No. 23-392

In The Supreme Court of the United States

METROPOLITAN SCHOOL DISTRICT OF MARTINSVILLE,

Petitioner,

v.

A.C., A MINOR BY HIS NEXT FRIEND, HIS 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 AMICUS CURIAE THOMAS MORE SOCIETY IN SUPPORT OF PETITIONER

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IDENTITY AND INTEREST OF AMICI CURIAE[1]

The Thomas More Society ("TMS") is a not-for-profit, national public interest law firm dedicated to restoring respect in law for life, family, and religious liberty. TMS pursues its purposes primarily through litigation and related activities. TMS has represented many individuals and organizations in federal and state courts and filed numerous amicus curiae briefs with the aim of protecting the rights of individuals and organizations to communicate their political and social views, as well as to faithfully practice their religion, as guaranteed by the Constitution.

SUMMARY OF THE ARGUMENT

An interpretation of Title IX's "on the basis of sex" language to mean "on the basis of gender identification" rather than "on the basis of biological sex" ignores the express language of Title IX, as well as the objectives Congress sought to accomplish in enacting Title IX. Indeed, such an interpretation would undermine, rather than promote Congressional intent to protect girls and women against discrimination favoring biological boys and

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[1] No counsel for a party wrote this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity, other than the *amici curiae* or their counsel, has made a monetary contribution to this brief's preparation or submission. Counsel of record for all parties were provided with notice of TMS' intention to submit an amicus brief in support of petitioner at least 10 days prior to the deadline to file the amicus brief.

men in educational programs and activities by requiring biological females to compete against biological males.

ARGUMENT

The Court Should Grant Certiorari In This Case To Resolve The Conflict Between The Decisions Of The Fourth And Seventh Circuits Concluding That "Sex" As Used In Title IX Means Gender Identity Rather Than Biological Sex, And The Decision Of The Eleventh Circuit Finding That "Sex" Means Biological Sex. The Resolution Of That Issue Has Profound Implications Particularly In The Area Of Women's Athletics.

A. The Court Should Grant Certiorari. The Decisions Of The Fourth, Seventh And Eleventh Circuits Are In Conflict - A Conflict That Must Be Resolved By This Court.

The Seventh Circuit in its decision in this case (*A.C. v. Metropolitan School Dist. of Martinsville*, 75 F.4th 760, 769-770 (7th Cir. 2023)), and in an earlier decision (*Whitaker By Whitaker v. Kenosha Unified School District No. 1 Board of Education*, 858 F.3d 1034, 1049-1050 (7th Cir. 2017)), and the decision of the Fourth Circuit in *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 618-619 (4th Cir. 2020), concluded that "sex" as used in Title IX means "gender identity" rather than biological sex. The Eleventh Circuit, however, consistent with usage at the time

Title IX was enacted in 1972, has interpreted "sex" to mean biological sex. *Adams by & through Kasper v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 812-814 (11th Cir. 2022) (en banc). See also, *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 632 (4th Cir. 2020) (Niemeyer, J., dissenting).

In this case, the Seventh Circuit's decision acknowledged the split among the circuits as it declined "to jump from one side of the circuit split to the other". *A.C.*, 75 F.4th at 770-771. The concurrence similarly acknowledged the split stating, "A conflict among the circuits will exist no matter what happens in the current suits. The Supreme Court or Congress could produce a nationally uniform approach; we cannot." *A.C.*, 75 F.4th at 775. (Posner, J., concurring in the judgment).[2] The guidance of this Court is required to resolve the conflict so that Title IX is uniformly interpreted throughout the nation.

B. An Interpretation Of Title IX That Ignores Biological Sex Is At Odds With Its Purpose And Has Profound Ramifications For Women's Sports.

Title IX prohibits discrimination "on the basis of sex". It provides that no person in the United States shall, on that basis, "be excluded from

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[2] Judge Posner stated, "I concur only in the judgment, however, because, although I admire my colleagues' thoughtful opinion, they endorse *Whitaker*, while I think that *Adams v. St. Johns County School Board*, 57, F4th 791 (11th Cir. 2022) (en banc), better understands how Title IX applies to transgender students."

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)). Title IX is an exercise by Congress of its Spending Power.[3] Interpretation of the term "sex" as used in Title IX to mean something other than biological sex, like the interpretations adopted by the Fourth and Seventh Circuits, has profound negative implications for women's sports that are wholly at odds with Congress' intention in enacting Title IX. See e.g., *Adams by & through Kasper v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 817-21 (11th Cir. 2022) (en banc) (Lagoa, J., specially concurring).

The overall problem that Congress was addressing in 1972 when enacting Title IX was that educational institutions girls and women had fewer opportunities than boys and men. See *e.g.*, *Cannon v. University of Chicago*, 441 U.S. 677, 681 n.2, 695 n.16, 704 n.36 (1979). Title IX's entire regulatory scheme assumes and operates with respect to differences between the sexes such that Title IX's text prohibiting discrimination "on the basis of sex"

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[3] A safeguard of our federal system is the demand that Congress provide the States with a clear statement when imposing a condition on federal funding because "legislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions." *Pennhurst State Sch. & Hospital v. Halderman*, 451 U.S. 1, 17 (1981). Thus, the "legitimacy of Congress' power to legislate under the [S]pending [Power] . . . rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.'" Id. (quoting *Steward Mach. Co. v. Davis*, 301 U.S. 548, 585–98 (1937)).

does not imply a requirement that institutions ignore biological sex. See *e.g.*, §34 C.F.R. 106.34(a)(1) and 106.41. Instead, Congress's operative definition of "sex" in Title IX is binary. A person is either one of two sexes, male or female. For example, the text of Title IX allows transition "from being an institution which admits only students of one sex to being an institution which admits students of *both* sexes." 20 U.S.C. 1681(a)(2) (emphasis added). Title IX regulations permit segregation by biological sex not only for athletics, but also housing, sex education, choruses, and other activities, provided such segregated facilities or services are comparable. See 34 C.F.R. §§106.32, 106.34(a)(1, 3, 4), and 106.41.

That binary distinction preserves rather than erodes the protections Title IX sought to provide biological women against discrimination. There are inherent physiological differences between males and females. See *United States v. Virginia* (VMI), 518 U.S. 515, 533, 540-41 (1996). Interpreting "sex" as used in Title IX to mean gender identification, rather than biological sex, would allow biological boys and men to participate in girl's and women's sports to the disadvantage of women and girls for whom Title IX sought to preserve equal opportunities.

As Judge Lagoa recognized in her concurrence in *Adams*, adopting "a [Title IX] definition of 'sex' beyond 'biological sex' would not only cut against the vast weight of drafting-era dictionary definitions and the Spending Clause's clear-statement rule but would also force female student athletes 'to compete against students who have a very significant biological advantage, including students who have

the size and strength of a male but identify as female.'" *Adams by & through Kasper v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 818 (11th Cir. 2022) (en banc) (Lagoa, J., specially concurring), citing *Bostock v. Clayton County*, ____ U.S. ____, 140 S.Ct. 1731, 1779-1780, 207 L.Ed.2d 218 (2020) (Alito, J., dissenting)]. Indeed, "commingling both biological sexes in the realm of female athletics—would 'threaten[ ] to undermine one of [Title IX's] major achievements, giving young women an equal opportunity to participate in sports.'" *Id.*, citing *Bostock*, 140 S.Ct. at 1779.

Title IV "'precipitated a virtual revolution for girls and women in sports.'" *Id.* at 818, quoting Deborah Brake, *The Struggle for Sex Equality in Sport and the Theory Behind Title IX*, 34 U. Mich., J.L. Reform 13, 15 (2000). The participation of female students in interscholastic athletics increased dramatically following the enactment of Title IX; by 1998-1999, it had increased from fewer than 300,000 in 1971 to 2.6 million, with significant increases each year. The number of girls playing high school sports went from one in twenty-seven to one in three. See *Id.* at 818-819.

But an interpretation of "sex" as used in Title IX to mean "gender identity" would allow "a transgender athlete, who is born a biological male, [to] demand the ability to try out for and compete on a sports team comprised of biological females. Such a commingling of the biological sexes in the female athletics arena would significantly undermine the benefits afforded to female student athletes under Title IX's allowance for sex-separated sports teams." *Adams*, 57 F.4th at 819 (Lagoa, J., specially concurring). "This is because it is neither myth nor

outdated stereotype that there are inherent differences between those born male and those born female and that those born male, including transgender women and girls, have physiological advantages in many sports." *Id.*, citing Doriane Lambelet Coleman, *et al.*, Reaffirming the Value of the Sports Exception to Title IX's General Non-Discrimination Rule, 27 Duke, J. Gender L. & Pol'y 69, 87-88 (2020).

The physiological differences between biological men and women include numerous differences that "'cut directly to the 'main physical attributes that contribute to elite athletic performance" as recognized by sports science and sports medicine." *Adams*, 57 F.4th at 819-820 (Lagoa, J., specially concurring), citing *The Role of Testosterone in Athletic Performance*, Duke Ctr. for Sports L. & Pol'y 1 (Jan. 2019). Those differences that contribute to elite athletic performance for biological men include, among others, more skeletal muscle and less fat, larger hearts with higher cardiac output, larger "maximal oxygen consumption", "'greater glycogen utilization'", "'higher anaerobic capacity'" and "'different economy of motion.'" *Id.* at 819. Even those transgender females who have undergone testosterone suppression "retain most of the puberty-related advantages of muscle mass and strength seen in biological males." *Id.* at 820, citing *generally,* Emma N. Hilton & Tommy R. Lundberg, *Transgender Women in The Female Category of Sport: Perspectives on Testosterone Suppression and Performance Advantage*, 51 Sports Medicine 200–01 (2021).

Biological female high school athletes (as opposed to elite biological female athletes) fare even worse in non-sex segregated sports. Some of them will not be able to make the team at all and, of those who do, most "'would be eliminated from competition in the earliest rounds.'" *Id.* at 821, citing Coleman *et al.*, *supra*, 89-90.

The interpretation of Title IX adopted by the Fourth and Seventh Circuits is at odds with the statutory language of Title IX and undermines rather than promotes Congress' intent in enacting Title IX. Title IX was intended to ameliorate discrimination against biological girls and women in educational programs and activities, not to provide additional opportunities favoring biological boys and men.

CONCLUSION

This Court should grant certiorari and to resolve a deepening circuit split among the Courts of Appeal regarding the proper interpretation and application of Title IX.

Title IX simply was never intended to address the rights of transgender people. The attempt to stretch Title IX to encompass transgender people by judicial fiat should be addressed by this Court and rejected. Balancing the sometimes competing rights of biological females (and biological males), and the rights of transgender people, in a way that recognizes that the rights of all people should be respected, remains Congress' job.

Respectfully submitted,

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