



female with access to the boys' restrooms, *Whitaker v. Kenosha Unified School District No. 1 Board of Education*, 858 F.3d 1034 (7th Cir. 2017), applied legal reasoning from case law on Title VII of the Civil Rights Act of 1964 to Title IX of the Education Amendments Act of 1972, and the Supreme Court expressly confined such reasoning to Title VII case law only in a subsequent decision, *Bostock v. Clayton County, Georgia*, 140 S. Ct. 1731 (2020). That is, recent legal precedent from the Supreme Court suggests the scope of Title IX and the claims asserted by A.C. in this lawsuit should be considered on briefing and legal arguments different than those that a panel of this Court relied upon in deciding *Whitaker*, begging the question of whether *Whitaker* was correctly decided and/or whether it controls this case. The Court should consider these arguments *en banc* to provide necessary clarity and guidance to legal questions of exceptional importance to the parties in this lawsuit and the district courts in this Circuit.

### **Argument**

This petition is timely, as Appellee's brief is due the same date as the filing of this petition. *See* Fed. R. App. P. 35(c). Moreover, this appeal should be heard *en banc*, as it involves legal issues of exceptional importance. Fed. R. App. P. 35(b)(1)(B). It is proceeding at a time when the legal questions underlying it are the subject of administrative action and litigation in courts throughout the United States in the wake of the *Bostock* decision, creating uncertainty in the law.

As summarized by a recent decision out of a federal district court in Tennessee (which entered an injunction affecting 20 states), in *Bostock*, the

Supreme Court resolved a discrete legal issue pertaining to Title VII, and “[t]he Court was careful to narrow the scope of its holding” to the specific context in front of it. *Tennessee v. United States Dep’t of Educ.*, No. 3:21-CV-308, 2022 WL 2791450, at \*1 (E.D. Tenn. July 15, 2022). Nevertheless, on “January 20, 2021, the President of the United States signed an ‘Executive Order on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation.’ Exec. Order. No. 13988, 86 Fed. Reg. 7023-25 (Jan. 20, 2021),” setting forth the Administration’s interpretation of “laws that prohibit sex discrimination” in light of *Bostock* and directing federal agencies to implement statutes that prohibit sex discrimination consistent with that interpretation. *Id.* at \*2. The Administration’s interpretation included prohibitions on discrimination on the bases of gender identity and sexual orientation. *Id.*

On June 22, 2021, the United States Department of Education (“DOE”) published an “Interpretation” of Title IX, which took effect upon publication and represented a change in the DOE’s position regarding the scope of Title IX. *Id.* Subsequent actions by the DOE reiterated its new position on the scope of Title IX, which tracked the Administration’s interpretation as set forth in the President’s Executive Order. *Id.*

Several states, including Indiana, filed a complaint seeking preliminary injunctive relief and challenging the legality of the guidance documents issued by the DOE (among other federal agency actions taken in response to the President’s Executive Order). *Id.* In finding the plaintiff states had a likelihood of succeeding on

the merits, the district court explained, that the DOE guidance overlooked the express limiting language of *Bostock* and sought to expand the footprint of Title IX’s “on the basis of sex” language, making such guidance “legislative rules” subject to certain procedural requirements that were not followed. *Id.* at \*21. Notably, in reaching this decision, the district court also found merit to the States’ argument that the guidance “squarely conflicts with both Title IX itself and its implementing regulations, which expressly permit sex-separated living facilities and athletic teams.” *Id.*

That is precisely an argument advanced by the School District in this lawsuit, and it is an argument that was not addressed in the *Whitaker* decision. Instead, in *Whitaker*, a panel of this Court looked to Title VII when construing Title IX, and found that a student who identified as a transgender male could bring a sex discrimination claim based on a sex-stereotyping theory under *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). The Court opined: “A policy that requires an individual to use a bathroom that does not conform with his or her gender identity punishes that individual for his or her gender non-conformance, which in turn violates Title IX.” *Whitaker*, 858 F.3d at 1049.

In short, *Whitaker* overlooked that “Title VII . . . is a vastly different statute from Title IX[.]” *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 175 (2005). *Bostock* and more recent legal developments make that clear. On one hand, “Title VII’s message is ‘simple but momentous’: An individual employee’s sex is ‘not relevant to the selection, evaluation, or compensation of employees.’” *Bostock*, 140

S. Ct. at 1741 (quoting *Price Waterhouse*, 490 U.S. at 239). On the other hand, “Title VII differs from Title IX in important respects: For example, under Title IX, universities must consider sex in allocating athletic scholarships, 34 C.F.R. § 106.37(c), and may take it into account in ‘maintaining separate living facilities for the different sexes. 20 U.S.C. § 1686.’ *Meriwether v. Hartop*, 992 F.3d 492, 510 n.4 (6th Cir. 2021). “Thus, it does not follow that principles announced in the Title VII context automatically apply in the Title IX context.” *Id.*

Indeed, Title IX’s allowance for separate living facilities based upon sex necessarily requires distinctions that are relevant to the argument advanced in this case: biological females use the girls’ restrooms; and biological males use the boys’ restrooms. These distinctions are “on the basis of sex,” and are, by definition, “discrimination.” See Black’s Law Dictionary (defining “discrimination” as “[t]he intellectual faculty of noting differences and similarities”). Such distinctions, however, are not unlawful—Title IX expressly allows for them with regard to living facilities. Otherwise, the permission in 20 U.S.C. § 1686 to have separate living facilities for the different sexes is a nullity. See *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1224-25 (10th Cir. 2007) (*Price Waterhouse* does not require “employers to allow biological males to use women’s restrooms. Use of a restroom designated for the opposite sex does not constitute a mere failure to conform to sex stereotypes.”), *overruled on other grounds by Bostock*, 140 S. Ct. 1731; *Chaney v. Plainfield Healthcare Ctr.*, 612 F.3d 908, 913 (7th Cir. 2010) (“[T]he law tolerates same-sex restrooms or same-sex dressing rooms . . . to accommodate privacy needs”); *see also*

*Goins v. W. Grp.*, 635 N.W.2d 717, 720 (Minn. 2001) (“an employer’s designation of employee restroom use based on biological gender is not sexual orientation discrimination”).

*Whitaker* did not address this aspect of Title IX. Any mention of Section 1686 and its express permission to provide separate living facilities is missing. And, while *Whitaker* mentioned 34 C.F.R. § 106.33, it omitted the five key words (“on the basis of sex”) from its summary of that regulation. *See* 858 F.3d at 1047. Indeed, *Whitaker* failed to consider the logical impact of its decision on Title IX as it relates to other private living spaces and as it relates to other permitted distinctions allowed by Title IX and its implementing regulations. Logically, if “[a] policy that requires an individual to use a bathroom that does not conform with his or her gender identity punishes that individual for his or her gender non-conformance” in violation of Title IX, *see* 858 F.3d at 1049, then so do rules that allow institutions to “provide separate housing on the basis of sex,” 34 C.F.R. § 106.32, provide separate locker rooms and shower facilities “on the basis of sex,” 34 C.F.R. § 106.33, provide “separation of students by sex” within physical education classes during contact sports, 34 C.F.R. § 106.34, provide separate classes relating to human sexuality “in separate sessions for boys and girls,” *id.*, provide opportunities for athletic scholarships based upon sex, 34 C.F.R. § 106.37(c), and allow for separate teams for members of each sex where selection is based upon competitive skill or involve contact sports. 34 C.F.R. § 106.41(b). This Court has previously held that the provision of separate sports teams on the basis of sex is “not at odds with the

purpose of Title IX.” *Kelley v. Bd. of Trustees*, 35 F.3d 265, 270 (7th Cir. 1994). Yet *Whitaker* offers no help in understanding how these “on the basis of sex” distinctions would not amount to unlawful discrimination under the sex stereotyping framework borrowed from Title VII, nor does it consider the impact that its ruling may have on other aspects of Title IX, including athletics and privacy concerns in other living spaces (like locker rooms and showers).

In short, *Whitaker’s* rush to weld a Title VII sex stereotyping framework onto a Title IX restroom access issue is contrasted by the Supreme Court’s subsequent declination to do so in *Bostock*, which the federal district court in Tennessee recognized. These recent developments in the law underscore the exceptional importance of these legal issues, as does the President’s Executive Order, the DOE guidance, and ongoing legal disputes in other jurisdictions on the same issues. *See Adams v. Sch. Bd. of St. Johns Cnty.*, 3 F.4th 1299 (11th Cir.), *vacated and rehearing en banc granted*, 9 F.4th 1369 (11th Cir. 2021). This Court should grant this Petition for Hearing *En Banc* to clarify this area of the law and address in the first instance whether *Whitaker* was correctly decided and whether it is controlling on this case and others like it in this Circuit.

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE**

I hereby certify that this petition conforms to Fed. R. App. P. 32 and 35 and Circuit Rule 32.

1. This brief complies with the type-volume limitations set forth in Federal Rules of Appellate Procedure 32(g)(1) and 35(b)(2)(A) because it contains 1,732 words based on the “Word Count” feature of Microsoft Word.

2. This brief complies with the typeface and type style requirements set forth in Circuit Rule 32 because the brief has been prepared in a proportionally-spaced typeface using Microsoft Word in 12-point Century font.

Dated: July 27, 2022

*Philip R. Zimmerly*

Philip R. Zimmerly

**CERTIFICATE OF SERVICE**

I hereby certify that on July 27, 2022, a copy of the foregoing “Appellants’ Petition for Hearing En Banc” was filed electronically. Notice of this filing will be sent to the following parties by operation of the Court’s electronic filing system. Parties may access this filing through the Court’s CM/ECF system.

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