No. _____

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

PETITION FOR WRIT OF CERTIORARI

JONATHAN L. MAYES
PHILIP R. ZIMMERLY
MARK A. WOHLFORD
BOSE MCKINNEY & EVANS LLP
111 Monument Circle
Suite 2700
Indianapolis, IN 46204

PAUL D. CLEMENT
Counsel of Record
ERIN E. MURPHY
CHADWICK J. HARPER*
CLEMENT & MURPHY, PLLC
706 Duke Street
Alexandria, VA 22314
(202) 742-8900
paul.clement@clementmurphy.com

*Supervised by principals of the firm who are members of the Virginia bar

Counsel for Petitioner

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QUESTION PRESENTED

This case presents a question that is the subject of "[l]itigation … occurring all over the country" and an open and acknowledged "circuit split," App.2, 17—namely, whether Title IX or the Equal Protection Clause prohibits schools from maintaining separate bathrooms on the basis of students' biological sex. Like many school districts throughout the country, Indiana's Metropolitan School District of Martinsville separates multi-user bathrooms at its middle school based on students' biological sex. As is also common, the District has a single-user bathroom available to students who prefer not to use the bathrooms provided for their biological sex.

A.C. is a middle-school student who was born with female anatomy but identifies as a boy. When Martinsville rejected A.C.'s request to use the boys' restrooms, A.C. brought this lawsuit, arguing that the District's policy violates Title IX and the Equal Protection Clause. The district court granted an injunction pursuant to existing Seventh Circuit precedent, and the Seventh Circuit affirmed. In declining Martinsville's invitation to reconsider circuit precedent, both the majority and the concurrence emphasized that "[a] conflict among the circuits will exist no matter what happens in the current suits," and that it falls to this Court to "produce a nationally uniform approach. App.27, 17.

The question presented is:

Whether Title IX or the Equal Protection Clause dictate a single national policy that prohibits local schools from maintaining separate bathrooms based on students' biological sex.

PARTIES TO THE PROCEEDING

Respondent A.C. was the plaintiff-appellee below.

Petitioner Metropolitan School District of Martinsville is a public school district in the State of Indiana and was the defendant-appellant below.

STATEMENT OF RELATED PROCEEDINGS

The following proceedings are directly related to this case within the meaning of Rule 14.1(b)(iii):

- *A.C. v. Metro. Sch. Dist. of Martinsville*, No. 1:21-cv-2965-TWP-MPB (S.D. Ind.), preliminary injunction entered on May 19, 2022.
- *A.C. v. Metro. Sch. Dist. of Martinsville*, No. 22-1786 (7th Cir.), judgment entered on August 1, 2023.[1]

[1] On appeal, this case was consolidated with another similar challenge. *See B.E. and S.E. v. Vigo Cnty. Sch. Corp.*, No. 22-2318 (7th Cir.). The consolidated appeals were resolved in a single opinion.

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PETITION FOR WRIT OF CERTIORARI

Over the past several years, schools across the country have confronted a difficult decision on which local mores and opinions vary widely: whether to determine access to traditionally sex-segregated spaces such as bathrooms and locker rooms based on biological sex or on how students identify. Not surprisingly in a diverse and divided nation, local jurisdictions have resolved this question differently. And not surprisingly in a litigious society, these disputes have made their way to federal courts. The federal courts have proven as divided as local school boards. Some, like the Seventh Circuit in the decision below, have concluded that Title IX and the Equal Protection Clause dictate a single nationwide answer to this question and preclude local jurisdictions from maintaining traditional policies determining access based on biological sex. Others have concluded that local school boards retain substantial discretion to fashion policies that respond to local preferences, including, for example, adopting different policies for elementary and secondary schools.

The circuit split on this question is square and entrenched. The en banc Eleventh Circuit has held that neither Title IX nor the Equal Protection Clause deprives schools of the ability to maintain bathrooms separated on the basis of biological sex. The Fourth and the Seventh Circuits have held the opposite, concluding that both Title IX and the Equal Protection Clause prohibit schools from denying students access to bathrooms corresponding to their gender identity. And the Seventh Circuit doubled down on that holding in the decision below, extending circuit precedent to

the middle-school context and expressly declining to reconsider that precedent because, as Judge Easterbrook wrote separately to emphasize, "[a] conflict among the circuits will exist" either way. App.27.

This Court should resolve this circuit split. The District believes that the Seventh Circuit is wrong on the merits. Title IX and its implementing regulations expressly permit separating facilities like bathrooms on the basis of "sex," and in 1972 when Title IX became law, "virtually every dictionary definition of 'sex' referred to the *physiological* distinctions between males and females." *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 632 (4th Cir. 2020) (Niemeyer, J., dissenting). Decades of cases also confirm that the Equal Protection Clause permits distinctions based on biological sex where "necessary to afford members of each sex privacy from the other sex." *United States v. Virginia*, 518 U.S. 515, 550 n.19 (1996). Simply put, the District did not violate either Title IX or the Constitution by maintaining a policy at the middle-school level that this Court expressly contemplated would be justified at the higher-education level. But even apart from the merits, this Court's review is imperative. The Seventh Circuit's view has profound implications for all manner of areas in which Title IX permits separation of the sexes so long as there is equal access, including housing, athletics, and historically sex-segregated organizations. It makes no sense to force jurisdictions in the Fourth and Seventh Circuit to abandon longstanding policies or modify decades-old infrastructure while the status quo ante prevails in the Eleventh Circuit. This Court should grant certiorari.

OPINIONS BELOW

The Seventh Circuit's opinion is reported at 75 F.4th 760 and reproduced at App.1-28. The district court's order granting a preliminary injunction is reported at 601 F.Supp.3d 345 and reproduced at App.29-48.

JURISDICTION

The Seventh Circuit issued its opinion on August 1, 2023. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The relevant provisions of the Fourteenth Amendment, Title IX, and Title IX's implementing regulations are reproduced in the appendix. *See* App.51-52.

STATEMENT OF THE CASE

A. Legal Background

1. The Fourteenth Amendment promises that no State shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, §1. While this Court initially gave that command a very narrow scope, *see, e.g.*, *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130 (1872), it has long since recognized that laws can violate the Equal Protection Clause by "providing dissimilar treatment for men and women who are ... similarly situated." *Reed v. Reed*, 404 U.S. 71, 77 (1971). Accordingly, "classifications based upon sex, like classifications based upon race, alienage, or national origin, are inherently suspect" and hence subject to heightened judicial scrutiny. *Frontiero v.*

Richardson, 411 U.S. 677, 686, 688 (1973) (plurality op.).

Recognizing that "[p]hysical differences between men and women … are enduring," however, the Court has also repeatedly made clear that this "heightened review standard … does not make sex a proscribed classification." *Virginia*, 518 U.S. at 533-34. Policymakers may legitimately take into account "our most basic biological differences." *Tuan Anh Nguyen v. INS*, 533 U.S. 53, 73 (2001). And where a sex-based classification serves "important governmental objectives" and employs means "substantially related to the achievement of those objectives," it may stand. *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982); *accord Nguyen*, 533 U.S. at 60-61.

Consistent with those principles, policymakers have long provided sex-separated bathrooms and locker rooms in many contexts, including schools. *See, e.g.*, W. Burlette Carter, *Sexism in the "Bathroom Debates": How Bathrooms Really Became Separated by Sex*, 37 Yale L. & Pol'y Rev. 227, 278 (2018) ("Carter") (noting that, as early as "1878, the Massachusetts State Board of Health enforced sex-separation in public school bathrooms"). Sex-separated facilities both reflect differences in the biological needs of male and female bodies and accommodate sex-specific privacy concerns that have long been recognized by this Court and others as legitimate. *See, e.g.*, *Faulkner v. Jones*, 10 F.3d 226, 232 (4th Cir. 1993) (noting "society's undisputed approval of separate public rest rooms for men and women based on privacy concerns"); *cf. Virginia*, 518 U.S. at 551 n.19. As Justice Marshall famously put it, "[a] sign that says

'men only' looks very different on a bathroom door than a courthouse door." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 468-69 (1985) (Marshall, J., concurring in part and dissenting in part).

2. Title IX was passed by Congress and signed by President Nixon in 1972. Pub. L. No. 92-318, Title IX, §901, 86 Stat. 235, 373 (codified at 20 U.S.C. §1681 *et seq.*). In keeping with this Court's equal-protection jurisprudence, Title IX seeks to outlaw sex-based discrimination by recipients of federal educational funding, while at the same time recognizing that not all sex-based distinctions necessarily constitute the kind of discrimination that must be eliminated. To that end, Title IX provides that "[n]o 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). But it subjects that command to several exceptions, including carve-outs for, *inter alia*, single-sex social organizations like fraternities, sororities, Boy Scouts or Girl Scouts, and traditionally single-sex schools. *See* 20 U.S.C. §1681(a)(1)-(9).

Particularly notable for present purposes, Title IX also provides that, "nothing contained herein shall be construed to prohibit any educational institution receiving funds under this Act, from maintaining separate living facilities for the different sexes." 20 U.S.C. §1686. As explained by Senator Bayh, Title IX's sponsor, that carve-out was included to "permit differential treatment by sex … where personal privacy must be preserved," such as in "sports

facilities or other instances." 118 Cong. Rec. 5807 (1972) (statement of Sen. Bayh); *cf.* 117 Cong. Rec. 30,407 (1971) (statement of Sen. Bayh) ("What we are trying to do is provide equal access for women and men … We are not requiring … that the men's locker room be desegregated.").

Consistent with that understanding, Title IX's implementing regulations confirm that recipients of federal funding remain free to "provide separate toilet, locker room, and shower facilities on the basis of sex" so long as 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. Pursuant to the statute and that regulation, countless recipients of Title IX funds have built and maintained bathrooms and locker rooms segregated on the basis of sex for decades. Other regulations permit sex-segregation for (among other things) housing, *id.* §106.32, sex education classes, *id.* §106.34(a)(3), and athletics, *id.* §106.41, again so long as the facilities or services provided are comparable. That approach of mandating equal access while permitting distinctions on the basis of sex in certain circumstances has been credited with helping to bring about enormous strides for women, in both sports and other areas, over the past 50 years. *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).

B. Factual and Procedural Background

1. The Metropolitan School District of Martinsville is located in central Indiana, about 30 miles south of Indianapolis. Its one middle school

bears the name of legendary college basketball coach and native Hoosier John R. Wooden. *See* D.Ct.Dkt.29-4 at 29:1-3.[2] Like many middle schools throughout the country, the school has multi-user restrooms that are separated on the basis of biological sex. *See* D.Ct.Dkt.29-4 at 48:1-49:3. In addition to those multi-user restrooms, the school has a single-user restroom in the health office that students can, with permission, use. D.Ct.Dkt.29-4 at 49:9-51:5.

While the District generally requires students at the middle school to use the restrooms associated with their biological sex, it has an unwritten policy for considering students' requests to use bathrooms that align with their gender identities rather than their biological sex. Factors under that policy include how long the student has so identified, whether the student has been diagnosed with gender dysphoria, whether the student is under a physician's care, and other such considerations. *See* App.4-5. For middle-school students, the District's policy takes into account the age and maturity of the student population and seeks to protect the privacy interests and safety of all students. D.Ct.Dkt.29-4 at 24:2-9.

2. A.C. is a student at the middle school who was born with female anatomy but has identified as a boy since about the age of eight. App.30. A.C. has been diagnosed with gender dysphoria, App.30, which, in A.C.'s words, includes "distress and pain that comes from my body not matching my gender," D.Ct.Dkt.29-3 ¶9. The Gender Health Program at Riley's

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[2] Citations to the "D.Ct.Dkt." are to docket entries in No. 1:21-cv-2965-TWP-MPB (S.D. Ind.).

Children's Hospital has treated A.C. for gender dysphoria, through therapy for depression and anxiety as well as hormonal suppression drugs to suppress the onset of menstruation. App.2-3. A.C. has also received a legal name change, and, during this litigation, an Indiana court ordered that the gender marker on A.C.'s birth certificate be changed from female to male. App.3.

When A.C. moved to the District in fifth grade, A.C. attended Bell Intermediate School. Around the same time, family members began to treat A.C. as a boy. D.Ct.34-1 at 17:5-22:3. While at Bell Intermediate, A.C. asked and was allowed to use a single-user health clinic restroom instead of the girls' bathrooms. D.Ct.Dkt.34-2 at 12:8-13:10. After starting at the middle school, A.C. likewise began using the single-user restroom in the school's health clinic. D.Ct.Dkt.34-1 at 26:14-23. Over time, however, A.C.'s family asked that A.C. be allowed to use the boys' restrooms. The District declined the request and instead permitted A.C. to use only the health clinic restroom or the girls' restrooms. App.3-4.

A.C. used the health clinic restroom for a while but was late to classes several times as a result of its location. The District responded by making clear that A.C. would not be punished for any tardiness related to using the health clinic restroom, but still could not use the boys' bathrooms. App.4, 31-32; *cf.* D.Ct.Dkt.29-4 at 61:22-25. For about three weeks, A.C. used the boys' bathrooms anyway. App.32. During that time, a teacher noticed A.C. in a boys' bathroom and reported it to the principal. D.Ct.Dkt.29-4 at 60:21-61:5, 62:2-14. The school then

reiterated that A.C. could not use the boys' bathrooms and could face discipline for doing so. App.32.

Eventually, A.C. filed suit against the District and sought a preliminary injunction authorizing use of the boys' restrooms, arguing that the District was "engaging in unlawful discrimination against A.C. in violation of both Title IX and equal protection." D.Ct.Dkt.30 at 3; *see also* D.Ct.Dkt.1 (complaint). The district court granted the injunction, finding that A.C. was likely to succeed on both the Title IX and the equal-protection claim given the Seventh Circuit's decision in *Whitaker By Whitaker v. Kenosha Unified School District No. 1 Board of Education*, 858 F.3d 1034 (7th Cir. 2017), which addressed a similar bathroom policy at a high school and held that it violated both provisions. App.36 (citing 858 F.3d at 1039, 1049-50). The court then determined that A.C. would suffer irreparable harm absent an injunction and dismissed the District's "concerns with the privacy of other students" as "entirely conjectural." App.46.

3. The District appealed, and the Seventh Circuit affirmed. In an opinion authored by Judge Wood and joined by Judge Lee, the court observed that "[l]itigation over transgender rights is occurring all over the country," and that it "assume[d] that at some point the Supreme Court will step in" given the circuit split that already exists. App.2. Given that dynamic, the court decided to "stay the course and follow *Whitaker*." App.2. The court went on to note that "[i]t makes little sense for us to jump from one side of the circuit split to the other" when the split would persist either way, and that "[m]uch of what is needed to

resolve this conflict is present in the majority opinion and four dissents offered by the Eleventh Circuit in *Adams*." App.18. The court also explained why it continued to believe that *Whitaker* is correct, App.11-17; why it considered the consolidated appeals before it "almost indistinguishable from *Whitaker*," App.18-23, App.25; and why it agreed with the district court that the remaining factors for injunctive relief are satisfied, App.23-26.[3]

Judge Easterbrook concurred in the judgment only. While he agreed that *Whitaker* made this "an easy case" under Seventh Circuit precedent, he opined that the Eleventh Circuit is likely correct that "'sex' in Title IX has a genetic sense, given that word's normal usage when the statute was enacted." App.27. And "if Title IX uses the word 'sex' in the genetic sense, then federal law does not compel states" to follow the approach that the Seventh Circuit's precedent commands. App.28. Nevertheless, Judge Easterbrook likewise saw little to be gained from reconsidering *Whitaker* en banc since "[a] conflict among the circuits will exist no matter what happens in the" Seventh Circuit. App.27. As he observed, "[t]he Supreme Court or Congress could produce a nationally uniform approach; we cannot." App.27.

REASONS FOR GRANTING THE PETITION

This case presents a clean split of authority on a hotly contested issue that requires this Court's

[3] On appeal, A.C.'s case was consolidated with a similar challenge to another district's policy related to access to bathrooms and locker rooms separated on the basis of biological sex at the high-school level. *See* App.6-8.

resolution. People across the nation disagree sharply on the question whether facilities that have long been permissibly separated based on sex—in contexts ranging from bathrooms to sports teams—should be separated based on biological sex or gender identity. Views vary across contexts and regions. The gist of the decision below is that Congress adopted a uniform nationwide rule in 1972 that mandates that every school district in the country adopt gender identity, rather than biological sex, as the operative definition of sex for purposes of Title IX and the Equal Protection Clause. The en banc Eleventh Circuit definitively took the opposite view and empowered local school districts to make their own choices, which can vary across schools and, as in this case, consider multiple factors. Thus, as things presently stand, schools in some parts of the country remain free to determine what policy best fits the needs of all their students, while schools in other regions are subject to a one-size-fit-all rule. And schools in circuits that have yet to address the question face grave uncertainty as they have watched schools in other jurisdictions face litigation no matter what policy they adopt.

That untenable situation cries out for this Court's intervention. The circuit split is undeniable, and the Seventh Circuit openly acknowledged that the arguments have been so thoroughly vetted that it had nothing left to add. Whichever side may have the better of the arguments, schools should not be left guessing as to what options they may lawfully consider when dealing with a question as delicate as this one. And it is not even just a matter of bathrooms; the answer to the question presented has consequences for all manner of issues governed by

Title IX, including locker rooms, housing, athletics, and more. In short, there is every reason to grant review and no compelling reason to deny it.

I. The Circuits Are Squarely Divided.

The courts of appeals are in open and acknowledged conflict over whether schools may lawfully separate bathrooms based on biological sex, rather than gender identity. The Seventh and Fourth Circuits have said no; the en banc Eleventh Circuit has said yes. And the Seventh Circuit made clear in the decision below that it has no intention of revisiting its precedent on this issue—precisely because "[a] conflict among the circuits will exist" even if it does. App.27 (Easterbrook, J., concurring); *see also* App.2, 17. It thus falls to this Court to provide a uniform answer to a question that has continued to divide the lower courts.

1. The Seventh Circuit first confronted the question presented in *Whitaker*, a case concerning a school district's policy at a Wisconsin high school that required students to use the restrooms designated for their biological sex. *Whitaker*, 858 F.3d at 1040. Whitaker sought permission to use the boys' bathrooms instead of the bathrooms corresponding to Whitaker's biological sex. The school declined the request but gave Whitaker permission to use a single-user, gender-neutral restroom in its main office as well. *See id.* Whitaker sued, alleging that the policy violated Title IX and the Equal Protection Clause. *Id.* The Seventh Circuit agreed.

Starting with Title IX, the court framed the question as whether "a transgender student who alleges discrimination on the basis of his or her

transgender status can state a claim of sex discrimination." *Id.* at 1047. The court found the text of Title IX and its regulations inconclusive on that question because "[n]either the statute nor the regulations define the term 'sex'" or use "the term 'biological.'" *Id.* The court thus turned to "the Supreme Court and our case law for guidance." *Id.* The court then purported to find support for Whitaker's claim in Title VII "sex-stereotyping" cases such as *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), and *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998). And the court dismissed the district's argument that its policy has nothing to do with "whether the student behaves, walks, talks, or dresses in a manner that is inconsistent with any preconceived notions of sex stereotypes." *Id.* at 1048. In the court's view, "the School District has denied [Whitaker] access to the boys' restroom because he is transgender." *Id.* at 1049.

Although it had already ruled for Whitaker on the Title IX claim, the court went on to address the equal-protection question too. And once again, it found the district's policy wanting. While the court acknowledged that "the School District has a legitimate interest in ensuring bathroom privacy rights are protected," it dismissed the district's invocation of that interest as "based upon sheer conjecture and abstraction." *Id.* at 1052. In addition to emphasizing that no students had complained during the six months when Whitaker used the boys' bathrooms, the court posited that the district's "policy does nothing to protect the privacy rights of each individual student vis-à-vis students who share similar anatomy" because students use the bathroom

"by entering a stall and closing the door." *Id.* at 1052. According to the court, "[c]ommon sense tells us that the communal restroom is a place where individuals act in a discreet manner to protect their privacy and those who have true privacy concerns are able to utilize a stall." *Id.*

2. A few years after *Whitaker*, the Fourth Circuit confronted a challenge to a similar school board policy requiring students to use bathrooms corresponding with their "birth-assigned sex" in *Grimm v. Gloucester County School Board*, 972 F.3d at 593. In addition to those multi-user bathrooms, the school board had also built single-user restrooms to accommodate students with gender identities that do not match their biological sex. *Id.* Grimm, a high school student born with female anatomy who identified as male, sued, alleging that the board's policy violated Title IX and the Equal Protection Clause. *Id.* A sharply divided panel of the Fourth Circuit agreed.

Starting with the constitutional question, the majority concluded that the Board's policy "as applied to Grimm" failed intermediate scrutiny because it "is not substantially related to the important objective of protecting student privacy." *Id.* at 607. While the majority acknowledged that "students have a privacy interest in their body when they go to the bathroom," like the Seventh Circuit, it accused the school board of "ignor[ing] the reality of how a transgender child uses the bathroom: 'by entering a stall and closing the door.'" *Id.* at 613 (quoting *Whitaker*, 858 F.3d at 1052). Like the Seventh Circuit, the Fourth Circuit also emphasized that Grimm had used the boys' bathrooms for seven weeks without incident, and it posited that

"privacy in the boys restrooms actually increased, because the Board installed privacy strips and screens between the urinals" after the community became aware that Grimm had been using the boys' bathrooms. *Id.* at 614. As such, the majority dismissed the Board's "privacy argument [a]s based upon sheer conjecture and abstraction." *Id.* (quotation marks omitted).

Turning to Title IX, the majority concluded that the policy constituted unlawful discrimination on the basis of sex. Citing *Bostock v. Clayton County*, 140 S.Ct. 1731 (2020), the majority declared that it had "little difficulty holding that a bathroom policy precluding Grimm from using the boys restrooms discriminated against him 'on the basis of sex.'" *Id.* at 616. The majority acknowledged that *Bostock* went out of its way to note that it was not addressing "sex-separated restroom[s]." *See id.* at 618 (citing 140 S.Ct. at 1753). Nevertheless, it found *Bostock* instructive, positing that Grimm did "not challenge sex-separated restrooms; he challenges the Board's discriminatory exclusion of himself from the sex-separated restroom matching his gender identity." *Id.* at 618. In the majority's view, the Board could not "rely on its own discriminatory notions of what 'sex' means." *Id.* For the same reasons, the majority deemed Title IX's provisions expressly allowing sex-separated facilities beside the point. *See id.* at 618 & n.16 (addressing 34 C.F.R. §106.33 and 20 U.S.C. §1686). And it dismissed in a footnote the concern that spending-power legislation must speak clearly, *see infra* pp.27-28, positing that discrimination "on the basis of sex" unambiguously covers discrimination against transgender persons, *Grimm*, 972 F.3d at 619 n.18.

Judge Niemeyer dissented. As to Title IX, he explained that the case turned on "what it means to provide separate toilet, locker room, and shower facilities *on the basis of sex*." *Id.* at 632 (Niemeyer, J., dissenting). Surveying a range of dictionaries from the time of Title IX's enactment, Judge Niemeyer concluded that "the term 'sex' in this context must be understood as referring to the traditional biological indicators that distinguish a male from a female," rather than gender identity or expression. *Id.* at 632; *see id.* at 632-33 (collecting sources). Given that understanding of "sex" and the biological-sex-specific privacy interests that supported Title IX's carve-outs, Judge Niemeyer concluded that Title IX does not require schools to allow "a biological female who identifies as male, to use the male restroom." *Id.* at 634. He likewise would have rejected Grimm's equal-protection claim, finding it "plain that a public school may lawfully establish, consistent with the Constitution, separate restrooms for its male and female students in order to protect bodily privacy concerns that arise from the anatomical differences between the two sexes." *Id.* at 636.

3. Shortly thereafter, the en banc Eleventh Circuit addressed a similar challenge and sided with Judge Niemeyer. The relevant school officials had instituted a "bathroom policy that separates bathrooms on the basis of biological sex while providing accommodative sex-neutral bathrooms." *Adams*, 57 F.4th at 803. A student sued, arguing that denying access based on gender identity violated both the Equal Protection Clause and Title IX. A majority of the court disagreed.

Starting with the constitutional question, the majority rejected the Seventh and Fourth Circuits' narrow conception of the privacy interests at stake, explaining that they are not reducible to "using the bathroom in privacy," but rather also include "using the bathroom away from the opposite sex." *Id.* at 806. And while the Seventh and Fourth Circuits considered it important that the transgender students there had used the boys' bathrooms for some time without complaint, *see, e.g.*, *Grimm*, 972 F.3d at 614, the Eleventh Circuit emphasized that the law does not require there to be "'problems' or 'reports of problems' from students or their parents" before a school may validly separate bathrooms on the basis of biological sex, *Adams*, 57 F.4th at 806.

Next, the Eleventh Circuit concluded that the school board's "bathroom policy is clearly related to—indeed, is almost a mirror of—its objective of protecting the privacy interests" of students. *Id.* at 805. And the court found the board's reliance on biological sex in protecting those interests consistent with "the Supreme Court's longstanding recognition that 'sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth.'" *Id.* at 807 (quoting *Frontiero*, 411 U.S. at 686 (plurality op.)). Accordingly, the court concluded that gender identity is not dispositive when "an individual of one sex seek[s] access to the bathrooms reserved for those of the opposite sex." *Id.* at 808.

As to Title IX, the majority agreed with Judge Niemeyer that "dictionary definitions of 'sex' from the time of Title IX's enactment show that when Congress

prohibited discrimination on the basis of 'sex' in education, it meant biological sex, i.e., discrimination between males and females." *Id.* at 812. By the same token, the sex-separated spaces expressly allowed by Title IX and its implementing regulations allow schools to make distinctions on the basis of biological sex. *See id.* at 813-15. Even if there were ambiguity on that score, moreover, the court concluded that this Court's spending-power cases would require that ambiguity to be resolved in favor of the school board since conditions on federal funding must be stated clearly. *Id.* at 815. As such, the school board's position "would only violate Title IX if the meaning of 'sex' unambiguously meant something other than biological sex." *Id.* at 816. The majority saw nothing in Title IX to support that conclusion. *Id.*

Judges Wilson, Jordan, Rosenbaum, and Jill Pryor dissented, issuing four separate opinions spanning almost 40 pages and exhaustively examining both the statutory and the constitutional issues. *See Adams*, 57 F.4th at 821-24 (Wilson, J., dissenting); *id.* at 824-830 (Jordan, J., dissenting); *id.* at 830-32 (Rosenbaum, J., dissenting); *id.* at 832-60 (Jill Pryor, J., dissenting). And all of that was in addition to two panel opinions that were vacated upon rehearing en banc, as well as two corresponding dissents from Chief Judge Pryor. *See Adams by & through Kasper v. Sch. Bd. of St. Johns Cnty.*, 968 F.3d 1286 (11th Cir. 2020); *Adams v. Sch. Bd. of St. Johns Cnty.*, 3 F.4th 1299 (11th Cir. 2021).

* * *

As the foregoing illustrates, there is no denying that the circuits are squarely divided on the question

of whether schools may lawfully separate bathrooms on the basis of biological sex rather than gender identity. And the Seventh Circuit's decision in this case leaves no doubt that the split is intractable. The majority reaffirmed *Whitaker* and extended it to the middle-school context. *See* App.18-23. And while Judge Easterbrook expressed doubt that *Whitaker* is correct, he concluded that little would be gained by reconsidering it given that "[a] conflict among the circuits will exist" either way. App.27 (Easterbrook, J., concurring). Indeed, the panel acknowledged that it could not even "supply a new line of argument" at this point, as "[m]uch of what is needed to resolve this conflict is present in the majority opinion and four dissents offered by the Eleventh Circuit in *Adams*." App.18. Suffice to say, this split is ripe for resolution.

II. The Seventh Circuit's Position Is Wrong.

The decision below not only underscores the circuit split, but comes out on the wrong side of that split. Settled principles of statutory interpretation and longstanding precedent confirm that one of the most contentious issues of our day was not definitely resolved in 1972 or 1868. Neither Title IX nor the Equal Protection Clause imposes a one-size-fits-all approach on schools across the nation and from K-12. Instead, schools remain free to limit access to sex-separated facilities based on biological sex or gender identity or, as here, to adopt a multi-factor approach.

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

1. Title IX prohibits recipients of federal education funding from discriminating "on the basis of sex." 20 U.S.C. §1681(a). But it expressly permits sex-

based distinctions in several contexts where the sexes have traditionally been separated for non-discriminatory reasons, including "maintaining separate living facilities for the different sexes." *Id.* §1686. And its implementing regulations confirm that this includes "provid[ing] separate toilet, locker room, and shower facilities on the basis of sex" so long as 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. There thus is not and cannot be any dispute that Title IX permits the separation of bathrooms on the basis of sex. The only question is what Title IX means by "sex" for purposes of allowing access to single-sex facilities.

The answer to that question is straightforward: The 1972 Congress meant biological sex, both generally and in particular in authorizing "maintaining separate living facilities for the different sexes." 20 U.S.C. §1686. When, as here, a statute does not define a term, courts look to its "ordinary meaning ... at the time Congress enacted the statute," *Wis. Cent. Ltd. v. United States*, 138 S.Ct. 2067, 2070 (2018), as reflected in sources like contemporaneous dictionaries, *see, e.g.*, *Taniguchi v. Kan Pac. Saipan, Ltd.*, 566 U.S. 560, 566 (2012). And contemporaneous dictionaries uniformly confirm what common sense strongly suggests: In 1972, "when Congress prohibited discrimination on the basis of 'sex' in education, it meant biological sex, i.e., discrimination between males and females." *Adams*, 57 F.4th at 812 (collecting sources). Indeed, "virtually every dictionary definition of 'sex' referred to the *physiological* distinctions between males and females—particularly with respect to their

reproductive functions." *Grimm*, 972 F.3d at 632 (Niemeyer, J., dissenting).

To take just a few examples, the American Heritage Dictionary of the English Language's 1976 edition defined "sex" as "[t]he property or quality by which organisms are classified according to their reproductive functions." The Oxford English Dictionary defined "sex" to mean "[e]ither of the two divisions of organic beings distinguished as male and female respectively," and then defined both "male" and "female" in terms of reproductive function. *See Male, Female*, *Oxford English Dictionary* (re-issued ed. 1978) (defining "male" as "[o]f or belonging to the sex which begets offspring, or performs the fecundating function of generation," and "female" as "[b]elonging to the sex which bears offspring"). Others abound. *See Grimm*, 972 F.3d at 632 (Niemeyer, J., dissenting) (collecting sources); *Neese v. Becerra*, 640 F.Supp.3d 668, 678 n.6 (N.D. Tex. 2022) (similar); *Conley v. Nw. Fla. State Coll.*, 145 F.Supp.3d 1073, 1077 (N.D. Fla. 2015) (similar).

Statutory context reinforces the conclusion that the term "sex" in Title IX means "biological sex." Consider, for example, Title IX's carve-outs. The reason Congress allowed "maintaining separate living facilities for the different sexes" is to accommodate biological-sex-specific privacy concerns. *See* 118 Cong. Rec. 5807 (1972) (statement of Sen. Bayh); *cf. Grove City Coll. v. Bell*, 465 U.S. 555, 567 (1984) (looking to Sen. Bayh's comments for guidance since they reinforced the "plain language of Title IX"). Title IX's other exemptions likewise allow for practices and institutions traditionally segregated on the basis of

biological sex. *See, e.g.*, 20 U.S.C. §1681(a)(6) (exempting "Girl Scouts [and] Boy Scouts" and other groups "the membership of which has traditionally been limited to persons of one sex and principally to persons of less than nineteen years of age"). To the extent Congress was going out of its way to avoid casting doubt on the permissibility of single-sex living facilities and institutions, it is highly probative that, as of 1972, those facilities and institutions almost universally limited access or admission based on biological sex. To be sure, some have changed their practices in the years since.[4] But the very fact that they had to *change* their polices (and in some cases their names) to include individuals of a different biological sex underscores that the sex-separation that they once practiced (and that Title IX allows) was based not on gender identity, but on biological sex.

Title IX's implementing regulations likewise contemplate separation on the basis of biological sex in classes and activities where physiological differences may matter. *See, e.g.*, 34 C.F.R. §106.34(a)(1) (allowing "separation of students by sex" with respect to "Contact sports in physical education classes," e.g., "wrestling, boxing, rugby"); *id.* §106.34(a)(3) (allowing "separate sessions for boys and girls" for classes "that deal primarily with human sexuality"). Students' biological sex has nothing to do with their need or ability to learn calculus or history; for sex-ed and P.E., though, biological sex can matter. Like the statute itself, Title IX's regulations recognize

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[4] *See, e.g.*, Niraj Chokshi, *Boy Scouts, Reversing Century-Old Stance, Will Allow Transgender Boys*, N.Y. Times (Jan. 30, 2017), https://tinyurl.com/yc6ry222.

that, in certain limited contexts, biological differences justify preserving the option of separating students on the basis of biological sex.

Legal authorities from that era reflect the same understanding of the meaning of "sex." For instance, in *Geduldig v. Aiello*, this Court observed that "only women can become pregnant" while discussing "discrimination against the members of one sex or the other." 417 U.S. 484, 496 n.20 (1974). In *Frontiero v. Richardson*, Justice Brennan described "sex" as "an immutable characteristic determined solely by the accident of birth," a view that the opinion then tied to much of Congress' then-recent action to combat sex discrimination. 411 U.S. at 686-88 (plurality op.). A 1976 dissent from Justice Stevens argued that, because "it is the capacity to become pregnant which primarily differentiates the female from the male," a rule related to pregnancy "discriminates on account of sex." *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 161-62 (1976) (Stevens, J., dissenting); *see also Geduldig*, 417 U.S. at 501 (Brennan, J., dissenting) ("Such dissimilar treatment of men and women, on the basis of physical characteristics inextricably linked to one sex, inevitably constitutes sex discrimination."). And then-Professor Ginsburg's briefing in *Reed* argued that "[l]egislative discrimination grounded on sex, *for purposes unrelated to any biological difference between the sexes*, ranks with legislative discrimination based on race, another congenital, unalterable trait of birth." *See* Brief for Petitioner at 5, *Reed*, No. 70-4 (U.S. June 1971) (emphasis added). All of those contemporaneous usages underscore what "sex" was

ordinarily understood to mean when Title IX became law. And what it meant was biological sex.[5]

2. The Seventh Circuit's reasons for resisting that conclusion do not pass muster. The court's entire analysis of the statutory text in *Whitaker* consisted of simply observing that "[n]either the statute nor the regulations define the term 'sex'" or use "the term 'biological.'" *Whitaker*, 858 F.3d at 1047; *see also* App.15. That likely reflects the reality that, as of 1972, that sex meant biological sex was sufficiently plain that the need for a definition did not even occur to Congress. In all events, it is well-established that when terms are undefined, courts must look to their "ordinary, contemporary, common meaning." *Sandifer v. U.S. Steel Corp.*, 571 U.S. 220, 227 (2014). They cannot treat the absence of a definition as a license to adopt an entirely anachronistic definition or simply declare contemporaneous definitions and powerful textual clues irrelevant.

The Seventh Circuit also posited in the decision below that "[d]ictionary definitions from around 1972" were "inconclusive" on whether "sex can mean only biological sex." App.15-16. There are any number of problems with that claim, including that it asks the wrong question. When it comes to undefined terms, courts are supposed to seek a term's "ordinary, contemporary, common meaning," *Sandifer*, 571 U.S. at 227, not its "only" one. And if it were established

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[5] That understanding was no anomaly. "[F]or more than forty years after the passage of Title IX in 1972, no federal court or agency had concluded sex should be defined to include gender identity." *Franciscan All., Inc. v. Burwell*, 227 F.Supp.3d 660, 689 (N.D. Tex. 2016).

that biological sex is one permissible definition of sex, that would suffice to make separation on that basis a lawful option for schools under Title IX. At any rate, the Seventh Circuit failed to identify a single contemporaneous dictionary that defined "sex" as gender identity. It instead pointed only to dictionaries that coupled a reference to biological distinctions with more general notions of differences between males and females—terms that themselves had primarily biological connotations when Title IX was enacted. App.15-16 (citing Black's Law Dictionary (4th ed. 1968) (defining sex as both "[t]he sum of the peculiarities of structure and function that distinguish a male from a female organism" and "the character of being male or female"); Webster's New World Dictionary (2d ed. 1972) (defining sex both "with reference to … reproductive functions" and as "all the attributes by which males and females are distinguished")); *see Adams*, 57 F.4th at 812.

Unable to identify any evidence that "sex" meant gender identity in 1972, the Seventh Circuit focused most of its analysis on a different question—namely, whether Title IX "foreclose[s] … transgender students from bringing sex-discrimination claims based upon a theory of sex-stereotyping." *Whitaker*, 858 F.3d at 1047. But that reasoning is misplaced in this context. Whatever may be true when students are denied an opportunity otherwise available to all because their biological sex and gender identity do not align, when the question concerns facilities permissibly separated by sex, there is no getting around the question whether sex may permissibly mean biological sex. If that is the case, then a school does not violate Title IX by limiting access to single-sex facilities on the basis

of biological sex. Such a policy simply does what Title IX and its implementing regulations permit: It "provide[s] separate toilet … facilities on the basis of sex." 34 C.F.R. §106.33.

That readily distinguishes this case from *Bostock*, which involved whether an employer may deny opportunities otherwise open to all employees on the basis that an employee's biological sex and gender identity do not align. The Court concluded that the answer is no, reasoning that "it is impossible to discriminate against a person for being homosexual or transgender without discriminating [because of] sex" in the biological sense because the whole reason the employer takes issue with the employee's sexual status or gender identity is because of the employee's biological sex. *See* 140 S.Ct. at 1741, 1747. The Court thus had no need to even resolve "the parties' debate" over whether "sex" in Title VII means biological sex, as "nothing in [its] approach … turn[ed] on the outcome of" that debate. *Id.* at 1739. Here, by contrast, whether the District's policy impermissibly denies A.C. access to the boys' restroom on the basis of sex turns entirely on whether "sex" means biological sex. And contemporary sources confirm beyond doubt that the "ordinary, contemporary, common meaning," *Sandifer*, 571 U.S. at 227, of "sex" when Title IX was enacted was "biological sex."

Even if there were any doubt on that score, the Seventh Circuit's position would still be wrong, as Title IX certainly cannot be said to give the fair notice that this Court's spending-power cases demand. "Recipients cannot knowingly accept the deal with the Federal Government unless they would clearly

understand the obligations that would come along with doing so." *Cummings v. Premier Rehab Keller, P.L.L.C.*, 142 S.Ct. 1562, 1570 (2022) (quotation marks and ellipsis omitted). And whatever else may be said about the meaning of "sex" in Title IX, it cannot seriously be argued that the term suffices to put schools throughout the country on clear notice that, by accepting federal funds, they are surrendering their traditional ability to separate bathrooms on the basis of biological sex. *See Adams*, 57 F.4th at 816 & n.8; *Doe by & through Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 515, 516 (3d Cir. 2018) (Jordan, J., dissenting from denial of rehearing en banc) ("Nowhere does Title IX unambiguously specify liability for failure to open locker rooms and bathrooms to transgender students of the opposite sex."). That much is clear from the fact that most schools went nearly half a century without anyone ever even thinking there might be a problem with doing so.

None of that means, as the Seventh Circuit seemed to assume, that "biological sex [is] the *only* permissible sorting mechanism" when it comes to places with heightened privacy concerns, like bathrooms, locker rooms, and living facilities. App.16 (emphasis added). If schools want to adopt policies that determine access to single-sex facilities on considerations that go beyond biological sex, Title IX imposes no obstacle. And many schools, including the District, have chosen to do exactly that. But what Title IX does not do is impose a straightjacket on schools all throughout the country as they struggle to deal with an issue that is simply not what Title IX was enacted to address. To say that Congress definitively took this issue out of local control in 1972 ignores the

contemporary definition of sex, the basic nature of spending-power legislation, and the dangers of taking contentious issues out of the local political process, which can readily accommodate regional differences and calibrated compromises, and putting them into the federal courts.

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

The Seventh Circuit's even more aggressive claim that this issue was definitively resolved in 1868, rather than 1972, and that the Equal Protection Clause imposes a one-size-fits-all rule on schools, fares no better. It is the clear teaching of this Court's precedent that distinctions on the basis of sex can violate the Equal Protection Clause. But it is the equally clear teaching of this Court that sex is not "a proscribed classification." *Virginia*, 518 U.S. at 533-34. After all, "[p]hysical differences between men and women … are enduring," *id.*, and it is a simple reality "the sexes are not similarly situated in certain circumstances," *Michael M. v. Sup. Ct. of Sonoma Cnty.*, 450 U.S. 464, 469 (1981) (plurality op.). Accordingly, there are contexts in which those "basic biological differences" can be taken into account without engaging in verboten discrimination. *Nguyen*, 533 U.S. at 73. So long as a sex-based classification serves "important governmental objectives" and employs means "substantially related to the achievement of those objectives," it can stand. *Miss. Univ. for Women*, 458 U.S. at 724. Consistent with those principles, in a context like sex-segregated facilities, Congress has embraced the view that

limiting access to such facilities on the basis of biological sex does not run afoul of the Constitution. *See supra* pp.20-28.

The District's policy concededly draws a distinction on the basis of sex. But it does not come close to impermissibly discriminating in violation of the Equal Protection Clause. Instead, it maintains a policy that dates back to the adoption of the Clause and was uncontroversial for much of that history, including as this Court interpreted the Clause to prohibit discrimination on the basis of sex. By maintaining bathrooms separated based on biological sex, the District seeks to protect "the interests of students in using the restroom away from the opposite sex and in shielding their bodies from exposure to the opposite sex." D.Ct.Dkt.35 at 18. That is "obviously an important governmental objective," and maintaining bathrooms separated by biological sex "clearly relate[s] to—indeed, is almost a mirror of—[that] objective." *Adams*, 57 F.4th at 804-05. That is enough to avoid any constitutional infirmity.

The Seventh Circuit's contrary conclusion rests on a mistaken understanding both of the nature of the District's interest and the manner in which its policy furthers it. In the Seventh Circuit's view, the only interest involved is "the interest in preventing bodily exposure," which is fully protected so long as students have access to individual stalls. App.21-22. But the District's policy does not merely aim to prevent "bodi[ly] … exposure" from within the confines of a bathroom stall. It seeks to protect students' privacy interest "in using the restroom away from the opposite sex." D.Ct.Dkt.35 at 18. That is why schools have long

had sex-separated facilities, where urinals and shower facilities provide relatively little individual privacy. *See Faulkner*, 10 F.3d at 232 ('The need for privacy justifies separation and the differences between the genders demand a facility for each gender that is different."); *see also Adams*, 57 F.4th 804-05; *cf. Virginia*, 518 U.S. at 550 n.19. "[L]ocker rooms and restrooms are spaces where it is not only common to encounter others in various stages of undress, it is expected." *Doe by & through Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518, 531 (3d Cir. 2018); *cf. Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 657 (1995) ("Public school locker rooms ... are not notable for the privacy they afford."). Those facilities have long been separated on the basis of sex, based on the view that there are distinct privacy interests served by such separation that would not be served in facilities open to all with individualized stalls.

The Seventh Circuit's blithe dismissal of those privacy concerns is at odds with the reality that this case is not about whether schools can have separate boys' and girls' bathrooms; A.C. has never disputed that they can. The only question is whether schools may separate those facilities on the basis of biological sex rather than gender identity. By the Seventh Circuit's logic, they could not do either. After all, if it were truly "sheer conjecture," *Whitaker*, 858 F.3d at 1052, that students have any privacy interest beyond "the interest in preventing bodily exposure," App.21-22, then it is hard to see how *any* policy beyond individual stalls in unisex bathrooms would pass constitutional muster. The notion that the Equal Protection Clause mandates open-to-all facilities across the board is at odds with more than a century's

worth of history—not to mention Congress' judgment as evidenced in Title IX.

The Seventh Circuit ignored all of those problems in favor of emphasizing that other students did not complain about A.C.'s brief use of the boys' restrooms. App.21. But as the Eleventh Circuit correctly explained, the "validity of sex-separated bathrooms" does not hinge "on 'problems' or 'reports of problems' from students or their parents." *Adams*, 57 F.4th at 806. Making that sort of evidence a prerequisite would force schools to wait for problems to arise, and thus deprive them of the ability to proactively set policies designed to address privacy concerns that students may not be comfortable bringing to their attention.

Making matters worse, the Seventh Circuit gave virtually no weight to schools' unique role and responsibilities vis-à-vis students. Students, of course, do not surrender their constitutional rights "at the schoolhouse gate." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969). But this Court has been clear that courts should not "disregard the schools' custodial and tutelary responsibility for children." *Vernonia Sch. Dist. 47J*, 515 U.S. at 656. And though the Seventh Circuit paid it no heed, the District's consideration of the relative maturity of different student populations also informed its decision-making. *See* D.Ct.29-4 at 24:5-9. Surely school districts can take into account that middle-schoolers "possess only an incomplete ability to understand the world around them," *J.D.B. v. North Carolina*, 564 U.S. 261, 273 (2011), and reasonably conclude that separating multi-user bathrooms on the

basis of biological sex protects students' sex-specific privacy and safety, while providing alternative options to students who feel uncomfortable using facilities that do not conform to their gender identity, *see Grimm*, 972 F.3d at 628 (Niemeyer, J., dissenting).

That approach may have its critics, and different jurisdictions may adopt different solutions. But the question here is whether the Equal Protection Clause categorically forbids a practice that long predates the Clause and continues to be prevalent in public buildings across the Nation. *See* Carter at 229 (explaining that "sex-separation in bathrooms dates back to ancient times, and, in the United States, preceded the nation's founding"). Views on this matter are surely in flux, and signs inviting use of facilities based on gender identity are increasingly common. But when it comes to the Equal Protection Clause, the question for the courts is whether to allow that process to continue or to pretermit it in a way that leaves much of the country dissatisfied. Facilities separated by sex have co-existed with the Equal Protection Clause for well over a century, and shifting judicial notions of privacy are simply not a sufficient basis to declare that longstanding practice not just outmoded or unfashionable, but unconstitutional.

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

The nationwide importance of the issue at stake here cannot be gainsaid. Litigation over these issues "is occurring all over the country," App.2, with school districts being sued both for maintaining and for discarding policies separating bathrooms based on

biological sex. *Compare, e.g.*, *Adams*, 57 F.4th 791, *and Grimm*, 972 F.3d 586, *with Parents for Priv. v. Barr*, 949 F.3d 1210, 1217 (9th Cir. 2020), *and Boyertown*, 897 F.3d 518. In the Seventh Circuit alone, litigation has found its way from the high-school level, *see Whitaker*, 858 F.3d at 1039-40, to the middle-school level, *see* App.3-4, down to the elementary-school level, *see Doe #1 by Doe #2 v. Mukwonago Area Sch. Dist.*, 2023 WL 4505245, at *6 (E.D. Wis. July 11, 2023) (relying on *Whitaker* to conclude that there is "no argument showing that Title IX allows elementary schools to engage in types of sex-based discrimination that high schools may not"). And more litigation is all but guaranteed now that state legislatures have started stepping into the fray. *See, e.g.*, *Roe by & through Roe v. Critchfield*, 2023 WL 5146182, at *1 (D. Idaho Aug. 10, 2023) (discussing recent Idaho law requiring "that students in Idaho public schools use the bathroom or locker room that corresponds with his or her biological sex"). Simply put, States and school districts need a clear answer about which policies are permissible under Title IX and the Constitution, and they need that answer now.

Clarity is especially essential because it is not just a question of bathroom policies (although that alone is an exceptionally important issue given its ubiquity). The meaning of "sex" in Title IX has implications all throughout the statute. After all, whether the issue is housing, bathrooms, sports, social organizations, or anything else, "there can only be one definition of 'sex' under Title IX and its implementing regulations," *Adams*, 57 F.4th at 821 (Lagoa, J., specially concurring). For precisely that reason, one district court in the Seventh Circuit has already extended

Whitaker to conclude that "[a] law that prohibits an individual from playing on a sports team that does not conform to his or her gender identity 'punishes that individual for his or her gender non-conformance,' which violates the clear language of Title IX." *A.M. by E.M. v. Indianapolis Pub. Sch.*, 617 F.Supp.3d 950, 966 (S.D. Ind. 2022) (quoting *Whitaker*, 858 F.3d at 1049). In short, whether "sex" means biological sex for purpose of Title IX is a question that has profound implications for the future of a legal regime that controls all of the various ways in which students of all levels may (or may not) be treated differently on the basis of sex. *See Adams*, 57 F.4th at 817-21 (Lagoa, J., specially concurring).

This is an excellent vehicle for providing the uniform answer schools desperately need. The District's policy is materially analogous to policies that have been adopted and challenged in many schools throughout the country. *See, e.g.*, *Grimm*, 972 F.3d at 593; *Adams*, 57 F.4th at 803. The Seventh Circuit resolved both the statutory and the constitutional question on legal grounds, through reasoning that is not unique to the facts of this case. And as the Seventh Circuit observed in declining to revisit *Whitaker*, "[m]uch of what is needed to resolve this conflict" is already laid out in the various opinions from judges of the Eleventh Circuit (not to mention the Fourth and Seventh Circuits). App.18. There is no reason to put off resolution of this persistent circuit conflict that is proving profoundly disruptive for schools of all levels all throughout the country.

CONCLUSION

This Court should grant the petition.

Respectfully submitted,

JONATHAN L. MAYES
PHILIP R. ZIMMERLY
MARK A. WOHLFORD
BOSE MCKINNEY
& EVANS LLP
111 Monument Circle
Suite 2700
Indianapolis, IN 46204

PAUL D. CLEMENT
Counsel of Record
ERIN E. MURPHY
CHADWICK J. HARPER*
CLEMENT & MURPHY, PLLC
706 Duke Street
Alexandria, VA 22314
(202) 742-8900
paul.clement@clementmurphy.com

*Supervised by principals of the firm who are members of the Virginia bar

Counsel for Petitioner

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