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 FOR *AMICUS CURIAE* DEFENSE OF FREEDOM INSTITUTE FOR POLICY STUDIES IN SUPPORT OF PETITIONER

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BRIEF OF *AMICUS CURIAE* DEFENSE OF FREEDOM INSTITUTE, IN SUPPORT OF PETITIONER

Pursuant to Supreme Court Rule 37.2, the Defense of Freedom Institute for Policy Studies ("DFI") respectfully submits this *amicus curiae* brief in support of Petitioner.[1]

STATEMENT OF INTEREST OF *AMICUS CURIAE*

DFI is a national nonprofit organization dedicated to defending and advancing freedom and opportunity for every American family, student, entrepreneur, and worker and to protecting the civil and constitutional rights of Americans at school and in the workplace. DFI envisions a republic where freedom, opportunity, creativity, and innovation flourish in our schools and workplaces. Former senior leaders of the U.S. Department of Education who are experts in education law and policy founded DFI in 2021. DFI contributes its expertise to policy and legal debates concerning the proper scope and interpretation of Title IX, including submitting comments to the Department of Education concerning its *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 87 Fed. Reg. 41390 (proposed Jul. 12, 2022) (codified at 34 C.F.R. 106).

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[1] No counsel for a party authored this brief in whole or in part and no person other than *amicus* or its counsel made any monetary contributions to fund the preparation or submission of this brief. Counsel for all parties were notified of DFI's intent to file this brief greater than ten days prior to the date to respond.

SUMMARY OF ARGUMENT

In *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), this Court held that it is unlawful under Title VII of the Civil Rights Act of 1964 for an employer to fire an individual "merely for being gay or transgender" because such an action is necessarily based in part on the individual's biological sex. *Id.* a 1754. Some lower courts–including the Seventh Circuit in the instant case–have relied on *Bostock*'s reasoning in the context of an entirely different statute, Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681 *et seq.*, to prohibit schools from requiring students to use the bathroom designated for their biological sex. *See, e.g.*, *A.C. v. Metro. Sch. Dist. of Martinsville*, 75 F.4th 760 (7th Cir. 2023) (Indiana schools' policies regarding use of sex-separated bathrooms by transgender students violated Title IX); *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586 (4th Cir. 2020) (Virginia school board's policy requiring students to use bathrooms corresponding with their "birth-assigned sex" violated Title IX); *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034 (7th Cir. 2017) (Wisconsin school district's policy requiring students to use bathrooms designated for their biological sex violated Title IX's prohibition of discrimination on the basis of sex). By contrast, the Eleventh Circuit has declined to extend *Bostock*'s reasoning to Title IX. *See Adams v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791 (11th Cir. 2022) (Title IX permitted Florida school officials to maintain policy separating bathrooms on the basis of biological sex).

This Court should resolve the circuit split by granting the petition for certiorari in this case and

declaring that its decision in *Bostock* does nothing to supersede the plain meaning of "sex" in Title IX as a binary, biological distinction. *Bostock* contemplated entirely different conduct—hiring and firing adults—in an entirely different setting—the workplace—under a statutory scheme—Title VII—that is entirely distinct from Title IX. Significantly, unlike Title VII, binary, biological distinctions permeate Title IX; its express carve-out allowing for "separate living facilities" (*e.g.*, bathrooms) based on biological sex is only one example.

This Court should recognize that the text, common public meaning at the time of enactment, and context and history of Title IX establish that the word "sex" for purposes of Title IX refers to a binary distinction between biological males and females. Interpreting Title IX's many uses of the term "sex" to encompass the concept of "gender identity" would not only contravene the plain meaning of the statute but would also conflict with the very purpose of the law when passed by Congress in 1972: to ensure equal opportunities in education for girls and women. The proper place to address normative questions about the extent to which the law should prohibit discrimination on the basis of "gender identity" is not the courts, but Congress, which has the constitutional power to legislate for the federal government, has the ability to consider fully the different nuances and consequences involved in policymaking, and is accountable to the public through elections.

Accordingly, this Court should grant certiorari to resolve the current circuit split that exists with respect to whether Title IX denies local schools the

authority to maintain a policy separating bathrooms on the basis of sex as a binary, biological concept. In doing so, this Court should confirm the original, unambiguous meaning of "sex" for purposes of Title IX—as a biological distinction between males and females—and overrule the Seventh Circuit's incorrect decision to the contrary.

ARGUMENT

I. The Court Should Take This Case as an Opportunity to Clarify the Impact of *Bostock* on Title IX's Framework.

A. Courts Have Misapplied *Bostock* to Cases in the Context of Title IX.

This Court's holding in *Bostock* does not negate the plain meaning of Title IX or force local schools to ignore biological sex when determining which students can use which bathroom; however, multiple circuit courts—including the Seventh Circuit in this case—have misinterpreted *Bostock* and Title IX to do exactly that. *See A.C.*, 75 F.4th at 769 ("Applying *Bostock*'s reasoning to Title IX, we have no trouble concluding that discrimination against transgender persons is sex discrimination for Title IX purposes, just as it is for Title VII purposes."); *Grimm*, 972 F.3d at 616 ("After the Supreme Court's recent decision in *Bostock v. Clayton County* . . . we have little difficulty holding that a bathroom policy precluding Grimm from using the boys restrooms discriminated against him 'on the basis of sex.'") (citation omitted); *Adams v. Sch. Bd. of St. Johns Cnty.*, 968 F.3d 1286, 1305 (11th Cir. 2020) ("With *Bostock*'s guidance, we conclude that Title IX, like Title VII, prohibits discrimination

against a person because he is transgender, because this constitutes discrimination based on sex."), *rev'd and remanded en banc*, 57 F.4th 791 (11th Cir. 2022).

The misapplication of *Bostock*'s Title VII-based holding to the entirely separate statutory scheme of Title IX requires correction by this Court. Granting the petition in this case would give this Court an opportunity to do so.[2]

B. *Bostock* Expressly Limits Its Reasoning to Discrimination Under Title VII.

Bostock explicitly disclaimed any extension of its interpretation of Title VII to Title IX. *Bostock*, 140 S. Ct. at 1753 (noting concerns about access to bathrooms, locker rooms, and dress codes before emphasizing that "none of these other laws are before us"). Moreover, *Bostock* acknowledged that a different statutory scheme could lead to a different result, stating that "we have not had the benefit of adversarial testing about the meaning of the[] terms [of other laws], and we do not prejudge any such question today." *Id.* The present case provides just such an opportunity for the Court to decide the

[2] Such clarification would also benefit a developing line of cases that is the subject of a split among lower courts and that addresses a separate but related issue – namely, whether student participation in school athletics can be based on biological sex. *Compare B.P.J. v. West Virginia State Bd. of Educ.*, No. 2:21-cv-00316, 2023 U.S. Dist. LEXIS 1820 (S.D. W. Va. 2023), *stayed pending appeal*, *B.P.J. v. West Virginia State Bd. of Educ.*, No. 23-1078, 2023 U.S. App. LEXIS 8379 (4th Cir. Feb. 22, 2023), *and Hecox v. Little*, 79 F.4th 1009 (9th Cir. 2023).

meaning of Title IX's terms with respect to bathrooms and other intimate facilities, the issue having already been fully developed through adversarial testing in various lower courts.

C. As Distinct Statutory Schemes, Courts Must Evaluate Title IX's Framework Independently from Title VII.

Title IX is a distinct statutory scheme from Title VII under which "sex" can only be understood as a binary, biologically-determined characteristic. Moreover, applying a broader definition of the term "sex" in Title IX directly conflicts with the text and purpose of Title IX, which seek to level the playing field in education for men and women based on a binary, biological understanding of "sex."

To begin with, Title VII makes it "unlawful . . . for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2. Thus, this Court in *Bostock* concluded that an employer unlawfully discriminates against an employee "when it intentionally fires an individual employee based in part on sex." *Bostock*, 140 S. Ct. at 1741. In doing so, the Court "proceed[ed] on the assumption that 'sex' . . . refer[s] only to biological distinctions between male and female." *Id.* at 1739.

Applying the same rule to the Title IX context, and using the same assumption that "sex" in Title IX only refers to a binary, biological classification, there

is no doubt that a school treats boys and girls differently when it declines to allow, for example, a biological girl to use a restroom designated for boys. The girl is, after all, being denied an opportunity to use the restroom that boys can access on the ground that she is a girl.

The critical difference between Title VII and Title IX is that when Congress passed the latter, it specifically *removed* sex-separated "living facilities" from the reach of the law's prohibition of discrimination on the basis of sex. 20 U.S.C. § 1686 ("[N]othing contained [in Chapter 38] shall be construed to prohibit any educational institution receiving funds under this Act[] from maintaining separate living facilities for the different sexes."). In its regulations implementing Title IX, the Department of Education has long interpreted this "living facilities" carveout to permit educational institutions to provide "separate toilet, locker room, and shower facilities on the basis of sex" if the facilities "provided for students of one sex [are] comparable to such facilities provided for students of the other sex." 34 C.F.R. § 106.33. Thus, Title IX *explicitly permits* schools to engage in the kind of biological, binary distinctions that are at issue in the present case. *Bostock* is inapplicable here.

Moreover, the issue at the heart of the instant case is whether "sex" as used in Title IX can refer only to biological distinctions or must also include concepts of gender identity; again, *Bostock* simply assumed "that 'sex' . . . refer[ed] only to biological distinctions between male and female." *Bostock*, 140 S. Ct. at 1739.

D. The Differences Between the Title VII and Title IX Statutory Frameworks Reflect Congressional Recognition of the Differences Between Schools and the Workplace.

Congress's inclusion of a carveout for sex-separated facilities in Title IX but not in Title VII reflects its broader recognition of the many material differences between the workplace and schools. Brief of Petitioners at 5-6. (quoting 118 Cong. Rec. 5807 (1972) (statement of Sen. Bayh) (explaining the inclusion of the carveout as a matter of "permit[ing] differential treatment by sex . . . where personal privacy must be preserved")) ; *Davis v. Monroe Cnty Bd. of Educ.*, 526 U.S. 629, 651 (1999) ("Courts . . . must bear in mind that schools are unlike the adult workplace."); *see also Adams*, 57 F.4th at 808 (differentiating *Bostock* from Title IX by noting "the school is not the workplace"). As the Sixth Circuit has recognized, "Title VII differs from Title IX in important respects;" therefore, "it does not follow that principles announced in the Title VII context automatically apply in the Title IX context." *Meriweather v. Hartop*, 992 F.3d 492, 510 n.4 (6th Cir. 2021); *see also Davis*, 526 U.S. at 675 (Kennedy, J., dissenting) (stating that analogies between Title IX and Title VII "are inapposite, because schools are not workplaces and children are not adults").

Relatedly, courts should decline to apply the holding in *Bostock* to the Title IX context because the tradeoffs are different under Title IX and Title VII. *Bostock* addressed whether an employee could be terminated from employment based on sexual

orientation. Whether an employee can be fired based on sexual orientation is primarily a matter impacting employee and employer. It does not inherently impact the rights and opportunities of others.

By contrast, the application of Title IX to school bathroom policies does. As the Court has acknowledged, "[p]hysical differences between men and women . . . are enduring: 'The two sexes are not fungible; a community made up exclusively of one sex is different from a community composed of both.'" *United States v. Virginia*, 518 U.S. 515, 533 (1996) (quoting *Ballard v. United States*, 329 U.S. 187, 193 (1946)) (cleaned up). Here, the petitioner school district implemented its policy limiting the ability of students to use a bathroom that is not designated for their biological sex in order to protect the privacy and safety interests of other students. *See* Brief of Petitioners at 7 (citing D.Ct.Dkt.29-4 at 24:2-9). As such, this case (and Title IX more generally) requires weighing the trade-offs between affirming gender identities and protecting student privacy. *Bostock* provides no guideposts for resolving these tradeoffs.

E. Prohibiting Schools from Maintaining Sex-Separated, Intimate Facilities Impermissibly Prioritizes Derivative Rights over the Plain Statutory Text.

Bostock determined that Title VII protected discrimination based on sexual orientation by reasoning that "because of" sex incorporates a "but for" test and that a man would not be fired for dating a woman nor a woman fired for dating a man; therefore, the "but for" cause when terminating an employee

based on sexual orientation was that employee's sex. *Bostock*, 140 S. Ct. at 1742. Protection of sexual orientation is thus a derivative consequence of protection because of sex.

By contrast, Title IX specifically contemplates binary, biological distinctions based on "sex"—dormitories, bathrooms, and other intimate facilities. The only way in which such sex separation, explicitly permitted by the statute, could violate a student's rights based on that student's "gender identity" would be if a student's gender identity could trump the term "sex" in the statute, without Congress ever having said so. As the Eleventh Circuit noted in *Adams*, interpreting "sex" to include gender identity "would result in situations where an entity would be prohibited from installing or enforcing the otherwise permissible sex-based carve-outs when the carve-outs come into conflict with a transgender person's gender identity," an outcome that "cannot comport with the plain meaning of 'sex' at the time of Title IX's enactment and the purpose of Title IX and its implementing regulations, as derived from the text." *Adams*, 57 F.4th at 814. *Bostock* did not contemplate such a scenario, but the Court now has the opportunity to explain that there is no statutory basis for "gender identity" to replace classifications based on binary, biological sex under Title IX.

Bostock clearly has no bearing on cases where Congress specifically contemplated the kind of distinctions at issue and exempted them from Title IX's prohibitions on sex discrimination. As noted, however, courts have repeatedly erred in interpreting *Bostock* to require them to overturn school bathroom

policies that distinguish between boys and girls on the basis of biological sex. Federal agencies have also misinterpreted *Bostock* to require them to investigate sex-separated bathroom policies in the administrative enforcement context. *See, e.g.*, Dep't of Educ., *Interpretation, Enforcement of Title IX of the Education Amendments of 1972 With Respect to Discrimination Based on Sexual Orientation and Gender Identity in Light of Bostock v. Clayton County*, 86 Fed. Reg. 32,637, (June 22, 2021) (stating that in light of *Bostock*, Department "will fully enforce Title IX to prohibit discrimination based on sexual orientation and gender identity in education programs and activities that receive Federal financial assistance from the Department"), *preliminarily enjoined*, *Tenn. v. U.S. Dep't of Educ.*, 615 F. Supp. 3d 807 (E.D. Tenn. 2022).

The Court should use this case as an opportunity to clarify that its holding in *Bostock* does not nullify the ability of schools to separate bathrooms based on binary, biological classifications, as Title IX clearly permits.

II. The Court Should Take This Case to Provide Critical Guidance to Lower Courts on the Meaning of "Sex" in Title IX.

Because Title IX provides an exemption for educational institutions "maintaining separate living facilities *for the different sexes*," 20 U.S.C. § 1686 (emphasis added), a court determining whether a school may maintain bathrooms separated on the basis of biological sex must first determine the original public meaning of the term "sex" in Title IX—and whether it encompasses the concept of "gender

identity." *See Adams*, 57 F.4th at 811 ("[T]his appeal requires us to interpret the word 'sex' in the context of Title IX and its implementing regulations. We cannot, as the Supreme Court did in *Bostock*, decide only whether discrimination based on transgender status necessarily equates to discrimination on the basis of sex . . . ."). Courts have split on this question. *Compare Martinsville*, 75 F.4th at 770 ("Title IX does not define sex. Dictionary definitions from around 1972 (when Title IX was passed) are equally inconclusive. . . . There is insufficient evidence to support the assumption that sex can mean only biological sex.") (citations omitted), *and Adams*, 57 F.4th at 815 ("When we read 'sex' in Title IX to mean 'biological sex,' as we must, the statutory claim resolves itself.").

This Court should resolve this circuit split and clarify that the term "sex" as used in Title IX refers only to "biological sex" and does not prohibit schools from requiring students to use the bathroom designated by biological sex.

A. The Text of a Statute is Paramount in Assessing its Meaning.

"As with any question of statutory interpretation, our analysis begins with the plain language of the statute." *Jimenez v. Quarterman*, 555 U.S. 113, 118 (2009); *see also* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts*, 56 (2012) ("Scalia & Garner") ("As Justinian's Digest put it: *A verbis legis non est recedendum* ('Do not depart from the words of the law')." (quoting Digest 32.69 pr. (Marcellus))). "If the words of a statute are unambiguous, this first step of the

interpretive inquiry is our last." *Rotkiske v. Klemm*, 140 S. Ct. 355, 360 (2019). This Court has explained that it "normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment." *Bostock,* 140 S. Ct. at 1738; *see also Asgrow Seed Co. v. Winterboer*, 513 U.S. 179, 187 (1995) ("When terms used in a statute are undefined, we give them their ordinary meaning.").

"It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *West Virginia v. Environmental Protection Agency*, 142 S. Ct. 2587, 2607 (2022) (quoting *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989)); *see also Scalia & Garner*, at 56 (2012) ("The words of a governing text are of paramount concern, and what they convey, in their context, is what the text means."). "In ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole." *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988); *see also Scalia & Garner* at 167–169 (describing the "whole-text canon" of statutory construction).

As Sir Edward Coke explained, "'[I]t is the most natural and genuine exposition of a statute to construe one part of the statute by another part of the same statute, for that best expresseth the meaning of the makers.'" *Scalia & Garner* at 167 (quoting Edward Coke, *The First Part of the Institutes of the Laws of England, or a Commentary upon Littleton* § 728 at 381a (1628; 14th ed. 1791)). Accordingly, "[i]f any

section [of a law] be intricate, obscure, or doubtful, the proper mode of discovering its true meaning is by comparing it with the other sections, and finding out the sense of one clause by the words or obvious intent of the other." *Id*.

B. Congress's Use of the Term "Sex" Throughout Title IX to Refer to a Binary, Biological Classification Reveals Its Intent to Permit the Separation of Bathrooms on the Basis of Biological Sex.

Petitioner's brief demonstrates comprehensively why contemporaneous dictionary definitions and legal authorities, among other overwhelming evidence, indicate that the ordinary public meaning of "sex" at the time Title IX was adopted referred to a binary distinction between males and females. Petitioner's Brief at 20–24. The textual context of Title IX as a whole also renders the meaning of the term "sex" as used in Section 1686, which permits sex-separated facilities, even less ambiguous.

Title IX repeatedly draws binary distinctions between "boys" and "girls" and does not refer to current conceptions of sexual orientation or gender identity. For example:

- Section 1681(a)(5) refers to public universities with "a policy of admitting only students of *one sex*," 20 U.S.C. § 1681(a)(5) (emphasis added);
- Subsection (6)(B) refers to youth service organizations that have "traditionally been

limited to persons of *one sex* . . .," *id.* at (6)(B) (emphasis added);

- Subsection 7 applies to "[b]oy or [g]irl conferences," *id.* at (7);
- Subsection (8) concerns "[f]ather-son or mother-daughter activities at educational institutions" and provides "if such activities are provided for students of *one sex*, opportunities for reasonably comparable activities shall be provided for students of *the other sex*," *id.* at (8) (emphasis added);
- Subsection (9) addresses "'beauty' pageants" in which "participation is limited to individuals of *one sex* only," *id.* at (9) (emphasis added); and
- Section 1681(b) likewise refers to "disparate treatment to the members of *one sex*," 20 U.S.C. § 1681(b) (emphasis added).

"In all but the most unusual situations, a single use of a statutory phrase must have a fixed meaning." *Cochise Consultancy, Inc. v. United States ex rel. Hunt*, 139 S. Ct. 1507, 1512 (2019). These references demonstrate that the word "sex" has only a biological, binary meaning—male or female—for the purposes of Title IX.

Although not raised explicitly in *A.C.*, the use of gender identity to define "sex" opens the door to future issues regarding multiple genders, *see, e.g., Grimm*, 972 F.3d at 621 (Wynn, J., concurring), notwithstanding clear Congressional intent.

C. Congress's Purpose in Passing Title IX—to Address Pervasive Discrimination Against Women and Girls in Education—Would Be Frustrated by Interpreting "Sex" to Encompass "Gender Identity."

With Title IX, Congress sought to address shocking and pervasive sex discrimination in education, particularly against women and in favor of men. *See Adams*, 57 F.4th at 811 (The "purpose" of Title IX, "as derived from its text, is to prohibit sex discrimination in education."). "[T]he concept of discrimination 'because of,' 'on account of,' or 'on the basis of' sex was well understood" because it "was part of the campaign for equality that had been waged by women's rights advocates for more than a century" and "meant . . . equal treatment for men and women." *Bostock*, 140 S. Ct. at 1769 (Alito, J., dissenting). There is no evidence that this concept included discrimination against, for example, biological males who identify as females in favor of other biological males. In any event, unlike Congress, courts are not equipped to decide such fundamental issues, particularly where, as here, Congress has clearly demonstrated a binary, biological understanding of "sex" under Title IX.

Prior to the introduction of Title IX, government reports, congressional statements, and legislative hearings made clear that Congress was interested in addressing discrimination against women, particularly in the context of education, and placed the phrase "on the basis of sex" squarely within that context.

In 1970, Representative Martha Griffith, who was one of the most forceful advocates for the addition of "sex" to Title VII of the Civil Rights Act, "gave the first speech ever in the U.S. Congress on the discrimination against women in education," stating in part "[i]t is shocking and outrageous that universities and colleges, using Federal moneys, are allowed to continue treating women as second-class citizens, while the Government hypocritically closes its eyes." Peg Pennepacker, *The Beginning of Title IX—The Bernice Sandler Story*, National Federation of High School Associations (May 12, 2022), https://tinyurl.com/4durjc49; *see also* 116 Cong. Rec. 6398-6400 (Mar. 9, 1970); Robert C. Bird, *More than a Congressional Joke: A Fresh Look at the Legislative History of Sex Discrimination of the 1964 Civil Rights Act*, 3 Wm. & Mary J. Women & L. 137 (1997).

In April 1970, the President's Task Force on Women's Rights and Responsibilities issued a report warning that "[s]o widespread and pervasive are discriminatory practices against women that they have come to be regarded, more often than not, as normal." *A Matter of Simple Justice : The Report of The President's Task Force on Women's Rights and Responsibilities,* III (Apr. 1970), https://tinyurl.com/y4yc49rk. Presaging what would become Title IX, the Task Force also recommended that Congress amend the Civil Rights Act to "authorize the Attorney General to aid women and parents of minor girls in suits seeking equal access to public education, and to require the Office of Education to make a survey concerning the lack of

equal educational opportunities for individuals by reason of sex." *Id.* at IV.

In May 1970, the House and Senate held multiple hearings on and eventually proposed the Equal Rights Amendment to the Constitution ("ERA"), including debating legislation to prevent discrimination against women at American universities. *See* 86 Stat. 1523, 92nd Cong., 2nd Sess. (1972).

In June and July 1970, Congress held hearings on discrimination against women, which sought to prohibit discrimination "on the basis of sex," including in the educational context, placing the phrase "on the basis of sex" squarely within the context of the treatment of women. *See Discrimination Against Women*, *Hearings Before the Special Subcommittee on Education of the Committee on Education and Labor of the House of Representatives*, 91st Cong., 2d Sess. (June 1970), https://tinyurl.com/3ardwkve.

In July 1970, Rep. Abner Mikva introduced the Women's Equality Act of 1970, a bill to prohibit discrimination against women in federally assisted programs, government employment, and employment in educational institutions, noting that "[i]t is surprising and inexcusable that the quality of life Americans have sought for nearly 200 years is in many ways denied female Americans by law." 116 Cong. Rec. 22,681–22,682.

This focus continued in the lead-up to Title IX. In September 1971, the "father of Title IX," Senator Birch Bayh, introduced a bill that was eventually largely included in Title IX, the Women's Educational

Equality Act, 92 S. 2185, 117 Cong. Rec. 22,740-43. *See* Akeem Glaspie, *"Father of Title IX" Birch Bayh Leaves Lasting Legacy for Women's Sports*, IndyStar (Mar. 14, 2019), https://tinyurl.com/4a44aase. In doing so, Senator Bayh stated, "The bill I am submitting today will guarantee that women, too, enjoy the educational opportunity every American *woman* deserves." 117 Cong. Rec. 32,476 (Sept. 20, 1971).

This focus on (biological) women was consistent with Senator Bayh's statements while attempting to introduce similar legislation earlier in 1971. At that time, Senator Bayh stated, "To my mind our greatest legislative failure relates to our continued refusal to recognize and take steps to eradicate the pervasive, divisive, and unwarranted discrimination against a majority of our citizens, the *women* of this country." 117 Cong. Rec. 22,735–22,743 (Jun. 29, 1971) (emphasis added). Senator Bayh further urged that the legislation would "narrow the gap between our obligations and our performance by giving to women the benefit of the major civil rights legislation of the last decade" and noted that it would "implement[] the recommendations of the President's Task Force on Women's Rights and Responsibilities." *Id*.

Likewise, when Title IX was introduced in the House, it was defended in terms of promoting equality for women. To wit, Representative Edith Green stated "[a]ll that this title does is to ask that a woman be considered as a human being, that her qualifications, her high-school work and other qualifications be considered in the same fashion of those of a male applicant." 117 Cong. Rec. 39,259 (Nov. 4, 1971) (emphasis added).

In February 1972, Sen. Bayh introduced an amendment to S. 659 and noted that "[w]hile the impact of this amendment would be far-reaching, it is not a panacea. It is, however, an important first step in the effort to provide for the women of America something that is rightfully theirs—an equal chance to attend the schools of their choice, to develop the skills they want, and to apply those skills with the knowledge that they will have a fair chance to secure the jobs of their choice with equal pay for equal work." 118 Cong. Rec. 5808 (Feb. 28, 1972).

Congress passed Title IX to rectify traditional discriminatory treatment of women. Issues regarding "gender identity" and the treatment of students who do not identify with their biological sex are wholly absent from the legislative record. Interpreting the term "sex" to prohibit schools from maintaining policies requiring students to use the bathroom designated for their biological sex threatens to frustrate this purpose. As Justice Alito pointed out in his dissent in *Bostock*, "[f]or women who have been victimized by sexual assault or abuse, the experience of seeing an unclothed person with the anatomy of a male in a confined and sensitive location such as a bathroom or locker room can cause serious psychological harm." *Bostock*, 140 S.Ct. at 1779 (Alito, J., dissenting). If schools can no longer use biological classifications to separate restrooms under Title IX, then it is difficult to imagine how a school might prevent the harm to women to which Justice Alito refers. And as Judge Lagoa discussed in her concurrence in *Adams*, interpreting "sex" in Title IX to include the concept of "gender identity" would

necessarily threaten the integrity of sex-separated athletics and deny women the chance to compete on a level playing field with men. *Adams*, 57 F.4th at 821 (Lagoa, J., concurring) ("Affirming the district court's conclusion that 'the meaning of "sex" in Title IX includes "gender identity"' would open the door to eroding Title IX's beneficial legacy for girls and women in sports.").

This case thus presents an opportunity for the Court to clarify Title IX as a guarantor of equal opportunities for women and girls in educational programs and activities, including in sports, and ensure that this legacy is not frustrated by misinterpretation by lower courts of the law's terms.

III. Expanding Title IX is a Question Properly Left to Congress, Not the Courts.

"Today, many Americans know individuals who are gay, lesbian, or transgender and want them to be treated with the dignity, consideration, and fairness that everyone deserves." *Bostock*, 140 S. Ct. at 1783-84 (Alito, J. dissenting). Nevertheless, "the authority of this Court is limited to saying what the law *is*," not what one might like it to be. *Id.* at 1784 (emphasis added).

Even if the word "sex" were somehow ambiguous (it is not), it would still not support the interpretation of the Seventh Circuit expanding its meaning to include the fluid concept of "gender identity." As a legal and practical matter, Congress is the proper venue to address the application of Title IX to gender identity, not the courts.

As Justice Gorsuch has observed, "[l]egislators can be held accountable by the people for the rules they write or fail to write; typically judges cannot." *Democratic Nat'l Comm. v. Wis. State Legis.*, 141 S. Ct. 28, 29 (2020) (Gorsuch, J., concurring in denial of application to vacate stay). Similarly, "[l]egislatures make policy and bring to bear the collective wisdom of the whole people when they do" and "enjoy far greater resources for research and factfinding on questions of science and safety than usually can be mustered in litigation between discrete parties before a single judge." *Id.*

Perhaps most importantly "[i]n reaching their decisions, legislators must compromise to achieve the broad social consensus necessary to enact new laws, something not easily replicated in courtrooms where typically one side must win and the other lose." *Id.*; *see also West Virginia*, 142 S. Ct. at 2618 (Gorsuch, J., concurring) ("By effectively requiring a broad consensus to pass legislation, the Constitution sought to ensure that any new laws would enjoy wide social acceptance, profit from input by an array of different perspectives during their consideration, and thanks to all this prove stable over time.") (citing James Madison, *Federalist 10* (Nov. 23, 1787)). The result is that "[t]he need for compromise inherent in this design also sought to protect minorities by ensuring that their votes would often decide the fate of proposed legislation—allowing them to wield real power alongside the majority." *West Virginia*, 142 S. Ct. at 2618 (Gorsuch, J., concurring).

Questions about controversial issues such as access to sex-separated bathrooms and locker rooms

are the classic sort of policy questions that would benefit from the legislative process and should be resolved by Congress. They are also issues that necessarily involve trade-offs between the preferences of persons with gender identities that differ from their biological sex and those whose gender identities do not differ.

Rejecting the concept of sex as binary, private companies like Facebook have given users the option of selecting between at least 58 different gender identities. Russell Goldman, *Here's a List of 58 Gender Options for Facebook Users*, ABC News (Feb. 13, 2014), https://tinyurl.com/5a49vh83. Which ones constitute protected classifications, and on what terms? As gender identity and sexual orientation are perceived as more fluid and less defined, what classifications are legally protected and what are simply matters of personal taste or preference? The Seventh and Fourth Circuit precedents offer little for states to go by and suggest a constantly changing paradigm.

These are not easy questions. Answering them requires making complex policy and value judgments, which are best made by a Congress that has access to a wide variety of views, not just that of the parties before it, a greater ability to assess scientific and safety claims, and the ability to adopt stable, nuanced compromises that defy black-and-white determinations. Accordingly, Congress—not the courts—is the best and proper place to resolve questions about whether and how Title IX should apply to gender identity.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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