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

**Brief of Family Research Council, The Institute for Faith & Family, and Nineteen (19) Other Family Policy Organizations as *Amici Curiae* in Support of Petitioners**


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## INTEREST OF AMICI[1]

Family Research Council, Institute for Faith & Family, and nineteen (19) other family policy organizations, as *amici curiae*, respectfully urge this Court to grant the Petition and reverse the Seventh Circuit decision.

Family Research Council is a non-profit organization located in Washington, D.C. that exists to advance faith, family and freedom in public policy and the culture from a Christian worldview. *See* www.frc.org. Institute for Faith & Family is a public charity affiliated with North Carolina Values Coalition. *See* ncvalues.org. These two organizations are based in Raleigh, NC and both exist to advance a culture where human life is valued, religious liberty thrives, and marriage and families flourish. *Amici* have an interest in ensuring that local communities are free to enact policies that advance these values and preserve privacy.

Other *amici* are nineteen (19) family policy councils and other policy-related organizations, as listed below, which each work within their respective states to preserve religious liberty, rights of conscience, and the fundamental rights of parents to raise their children free from state overreach and government intrusion.

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[1] Counsel of record for all parties received notice at least 10 days prior to the due date of *amici curiae*'s intention to file this brief. The parties have consented to the filing of this brief. *Amici curiae* certify that no counsel for a party authored this brief in whole or in part and no person or entity, other than *amici*, their members, or their counsel, has made a monetary contribution to its preparation or submission.

They are nonprofits who advocate for the nation's first liberty – religious freedom – in courts, legislatures, governor's mansions, and in the court of public opinion. They are vitally concerned that the Seventh Circuit ruling will encroach on these values, particularly parental rights and the privacy interests of public school students across the nation. The complete list follows:

Center for Arizona Policy, Alaska Family Action, Citizens for Community Values, California Family Council, Florida Family Policy Council, The Family Foundation (KY), Louisiana Family Forum, Massachusetts Family Institute, Minnesota Family Council, Nebraska Family Alliance, New Jersey Family Policy Council, New Yorkers for Constitutional Freedoms, North Carolina Family Policy Council, Pennsylvania Family Council, Family Action Council of Tennessee, Inc., The Family Foundation of Virginia, Family Policy Institute of Washington, Family Policy Council of West Virginia, Wisconsin Family Council.

## INTRODUCTION AND SUMMARY OF THE ARGUMENT

The Seventh Circuit ruling poses ominous threats to individual liberty, rights to privacy, and representative democracy generally.

The circuit court hijacks a theory of sex stereotyping used for employment cases and applies it to force school children to sacrifice their privacy by sharing bathrooms with members of the opposite biological sex. The ruling defies the explicit statutory language of Title IX and its implementing regulations, as applied in public schools. The result is an incoherent mandate demanding that

schools violate the regulations (34 C.F.R. §§ 1632, 1633) in order to comply with the statute (20 U.S.C. § 1681) as interpreted—or rather redrafted—by the Seventh Circuit. Schools are already caught in the clutches of a Catch-22 where they increasingly face litigation, whether from a disgruntled student unable to use the restroom of the opposite sex, as in the recent *G. G. v. Gloucester Cnty. Sch. Bd.*, 822 F.3d 709 (4th Cir. 2016), or by other students whose privacy has been compromised. *See, e.g.*, *Students and Parents for Privacy v. Dep't of Educ.*, No. 1:16-cv-04945 (N.D. Ill. 2016).

Indeed, reasonable minds have always held that sex nondiscrimination laws do not obliterate anatomical distinctions between the sexes in bathrooms and other locations where privacy concerns are paramount. As one scholar, currently serving as a Justice of this Court, has observed: "Separate places to disrobe, sleep, perform personal bodily functions are permitted, in some situations required, by regard for individual privacy. Individual privacy, a right of constitutional dimension, is appropriately harmonized with the equality principle." Ruth Bader Ginsburg, *The Fear of the Equal Rights Amendment*, Wash. Post, Apr. 7, 1975.[2]

Moreover, public education is a matter entrusted primarily to the state and local elected representatives closest to the people and most responsive to their concerns. This ruling deprives individuals of the liberty

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[2] https://www.washingtonpost.com/news/volokh-conspiracy/wp-content/uploads/sites/14/2016/05/ginsburg.jpg (last visited, 09/14/17).

to participate in a matter of vital importance in the public schools that educate their children. Public school students, subject to compulsory education laws, are compelled to sacrifice their liberty and reasonable expectation of privacy on a daily basis. At the same time, the Kenosha School District has not denied Respondent the right to receive an education or the liberty to assume a male identity.

This Court should grant the Petition in order to make clear that when Title IX and its implementing regulation say "sex," they mean biological sex—notwithstanding lower court arguments to the contrary.

## ARGUMENT

### I. THIS COURT SHOULD GRANT THE PETITION TO CLARIFY—BUT NOT REDRAFT—THE TITLE IX STATUTE AT ISSUE.

Amici urge this Court to "say what the law is" (*Marbury v. Madison*, 5 U.S. 137, 178 (1803)) as it is now written, not as it could be, should be, or might be if Congress took action. The *legislative* branch—not the *judicial* branch and not the *executive* branch—is charged with making the law. U.S. Const., Art. I, § 1. Neither courts nor executive agencies have authority to alter the statutory scheme.

Last year, it was the Departments of Justice and Education—the executive branch—that encroached on legislative territory by issuing a nationwide mandate concerning the use of bathrooms in public schools. The executive branch has possibly become "the most powerful branch of government." Robert J. Reinstein,

*The Limits of Executive Power*, 59 Am U. L. Rev. 259, 265 (2009). Agencies "routinely establish policy and even issue binding regulations pursuant to statutes that provide only vague and highly general guidance regarding Congress's desired policy." Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 Vand. L. Rev. 671, 683 (2014). But the limits woven into the constitutional fabric must be preserved:

> An agency has no power to "tailor" legislation to bureaucratic policy goals by rewriting unambiguous statutory terms. Agencies exercise discretion only in the interstices created by statutory silence or ambiguity; they must always "give effect to the unambiguously expressed intent of Congress." *National Assn. of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 665 (2007) (quoting *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984)).

*Util. Air Reg. Grp. v. EPA*, 134 S. Ct. 2427, 2445 (2014). This time, it is the judicial branch that oversteps constitutional boundaries. The Seventh Circuit has done exactly what the judicial and executive branches are both constitutionally powerless to do—"tailor" Title IX, contrary to "the unambiguously expressed intent of Congress," to impose radical social engineering on the American people without their consent.

One Seventh Circuit judge admits the court's methodology involves "making old law satisfy modern needs and understandings." *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339, 352 (7th Cir. 2017) (Posner, J., concurring). This "judicial interpretive updating" admittedly "flouts 'original meaning.'" *Id.* at 353, 352. "The result," in *Hively* and again in this case, "is a

statutory amendment courtesy of unelected judges." *Id.* at 360 (Sykes, J., dissenting).

## II. THIS COURT SHOULD GRANT THE PETITION TO CLARIFY THAT POLICIES PROVIDING FOR SEX-SEGREGATED PRIVATE FACILITIES DO NOT CONSTITUTE "SEX STEREOTYPING."

Just last term, this Court affirmed it has long "viewed with suspicion" laws that reflect overly broad, fixed generalizations about the abilities and roles of men and women. *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 198 L. Ed. 150, 165 (2017); *see also United States v. Virginia*, 518 U.S. 515, 533 (1996), *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 725 (1982). "As for the legal relevance of sex stereotyping, we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group. . . ." *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989). But "gender identity" discrimination does not classify people according to either male or female stereotypes. It is not motivated by any sex-specific bias and does not constitute "sex discrimination."

The gravamen of a sex stereotyping claim is behaviors, mannerisms, and/or appearances. In *Price Waterhouse*, it was it was plaintiff's failure to be "feminine" enough—in her walk, talk, hairstyle, and jewelry—that doomed her partnership. *Id.* at 235. This is classic stereotyping. In *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011), a case the Seventh Circuit cites to support its ruling, there is a collection of stereotyping cases that include "wearing jewelry that was considered too effeminate, carrying a serving tray

too gracefully, or taking too active a role in child-rearing." *Id*. at 1318-1319. In *Glenn* itself, the employer was concerned that the employee, a biological male, "appear[ed] at work dressed as a woman." *Id*. at 1320.[3] Similarly, Title IX stereotyping cases focus on appearance and mannerisms. *See, e.g., Theno v. Tonganoxie Unified Sch. Dist. No. 464*, 394 F. Supp. 2d 1299, 1307 (D.C. Kan 2005) (male student wore earrings, maintained unusual hairstyle, and declined to play basketball or football in high school).

Respondent brought a claim based solely on gender identity, unlike cases that implicate dual claims—sexual orientation or gender identity *plus sex stereotyping* claims based on mannerisms, appearance, and/or behaviors. For example, the Seventh Circuit cites *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004) to support its reliance on *Price Waterhouse*. In *Smith*, "the plaintiff was diagnosed with Gender Identity Disorder, a condition later renamed Gender Dysphoria." *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ*., 858 F.3d 1034, 1048 (7th Cir. 2017). But the *Smith* plaintiff raised two distinct claims, i.e., that "he was a victim of discrimination 'because of . . . sex' *both* because of his gender non-conforming conduct *and* . . . because of his identification as a transsexual. . . . His complaint sets forth *the conduct and mannerisms* which . . . did not conform with his employers' and co-workers' *sex stereotypes of how a man should look and behave*." *Smith*, 378 F.3d at 571, 572 (emphasis added). This "failure to conform to sex stereotypes"—outward

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[3] An employer may have valid concerns about employee appearance on the job, but that is a separate legal question that is not analogous to the privacy concerns at issue here.

appearance and behavior, rather than plaintiff's identification as a transsexual—was alleged to be "the driving force" behind the employer's actions. *Id*. at 572. In the Third Circuit, similarly, a male machine operator sued after he was harassed and terminated, based on *both* his sexual orientation *and* stereotyping. *Prowel v. Wise Business Forms, Inc*., 579 F.3d 285, 287 (3d Cir. 2009) (describing "effeminate" mannerisms, i.e., high-pitched voice, did not curse, and wore "dressy" clothes).

These dual-claim cases can be distinguished from Respondent's single-claim case. But *Glenn* went astray by merging two distinct concepts: stereotyping and gender identity discrimination. "A person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes." *Glenn*, 663 F.3d at 1316. Yet many (or even most) plaintiffs who allege stereotyping do not identify their gender with the opposite biological sex—including the female litigant in *Price Waterhouse*. *Glenn* conflates two separate constructs. Other courts acknowledge the distinction and analyze accordingly. "Use of a restroom designated for the opposite sex does not constitute a mere failure to conform to sex stereotypes." *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1224 (10th Cir. 2007). "Here, Plaintiff has not alleged that Defendants discriminated against him because of the way he looked, acted, or spoke." *Johnston v. Univ. of Pittsburgh of Commw. Sys. of Higher Educ.*, 97 F. Supp. 3d 657, 680 (W.D. Pa. 2015).

In contrast to cases presenting dual claims, sometimes there is no allegation of stereotyping and the sole dispute is restroom use—as in this case. In

such instances, courts understandably hesitate to apply the *Price Waterhouse* framework. *See, e.g., Johnson v. Fresh Mark, Inc*., 337 F. Supp. 2d 996, 1000 (N.D. Ohio 2003), *aff'd*, 98 F. App'x 461 (6th Cir. 2004) (employer did not require plaintiff-employee to conform appearance to stereotype). Sex segregation preserves privacy rights in certain contexts and has nothing to do with stereotyping or an individual's internal sense of gender. The absence of privacy concerns in *Glenn* and similar cases is yet another reason to reject this line of precedent. The Eleventh Circuit did mention restrooms briefly in *Glenn*, because the employer pointed to a single statement in his deposition observing the possibility that other women employees might object to Glenn's restroom use. But the lawsuit was simply not about restroom use. *Glenn*, 663 F.3d at 1321.

The facts and opinion in *Price Waterhouse* merit close examination. Certiorari was granted to resolve a conflict about the burdens of proof in Title VII claims involving "a mixture of legitimate and illegitimate motives." *Price Waterhouse*, 490 U.S. at 232. This Court lowered the high bar the lower courts had erected for employers in such cases. The opinion was a plurality, not a majority, with two concurring opinions. Stereotyping was an issue but not the reason for granting certiorari. This Court noted that "stereotyped remarks can certainly be *evidence* that gender played a part" in an employment decision (*id*. at 251) but did not establish stereotyping as a separate species of sex discrimination. Moreover, the case is about mixed motives. In *Kenosha*, the Seventh Circuit collapses stereotyping and gender identity discrimination. The court ignores that, unlike the mixed motivations in *Price Waterhouse*, there is only *one* motive—

maintaining legally permissible sex-segregated facilities that preserve the privacy of all students.

*Price Waterhouse* does offer an analogy for analyzing Respondent's claim. Under Title VII, where the burden has shifted to the employer, the employer must demonstrate it "would have made the same decision" in the absence of the alleged sex discrimination. *Price Waterhouse*, 490 U.S. at 251. Here, courts might ask whether the school would have made the same decision if a student's presentation—appearance, mannerisms, behaviors—conformed to that student's biological sex. The answer is *yes*. Respondent is actually *demanding* a type of "disparate treatment." Other students do not have the privilege of using a restroom designated for the opposite sex. As a biological female, Respondent would have been denied access to the boys' bathroom regardless of behaviors, mannerisms, name, or any criteria other than biological sex. The outward criteria that define stereotyping were not a consideration at all, let alone a motivating factor.

Finally, "stereotyping" allegations do not override the explicit provisions for sex-segregated bathrooms, locker rooms, showers, and living accommodations designed to protect student privacy in educational institutions.

## III. THIS COURT SHOULD GRANT THE PETITION TO AFFIRM THE UNAMBIGUOUS LANGUAGE OF TITLE IX AND ITS IMPLEMENTING REGULATION.

It may seem odd to ask this Court to interpret a statute as straightforward as Title IX. But there has been a recent proliferation of cases concerning sex-segregated bathrooms, and some of those cases have caused confusion about the application of Title IX and *Price Waterhouse*. However, maintaining separate private facilities for men and women does not perpetrate a "reasonably comparable evil" that falls within Title IX's prohibited sex discrimination. *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 79 (1998). Here, there is crystal clear "justification in the statutory language" for the definition of "sex" that has remained stable for over four decades. *Id*. Nevertheless, the Seventh Circuit bypassed the plain reading of the statute and created more confusion.

### A. The Circuit Ruling Would *Prohibit* Policies The Implementing Regulations Expressly *Permit*.

Title IX's *mandatory* language prohibits discrimination "on the basis of sex." 20 U.S.C. § 1681(a). The regulations are written in *permissive* terms. Schools receiving federal funding "*may* provide separate toilet, locker room, and shower facilities on the basis of sex" (34 C.F.R. § 106.33) and "*may* provide separate housing on the basis of sex" (34 C.F.R. § 106.32) (emphasis added). The Seventh Circuit has essentially rewritten these regulations to read "*may not* provide . . . ." This ruling would prohibit precisely what the regulations allow, thus rendering compliance with

the regulations tantamount to a violation of Title IX. This defies logic, common sense, and longstanding social expectations.

"Physical differences between men and women . . . are enduring." *Virginia*, 518 U.S. at 533. Other Title IX regulations affirm this. Regulations for student athletics consider anatomical differences and clearly presume that "sex" means biological sex. Schools have a general mandate to provide equal athletic opportunities for both sexes, but sex segregation is permissible where selection of team members is based on competitive skill or the activity involved is a contact sport such as boxing, wrestling, rugby, ice hockey, football, basketball, or another activity involving bodily contact. 34 C.F.R. § 106.41. "The regulation requires a school to permit a member of the excluded sex to try out for the single-sex team only if the athletic opportunities of the excluded sex have previously been limited. Even if they have been so limited, exclusion is permitted if the sport involved is a contact sport." *Williams v. School Dist.*, 998 F.2d 168, 172 (3d. Cir. 1993) (remanding to district court to determine whether field hockey is a "contact" sport, where boy was excluded from all-girls team). This provision, much like 34 C.F.R. § 106.33, acknowledges the relevance of anatomical differences between male and female.

### B. The Circuit Ruling Creates Absurd And Illogical Results.

Title IX and its implementing regulation date back over four decades. Recent reinterpretations conflict with both. As the Fourth Circuit admitted in a similar case, "[r]ead plainly . . . § 106.33 permits schools to provide separate toilet, locker room, and shower

facilities for its male and female students." *G. G.*, 822 F.3d at 720. It requires verbal somersaults to construe the Seventh Circuit's position as a permissible construction of the statute. As dissenting Judge Niemeyer explained, the term "sex" must logically mean one of the following if "biological sex" is not the sole definition: (1) biological sex *and* "gender identity" (conjunctive); (2) biological sex *or* "gender identity" (disjunctive); (3) *only* "gender identity." *G. G.*, 822 F.3d at 737 (Niemeyer, J., dissenting). The results here, as in *G.G.*, expose the Seventh Circuit's flawed reasoning:

> (1) "[A] transgender student's use of a boys' or girls' restroom or locker room could not satisfy the conjunctive criteria . . . such an interpretation would deny [Respondent Whitaker] the right to use either the boys' or girls' restrooms." *Id*. The boys' restroom is inconsistent with Respondent's biological sex, and the girls' restroom does not conform to Respondent's gender identity.
>
> (2) "[T]he School Board's policy is in compliance because it segregates the facilities on the basis of biological sex, a satisfactory component of the disjunctive." *Id*. The same is true for the Kenosha policy.
>
> (3) Under this option, "privacy concerns would be left unaddressed." *Id*. at 738. Yet it was exactly those concerns that led to the provision of sex-segregated facilities in the first place. Indeed, the whole concept of permissible sex-segregation would collapse under the Seventh Circuit's reasoning.

The implications are astounding and extremely confusing. The Seventh Circuit's interpretation of "sex" is not coherent—let alone persuasive. Instead of resolving an ambiguity in either the statute or regulations, it has created one.

### C. No Reasonable Legislator Would Have Defined "Sex" As "Gender Identity."

It is possible—indeed, probable—that no legislator considered how Title IX would apply to students who identify as transgender. If Congress had addressed the issue, how would a "reasonable member of Congress" approached it? Stephen Breyer, Active Liberty (Vintage Books 2006), at 88. The statute was designed to ensure equal educational opportunities for men and women—all persons.

Even if a "reasonable legislator" would have agreed that students who identify as transgender have the right to an education, it surely would have been *unreasonable* to disregard the privacy rights of all other students. Here, Respondent has not been threatened with expulsion, denied the right to an education, or denied access to a bathroom. Indeed, the school has offered accommodations providing a level of privacy above what most other students experience.

Moreover, no matter what private facilities a student uses, it is difficult to imagine the student's transgender activity is invisible to others unless the transition has been completed and the student is enrolling in a new school. In this highly sensitive area, individual schools and local governments must have flexibility to craft policies and solutions that fit local circumstances and protect the liberty of all students.

The permissive language of the implementing regulation *allows* but does not *require* a school to accommodate a particular student's request to use a bathroom consistent with his or her gender identity—without opening the door, literally and figuratively, to locker rooms, showers, and other attempts to use an opposite sex's bathroom. This permissive regulation provides flexibility to set policies in the event a school district desires to provide single-user bathrooms or other reasonable accommodation. The school policy might include objective criteria such as a medical diagnosis, parental consent, or other relevant considerations.

It is highly improbable that a hypothetical "reasonable legislator" would have wanted to defer to either a court decree or executive order, "given the statutory aims and circumstances" and the importance of the question. Active Liberty, at 106-107. This case involves setting aside the time-honored understanding of the word "sex" for a novel definition that erases the line between male and female and ignores their anatomical differences. This is an issue of paramount importance that Congress would have wanted to decide for itself.

## IV. THIS COURT SHOULD GRANT THE PETITION BECAUSE THE CIRCUIT RULING PLACES SCHOOLS IN A PRECARIOUS CATCH-22.

In 2016, the Departments of Justice and Education attempted to impose a draconian mandate that would have robbed the people of the power to govern themselves and transgressed the liberty of millions of school children. Their directives placed state and local

authorities in a straight-jacket, disabling their ability to craft workable policies that address the rights and concerns of local citizens and individual children. "The United States is a nation built upon principles of liberty. That liberty means not only freedom from government coercion but also the freedom to participate in the government itself." Active Liberty, at 3. Both types of liberty are at stake. The Seventh Circuit ruling would coerce conformity to a controversial policy and deny adults the liberty to participate in shaping public policy, as well as the liberty of young children to maintain bodily privacy. Like the now-rescinded mandate, this ruling would upend the federalist principles that preserve broad state and local decision-making authority, "secur[ing] decisions that rest on knowledge of local circumstances, [and] help[ing] to develop a sense of shared purposes and commitments among local citizens." *Id.* at 57.

The executive mandates have been withdrawn, but the battle rages on in lowers courts. Pet. 29-30 (listing recent cases). The Seventh Circuit ruling places schools in a Catch-22. Recent cases demonstrate their dilemma: If the school acquiesces to a student's demand to use the bathrooms designated for the opposite biological sex, it is likely to create acute discomfort for other students, who in turn may sue for invasion of their privacy. But if the school refuses, the student may sue—as in this case.

### A. Education Is Primarily A State And Local Concern.

Education is not among the federal government's enumerated powers, but rather one of the many powers

reserved to the states and the people, absent a constitutional restriction:

> [S]tate governments do not need constitutional authorization to act. The States thus can and do perform many of the vital functions of modern government—punishing street crime, *running public schools*, and zoning property for development, to name but a few—even though the Constitution's text does not authorize any government to do so.

*Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2578 (2012) (emphasis added).

Local control over public education is "deeply rooted" in American tradition. Indeed, "local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process." *Milliken v. Bradley*, 418 U.S. 717, 741-742 (1974). Judicial restraint should characterize any federal attempt to intervene in public education:

> Judicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint . . . . By and large, public education in our Nation is committed to the control of state and local authorities.

*Epperson v. Arkansas*, 393 U.S. 97, 104 (1968). The same is true here. There is no reason for the federal judiciary to interfere in local school privacy policies and shut citizens out of the process. At the same time, the Seventh Circuit's interference in such a policy, and the multitude of cases coming before lower courts, has

generated an urgent need for clarification from this Court.

### B. This Case Implicates The Privacy Rights of Minor Children In A Context Where Their Presence Is Mandatory.

The public school is a unique environment. First, it is the place where minor children spend most of their waking hours. Second, education is compulsory and many families have little choice but to place their children in public schools rather than some alternative educational setting. Some parents are able to afford private school tuition—in addition to the taxes they must pay to support public education—but many cannot.

As this Court observed in another context, "there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools." *Lee v. Weisman*, 505 U.S. 577, 592 (1992). This case does not involve religious exercise, but it does involve the coercive environment of the public school system. The coercion in this case is even greater. *Lee v. Weisman* involved a one-time event. This case involves daily school activities. *Lee v. Weisman* required students to stand respectfully for a few minutes. This case demands that children routinely sacrifice their bodily privacy, potentially even exposing their unclothed bodies to students of the opposite sex if the Seventh Circuit's reasoning is extended beyond bathrooms. *Lee v. Weisman* was about high school seniors ready to graduate and become adults. The Seventh Circuit's position would encompass all elementary and secondary students—many of them too young to

understand transgenderism. The coercion is extreme and pervasive. The Seventh Circuit ruling would intrude on the basic rights of children:

> In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students in school as well as out of school are "persons" under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State.

*Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 511 (1969). In other contexts, perhaps "liberty gives substantial protection to *adult* persons in deciding how to conduct their *private* lives in matters pertaining to sex." *Lawrence v. Texas*, 539 U.S. 558, 571-572 (2003) (emphasis added). But here, the federal government demands that *children* sacrifice bodily privacy in a *public* school among other students—including those of the opposite biological sex.

Discrimination in employment, credit, and other settings does not invade the rights of minor children. "Courts . . . must bear in mind that schools are unlike the adult workplace and that children may regularly interact in a manner that would be unacceptable among adults." *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 651 (1999). *Davis* was about student-on-student sexual harassment, which can be difficult to distinguish from typically immature student behavior. This Court noted the unique qualities of the school setting, where "students often engage in insults, banter, teasing, shoving, pushing, and gender-specific conduct that is upsetting to the students subjected to

it." *Id.* at 651-652. In this environment, it is a formula for disaster to mandate that children regularly expose their unclothed bodies to students of the opposite sex. This endangers the privacy rights of all children. Indeed, even students who identify as transgender may be subjected to "insults, banter, teasing, shoving, pushing" beyond what might otherwise occur. There is no compelling reason for the federal government to jeopardize the liberty and privacy of young schoolchildren—rights long recognized by this Court and many others.[4]

In addition to the sensitive privacy concerns of young school children, the Seventh Circuit ruling jeopardizes the liberty of adult citizens to participate in the political process. The "federalist structure of joint sovereigns . . . increases opportunity for citizen involvement in democratic processes" (*Gregory v. Ashcroft,* 501 U.S. 452, 458 (1991)) and "frees citizens from restraints that a more distant central government might otherwise impose" (Active Liberty, 56). The Seventh Circuit ruling would foreclose those opportunities. Accommodation of the privacy concerns of all students requires sensitivity, compassion, and skillful crafting of a workable policy for each school district. It may require construction or remodeling of facilities to implement accommodations. No branch of the federal government should dictate a one-size-fits-all

[4] *See, e.g.*, *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 374-375 (2009); *Thomas ex rel. Thomas v. Roberts*, 261 F.3d 1160, 1168 (11th Cir. 2001), *vacated on other grounds by* 122 S. Ct. 2653 (2002); *Sepulveda v. Ramirez*, 967 F.2d 1413, 1416 (9th Cir. 1992); *Beard v. Whitmore Lack Sch. Dist.*, 402 F.3d 598, 604 (6th Cir. 2005); *Doe v. Renfrow*, 631 F.2d 91, 92–93 (7th Cir. 1980).

"cookie cutter" solution for the entire nation. It is impossible, at the federal level, to consider the multitude of factors that may differ from one school district to another.

### C. The Circuit Ruling Potentially Coerces Compliance By Threatening Withdrawal Of Federal Funds.

This Court has "repeatedly treated Title IX as legislation enacted pursuant to Congress' authority under the Spending Clause." *Davis*, 526 U.S. at 640. But that power, "if wielded without concern for the federal balance . . . permit[s] the federal government to set policy in the most sensitive areas of traditional state concern, areas which otherwise would lie outside its reach." *Id*. at 654-655 (Kennedy, J., dissenting). In light of that danger, this Court has consistently held that Congress must "speak with a clear voice." *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17 (1981). Any funding conditions Congress imposes must be set forth "unambiguously," and states must "voluntarily and knowingly accept[] the terms." *Id*.; *see also NFIB*, 132 S. Ct. at 2602. In *NFIB*, Congress threatened to withhold *existing* Medicaid funds from those states that declined to sign up for "the dramatic expansion in health care coverage effected by the [Affordable Care] Act." *Id*. at 2603. This Court, reiterating earlier precedents, rejected this attempt to impose retroactive conditions on the states. *Id*. at 2606.

The same principle applies here. When Title IX was enacted over four decades ago, no state had explicit notice that it must accept, as a condition of federal funding, any definition of "sex" other than the two

biological sexes. And the implementing regulations expressly permit that definition.

### D. The School District Has Not Denied Respondent The Opportunity To Receive An Education.

The school's conduct falls far short of denying Respondent either the opportunity to receive an education or the liberty to assume a male identity. In *Davis*, this Court had to consider whether a fifth grade girl was the victim of sexual harassment by a classmate and whether the school district could be liable under Title IX as a recipient of federal funds. The Court held that liability was possible, but "only for harassment that is so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit." *Davis*, 526 U.S. at 633. Here, there is no evidence that Respondent was effectively denied "access to an educational opportunity or benefit," or the liberty to conform to a male identity, merely because the school adopted a sex-segregated bathroom policy compliant with Title IX.

## CONCLUSION

This Court should grant the Petition and reverse the decision of the Seventh Circuit.

Respectfully submitted,

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