No. 23-2568

In the United States Court of Appeals
FOR THE SEVENTH CIRCUIT

D.P., a minor, by her mother
and next friend, A.B.,
PLAINTIFF-APPELLEE,

v.

MUKWONAGO AREA SCHOOL DISTRICT and JOSEPH KOCH,
DEFENDANTS-APPELLANTS

Appeal from the United States District Court
for the Eastern District of Wisconsin
the Honorable Judge Lynn Adelman, Presiding,
Case No. 2:23-CV-876

AMICUS BRIEF OF THE EMPOWERED COMMUNITY COALITION, UA IN SUPPORT OF DEFENDANTS-APPELLANTS AND REVERSAL

WISCONSIN INSTITUTE FOR
LAW & LIBERTY, INC.

RICHARD M. ESENBERG
LUKE N. BERG
Counsel of Record
CORY J. BREWER
LAUREN GREUEL

330 E. Kilbourn Ave., Ste. 725
Milwaukee, WI 53202
Phone: (414) 727-9455
Facsimile: (414) 727-6385

Attorneys for Empowered Community Coalition, UA

APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 23-2568

Short Caption: D.P. v. Mukwonago Area School District

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party, amicus curiae, intervenor or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

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Empowered Community Coalition, UA

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

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N/A

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N/A

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

N/A

Attorney's Signature: /s/ Luke N. Berg Date: 07/25/25

Attorney's Printed Name: Luke N. Berg

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☑ **No** ☐

Address: 330 E. Kilbourn Ave., Ste. 725

Milwaukee, WI 53202

Phone Number: (414) 727-9455 Fax Number: (414) 727-6385

E-Mail Address: luke@will-law.org

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N/A

Attorney's Signature: /s/ Richard M. Esenberg Date: 07/25/25

Attorney's Printed Name: Richard Esenberg

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

Address: 330 E. Kilbourn Ave., Ste. 725

Milwaukee, WI 53202

Phone Number: (414) 727-9455 Fax Number: (414) 727-6385

E-Mail Address: Rick@will-law.org

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N/A

Attorney's Signature: /s/ Cory J. Brewer Date: 07/25/25

Attorney's Printed Name: Cory J. Brewer

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

Address: 330 E. Kilbourn Ave., Ste. 725

Milwaukee, WI 53202

Phone Number: (414) 727-9455 Fax Number: (414) 727-6385

E-Mail Address: CBrewer@will-law.org

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N/A

Attorney's Signature: /s/ Lauren Greuel Date: 07/25/25

Attorney's Printed Name: Lauren Greuel

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

Address: 330 E. Kilbourn Ave., Ste. 725

Milwaukee, WI 53202

Phone Number: (414) 727-9455 Fax Number: (414) 727-6385

E-Mail Address: Lauren@will-law.org

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Ordinances

Other Authorities

Rules

INTEREST OF AMICUS[1]

Amicus Empowered Community Coalition, UA, is an unincorporated association of 102 parents of children who are or were enrolled in the Elkhorn Area School District. Elkhorn is currently facing a similar lawsuit by a transgender student (biologically male) who wants to use the girls' bathrooms and locker rooms. *Doe v. Elkhorn Area Sch. Dist.*, No 2:24-CV-354 (E.D. Wis., filed Mar. 21, 2024). The members formed the association to support the district's policy to separate facilities based on biological sex. Decl. of S.P. ¶¶ 2–4, Dkt. 51-4, No 2:24-CV-354 (E.D. Wis., filed Aug. 1, 2024) (App. 9–10).[2] They submitted declarations in the case to show how eliminating sex-separated facilities would affect them and their children. Multiple of their daughters (5th and 6th graders) expressed fear and anxiety about using the bathroom or locker room if a male, transgender student had access to the girls' facilities; one even stopped using the bathroom alone, and another now tries to avoid the bathrooms altogether. Dkts. 51-1 ¶¶ 3–4, 51-2 ¶¶ 3–8, 51-3 ¶¶ 3–4, 51-4 ¶¶ 5–9, 51-5 ¶¶ 2–3, 51-6 ¶¶ 2–3, 63-2 ¶ 3, 63-5 ¶¶ 3–4, No 2:24-CV-354 (E.D. Wis., filed Aug. 1, 2024, and Feb. 27, 2025) (App. 1–19, 25–26). After the District Court granted a preliminary injunction (based entirely on *Whitaker* and *A.C.*), multiple members changed schools or withdrew their children from the district, at great cost to

[1] No party's counsel authored this brief in whole or in part. No party or party's counsel contributed money that was intended to fund preparing or submitting this brief. No person—other than the amicus curiae, its members, or its counsel—contributed money that was intended to fund preparing or submitting this brief. Counsel for all parties have consented to the filing of this brief.

[2] For ease of reference, Amicus has included all of the declarations referenced in this brief in an appendix.

themselves. Dkts. 63-3 ¶¶ 1–15; 63-4 ¶¶ 1–7, No 2:24-CV-354 (E.D. Wis., filed Feb. 27, 2025) (App. 20–24).

The Elkhorn Area School District has notified the District Court of this Court's order asking the parties to brief whether it should overrule *Whitaker* and *A.C.*, and the District Court will likely wait to rule on summary judgment until after this Court's decision. Dkt. 76, No 2:24-CV-354 (E.D. Wis., filed July 1, 2025). Thus, Amicus and its members have a direct and substantial interest in the outcome here.

INTRODUCTION

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). The statute itself also contains an explicit carve-out for "living facilities" to protect privacy interests: "[N]othing contained herein shall be construed to prohibit any educational institution … from maintaining separate living facilities for the different sexes." 20 U.S.C. § 1686. At the time these provisions were adopted, the word "sex" 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 v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 812 (11th Cir. 2022). In light of that text, the question this Court asked in its June 30 Order should be straightforward. A policy to limit bathrooms based on biological sex is not only "valid under … Title IX," it directly mirrors the text.

Nevertheless, this Court has now twice held that Title IX *prohibits* what it explicitly *permits*—separating bathrooms by biological sex—and requires schools to

allow students to use whatever bathrooms they identify with. *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034 (7th Cir. 2017); *A.C. v. Metro. Sch. Dist. of Martinsville*, 75 F.4th 760 (7th Cir. 2023).

Whitaker and *A.C.* are deeply flawed, both on the law and the facts, and this Court should overrule them. On the law, the Supreme Court's recent decision in *United States v. Skrmetti*, 145 S. Ct. 1816 (2025), undermines both of the two reasons *Whitaker* gave for applying heightened scrutiny. *Infra* Part II. Another recent Supreme Court decision, *Department of Education v. Louisiana*, 603 U.S. 866 (2024), unanimously rejected the premise behind *Whitaker*'s and *A.C.*'s interpretation of Title IX. *Infra* Part III.

On the facts, *Whitaker* and *A.C.* wrongly dismissed safety and privacy concerns as "entirely conjectural." *A.C.*, 75 F.4th at 772. Yet many young girls are rightfully afraid of male students having access to the same facilities as them, and courts have long recognized that safety and privacy justify separate bathrooms. *Infra* Part I. *Whitaker* and *A.C.* create a situation where "any biological male c[an] claim to be transgender and then be allowed to use the same restroom or changing area as girls," a "major safety concern." *Bridge v. Oklahoma State Dep't of Educ.*, 711 F. Supp. 3d 1289, 1297 (W.D. Okla. 2024). This Court in *A.C.* was "unconvinced" that this is a real problem, believing that "such a scenario has *never* materialized." *A.C.*, 75 F. 4th at 774. Yet this exact scenario *has* materialized, just down the road from Mukwonago in Sun Prairie, Wisconsin. As explained in more detail below, a male student claiming to be transgender exposed himself to multiple freshman girls in the locker room

showers. *Whitaker* and *A.C.* created the opportunity for this incident, and this kind of thing will keep happening until this Court corrects its mistake.

ARGUMENT

I. Privacy and Safety Interests Justify Sex-Separated Bathrooms.

"[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); *e.g.*, *Canedy v. Boardman*, 16 F.3d 183, 185 (7th Cir. 1994). And courts have recognized a privacy interest 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."). This privacy interest 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 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, privacy interests are 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. The Supreme Court, in *United States v. Virginia*, observed 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, 550–51 n.19 (1996). And Justice Ginsburg once 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, 229 (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).

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

In both *Whitaker* and *A.C.*, this 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."). Amicus got involved in the Elkhorn case to show that privacy concerns are not "conjectural," but are real and significant for many parents and students. The procedural history in this case did not give parents time to organize and do the same—the district court granted the preliminary injunction less than two weeks after the case was filed. Dkt. 15. Amicus submits the declarations they filed in the Elkhorn case to show how *Whitaker* and *A.C.* affect other students.

In the Elkhorn case, Amicus also submitted a declaration from a Sun Prairie student to illustrate what can and will happen if sex-separated facilities are eliminated. As other courts have recognized and common sense confirms, *Whitaker* and *A.C.* create a situation where "any biological male c[an] claim to be transgender and then be allowed to use the same restroom or changing area as girls," a "major safety concern." *Bridge*, 711 F. Supp. 3d at 1297. This Court dismissed this concern in *A.C.* based on an amicus brief asserting that "such a scenario has *never* materialized." *A.C.*, 75 F. 4th at 774 ("We are [ ] unconvinced that students will take advantage of gender-affirming facility access policies by masquerading as transgender"). That blind-to-reality response is no longer valid, because this exact concern *has* materialized.

L.V. is a high-school student in the Sun Prairie Area School District in Wisconsin. L.V. Decl. ¶ 1, *Doe v. Elkhorn Area Sch. Dist.*, Dkt. 63-6, No 2:24-CV-354 (E.D. Wis., filed Feb. 27, 2025) (App. 27–29). On March 3, 2023, when she was a freshman, she and three other freshman girls participated in a swim unit as part of their first-hour physical education class. *Id.* ¶ 2. After the class, they entered the girls' locker room to shower and change for class. *Id.* ¶ 3. Upon entering, they noticed an 18-year-old senior male student in the area containing lockers and benches. *Id.* ¶ 4. While L.V. and the girls were surprised to see this student in the girls' locker room, they had a general idea that he identified as transgender and had used the girls' bathrooms before. *Id.* ¶ 5. They were uncomfortable, but they proceeded to the shower area without interacting with the student. *Id.* ¶ 6.

Per their usual practice, the girls rinsed off with their swimsuits on. *Id.* ¶ 7. As they began to shower, however, the male student entered the shower area, announced, "I'm trans, by the way," and then completely undressed and showered fully naked across from L.V. and right next to one of the other girls. *Id.* ¶ 8. He was initially facing towards the wall but eventually turned and fully exposed himself to the four girls. *Id.* ¶ 9. They were shocked and caught off guard, closed their eyes, and tried to hurry up and leave the showers as quickly as possible. *Id.* ¶ 10. This incident is the subject of a Title IX investigation by the Department of Education's Office of Civil Rights—but one that has now been pending for almost two years.[4] *Id.* ¶¶ 11–13.

[4] *See* Department of Education, *Pending Cases Currently Under Investigation at Elementary-Secondary and Post-Secondary Schools*, https://ocrcas.ed.gov/open-investigations.

Eliminating sex-separated bathrooms and locker rooms creates the opportunity for this kind of incident, which is why so many parents are rightfully concerned for their young daughters. *Id.* ¶¶ 14–17; *supra* pp 1–2. This is an all-or-nothing proposition. Either sex-separated facilities are permitted, or they're not. If any individual can claim to be transgender and access the opposite-sex facilities, then sex-separated bathrooms have effectively been eliminated. Courts have long recognized that safety and privacy—especially for young girls—justify separating the sexes. This Court should too.

II. *Skrmetti* Rejects *Whitaker*'s and *A.C.*'s Overly Simplistic Equal Protection Analysis.

Whitaker and *A.C.* held that a policy of sex-separated bathrooms is subject to heightened scrutiny for two reasons, 858 F.3d at 1039, 1051–52, both of which the Supreme Court has now rejected in *United States v. Skrmetti*, 145 S. Ct. 1816 (2025).

First, Whitaker reasoned (with very little analysis) that separate bathrooms are "inherently based on a sex-classification" because such a policy "cannot be stated without referencing sex." 858 F.3d at 1051.[5] Yet in *Skrmetti*, the Supreme Court clarified that "mere reference to sex is [not] sufficient to trigger heightened scrutiny." 145 S. Ct. at 1829. Some sort of "differential treatment" is required, *id.* at 1828 (citation omitted), like "prohibit[ing] conduct for one sex that [is] permit[ted] for the other," *id.* at 1831. The Sixth Circuit, in the decision the Supreme Court affirmed,

[5] *A.C.* did not add anything to *Whitaker*'s cursory analysis on this point, instead relying entirely on *Whitaker*. 75 F.4th at 772–73; *id.* at 768 ("*Whitaker* answers almost all the questions raised by these consolidated appeals.").

gave more examples of the kinds of unequal treatment that would trigger heightened review: "bestow[ing] benefits or burdens based on sex," "apply[ing] one rule for males and another for females," or "includ[ing] one sex and exclud[ing] the others." *L.W. v. Skrmetti*, 83 F.4th 460, 480 (6th Cir. 2023) (listing cases).

Policies based on "enduring differences between men and women," by contrast—like "hous[ing] men and women separately at a prison" or "plac[ing] urinals only in men's rooms"—"do not trigger heightened review," as long as they apply equally to both sexes. *Id.* at 484 (citing *Women Prisoners of D.C. Dep't of Corrs. v. District of Columbia*, 93 F.3d 910, 926 (D.C. Cir. 1996)). Likewise, sex-separated bathrooms do not "prefer one sex over the other, bestow benefits or burdens based on sex, or apply one rule for males and another for females"; they "treat[ ] both sexes equally," while acknowledging the biological differences between them. *D.H. v. Williamson Cnty. Bd. of Educ.*, No. 3:22-CV-00570, 2024 WL 4046581, at *4 (M.D. Tenn. Sept. 4, 2024).

Whitaker's second reason for applying heightened scrutiny was its conclusion that separate bathrooms reflect "sex stereotyping," by treating "students like Ash, who fail to conform to the sex-based stereotypes associated with their assigned sex at birth, differently." 858 F.3d at 1051. The Supreme Court rejected a similar argument in *Skrmetti*. 145 S. Ct. at 1832. The "plaintiffs' allegations of sex stereotyping are misplaced," the Court explained, because the law was based, not on stereotypes, but on a "legitimate, substantial, and compelling interest in protecting minors from physical and emotional harm" caused by "potentially irreversible medical

procedures." *Id.* (citations omitted). So too here. Separate bathrooms are not based on stereotypes, but on basic biological differences between the sexes. As explained above, this was universally recognized until recently. *Supra* Part I.

Accordingly, the District's policy should be subject only to rational basis review, which it easily survives.

But even if heightened scrutiny applies, many courts have concluded that sex-separated facilities survive intermediate scrutiny.[6] *Adams*, 57 F.4th at 805; *Roe v. Critchfield*, 137 F.4th 912, 922–26 (9th Cir. 2025); *Bridge*, 711 F. Supp. 3d at 1294; *Johnston v. Univ. of Pittsburgh of Commw. Sys. of Higher Educ.*, 97 F. Supp. 3d 657, 669 (W.D. Pa. 2015). "[P]rotecting the privacy interests of students to use the bathroom away from the opposite sex" has long been recognized as an important governmental interest. *Adams*, 57 F.4th at 805. Even the Supreme Court has recognized that privacy interests would require separate facilities in *college*, *Virginia*, 518 U.S. at 550–51 n.19—how much more so in elementary, middle, and high school, where minor students' bodies are still developing. As to the tailoring prong, separating facilities based on biological sex is not only narrowly tailored to safety and privacy interests, it directly "mirror[s]" those interests. *Adams*, 57 F.4th at 805; *Bridge*, 711 F. Supp. 3d at 1296 ("undoubtedly closely related").

[6] While these cases all applied intermediate scrutiny, they were all pre-*Skrmetti*.

III. The Supreme Court's Unanimous Stay Decision in *Department of Education v. Louisiana* Rejected *Whitaker*'s and *A.C.*'s Flawed Interpretation of Title IX, As Codified in 34 C.F.R. § 106.10.

As the District argues (and Amicus agrees), the Supreme Court's decision in *Department of Education v. Louisiana*, 603 U.S. 866 (2024), undermines *Whitaker*'s and *A.C.*'s Title IX holdings. Defendants-Appellants' Br. at 9–12. Those cases and the Biden Administration's recent Title IX Rule[7] both depended on the same underlying premise—that gender identity discrimination *is necessarily* prohibited sex discrimination under Title IX. *Compare A.C.*, 75 F.4th at 769 ("In *Whitaker*, we answered that discrimination against transgender students is a form of sex discrimination.") *with* 89 Fed. Reg. at 33,886 (adopting 34 C.F.R. § 106.10: "[d]iscrimination on the basis of sex includes discrimination on the basis of … gender identity"). The Rule repeatedly cited *Whitaker* and *A.C.* for support, *e.g.*, 89 Fed. Reg. at 33,802, 33,805, 33,808, 33,809, 33,820, and the Biden Administration invoked *A.C.* in its application for a stay, even arguing that "affirming the injunction as to Section 106.10's interpretation of the scope of sex discrimination would conflict with decisions of the Fourth, *Seventh*, and Ninth Circuits" (citing *A.C.*).[8]

Nevertheless, "all Members of the Court" agreed that plaintiffs "were entitled to preliminary injunctive relief as to … the central provision [34 C.F.R. § 106.10] that newly defines sex discrimination to include discrimination on the basis of … gender

[7] *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 89 Fed. Reg. 33,474 (April 29, 2024).

[8] Application for a Partial Stay at 17–18, *United States Department of Education v. Louisiana*, No. 24A79 (filed July 22, 2024), *available at* https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/24a79.html.

identity." 603 U.S. at 867; *id.* at 868–69 (Sotomayor, dissenting in part) ("Every Member of the Court agrees …"). Because § 106.10 effectively codified *Whitaker*'s and *A.C.*'s Title IX interpretation, this decision is a strong indicator that those cases are not likely to survive Supreme Court review.

The litigation over Biden's Title IX Rule has also made *Whitaker* and *A.C.* more and more of an outlier. A separate provision of the Biden Rule (34 C.F.R. § 106.31(a)(2)) addressed the bathroom issue directly, and, like *Whitaker* and *A.C.*, required schools to allow transgender students to use whatever facilities they identify with. 89 Fed. Reg. at 33,817–21. As the District notes, the Rule was enjoined in *every case* in which it was challenged. Defendants-Appellants' Br. 9–11 n.5. And in many of those cases, the courts criticized the Rule's treatment of the bathroom issue. *Louisiana v. U.S. Dep't of Educ.*, 737 F. Supp. 3d 377, 407–08 (W.D. La. 2024); *Tennessee v. Cardona*, 737 F. Supp. 3d 510, 534–35, 559–60, 561–63 (E.D. Ky. 2024); *Kansas v. U.S. Dep't of Educ.*, 739 F. Supp. 3d 902, 922, 926, 929 (D. Kan. 2024); *Arkansas v. U.S. Dep't of Educ.*, 742 F. Supp. 3d 919, 943 (E.D. Mo. 2024); *Oklahoma v. Cardona*, 743 F. Supp. 3d 1314, 1330–31 (W.D. Okla. 2024); *Tennessee v. Cardona*, 762 F. Supp. 3d 615, 626 (E.D. Ky. 2025).

In addition to all of those cases, the Ninth and Eleventh Circuits have rejected claims nearly identical to those here. *Adams*, 57 F.4th 791; *Critchfield*, 137 F.4th 912. So have many other districts courts. *Bridge*, 711 F. Supp. 3d 1289; *Johnston*, 97 F. Supp. 3d 657; *D.H.*, 2024 WL 4046581.

CONCLUSION

Whitaker and *A.C.* were wrong when they were decided; they are wrong now; and they continue to burden school districts throughout the Circuit and harm young girls. This Court should correct its mistake and overrule them both.

Dated: July 25, 2025.

Respectfully submitted,

WISCONSIN INSTITUTE FOR
LAW & LIBERTY, INC.

s/ Luke N. Berg

Richard M. Esenberg (WI Bar No. 1005622)
Luke N. Berg (WI Bar No. 1095644)
Cory J. Brewer (WI Bar No. 1105913)
Lauren Greuel (WI Bar No. 1127844)

330 East Kilbourn Avenue, Suite 725
Milwaukee, WI 53202
Telephone: (414) 727-9455
Facsimile: (414) 727-6385

Rick@will-law.org
Luke@will-law.org
CBrewer@will-law.org
Lauren@will-law.org

Attorneys for Empowered Community Coalition

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(G), I certify the following:

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(a)(5) and Circuit Rule 29 because this brief contains 3356 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

This brief complies with the typeface requirements of Circuit Rule 32(b), and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6), because this brief has been prepared in a proportionately spaced typeface using Microsoft Word in 12-point Century Schoolbook font.

Dated: July 25, 2025.

/s/ Luke N. Berg
LUKE N. BERG

APPENDIX

APPENDIX TABLE OF CONTENTS

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

DECLARATION OF B[redacted] P[redacted]

I, B[redacted] P[redacted], declare that, if called upon, I could and would competently testify to the following:

1. I am a member of the Empowered Community Coalition, UA, and a parent in the Elkhorn Area School District.

2. I currently have four children in the Elkhorn Area School District: three girls and one boy.

3. My oldest daughter is currently in the 6th grade at Elkhorn Area Middle School, where Jane Doe attends. She is 12 years old.

4. My daughter has told me that she is anxious about having to share bathrooms and locker rooms with biological boys. She currently will not use the

bathrooms or locker rooms without a friend to avoid being alone in a bathroom or locker with a biological boy.

5. I am also deeply concerned about my children's safety and privacy if they are forced to share bathrooms and locker rooms with students of the opposite biological sex as a condition of obtaining a public education. I view this as both an emotional and physical safety issue for them.

6. My children are entitled to a free and appropriate public education, and the school would be denying them that right. By forcing them to share bathrooms and locker rooms with students of the opposite sex, the school would be putting them in a position where they would not feel safe and would be subjected to substantial embarrassment.

7. If, as a result of this lawsuit, Elkhorn Area schools are required to allow transgender students to use the bathrooms and locker rooms associated with whatever gender they identify as, my husband and I are seriously considering removing our children from the District to protect their safety and privacy.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: May 31, 2024

[redacted]

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

DECLARATION OF D[redacted] G[redacted]

I, D[redacted] G[redacted], declare that, if called upon, I could and would competently testify to the following:

1. I am a member of the Empowered Community Coalition, UA, and a parent in the Elkhorn Area School District.

2. I currently have eight children in the Elkhorn Area School District; five sons and three daughters.

3. One of my daughters will be entering 5th grade in the fall. She is currently 10 years old.

4. My daughter has told me that she is deeply concerned about having to share bathrooms and locker rooms with biological boys. She communicated to me

that she is afraid for her safety and privacy if she is forced to share bathrooms and locker rooms with biological boys.

5. One of my sons will be entering the 7th grade in the fall at the Elkhorn Area Middle School, where Jane Doe attends. He is 13 years old.

6. He is autistic, and the concept of students using the bathrooms and lockers associated with the opposite biological sex is confusing to him.

7. He has expressed to me that he is worried about students of the opposite sex looking at him while he is in a bathroom or locker room.

8. I am also deeply concerned about my children's safety and privacy if they are forced to share bathrooms and locker rooms with students of the opposite biological sex as a condition of obtaining a public education. I view this as both an emotional and physical safety issue for them.

9. My children are entitled to a free and appropriate public education, and the school would be denying them that right. By forcing them to share bathrooms and locker rooms with students of the opposite sex, the school would be putting them in a position where they would not feel safe and would be subjected to substantial embarrassment.

10. If, as a result of this lawsuit, Elkhorn Area schools are required to allow transgender students to use the bathrooms and locker rooms associated with whatever gender they identify as, my wife and I are seriously considering removing all of our children from the District to protect their safety and privacy.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: May 29, 2024

[redacted]

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

DECLARATION OF K[redacted] W[redacted]

I, K[redacted] W[redacted], declare that, if called upon, I could and would competently testify to the following:

1. I am a member and President of the Empowered Community Coalition, UA, and a parent in the Elkhorn Area School District.

2. I currently have four children in the Elkhorn Area School District: a 16-year-old son in 10th grade at Elkhorn Area High School; a 12-year-old daughter in 6th grade at Elkhorn Area Middle School, where Jane Doe attends; an 8-year-old daughter in 2nd grade at Jackson Elementary School; and a 6-year-old daughter in kindergarten at Jackson Elementary School.

3. My 6th grade daughter has told me that she is deeply concerned about having to share bathrooms and locker rooms with biological boys. She told me that

she would be afraid to be encountered by a biological boy if she had to go to the bathroom or change in the locker room and has expressed to me that she will not change clothes with a boy in the same room. Even though she would want to change clothes in a separate room, she has expressed concern that girls will ask her why she left the locker room. She also expressed to me that if a boy were to use the girls' bathroom it would make her feel uncomfortable.

4. My daughter is asking me, as a parent, to protect her from this situation.

5. I am also deeply concerned about my children's safety and privacy if they are forced to share bathrooms and locker rooms with students of the opposite biological sex as a condition of obtaining a public education. I view this as both an emotional and physical safety issue for them.

6. My three daughters attend Summer Academy in the Elkhorn Area School District, which is for K–8 students. It will be held at the middle school during the summer. My daughter in 2nd grade and my daughter in kindergarten change into their swimsuits in the girls' bathroom at the middle school where Jane Doe attends before they get on the swim shuttle bus. If my three daughters are forced to share bathrooms and locker rooms with students of the opposite biological sex, I would be deeply concerned and would be forced to pull my daughters from Summer Academy for their protection and privacy. They would be emotionally upset to know that they wouldn't be able to attend Summer Academy which they enjoy being a part of.

7. My children are entitled to a free and appropriate public education and the school would be denying them that right. By forcing them to share bathrooms and locker rooms with students of the opposite biological sex, the school would be putting them in a position where they do not feel safe and, even though they have done nothing wrong, would be subjected to substantial embarrassment.

8. If, as a result of this lawsuit, Elkhorn Area schools are required to allow transgender students to use the bathrooms and locker rooms associated with whatever gender they identify as, I intend to remove my four children from the District to protect their safety and privacy.

9. That is the only way that I can protect them from the violation of their rights.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: May 31, 2024

[redacted]

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

DECLARATION OF S[redacted] P[redacted]

I, S[redacted] P[redacted], declare that, if called upon, I could and would competently testify to the following:

1. I am a member and Vice President of the Empowered Community Coalition, UA, and a parent in the Elkhorn Area School District.
2. The Empowered Community Coalition, UA, is an unincorporated association of 102 parents with children in the Elkhorn Area School District.
3. The members formed the Association specifically to support the school district's policy to separate bathrooms and locker rooms based on biological sex.

4. 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."
5. I am also a parent in the Elkhorn Area School District where my four children attend school. My first son is 15 years of age and a sophomore attending Elkhorn Area High School. My second son is 13 years of age and a 7th grader attending Elkhorn Area Middle School, where Jane Doe attends. My first daughter is 8 years of age and a 3rd grader, and my second daughter is 6 years of age and a 1st grader. Both of my daughters attend Tibbets Elementary School in the Elkhorn Area School District.
6. I am deeply concerned about my daughters' safety and privacy if they are forced to share bathrooms and swimming locker rooms with biological boys as a condition of obtaining a public education. I view this as both an emotional and physical safety issue for them.
7. As a parent, I must protect them from this situation.
8. In addition, Elkhorn Summer Academy is held at the Elkhorn Area Middle School. I am also deeply concerned about my daughters' safety and privacy if they are forced to share bathrooms and swimming locker rooms with students of the opposite biological sex as a condition of attending the summer academic program provided by the public school. I view this as

both an emotional and physical safety issue for them. Though this program is optional, it is recommended for my first daughter who will benefit from additional academic support through the summer. This program runs from 8am to 12pm and provides bussing transportation to and from our home. If, as a result of this lawsuit, Elkhorn Area schools are required to allow transgender students to use the bathrooms and locker rooms associated with whatever gender they identify as, I intend to remove my children from the Summer Academy to protect their safety and privacy, forcing me to pay for the unexpected daycare and transportation costs and removing them from a reoccurring summer programs that they enjoy attending.

9. In addition to the Summer Academy, my daughters have been participants in swimming classes, as a precaution to living in a lake community and as a required high school class. These classes are held at the Elkhorn Area High School. I am also deeply concerned about my daughters' safety and privacy if they are forced to share bathrooms and swimming locker rooms with students of the opposite biological sex of all ages, as the classes are based on skill level, not age. My oldest daughter, in 3rd grade, is in level 4 swim class with children that attend the Middle School. As a parent, I need to protect my daughters from this situation of potentially having to share bathroom and swimming locker rooms with students of any age of the opposite biological sex. If, as a result of this

lawsuit, Elkhorn Area schools are required to allow transgender students to use the bathrooms and locker rooms associated with whatever gender they identify as, I intend to remove my children these swimming classes that they enjoy and actively participate in every year.

10. As students, my children are entitled to a free and appropriate public education and the school would be denying them that right. By forcing them to share bathrooms and swimming locker rooms with biological boys, the school would be putting them in a position where they do not feel safe and, even though they have done nothing wrong, would be subjected to substantial embarrassment.

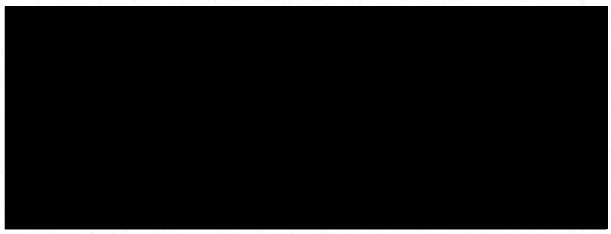
11. I am deeply concerned at the chaos and confusion my middle school son experienced when Jane Doe changed from using the biological boys' bathroom to the biological girls' bathroom. The students were aware of Jane Doe using the girls' bathrooms, and my son was subjected to substantial embarrassment when questioning these incidents. I view this as both an emotional and safety issue for him.

12. If, as a result of this lawsuit, Elkhorn Area schools are required to allow transgender students to use the bathrooms and locker rooms associated with whatever gender they identify as, I intend to remove my children from the District to protect their safety and privacy.

13. That is the only way that I can protect them from the violation of their rights.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: June 3, 2024



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

DECLARATION OF T[redacted] J[redacted]

I, T[redacted] J[redacted], declare that, if called upon, I could and would competently testify to the following:

1. I am a member of the Empowered Community Coalition, UA, and a parent in the Elkhorn Area School District.

2. I currently have a daughter in the Elkhorn Area School District. She will be in the 6th grade at Elkhorn Area Middle School next fall, where Jane Doe attends. She is 11 years old.

3. My daughter has told me that she is concerned about having to share bathrooms and locker rooms with biological boys.

4. I am also deeply concerned about my daughter's safety and privacy if she is forced to share bathrooms and locker rooms with biological boys as a

condition of obtaining a public education. I view this as both an emotional and physical safety issue for her.

5. My daughter is entitled to a free and appropriate public education, and the school would be denying her that right. By forcing her to share bathrooms and locker rooms with students of the opposite sex, the school would be putting her in a position where she would not feel safe and would be subjected to substantial embarrassment.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: May 31, 2024

[redacted]

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

DECLARATION OF T[redacted] S[redacted]

I, T[redacted] S[redacted], declare that, if called upon, I could and would competently testify to the following:

1. I am a member of the Empowered Community Coalition, UA, and a parent in the Elkhorn Area School District.

2. I currently have a daughter in the Elkhorn Area School District. She will be entering 6th grade in the fall at the Elkhorn Area Middle School, where Jane Doe attends. She is 10 years old.

3. My daughter has told me that she is deeply concerned about having to share bathrooms and locker rooms with biological boys. She communicated to me that she is afraid for her safety and privacy if she is forced to share bathrooms and locker rooms with biological boys.

4. She is asking me, as a parent, to protect her from this situation.

5. I am also deeply concerned about my daughter's safety and privacy if she is forced to share bathrooms and locker rooms with students of the opposite biological sex as a condition of obtaining a public education. I view this as both an emotional and physical safety issue for her.

6. As a student, she is entitled to a free and appropriate public education and the school would be denying her that right. By forcing her to share bathrooms and locker rooms with biological boys, the school would be putting her in a position where she does not feel safe and, even though she has done nothing wrong, would be subjected to substantial embarrassment.

7. If, as a result of this lawsuit, Elkhorn Area schools are required to allow transgender students to use the bathrooms and locker rooms associated with whatever gender they identify as, I intend to remove my daughter from the District to protect her safety and privacy.

8. That is the only way that I can protect her from the violation of her rights.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: May 29 2024

[redacted]

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-356

v.

ELKHORN AREA SCHOOL DISTRICT, *et al.*,

Defendants

DECLARATION OF B[redacted] P[redacted]

I, B[redacted] P[redacted], declare that, if called upon, I could and would competently testify to the following:

1. I previously submitted a declaration in support of the Empowered Community Coalition's opposition to Plaintiff's preliminary injunction motion, which provides more details about me and my children.

2. I decided to leave my 7th grade daughter in the Elkhorn Area Middle School for now. However, if this Court extends the injunction to allow Plaintiff to use the girls' locker rooms, or if, as a result of this lawsuit, the District begins allowing more biologically male students to use the girls' facilities, I would be much more likely to remove my daughter from the District.

3. My daughter continues to feel anxiety about encountering Plaintiff or another biological boy in the bathroom. And she still will not use the bathrooms or

locker rooms without a friend to avoid being alone in a bathroom or locker room with a biological boy.

4. I declare under penalty of perjury that the foregoing is true and correct.

Dated: February 4, 2025

[redacted]

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; *et al.*,

Defendants

DECLARATION OF K[redacted] W[redacted]

I, K[redacted] W[redacted], declare that, if called upon, I could and would competently testify to the following:

1. I previously submitted a declaration in support of the Empowered Community Coalition's opposition to Plaintiff's preliminary injunction motion, which provides more details about me and my children.

2. As a direct result of this Court's preliminary injunction, my husband and I felt compelled to transfer our three youngest children to a different school within the Elkhorn Area School District.

3. My 7th grade daughter previously attended Elkhorn Area Middle School, where the Plaintiff attends, and would have gone there this fall with the Plaintiff.

4. My daughter has told me that she is deeply concerned about having to share bathrooms and locker rooms with biological boys. She told me that she would be afraid to be encountered by a biological boy if she had to go to the bathroom or change in the locker room and has expressed to me that she will not change clothes with a boy in the same room. Even though she would want to change clothes in a separate room, she has expressed concern that girls will ask her why she left the locker room. She also expressed to me that if a boy were to use the girls' bathroom it would make her feel uncomfortable.

5. My husband and I felt that, given the injunction, the only way to protect our daughter would be to remove her from the middle school.

6. We cannot afford private school, so the only option available to us was a partially-virtual charter school operated by the District, but in a different building from the middle school.

7. In that school, our children learn from home on Mondays and Fridays and are only in the school building Tuesdays through Thursdays.

8. The school district does not provide bussing to the charter school, so I am now forced to drive my daughter to and from school.

9. Due to this change in routine, I had to transfer my two youngest daughters to the charter school as well to avoid conflicts.

10. Because my three youngest children are now at home on Mondays and Fridays, and because I have to drive them to and from school on Tuesdays through Thursdays, I am unable to hold a full-time job, which has affected our finances.

11. My seventh-grade daughter misses her friends at the middle school.

12. She has also lost opportunities in music. She previously participated in the band class at the middle school. While the charter school also has a band class, it is much less challenging than the middle school's band class. My daughter no longer enjoys band as much as she did, and feels like her skills are regressing.

13. I continue to be concerned for the safety and privacy of my first- and third-grade daughters as well. I am concerned that, as a result of this Court's rulings, the District will begin to allow other biologically male students claiming a transgender identity to use the girls' bathrooms.

14. If that happens, it would be a significant threat to their safety and privacy, and we would have to make further changes to protect them.

15. If the injunction were removed and we had assurance from the school district that bathrooms would be limited based on biological sex, we would strongly consider re-enrolling our three daughters in the schools they previously attended.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: February 1, 2025

[redacted]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

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

Plaintiff,

v.

ELKHORN AREA SCHOOL DISTRICT, *et al.*,

Defendants.

Case No. 2:24-CV-354

DECLARATION OF S[redacted] P[redacted]

I, S[redacted] P[redacted], declare that, if called upon, I could and would competently testify to the following:

1. I previously submitted a declaration in support of the Empowered Community Coalition's opposition to Plaintiff's preliminary injunction motion, which provides more details about me and my children.

2. In part due to this Court's preliminary injunction, my wife and I decided to remove our 8th grade son and our 2nd and 4th grade daughters from the Elkhorn Area School District and enrolled them instead in a private school.

3. We now have to drive 25 minutes one way, four times per day (to and from school twice), to take our kids to school in the morning and pick them up at the end of the day, a significant burden for our family both in terms of time and money.

4. With respect to our eighth-grade son, we were concerned that a biological boy using the girls' bathroom would become a source of a confusion for him and a distraction from learning. We already saw this happening in prior years when the Plaintiff started seeking to use the girls' bathroom. This became a major focus of discussion and dispute among the middle school students.

5. With respect to our daughters, were concerned that, as a result of the injunction, the school district could begin allowing other biologically male students asserting a transgender identity to use the girls' bathrooms.

6. My wife and I are deeply concerned about our daughters' safety and privacy if they are forced to share bathrooms and locker rooms with biological boys as a condition of obtaining a public education. We view this as both an emotional and physical safety issue for them.

7. If the injunction were removed, such that the school district could continue to limit bathrooms based on biological sex, we would strongly consider re-enrolling our three youngest children in the Elkhorn Area School District.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: February 1, 2025

[redacted]

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-356

v.

ELKHORN AREA SCHOOL DISTRICT, *et al.*,

Defendants

DECLARATION OF T[redacted] S[redacted]

I, T[redacted] S[redacted], declare that, if called upon, I could and would competently testify to the following:

1. I previously submitted a declaration in support of the Empowered Community Coalition's opposition to Plaintiff's preliminary injunction motion, which provides more details about me and my children.

2. I decided to leave my 6th grade daughter in the Elkhorn Area Middle School for now. However, I am still evaluating whether to remove her from the school district. If this Court extends the injunction to allow Plaintiff to use the girls' locker rooms, or if, as a result of this lawsuit, the District begins allowing more biologically male students to use the girls' facilities, I would be much more likely to remove my daughter from the District.

3. My daughter has told me that she avoids using the bathroom at school so that she does not encounter Plaintiff or any other biological boy in the bathroom, which would make her very uncomfortable.

4. If she has to use the bathroom, she holds it for as long as she can in the hopes of making it home, which is both unhealthy and uncomfortable for her.

5. I declare under penalty of perjury that the foregoing is true and correct.

Dated: January 28, 2025

[redacted]

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-356

v.

ELKHORN AREA SCHOOL DISTRICT, *et al.*,

Defendants

DECLARATION OF L[redacted] V[redacted]

I, L[redacted] V[redacted] declare that, if called upon, I could and would competently testify to the following:

1. I am currently a high-school junior in the Sun Prairie Area School District in Wisconsin.

2. On March 3, 2023, when I was a freshman, I and three other freshman girls participated in a swim unit as part of our first-hour physical education class.

3. After the class, we entered the girls' locker room to shower and change for class.

4. Upon entering, I noticed an 18-year-old senior male student in the area containing lockers and benches.

5. While I was surprised to see this student in the girls' locker room, I knew that he identified as transgender and had used the girls' bathrooms before.

6. I was uncomfortable, but I and the other girls proceeded to the shower area without interacting with the student.

7. We rinsed off with our swimsuits on, as we normally do.

8. As we began to shower, the male student entered the shower area, announced, "I'm trans, by the way," and then completely undressed and showered fully naked across from me and next to one of the other girls.

9. He was initially facing towards the wall but eventually turned and fully exposed himself to us.

10. I was shocked and caught off guard. I closed my eyes and tried to hurry up and leave the showers as quickly as possible.

11. My mom contacted the school district about this incident, but the District never interviewed me or offered supportive measures.

12. The Wisconsin Institute for Law & Liberty filed a complaint with the U.S. Department of Education's Office of Civil Rights on my behalf in the summer of 2023.

13. That department opened an investigation in November 2023, but so far, has taken no action on that complaint.

14. No girl should have to experience what I went through.

15. Girls should feel safe and have their privacy rights protected in bathrooms and locker rooms.

16. I am concerned for the safety and privacy of other girls in the Elkhorn Area School District if this Court requires schools to allow male students who identify as transgender to use the girls' bathrooms and locker rooms.

17. I would urge this Court to protect girls' safety and privacy in bathrooms and locker rooms.

18. I declare under penalty of perjury that the foregoing is true and correct.

Dated: February 21 2025

[redacted]