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

Defendant

CONDITIONAL MOTION TO INTERVENE AND TO FILE *AMICUS* BRIEF

Movant Empowered Community Coalition, UA (the "Coalition"), by its undersigned attorneys, hereby moves, pursuant to Rules 7 and 24 of the Federal Rules of Civil Procedure, to intervene in the above-captioned case, but asks this Court to hold the motion to intervene in abeyance until the Coalition can demonstrate inadequate representation. In the meantime, the Coalition hereby moves to file an amicus brief in opposition to the preliminary injunction motion and seeks *amicus* status going forward in this case. This motion is supported by what follows below and the declarations submitted in conjunction with this motion. No memorandum, other than this document, is being submitted. *See* Civil L. R. 7(a)(2). The proposed amicus brief is being submitted simultaneously as an attachment to this motion. Civil L. R. 7(i).

The Coalition is an unincorporated association of parents with minor children in the Elkhorn Area School District (the "District") who have a direct interest in this action and are so situated that the disposition of the action may, as a practical matter, impair or impede their ability to protect that interest. F. R. Civ. P. 24(a)(2). Further, the representation of that interest by existing parties may become inadequate. *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Engineers*, 101 F.3d 503, 509 (7th Cir. 1996). The Coalition seeks to participate in this lawsuit so that it can provide the Court with a perspective that is currently lacking: how other children and families will be directly affected.

ARGUMENT

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 Plaintiff's 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. Movant is an association of 105 parents and 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.

I. The Coalition meets all of the requirements to intervene except inadequate representation, but that requirement may be met later. This Court should hold the motion to intervene until inadequacy can be shown, as the Seventh Circuit has directed for this situation.

A party may intervene as a matter of right when there is: (1) timely application; (2) an interest relating to the subject matter of the action; (3) potential impairment, as a practical matter, of that interest by the disposition of the action; *and* (4) lack of adequate representation of the interest by the existing parties to the action. *State v. City of Chicago*, 912 F.3d 979, 984 (7th Cir. 2019); *see also Driftless Area Land Conservancy v. Huebsch*, 969 F.3d 742, 746 (7th Cir. 2020).

As explained below, the Coalition currently meets the first three factors, but it is unclear whether the District will adequately represent its interests. If the Coalition waits to intervene until representation becomes inadequate, it risks a finding by this court that a motion to intervene is untimely. The "proper way to handle" such situations, the Seventh Circuit has explained, is to file a "standby or conditional application for leave to intervene and [to] ask the district court to defer consideration of the question of adequacy of representation until the applicant is prepared to demonstrate inadequacy." *Solid Waste Agency of N. Cook Cnty*, 101 F.3d 503 at 509.

a. The Coalition's motion is timely.

Federal Rules of Civil Procedure requires that applications to intervene be timely. F. R. Civ. P. 24(a)(2). The Seventh Circuit considers four factors: (1) the length of time the intervenor knew or should have known of his interest in the case; (2) the prejudice caused to the original parties by the delay; (3) the prejudice to the

intervenor if the motion is denied; and (4) any other unusual circumstances. *Heartwood, Inc. v. U.S. Forest Serv., Inc.*, 316 F.3d 694, 701 (7th Cir. 2003).

The complaint was filed on March 21, 2024, just a little over two months ago. On April 12, the Plaintiff filed a motion for preliminary injunction, and this Court denied a motion to expedite, giving the School District until today, June 3, 2024, to file a response. This conditional motion to intervene, and the proposed *amicus* brief in opposition to the preliminary injunction motion, is being filed on the same day as the District is required to file its response to the motion for preliminary injunction. Thus, this motion is timely with respect to that deadline. And there is no prejudice or delay to the original parties.

Courts have found motions to intervene to be timely that were filed much later than this one. *See Reich v. ABC/York-Estes Corp.*, 64 F.3d 316 (7th Cir. 1995) (motion to intervene granted nineteen months after proposed-intervenors found out about the action). Additionally, the Seventh Circuit does not "necessarily put potential intervenors on the clock at the moment the suit is filed or even at the time they learn of its existence. Rather, [it] determine[s] timeliness from the time the potential intervenors learn that their interest might be impaired." *Reich*, 64 F.3d 316 at 321. This motion is timely.

b. The Coalition's members have a direct interest in preserving their children's bodily privacy in District bathrooms and locker rooms, and that interest is threatened by this lawsuit.

"The 'interest' required by Rule 24(a)(2) has never been defined with particular precision." *Sec. Ins. Co. of Hartford v. Schipporeit, Inc.*, 69 F.3d 1377, 1380 (7th Cir.

1995). The Seventh Circuit has often said that the interest must be "direct, significant, [and] legally protectable." *E.g.*, *Bost v. Illinois State Bd. of Elections*, 75 F.4th 682, 686 (7th Cir. 2023). However, the Seventh Circuit has also "interpreted statements of the Supreme Court as encouraging liberality in the definition of an interest." *Lopez-Aguilar v. Marion Cnty. Sheriff's Dep't*, 924 F.3d 375, 392 (7th Cir. 2019). And it is "a highly fact-specific determination, making comparison to other cases of limited value." *Sec. Ins. Co. of Hartford*, 69 F.3d at 1381. Notably, the Court has emphasized that "[t]he strongest case for intervention is not where the aspirant for intervention could file an independent suit, but where the intervenor-aspirant has no claim against the defendant yet a legally protected interest that could be impaired by the suit." *Solid Waste Agency of N. Cook Cnty.*, 101 F.3d at 507.

The Coalition is an unincorporated association of 105 parents of students who attend schools in the Elkhorn Area School District, many of whom attend the middle school that Plaintiff Jane Doe attends. S.P. Decl. ¶ 2; T.S. Decl. ¶ 2; K.W. Decl. ¶ 2; B.P. Decl. ¶ 3; T.J. Decl. ¶ 2; D.G. Decl. ¶¶ 5–7; Compl. ¶¶ 21–22. It is well-established that an association can represent its members' interests in litigation, including through intervention. *See Flying J, Inc. v. Van Hollen*, 578 F.3d 569, 571 (7th Cir. 2009); *Wal-Mart Stores, Inc. v. Texas Alcoholic Beverage Comm'n*, 834 F.3d 562, 567 (5th Cir. 2016) (listing cases); *see also Speech First, Inc. v. Killeen*, 968 F.3d 628, 638 (7th Cir. 2020) (listing the standing requirements for associations); Wis. Stat. 184.07(2) ("[a] nonprofit association may assert a claim in its name on behalf of its members"). It is also well-established that parents can represent their children's

interests in litigation, as John and Jane Doe seek to do here. *E.g.*, *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 713 (2007).

The Coalition's members, and their children, have a direct, substantial, and legally protectable interest in protecting their children's bodily privacy from members of the opposite sex while in the District's bathrooms and locker rooms. Indeed, "courts have long found a privacy interest in shielding one's body from the opposite sex in a variety of legal contexts." *Adams by & through Kasper v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 805 (11th Cir. 2022) (listing cases); *Canedy v. Boardman*, 16 F.3d 183, 185 (7th Cir. 1994) (noting that "[t]he 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 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 ("A recipient may provide separate toilet, locker room, and shower facilities on the basis of sex."). 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).[1] 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

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

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

The Coalition consists 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. S.P. Decl. ¶ 2, 6; 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. The members formed the Association specifically to support the school district's policy to separate bathrooms and locker rooms based on biological sex. S.P. Decl. ¶ 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." S.P. Decl. ¶ 4.

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. The parents in the coalition share these concerns. T.S. Decl. ¶¶ 3, 5; K.W. Decl. ¶¶ 3, 5; B.P. Decl. ¶¶ 4–5; T.J. Decl. ¶¶ 3–4; S.P. Decl. ¶¶ 6, 9; D.G.

Decl. ¶ 8. 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.

c. The District's representation may become inadequate.

The Coalition's understanding is that the District intends to defend its Policy of sex-separated bathrooms and to oppose the preliminary injunction. *See* Dkt. 19. Thus, as of now, the District's representation of the Coalition's interests is not inadequate. But it may become inadequate in the future—if, for example, the District loses before this Court and chooses not to appeal. *E.g.*, *Solid Waste Agency of N. Cook Cnty.*, 101 F.3d at 508. Accordingly, the Coalition asks this Court to defer ruling on its conditional motion to intervene so that it may promptly intervene if the District's representation becomes inadequate.

II. This Court should allow the Coalition to file amicus briefs, both now, in opposition to the preliminary injunction motion, and throughout this case.

Regardless of whether the Coalition is entitled to intervene, its participation is critically important to this suit to show the harms to all the other students if this Court requires the District to allow students asserting a transgender identity to use whatever bathroom they associate with. In the last two cases on this topic in the Seventh Circuit, 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 By Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ., 858 F.3d 1034, 1039 (7th Cir. 2017); *A.C. by M.C. v. Metro. Sch. Dist. of Martinsville*, 75 F.4th 760, 772 (7th Cir. 2023) (concluding that privacy concerns "appear[ ] entirely conjectural" because "[n]o [other] students complained."). The Coalition seeks to participate in this case, in part, to show how a ruling in Plaintiff's favor will harm other students in the District by eliminating the privacy they expect when they use the bathroom or locker room. The perspectives of other parents and students have been missing from previous cases, and that reason alone warrants allowing the Coalition to file an amicus brief here.

This Court would have an incomplete story if it were to hear just from the District and a single transgender student who claims to be harmed by the respective policy. The complete story includes the vast majority of students attending the Elkhorn School District who will be directly affected. Finally, the submission of an amicus brief will not delay or prejudice the proceedings in any way.

CONCLUSION

For the foregoing reasons the Coalition respectfully requests that this Court hold this intervention motion in abeyance until the Coalition is prepared to demonstrate inadequate representation, and to grant the Coalition's motion to file an amicus brief in opposition to the preliminary injunction motion, and to grant the Coalition *amicus* status going forward as this case proceeds.

Dated: June 3, 2024.

Respectfully submitted,

WISCONSIN INSTITUTE FOR
LAW & LIBERTY

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**Admission pending*