No. 23-392

In the Supreme Court of the United States

METROPOLITAN SCHOOL DISTRICT OF MARTINSVILLE,
Petitioner,

v.

A.C.

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

BRIEF FOR INDEPENDENT WOMEN'S FORUM, WOMEN'S LIBERATION FRONT, CONCERNED WOMEN FOR AMERICA, AND WOMEN'S DECLARATION INTERNATIONAL USA AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTRODUCTION AND INTEREST OF *AMICI CURIAE*[1]

Across the country, public schools are grappling in good faith with how to craft bathroom policies in the face of demands from students who seek to access facilities set aside for the opposite sex.[2] As explained in the petition, Martinsville School District (Martinsville)—like many districts throughout the nation—designates bathroom facilities for use on the basis of sex while also providing single-user bathrooms as an alternative.

A.C. is a biological female who seeks access to the boys' bathroom on grounds that she identifies as a boy. The District Court and Seventh Circuit in this case held that Title IX and the Equal Protection Clause

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amici curiae*, their members, and their counsel, made any monetary contribution toward the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.2(a), counsel of record for all parties were notified by *amici curiae* of their intent to file this brief more than 10 days prior to its due date.

[2] The linguistic sleight-of-hand often employed in these cases equates "gender" with "sex." But these terms are not synonymous. "Sex" refers to the objective, observable differences between male and female that reflect reproductive potential. And sex is not "assigned" at birth—it is *observed* at birth. In common parlance, "gender" often "refers to cultural expectations regarding males and females." See Jennifer C. Braceras, *Sex Is Better than Gender*, Indep. Women's L. Ctr. (Sept. 7, 2022), https://tinyurl.com/nfav6bx6. Congress chose the word "sex" in Title IX. Rewriting that statute to incorporate subjective notions of "gender" and "gender identity" threatens to erase women and cast off the objective anchor that moors women's rights in the law.

required Martinsville to allow students to use bathrooms designated for the opposite sex, consistent with the student's subjective "gender identity." The court reached that conclusion even though Title IX's implementing regulations *explicitly permit* schools to establish separate bathroom facilities for each sex and even though Martinsville provided single-user bathrooms to any student who wished to use them.

Decisions like the one below effectively require schools to designate bathrooms, locker rooms, and other like facilities for use on the basis of gender identity rather than on the basis of sex. And those decisions conflict with the ruling of another circuit, the *en banc* U.S. Court of Appeals for the Eleventh Circuit, which held that a similar bathroom policy violated neither Title IX nor the Equal Protection Clause. See *Adams by & through Kasper* v. *School Bd. of St. Johns Cnty.*, 57 F.4th 791, 796 (11th Cir. 2022).

As women's organizations, *amici* are greatly concerned about preserving private single-sex spaces. Independent Women's Forum (IWF) is a nonprofit, non-partisan 501(c)(3) organization founded by women to develop and advance policies that enhance people's freedom, opportunities, and well-being. Women's Liberation Front (WoLF) is a 501(c)(3) nonprofit radical feminist organization whose charitable mission is dedicated to the total liberation of women and girls by ending male violence, protecting reproductive sovereignty, preserving women-only spaces, and abolishing regressive gender roles. Concerned Women for American (CWA) is the largest public policy organization for women in the nation, with a robust volunteer force which encourages

policies that protect women and families, and advocates for the traditional virtues that are central to America's cultural health and welfare. And Women's Declaration International USA (WDI USA) is a volunteer, all-female group, founded by radical feminists to protect women's sex-based rights and to advance the Declaration on Women's Sex-Based Rights[3] throughout law and society.

Amici's goals and beliefs span the political spectrum, and they disagree on many issues. But they agree on this: neither Title IX nor the Equal Protection Clause of the U.S. Constitution requires that schools dismantle single-sex bathroom facilities.

[3] Women's Hum. Rts. Campaign, *Declaration on Women's Sex Based Rights* (reaff'd 2019), https://tinyurl.com/3pn9t2y3.

REASONS FOR GRANTING THE PETITION

Amici write to emphasize three reasons that this Court should grant review. First, this Court should make clear that the decision below directly contradicts Title IX and its implementing regulations, which expressly *permit* school boards to provide bathroom facilities on the basis of sex rather than on the basis of gender identity. Second, this Court should grant review to clarify that, despite inconsistent decisions from lower courts and shifting guidance from different presidential administrations, the decision to maintain single sex bathroom facilities is one that falls squarely within the discretion of local school boards and not one governed by federal law. Third, this Court should clarify for lower courts the appropriate level of scrutiny for cases such as this brought under the Equal Protection Clause. Because students like A.C. seek an exception to the school's bathroom policy, rather than objecting to the policy itself, the school's decision should be subject to rational-basis review.

I. This Court should grant review to make clear that Title IX and its implementing regulations expressly permit providing bathrooms based on sex.

Far from being compelled by Title IX, the lower court's decision directly contradicts that statute and its implementing regulations.

A. Title IX explicitly permits the near-universal practice of sex separation in appropriate contexts like bathrooms and locker rooms.

Nothing in Title IX or its implementing regulations supports the Seventh Circuit's holding that schools discriminate in violation of federal law when they decline to allow students to use private facilities assigned to the opposite sex. To the contrary, the statute and regulations unambiguously allow schools to do just that.

As Petitioner explains, while Title IX prohibits schools from discriminating "on the basis of sex," 20 U.S.C. § 1681(a), "it expressly permits sex-based distinctions in several contexts where the sexes have traditionally been separated for non-discriminatory reasons." Pet. 19-20. This includes "maintaining separate living facilities for the different sexes." 20 U.S.C. § 1686. And the implementing regulations explain that those facilities can include "separate toilet, locker room, and shower facilities on the basis of sex," so long as each is comparable to the other. 34 C.F.R. § 106.33. Title IX and its related regulations thus expressly permit the longstanding practice of

providing separate bathroom and locker facilities based on sex.

Furthermore, although Title IX does not require schools to offer accommodations for students who do not wish to use shared single-sex bathrooms that correspond to their biological sex, it does leave space for schools to make those accommodations. For example, here, Martinsville—like many other schools and businesses nationwide—provides a single-user bathroom as an alternative for any student who, for any reason, is not comfortable using a shared bathroom for members of their sex.

B. This Court's decision in *Bostock* does not apply to Title IX.

To go against the unambiguous statutory and regulatory language, the lower court in this case relied on a misreading of this Court's decision in *Bostock* v. *Clayton Cnty.*, 140 S. Ct. 1731 (2020). In *Bostock*, this Court established a *but-for* test for determining whether firing decisions violate Title VII. 140 S. Ct. at 1739-1740. The Court reasoned that, just as an employer who fires any woman he discovers to be a Yankees fan has discriminated "because of sex" if the employer would have tolerated the same allegiance in a male employee, an employer likewise discriminates "because of sex" if it fires a male employee who identifies as a woman but does not fire a female employee who identifies the same way. *Bostock*, 140 S. Ct. at 1741-1742. In both cases, the employer has intentionally penalized a person for something it tolerates in employees of the opposite sex. *Id.*

Here, the Seventh Circuit, like many other lower courts, has erroneously interpreted *Bostock* to mean that Title IX also prohibits discrimination on the basis of gender identity. App. 14 ("Applying *Bostock*'s reasoning to Title IX, we have no trouble concluding that discrimination against transgender persons is sex discrimination for Title IX purposes, just as it is for Title VII purposes."). This is incorrect, and this Court should grant cert to correct this widespread misperception.

Bostock does not govern the application of Title IX to school bathroom policies for three reasons: (1) bathroom policies involve an entirely different factual context than workplace hiring and firing policies; (2) Title IX expressly allows for certain single-sex facilities; and (3) Title IX, unlike Title VII, is a Spending Clause measure that must be interpreted narrowly.

To begin with, the *Bostock* majority expressly and appropriately limited the reach of that decision and declined to opine on how its reasoning would apply to "other laws," including those "address[ing] bathrooms, locker rooms, or anything else of the kind." 140 S. Ct. at 1753. *Bostock*, therefore, involved workplace hiring and firing and nothing more. Even in that limited context, this Court did not equate "sex" and "gender identity." Rather, the *Bostock* Court proceeded on the assumption that, as used in Title VII, the term "sex" refers to the biological state of being either male or female. 140 S. Ct. 1739 (assuming that "sex" "refer[s] only to biological distinctions between male and female.") It went on to hold that in the unique context of the workplace, an employer who fires an employee

"for traits or actions it would not have questioned in members of a different sex" has violated the statute's prohibition on discrimination because of sex. *Id.* at 1737. In so holding, the Court was careful to emphasize that "[a]n individual employee's sex is not relevant to the selection, evaluation, or compensation of employees." *Id.* at 1741.

But when it comes to intimate facilities in schools, such as bathrooms and locker rooms, sex *is* relevant. One's biological sex rarely affects workplace capacity or performance, but it directly affects the privacy and safety concerns of other students who must now share previously single-sex facilities—in which they change clothes, shower, and use the toilet—with members of the opposite sex. Section II.C, *infra*. As Judge Pryor observed in *Adams*, litigation in the Title IX facilities context does not raise the same question that was before this Court in *Bostock*. Rather it "concerns the converse" question: "whether discrimination on the basis of *sex* necessarily entails discrimination based on transgender status." *Adams* v. *School Bd. of St. Johns Cnty.*, 3 F.4th 1299, 1332 (11th Cir.) (Pryor, J., dissenting) (emphasis added), *vacated and reh'g en banc granted,* 9 F.4th 1369 (11th Cir. 2021). Where schools offer separate bathroom and locker facilities based on enduring physical differences rather than stereotypes, the answer is clearly "no."

Differences in context are not the only reason that *Bostock*'s rationale does not apply here. Differences in statutory language also compel a different result. See *Jackson* v. *Birmingham Bd. of Educ.*, 544 U.S. 167, 175 (2005) (Title IX is a "vastly different statute" from Title VII. While both Title VII and Title IX contain

"broadly written general prohibition[s] on discrimination," the plain language of Title IX and its regulations expressly permits sex-separated "living facilities," 20 U.S.C. § 1686, which include "toilet, locker room, and shower facilities." 34 C.F.R. § 106.33; see also *Meriwether* v. *Hartop*, 992 F.3d 492, 510 n.4 (6th Cir. 2021) ("[I]t does not follow that principles announced in the Title VII context automatically apply in the Title IX context").

Bostock's holding under Title VII that "it is impossible to discriminate against a person for being *** transgender without discriminating against that individual based on sex," 140 S. Ct. at 1741, cannot coherently be read to disallow the very actions expressly *permitted* by Title IX's regulations—sex-separated private facilities. Requiring males and females to use facilities in accordance with their sex or to use single-user facilities, rather than permitting access to single-sex facilities on the basis of subjective gender identity, neither discriminates on the basis of sex nor enforces gendered stereotypes on members of either sex.

Third, as Martinsville points out, Pet. 26-27, Title IX is a Spending Clause provision, which means that recipients of federal funds must be on clear notice of the obligations that funding entails. See, *e.g.*, *Cummings* v. *Premier Rehab Keller, P.L.L.C.*, 142 S. Ct. 1562, 1570 (2022). "[I]t cannot seriously be argued that the [express terms of Title IX] 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." Pet. 27.

II. This Court should grant review to provide clear guidance on the scope of a school board's authority.

This Court should grant the petition to make clear that schools and local authorities retain their authority to set policy in this area.

A. The existing legal authority on this issue is divided and shifting, leaving school boards across the nation unsure of their authority.

On the issue of school bathroom policies, the federal courts of appeal are solidly split, and that conflict is likely to deepen in the near future. Pet. 32-33. Moreover, the Executive branch—which often provides guidance in educational policy—has shifted positions twice across the past three administrations. Compare *G.G. ex rel. Grimm* v. *Gloucester Cnty. Sch. Bd.*, 822 F.3d 709, 715 (4th Cir. 2016) (granting deference to Obama administration's Guidance Document) with *Gloucester Cnty. Sch. Bd.* v. *G.G. ex rel. Grimm*, 137 S. Ct. 1239, 1239 (2017) (mem.) (remanding Fourth Circuit case "for further consideration in light of the guidance document issued by" Trump administration) and *Tennessee* v. *United States Dep't of Educ.*, 615 F. Supp. 3d 807, 817 (E.D. Tenn. 2022) (discussing Biden administration guidance, 86 Fed. Reg. 32637, which essentially reinstated Obama-era guidance).

This places schools between a legal rock and a hard place. Even after sailing those shoals and landing on a decision, educational institutions will likely face federal litigation once ashore, no matter what policy

they choose. The outcome of that litigation in the eight circuits that have not yet reached this question is anything but certain.

B. This Court should grant review to ensure that the States retain their traditional control over local education policy.

This Court should grant review to settle the question presented in a way that protects the proper division of labor in our federal system. States—not the Federal government—have long borne the laboring oar on education policy. See, *e.g., San Antonio Indep. Sch. Dist.* v. *Rodriguez*, 411 U.S. 1, 49 (1973) ("In an era that has witnessed a consistent trend toward centralization of the functions of government, local sharing of responsibility for public education has survived."); see also *United States* v. *Lopez*, 514 U.S. 549, 580 (1995) (Kennedy, J., concurring) ("[I]t is well established that education is a traditional concern of the States."). And school boards, with roots running back to the 1700s, are a particularly time-honored facet of American self-government.[4] Although public education has evolved dramatically over the years, school boards remain one of America's "last grassroots governing bodies that touch us all," and one of the

[4] See Lila N. Carol et al., Inst. for Educ. Leadership, *School Boards: Strengthening Grass Roots Leadership* 14 (1986), http://files.eric.ed.gov/fulltext/ED280182.pdf; Deborah Land, *Local School Boards Under Review: Their Role and Effectiveness in Relation to Students' Academic Achievement* 2 (2002), https://files.eric. ed.gov/fulltext /ED462512.pdf.

principal ways in which parents can shape their children's education.[5]

This includes ensuring each student's safety and privacy in the most intimate settings—bathrooms and locker rooms—free from mutual exposure (of body and bodily function) to the opposite sex. When crafting policy in this area, schools must consider the rights of all students, not just those who do not feel comfortable using facilities that correspond to their biology.

Yet the decision below *forbids* local districts from making "adjustments" to accommodate the "physiological differences between [biological] male and female individuals." *United States* v. *Virginia*, 518 U.S. 515, 550 n.19 (1996). Even were there not an express regulatory exemption for living facilities, see Section I.A. *supra*, this would be a remarkable land grab of federal authority at the expense of local governments. By prohibiting local school boards from tailoring policies to the diverse needs of their students in light of parental input—especially policies affecting students' most personal privacy concerns—the Seventh and Fourth Circuits' approach seriously undermines our federal system.

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[5] See Jacqueline P. Danzberger et al., *School Boards: The Forgotten Players on the Education Team*, 69 Phi Delta Kappan 53, 53 (1987).

C. This Court should grant review to ensure that school boards can protect all their students based on objective standards.

Local control is particularly important to protect student privacy and safety—a core function of the public education system. See generally *Board of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie Cnty.* v. *Earls*, 536 U.S. 822, 830 (2002) ("[I]n a public school environment[,] *** the State is responsible for maintaining discipline, health, and safety."). As many courts have recognized, students have a "significant privacy interest in their unclothed bodies." *Beard* v. *Whitmore Lake Sch. Dist.*, 402 F.3d 598, 604 (6th Cir. 2005). "And this privacy interest is significantly heightened when persons of the opposite sex are present, as courts have long recognized." *Grimm* v. *Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 633-634 (4th Cir. 2020) (Niemeyer, J., dissenting) (citing cases).

Privacy interests are heightened further still by minor students' physical and emotional immaturity. As any teen (or anyone who has been a teen) can readily attest, those students are "extremely self-conscious about their bodies." *Cornfield by Lewis* v. *Consolidated High Sch. Dist. No. 230*, 991 F.2d 1316, 1323 (7th Cir. 1993). This is because they "are still developing, both emotionally and physically." *Grimm*, 972 F.3d at 636 (Niemeyer, J., dissenting). Thus, their privacy interests should protect—at a minimum—the right to "avoid the unwanted exposure of one's body especially one's 'private parts,'" to members of the opposite sex. *Thomas ex rel. Thomas* v. *Roberts*, 261 F.3d 1160, 1168 (11th Cir. 2001), *vacated on other grounds sub nom. Thomas* v. *Roberts*, 536 U.S. 953

(2002). And given their heightened sensitivity and greater immaturity compared to adults, minor students' privacy interests "are broader than *the risks of actual* bodily exposure. *They include the intrusion created by mere presence*." *Grimm*, 972 F.3d at 634 (Niemeyer, J., dissenting). For these students, the question presented raises a significant "question of modesty" that provides an independent reason for granting the petition. *Bostock*, 140 S. Ct. at 1779 (ALITO, J., dissenting).

These concerns cannot simply be waved aside (as the district court here did, Pet. App. 21) by saying that a particular student's presence has not caused any documented problems or distress. While more alarming issues are certainly possible, the presence itself in this context *is* the problem and the source of distress. *Grimm*, 972 F.3d at 634 (Niemeyer, J., dissenting). "The issue is not whether any transgender student has affirmatively done anything—good, bad, or otherwise—to another student. The issue is whether a student must, against his or her wishes, be forced to change (or undertake other private duties) in the presence of someone of the opposite sex[.]" *Roe by and through Roe* v. *Critchfield*, No. 1:23-cv-000315, 2023 WL 6690596, at *10 (D. Idaho, Oct. 12, 2023).

Indeed, privacy concerns were the primary motivation, from the outset, behind Title IX's carve-out for sex-based living facilities in schools. Senator Birch Bayh, Title IX's principal sponsor, explained that this exception was necessary because there are "instances where personal privacy must be preserved." 118 Cong. Rec. 5807 (1972). Consistent with that

observation, the Department of Education has long interpreted "living facilities" to include "toilet, locker room, and shower facilities." 34 C.F.R. § 106.33. That is as it should be, and schools ought to be able to avail themselves of that exception to protect all their students.

III. This Court should grant review to ensure the correct standard of review under the Equal Protection Clause.

Finally, this Court should grant review to ensure that lower courts are applying the correct standard of review under the Equal Protection Clause. Because students like A.C. seek to redefine what constitutes sex discrimination, rather than end it, this Court should review the challenged policies for whether they have a rational basis. But if this Court instead concludes intermediate scrutiny applies, it should clarify that the correct application of that standard permits schools to maintain their single-sex bathroom policies.

A. Rational-basis review applies because A.C. brought an underinclusivity claim, not a challenge to the existence of sex-segregated facilities.

The Equal Protection Clause is "essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne* v. *Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). As this Court has long recognized, "[t]he general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." *Id.* at 440. To

be sure, this Court has applied the higher intermediate scrutiny standard in challenges to sex-based classifications. *E.g.*, *Reed* v. *Reed*, 404 U.S. 71, 75 (1971); *Virginia*, 518 U.S. at 532-533. But A.C. does not bring that kind of challenge.

Indeed, A.C. is not arguing that the existence of sex-segregated bathrooms violates the Equal Protection Clause. In fact, A.C. has no problem with the existence of separate bathrooms for boys and girls. Rather, A.C. wants to adjust the contours of that separation to include subjective gender identity, and thereby gain the right to "freely us[e] any boys' restroom." Pet. App. 5, 49. That is an underinclusivity claim, not a challenge to a sex-based classification, and should be analyzed as such.

Underinclusiveness claims have been common in the racial affirmative-action context, and their dispositions underscore why challenges to the alleged underinclusivity of a classification—rather than a challenge to the existence of the classification itself—warrant only rational-basis review. Where a court "is not asked to pass on the constitutionality of [the] program or *** preference itself," but is instead asked "to examine the parameters of the beneficiary class," then rational basis applies. *Hoohuli* v. *Ariyoshi*, 631 F. Supp. 1153, 1159 (D. Haw. 1986). Here, because A.C. seeks to take part in a sex-segregated program by broadening the "parameters of the beneficiary class," *id.*, the government's decision not to calibrate the class to A.C.'s preferences does not warrant heightened scrutiny. See *id.* at 1160-1161 (rejecting Equal Protection claim where government's "definition of 'Hawaiian' *** ha[d] a rational basis"); see also *Jana-*

Rock Const., Inc. v. *New York Dep't of Econ. Dev.*, 438 F.3d 195, 208 (2d Cir. 2006) (definition of "Hispanic" under state law).

Because A.C. does not challenge a sex-based classification, rational basis, not intermediate scrutiny, applies.

B. The Seventh Circuit applied strict scrutiny in all but name.

Should this Court determine that A.C.'s claim is one of sex discrimination after all, it should apply intermediate scrutiny and clarify that the longstanding and widespread—as well as statutorily and regulation-endorsed—practice of private sex-based facilities easily passes that standard.

For claims involving less politically charged issues, separate sex facilities routinely pass intermediate scrutiny. See generally *Harrison* v. *Kernan*, 971 F.3d 1069, 1078 (9th Cir. 2020) (noting that many sex-based policies in prison system pass intermediate scrutiny); see, *e.g., Roubideaux* v. *North Dakota Dep't of Corr. & Rehab.*, 570 F.3d 966, 974 (8th Cir. 2009) (upholding statute providing for unequal services at male and female prisons); *Pariseau* v. *Wilkinson*, No. 96-3459, 1997 WL 144218, at *1 (6th Cir. 1997) (upholding sex-based hair grooming policy); *Bauer* v. *Lynch*, 812 F.3d 340, 350 (4th Cir. 2016) (upholding FBI policy setting different physical fitness tests for men and women); *Dinote* v. *Danberg*, 601 F. App'x. 127, 130 (3d Cir. 2015) (upholding practice of transferring female arrestees to all-female institution within 24 hours of arrest).

Long-held and reasonable policies separating bathroom access—particularly for minor students—should easily pass the same level of scrutiny. That is particularly true where—as here—the school has provided single-user facilities to help accommodate students who would prefer not to use sex-specific bathrooms designated for their sex.

But the Seventh Circuit held the policy did not pass constitutional muster, effectively applying strict scrutiny. Many laws are underinclusive or overinclusive to some degree, and under other standards of review, those calibrations are tolerable. See, *e.g., Vance* v. *Bradley*, 440 U.S. 93, 108 (1979) (holding law was "to some extent both underinclusive and overinclusive," but that "perfection is by no means required" under rational-basis review) (cleaned up). Not so with strict scrutiny, which requires regulations to have "narrow specificity." *NAACP* v. *Button*, 371 U.S. 415, 433 (1963). In practice, that specificity drastically reduces the available policy options—sometimes down to a single option.

The effect of the Seventh Circuit's holding is that *no* accommodation short of unfettered access for objecting students will suffice. That is not reviewing a policy to see if it falls within a range of acceptable choices; that is mandating a single, one-size-fits-all solution.

This Court should make clear that school districts are not so trammeled in this area.

C. Martinsville's policy would easily pass the intermediate scrutiny test.

To meet the intermediate scrutiny standard, the State must show "that the classification serves 'important governmental objectives and the discriminatory means employed are 'substantially related to the achievement of those objectives.'" *Mississippi Univ. for Women* v. *Hogan*, 458 U.S. 718, 724 (1982) (quoting *Wengler* v. *Druggists Mut. Ins. Co.*, 446 U.S. 142, 150 (1980)).

The government's interest cannot "rely on overbroad generalizations about the different talents, capacities, or preferences of males and females." V*irginia*, 518 U.S. at 533.

Substantial relationship requires "enough of a fit between" the policy "and its asserted justification." *Danskine* v. *Miami Dade Fire Dept.*, 253 F.3d 1288, 1299 (11th Cir. 2001). But sex classifications do not have to be a perfect fit. *Adams*, 57 F.4th at 801. "None of [this Court's] gender-based classification equal protection cases have required that the [policy] under consideration must be capable of achieving its ultimate objective in every instance." *Nguyen* v. INS, 533 U.S. 53, 70 (2001).

This standard is easily met where the classification is made on the basis of "[p]hysical differences between men and women" that are "enduring." *Virginia*, 518 U.S. at 533. "To fail to acknowledge even our most basic biological differences *** risks making the guarantee of equal protection superficial, and disserving it." *Nguyen*, 533 U.S. at 73. Such classifications pass constitutional muster when "sex

represents a legitimate, accurate proxy." *Craig* v. *Boren*, 429 U.S. 190, 204 (1976). And under intermediate scrutiny, the State is free to choose an "easily administered scheme" that substantially promotes its important interest. *Nguyen*, 533 U.S. at 69. The "existence of wiser alternatives than the one chosen does not serve to invalidate" a legislative classification under intermediate scrutiny. *Clark by and through Clark* v. *Arizona Interscholastic Ass'n*, 695 F.2d 1126, 1132 (9th Cir. 1982).

The policy in this case easily passes muster, for two reasons. First, administrability. Martinsville—like many school districts across the nation—should be free to pick an "easily administered scheme." *Nguyen*, 533 U.S. at 69. Sex-based decisions are easily administrable because they are objective, unchanging, and unburdensome. By contrast, policies based on gender identity are more difficult to administer because subjective "identity" can change or be fluid over time. See Sandy E. James et al., Nat'l Ctr. for Transgender Equal., *The Report of the 2015 U.S. Transgender Survey* (2015), https://tinyurl.com/ywavn9nu; HRC Found., *Understanding the Transgender Community*, Hum. Rts. Campaign, https://tinyurl.com/2e8fdebf (last visited Nov. 11, 2023). That is no way to run a railroad, let alone schools filled with children.

Second, these policies exist to protect the privacy and safety interests of students in using the restroom and locker room away from the opposite sex, and in shielding their bodies from exposure to the opposite sex. And they further prevent male students from crossing boundaries and engaging in school-

sanctioned voyeurism and exhibitionism. That is "obviously an important governmental objective," and maintaining bathrooms separated by sex "clearly relates to—indeed, is almost a mirror of—[that] objective." *Adams*, 57 F.4th at 804-805.

CONCLUSION

The Court should address the question presented now, for three reasons. First, the decision below directly conflicts with Title IX and its regulations and misinterprets this Court's precedent in *Bostock*. Second, school districts lack clear direction on the limits of their authority when it comes to the frequently occurring question of bathroom access, and the court of appeals' decision to enforce a one-size-fits-all policy undermines both our federalist system and the deference that this Court has long afforded schools in pursuing their unique mission and serving their constituents. It also undermines the privacy and safety interests of the students who must use these bathrooms. Third, the lower courts need clarification of what standard of constitutional scrutiny to apply and how to apply it in cases such as these. This Court should settle all these conflicts in a way that provides clear guidance to schools, preserves local control over education policy, and protects the privacy interests of vulnerable children.

Respectfully submitted,

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