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 IN OPPOSITION

KENNETH J. FALK
Counsel of Record
GAVIN M. ROSE
STEVIE J. PACTOR
ACLU OF INDIANA
1031 E. Washington St.
Indianapolis, IN 46202
317/635-4059
kfalk@aclu-in.org
grose@aclu-in.org
spactor@aclu-in.org

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

QUESTIONS PRESENTED

The Seventh Circuit affirmed a preliminary injunction prohibiting the Metropolitan School District of Martinsville ("Martinsville") from excluding A.C., a boy who is transgender, from "any boys' restroom located on or within the campus of John R. Wooden Middle School." Pet. App. 49-50.

A.C. has since graduated middle school and now attends a high school in Martinsville that allows transgender students to use restrooms consistent with their gender identity if they meet Martinsville's criteria. After the Seventh Circuit ruled, the district court issued a new order modifying the previous injunction to cover "any other school within" Martinsville. Resp. App. 1. Petitioner has not appealed the new injunction, despite reserving the right to do so.

The questions presented are:

1. Whether this Court has jurisdiction to review a preliminary injunction that has been mooted by the plaintiff's graduation from middle school, and has also been superseded by a modified injunction for high school that petitioner has not appealed.

2. Whether excluding A.C. from the middle-school boys' restrooms because he is transgender likely violated Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, *et seq*.

QUESTIONS PRESENTED—Continued

3. Whether excluding A.C. from the middle-school boys' restrooms because he is transgender likely violated the Equal Protection Clause.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

STATUTES

REGULATIONS

TABLE OF AUTHORITIES—Continued

INTRODUCTION

A.C. is a transgender boy who, when this case began, attended John R. Wooden Middle School ("Wooden Middle School") in the Metropolitan School District of Martinsville ("Martinsville"). The Wooden Middle School principal prohibited him from using the boys' restrooms because A.C. had been designated female at birth. A.C. sued, alleging that the exclusion violated his rights under Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, *et seq.*, and the Equal Protection Clause of the United States Constitution. Concluding that A.C. was likely to prevail on his claims, the district court issued a preliminary injunction prohibiting Martinsville from excluding A.C. from "any boys' restroom located on or within the campus of John R. Wooden Middle School." Pet. App. 49-50. A Seventh Circuit panel unanimously affirmed.

Martinsville now seeks this Court's review, but the preliminary injunction issued by the district court and affirmed by the Seventh Circuit is no longer in effect. A.C. has graduated from middle school, so he no longer has any prospective interest in that school's policy, and this Court lacks jurisdiction to review it. *See Univ. of Tex. v. Camenisch*, 451 U.S. 390, 396 (1981). Moreover, the initial injunction has been replaced by a modified injunction that prohibits Martinsville from excluding A.C. from high school restrooms. But while Martinsville preserved the right to appeal the modified injunction, it never appealed it, so this Court lacks jurisdiction to review that injunction. *See* 28 U.S.C.

§ 1254 (limiting certiorari jurisdiction to "[c]ases in the courts of appeals").

Even if this Court had jurisdiction to review the unappealed injunction that now governs the parties' conduct, this petition presents an exceedingly poor vehicle for doing so. There are no facts in the record about A.C.'s or other transgender students' use of the restrooms in the high school A.C. now attends, beyond the fact that some transgender students are allowed to use restrooms associated with their gender identity on a case-by-case basis. Indeed, the modified preliminary injunction may well be superfluous because, under the criteria that Martinsville has used to allow other transgender high school students to use restrooms consistent with their gender identity, A.C. could be eligible to use the boys' restrooms without any court order. And because this case did not address the high school, there is no evidence about the layout of the high school restrooms, or what privacy protections they have. Indeed, the only evidence regarding the high school's experience with allowing transgender students access to restrooms associated with their gender identity is that students have done so "without incident." Pet. App. 25.

It would also be premature to grant review without further percolation in the lower courts because a critical regulation is under revision. With respect to Title IX, the only disagreement in the circuits concerns the meaning of a soon-to-be-amended Department of Education regulation that allows schools to provide "separate toilet . . . facilities on the basis of sex." 34 C.F.R. § 106.33. The court below and the Fourth Circuit

have concluded that the regulation does not authorize schools to exclude transgender students from restrooms consistent with their gender identity. *See* Pet. App. 15-16; *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 618-19 (4th Cir. 2020). The Eleventh Circuit has interpreted the regulation to provide a "carve-out" from Title IX, authorizing such exclusions. *Adams ex rel. Kasper v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 811 (11th Cir. 2022) (en banc). But the Department of Education is poised to resolve that disagreement by amending the regulation to ratify the Fourth and Seventh Circuits' interpretation and reject the Eleventh Circuit's reading. *See* Proposed Rule, *Nondiscrimination on the Basis of Sex in Education Program of Activities Receiving Federal Financial Assistance*, 87 Fed. Reg. 41390 (proposed July 12, 2022). There is nothing to be gained by this Court taking up a dispute about a regulation that is about to be changed. And once the Title IX question is resolved, there may be no need even to take up the constitutional issue.

Nor is there any split on the legal standard that governs equal protection challenges to restroom exclusion policies among the three circuits that have addressed such claims. All three circuits agree that heightened scrutiny applies to sex classifications excluding transgender students from restrooms associated with their gender identity. The circuits have reached different results applying the heightened scrutiny test, but based on different records and different legal arguments. Different applications of "a

properly stated rule of law" do not warrant this Court's review. Sup. Ct. R. 10.

In any event, the decision below was correct, and there is no urgency requiring immediate review. By reaffirming its prior holding in *Whitaker ex rel. Whitaker v. Kenosha Unified School District No. 1 Board of Education*, 858 F.3d 1034 (7th Cir. 2017), the Seventh Circuit maintained the status quo that has existed in that circuit for nearly seven years. Other circuits will soon weigh in, some presumably after the Department of Education issues its modified Title IX regulation, which may render it unnecessary even to reach the constitutional question presented.[1]

The petition should be denied.

STATEMENT

A. A.C. and gender dysphoria.

A.C. is a teenage boy who is transgender. Pet. App. 2. When he was nine, he socially transitioned to live consistent with his male identity, using a boy's name and masculine pronouns, and wearing masculine clothing and hairstyles. *Id.* He has consistently lived in accordance with his identity as a boy ever since. *Id.* As

[1] The Ninth Circuit will soon address these questions in a challenge to a state-wide restroom ban in Idaho. *See Roe v. Critchfield*, No. 23-2807 (9th Cir.). The Tenth Circuit may also soon have an opportunity to do so in a challenge to a similar ban in Oklahoma. *Bridge v. Okla. State Dep't of Educ.*, No. CIV-22-00787-JD (W.D. Okla).

part of his medical care for gender dysphoria, A.C. receives medication to suppress endogenous puberty, and he, his parents, and his doctors anticipate that when he is older, he will take testosterone to further masculinize his appearance to minimize ongoing distress. *Id.* at 3. Indiana courts have granted A.C. a legal name change and changed the gender marker on his birth certificate, which is now listed as male. *Id.* at 3, 22.

B. A.C.'s use of the restrooms in middle school.

A.C. enrolled in Wooden Middle School in Martinsville in seventh grade. *Id.* at 3. The school has separate common restrooms for boys and girls, and A.C.'s family requested that he be allowed to use the boys' restrooms. *Id.* The school refused, instructing A.C. to use either the girls' restrooms or a single-user restroom in the health clinic. *Id.*

Neither of these options was tenable for A.C. As a transgender boy, he could not use the girls' restrooms, which would have required him to deny his gender identity, exacerbated his gender dysphoria, and drawn attention to him for being transgender. *Id.* And the single-user restroom in the health clinic was so far from his classes that he was repeatedly marked tardy when he used it. *Id.* at 31. Using that restroom was also stigmatizing to A.C., who had to seek permission and sign into the health office each time he visited it, inviting unwanted scrutiny and attention. *Id.* at 3-4, 31, 44-45.

A.C. and his family met with Martinsville officials in an attempt to explain the harm that the exclusion

was causing him. *Id.* at 31-32. But the only other options Martinsville offered were for A.C. to attend school online or for his teachers to refrain from marking him tardy when he travelled to the distant health clinic restroom. *Id.* at 4, 32.

Frustrated with Martinsville's intransigence, A.C. began using the boys' restrooms without permission. *Id.* at 4. During the three weeks that he did so there were no reported complaints from his classmates. *Id.* at 32. As A.C.'s distress lessened, his attitude toward school "changed completely." *Id.* at 32; *see also id.* at 4. But when a staff person reported that A.C. was using the boys' restrooms, he was forced to stop. *Id.* at 32.

Without any viable restrooms to use, A.C. tried to avoid going to the restroom during his school day, which was uncomfortable, distracting, and unhealthy. *Id.* at 4. Although he had been an excellent student in grade school, earning good marks and participating in a gifted-and-talented program, his education at Wooden Middle School was "disrupted" and "his grades fell." *Id.* A.C. "dread[ed]" attending school, felt "humiliated," and became "depressed." *Id.* at 33. This was a complete contrast to the positive feelings he experienced during the three weeks when he used the boys' restrooms. *Id.* at 4.

C. Martinsville's policy for transgender students in high school, and Martinsville's refusal to apply it at the middle school.

Although not disclosed to A.C. and his family until after the litigation was commenced, Martinsville allows transgender high school students to use the restrooms consistent with their gender identity if they meet certain criteria. *Id.* at 4, 33. Under that policy, Martinsville evaluates requests by transgender students based on several factors, including: how long the student has identified as transgender; whether the student is under a physician's care; whether the student has been diagnosed with gender dysphoria; whether the student has been prescribed hormones; and whether the student has taken legal steps to change their legal name or gender marker. *Id.* at 4-5. Pursuant to this policy, some transgender students at Martinsville High School are permitted to use restrooms consistent with their gender identity, and the district has supplied "no evidence" of "problems" stemming from their use of the restrooms. *Id.* at 46.

Upon learning of this policy, A.C. submitted documentation from the supervising physician at the Gender Health Clinic at Riley Children's Hospital to demonstrate that he should be permitted to use the boys' restrooms based on the factors considered for students in high school. *Id.* at 33. But officials at Wooden Middle School refused the request without explanation. *Id.* at 5, 33.

D. Procedural history.

A.C. filed a complaint against Martinsville and the middle school principal in December 2021, alleging that banning him from the middle school boys' restrooms violated Title IX and the Equal Protection Clause. *Id.* at 5. The complaint sought declaratory and injunctive relief, as well as damages. Resp. App. 13. A.C. moved for a preliminary injunction, which the district court granted. Pet. App. 35-48. The injunction was specifically limited to "any boys' restroom located on or within the campus of John R. Wooden Middle School located in Martinsville, Indiana." *Id.* at 49-50.

The Seventh Circuit affirmed.[2] Adhering to its prior decision in *Whitaker ex rel. Whitaker v. Kenosha Unified School District No. 1 Board of Education*, 858 F.3d 1034 (7th Cir. 2017), the court held that discrimination against a transgender student is a form of sex discrimination under Title IX and the Equal Protection Clause and determined, on the record before the court, that A.C. had demonstrated a likelihood of success on both claims. Pet. App. 18-22.

With respect to Title IX, the Seventh Circuit concluded that its earlier decision in *Whitaker* had been strengthened by this Court's decision in *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020). Applying *Whitaker*

---

[2] On appeal, this case was consolidated and decided with another appeal from a different school district appealing a preliminary injunction allowing two transgender high school students to use facilities consistent with their gender identity. *See B.E. and S.E. v. Vigo Cnty. Sch. Corp.*, No. 22-2318 (7th Cir.). The appellants in that case have not sought certiorari.

and *Bostock*, the court concluded that A.C. was subject to discrimination on the basis of sex because he was "suffering negative consequences (for Title IX, lack of equal access to school programs) for behavior that is being tolerated in male students who are not transgender." Pet. App. 14.

The Seventh Circuit rejected Martinsville's argument that its practice did not violate Title IX because of a Department of Education regulation authorizing schools to provide "separate toilet . . . facilities on the basis of sex." 34 C.F.R. § 106.33. The court reasoned that the regulation does not purport to define sex as "biological sex" and that "bathroom-access policies that engaged in sex stereotyping could violate Title IX, notwithstanding 34 C.F.R. § 106.33." Pet. App. 15.[3]

Turning to equal protection, the court observed that Martinsville's policy distinguished on the basis of sex, and therefore triggered heightened scrutiny. *Id.* at 20-21. It found that, on the record before the court, A.C.'s use of the restrooms did not "implicate" Martinsville's asserted "interest in preventing bodily exposure, because there is no such exposure." *Id.* at 21. Martinsville failed to identify how A.C.'s presence behind a closed restroom stall door threatened any student's privacy. *Id.* at 21-22. Indeed, the court noted, during the three weeks when A.C. used the boys' restrooms, no students had complained. *Id.* at 21. Martinsville's

[3] The court reached the same conclusion with respect to 20 U.S.C. § 1686, a statutory provision authorizing schools to provide "separate living facilities for the different sexes." Pet. App. 15-16.

asserted interests were further undermined by the fact that it allows transgender students in the high school to use restrooms associated with their gender identity without incident. *Id.* at 25.

The court also questioned how Martinsville could legally deny A.C. access to the boys' restrooms under Indiana state law once A.C. legally changed his name and received an amended birth certificate identifying him as male. *Id.* at 22.

Finally, the Seventh Circuit concluded that the district court did not abuse its discretion in assessing the remaining preliminary injunction factors, in light of the fact that: A.C. was facing harm that was "ongoing, debilitating, and cannot be remedied with monetary damages," *id.* at 24; Martinsville was already allowing high school students to use restrooms consistent with their gender identity, *id.* at 24-25; A.C.'s presence in the boys' restrooms did not unduly threaten individual privacy interests, *id.* at 25; and protecting individuals' civil and constitutional rights is in the public interest, *id.*

Judge Easterbrook concurred in the judgment, viewing the matter as controlled by *Whitaker*. *See id.* at 27-28.

E. A.C.'s graduation from middle school.

As noted above, the injunction that Martinsville appealed to the Seventh Circuit applied only to Wooden Middle School. *Id.* at 49-50. But A.C. has now

graduated from middle school, and therefore no longer has any prospective interest in that injunction.

On August 10, 2023, A.C. began attending Martinsville High School, where Martinsville's unwritten policy has resulted in some transgender students using restrooms consistent with their gender identity based on a multi-factor assessment. Resp. App. 5; Pet. App. 5, 25, 33. At that time, the parties jointly sought "clarification" from the district court regarding use of restrooms in Martinsville High School. Resp. App. 3-6. While joining in the request, Martinsville did "not concede the propriety of the preliminary injunction or any clarification and reserve[d] the right to pursue all remedies to challenge it." *Id.* at 5.

The district court issued a new order on August 10, materially altering the prior injunction's scope by extending it to A.C.'s use of boys' restrooms "located on or within the campus of John R. Wooden Middle School *or any other school* within the Metropolitan School District of Martinsville." *Id.* at 1-2 (emphasis added). Despite reserving the ability to appeal the new injunction, Martinsville has not done so.

REASONS FOR DENYING THE PETITION

I. THE PETITION SHOULD BE DENIED FOR LACK OF JURISDICTION.

The petition should be denied for lack of jurisdiction. The original injunction reviewed by the Seventh

Circuit is moot. And this Court lacks jurisdiction to review the modified injunction because Martinsville never appealed it. *See* 28 U.S.C. § 1254 (limiting certiorari jurisdiction to "[c]ases in the courts of appeals"); *see Hohn v. United States*, 524 U.S. 236, 241 (1998).

Petitioner seeks review of the district court's preliminary injunction of May 19, 2022. But that now-superseded order—which concerned only A.C.'s use of boys' restrooms in a middle school he no longer attends—is moot. A.C. now attends Martinsville High School, which, unlike his middle school, allows some transgender students to use restrooms consistent with their gender identity under certain circumstances. Because "[n]o order of this Court could affect the parties' rights with respect to the injunction [it is] called upon to review," this Court lacks jurisdiction to review it. *Honig v. Students of Cal. Sch. for the Blind*, 471 U.S. 148, 149 (1985).

University of Texas v. Camenisch, 451 U.S. 390 (1981), is immediately on point. In *Camenisch*, this Court dismissed as moot an appeal over a preliminary injunction requiring the University of Texas to pay for a deaf graduate student's sign-language interpreter. *Id.* at 394. Because the student had graduated, the relevant injunction no longer bound the parties' behavior. *Id.* at 393. Other aspects of the dispute remained live, but the issue of "whether the preliminary injunction should have issued" was not. *Id.*

So too here. There remains a live dispute between the parties regarding Martinsville's liability

for damages from the time when A.C. attended middle school—and the Court would have jurisdiction to review any such award upheld on appeal. But the preliminary injunction addressed below, the only possible basis for this Court's jurisdiction at this point, no longer governs because A.C. does not attend the only institution the injunction covered. He has no prospective interest in the middle school's policy.[4]

This Court also lacks jurisdiction to review the district court's subsequent order expanding the original injunction because Martinsville never appealed it. Although captioned a "clarification," the new order imposed new obligations, and thus was a modified injunction subject to a separate appeal. It is well settled that courts "look beyond labels such as 'clarification' or 'modification' to consider the actual effect of the order." *Gautreaux v. Chicago Hous. Auth.*, 178 F.3d 951, 956-57 (7th Cir. 1999). While the initial injunction here addressed only the middle school, the new order applies to "any other school" in the district, including the high school that A.C. presently attends. Resp. App. 1. And "[i]f [an] order changes the obligations imposed by the injunction . . . it is a modification that can be appealed." Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure*, § 3924.2 (3d ed. 2008).

---

[4] Vacating the Seventh Circuit opinion pursuant to *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950), would be inappropriate because A.C.'s case against Martinsville was consolidated for decision with *B.E. and S.E. v. Vigo County School Corp.*, No. 22-2318 (7th Cir.), which is not the subject of a petition for certiorari.

Martinsville reserved its right to appeal the new order, but never did so. Accordingly, the only extant injunction is not "in the courts of appeals," 28 U.S.C. § 1254, and this Court has no jurisdiction to review it.

II. THIS CASE IS A POOR VEHICLE TO REVIEW THE QUESTIONS PRESENTED.

Even if this Court had jurisdiction to review the only operative injunction between the parties—the one applying to the high school that Petitioner has not appealed—this case would be an especially inappropriate vehicle. The "biological sex" policy that Petitioner seeks to have this Court review, Pet. i, simply does not exist in Martinsville High School. The high school allows transgender students to use restrooms associated with their gender identity under some circumstances. And there are no facts whatsoever in the record concerning A.C.'s use of the high school restrooms, nor any facts about those restrooms and their privacy protections.

A. This case is a poor vehicle for reviewing a "biological sex" policy because Martinsville High School does not have a "biological sex" policy.

In its current posture, this case does not provide an opportunity to rule on the legality of "maintaining separate bathrooms on the basis of students' biological sex," Pet. 1, because Martinsville High School does not purport to limit transgender students to restrooms solely on that basis. Rather, as Petitioner

openly acknowledges, at the high school level Martinsville evaluates restroom requests by transgender students based on "a multi-factor approach." *Id.* at 19; *see also* Pet. App. 4.

Because A.C. appears to meet Martinsville's criteria for transgender students to use restrooms consistent with their gender identity, the modified, never-appealed injunction may be entirely superfluous, and there may be no live controversy between the parties aside from A.C.'s damages claim. Martinsville High School allows transgender students to use restrooms consistent with their gender identity based on several factors, including: how long the student has identified as transgender; whether the student is under a physician's care; whether the student has been diagnosed with gender dysphoria; whether the student has been prescribed hormones; and whether the student has taken legal steps to change their legal name or gender marker. Pet. App. 4-5. A.C. appears to meet all of the foregoing criteria. *Id.* at 5, 33. Under Martinsville's policy, therefore, he should be able to use the boys' restrooms even without an injunction.

B. This case is a poor vehicle because potentially critical facts are not in the record.

This case is also a poor vehicle because the evidentiary record concerns only the middle school, and therefore provides no basis for assessing the high school's policy and practice. "This Court has often

refused to decide constitutional questions on an inadequate record." *Ellis v. Dixon*, 349 U.S. 458, 464 (1955) (citing cases); *cf. N.Y. State Rifle & Pistol Ass'n, Inc. v. City of New York*, 140 S. Ct. 1525, 1526 (2020) (per curiam) (remanding when claims for injunctive relief against the City's old rule were moot for the parties to develop the record more fully with respect to the City's new rule); *Texas v. Hopwood*, 518 U.S. 1033 (1996) (Ginsburg, J., respecting the denial of certiorari) (explaining that certiorari was inappropriate where a law school's former admissions policy had been discontinued and parties conceded the record was inadequate to definitively assess the school's new, operative policy).

The record concerning the high school that A.C. now attends is virtually non-existent. All we know is that the high school policy is not based solely on "biological sex," that it relies on an "extensive list" of factors, and that some transgender students are permitted to use restrooms associated with their gender identity. Pet. App. 4-5. But there are no further details because the now-moot preliminary injunction upheld below covered only the middle school.

And facts matter. Although Petitioner seeks to frame the question presented as purely legal, the court of appeals relied on evidence concerning physical conditions at Wooden Middle School to assess both the burdens on A.C. and alternative ways to protect student privacy. *See* Pet. App. 3 (referring to distance of health clinic restroom); *id.* at 22 (discussing stalls with doors in restrooms). To determine whether A.C.'s hypothetical exclusion from high school restrooms survives

scrutiny, potentially relevant facts include: the high school's record in applying its multi-factor approach to other transgender students; its experience in allowing transgender students to use restrooms associated with their gender identity; the availability and adequacy of any alternative restrooms, and the physical features of the high school's restrooms that preserve privacy. The record contains none of this information.[5]

These sorts of factual questions have been relevant in other cases involving transgender students' use of the restrooms as well. In *Grimm*, the Fourth Circuit invalidated a school district's policy of excluding a transgender boy from the boys' restrooms based on an extensive record demonstrating that the high school had already successfully addressed privacy concerns by installing enhanced privacy strips in restroom stalls and expanded dividers between urinals. *See Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 614 (4th Cir. 2020). By contrast, in *Adams*, which held that a different school district had justified excluding a transgender boy from the boys' restroom, the court noted that the boys' restrooms had "undivided urinals" and that students "engage[d] in other activities, like

[5] Moreover, the fact that other transgender students are already using restrooms associated with their gender identity significantly undermines any assertion that excluding A.C. is necessary to further any interest in privacy. If other transgender students who satisfy the same criteria as A.C. are allowed to use high-school restrooms consistent with their identity, Martinsville cannot defend the exclusion of A.C. from those same restrooms based on a generalized interest in separating restrooms based on sex designated at birth.

changing their clothes, in those spaces." *See Adams ex rel. Kasper v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 797 (11th Cir. 2022) (en banc); *see also id.* at 806 (emphasizing these facts).

Accordingly, even if this Court had jurisdiction, this Court should not decide significant constitutional and statutory questions on a record that contains none of the evidence other courts have found important in resolving these issues.[6]

III. TO THE EXTENT THAT THERE IS ANY ACTUAL SPLIT IN THE CIRCUITS, IT IS SHALLOW AND TEMPORARY AND DOES NOT WARRANT REVIEW.

Martinsville vastly overstates the breadth and depth of the disagreement in the circuits regarding the exclusion of transgender students from common restrooms. The court below held that a particular school policy, on a particular record, likely violated Title IX and the Equal Protection Clause. Pet. App. 18-23; *see also Grimm*, 972 F.3d 586; *Whitaker*, 858 F.3d 1034.

---

[6] This case is also a poor vehicle because the panel majority and Judge Easterbrook both noted that A.C. may have a right to use the boys' restrooms under state law because his gender marker has been changed. Pet. App. 22, 27-28. If state law provides relief, there is no need for this Court to expend resources reviewing federal questions that will not alter the relationship between the parties.

The Eleventh Circuit upheld a different policy on a different record. *Adams*, 57 F.4th 791.[7]

But there is no "split" warranting this Court's review. Pet. 18-19. As to A.C.'s Title IX claim, there is at most a temporary disagreement about the meaning of a Department of Education regulation that is in the process of being amended through notice-and-comment rulemaking. *See* Proposed Rule, *Nondiscrimination on the Basis of Sex in Education Program of Activities Receiving Federal Financial Assistance*, 87 Fed. Reg. 41390 (proposed July 12, 2022).

And as to A.C.'s equal protection claim, all three circuits agree that heightened scrutiny applies to the type of restroom policies at issue here. The Seventh Circuit found that Martinsville had not satisfied heightened scrutiny in defense of its policy, while the Eleventh Circuit found a different record sufficient to satisfy the standard. That is not a split at all.

A. The current disagreement regarding Title IX may soon be resolved by amendments to the restroom regulation.

It would be premature to address A.C.'s Title IX claim because, to the extent there is a disagreement

---

[7] The Ninth Circuit has also granted an injunction pending appeal to transgender students in *Roe v. Critchfield*, No. 23-2807, ECF 11 (9th Cir. Oct. 26, 2023) (minute entry), and the Sixth Circuit denied a school district's motion to stay a preliminary injunction for a transgender student in *Dodds v. United States Department of Education*, 845 F.3d 217, 220 (6th Cir. 2016).

among the circuits, it concerns a regulation that is under revision. Title IX prohibits "discrimination" by covered entities "on the basis of sex." 20 U.S.C. § 1681(a). The statute provides certain "carve-outs" to that general prohibition, *see* Pet. 5 (citing 20 U.S.C. § 1681(a)(2)-(9)), but there is no statutory "carve-out" for restrooms. The authority to provide sex-separated restrooms comes instead from 34 C.F.R. § 106.33, a Department of Education regulation. But imminent revisions to that regulation could resolve any disagreement among the circuits on the Title IX issue. At a minimum, this Court's review should wait until lower courts have an opportunity to assess the legal effect of the new regulation.

The Fourth, Seventh, and Eleventh Circuits all agree that Title IX prohibits discrimination against transgender students as a general matter. *See* Pet. App. 14; *Grimm*, 972 F.3d at 618; *Adams*, 57 F.4th at 814. Their disagreement concerns whether 34 C.F.R. § 106.33—which authorizes schools to provide "separate toilet . . . facilities on the basis of sex"—permits schools to bar transgender students from the common restrooms associated with their gender identity.

The Fourth Circuit in *Grimm* held that under 34 C.F.R. § 106.33 "the act of creating sex-separated restrooms in and of itself is not discriminatory," but the regulation does not allow schools to exclude transgender students from restrooms associated with their gender identity. *Grimm*, 972 F.3d at 618. According to the Fourth Circuit, the regulation authorizes sex-separation that does not inflict harm but "cannot

override the statutory prohibition against *discrimination* on the basis of sex." *Id.* (emphasis in original). The Seventh Circuit below likewise concluded that the regulation's authorization to provide restrooms on a sex-separated basis did not authorize schools to adopt exclusionary policies that engage in sex stereotyping. *See* Pet. App. 15-17.

By contrast, the Eleventh Circuit interpreted 34 C.F.R. § 106.33 as a "regulatory carve-out" that, like the statutory exceptions in 20 U.S.C. § 1681(a)(2)-(9), allows schools to engage in discrimination based on sex that would otherwise be prohibited. *Adams*, 57 F.4th at 811. According to the Eleventh Circuit, "if the School Board's policy fits within the carve-out, then Title IX permits the School Board to mandate that all students follow the policy." *Id.* at 811-12.[8]

Thus, the only disagreement among the circuits concerns the meaning of Title IX's implementing regulations. But as noted above, the Department of Education has given formal notice that it plans to issue a revised regulation that ratifies the Fourth and Seventh Circuits' reasoning and makes clear that 34 C.F.R. § 106.33 does not authorize schools to exclude

---

[8] The Eleventh Circuit disagreed with the Seventh Circuit's description of restroom exclusions as a form of "sex stereotyping," but under *Bostock*, sex stereotyping is merely one way of illustrating that a person's sex has been a but-for cause of differential treatment. Regardless of whether the Eleventh Circuit would regard exclusion of a transgender student from the restroom associated with their gender identity as the enforcement of a "stereotype" as a descriptive matter, it agrees with the Seventh Circuit that "sex" is a but-for cause of the exclusion.

transgender students from common restrooms associated with their gender identity. Proposed Rule, *Nondiscrimination on the Basis of Sex in Education Program of Activities Receiving Federal Financial Assistance*, 87 Fed. Reg. 41390 (proposed July 12, 2022). The proposed rule explains that "[t]he Department's regulations have recognized limited contexts in which recipients are permitted to employ sex-specific rules or to separate students on the basis of sex because the Department has determined that in those contexts such treatment does not *generally* impose harm on students," and, thus, "will not amount to discrimination on the basis of sex under Title IX." *Id.* at 41534 (citing 34 C.F.R. § 106.33). Thus, in its view, barring a cisgender boy from using the girls' restroom treats him differently because of sex, but imposes no harm, or at most de minimis harm. By contrast, excluding transgender students from facilities consistent with their gender identity *does* inflict substantial harm that rises to the level of prohibited discrimination. *See id.* Therefore, the proposed regulations would make clear that 34 C.F.R. § 106.33 does not authorize schools to create restroom policies that exclude transgender students from restrooms consistent with their gender identity. *Id.*

Once finalized, the new regulations will resolve the current disagreement among the circuits by ratifying the Fourth and Seventh Circuits' interpretation. There is no need for this Court to intervene before that occurs. Moreover, once it is clear that Title IX bars these practices, there will be no need for courts even to

address whether they also violate the Equal Protection Clause. Any review should wait until after the new Title IX regulations are promulgated and lower courts have an opportunity to weigh in.

B. All three circuits agree on the constitutional standard that governs restroom policies excluding transgender students.

There is no split on the constitutional question presented. All three circuits agree that policies excluding transgender students from restrooms associated with their gender identity facially classify based on sex and are therefore subject to heightened equal protection scrutiny. The court below found that Martinsville failed to meet that standard, holding that the school district was "fighting a phantom." Pet. App. 21. Barring A.C. from the common boys' restrooms did not advance its asserted privacy concern in avoiding "bodily exposure," the court held, because the record showed that no such "bodily exposure" would occur given the layout and use of the restrooms at Wooden Middle School. *Id.*

The Eleventh Circuit in *Adams* found that a different school on a different factual record, satisfied the same heightened scrutiny standard. According to the Eleventh Circuit, the school's physical privacy protections were not adequate because of "the undisputed fact" that students at the school changed clothes outside the restroom stalls and there were no dividers between urinals. *See Adams*, 57 F.4th at 806. Regardless of whether the Eleventh Circuit's decision was correct,

the fact that the two courts reached different results while applying "a properly stated rule of law" to different facts does not constitute a split or warrant review. Sup. Ct. Rule 10.

The significance of the difference in the courts' bottom lines is further obscured by the plaintiff's failure in *Adams* to preserve a critical argument for review. An important fact in *Grimm* and *Whitaker* was that the policies in those cases did not actually separate students based on *physiology*, but rather on the basis of the sex indicated on their *birth certificates*. As a result, the policies would treat two transgender students with identical physiology differently based on the happenstance of whether they had been able to update their birth certificates, a fact that has no bearing on the schools' asserted privacy interests. *See Grimm*, 972 F.3d at 615; *Whitaker*, 858 F.3d at 1053-54. Thus, in *Grimm*, "by focusing on an individual's birth certificate, the Board ensure[d] the policy lacks a basic consistency: it fail[ed] to treat *even transgender* students alike." 972 F.3d at 622 (Wynn, J., concurring). And, in *Whitaker*, "the School District's reliance upon a birth certificate's sex-marker demonstrate[d] the arbitrary nature of the policy." 858 F.3d at 1054.

The plaintiff in *Adams* sought to make the same argument on appeal: namely, that the school's policy was actually predicated on birth certificates, not physiology. But the Eleventh Circuit held that the plaintiff failed to raise the argument below, and therefore declined to address it. *See Adams*, 57 F.4th at 799 n.1. The dissenting judges would have reached the argument

and held that assigning restrooms based on birth certificates is "irrational, and indefensible under intermediate scrutiny." *Id.* at 828 (Jordan, J., dissenting).

It remains to be seen how the Eleventh Circuit would rule if directly confronted with the argument that prevailed in the Fourth and Seventh Circuits but forfeited in *Adams*. And without such a ruling, there is no split for this Court to review.

* * *

In sum, there is no split on the equal protection issue, and the only disagreement on Title IX concerns the effect of a regulation that the Department of Education is about to revise. That is a far cry from the sort of "square and entrenched" split that requires this Court's intervention. Pet. 1.

IV. THE DECISION BELOW IS CORRECT

A. Excluding A.C. from the common boys' restrooms likely violated Title IX.

1. Title IX prohibits discrimination based on transgender status as a form of sex discrimination.

Excluding A.C. from using the same common restrooms as other boys subjected A.C. "to 'discrimination' 'on the basis of sex'" under Title IX. *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 173 (2005) (quoting 20 U.S.C. § 1681(a)). In *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), this Court held that discrimination against a person because they are transgender

is a form of discrimination "because of . . . sex" under Title VII. To discriminate based on transgender status, the Court reasoned, "requires an employer to intentionally treat individual employees differently because of their sex," even if sex is interpreted to mean sex designated at birth or "biological" sex. *Id.* at 1472. This Court explained that its holding was compelled by two of "Congress's key drafting choices—to focus on discrimination against individuals and not merely between groups and to hold employers liable whenever sex is a but-for cause of the plaintiff's injuries." *Id.* at 1753.

Congress made the same key drafting choices when it wrote Title IX. Title IX also prohibits discrimination against individual "person[s]," not groups. 20 U.S.C. § 1681(a). And Title IX's prohibition of discrimination "on the basis of" sex requires no more than but-for causation. 20 U.S.C. § 1681(a); *cf. Comcast Corp. v. Nat'l Ass'n of African Am.-Owned Media*, 140 S. Ct. 1009, 1016 (2020) (explaining that the phrase "on the basis of" is "strongly suggestive of a but-for causation standard"). Thus, as with Title VII, even if this Court assumes "for argument's sake" that the term "sex" in Title IX "refer[s] only to biological distinctions between male and female," when a student is discriminated against for being transgender, "[s]ex plays a necessary and undisguisable role in the decision." *Bostock*, 140 S. Ct. at 1737; *see Doe v. Snyder*, 28 F.4th 103, 114 (9th Cir. 2022) (Callahan, J.,) ("Given the similarity in language prohibiting sex discrimination in Titles VII and IX, we do not think *Bostock* can be limited" to Title VII).

Martinsville does not argue that Title IX permits sex discrimination against transgender students as a general matter. *See* Pet. 25. Instead, it argues that *Bostock*'s reasoning does not apply "where the sexes have traditionally been separated for non-discriminatory reasons." *Id.* at 20. But that is not an argument about the meaning of "sex." It is an argument about the meaning of "discrimination." And it is wrong.

2. Title IX and 34 C.F.R. § 106.33 do not authorize schools to discriminate when providing sex-separated restrooms.

Title IX—like Title VII—"does not concern itself with everything that happens '[on the basis] of' sex." *Bostock*, 140 S. Ct. at 1740. It imposes liability only when a person is "subjected to discrimination." 20 U.S.C. § 1681(a). The term "discrimination," in turn, "refers to distinctions or differences in treatment *that injure protected individuals*." *Burlington N. & Santa Fe Rwy. Co. v. White*, 548 U.S. 53, 59 (2006) (emphasis added). And "[s]tudents are not only protected from discrimination, but also specifically shielded from being 'excluded from participation in' or 'denied the benefits of' any 'education program or activity receiving Federal financial assistance." *Davis ex rel. Lashonda D. v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 650 (1999) (quoting 20 U.S.C. § 1681(a)).

Whether differential treatment amounts to discrimination must be judged from "'the perspective of a

reasonable person in the plaintiff's position, considering all the circumstances.'" *Burlington*, 548 U.S. at 71 (quoting *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81 (1998)) (internal quotation marks omitted). That "inquiry requires careful consideration of the social context in which particular behavior occurs and is experienced by its target." *Oncale*, 523 U.S. at 81.

Because "[c]ontext matters," being excluded from the boys' restrooms may be "immaterial in some situations"—*e.g.*, for cisgender girls—but "material in others"—*e.g.*, for transgender boys like A.C. *Burlington*, 548 U.S. at 69 (citations omitted); *see* Tr. of Oral Argument at 15:2-6, *Bostock v. Clayton County, Georgia*, No. 17-1618, and *Altitude Express, Inc. v. Zarda*, No. 17-1623 (Gorsuch, J.) ("[T]here are male and female bathrooms, there are dress codes that are otherwise innocuous, right, most—most people would find them innocuous. But the affected communities will not. And they will find harm.").

Excluding A.C. from the same restrooms as other boys because he is transgender was a "distinction[] or difference[] in treatment" that "injure[d] [a] protected individual[]" on the basis of his sex. *Burlington*, 548 U.S. at 59. A.C. could not use the girls' restrooms because it would require him to deny his identity and thereby "exacerbate his dysphoria" and "expose[] him as transgender to his classmates." Pet. App. 3. And he could not use the health clinic restroom "because it was far from [his] classes" and similarly exposed and "stigmatized him" for being transgender. *Id.* His grades suffered, he became "depressed, humiliated, and angry,"

and he "tried to avoid using the bathroom at school, which was distracting, uncomfortable, and medically dangerous." *Id.* at 4.

Title IX contains no statutory "donut hole[]" that allows schools to use sex-based restroom policies to injure particular students or deny them equal educational opportunity. *Bostock*, 140 S. Ct. at 1747. Although the statute's "broad prohibition" on sex discrimination is subject to "specific, narrow exceptions," *Jackson*, 544 U.S. at 175 (citing 20 U.S.C. § 1681), those exceptions do not include restrooms. *See* 20 U.S.C. § 1681(a)(2)-(9). Nor is there any exception for restrooms in the statutory provision allowing separate "living facilities." 20 U.S.C. § 1686.[9]

Rather, the authorization allowing for sex-separated restrooms is exclusively contained in a regulation for "toilet" facilities. 34 C.F.R. § 106.33. And, as discussed above, the restroom regulation does not authorize

---

[9] Martinsville's assertion, Pet. 19-20, that allowing for sex-separated toilets serves to implement 20 U.S.C. § 1686, lacks any foundation in the administrative record and is simply wrong. *See* Nondiscrimination on the Basis of Sex in Education Programs and Activities Receiving or Benefiting from Federal Financial Assistance, 40 Fed. Reg. 24127, 24141 (June 4, 1975) (implementing the statutory provision for "living facilities" solely through a regulation on "Housing," now codified at 34 C.F.R. § 106.32). And, in any event, even if school restrooms were treated as "living facilities," the provision is different from the carve-outs enumerated at 20 U.S.C. § 1681(a)(2)-(9). Unlike those exceptions to the prohibition on "discrimination," 20 U.S.C. § 1686 simply authorizes schools to "maintain[] separate living facilities for the different sexes," while leaving Title IX's prohibition on "discrimination" undisturbed.

schools to employ restroom policies in a manner that inflicts harmful "discrimination." To the extent that there is any disagreement on that point among the circuits, it will soon be eliminated by the Department of Education's forthcoming rulemaking.

3. The plain meaning of Title IX is not confined to its anticipated applications.

Like the employers in *Bostock*, Martinsville argues that protecting A.C. from discrimination with respect to restrooms was not one of Title IX's anticipated applications. Martinsville asserts that when Title IX was adopted in 1972, the plain meaning of "sex" was understood to be "biological sex," and that, by extension, allowing transgender boys to use boys' restrooms would be inconsistent with that plain meaning. Pet. 23-24. But *Bostock* made clear, consistent with *Oncale*, that the plain meaning of a statute is not restricted to its anticipated applications. *See Bostock*, 140 S. Ct. at 1749. And *Bostock* established that even if sex were narrowly understood as limited to sex designated at birth, discriminating against individuals based on their transgender status is still sex discrimination. *Id.* at 1739. Here, as in *Bostock*, regardless of how "sex" is defined, excluding transgender students from restrooms consistent with their gender

identity constitutes "discrimination" "on the basis of sex" and is, therefore, prohibited.[10]

B. Excluding A.C. from the common boys' restrooms likely violated the Equal Protection Clause.

The Seventh Circuit also correctly concluded that Martinsville's treatment of A.C. likely violated the Equal Protection Clause. "[A]ll gender-based classifications today warrant heightened scrutiny." *United States v. Virginia*, 518 U.S. 515, 555 (1996) (internal quotation marks and citation omitted). As Martinsville concedes, there is no dispute that the district's policy "draws a distinction on the basis of sex." Pet. App. 29. To justify its relegation of A.C. to separate and unequal restrooms, Martinsville thus must carry its

---

[10] Nor can Martinsville evade Title IX's broad scope by invoking *Pennhurst*'s requirement that Spending Clause legislation provide fair notice of a recipient's obligations. *See* Pet. 26-28. Title IX is drafted "broadly to encompass diverse forms of intentional sex discrimination." *Jackson*, 544 U.S. at 183; *cf. Elwell v. Okla. ex rel. Bd. of Regents of Univ. of Okla.*, 693 F.3d 1303, 1311 (10th Cir. 2012) (Gorsuch, J.) ("Title IX does not limit its coverage at all, outlawing discrimination against any 'person,' " which is "broad language the Court has interpreted broadly."). For example, this Court has held that Title IX prohibits sexual harassment even though the drafters of Title IX likely did not anticipate that result. *See Franklin v. Gwinnett Cnty. Pub. Sch.*, 503 U.S. 60, 75 (1992). But the mere fact that broad language can result in unanticipated applications does not demonstrate ambiguity; "instead, it simply demonstrates the breadth of a legislative command." *Bostock*, 140 S. Ct. at 1749 (internal quotation marks and brackets omitted).

"demanding" burden under heightened scrutiny. *Virginia*, 518 U.S. at 533. It failed to do so.

Martinsville argued below that its exclusion of A.C. was justified as protecting "the privacy concerns of other students." Pet. App. 21. But the district court found (and the Seventh Circuit agreed) that Martinsville presented no credible evidence that its exclusion of A.C. was substantially related to that interest. "Common 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.* (quoting *Whitaker*, 858 F.3d at 1052). The record establishes that no student complained about A.C.'s use of the boys' restrooms, and that given the restrooms' privacy dividers, any privacy concerns were "entirely conjectural." *Id.* Moreover, the undisputed fact that Martinsville allows transgender high school students to use the restroom associated with their gender identity demonstrates that privacy concerns can be addressed without exclusion, and Martinsville made no showing that middle school students' privacy interests are any different from those of high school students.

To the extent that Martinsville seeks to advance a broader privacy interest in students "using the restroom away from the opposite sex," Pet. 29, that argument is "notably circular." *Virginia*, 518 U.S. at 545. It echoes Virginia's assertion in the VMI case that excluding women from VMI was substantially related to the government's objective to provide "[s]ingle-sex education." *Id.* As in *Virginia*, Martinsville's asserted

interest confuses the "means" with the "ends." *Id.* Sex-separated restrooms may be a means of enhancing privacy, but if heightened scrutiny means anything, they cannot be an end unto themselves.[11]

To be sure, difference can be discomforting. The government is free to respond to that discomfort, so long as it does so without discrimination. *Cf. City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448 (1985). For example, Martinsville could allow students to enhance *their own privacy* by using the restroom in the nurse's office if they are uncomfortable with the presence of a transgender student, or anyone else, in the common restrooms. By contrast, excluding transgender students from common spaces based on the alleged, unsubstantiated discomfort of others "would very publicly brand all transgender students with a scarlet 'T,' and they should not have to endure that as the price of attending their public school." *Doe ex rel. Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518, 530 (3d Cir. 2018).

V. THERE IS NO URGENCY REQUIRING IMMEDIATE REVIEW.

Martinsville asserts this Court's review is urgently needed to resolve a "circuit conflict that is

---

[11] Martinsville analogizes the exclusion of transgender students from school restrooms to the privacy alterations installed at the Virginia Military Institute after the admission of women. *See* Pet. 2 (citing *Virginia*, 518 U.S. at 550 n.19). But that analogy misses the *Virginia* Court's point, which was that privacy concerns do not justify overbroad exclusions when they can be addressed more narrowly. *See Virginia*, 518 U.S. at 555 n.20.

proving profoundly disruptive for schools of all levels all throughout the country." Pet. 35. But, as the court of appeals recognized, "*Whitaker* has been controlling law in the Seventh Circuit since 2017," Pet. App. 25, and *Grimm* has been the law in the Fourth Circuit since 2020—with no evidence that either decision has proved "profoundly disruptive." Pet. 35. The decision below merely maintains the status quo.

This Court will have many other opportunities to address the legality of restroom exclusions. But this petition—where the original injunction no longer governs the parties' conduct and a new injunction has not even been appealed, where there are virtually no facts in the record concerning the high school's policy, and where A.C. may in fact satisfy that policy—is not the right vehicle. Moreover, there is no split on the constitutional standard that applies, and the only disagreement among the circuits on the Title IX question concerns the interpretation of a regulation that the Department of Education is about to revise. If an enduring split arises, there will be time enough for the Court to address it.[12]

[12] Martinsville's *amici* argue that review is necessary because lower courts have relied upon *Whitaker*'s reasoning when evaluating the constitutionality of a recent spate of "widely adopted laws" prohibiting gender affirming care for transgender adolescents. Indiana Amicus 13. This Court can answer that question for *amici* directly by granting certiorari in a case challenging the constitutionality of those healthcare bans. *See* Petition for Writ of Certiorari, *L.W. v. Skrmetti*, petition for cert. pending, No. 23-466 (filed Nov. 1, 2023).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

KENNETH J. FALK
Counsel of Record
GAVIN M. ROSE
STEVIE J. PACTOR
ACLU OF INDIANA
1031 E. Washington St.
Indianapolis, IN 46202
317/635-4059
kfalk@aclu-in.org
grose@aclu-in.org
spactor@aclu-in.org

December 19, 2023