No. 23-392

IN THE
Supreme Court of the United States

METROPOLITAN SCHOOL DISTRICT OF MARTINSVILLE,
Petitioner,

v.

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

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

BRIEF OF INDIANA, ALABAMA, AND 17 OTHER STATES AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether Title IX or the Equal Protection Clause dictate a single national policy that prohibits local schools from maintaining separate bathrooms based on students' biological sex.

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INTEREST OF THE *AMICI* STATES*

The States of Indiana and Alabama, and Arkansas, Georgia, Idaho, Iowa, Kansas, Louisiana, Mississippi, Missouri, Montana, Nebraska, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, and West Virginia respectfully submit this brief as *amici curiae* in support of petitioner. *Amici* States all have public-school and public-university systems that receive federal funding under Title IX. In a "public school environment[,] … the State is responsible for maintaining discipline, health, and safety." *Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomi Cnty. v. Earls*, 536 U.S. 822, 830 (2002). *Amici* States therefore have a strong interest in protecting the health, safety, welfare, and privacy of all students.

Traditionally, public institutions have safeguarded students' privacy and welfare by separating the sexes in bathrooms and on sports fields. Institutions have recognized that forcing boys and girls to share bathrooms, showers, and hotel rooms would compromise the privacy, security, and safety of students, especially girls. Institutions have recognized that forcing girls to compete against boys—who have innate, biologically conferred advantages in size, strength, and speed—would jeopardize girls' safety and crowd them off podiums. And courts have upheld those policies as substantially related to "compelling

* Pursuant to Supreme Court Rule 37.2(a), *amici* States provided notice to the parties more than ten days prior to the due date of this brief.

state interest[s]." *E.g.*, *O'Connor v. Bd. of Ed. of Sch. Dist. No. 23*, 645 F.2d 578, 581 (7th Cir. 1981).

When Congress enacted Title IX under the Spending Clause in 1972, no one thought that Title IX's prohibition on discrimination "on the basis of sex," 20 U.S.C. § 1681, would end sex-segregated bathrooms and sports programs. The statute itself and its implementing regulations both provided for the continued separation of the sexes in contexts where sex matters, such as bathrooms, dorms, and athletics.

Now, however, courts are twisting Title IX and the Equal Protection Clause to invalidate polices in place ever since (and long before) their adoption. The Seventh Circuit and other courts have redefined "sex" to mean "gender identity," requiring schools to let males access girls' bathrooms and compete against female athletes, even where state law requires a different result. Those decisions not only undermine States' ability to protect student privacy and welfare, but also offend basic principles of federalism by invalidating state and local government policies without clear constitutional or statutory warrant.

SUMMARY OF THE ARGUMENT

Courts across the Nation have splintered over whether the Equal Protection Clause or Title IX prohibit public educational institutions from maintaining separate bathrooms based on students' sex as opposed to students' gender identity. The result has been numerous, costly lawsuits against schools over policies that have existed since the Framing era. Decisions from the Seventh Circuit and other courts requiring schools to segregate bathrooms and locker

rooms based on gender identity instead of sex cry out for review. Those decisions undermine state and local policies in traditional areas of state concern, compromise efforts to protect student privacy and safety, and leave schools in an untenable position.

The impact of the Seventh Circuit's approach to the Equal Protection Clause and Title IX goes well beyond the bathroom context. Courts have already seized on the Seventh Circuit's logic to invalidate state laws separating students by sex in athletics, state laws requiring state-issued credentials to reflect persons' sex rather than gender identity, and even state laws banning experimental medical procedures for children. More lawsuits are inevitable. The Affordable Care Act expressly incorporates Title IX's prohibition on "sex" discrimination. And the Biden Administration has invoked the Seventh Circuit's view of the Equal Protection Clause and Title IX to redefine "sex" discrimination in still more contexts.

The costs and confusion created by the Seventh Circuit's view all stem from a fundamentally flawed approach to the Equal Protection Clause and Title IX. Neither A.C., the plaintiff in this case, nor the Seventh Circuit objects to "sex-segregated bathrooms." App.3. What both dislike is the school's decision to *define* "sex" in traditional, biological terms rather than to reimagine sex as an internal gender identity. They still want bathrooms separated, just differently. But that demand is a disparate-impact or under-inclusiveness challenge that warrants only rational-basis review. And the challenge fails because it is perfectly rational to use traditional definitions of

"sex" when assigning students to sex-segregated bathrooms to protect everyone's privacy and safety.

The Seventh Circuit's Title IX analysis suffers from similar flaws. The Seventh Circuit jettisoned years of uninterrupted practice to hold that Title IX, too, required States to use "gender identity" in place of sex, a biological characteristic. Among the many problems with this analysis, one stands out to *amici* States: There is nothing that gave them unambiguous notice that they would face liability for segregating bathrooms based on biological sex. The Seventh Circuit's decision needs correcting.

ARGUMENT

I. The Question Presented Is Exceptionally Important

As the Petition demonstrates, Pet. 12-19, the circuits are hopelessly split over whether schools may exclude from a single-sex bathroom all members of the opposite sex, regardless of gender identity. The Eleventh Circuit sees nothing wrong with separating students by sex. *Adams by & through Kasper v. School Bd. of St. Johns Cnty.*, 57 F.4th 791, 796 (11th Cir. 2022) (en banc). The Fourth and Seventh Circuits have no quarrel with "sex-segregated bathrooms" per se. App.10, App.15. But they say schools must allow students whose gender identity and sex diverge to use the bathroom corresponding to their gender identity. *See Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 619-20 (4th Cir. 2020); *Whitaker by Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1049-50, 1051-54 (7th Cir. 2017).

Whether maintaining traditional sex-segregated bathrooms violates the Equal Protection Clause and Title IX warrants review. Absent clear guidance from this Court, schools across the country are being hit from all sides with numerous, costly lawsuits. Schools cannot effectively pursue their primary mission of educating students while faced with contradictory, and changing, instructions about what the Equal Protection Clause and Title IX require. The recurring litigation over these provisions is of exceptional importance to States as well. Courts have already seized on the Fourth and Seventh Circuit's approach to invalidate a variety of state laws designed to protect children's privacy, safety, and welfare. The erosion of state authority will continue until this Court halts it.

A. The numerous, costly lawsuits—and resulting uncertainty—over bathrooms are harming States, schools, and students

1. The open and acknowledged split among the Fourth, Seventh, and Eleventh Circuits only scratches the surface of the confusion over what the Equal Protection Clause and Title IX require. Schools "all over the country," App.2, are facing litigation.

Plaintiffs have brought more than a dozen lawsuits across eight circuits challenging policies that divide bathrooms based on (biological) sex. Some courts have upheld these policies, *see, e.g.*, *Roe v. Critchfield*, No. 1:23-cv-00315, 2023 WL 6690596 (D. Idaho Oct. 12, 2023), *injunction granted pending appeal*, No. 23-2807 (9th Cir.); *Johnston v. Univ. of Pittsburgh of Commonwealth Sys. of Higher Educ.*, 97 F. Supp. 3d 657 (W.D. Pa. 2015); *D.H. ex rel. A.H. v. Williamson Cnty. Bd. of Educ.*, 638 F. Supp. 3d 821 (M.D. Tenn.

2022); other courts have invalidated them, *see, e.g.*, *A.H. v. Minersville Area Sch. Dist.*, 408 F. Supp. 3d 536 (M.D. Penn. 2019); *M.A.B. v. Bd. of Educ. of Talbot Cnty*, 286 F. Supp. 3d 704 (D. Md. 2018); *Carcano v. McCrory*, 203 F. Supp. 3d 615 (M.D. N.C. 2016); *Bd. of Educ. of Highland Local Sch. Dist. v. U.S. Dep't of Educ.*, 208 F. Supp. 3d 850 (S.D. Ohio 2016). And new lawsuits continue to be filed. *See, e.g.*, *Doe #1 v. Vicksburg Comm. Schs.*, No. 1:23-cv-00901 (W.D. Mich.); *Bridge ex rel. Bridge v. Okla. State Dep't Educ.*, No. CIV-22-00787 (W.D. Okla.).

Even schools that adopt policies separating students based on gender identity are not safe from litigation. Plaintiffs have sued schools that permit "male students who claim female gender to use privacy facilities … designated for use by the female sex," alleging that the policies have resulted in unwanted harassment. *Students & Parents for Privacy v. Sch. Dirs. of Twp. High Sch. Dist. 211*, 377 F. Supp. 3d 891, 894 (N.D. Ill. 2019); *see, e.g.*, *Parents for Privacy v. Barr*, 949 F.3d 1210 (9th Cir. 2020); *Doe ex rel. Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518 (3d Cir. 2018); *Doe No. 1 v. Bethel Local School Dist. Bd. of Educ.*, No. 3:22-cv-337, 2023 WL 5018511 (S.D. Ohio Aug. 7, 2023), *appeal pending*, No. 23-3740 (6th Cir.); *Parents for Privacy v. Dallas Sch. Dist. No. 2*, 326 F. Supp. 3d 1075 (D. Ore. 2018).

2. The widespread confusion over what the Equal Protection Clause and Title IX require is costly. Schools must hire their own legal counsel and, if they lose litigation, face judgments for damages and attorney's fees. *See* 42 U.S.C. § 1988(b); Consent Judgment at 3-4, *Whitaker v. Kenosha Unified Sch. Dist.*

No. 1 Bd. of Educ., No. 2:16-cv-943 (E.D. Wis. Jan. 23, 2018) (ordering payment of "$800,000" in "compensatory damages and reasonable attorneys' fees and costs"). Additionally, to defend traditional policies that have existed for decades, schools are now forced to hire experts to opine on what should be a straightforward question—what does "sex" mean? Although no expert testimony should be necessary, schools cannot afford to forego experts when judges have signaled that they would rule against schools that fail to offer expert testimony. *See Adams*, 57 F.4th at 833, 836 (J. Pryor, J., dissenting).

The Seventh Circuit's approach inflicts substantial compliance costs as well, leaving schools without the clear guidance they need to set workable policies and focus on their educational mission. According to the Seventh Circuit, schools must let at least some students whose gender identity does not align with their sex use bathrooms designated for the opposite sex. App.22. The court also stated that schools may adopt "reasonable measures" to ensure there is a "genuin[e] need[]." *Id.* But how schools are supposed to apply that standard the court did not say. Its decision leaves schools with no guidance as to what they should do if a student's self-proclaimed identity conflicts with the gender listed on the student's "birth certificate[]" or the student lacks a "medical diagnosis[]." *Id.* Are schools supposed to let a student use the opposite-sex bathroom without further proof? Hire experts to evaluate the student's self-proclaimed identity? All that schools know is that they will risk litigation whatever choice they make.

Other compliance difficulties with the Seventh Circuit's decision abound. As this Court recognizes, schools have responsibility for the "discipline, health, and safety" of students. *Earls*, 536 U.S. at 830. Traditionally, schools have safeguarded student privacy and safety by separating students by sex to prevent unwanted bodily exposure. "[S]ex separation in bathrooms dates back to ancient times, and, in the United States, preceded the nation's founding." W. Burlette Carter, *Sexism in the "Bathroom Debates"*, 37 Yale L. & Pol'y Rev. 227, 229 (2018). That is why this Court acknowledged in *United States v. Virginia*, 518 U.S. 515 (1996), that "admitting women to [the Virginia Military Institute (VMI)] would undoubtedly require alterations necessary to afford members of each sex privacy from the other sex in living arrangements." *Id.* at 550 n.19.

Notwithstanding the lineage of sex-segregated bathrooms and privacy justifications, the Seventh Circuit dismissed privacy concerns as "conjectural" on the grounds that "[n]o students complained about A.C.'s use of the [opposite-sex] bathroom" and that A.C. (or other students) could use a "bathroom stall." App.21-App.22. But what if students start complaining about another student's use of a bathroom designated for the opposite sex, students fail to use stalls, or other students are afraid to express concern for their privacy out of concern the schools will "view them as bigoted"? *Students & Parents for Privacy*, 377 F. Supp. 3d at 895. May schools now treat privacy concerns as genuine? Or what if older buildings have "[n]o individual dressing rooms" and no dividers along urinals? *Veronia Sch. Dist. 47 v. Acton*, 515 U.S. 646,

657 (1995). Must schools now undertake costly building programs to refit facilities? Again, the Seventh Circuit's approach to equal protection and Title IX leaves schools with nothing but questions.

Ever-changing federal regulations exacerbate the difficulties schools face. In 2016, the Department of Education informally embraced the view that Title IX prohibits "discrimination based on a student's gender identity"—a view that would require schools to adopt the Seventh Circuit's approach to bathroom policies. Catherine Lhamon & Vanita Gupta, *Dear Colleague Letter: Transgender Students*, U.S. Dep't of Educ.: Off. for Civ. Rts., at 1 (May 13, 2016). Four years later, the Department repudiated its previous stance, explaining that "Title IX and its implementing regulations … presuppose sex as a binary classification." 85 Fed. Reg. 30,026, 30,178 (May 19, 2020). Now, the Department's position is changing its position once again. *See* 86 Fed. Reg. 32,637 (June 22, 2021); 87 Fed. Reg. 41,390 (July 12, 2022). Only a decision from this Court can give schools the certainty they need.

3. This Court's intervention is critically important for States as well. "State[s]," not the federal government, are the traditional guardians of student privacy, health, and welfare. *Earls*, 536 U.S. at 830. At least nine States have exercised their authority to safeguard student privacy and safety by requiring public schools to have sex-separated bathrooms, locker rooms, or sleeping areas. *See* Ala. Code § 16-1-54; Ark. Code § 6-21-120; Ark. Code § 6-21-120; Idaho Code § [33-6703]33-6603; Iowa Code § 280.33; Ky. Rev. Stat. § 158.189; N.D. Cent. Code § 15.1-06-21; Okla.

Stat. tit. 70, § 1-125; Tenn. Code § 49-2-802. The Fourth and Seventh Circuit's approach directly implicates the validity of these statutes—and an untold number of policies adopted by school boards and other local government entities—which underscores the importance of review. *See Pharm. Rsch. & Mfrs. of Am. v. Walsh*, 538 U.S. 644, 649-50 (2003).

B. The Seventh Circuit's flawed approach to the Equal Protection Clause and Title IX impacts a wide range of policies

The importance of the issue goes well beyond school policies regarding bathroom use. Already courts have wielded the Seventh Circuit's decisions on school bathroom policies to invalidate other school policies and state laws, multiplying the difficulties for schools and undermining state authority.

1. Whatever approach that courts take to the Equal Protection Clause and Title IX in the bathroom context invariably affects schools in other contexts. There can be "only be one definition of 'sex.'" *Adams*, 57 F.4th at 821 (Lagoa, J., specially concurring). Already, courts have cited the Seventh Circuit's decision in *Whitaker* in holding that the decision to exclude males who identify as female from girls' sports teams violates equal protection and Title IX. *See Hecox v. Little*, 79 F.4th 1009, 1026-27 (9th Cir. 2023); *A.M. by E.M. v. Indianapolis Pub. Schs.*, 617 F. Supp. 3d 950, 962-66 (S.D. Ind. 2022). And more litigation is sure to come. To protect the fairness of female sports and girls' safety, twenty-three States—

not to mention school boards—have restricted participation on girls' teams to the female sex.[1]

The spread of the Seventh Circuit's theory to sports leaves schools facing the same costly litigation—and impossible demands. Under Title IX, schools must not only avoid "discriminat[ing]" on the basis of "sex"; schools must ensure no student is "excluded from" or "denied the benefits" of any activity on the basis of sex. 20 U.S.C. § 1681. Ever since Title IX's enactment, schools have balanced those competing demands by separating students by sex. Schools have recognized that forcing girls to compete against boys—who have advantages in speed, size, and strength—would create a "substantial risk that boys would dominate the girls' programs and deny them an equal opportunity to compete." *O'Connor v. Bd. of Educ. of Sch. Dist. No. 23*, 449 U.S. 1301, 1306-07 (1980) (Stevens, J., in chambers). Now, however, schools are told that they must allow some biological males to compete against girls, even though males have innate athletic advantages. *See* Benjamin D. Levine et al., *The Role of Testosterone in Athletic Performance,* Duke Ctr. for Sports L. & Pol'y, at 1 (Jan.

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[1] Ala. Code § 16-1-52; Ariz. Rev. Stat. § 15-120.02; Ark. Code § 6-1-107; Fla. Stat. § 1006.205; Idaho Code § 33-6203; Ind. Code § 20-33-13-4; Iowa Code § 261I.2; Kan. Stat. § 60-5603; Ky. Rev. Stat. §§ 156.070, 164.2813; La. Stat. § 4:444; Miss. Code § 37-97-1; Mo. Rev. Stat. § 163.048; Mont. Code Ann. § 20-7-1306; N.C. Gen. Stat. § 116-401; N.D. Cent. Code §§ 15-10.6-02, 15.1-41-02; Okla. Stat. tit. 70, § 27-106; S.C. Code § 59-1-500; S.D. Codified Laws § 13-67-1; Tenn. Code §§ 49-6-310, 49-7-180; Tex. Educ. Code § 33.0834; Utah Code § 53G-6-902; W. Va. Code § 18-2-25d; Wyo. Stat. § 21-25-102.

2019); Doriane Lambelet Coleman et al., *Re-Affirming the Value of the Sports Exception to Title IX's General Non-Discrimination Rule*, 27 Duke J. of Gender L. & Pol'y 69, 88 (2020).

Once again, schools find themselves in an impossible position. If schools exclude males who identify as girls from girls' teams, they may be sued by those males for "sex" discrimination. And if schools allow males who identify as girls on girls' teams, they may be sued by females who believe themselves disadvantaged by policies allowing students "to participate in gender specific sports teams consistent with their gender identity." *Soule by Stancescu v. Connecticut Ass'n of Schools Inc.*, 57 F.4th 43 (2d Cir. 2022). It is, moreover, cold comfort to suggest that schools may limit male participation on girls' teams using ill-defined criteria. *See* 88 Fed. Reg. 22,860, 22,891 (Apr. 13, 2023). Determining what criteria—if any—schools may impose itself is costly. So too is administering any policy that requires medical testing or expert opinion about what limits are necessary to avoid endangering girls too much (whatever that means). And of course schools still face the risk that half-measures will satisfy no one, leading to yet more litigation and judicial fiddling with school policies.

2. Even outside the school environment, the Seventh Circuit's approach to Title IX and equal protection is causing mischief. In *Whitaker*, the Seventh Circuit took the view that the bathroom policy was subject to heightened scrutiny because it "cannot be stated without referencing sex." 858 F.3d at 1051. Although the court had no quarrel with separating students by sex generally, it deemed the

policy unlawful because of its impact on transgender students. *Id.* Put another way, the court equated a disparate impact on transgender students with sex discrimination.

A theory that conflates a disparate impact on transgender persons with intentional sex discrimination is potent indeed. Citing *Whitaker*, courts have held that widely adopted laws[2] prohibiting experimental gender-transition procedures for minors must be subject to heightened scrutiny as well. *See, e.g.*, *Brandt v. Rutledge*, 47 F.4th 661, 670 (8th Cir. 2022); *K.C. v. Individual Members of Med. Licensing Bd. of Ind.*, ___ F.Supp.3d ___, 2023 WL 4054086 (S.D. Ind. 2023), *appeal pending*, No. 23-2366 (7th Cir.). (And since the Affordable Care Act expressly incorporates Title IX's anti-discrimination provision, 42 U.S.C. § 18116, challenges along those lines have been launched too. *Koe v. Noggle*, ___ F.Supp.3d ___, 2023 WL 5339281, *13 n.7 (N.D. Ga. Aug. 20, 2023).)

3. Finally, the Biden Administration has seized on the Seventh Circuit's view to promulgate mandates attempting to redefine federal prohibitions on "sex" discrimination to include "gender identity" discrim-

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[2] Ala. Code § 26-26-4; Ariz. Rev. Stat. § 32-3230; Ark. Code § 20-9-1502; Fla. Stat. § 456.52; Fla. Admin. Code R.64B8-9.019; Ga. Code § 31-7-3.5; Idaho Code § 18-1506C; Ind. Code § 25-1-22-13; Iowa Code § 147.164; Ky. Rev. Stat. § 311.372; La. Stat. § 40:1098.2; 2023 Miss. Laws, H.B. No. 1125, § 2; Mo. Ann. Stat. § 191.1720; Mont. Code Ann. § 50-4-1004; Neb. Rev. Stat. § 71-7304; N.C. Gen. Stat. § 90-21.151; N.D. Cent. Code § 12.1-36.1-02; Okla. Stat. tit. 63, § 2607.1; S.D. Codified Laws § 34-24-34; Tenn. Code § 68-33-103; Tex. Health & Safety Code § 161.702; Utah Code §§ 58-67-502, -68-502; W. Va. Code § 30-3-20.

ination in far-reaching contexts, including employment, *Protections Against Employment Discrimination Based on Sexual Orientation or Gender Identity*, EEOC (June 15, 2021), food and nutrition assistance, *Supplemental Nutrition Assistance Program: Civil Rights Update to the Federal-State Agreement*, 87 Fed. Reg. 35,855 (June 14, 2022), lending, *Equal Credit Opportunity (Regulation B); Discrimination on the Bases of Sexual Orientation and Gender Identity*, 86 Fed. Reg. 14,363 (Mar. 16, 2021), labor, *Notification of Interpretation of Section 188 of the Workforce Innovation and Opportunity Act*, 87 Fed. Reg. 20,321 (Apr. 7, 2022), the Affordable Care Act, *Nondiscrimination in Health Programs and Activities*, 87 Fed. Reg. 47,824 (Aug. 4, 2022), and HHS grants, *Health and Human Services Grants Regulation*, 88 Fed. Reg. 44,750 (July 13, 2023). The Fourth and Seventh Circuit's approach will continue to beget confusion until corrected.

II. The Seventh Circuit's Approach Conflicts with This Court's Equal Protection and Title IX Jurisprudence

Much of the cost and confusion surrounding the Equal Protection Clause and Title IX challenges to sex-based classifications stems from courts treating claims like A.C.'s as if they were challenges to the classifications themselves. But these claims are different. They seek to alter, not bar, sex-based policies. That means they should be subject to rational-basis review and fail at the pleadings stage.

A. The Equal Protection Clause does not require States to define "sex" as "gender identity"

1. The Fourteenth Amendment's Equal Protection Clause prohibits a State from "deny[ing] to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. The Clause is "essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). When two similarly situated persons are treated better or worse because of their sex, heightened scrutiny applies. *Miss. Univ. for Women* v. *Hogan*, 458 U.S. 718, 724 (1982).

United States v. Virginia is the classic case. 518 U.S. 515 (1996). The Virginia Military Institute admitted only men. *Id.* at 520. The federal government challenged that policy, contending that the Equal Protection Clause required VMI to admit women too. *Id.* at 519. This Court agreed. *Id.* While recognizing that "[p]hysical differences between men and women" "are enduring," *id.* at 533, the Court determined that the school's sex-based admissions policy was not rooted in relevant physical differences, but in "generalizations about 'the way women are.'" *Id.* at 550. In the respects that mattered, the Court concluded, the men and women "seeking and fit for a VMI-quality education" were alike. *Id.* at 557-58. Because VMI did not treat them alike, it violated the Equal Protection Clause, and the remedy was to require women's admission. *Id.* at 547-55.

Notably, the Court used "sex" to mean "biological sex," not gender identity. Indeed, "the Court's justification for giving heightened scrutiny to sex-based classifications makes sense only with reference to physiology." *Adams v. Sch. Bd. of St. Johns Cnty.*, 3 F.4th 1299, 1334 (11th Cir. 2021) (*Adams II*) (W. Pryor, J., dissenting), *opinion vacated*, *Adams by & through Kasper v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791 (11th Cir. 2022) (en banc) (*Adams III*). The Court applies intermediate scrutiny, not strict, precisely *because* the "inherent" "[p]hysical differences between men and women" are "enduring" and the "'two sexes are not fungible.'" *Virginia*, 518 U.S. at 533. The "difference[s] between men and women" sometimes require "address[ing] the problem at hand in a manner specific to each gender." *Tuan Anh Nguyen v. I.N.S.*, 533 U.S. 53, 73 (2001). So "[t]he heightened review standard … does not make sex a proscribed classification." *Virginia*, 518 U.S. at 533.

Under this traditional framework, it is clear that maintaining separate bathrooms for boys and girls does not violate the Equal Protection Clause. The school district here, for example, has offered an exceedingly persuasive justification for its classification: protecting "the interests of students in using the restroom away from the opposite sex and in shielding their bodies from exposure to the opposite sex." D.Ct.Dkt.35 at 18; *see Adams III*, 57 F.4th at 804. And the fit between that important interest and the classification chosen cannot get any tighter. Students' privacy interests are rooted in physiology—students' *bodies*—so it makes perfect sense to draw the line based on physiology, too. *See Adams III*, 57 F.4th at 805. The Equal Protection Clause is satisfied.

2. A.C. did "not challenge" the school district's policy of "maintain[ing] sex-segregated bathrooms." App.3. Yet the Seventh Circuit still characterized A.C.'s claim as a challenge to a sex classification—a maneuver the court first performed in *Whitaker*. *See* App.21. The move went like this. First, the court invoked the school district's (biologically) sex-based bathroom policy to determine that heightened scrutiny applies. *Whitaker*, 858 F.3d at 1051 ("This policy is inherently based upon a sex-classification and heightened review applies."). Next, the court shifted the focus from the sex-based policy itself to how that policy may impact students who "fail to conform to the sex-based stereotypes associated with their assigned sex at birth" and identify as transgender; "[t]hese students," the court said, "are disciplined … if they choose to use a bathroom that conforms to their gender identity." *Id.* Essentially, the court reframed the question from "whether excluding students of one sex from the bathroom of the other sex substantially advances the schools' privacy objectives" to "whether excluding transgender students from the bathroom of their choice furthers important privacy objectives." *Adams II*, 3 F.4th at 1332 (W. Pryor, J., dissenting). Last, the court sought to answer its newfound question by applying heightened scrutiny and, thus stacked, ruled that it fails. *Whitaker*, 858 F.3d at 1054; App.21-App.22.

This is error on many fronts. To start, the court's language about "sex-based stereotypes" is a red herring. The school district does not admit students to the girls' restroom based on whether they "walk more femininely, talk more femininely, dress more femininely, wear make-up, have [their] hair styled, [or]

wear jewelry." *Price Waterhouse v. Hopkins*, 490 U.S. 228, 235 (1989) (plurality op.). Rather, "[t]he bathroom policy separates bathrooms based on biological sex, which is not a stereotype." *Adams III*, 57 F.4th at 809; *see Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (noting that stereotypes are not "immutable characteristic[s] determined solely by the accident of birth").

The court's disguised foray into disparate impact fares no better. In a disparate-impact challenge, the first step is to ask whether a law impacts "men and women" differently. *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 274-75 (1979). But the Seventh Circuit did not identify any way in which having separate boys' and girls' bathrooms somehow advantages "men over women" (or women over men). It did not cite any evidence that, say, girls' bathrooms are more luxurious than boys'. Instead, the court complained about the impact of the school district's policy on transgender students, who can be "of either sex." *Id.* at 280.

That the Seventh Circuit objected to a policy that impacts boys and girls equally reveals that this case is not about alleged sex discrimination. This case is about alleged transgender discrimination. But this Court has never recognized transgender status as a protected characteristic or, in the equal-protection context, equated transgender status with sex. The Court treats sex as an "immutable," *Frontiero*, 411 U.S. at 686, "enduring," and biologically rooted characteristic, *Virginia*, 518 U.S. at 533. By equating a disparate impact on transgender students with a disparate impact on the sexes, the Seventh Circuit attempted to end-run the "high" bar for "recognizing a

new suspect class." *L.W. by & through Williams v. Skrmetti*, 83 F.4th 460, 486 (6th Cir. 2023).

Even setting aside the Seventh Circuit's initial blunder, its disparate-impact theory fails. "[P]urposeful discrimination"—not disparate impact alone—"is the condition that offends the Constitution." *Feeney*, 442 U.S. at 274 (quotation marks and citation omitted); *see, e.g.*, *Geduldig v. Aiello*, 417 U.S. 484 (1974) (state insurance policy excluding pregnancy coverage—disparately impacting women—did not classify based on sex). "Purposeful discrimination" means "more than" "intent as awareness of consequences" and "implies that the decisionmaker … selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Feeney*, 442 U.S. at 274, 279.

The school board's decision to segregate bathrooms based on sex is a far cry from any blatantly discriminatory action. Sex-separated bathrooms were not "devised" with the "goal of keeping women," men, or even transgender students "in a stereotypic and predefined place." *Id.* Rather, "throughout American history," bathrooms have been segregated by sex to protect "privacy." *Adams III*, 57 F.4th at 805. Even the Seventh Circuit did not dispute that legitimate reasons underlie sex-separated bathrooms. It merely stated that creating an exception to an otherwise legitimate bathroom policy and allowing A.C. to use a "bathroom stall" wouldn't "threaten[] student privacy." App.22. The Seventh Circuit erred by granting relief based on disparate impact.

3. There is another problem with the Seventh Circuit's resort to intermediate scrutiny: A.C.'s claim is really an underinclusiveness challenge.

Return to *Virginia*. There, the government challenged VMI's discriminatory practice of admitting men but not women. *Virginia*, 518 U.S. at 519. The claim was not that VMI was wrongly classifying which of its applicants were men and which were women, but that the whole system of accepting men and rejecting women was unlawful discrimination. *Id.* at 523. It was *that* sex-based segregation the government challenged and this Court dismantled. *Id.* at 547-55. Here, by contrast, "A.C. does not challenge" the school's practice of "maintain[ing] sex-segregated bathrooms." App.3. A.C. instead takes issue with the school district's understanding of male and female, contending that the district must segregate bathrooms based on gender identity instead of sex. *Virginia* this case isn't.

As a result, rational-basis review applies. That is because, while "[s]eparating bathrooms by sex treats people differently on the basis of sex," "the mere act of determining an individual's sex, using the same rubric for both sexes, does not treat anyone differently on the basis of sex." *Adams II*, 3 F.4th at 1325-26 (W. Pryor, J., dissenting). In other words, where, as here, the decision to segregate by sex has already survived heightened scrutiny and the plaintiff merely challenges the State's understanding of sex itself, there is no further "implication of any constitutionally protected fundamental right (or suspect classification)," thus making "heightened scrutiny … indisputably inappropriate." *Ill. Health Care Ass'n v. Ill. Dep't of Pub.*

Health, 879 F.2d 286, 288 n.4 (7th Cir. 1989). The contours of the school district's otherwise lawful sex segregation require only a rational basis.

Other precedent underscores the importance of this distinction. For example, in *Jana-Rock Construction, Inc. v. N.Y. Department of Economic Development*, 438 F.3d 195 (2d Cir. 2006), the Second Circuit considered a challenge to the administration of New York's affirmative-action program that gave minority-owned businesses preferential treatment. The plaintiff, Rocco Luiere, did not "challenge the constitutional propriety of New York's race-based affirmative action program." *Id.* at 200. He challenged only New York's "definition" of Hispanic and decision not to treat him—"the son of a Spanish mother whose parents were born in Spain"—as Hispanic. *Id.* at 199-200. In rejecting Luiere's claim, the Second Circuit explained that the "purpose" of strict scrutiny is "to ensure that the government's choice to use racial classifications is justified, not to ensure that the contours of the specific racial classification that the government chooses to use are in every particular correct." *Id.* at 210. Challenging the race-based regime would trigger heightened scrutiny, but seeking to extend it did not.

Consider also the case of Ralph Taylor. Taylor "received results from a genetic ancestry test that estimated that he was 90% European, 6% Indigenous American, and 4% Sub-Saharan African." *Orion Ins. Grp. v. Wash State Off. of Minority & Women's Bus. Enter.*, 2017 WL 3387344, at *2 (W.D. Wash. Aug. 7, 2017). He took these results to mean that "he had Black ancestry." *Id.* Taylor then classified himself as

"Black" and applied for special benefits under State and federal affirmative-action programs—and then filed suit when his applications were denied. *Id.* at *2-3. The court summarily dispatched with Taylor's claim, explaining that accepting Taylor's expansive definition of "Black" would "strip the provision of all exclusionary meaning." *Id.* at *11. Notably, rather than apply heightened scrutiny and force the State to justify its definition of "Black," the court recognized the definition's rational basis and rejected Taylor's claim accordingly. *Id.* at *13

By challenging the lawfulness of a classification's definitional contours rather than the lawfulness of the classification itself, A.C. follows the same path as Rocco Luiere and Ralph Taylor. A.C. endorses sex-segregated bathrooms and challenges only the district's determination of "who counts as a 'boy' for the boys' rooms, and who counts as a 'girl' for the girls' rooms." App.15. But the "purpose" of heightened scrutiny "is to ensure that the government's choice to use [protected] classifications is justified," not to police the classifications' "contours." *Jana-Rock*, 438 F.3d at 210. Schools and courts after all must have some definition of "sex" to have a meaningful discussion about what triggers heighted scrutiny. So the "contours" attendant to the school board's definition of sex warrant only rational-basis review.

B. Title IX cannot require States to redefine "sex" as "gender identity" without saying so unambiguously

The Seventh Circuit's Title IX holding was also wrong, for all the reasons the Petition states and more. *See* Pet.19-28; *Adams III*, 57 F.4th 811-17;

Grimm, 972 F.3d at 632-35 (Niemeyer, J., dissenting). Here, *amici* States focus on one error that particularly affects them: the Seventh Circuit's complete abdication of its duty to enforce the Constitution's Spending Clause.

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). This Court has recognized that, "if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously." *Id.* There can "be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it." *Id.*; *see Cummings v. Premier Rehab Keller*, 596 U.S. 212, 519 (2022); *South Dakota v. Dole*, 483 U.S. 203, 206-07 (1987). Only unambiguous clarity keeps Spending Clause legislation from undermining States' status as "independent sovereigns." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 576-77 (2012) (opinion of Roberts, C.J., joined by Breyer and Kagan, JJ.).

Suffice it to say, Congress did not put States on clear, unambiguous notice in 1972 that Title IX would force them to use "gender identity" rather than biological sex to segregate their bathrooms—and their "living facilities," 20 U.S.C. §1686, and their locker rooms, and their shower facilities, 34 C.F.R. §106.33. When Title IX was enacted in 1972, "virtually every

dictionary definition of 'sex' referred to the *physiological* distinctions between males and females." *Grimm*, 972 F.3d at 632 (Niemeyer, J., dissenting). And even if "[d]ictionary definitions" were "inconclusive" as the Seventh Circuit supposed, App.15, that would not mean that state and local governments were *clearly* on notice they must define "sex" as "gender identity."

The Seventh Circuit's decision to turn a purported ambiguity into a federal mandate reverses how the analysis of Spending Clause statues should go. For Spending Clause legislation, where two interpretations are possible, the tie goes to the States. *See Pennhurst*, 451 U.S. at 24. The onus is on whoever challenges the traditional practice of segregating school bathrooms by sex, biologically defined, that state and local governments were on notice they would have to alter their unbroken practice in accepting federal funds. The Seventh Circuit's decision to rewrite "sex" in Title IX to mean "gender identity" not only "offend[s] first principles of statutory interpretation and judicial restraint," *Adams III*, 57 F.4th at 817, but basic workings of our federalist system.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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