No. 20-1163

In the Supreme Court of the United States

GLOUCESTER COUNTY SCHOOL BOARD, PETITIONER,
v.
GAVIN GRIMM

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

Grimm does not challenge the petition's central showing that the question presented is very important for millions of students and thousands of schools across the country. See Sup. Ct. R. 10(c); Pet.262a-263a. Considering that this was one of the only things that Judges Niemeyer and Wynn agreed on below, fighting that point would have been difficult. See Pet.7a (Wynn, J., concurring) ("[T]he question presented *** is no doubt one of substantial importance."); Pet.5a (Niemeyer, J., concurring) ("The issues in this case *** merit" the Supreme Court "granting" review.) Nor, despite the additional Equal Protection element, does Grimm provide any reason why this case, which this Court has already vetted, is no longer an ideal vehicle for deciding the question presented.

Instead, Grimm argues that there is now a "unanimous" consensus among the three circuits that have answered the question presented on the merits. BIO.23. But those circuits have uniformly answered the question incorrectly. Two of those decisions, moreover, were decided by sharply divided panels—a point that Grimm ignores. If anything, the fact that three circuits—with authority over thousands of schools and millions of school-children—have now incorrectly answered the question presented on the merits shows that this issue has percolated among the lower courts long enough. See Pet.262a-263a.

This growing body of decisions has also deprived hundreds of school boards across the country of the ability to exercise their best judgment when answering the difficult question of how to

accommodate the needs of their transgender and cisgender students. Waiting for the issue to percolate further, or for a split to form, will only exacerbate the harm to such school boards and the children they serve. Given that this case remains an excellent vehicle for resolving that question, the Court should grant the petition.

ARGUMENT

I. The Question Presented Is At Least As Important Now As It Was The Last Time The Court Granted Review In This Case.

Grimm is correct not to dispute that the question presented is critically important.

Indeed, at least with respect to the proper interpretation of Title IX, this Court has already granted certiorari once—in this very case—to decide whether an agency interpretation reaching the same conclusion as the Fourth Circuit should be given effect, with or without deference. For this reason, Grimm's attempts to undermine the importance of this Court's earlier grant of certiorari because, as he claims, this Court's reasons for granting it are "wholly absent," is wrong. BIO.23 n.11. The Title IX aspect of the question presented this time mirrors the third question presented in the earlier petition, which this Court granted. Petition for Certiorari at i, *Gloucester County. Sch. Bd.* v. *G.G. ex rel. Grimm*, 137 S.Ct. 369 (2016) (No. 16-273). That question was important then, and it is even more important now, particularly because it comes bundled with an interpretation of the Fourteenth Amendment's Equal Protection Clause

that will have even wider effects than the Title IX interpretation alone.

The question presented is also important because of what it means to students and schools in a growing number of jurisdictions across the country. The decision below and similar decisions in the Seventh and Eleventh Circuits threaten to deprive thousands of schools of billions of dollars of federal funding and ignore the privacy rights of potentially millions of students.[1] Those decisions also strip the public and their elected representatives of the right to answer a question that is "a matter of concern to many people." *Bostock* v. *Clayton Cnty.*, 140 S. Ct. 1731, 1778 (2020) (Alito, J., dissenting).

In so doing, these decisions cripple the vertical separation of powers by requiring schools—on pain of federal sanction—to ignore local conditions and implement a policy that effectively allows students to use whatever restroom facilities they wish, irrespective of their biological sex. That policy ignores students who are "reticent about disrobing or using toilet facilities in the presence of individuals whom they regard as members of the opposite sex," *ibid.*, and exposes those students to many of the same harms that Grimm claims he experienced because of the Board's policy. Compare BIO.11-13 with Penn.St. Amicus Br.6-8 (describing how female students would "limit[] fluids and *** hold their bladders rather than use the school's restrooms" with a biological male).

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[1] To be specific, over 24,000 schools and 14,000,000 students. See Pet.262a-263a.

Nor can the Fourth Circuit's resolution of this question be limited to restrooms. Compare BIO.17 n.8. While Grimm's case itself involved only restrooms, the Fourth Circuit's central holding, that the Board violated Title IX and the Equal Protection Clause when it treated Grimm differently than it treated biological males, obviously extends beyond the facts of this case. And Grimm provides no reason—because there is none—why the same logic used here to invalidate the Board's restroom policy would not invalidate similar rules in other jurisdictions regarding locker rooms and shower facilities.

The Court should thus grant certiorari because the question presented, which implicates federalism, student privacy, and federal statutory and constitutional law, is at least as important as it was the last time the Court granted review in this case.

II. The Circuits' Answers To The Question Presented Have Been Uniformly Wrong.

Like the other circuits to address the question presented, the Fourth Circuit also answered it incorrectly. Contrary to Grimm's arguments, the text and history of Title IX, and this Court's Equal Protection cases, should have compelled each circuit to rule the other way.

1. Grimm (at 25) joins the Fourth and Eleventh Circuits in arguing that *Bostock* governs the outcome of the Title IX claim here. 140 S. Ct. 1731 (2020). And he argues that the Court need not even address whether the lower courts have departed from the original public meaning of "sex" in 1972, because "the

outcome would be the same under any definition" of "sex." BIO.25 n.12. He errs on both counts.

As Judges Pryor and Niemeyer have correctly recognized, *Bostock* "does not extend to Title IX," at least with respect to living facilities, because unlike Title VII, Title IX expressly "*permits* schools to act on the basis of sex through sex-separated bathrooms" and similar facilities. *Adams ex rel. Kasper* v. *Sch. Bd. of St. Johns Cnty.*, 968 F.3d 1286, 1320 (11th Cir. 2020) (Pryor, J., dissenting) (emphasis added; citing 20 U.S.C. §1686; 34 C.F.R. §106.33); Pet.110a (Niemeyer, J., dissenting) (citing, *inter alia*, 20 U.S.C. §1686; 34 C.F.R. §106.33) (recognizing that "'sex' in Title IX refers to biological characteristics, not gender identity"). Because, at the time of the statute's enactment, the word "sex" referred to the "traditional biological indicators that distinguish a male from a female," Title IX does not prohibit the Board's decision to provide a separate living facility for the different sexes. Pet.108a. By suggesting that this Court should ignore the original meaning of the word "sex" here, Grimm asks the Court to abandon the words of the statute to further what he would prefer the statute and its implementing regulation to say, not what they actually say. The Court should grant the petition to fix the incorrect understanding of Title IX that now governs in the Fourth, Seventh and Eleventh Circuits. See *Adams*, 968 F.3d 1286; *Whitaker ex rel. Whitaker* v. *Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034 (7th Cir. 2017).

Grimm's novel arguments against the statute's public meaning are not persuasive. He argues that, although an implementing regulation, 34 C.F.R.

§106.33, expressly allows separate restroom facilities, Title IX itself includes no exception for restrooms because restrooms are not "living facilities" within the meaning of 20 U.S.C. §1686. BIO.26-27. To Grimm, 34 C.F.R. §106.33's failure to mention 20 U.S.C. §1686 by name means that that statute cannot be the statutory basis for the regulation. BIO.27 n.13. That argument makes no sense and is contrary to the understanding of both Judge Pryor and Judge Niemeyer, who, like the Board, understood §1686 to be the statute authorizing the Department of Education's restroom regulation. Pet. 108a; *Adams*, 968 F.3d at 1320 (Pryor, J., dissenting). For decades, no one has ever denied that the statutory authority for that regulation is 20 U.S.C. §1686, as none of the exemptions to Title IX enumerated in 20 U.S.C. §1681(a)(2)-(9) could even plausibly allow the Department to authorize school boards to treat boys and girls differently in restrooms, locker rooms, or showers. Grimm's failure to point to any other statutory provision that would have allowed such differentiation because of sex under Title IX undermines his claim. See *Chrysler Corp.* v. *Brown*, 441 U.S. 281, 308 (1979) ("What is important is that the reviewing court reasonably be able to conclude that the grant of authority contemplates the regulations issued.").

Grimm also argues that §1686 does not authorize discrimination on the basis of sex in restrooms because Congress failed to use the same language it used in the other exemptions to Title IX, namely that the anti-discrimination provision "shall not apply." BIO.26. But Congress's failure to use those magic words is of no moment, particularly when the words it *did* use were broader. Section 1686 expressly provides

that *nothing* in Title IX—not its anti-discrimination provision nor "anything [else] to the contrary"—prohibits "educational institution[s] receiving funds *** from maintaining separate living facilities for the different sexes."

In holding that Title IX forbade the Board from accepting Title IX's express authorization (in Section 1686) to maintain "separate living facilities for the different [biological] sexes," the Fourth Circuit joined a growing number of circuits that have deviated from the plain meaning of Title IX.

2. The panel below, like the panels in *Adams* and *Whitaker*, also erred in their resolution of the Equal Protection aspect of the question presented.

To be sure, the Board's policy classifies on the basis of sex, but it does so for the "long-recognized and important" need to "protect[] the privacy interests of students who do not wish to be exposed to, or in a state of undress in front of, those with physical characteristics of the opposite sex." Pet.86a (Wynn, J., concurring); see also *Adams*, 968 F.3d at 1312 (Pryor, J., dissenting) (recognizing the "important objectives of protecting the interests of children in using the bathroom away from the opposite sex and in shielding their bodies from exposure to the opposite sex").

Grimm nevertheless argues that the Board's purposes are irrelevant because he is a boy in all relevant respects. BIO.29. That is false. Grimm's attempt (at 29) to characterize his "chromosomes or unseen genitalia" as anything other than the central issue governing the Board's decision gives the game away. Grimm, as a biological girl, is unquestionably

different from biological boys, and that difference carries constitutional significance. Pet.116a. Although Grimm devotes several pages of his brief to undermining the privacy interests that the Board was furthering, the fact remains that, in at least one relevant respect, Grimm was female. BIO.31-32. It makes no difference that "an individual's appropriate use of a public bathroom does not involve exposure to nudity." BIO.30 (quoting Pet.86a). The same, after all, could be said about any sex-separated restrooms. The Equal Protection Clause allows state actors to separate the sexes in areas where they are in a "state of partial or complete undress to engage in matters of highly personal hygiene" even in the absence of exposure. Pet.110a (Niemeyer, J., dissenting). Because that is all the Board did here, its decision complied fully with the Equal Protection Clause. Pet.116a-117a (Niemeyer, J., dissenting).

In short, the Court should grant certiorari to correct the Circuits' incorrect interpretations of Title IX and the Equal Protection Clause, just as the Court granted certiorari last time when only one circuit had resolved the Title IX issue erroneously.

III. There Is No Need For Further Percolation Among The Lower Courts.

Because of the widespread harms that the three circuits to decide the question presented have inflicted on schools and students alike, there is no need for this issue to further percolate among the lower courts.

Indeed, because each of the three circuits has now answered the question presented in the years since this Court previously granted certiorari in this case,

this Court will be better able to answer the question presented than it would have been in 2017. The debates between the majorities in those cases and the dissents of Judges Niemeyer and Pryor will help the Court to "evaluate the different approaches" to the "difficult and unresolved question[]" before it now. *California* v. *Carney*, 471 U.S. 386, 400 (1985) (Stevens, J., dissenting). Given the amount of ink that has been spilled on this question in the last few years by a growing chorus of federal judges, this issue has already percolated among the circuits to the point that it is ripe for this Court's plenary consideration.

This Court should also grant the petition now rather than waiting for further percolation or a possible split to develop. Grimm suggests, for example, that this Court may want to hold this case until the Eleventh Circuit resolves the pending petition for *en banc* rehearing in *Adams*. BIO.22 n.10. But there is no reason to do that, given that the arguments on both sides of the question have already been well elucidated by intelligent and respected circuit judges. Besides, the proper resolution of the question presented has practical consequences for the Board and other school boards that have been hindered, year by year, from setting their own policies based on the needs of their students.

Indeed, this litigation has now been pending for seven years, meaning that students who had not even begun high school at its start have long since graduated. Every year the Court delays resolving this question is another year in the Fourth, Seventh, and Eleventh Circuits that the Board and others like it will be unable to decide for themselves the important

question of how to resolve this question of "substantial importance" for their students. Pet.7a (Wynn, J., concurring).

In short, just as the Court refused to await further percolation or developments before granting review the last time this case was before it, the Court should resist that temptation here—and grant the petition now.

IV. This Case Remains An Excellent Vehicle For Resolving The Question Presented.

Nor does Grimm's brief even attempt to deny that this case offers an excellent vehicle for resolving both aspects of the question presented. His occasional claims that the petition misstates the record are incorrect and, in any event, are immaterial.[2] And he does not deny that the Board has consistently sought to treat him with compassion and respect, even as it worked to reconcile his interests with those of its other students. Resolving the question presented in the Board's favor would allow school boards across the country to reach their own conclusions on how to

[2] Grimm, for example, challenges the Board's claim that he *and his mother* suggested that he use the nurse's restroom on the same page where he explains that the decision was made in a meeting with the guidance counselor, Grimm, and Grimm's mother. Compare BIO.5 n.3, with BIO.5 (suggesting instead that Grimm agreed to use the nurse's restroom on his own accord in that meeting). A reasonable inference in the Board's favor (as is required at the summary-judgment stage) is that his mother, who was present at the meeting, was involved in the decision. See also Pet.App.31; Pet.App.209 (Niemeyer, J., dissenting). Regardless, this fact carries no legal significance.

address that problem, rather than imposing the one-size-fits-all policy now imposed in three circuits.

Moreover, this Court can answer the purely legal question presented here without being hindered by factual disputes because, as both the petition and the brief in opposition make clear, the facts leading to Grimm's lawsuit are undisputed. See BIO.2; Pet.36. This case is also unique in that the Court has already vetted it once and, presumably, found that it lacked any problems that would hamper the Court's ability to decide the question presented.

Finally, to the extent Grimm implicitly suggests (at 23) that this Court's previous denial of petitions arising from the Third and Ninth Circuits undermines the case for this Court's review, that is false. See *Parents for Privacy* v. *Barr*, 141 S. Ct. 894 (2020); *Doe* v. *Boyertown Area Sch. Dist.*, 139 S. Ct. 2636 (2019). Those cases asked whether school boards violate the statutory or constitutional rights of *cisgender* students when they *allow* transgender students to use the restroom assigned to students of the opposite sex. Whatever the merits of that question, the question here is much narrower: This petition asks only whether school boards have sufficient discretion under Title IX to address the local needs of their students; it does not ask the Court to flip the Fourth Circuit's decision by mandating that all school boards reach the same conclusion reached by the Board here.

CONCLUSION

This case is an excellent vehicle for deciding a question that has been percolating among the lower courts for nearly seven years—and which this Court has already agreed to decide once before, in this very case. The petition should be granted.

Respectfully submitted.

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