ohio 44114
(216) 363-4500
pkirsanow@beneschlaw.com

Counsel for Amicus Curiae