No. 25-1094

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

A.C., a minor child by his next friend, mother and legal guardian, M.C.,

Plaintiff-Appellee,

v.

METROPOLITAN SCHOOL DISTRICT OF MARTINSVILLE,

Defendant-Appellant.

On Appeal from the U.S. District Court for the
Southern District of Indiana, No. 1:21-cv-2965
The Honorable Tanya Walton Pratt, Chief Judge.

BRIEF OF INDIANA, 24 OTHER STATES, AND THE ARIZONA LEGISLATURE AS *AMICI CURIAE* SUPPORTING DEFENDANT-APPELLANT

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INTRODUCTION AND INTERESTS OF AMICI CURIAE

No child who attends public school should have to worry about whether she can safely and privately use the toilet, change her clothes, or shower after practice. As the Supreme Court has recognized, public educational institutions must be able to adopt measures "necessary to afford members of each sex privacy from the other sex." *United States v. Virginia*, 518 U.S. 515, 550 n.19 (1996) (Ginsburg, J.).

Eight years ago, however, this Court started mandating policies that deprive schoolchildren of their privacy during vulnerable moments. In *Whitaker by Whitaker v. Kenosha Unified School District*, 858 F.3d 1034 (7th Cir. 2017), this Court required a school to let a girl access a multi-occupancy restroom reserved for the opposite sex because the student, though female, identified as a boy. Six years later, in *A.C. by M.C. v. Metropolitan School District of Martinsville*, 75 F.4th 760 (7th Cir. 2023), this Court reissued the same command. Although a forceful en banc decision from the Eleventh Circuit gave one panel member additional reason to doubt *Whitaker*, *A.C.*, 75 F.4th at 771, this Court declined to revisit *Whitaker* at that time because it "assume[d] at some point the Supreme Court will step in with more guidance," *id.* at 764.

The Supreme Court has now done so. In *United States v. Skrmetti*, 145 S. Ct. 1816 (2025), the Supreme Court rejected *Whitaker*'s view of what equal protection requires. The Court clarified that rules that apply equally to all children are not (as *Whitaker* assumed) sex based merely because they reference sex-related concepts. And in *Department of Education v. Louisiana*, 603 U.S. 866 (2024) (per curiam), the

Supreme Court let stand injunctions that blocked the federal government from forcing States—including the Seventh Circuit State of Indiana—to adopt the very type of bathroom-access policies that *Whitaker* requires schools to adopt. A clearer signal that *Whitaker*'s days are numbered is hard to imagine.

Given this intervening guidance from the Supreme Court, the time has come to overrule *Whitaker*. *Whitaker* cannot be squared with Supreme Court precedent, Title IX's text and implementing regulations, or Spending Clause principles, as yet another Circuit recently recognized. *See Roe v. Critchfield*, 137 F.4th 912, 924–31 (9th Cir. 2025). Requiring schools to continue adhering to *Whitaker* risks endangering schoolchildren while placing schools themselves in an untenable position. If schools allow boys who identify as girls to use restrooms and changing facilities reserved for girls, schools will risk liability for compromising girls' privacy and safety. And if schools attempt to preserve girls' spaces for girls, schools will risk liability under *Whitaker*. Amici States, all of which have schools and universities subject to the Equal Protection Clause and Title IX, have a strong interest in ensuring that their institutions can adopt sensible policies that protect student welfare.

ARGUMENT

Martinsville schools—as countless other schools do—provide students with restrooms and locker rooms designated for boys or girls. Dkt. 123-5 at 20, 87. A.C., the plaintiff in this case, "does not challenge" Martinsville's policy of "maintain[ing] sex-segregated bathrooms." *A.C. by M.C. v. Metro. Sch. Dist. of Martinsville*, 75 F.4th 760, 764 (7th Cir. 2023); *see* SA18 ("The Court does not evaluate the School District's decision to maintain sex-segregated facilities; instead, the Court solely evaluates the

School District's facility access policy"). Instead, A.C. challenges Martinsville's policy of not allowing *any* student to access multi-occupancy facilities reserved for the opposite sex. As recent Supreme Court precedent makes clear, Martinsville's "no exceptions" policy accords with both the Constitution and Title IX.

I. The Equal Protection Clause Permits Schools To Protect Students' Safety and Privacy by Maintaining Sex-Specific Facilities

A. Under *Skrmetti*, Martinsville need not make exceptions to its unchallenged policy of maintaining sex-specific facilities

It is common ground that the Equal Protection Clause permits sex-separated bathrooms, locker rooms, and overnight accommodations "to afford members of each sex privacy from the other sex." *Virginia*, 518 U.S. at 550 n.19. A.C., like the plaintiff in *Whitaker*, has expressly disclaimed any "challenge" to Martinsville's decision to "maintain[] sex-segregated bathrooms." *A.C.*, 75 F.4th at 764; *see Whitaker*, 858 F.3d at 1040 (explaining the student did not seek to eliminate sex-designated bathrooms). That concession should end this case. If the Constitution permits a school to direct boys to use one bathroom and girls another, the school must be able to enforce its policy against girls who would prefer to use a boys' bathroom and boys who would prefer to use a girls' bathroom. "No axiom is more clearly established in law, or in reason, than that . . . wherever a general power to do a thing is given, every particular power necessary for doing it is included." *Free Speech Coal., Inc. v. Paxton*, 145 S. Ct. 2291, 2306 (2025) (quoting The Federalist No. 44, at 285 (James Madison) (Clinton Rossiter ed., 1961). Using sex to determine who can use sex-separated bathrooms is

the "ordinary and appropriate means of enforcing" sex-separated bathrooms. *Id.* at 2307.

Not so fast, A.C. says—Martinsville's "no exceptions" policy discriminates on the basis of sex because it prevents students from accessing "the multi-use section of a bathroom facility where the sex designation for that bathroom facility differs from the student's biological sex at birth." SA15 (quoting Dkt. 123-5 at 89). But a policy classifies on the basis of sex and thus triggers heightened scrutiny only where the policy "place[s] a benefit within the reach of one sex and out of the reach of the other" or "burden[s] one sex in a way that it ha[s] not burdened the other." *K.C. v. Individual Members of Med. Licensing Bd. of Ind.*, 121 F.4th 604, 616 (7th Cir. 2024). Martinsville's "no exceptions" policy does not create such uneven burdens. "In no event," the policy unequivocally states, "may a principal permit a student to access or use the multiple-use section of a bathroom facility where the sex designation for that bathroom facility differs from the student's biological sex at birth." Dkt. 123-5 at 89. Simply put, the policy applies to all students the same regardless of sex or gender identity.

The Supreme Court's decision in *Skrmetti* makes that conclusion inescapable. In *Skrmetti*, the Court decided that a Tennessee law—which barred "certain medical treatments" for minors "to treat gender dysphoria, gender identity disorder, or gender incongruence"—did not contain a sex-based classification because none of the law's limitations "turn[ed] on sex." 145 S. Ct. at 1829, 1831. Rather, the law prohibited "healthcare providers from administering puberty blockers and hormones to *minors*

for certain *medical uses*, regardless of a minor's sex." *Id.* at 1829. True, Tennessee's law referenced "sex" in describing those medical uses. *Id.* But "mere reference to sex," the Court explained, is not "sufficient to trigger heightened scrutiny." *Id.* For heightened scrutiny to apply, the law must "prohibit conduct for one sex that it permits for the other." *Id.* at 1831. Tennessee's law, however, applied equally to all minors.

By the same token, Martinsville's "no exceptions" policy does not classify by sex. The policy references "sex." But it does not "prohibit conduct for one sex that it permits for the other." *Skrmetti*, 145 S. Ct. at 1831. No student—boy or girl—is permitted to access the "multi-use section of a bathroom facility" designated for the opposite sex. Dkt. 123-5 at 89. Every student is subject to the same restriction. That analysis holds true even if one embraces the notion that gender identity is bound up with sex. No classifications based either on sex or gender identity appear in the policy challenged here. Whatever a student's gender identity, Martinsville's "no exceptions" policy subjects the student to the same rule. *See Skrmetti*, 145 S. Ct. at 1833–34. A boy who identifies as transgender, no gender, or some other identity can no more access a multi-occupancy girls' bathroom than a boy who identifies as a boy. Policies that treat all students the same do not offend the Equal Protection Clause.

B. *Whitaker*'s contrary mandate defies *Skrmetti*

Whitaker spent very little time analyzing whether the policy challenged there classified based on sex. Although the plaintiff in *Whitaker* did not challenge the school's policy of maintaining sex-separated restrooms, the plaintiff objected to using the school restroom that corresponded to the plaintiff's sex. *See Whitaker*, 858 F.3d

at 1041–42. This Court ruled that this unwritten policy of not allowing the plaintiff access to the bathroom of the plaintiff's choice was "inherently based upon a sex-classification" because the "policy [could not] be stated without referencing sex." *Id.* at 1051. That logic is directly contrary to *Skrmetti*. Under *Skrmetti*, "mere reference" to sex is insufficient to trigger heightened scrutiny. 145 S. Ct. at 1829. A line is sex-based only if it "prohibit[s] conduct for one sex that it permits for the other." *Id.* at 1831. But the "no exceptions" policy challenged here and in similar cases is different because it applies "regardless of whether the [student] is a boy or a girl." *K.C.*, 121 F.4th at 617. Under the policy, all students must use the bathroom consistent with their sex.

With scant explanation, *Whitaker* alternatively asserted that such even-handed treatment of students offends constitutional prohibitions against "sex-stereotyp[ing]." 858 F.3d at 1051. *Skrmetti* rejects that reasoning too. The Court explained that "a law that *classifies on the basis of sex* may fail heightened scrutiny if the classifications rest on impermissible stereotypes." 145 S. Ct. at 1832 (emphasis added). "But where a law's classifications are neither covertly nor overtly based on sex . . . we do not subject the law to heightened review unless it was motivated by an invidious discriminatory purpose." *Id.* Thus, where a policy applies equally to both sexes, the policy cannot be invalidated for supposedly perpetuating some stereotype. That makes sense. The Equal Protection Clause's point is to guard against impermissible "legislative classifications"—not enshrine particular policy outcomes. *Id.* at 1828.

"No exceptions" policies like Martinsville's, moreover, do not rest upon outmoded stereotypes. It is axiomatic that "[p]hysical differences between men and women are enduring," making the need for sex-separated spaces enduring as well. *Virginia*, 518 U.S. at 533; *see id.* at 550 n.19 (noting that the admission of women would entail the need for sex-separated spaces). Multi-use bathrooms in public schools are designated for a single sex precisely because it is "especially important for school-aged children who are still developing" to have the ability to shield their "bodies" from "students of the opposite sex." *Roe*, 137 F.4th at 924.

Nor is it a stereotype to recognize that sex is distinct from gender identity. Recognizing that there is a "basic biological difference[]" between someone who is a boy and someone who identifies as a boy is not "stereotyp[ing]." *Tuan Anh Nguyen v. I.N.S.*, 533 U.S. 53, 73 (2001). Again, *Skrmetti* drives the point home. It rejected the argument that Tennessee engaged in sex stereotyping by prohibiting minors from accessing medications that would enable a minor to express an "identity inconsistent with the minor's sex." 145 S. Ct. at 1831 (quoting Tenn. Code Ann. § 68-33-103(a)(1)). Sex, the Court understood, is a biological reality independent of a person's identity. *Whitaker* simply misapprehended what constitutes a stereotype—and more importantly when courts should engage in a stereotyping analysis—in suggesting that a policy that draws no sex-based distinctions is somehow guilty of stereotyping.

Skrmetti also forecloses any assertion that "no exceptions" policies like Martinsville's "punish[] a student for their transgender identity." *A.C.*, 75 F.4th at 772 (citing *Whitaker*, 858 F.3d at 1049). To begin, such policies do "not classify on the

basis of transgender status." *Skrmetti*, 145 S. Ct. at 1833. The application of a "no exceptions" policy does not turn on gender identity any more than it turns on sex: "no" student—regardless of gender identity—may access a "multiple-use section of a bathroom facility" that is inconsistent with the student's sex. Dkt. 123-5 at 89. Nor do policies like Martinsville seek to "punish." It is undisputed that the sexes need private spaces in which to use the bathroom, change their clothes, and shower. Prohibiting all boys from accessing girls' bathrooms, and all girls from accessing boys' bathrooms, is precisely what a school must do to create single-sex spaces.

There is also no reason to suppose that policies like Martinsville's represents a "mere pretext" for covert classifications based on sex or gender identity. *Skrmetti*, 145 S. Ct. at 1833. As the Court explained in *Geduldig v. Aiello*, 417 U.S. 484, 496–97 (1974), when a policy divides people into two groups, the question is whether women (or men) are part of both groups. If men and women are both part of one group, the policy is not based on sex. *See Skrmetti*, 145 S. Ct. at 1833. Like the law at issue in *Skrmetti*, the policy challenged here creates a category that contains both sexes and more than one gender identity. Martinsville's "no exceptions" policy bars all students—boys, girls, students who identify as transgender, and students who identify as something else—from accessing bathrooms reserved for the opposite sex. So the policy equally burdens and benefits students belonging to different sexes and identities, demonstrating that the policy does not classify based on sex or gender identity.

Lastly, this Court's assumption that "*Bostock* strengthens *Whitaker*[]," *A.C.*, 75 F.4th at 769, cannot survive *Skrmetti*. In *Skrmetti*, the Supreme Court clarified

that it has never held that "*Bostock*'s reasoning reache[s] beyond the Title VII context." 145 S. Ct. at 1834; *see id.* at 1838–39 (Thomas, J., concurring) (explaining why *Bostock*'s Title VII analysis cannot be "import[ed]" into the Equal Protection Clause). And the Court explained that *Bostock* contains important limits. Under *Bostock*, the Court explained, "an employer who fires a homosexual male employee for being attracted to men while retaining the employee's straight female colleague has discriminated on the basis of sex because it has penalized the male employee for a trait (attraction to men) that it tolerates in the female employee." *Skrmetti*, 145 S. Ct. at 1835. But that logic could not be used to condemn Tennessee's law because changing a minor's sex would not "automatically change" the operation of that law. *Id.*

What is true of Tennessee's law is true of policies like Martinsville's. Under Martinsville's "no exceptions" policy, if a male student wishes to use a multi-use bathroom, he must use the bathroom consistent with his sex. Switch the male student to female student and the same rule applies—she too must use a bathroom consistent with her sex. The policy does not "penalize[]" male students for a trait—wishing to use the bathroom associated with the opposite sex—"that [Martinsville] tolerates in [] female" students. *Skrmetti*, 145 S. Ct. at 1835. Thus, even if one is inclined to apply *Bostock* outside of the Title VII context, "sex is simply not a but-for cause of" the policy's operation. *Id. Skrmetti* requires *Whitaker* to be abandoned.

II. Title IX Authorizes Schools To Protect Students' Safety and Privacy by Maintaining Sex-Specific Facilities

Just as this Court's equal-protection analysis in *Whitaker* and *A.C.* cannot survive *Skrmetti*, neither can this Court's Title IX analysis. This Court's decisions in

Whitaker and *A.C.* accepted that schools can "maintain sex-segregated bathrooms." *A.C.*, 75 F.4th at 767. Instead, they faulted schools for failing to adopt "accommodation[s]" for students who do not identity with their sex. *Id.* But Title IX forbids discrimination "on the basis of sex"—not gender identity. 20 U.S.C. § 1681(a). When Title IX was enacted in 1972, the term "sex" referred to the "two divisions" of organisms, "designated male and female," classified "according to their reproductive functions." Sex, *The American Heritage Dictionary of the English Language* 1187 (1980); *see Adams by & through Kasper v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 812 (11th Cir. 2022) (en banc) (collecting definitions). "Sex" did not refer a subjective, changeable identification with an unbounded number of possible identities. Thus, a school does not violate Title IX by refusing to create exceptions to otherwise valid policies—exceptions that benefit only students who identify as transgender.

Section 1686 removes any doubt. That provision expressly authorizes schools to have "separate living facilities for the different sexes," 20 U.S.C. § 1686, which necessarily entails that schools may maintain "separate toilet, locker room, and shower facilities on the basis of sex," 34 C.F.R. § 106.33. And if Title IX authorizes schools to maintain separate toilets, showers, and locker rooms for the sexes, it necessarily authorizes schools to "enforce[]" policies that direct students to use the bathroom, shower, or changing area designated for members of their sex. *Free Speech Coal.*, 145 S. Ct. at 2307. It would make a mockery of Title IX to bar schools from enforcing policies necessary to preserve the sanctity of single-sex quarters.

A.C. sought to sidestep the problem by saying the issue is not whether sex-segregated bathrooms are permissible but "how do we sort by gender?" 75 F.4th at 770. But Title IX is not silent "on this topic." *Id.* As explained, Title IX directs that schools to sort based on a student's "sex"—not a student's gender identity. 20 U.S.C. §§ 1681, 1686. Title IX might "not define sex." *A.C.*, 75 F.4th at 770. But one thing is clear from context—"sex" refers to a binary, biological trait rather than one of many possible identities that someone might declare over a lifetime. Repeatedly, Title IX speaks of institutions, organizations, and activities open to "only students of one sex" and those open to "students of both sexes." 20 U.S.C. § 1681(a)(2); *see* § 1681(a)(5), (a)(6), (a)(7), (a)(8), (a)(9), (b). And as examples of organizations and activities open only to "one sex," Title IX lists the "Young Men's Christian Association, Young Women's Christian Association, Girl Scouts, Boy Scouts, Camp Fire Girls," "father-son" activities, "mother-daughter" activities, and "beauty pageants." § 1681(a)(6)(B), (a)(8), (a)(9). Against the backdrop of society in 1972, it is impossible to understand "sex" as referring to anything but the biological trait of being male or female.

A.C. never considered the context in which "sex" appears. But even if one indulges the assumption that the term's meaning is "inconclusive," *A.C.*, 75 F.4th at 770, an intractable problem remains. Congress enacted Title IX pursuant to its Spending Clause authority. *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 640 (1999). "[L]egislation enacted pursuant to the spending power is much in the nature of a contract"—"in return for federal funds, the States agree to comply with federally imposed conditions." *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17

(1981). The "legitimacy" of any condition "thus rests on whether the State[s] voluntarily and knowingly accept[] the terms of the 'contract.'" *Id.* "There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it." *Id.* Consequently, "if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously." *Id.*; *see Medina v. Planned Parenthood of S. Atl.*, 145 S. Ct. 2219, 2232 (2025).

Suffice it to say Congress never gave States and schools "adequate notice" in 1972 that accepting federal monies would compel schools to let males enter girls' "restrooms, locker rooms, shower facilities, and overnight lodging" whenever a male does not subjectively identify as a male. *Roe*, 137 F.4th at 929; *see Tennessee v. Cardona*, No. 24-5588, 2024 WL 3453880, at *3 (6th Cir. July 17, 2024). Sex-separated bathrooms "preceded the nation's founding." *Adams*, 57 F.4th at 805 (quoting W. Burlette Carter, *Sexism in the "Bathroom Debates": How Bathrooms Really Became Separated by Sex*, 37 Yale L. & Pol'y Rev. 227, 229 (2019)). Yet Congress nowhere stated that it would penalize schools for having sex-segregated facilities or adhering to a traditional, biologically based understanding of "sex." Indeed, it was not until more than half a century after Title IX's enactment that the federal government first adopted regulations that sought to redefine "sex" to include "gender identity"—and those regulations were promptly enjoined and ultimately vacated for exceeding the government's statutory authority. *See Dep't of Educ. v. Louisiana*, 603 U.S. 866, 867 (2024); *Tennessee v. Cardona*, 762 F. Supp. 3d 615, 622–24, 627–28 (E.D. Ky. 2025).

Bostock cannot rescue this Court's Title IX analysis either. In *Bostock* itself, the Supreme Court declined to "prejudge" whether "sex-segregated bathrooms, locker rooms," or "anything else of the kind" are permissible under Title VII. *Bostock v. Clayton Cnty.*, 590 U.S. 644, 681 (2020). And the Court has never held that "*Bostock*'s reasoning reaches beyond the Title VII context." *Skrmetti*, 145 S. Ct. at 1834. There are, moreover, reasons that *Bostock* cannot be extended to Title IX that this Court never considered. *See Tennessee*, 762 F. Supp. 3d at 623–24 (explaining Title IX "use[s] materially different language," "serve[s] different goals," and has "distinct defenses"). Among those reasons is that Title IX is Spending Clause legislation. This means that courts cannot impose any mandates on States or their schools that Congress itself did not clearly articulate when it enacted Title IX in 1972. *See Roe*, 137 F.4th at 928–29. Whatever else might be said, States and schools had zero notice that the Supreme Court would adopt a new interpretation of Title VII in 2020.

Besides, as discussed above, *Skrmetti* clarifies that *Bostock*'s logic does not condemn every policy that might reference sex or sex-related concepts. *Bostock* requires sex to be the "but for" cause of an outcome, not merely a factor "at play." *Skrmetti*, 145 S. Ct. at 1835. Or put another way, changing a person's sex must "*automatically* change the operation" of a statute or policy. *Id.* (emphasis added). Again, there is no automatic change of outcomes here. This case does not challenge Martinsville's policy of maintaining separate bathrooms for boys and girls. Rather, the challenge is to Martinsville's policy against making exceptions. And just as in *Skrmetti*, changing the sex of a student requesting an exception does not change whether the exception

might be granted. "[N]o" student—boy or girl—may "access or use the multi-use section of a bathroom facility where the sex designation for that bathroom facility differs from the student's biological sex at birth." Dkt. 123-5 at 89.

The district court argued that Martinsville's policy subjects A.C. "to different rules and treatment than non-transgender students." SA15. That is incorrect. All students are subject to the same treatment. Under the plain text of Martinsville's "no exceptions" policy, no boy may use a bathroom designated for girls, and no girl may use a bathroom designated for boys. That is true whether a student identifies as transgender or not. A boy who identifies as a girl can no more use a girl's bathroom than a boy who identifies as a boy but feels more comfortable around girls or who seeks access for voyeuristic purposes. Simply put, students who identify as transgender are treated no better and no worse than students who identify differently. Just as in *Skrmetti*, all students are subject to the same across-the-board rule. Martinsville's "no exceptions" policy does not violate Title IX.[1]

[1] The district court asserted that A.C.'s "birth certificate state[s] that he is male." SA15. Whatever the birth certificate might say, however, no one contends that A.C. is a male biologically. A.C. was born female and only later had the birth certificate changed to match A.C.'s gender identity. *See* SA05–06. Moreover, while the district court assumed that the change to the birth certificate has legal consequences, A.C. had the birth certificate changed in an ex parte proceeding. There is an intermediate appellate court decision from Indiana (also issued in an ex parte proceeding) that read Indiana Code § 16-37-2-10 to "provide[] general authority for the amendment of birth certificates, without any express limitation . . . regarding gender amendments." *In re Petition for Change of Birth Certificate*, 22 N.E.3d 707, 708–09 (Ind. Ct. App. 2014). As other decisions have since observed, however, nothing in § 16-37-2-10 authorizes birth certificates to be changed so that they match a person's gender identity. *See In re O.J.G.S.*, 187 N.E.3d 324, 325 (Ind. Ct. App. 2022). State law requires there to be a "permanent record" of a person's "sex," not a shifting record of a person's gender identity. Ind. Code § 16-37-2-9(a)(2). And lest there be any confusion, Indiana's

III. This Court Should Course Correct Now

Since the Supreme Court has provided the guidance that this Court wanted, the Court should not delay in overruling *Whitaker* and *A.C.* As long as those decisions remain the law in this Circuit, students and schools will be in impossible positions.

It is "not difficult" to understand why schools have long provided different bathrooms, showers, locker rooms, changing facilities, and overnight lodgings for members of each sex—students of all ages have a legitimate interest in "shielding their bodies from the opposite sex." *Adams*, 57 F.4th at 804; *see Canedy v. Boardman*, 16 F.3d 183, 185 (7th Cir. 1994) (having "one's naked body viewed by a member of the opposite sex" is an "invasion" of privacy). The law tolerates sex-segregated "restrooms" and "dressing rooms . . . to accommodate privacy needs." *Chaney v. Plainfield Healthcare Ctr.*, 612 F.3d 908, 913 (7th Cir. 2010); *see Faulkner v. Jones*, 10 F.3d 226, 232 (4th Cir. 1993) ("society's undisputed approval of separate public rest rooms for men and women" rest on "privacy concerns"). If schools were required to make all bathrooms or showers co-ed, it is not difficult to imagine what would happen: Many schoolchildren would be so uncomfortable that they would prefer suffering physical discomfort to using the bathroom or showering during the school day.

For the same reason, *Whitaker*'s policy of forcing students to share facilities with members of the opposite sex who identify as transgender is not costless. Students forced to share facilities with transgender identifying students have reported

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Governor has declared it to be the "official position of Indiana's Executive Branch" that statutes referencing "sex" must be understood to refer to the biological trait of being male or female rather than to a person's gender identity. Ind. Exec. Order No. 25-36 (Mar. 4, 2025).

suffering "embarrassment, humiliation, anxiety, fear, apprehension, stress," and "loss of dignity"—so much so that they have "avoid[ed] getting undressed in locker rooms" and worn "soiled, sweaty gym clothes under . . . school clothes." *Students & Parents for Priv. v. Sch. Dirs. of Twp. High Sch. Dist. 211*, 377 F. Supp. 3d 891, 894–96 (N.D. Ill. 2019); *see also, e.g.*, *Parents for Priv. v. Barr*, 949 F.3d 1210, 1218 (9th Cir. 2020) (similar report from boys forced to share a locker room with a girl who identified as transgender); *Doe No. 1 v. Bethel Loc. Sch. Dist. Bd. of Educ.*, No. 3:22-cv-337, 2023 WL 5018511, at *1 (S.D. Ohio Aug. 7, 2023) (similar report from a girl forced to share restroom with a boy); Dkt. 21-5, Declaration of A.C. ¶¶ 51–69, *Tennessee v. Cardona*, No. 2:24-cv-72 (E.D. Ky.) (student describing how she was sexually harassed by a transgender-identifying student in the locker room). In this case, parents reported that their sons so "worried about encountering A.C. in the male restroom" that "they would just hold it all day." Dkt. 174-10 at 6 (Bell Dep. 21:10–20).

These real-world reports cannot be dismissed as "phantom[s]." *A.C.*, 75 F.4th at 773. "Public school locker rooms . . . are not notable for the privacy they afford." *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 657 (1995). School "locker rooms and restrooms are spaces where it is not only common to encounter others in various stages of undress, it is expected." *Doe by & through Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518, 531 (3d Cir. 2018). So as students' own experiences illustrate, forcing schools to let students access restrooms and locker rooms designated for another sex compromises student privacy and safety. *Whitaker* would have schools address this problem by telling girls wishing to use a multi-occupancy girls' locker room to use

individual stalls. *See A.C.*, 75 F.4th at 773. It is far from guaranteed that girls will always have such an opportunity. *See Vernonia*, 515 U.S. at 657 (school building had "[n]o individual dressing rooms"); *Doe No. 1*, 2023 WL 5018511, at *1 (girl reported individual stall was "frequently occupied"). And *Whitaker*'s response highlights that the accommodations it mandates for gender identity imposes hardship on boys and girls who simply want to take advantage of Title IX's protections for sex-separate spaces. As one district court aptly observed, "the *entire point* of Title IX is to prevent discrimination based on sex—throwing gender identity into the mix eviscerates the statute and renders it largely meaningless." *Tennessee*, 762 F. Supp. 3d at 624.

Just as students must bear consequences under *Whitaker*, so too must schools. Schools like Martinsville that adopt common-sense policies sanctioned by Title IX to protect student privacy and safety are being sued under *Whitaker*. On the flip side, schools that adopt the policies *Whitaker* mandates are exposed to liability as well. After *Whitaker*, a district court in this Circuit held that girls forced to share bathrooms and changing rooms with boys who identified as girls had a plausible claim under Title IX for sexual harassment. *See Students & Parents for Privacy*, 377 F. Supp. 3d. at 899–900. And the U.S. Department of Education has found schools in violation of Title IX for allowing "students to access intimate facilities based on their 'gender identity' rather than their sex." U.S. Dep't of Ed., *U.S. Dep't of Ed. Finds Five Northern Virginia School Districts in Violation of Title IX* (July 25, 2025), https://www.ed.gov/about/news/press-release/us-department-of-education-finds-five-northern-virginia-school-districts-violation-of-title-ix; *see* Letter to Alex Marrero,

Superintendent, Denver Public Schools, U.S. Dep't of Educ. Office of Civil Rights (Jan. 28, 2025), https://ocrcas.ed.gov/sites/default/files/ocr-letters-and-agreements/08255901-a1.pdf (investigating Denver school over bathroom designation).

These developments leave schools between a rock and a hard place. Should schools risk lawsuits and federal investigations by allowing students to decide based on their internal feelings which restrooms and locker rooms they would like to use? Or should schools risk being sued for damages and injunctive relief under *Whitaker* for maintaining the sex-separated facilities that Title IX and implementing regulations expressly allow? The Court should revisit *Whitaker* and *A.C.* now.

CONCLUSION

The Court should reverse, overruling *Whitaker* and *A.C.*

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August 11, 2025

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I hereby certify that on August 11, 2025, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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