No. 17-301

In the
Supreme Court of the United States

KENOSHA UNIFIED SCHOOL DISTRICT NO. 1
BOARD OF EDUCATION, *et al.*,

Petitioners,

v.

ASHTON WHITAKER, BY HIS MOTHER AND NEXT FRIEND,
MELISSA WHITAKER,

Respondent.

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

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BRIEF OF AMICUS CURIAE WILLIAM J. BENNETT IN SUPPORT OF PETITIONERS

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September 27, 2017

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INTEREST OF AMICUS CURIAE[1]

William J. Bennett, who served as Secretary of the Department of Education from 1985 to 1988, is an expert and frequent commentator on educational policy. He is an author of over 24 books, many of which concern K-12 and higher education, and he acts as an advisor to many organizations that seek to improve the American educational system. In addition to his government service and his private-sector work on the issue of education, Dr. Bennett has taught at Boston University, the University of Texas, and Harvard University. Having spent a career working to improve America's schools, Dr. Bennett has an acute interest in the outcome of this litigation over the radical new interpretation of Title IX adopted by the panel below.

SUMMARY OF ARGUMENT

Though Title IX and its implementing regulations generally bar discrimination "on the basis of sex," 20 U.S.C. § 1681(a), they permit federally-funded educational institutions to "maintain[ ] separate living facilities for the different sexes," *id.* § 1686,

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[1] Pursuant to SUP. CT. R. 37.2(a), amicus certifies that counsel of record for all parties received timely notice of the intent to file this brief, that Respondent has given written consent to the filing of this brief, and that Petitioners have given blanket consent to the filing of amicus briefs in support of either party. Pursuant to SUP. CT. R. 37.6, amicus certifies that no counsel for any party authored this brief in whole or in part, no party or party's counsel made a monetary contribution to fund its preparation or submission, and no person other than amicus or his counsel made such a monetary contribution.

as well as to "provide separate toilet, locker room, and shower facilities on the basis of sex," so long as those facilities are "comparable," 34 C.F.R. § 106.33. In the opinion below, a panel of the Seventh Circuit has effectively nullified these provisions, holding that federally-funded educational institutions *cannot* maintain separate restrooms—or, by necessary implication, separate living facilities, locker rooms, or showers—based on sex, but instead must allow students to access those separated facilities on the basis of the student's "gender identity," rather than his or her biological sex. Pet.App.4a–5a.

1. The panel majority was wrong to conclude that Petitioners' policy of separating school restrooms based on biological sex violates Title IX. For that conclusion simply cannot be squared with the plain text of the phrase that Congress adopted to describe the type of discrimination it meant to eliminate in Title IX—"on the basis of sex"—at least not as those words have always been understood and were certainly understood when Congress acted in 1972. Indeed, the legislative history of Title IX makes clear that Congress sought to eliminate sex discrimination *precisely because* it understood a person's "sex" to be an *immutable* characteristic—an accident of birth—just like one's race or national origin. The application of Title IX below is thus not only inconsistent with the text Congress adopted; it is *directly contrary to the very understanding of sex that led Congress to target sex discrimination to begin with.*

2. The panel's decision also ignores the practical reasons that schools maintain separate facilities such as restrooms, locker rooms, and showers for boys and girls. Put simply, we separate these facilities on the basis of sex because neither parents nor students want young girls or boys to be exposed, when showering, changing clothes, or using the restroom, to a person with the anatomy of the opposite sex. We *do not* maintain separate facilities of these kinds because we wish to prevent our schoolchildren from showering next to someone who has the anatomy of the same sex but whose internal sense of gender is different. And the practical problems of forbidding the *anatomy*-based separation of these sensitive facilities go beyond these privacy concerns. For as experience has already unfortunately demonstrated, allowing a student to access either the girls' or boys' restroom, shower, or locker room based not the student's actual sex, but rather on nothing more than his or her self-reported internal sense of gender facilitates those *non-transgender* students who wish to access the opposite-sex facility not because of any genuine gender dysphoria but rather out of a desire for voyeurism or, worse, abuse.

ARGUMENT

In the decision below, a panel of the Seventh Circuit concluded, based on a strained extension of the "sex stereotyping" theory adopted by this Court in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), that Petitioners' policy of separating restrooms based on biological sex, "punishes" a transgender student "for his or her gender non-conformance, which in turn violates Title IX." Pet.App.28a.[2] The effect of that ruling is straightforward: the panel has essentially mandated that schools across the country must allow students to access sex-separated restrooms (and, by unavoidable extension, locker rooms, housing facilities, and showers) based not on their biological sex but rather on their "gender identity"—what Respondent describes as "a person's deeply felt understanding of their own gender." Pet.App.108a. That conclusion is flatly contrary to both the plain text of Title IX and its history and purpose. And the costs imposed by that unworkable interpretation of "sex" are severe.

I. The Text and Legislative History of Title IX Make Clear that Congress Understood and Intended "Sex" To Refer to an Immutable Physiological Characteristic, Not an Individual's Self-Reported "Understanding Of Their Own Gender."

In its haste to reach its desired result, the panel dispatched the text of Title IX in a single sentence: "Neither the statute nor the regulations define the term 'sex.' " Pet.App.22a. The panel thus concluded that the term "sex," as used by Congress in enacting Title IX in 1972, is ambiguous, amenable to two (at

[2] The panel alternatively held that Respondent was likely to succeed in showing that separating school restrooms based on anatomical sex is unconstitutional under the Equal Protection Clause. In this brief, we address only the panel's Title IX holding.

least) different meanings: one's actual immutable biological sex and the sex that accords with one's gender identity. But the meaning of "sex" in Title IX could not be clearer; indeed, there was only one meaning of "sex" when Congress enacted Title IX, which explains why it did not define the term.

A. Text.

Whether Title IX, in proscribing discrimination "on the basis of sex," 20 U.S.C. § 1681(a), refers to biological sex or rather self-reported gender identity is a question of statutory interpretation. And it is not a difficult one.

As this Court has repeatedly clarified, such an "inquiry begins with the statutory text, and ends there as well if the text is unambiguous." *BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 183 (2004). Here, Congress's use of the term "sex" unambiguously meant the person's *actual* sex—that is, the sex that an individual possesses by virtue of being born with certain immutable physiological and biological characteristics, such as a particular alignment of chromosomes and the possession of male or female reproductive organs. When Title IX was enacted in 1972, the term "sex" was not understood to refer to an individual's self-reported "understanding of their own gender." Pet.App.108a.

"Ordinarily, a word's usage accords with its dictionary definition," *Yates v. United States*, 135 S. Ct. 1074, 1082 (2015), and the dictionaries recording the sense of the word "sex" around the time when Title IX was enacted uniformly indicate that the word was understood, then, the way it had *always* been understood: as referring to the biological or physiological characteristics that constitute a person's sex, not his or her internal identification with one gender or the other.

The 1961 Oxford English Dictionary, for example, defined "sex" as "[t]he sum of those differences in the structure and function of the reproductive organs on the ground of which beings are distinguished as male and female, and of the other physiological differences consequent on these." 9 OXFORD ENGLISH DICTIONARY 578 (1961). The 1976 American Heritage dictionary concurred, defining the word as "[t]he property or quality by which organisms are classified according to their reproductive functions." AMERICAN HERITAGE DICTIONARY 1187 (1976). The American College Dictionary referred to "the sum of the anatomical and physiological differences with reference to which the male and the female are distinguished." THE AMERICAN COLLEGE DICTIONARY 1109 (1970). Random House noted that "sex" referred to "either the male or female division of a species, esp. as differentiated with reference to the reproductive functions." THE RANDOM HOUSE COLLEGE DICTIONARY 1206 (rev. ed. 1973.) And Webster's Third International Dictionary defined "sex" as "the sum of the morphological, physiological, and behavioral peculiarities of living beings that subserves biparental reproduction," WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2081 (1976).

The understanding of "sex" articulated in these contemporary dictionaries was not a novel one. Indeed, for as long as the word "sex" *existed in the English language*, it unequivocally bore this anatomy-based meaning. It is thus not as though Congress was faced with a choice between competing conceptions of "sex" when it enacted Title IX; there was simply *no meaning of the word available* to Congress, other than the traditional anatomy-based one, until long after 1972.

The meaning of the term "sex" in Title IX is further confirmed by Congress's many other uses of that word. Congress has employed the term "sex" in *literally hundreds* of statutes, enacted both before and after 1972. Never before, to our knowledge, has it seriously been suggested that Congress meant the word "sex" in *any* of these provisions to refer to something other than the anatomy-based distinction between male and female. And in most instances, the context makes clear that an anatomy-based understanding was intended. *See, e.g.*, 10 U.S.C. § 4320 (requiring that the housing provided to army recruits during basic training be limited "to drill sergeants and other training personnel who are of the same sex as the recruits housed in that living area"); 19 U.S.C. § 1582 (authorizing customs officials "to employ female inspectors for the examination and search of persons of their own sex"); 29 U.S.C. § 206(d)(1) (forbidding certain employers from discriminating "between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex"); 36 U.S.C. § 220522(a)(9) (limiting sports organizations that may be recognized as a national governing body of the sport to those led by a board "whose members are selected without regard to . . . sex, [unless], in sports where there are separate male and female programs, it provides for reasonable representation of both males and females on the board"); 46 U.S.C. § 11301(b)(7) (requiring U.S. vessels to maintain a logbook listing "each birth on board, with the sex of the infant and name of the parents").

Congress's decision to ground Title IX on "sex" is made even more manifest by looking at the language it has chosen when it *does* mean to reach discrimination based on gender identity. In 2009, for instance, Congress passed "hate crime" legislation that prohibits inflicting "bodily injury to any person, because of [his or her] actual or perceived religion, national origin, gender, sexual orientation, *gender identity*, or disability." 18 U.S.C. § 249(a)(2) (emphasis added). And in 2013, Congress amended portions of the Violence Against Women Act to encompass discrimination "on the basis of actual or perceived race, color, religion, national origin, sex, *gender identity* . . . , sexual orientation, or disability." 42 U.S.C. § 12291(b)(13)(A) (emphasis added). These provisions are *in pari materia* with Title IX's bar on sex-discrimination, and Congress's decision not to include *here* the language it has used to target this kind of discrimination *elsewhere* should be honored, not ignored.

Indeed, not only did the contemporary meaning of "sex" in the 1970s not encompass or depend upon an individual's "understanding of their own gender," that definition of sex *was simply unavailable* to Congress or the general public at the time. While a usage of the word "gender" (traditionally nothing more than a grammatical classification) as referring to "the social and cultural, as opposed to the biological, distinctions between the sexes" began to emerge among feminist theorists in the United States in the mid-twentieth century, 6 OXFORD ENGLISH DICTIONARY 428 (1989) (citing a 1963 book as the earliest example), it remained an uncommon usage until much later. (Webster's Collegiate Dictionary did not list this sense of "gender" until 1993. *Compare* MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 484 (10th ed. 1993), *with* MERRIAM-WEBSTER, NINTH NEW COLLEGIATE DICTIONARY 510 (9th ed. 1983)). And the notion that sex ultimately depends not on anatomy but on one's internal sense of oneself simply did not exist until after Title IX was enacted, at least not among the general educated public.

The term "transgender" appears to have been first coined by an obscure magazine in 1969, RICHARD EKINS & DAVE KING, THE TRANSGENDER PHENOMENON 82 (2006) (citing the use of the term "transgenderal" in Virginia Prince, *Change of Sex or Gender*, 10 TRANSVESTIA 53, 65 (1969)), but it did not enter the general lexicon until the late '80s, *see* "Transgender," Google Books Ngram Viewer, https://goo.gl/snSrqV (showing first significant usage beginning in 1987). The term was first used in the *New York Times* in 1986, Michael Norman, *Suburbs Are a Magnet to Many Homosexuals*, N.Y. TIMES, Feb. 11, 1986, *available at* https://goo.gl/ku77gA, and its first use in the *Los Angeles Times* was not until 1988, John Johnson, *Transsexualism: A Journey Across Lines of Gender*, L.A. TIMES, July 25, 1988, *available at* https://goo.gl/jECJ5E. Indeed, the first sex-reassignment surgery was not performed in the United States until 1966, PRINCIPLES OF TRANSGENDER MEDICINE & SURGERY 251 (Randi Ettner et al. eds, 2d ed. 2016), and it was "perceived as radical" and conducted only for "experimental" reasons at that time, *Hopkins Hospital: A History of Sex Reassignment*, JOHNS HOPKINS NEWS-LETTER, May 1, 2014, https://goo.gl/jE2tQR. There can simply be no doubt—none at all—that if Respondent's revisionist understanding of the term "sex" as encompassing "an individual's gender identity, transgender status, and gender expression," Pet.App.139a, had been disclosed to Congress when Title IX was being debated in 1972, Congress would have taken care to expressly define the term in the statute to accord with the commonly understood biological meaning of the term.

B. History.

An examination of the legislative history of Title IX—and of the proposed constitutional amendment it grew out of—unsurprisingly demonstrates that Congress intended the term "sex" in that legislation to bear the only meaning that, given the public understanding of the word, it reasonably could have borne:

the possession of either male or female anatomical and other physiological features.

1. The legislative debate over Title IX itself makes clear that Congress, by barring discrimination "on the basis of sex" in federally-funded educational programs, 20 U.S.C. § 1681(a), meant to target discrimination against an individual for possessing the *physiological characteristics* (anatomy, reproductive organs, etc.) of one sex rather than the other.

The legislation that was ultimately enacted as Title IX was authored and proposed by Senator Birch Bayh of Indiana, and it largely grew out of his work in the early 1970s on the draft Equal Rights Amendment ("ERA"), which during that period contained a section guaranteeing equal opportunities for women in education. Birch Bayh, *Personal Insights and Experiences Regarding the Passage of Title IX*, 55 CLEV. ST. L. REV. 463, 468 (2007). In June of 1970, Representative Edith Green's Special Subcommittee on Education held a series of hearings designed to highlight the ongoing discrimination against women in education and to lay the groundwork for responsive legislation. In 1971, as progress on the ERA seemed stalled, Senator Bayh decided to propose the education provisions from the draft ERA as an amendment to the Higher Education Act of 1971, then under consideration. *Id.* at 467. His amendment was ruled non-germane, 117 CONG. REC. S30412, 30415 (1971), but Senator Bayh re-introduced a revised version of the bill in February of 1972, which was ultimately enacted as Title IX.

Congress's understanding of "sex discrimination" as discrimination based on innate, anatomical features is evident, first, from the record compiled during Representative Green's Education Subcommittee hearings. One witness before the Subcommittee, for example, in the course of criticizing discrimination against women based on "[p]resumed differences in the stamina and strength of the two sexes," was careful to note that there were of course "actual physiological differences." *Discrimination Against Women: Hearings Before the Special Subcomm. on Educ. of the H. Comm. on Educ. & Labor*, 91st Cong. 1098 (1970) (statement of Stephen Schlossberg, Gen. Counsel, UAW). He urged that "the only protective legislation" that was permissible "is that based on real biological factors, such as that dealing with maternity leaves, *separate rest rooms*, pregnancy, and the like." *Id.* at 1100 (emphasis added). Another witness, Dr. Ann Scott, professor at the University of Buffalo and active member of the National Organization for Women, submitted written testimony to the Special Subcommittee insisting that true equality for women in educational institutions would require taking into account "a woman's unique biological ability to bear children," by offering them free child care and more generous maternity leave so as to "relieve women of the penalties their biology exacts." *Discrimination Against Women: Hearings Before the Special Subcomm. on Educ. of the H. Comm. on Educ. & Labor*, 91st Cong. 231 (1970).

In like form, the Subcommittee included in its report an article that stressed *"[t]hat differences between the sexes do in fact exist is not to the point*," in discussing discrimination against women in the work force, because while some "differences that relate to job performance" do "have a *valid* physiological basis," others "are socially or culturally based." *Id.* at 989, 990 (excerpt from Col. Jeanne M. Holm, *Women and Future Manpower Needs*, DEFENSE MGMT. J. (1970)).

The floor debate in the Senate in 1972 over Title IX likewise shows that Congress was legislating against the shared premise that the differences between the sexes were *biological*. For example, Senator Bayh, in speaking in support of his proposed bill, introduced into the Record a paper by Dr. Bernice Sandler, a contemporary expert on the problem of sex discrimination. Dr. Sandler spoke against the extra burdens faced by female students *because of their different anatomy*: "Many students are denied leave for pregnancy and childbirth," she noted, and often "[g]ynecological services are not available for women students, although urological services are available for male students." 118 CONG. REC. S5811 (1972).

2. Some of the strongest evidence of Congress's contemporary understanding of the term "sex" as based on the biological differences between men and women comes from Congress's contemporaneous consideration of the proposed Equal Rights Amendment, which would have forbidden the abridgment of the "[e]quality of rights . . . on account of sex." H.R.J. Res. 208, 92d Cong. § 1, 86 Stat. 1523 (1972). While the

ERA ultimately was not ratified, because it used similar language as Title IX, because it passed roughly contemporaneously, and because Title IX in fact *grew out of the ERA*, Congress's understanding of the term "sex" as used in that proposed constitutional amendment is highly persuasive evidence of its understanding of the same term in Title IX. That evidence is also unequivocal: Congress intended to forbid discrimination based on one's actual sex—their *biological* sex—not one's self-reported, internal sense of gender.

This is clear, for example, from a series of statements on the House and Senate floors that took place during Congress's initial consideration of the ERA in 1970. On the House side, Representative Catherine May from Washington, speaking "in enthusiastic and wholehearted support" of the ERA, acknowledged that "[m]en and women do have obvious physiological differences," even if "they also perform many of the same or overlapping roles." 116 CONG. REC. H28020 (1970) (statement of Rep. May). Another supporter, Representative McClory from Illinois, similarly noted that he did not want his support to be misconstrued as "a denial of any protection of benefits to which women are entitled by reason of their physical and biological differences." *Id.* at 28025 (statement of Rep. McClory). In like form, on the Senate side, Senator Bayh (a sponsor of the ERA, as he was of Title IX), clarified that the proposed amendment "would not eliminate all the differences between the sexes. Congressional enactment would not and should not eliminate the natural physiological differences between the sexes." 116 CONG. REC. S35451 (1970) (statement of Sen. Bayh).

When the Senate continued floor debate over the ERA in 1971, that understanding of "the natural physiological differences between the sexes," *id.*, persisted. For instance, Sen. Bayh introduced into the record a Yale Law Journal article analyzing the proposed amendment, which concluded that it would "not preclude legislation" based on "a physical characteristic unique to one sex." 117 CONG. REC. S35016 (1971). "Thus not only would laws concerning wet nurses and sperm donors be permissible, but so would laws establishing medical leave for childbearing" or "[l]aws punishing forcible rape, which relate to a unique physical characteristic of men and women." *Id.* Similar considerations, the same article continued, would "permit the separation of the sexes in public rest rooms." *Id.* at 35018.

The self-same understanding of "sex" is manifest from the hearing and reports of the House and Senate Judiciary Committees concerning the ERA. The Senators on the Judiciary Committee had a number of exchanges on the nature of sex discrimination in a February 29, 1972, executive session. Senator Fong of Hawaii asked Senator Bayh, for example, whether the ERA would subject women to the draft and, if so, whether "they would be forced . . . to live in the same barracks with men?" *Executive Session of the S. Comm. on the Judiciary*, 91st Cong. 11 (Feb. 29, 1972). Senator Bayh agreed that women would be subject to the draft, but did not agree that they would live in the same barracks, since "the right of privacy would be involved." *Id.* "This goes to the basic physiological characteristics and differences . . . between sexes, and we are not trying to change that," Senator Bayh emphasized. *Id.* at 12. Later in the same session, Senator Gurney of Florida agreed that the question of "who has the right to go into what toilet" "revolv[ed] around physiological differences," and would not be affected by the ERA. *Id.* at 19.

A few months later, the Committee heard testimony from the Chairman of the National Organization for Women, Wilma Scott Heide, who carefully noted that "[t]o demand to be equal to men under the law is not to state or imply sameness of biology." *The "Equal Rights" Amendment: Hearing Before the Subcomm. on Constitutional Amendments of the S. Comm. on the Judiciary*, 91st Cong. 563 (1970) (statement of Wilma Scott Heide, Chairman, Nat'l Org. for Women). The point instead was that "biology is not relevant to human equity," *id.*, and accordingly "[t]here are no men's roles or women's roles beyond the biological," *id.* at 566.

The report issued by the Senate Judiciary Committee on March 14, 1972, is to the same effect. According to the report, "the proponents of the Amendment" did not understand it to "prohibit reasonable classifications based on characteristics that are unique to one sex," including "separation of persons of different sexes under some circumstances" such as "sleeping quarters at coeducational colleges, prison dormitories, and military barracks," or other "activities which involve disrobing, sleeping and personal bodily functions." S. REP. NO. 92-689, at 11, 12, 17 (1972).

Much the same understanding played out on the House side. In March and April of 1971, a Subcommittee of the House Judiciary Committee heard testimony on the proposed amendment, including from Abner Mikva, then a Representative from Illinois, who spoke in favor of the ERA but carefully noted that "[b]ecause of the admitted physiological differences between the sexes, and a long tradition of sexual privacy, there are various instances in which the mutual convenience of men and women dictates separate facilities or treatment. Separate washrooms for men and women has been the most widely cited example." *Equal Rights for Men and Women: Hearings Before Subcomm. No. 4 of the H. Comm. on the Judiciary*, 92d Cong. 94 (1971).

In 1971 the House Judiciary Committee issued a report endorsing a softening amendment to the ERA proposed by Representative Wiggins of California that would have exempted any discriminatory law that "reasonably promotes the health and safety of the people." H.R. REP. NO. 92-359, at 1 (1971). The minority of the Committee included a statement of their own views, insisting that the amendment simply was not necessary to preserve "reasonable classifications based on characteristics that are unique to one sex," since " '[e]quality' does not mean 'sameness.' " *Id.* at 7. Thus, even under the original text of the ERA "a law providing for payment of the medical costs of child bearing could only apply to women." *Id.* Nor would there be anything impermissible about "a separation of the sexes with respect to such places as public toilets, as well as sleeping quarters of public institutions." *Id.*

3. The legislative debates over Title IX and the ERA reveal, crucially, that not only did Congress view "sex" as defined in terms of the different physiology of men and women, that understanding of sex as immutably flowing from anatomy was *the very reason they sought to eliminate it as a permissible basis of discrimination*.

The legal analysis of the proposed ERA that Senator Bayh introduced into the record, for example, noted that sex discrimination was improper because "[s]ex, like race and lineage, is an immutable trait, a status into which the class members are locked by the accident of birth." 117 CONG. REC. S35033 (1971) (quoting *Sail'er Inn, Inc. v. Kirby*, 485 P.2d 529, 540 (Cal. 1971)). Testimony before the Senate Judiciary Committee in support of the ERA likewise underscores the contemporaneous understanding that sex was determined by permanent, objective, and readily identifiable physiological characteristics. As Professor Murray put it, "Negroes and women are the two major groups in the country which have been subjected to a prolonged history of legal proscriptions and disabilities based upon biological characteristics which were permanent and easily identifiable . . . [t]he characteristics of race and sex are public and permanent and discrimination based on those factors is therefore much more difficult to dislodge." *Equal Rights: Hearings Before the S. Comm. on the Judiciary*, 91st Cong. 431 (1970) (statement of Pauli Murray, Prof., Brandeis Univ.). *See also The "Equal Rights" Amendment: Hearing Before the Subcomm. on Constitutional Amendments of the S. Comm. on the Judiciary*, 91st Cong. 563 (1970) (statement of Wilma Scott Heide, Chairman, Nat'l Org. for Women). ("[B]iology is not relevant to human equity. . . .").

Nowhere in the majority opinion did the court below address this revealing—indeed dispositive—legislative history confirming the commonly accepted meaning of the term sex as used in Title IX.

II. The Panel's Decision Creates Severe Practical Difficulties and Opportunities for Abuse.

The panel's decision striking down Petitioners' policy of separating sex-specific restrooms on the basis of biological sex, as just shown, is at war with both the words Congress chose when it enacted Title IX and the reasons that it chose them. As experience with other attempts to make access to sex-specific facilities depend on each individual's self-reported "understanding of their own gender," Pet.App.108a, unfortunately demonstrates, that approach also poses a host of practical problems—from the invasion of privacy interests to the unwitting facilitation of sexual abuse. All of these difficulties flow from the basic misalignment between Respondent's understanding of "sex" and the *reason* our schools maintain separate restrooms, locker rooms, and showers for girls and boys. Put simply: these facilities are separated based on sex because the vast majority of people do not want children exposed, when they are showering or undressing, to individuals with the *biological features*—in particular, the reproductive organs—of the opposite sex. We *do not* separate these facilities because we want to avoid exposing our children to individuals with the *internal sense* that they belong to the opposite gender.

At the worst end of the spectrum, granting access to these sensitive facilities based on each individual's subjective *assertion* that he or she identifies with the opposite gender enables—unintentionally, of course—*non-transgender* sexual predators to more easily access their intended victims. The point is *not*, as the activists attempting to erode the separation of showers and locker rooms based on biological sex portray it, that those in favor of such separation fear that transgender students themselves are sexual predators. Rather, the point is that a rule granting access based on gender identity can be exploited by *non-transgender* sexual predators who *falsely* assert that their internal sense of gender differs from their biological sex in order to gain easier access to these sensitive spaces.

Examples of sexual predators attempting to take advantage of such rules have already occurred. The most egregious involve violent sexual assault. For instance, in 2014, a habitual sexual offender falsely claimed to be a transgender woman to gain access to several female-only homeless shelters in Toronto, Ontario, where he sexually assaulted two women. Sam Pazzano, *Predator Who Claimed To Be Transgender Declared Dangerous Offender*, TORONTO SUN, Feb. 26, 2014, *available at* https://goo.gl/KUhOyl. More commonly, the Department's redefinition of "sex" can also be exploited by non-violent students or other individuals driven by voyeuristic sexual desires. While less jarring than cases involving sexual assault, the cost of this type of abuse is no less real. And unfortunately, examples of non-violent abuse of rules like those required by the panel's decision already abound.

After the University of Toronto put in place a policy allowing gender-neutral access to bathrooms, for example, an individual attempted to film two female students with a cell phone while they were showering. Ramisha Farooq, *University of Toronto Alters Bathroom Policy After Two Reports of Voyeurism*, THE TORONTO STAR, Oct. 5, 2015, *available at* https://goo.gl/9Y49d3. Shortly after Seattle, Washington, enacted an ordinance allowing transgender access to bathrooms and locker rooms in public facilities, a man entered the women's locker room at a community swimming pool, undressed, and refused to leave, citing the new ordinance. Laura Bult, *Seattle Man Undresses in Women's Locker Room at Local Pool To Test New Transgender Bathroom Rule*, N.Y. DAILY NEWS, Feb. 17, 2016, *available at* https://goo.gl/8pzi7b. He entered the locker room a second time, later that day, "when young girls were changing for swim practice." *Id.* And after the retail chain Target announced in

April that it would allow transgender individuals to use the restroom and dressing room of their choice, there have been multiple instances of sexual offenders attempting to film women changing their clothes in adjacent fitting rooms. *See Man Wanted for Taking Photos Inside Target Changing Room*, FOX 4 NEWS, Sept. 7, 2016, https://goo.gl/Fgyr1e; Stephan Rockefeller, *Transgender Woman Arrested for Voyeurism at Ammon Target*, EAST IDAHO NEWS, July 12, 2016, *available at* https://goo.gl/RDTbtT; *South Windsor Police Investigate Voyeurism at Local Target*, CBS CONNECTICUT, July 11, 2016, https://goo.gl/BdrP53.

It does not take clairvoyance to predict that in high schools and middle schools, some number of students will seek to misuse the rule required by the panel's decision in similar ways.

To be sure, under either an anatomy-based rule or an "identity" based one, the most flagrant sexual offenders will often be apprehended and their abuse stopped. But that provides cold comfort to those they have already victimized. Further, about two-thirds of all sexual assaults already go unreported. BUREAU OF JUSTICE STATISTICS, CRIMINAL VICTIMIZATION, 2014 7 tbl.6 (2015), https://goo.gl/zmkdnF. Replacing a separation of these sensitive spaces based on objective biological distinctions with one based on each individual's subjective assertion that their internal sense of gender is the opposite of their physiological sex necessarily increases the likelihood that additional victimization will go unreported. Indeed, the very design of such a rule—to bar students from objecting that someone with the anatomical features of the opposite sex is using their shower or locker room and, indeed, to brand such an objection as bigoted and transphobic—increases this likelihood.

The privacy costs of the panel's decision are especially high for those students, mostly young girls, who have survived previous sexual abuse. For many sexual assault survivors, the thought of being in the same locker room or bathroom as an individual of the opposite biological sex may be acutely traumatic *regardless* of that individual's gender identity. *See* Bradford Richardson, *Sexual-Abuse Victims Speak Out in Video Against Transgender Bathroom Laws*, THE WASHINGTON TIMES, May 9, 2016, *available at* https://goo.gl/CoL8hA; Jeannie Suk Gersen, *The Transgender Bathroom Debate and the Looming Title IX Crisis*, THE NEW YORKER, May 24, 2016, *available at* https://goo.gl/FQRGqr.

The decision below thus imposes significant costs *even if* non-transgender individuals never exploit it to increase their opportunity for abuse. And this is true not only of sexual-assault survivors but more broadly, since allowing transgender individuals to access the shower, locker room, bathroom, and hotel room that accords with their gender identity rather than their anatomy infringes the privacy interests of every boy or girl who does not want to undress, shower, use the restroom, or sleep in the same room as someone of the opposite sex. Again, we do not maintain separate facilities of this kind to avoid exposure in these sensitive contexts to someone with a different internal sense of gender. We separate locker rooms and bathrooms by sex because of the natural desire, shared by most people throughout history, not to disrobe in the same room as individuals of the opposite-sex.

For all of these reasons, the decision below imposes real and significant costs. The interpretation of "sex" adopted by Congress preserves each community's ability to adopt the approach that works best for it. The panel's revisionist application of the statute eliminates that flexibility. This Court ought not to sanction the panel's attempt to redefine the term "sex" in Title IX so as to impose on every school in the Nation its own views on this sensitive subject.

CONCLUSION

For the above reasons, this Court should grant the writ and reverse the judgment of the Seventh Circuit.

September 27, 2017 Respectfully submitted,

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