UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

JANE DOE, a minor, by her parents and next friends, JOHN DOE and JILL DOE,

Plaintiff,

Case No. 2:24-CV-354

v.

ELKHORN AREA SCHOOL DISTRICT; JASON TADLOCK, in his individual capacity; and RYAN MCBURNEY, in his individual capacity

Defendants

PROPOSED AMICUS BRIEF OF THE EMPOWERED COMMUNITY COALITION, UA, IN SUPPORT OF DEFENDANTS

Title IX explicitly permits sex-separated bathrooms and locker rooms. 34 C.F.R. § 106.33 ("A recipient may provide separate toilet, locker room, and shower facilities on the basis of sex."). Separate bathrooms have been the norm and societal expectation for centuries, and the rationale used to be obvious to all—to allow bodily privacy from members of the opposite sex. Yet the Plaintiff in this case, a biological boy, seeks an order from this Court requiring the District to ignore his sex and allow him to use female bathrooms and locker rooms solely because his self-declared gender identity is female, a ruling that would obviously affect more than just him. Amicus Empowered Community Coalition is an association of 105 parents of students in the District who wish to protect their children's bodily privacy while in the District's intimate facilities, and who oppose this radical transformation of both Title IX and

the long-standing societal norm of separate bathrooms. Granting an injunction will harm all of the Coalition's members and their children, and is unnecessary because, as Doe admits, he has access to "several" (at least "five") gender-neutral restrooms in the school. Complaint ¶¶ 102, 109.

This Court should not only deny the preliminary injunction, it should also stay this case pending the resolution of the litigation over the Department of Education's new Title IX rule. The result of that litigation will resolve the bathroom issue once-and-for-all nationwide, including in this case.

INTEREST OF AMICUS

The Empowered Community Coalition, UA, is an unincorporated association of 105 parents with children in the Elkhorn Area School District. S.P. Decl. ¶ 2. The members formed the Association specifically to support the school district's policy to separate bathrooms and locker rooms based on biological sex. *Id.* at ¶ 3. Indeed, each member signed a membership letter explaining that "[t]he Association's mission is to preserve safety and privacy for children in public school districts in Wisconsin by, among other things, participating in litigation to ensure that multi-use bathrooms and locker rooms in school districts remain separated by biological sex." *Id.* at ¶ 4.

Many of the Association's members have girls in the Elkhorn Area Middle School, where Doe currently attends and will be attending in the fall. T.S. Decl. ¶ 2; K.W. Decl. ¶ 2; B.P. Decl. ¶ 3; T.J. Decl. ¶ 2; Compl. ¶¶ 21–22. These young girls and their parents are both deeply concerned about their safety and privacy if they are forced to share bathrooms and locker rooms with members of the opposite biological

sex. T.S. Decl. ¶¶ 3, 5; K.W. Decl. ¶¶ 3, 5; B.P. Decl. ¶¶ 4–5; T.J. Decl. ¶¶ 3–4. The thought of having to share facilities with students of the opposite sex makes them very uncomfortable and even afraid. T.S. Decl. ¶¶ 3, 6; K.W. Decl. ¶¶ 3, 7; B.P. Decl. ¶¶ 4, 6; T.J. Decl. ¶¶ 3, 5. For instance, the middle school daughter of one member has expressed that she will not change clothes with a biological boy in the same room. K.W. Decl. ¶ 3. Another will not go to the bathroom or locker room without a friend for fear of being alone with a biological boy in a bathroom or locker room. B.P. Decl. ¶ 4. Others are afraid for their safety and privacy. T.S. Decl. ¶ 3; D.G. Decl. ¶ 4. Multiple of the Association's members either intend to, or are seriously considering, withdrawing their children from the school district if the end result of this lawsuit is that students who claim a transgender identity must be permitted to use whatever bathrooms and locker rooms they associate with. T.S. Decl. ¶ 7; K.W. Decl. ¶ 8; B.P. Decl. ¶ 7; D.G. Decl. 10; S.P. Decl. ¶ 12.

Even though the school year is about to conclude, these concerns will not be alleviated. The Elkhorn Area School District holds a Summer Academy for students in grades kindergarten through 8. K.W. Decl. ¶ 6; S.P. Decl. ¶ 8. It will be held at the middle school, where Jane Doe attends. *Id.* At least two of the Association's members have elementary school-aged daughters who will participate in Summer Academy. *Id.* The girls change into their swimsuits in the girls' bathroom at the middle school before they get on a swim shuttle bus. K.W. Decl. ¶ 6. These members intend to withdraw their children from Summer Academy if the girls are forced to share bathrooms and locker rooms with biological boys. K.W. Decl. ¶ 6; S.P. Decl. ¶ 8.

In addition to Summer Academy, at least one member has daughters who have participated in swimming classes held at the Elkhorn Area High School. S.P. Decl. ¶ 9. Classes are based on skill level rather than age. *Id.* For example, this member has a third-grade girl who is in a level four swim class and attends class with middle school students. *Id.* This member is concerned about his daughters' safety and privacy if the girls are forced to share bathrooms and swimming locker rooms with biological boys of any age. *Id.* This member intends to withdraw his children from swimming classes if the girls are forced to share bathrooms and locker rooms with students of the opposite biological sex. *Id.*

One of the Association's members has a middle school student who is autistic, and the concept of students using the bathrooms and locker rooms associated with the opposite biological sex is confusing to that student. D.G. Decl. ¶ 6. The student has expressed to his parent that he is worried about students of the opposite sex looking at him while he is in a bathroom or locker room. *Id.*, ¶ 7. This parent is concerned about the safety and privacy of his child. *Id.*, ¶ 8.

Students have also either already been subject to embarrassment by peers or they fear that students will question any opposition to changing in the same room as a student of the opposite biological sex. S.P. Decl. ¶ 11; K.W. Decl. ¶ 3. For instance, when one middle school boy questioned Jane Doe's use of the girls' bathrooms, he was subjected to substantial embarrassment. His parent viewed this as both an emotional and safety issue for him. S.P. Decl. ¶ 11. One middle school girl told her parent that she will not change clothes with a boy in the same room. She would plan to use a

separate room to change, but she has expressed concern that girls might ask her why she is leaving the locker room to change. K.W. Decl. ¶ 3.

ARGUMENT

I. Title IX Explicitly Condones Sex-Separated Bathrooms. *Whitaker* and *Martinsville* Are Distinguishable.

The current Title IX regulations expressly allow school districts to "provide separate toilet, locker room, and shower facilities *on the basis of sex*." 34 C.F.R. § 106.33 (emphasis added).[1] The statute itself also contains an explicit carve-out for "living facilities" that reflects the important privacy interests discussed further below: "[N]othing contained herein shall be construed to prohibit any educational institution receiving funds under this Act, from maintaining separate living facilities for the different sexes." 20 U.S.C. § 1686. At the time these provisions were adopted, the word "sex" undisputedly referred to "biological sex." Indeed, "the overwhelming majority of dictionaries" at the time "defin[ed] 'sex' on the basis of biology and reproductive function." *Adams by & through Kasper v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 812 (11th Cir. 2022) (listing the definitions from various dictionaries).

In light of that plain text, this should be an easy, open-and-close case. Plaintiff's argument is that Title IX *prohibits* what it explicitly *permits*—separating bathrooms by biological sex. Such arguments ordinarily do not get very far. The Seventh Circuit, however, has now twice ruled in favor of plaintiffs in similar cases.

[1] The Department of Education's new Title IX regulation is addressed in Part III, *infra*.

Whitaker By Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ., 858 F.3d 1034 (7th Cir. 2017); *A.C. by M.C. v. Metro. Sch. Dist. of Martinsville*, 75 F.4th 760 (7th Cir. 2023). If these cases stand for the proposition that school districts must allow any student who asserts a transgender identity to use whatever bathroom they associate with, regardless of the facts on the ground, the world is truly upside down. Title IX has been re-written and turned on its head, entirely by judicial fiat. This Court should not interpret those cases so broadly.

Both decisions came in a preliminary posture (an appeal from a preliminary injunction) and the Court relied, in part, on the lack of "evidence of how [a] preliminary injunction [would] harm [the District], or any of its students or parents." *Whitaker*, 858 F.3d at 1039; *A.C.*, 75 F.4th at 772 (concluding that privacy concerns "appear[ ] entirely conjectural" because "[n]o [other] students complained."). This Court should take the Seventh Circuit at its word that this was relevant to its holdings. Amicus submits this brief in part to show that privacy concerns are not "entirely conjectural," but are very real and significant concern for many parents and students in the District.

This Court should distinguish *Whitaker* and *Martinsville* on this basis and deny the preliminary injunction.[2]

[2] The Coalition also submits that the Seventh Circuit's decisions are, quite obviously, wrong on the law. The Eleventh Circuit, en banc, has rejected the Seventh Circuit's legal reasoning, as have multiple other judges around the country. *Adams*, 57 F.4th 791; *A.C.*, 75 F.4th at 775 (Easterbrook, J., concurring); *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 627–37 (4th Cir. 2020) (Niemeyer, J., dissenting). The Coalition recognizes that this Court

II. An Injunction Will Harm Most Other Students in the District, While There Are Reasonable Alternative Options for Doe

"[C]ourts have long found a privacy interest in shielding one's body from the opposite sex in a variety of legal contexts." *Adams*, 57 F.4th at 805 (listing cases); *Canedy v. Boardman*, 16 F.3d 183, 185 (7th Cir. 1994) ("The right to privacy is now firmly ensconced among the individual liberties protected by our Constitution.").

Courts have recognized a right to privacy both as to one's unclothed body and as to one's "*partially* clothed body." *See*, *e.g.*, *Doe v. Luzerne Cnty.*, 660 F.3d 169, 176 (3d Cir. 2011) (listing cases); *Poe v. Leonard*, 282 F.3d 123, 138 (2d Cir. 2002) ("[T]here is a right to privacy in one's unclothed or partially unclothed body."). And this privacy right applies, especially, to protect one's body from view by members of *the opposite sex*. *See*, *e.g.*, *Luzerne Cnty.*, 660 F.3d at 177 (finding a "reasonable expectation of privacy … *particularly while in the presence of members of the opposite sex*.") (emphasis added); *Brannum v. Overton Cnty. Sch. Bd.*, 516 F.3d 489, 494 (6th Cir. 2008) (the "right to privacy [ ] includes the right to shield one's body from exposure to viewing by the opposite sex.").

This privacy interest is even more "heightened" when children and adolescents are involved, because their bodies "are still developing, both emotionally and physically," *Adams*, 57 F.4th at 804 (quoting *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 636 (4th Cir. 2020) (Niemeyer, J., dissenting)), and because children and

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cannot ignore or overrule the Seventh Circuit, so, if this Court concludes those cases are not distinguishable and that the facts on the ground do not matter, then it of course must follow them. But the Coalition raises this point here to preserve it for appeal.

adolescents tend to be "extremely self-conscious about their bodies," *Cornfield by Lewis v. Consol. High Sch. Dist. No. 230*, 991 F.2d 1316, 1323 (7th Cir. 1993); *see also Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 375 (2009) ("adolescent vulnerability intensifies the patent intrusiveness of the exposure").

Indeed, this right to privacy is the very reason that "sex-separated bathrooms ha[ve] been widely recognized throughout American history and jurisprudence," *Adams*, 57 F.4th at 805, and why Title IX, itself, specifically permits sex-segregated bathrooms, 34 C.F.R. § 106.33. It is why the Supreme Court observed in *United States v. Virginia* that "[a]dmitting women to VMI would undoubtedly require alterations necessary to afford members of each sex privacy from the other sex in living arrangements." 518 U.S. 515, 551 (1996). And it is why even Justice Ginsburg wrote that "[s]eparate places to disrobe, sleep, perform personal bodily functions are permitted, in some situations required, by regard for individual privacy. Ruth Bader Ginsburg, *The Fear of the Equal Rights Amendment*, Washington Post (April 7, 1975).[3] As one scholar put it, "sex-separation in bathrooms dates back to ancient times, and, in the United States, preceded the nation's founding," and the "key purpose … was to protect women and girls from sexual harassment and sexual assault in the workplace and other venues." W. Burlette Carter, *Sexism in the "Bathroom Debates": How Bathrooms Really Became Separated by Sex*, 37 Yale L. & Pol'y Rev. 227, 230 (2018). In short, "the law tolerates same-sex restrooms or same-

[3] Available at https://www.washingtonpost.com/news/volokh-conspiracy/wp-content/uploads/sites/14/2016/05/ginsburg.jpg?itid=lk_inline_manual_3

sex dressing rooms … to accommodate privacy needs." *Chaney v. Plainfield Healthcare Ctr.*, 612 F.3d 908, 913 (7th Cir. 2010).

Amicus represents a coalition of 105 parents with children in the District who are all deeply concerned about their children's privacy and safety if students of the opposite biological sex who assert a transgender identity are permitted to use whatever bathroom and locker room they associate with. T.S. Decl. ¶¶ 3, 5; K.W. Decl. ¶¶ 3, 5; B.P. Decl. ¶¶ 4–5; T.J. Decl. ¶¶ 3–4; D.G. Decl. ¶¶ 4, 7-8; S.P. Decl. ¶¶ 2, 6. Many of their children have expressed anxiety or fear about using the bathroom if a student of the opposite sex could be present or come into the bathroom while they are using it. T.S. Decl. ¶ 3; K.W. Decl. ¶ 3; B.P. Decl. ¶ 4; T.J. Decl. ¶ 3; D.G. Decl. ¶¶ 4. 7. And many families intend to or are seriously considering withdrawing their children from the school district to protect their safety and privacy if the result of this lawsuit is that the District is required to allow students who assert a transgender identity to use whatever bathroom they want. T.S. Decl. ¶ 7; K.W. Decl. ¶ 8; B.P. Decl. ¶ 7; D.G. Decl. ¶ 10; S.P. Decl. ¶ 12.

Granting an injunction will harm all of these students, and their parents, by eliminating their safety and privacy from members of the opposite sex that they rightly expect when they use the bathroom at school. Moreover, an injunction will force every other student into a Hobson's choice between two rights: their right to a free, public education, as protected by Wisconsin's constitution, Wis. Const. art. 10, § 3, and their right to bodily privacy from members of the opposite sex. If this Court

grants Doe's preliminary injunction motion, every other student in the middle school will have to give up one of those rights.

And, of course, unless this Court's decision is limited to the facts of Plaintiff in some way,[4] it will also require the District to allow every other student who asserts a transgender identity to use whatever bathroom they associate with—affecting not only middle school students, but also elementary students and high school students as well. This Court should not allow the desires of one student to trump the rights and privacy interests of the rest.

To be clear, transgender students, like Doe, of course need a reasonable option at school to use the bathroom. But the District has offered Doe gender-neutral alternatives if he is not comfortable using the boys' bathroom, as even the Complaint acknowledges. Complaint ¶¶ 61, 70, 80, 85–86, 99, 109. And Doe has access to not just one, but "*five* gender-neutral restrooms," according to the Complaint. *Id.* ¶ 102. The fact that Doe has to "travel [a little] further" to use the bathroom, *id.* ¶ 103, simply does not compare to eliminating every other student's expectation of privacy from members of the opposite sex while they use the bathroom.

[4] It is untenable to take this issue on a case-by-case, student-by-student basis. School districts cannot reasonably allow some, but not all, transgender students to use whatever bathrooms they want. It would also encumber the court system if every transgender student had to litigate the issue. As a practical matter, this is an all-or-nothing issue. Either bathrooms can be sex-separated, or every student who asserts a transgender identity must be permitted to use whatever bathroom they want; in which case sex-separated bathrooms will cease to exist.

III. This Court Should Stay This Case Pending Resolution of the Ongoing Litigation Over the New Title IX Rule.

In addition to denying the preliminary injunction motion, this Court should also stay this case pending resolution of the litigation over the new Title IX rule, which will almost certainly resolve this case one way or the other.

While the current Title IX regulations explicitly permit sex-separated bathrooms, 34 C.F.R. § 106.33, the Department of Education recently published a new final rule that is set to go into effect on August 1, 2024. *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 89 Fed. Reg. 33,474 (April 29, 2024). That new rule, *if* it goes into effect, will substantially change the rules relevant to this case, albeit in a convoluted way. The new rule does not alter § 106.33, but amends § 106.31(a) to provide that "[i]n the limited circumstances in which Title IX or this part permits different treatment or separation on the basis of sex, a recipient must not carry out such different treatment or separation in a manner that discriminates on the basis of sex by subjecting a person to more than de minimis harm." *Id*. at 33,887. The new regulation further provides that any policy or practice that "prevents a person from participating in an education program or activity consistent with the person's gender identity subjects a person to more than de minimis harm on the basis of sex." *Id*. There are exceptions, but the bathroom rule (§ 106.33) is not among them. *Id*. The preamble explains that the Department interprets these provisions as requiring schools to allow transgender students to use whatever facilities they identify with. *Id*. at 33,817–33,821.

The new rule, however, has already been challenged by 26 states[5] and 34 other parties in at least 8 separate lawsuits.[6] The plaintiffs in 6 of these cases have filed preliminary injunction motions, many of which will be heard this summer on an expedited schedule.[7] Many, if not all of these cases, focus on the change to the bathroom rule, and ask the courts to enjoin implementation of the new rule and/or delay its effective date.[8] If any of the courts stay the new rule or enjoin its implementation, that will obviously be directly relevant to this case.

Furthermore, whichever way the lower courts rule, the issue is very likely headed to the Supreme Court—and relatively quickly—given the nationwide significance of the issue and the flood of litigation over the new rule. When the issue

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[5] Alabama, Alaska, Arkansas, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, West Virgnia, and Wyoming

[6] *Louisiana v. U.S. Dep't of Educ.*, No. 3:24-cv-563 (W.D. La., filed Apr. 29, 2024); *Alabama v. Cardona*, No. 7:24-cv-533 (N.D. Ala., filed Apr. 29, 2024); *Kansas v. U.S. Dep't of Educ.*, No. 5:24-cv-4041 (D. Kan., filed May 14, 2024); *Tennessee v. Cardona*, No. 2:24-cv-72 (E.D. Ky., filed Apr. 30, 2024); *Texas v. United States*, No. 2:24-cv-86 (N.D. Tex., filed April 29, 2024); *Arkansas v. U.S. Dep't of Educ.*, No. 4:24-cv-636 (E.D. Mo., filed May 7, 2024); *Oklahoma v. Cardona*, No. 5:24-cv-461 (W.D. Okla., filed May 6, 2024); *Oklahoma State Dep't of Educ. v. United States*, No. 5:24-cv-459 (W.D. Okla., filed May 6, 2024).

[7] *See* the dockets in the cases listed in *supra* n.6. For example, in *Tennessee v. Cardona*, No. 2:24-cv-72 (E.D. Ky.), the preliminary injunction motion is scheduled for a hearing on June 10 (*see* Dkt. 49). And in *Alabama v. Cardona*, No. 7:24-cv-533 (N.D. Ala.), the preliminary injunction hearing is set for July 1 (*see* Dkt. 20).

[8] *E.g.*, Motion for a § 704 Stay and Preliminary Injunction, Dkt. 19, *Tennessee v. Cardona*, No. 2:24-cv-72 (E.D. Ky., filed May 3, 2024); Motion for a Postponement or Stay under 5 U.S.C. § 705 or Preliminary Injunction, Dkt. 17, *Louisiana v. U.S. Dep't of Educ.*, No. 3:24-cv-563 (W.D. La., filed May 13, 2024); Motion for Stay of Effective Date or Preliminary Injunction, *Alabama v. Cardona*, No. 7:24-cv-533 (N.D. Ala., filed May 8, 2024).

reaches the Supreme Court, it will resolve the bathroom issue once and for all in either direction. If the Court holds that the new rule is invalid and inconsistent with the text of Title IX—as it is—it will abrogate both *Whitaker* and *Martinsville*. Alternatively, if it upholds the new rule, Plaintiff's position will be the law of the land.[9] Accordingly, rather than wasting more judicial resources on this issue, after this Court decides (and denies) the preliminary injunction motion, it should stay this case pending resolution of the ongoing litigation over the new Title IX rule.

Dated: June 3, 2024

Respectfully Submitted,

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[9] While it is impossible to know, this is likely the reason that the Court denied the cert. petition in the *Martinsville* case. Indeed, one of Respondents' main arguments in opposition to the petition was that the issue would be resolved by the new rule (and the litigation over it). *See* Brief in Opposition 19–23, *Metro. Sch. Dist. of Martinsville v. A.C.*, No. 23-392 (filed Dec. 19, 2023), available at https://www.supremecourt.gov/DocketPDF/23/23-392/293767/20231219162353155_44416%20pdf%20Falk%20br.pdf

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**Admission Pending*