NO. 17-301

IN THE
Supreme Court of the United States

KENOSHA UNIFIED SCHOOL DISTRICT NO. 1 BOARD OF EDUCATION AND SUE SAVAGLIO-JARVIS, IN HER OFFICIAL CAPACITY,

Petitioners,

v.

ASHTON WHITAKER, BY HIS MOTHER AND NEXT FRIEND, MELISSA WHITAKER,

Respondent.

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

BRIEF OF *AMICUS CURIAE* ALLIANCE DEFENDING FREEDOM IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

Alliance Defending Freedom (ADF) is an international not-for-profit legal organization providing strategic planning, training, funding, and direct litigation services to protect civil liberties.

ADF has a particular interest in the outcome of the instant case as it arose in the same circuit in which ADF attorneys are litigating *Students and Parents for Privacy v. U.S. Department of Education*, No. 1:16-cv-04945, 2016 WL 6134121 (N.D. Ill. October 18, 2016),[2] which concerns how access to sex-specific privacy facilities (school locker rooms, showers, restrooms, and overnight accommodations on school trips) should be regulated under Title IX. Additionally, ADF is currently litigating two similar cases[3] in other circuits.

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[1] Parties to this case received timely notice of the intent to file this brief and have consented to its filing; letters indicating their consent are on file with the Clerk. *Amicus* states that no counsel for a party authored this brief in whole or in part, and no person other than the *amicus* and its counsel made any monetary contribution intended to fund the preparation or submission of this brief.

[2] The case is pending decision by the Article III judge on the Magistrate Judge's Report and Recommendation regarding the student plaintiffs' motion for a preliminary injunction, which if granted would preserve single-sex privacy facilities during the pendency of the litigation.

[3] *Bd. of Educ. of the Highland Local Sch. Dist. v. U.S. Dep't of Educ.*, 208 F. Supp. 3d 850 (S.D. Ohio 2016); *Doe v. Boyertown Area Sch. Dist.,* No. 5:17-cv-1249, 2017 WL 3675418 (E.D. Pa. Aug. 25, 2017).

SUMMARY OF ARGUMENT

Amicus makes a singular point in this brief as to the interests being advanced by the two sides in this and similar cases: the proponents of gender identity theory see sex-specific privacy facilities as a tool to affirm a student's self-perception of gender, while privacy advocates would preserve the function of sex-specific privacy facilities, which is to ensure the separation of the sexes when students are changing clothes or attending to personal hygiene needs. This difference in interests is dispositive: the protection of privacy squarely aligns with the purposes of Title IX, while the novel self-affirmation interest falls outside of Title IX's ambit.

As a threshold matter, we define two key terms used in this brief: "sex" refers to male and female as grounded in reproductive biology—it is binary, fixed at conception, and objectively verifiable.[4] "Gender" is used in the sense that the proponents of gender identity theory use it: a malleable, subjectively discerned continuum that ranges from male to female to something else.

In broad outline, the actors in this and similar cases being litigated in federal courts around the nation fall into four categories: (1) the federal Department of Education ("DOE"); (2) a local school or school district; (3) a few students who seek access

[4] As a matter of biological accuracy, the use of pronouns herein is consistent with the referenced person's sex.

to sex-specific privacy facilities as a way of affirming their social transition from their sex to a perceived gender identity; and (4) the vast majority of students who use sex-specific privacy facilities so as to have privacy from the opposite sex while changing clothes or using the restroom. While the precise role of each actor may vary from case to case, the core issues and arguments are largely the same.

Much of the current controversy began with the DOE, which over the past few years issued "guidance"[5] to schools receiving federal education funds, informing them that under Title IX the term "sex" includes "gender identity" and that such schools risked losing their federal funding if they did not adopt that new definition. Following up on those threats, the DOE aggressively enforced its new mandate against schools[6] until February 22, 2017,

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[5] The DOE produced a number of documents in its quest to incorporate gender identity theory into Title IX: United States Department of Justice, Civil Rights Division, and United States Department of Education, Office for Civil Rights, *Dear Colleague Letter on Transgender Students,* May 13, 2016; United States Department of Education, Office for Civil Rights, *Title IX Resource Guide*, April 2015; United States Department of Education, Office for Civil Rights, *Questions and Answers on Title IX and Single-Sex Elementary and Secondary Classes and Extracurricular Activities*, December 1, 2014; and United States Department of Education, Office for Civil Rights, *Questions and Answers on Title IX and Sexual Violence*, April 29, 2014. None of this guidance was enacted via notice-and-comment rulemaking, but during this period the DOE nonetheless enforced it as binding on all schools receiving federal education funding.

[6] Enforcement targets included: Highland Local School District (OH); Township High School District 211 (IL); Dorchester County School District (SC); Broadalbin-Perth Central School

when it: rescinded its May 2016 Dear Colleague Letter and the related "Ferg-Cadima" letter; eschewed further reliance on the positions expressed in those letters[7]; and subsequently terminated some of its then-active enforcement actions seeking to compel schools to admit students to sex-specific privacy facilities based upon gender identity rather than sex.

As to the school districts that were targeted for enforcement, some yielded to the DOE's demands, while others like Kenosha Unified School District No. 1 Board of Education ("Kenosha") and our ADF client, Board of Education of the Highland Local School District ("Highland"), resisted and stood by their policies which preserved sex-specific privacy facilities for their students.

Then there are the few students who profess a gender identity discordant with their sex. In the instant case, the Respondent (and plaintiff) Ashton Whitaker asserts her perception that she is a male,

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District (NY); Central Piedmont Community College (NC); Downey Unified School District (CA); and Arcadia Unified School District (CA). *See* U.S. Dep't of Educ., Office for Civil Rights, *Resources for Transgender and Gender- Nonconforming Students*, http://www2.ed.gov/about/offices/list/ocr/lgbt.html (last modified Feb. 24, 2017). Other schools, well aware of the federal campaign to insinuate gender identity theory into Title IX, attempted to avoid enforcement by preemptively adopting the federal reinterpretation of "sex," as was the case in *Doe v. Boyertown Area School District,* No. 5:17-cv-1249, 2017 WL 3675418 (E.D. Pa. Aug. 25, 2017).

[7] U.S. Dep't of Justice, Civil Rights Division, and U.S. Dep't of Educ., Office for Civil Rights, *Dear Colleague Letter,* Feb. 22, 2017 (withdrawing Title IX guidance on transgender students).

while in the ADF cases, students professing a transgender identity intervened, or attempted to intervene, to assert their interests.[8] In any event, all such students profess to be of a different gender than their sex, and each insists that their respective schools must authorize them to use sex-specific privacy facilities based on their self-perceived gender rather than their sex. And they allege that if such access is not granted, then several of their legal rights are violated.

In all privacy cases of which *Amicus* is aware, at the time that transgender students sought legal relief, they remained anatomically true to their birth sex. In light of this, schools (including Petitioner Kenosha) which preserved sex-specific privacy facilities have affirmatively accommodated transgender students' bodily privacy needs by

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[8] Whitaker has since graduated from the school, so the Respondent may argue the preliminary injunction issue before this Court is now moot. Should that argument be made and accepted, then the appropriate course of action is to grant certiorari, vacate the appellate opinion, and remand the case for further proceedings. *See Univ. of Tex. v. Camenisch*, 451 U.S. 390, 394 (1981) ("Because the only issue presently before us—the correctness of the decision to grant a preliminary injunction—is moot, the judgment of the Court of Appeals must be vacated and the case must be remanded to the District Court for trial on the merits."); *see also Honig v. Students of Cal. Sch. for the Blind*, 471 U.S. 148, 149 (1985) (citing *Camenisch* to vacate the appellate opinion when "petitioners had completely complied with the terms of a preliminary injunction by the time the case reached this Court," thus mooting the issue before the Court).

providing single-user facilities for such activities as changing clothes, showering, and personal hygiene.

Finally, there are all of the other young men and women attending the affected public schools. These students hold—as all humans do—a right to bodily privacy. That right is more specifically defined in these cases as the right to use public schools' sex-specific privacy facilities free of simultaneous government-mandated access to that facility by a member of the opposite sex.

The students' legal interest in bodily privacy is raised either indirectly—by school officials, such as in Kenosha and in Highland, who assert the bodily privacy interests of their students as a basis for maintaining sex-specific facilities—or directly by students whose privacy is being violated, as in the *Students and Parents for Privacy* and *Boyertown Area School District* cases.

Schools which authorize access to multi-user privacy facilities based on gender rather than sex intentionally place anatomical males into girls' privacy facilities, and vice versa. Both ways, the sexes are intermingled, and students' bodily privacy rights are violated. On the other hand, when schools have preserved sex-specific privacy facilities, then the privacy of all students has been protected: transgender students may access wholly private individual facilities,[9] and all students (transgender or

[9] We recognize that in some instances, logistical issues arose with individual facilities—distance to the facility, method of access, number of facilities, and so on. But the Court's role is to interpret the statute and establish the right principle of access;

not) may access the facility reserved for their sex. Thus, there is no government-mandated intermingling of the sexes, and bodily privacy is protected for everyone.

ARGUMENT

Implicit in this sketch is the very point that *Amicus* explicitly brings to this Court: those resisting gender-identity-regulated facilities are defending the bodily privacy rights of all students, and such bodily privacy is squarely within the purpose of Title IX and 34 C.F.R. § 106.33.

In contrast, the interest claimed by the self-identified transgender students is for the government to affirm their subjectively perceived gender, an interest that is both divorced from the plain text of Title IX and its regulations, and as shown herein, eliminates the ability of schools to protect bodily privacy under the authority of 34 C.F.R. § 106.33. [10]

This difference in interests is dispositive: Title IX was enacted to protect the fixed, binary, objectively defined categories of male and female, and 34 C.F.R. § 106.33 issued to mitigate legislators' concerns about bodily privacy if sex nondiscrimination was taken so literally as to *obligate* schools to have unisex

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it should leave the management of site-specific concerns to local school officials.

[10] Some transgender students have claimed a "privacy" right to keep the transgender status they claim secret—at least from most people. Whatever the merits of this dubious claim, it is distinct from, and irrelevant to, the right of bodily privacy.

restrooms.[11] The statute and regulation complement one another, barring *invidious*[12] sex discrimination while permitting rational discrimination between the sexes that is permissible when it is grounded in anatomical differences between men and women, and within a context where bodily privacy is important. *See United States v. Virginia*, 518 U.S. 515, 550 n.19 (1996) ("Admitting women to VMI would undoubtedly require alterations necessary to afford members of each sex privacy from the other sex in living arrangements . . . .").

At bottom, this case turns on straightforward statutory interpretation and there is no hint in the text, history, or logic of Title IX to suggest that Congress intended its sex nondiscrimination law to obligate the government to affirm an individual student's self-perception of his or her gender. Such an interpretation undercuts the clear purpose of Title IX of protecting and promoting equal educational opportunities for women by prohibiting invidious sex discrimination. Indeed, the interest of affirming a student's self-perception of his or her sex is wholly outside of Title IX, and if it is to be enforced through law, then Congress must first write and enact such a law.

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[11] As Senator Birch Bayh, sponsor of the bill which became Title IX, put it, "What we are trying to do is provide equal access for women and men students to the educational process and the extracurricular activities in a school, where there is not a unique facet such as football involved. We are not requiring that intercollegiate football be desegregated, nor that the men's locker room be desegregated." 117 Cong. Rec. 30407 (1971).

[12] We emphasize "invidious" because the government has a rightful role only in eliminating irrational discrimination.

I. Human reproductive nature establishes what sex is, and that nature gives rise to the human right of bodily privacy, the protection of which is consistent with Title IX objectives.

A person's sex is determined at conception[13] and may be ascertained at or before birth, being evidenced by objective indicators such as gonads, chromosomes, and genitalia. *See* Am. Psychiatric Ass'n, *Diagnostic and Statistical Manual of Mental Disorders* 451 (5th ed. 2013) ("DSM-5") (defining sex as "the biological indicators of male and female (understood in the context of reproductive capacity), such as in sex chromosomes, gonads, sex hormones, and nonambiguous internal and external genitalia"). We are obviously a sexually reproducing[14] species. The human sensitivities surrounding sex (whether used as a noun or a verb) and those reproductive body parts give rise to personal privacy needs and correlated rights—specifically, the right to bodily privacy.

That right is evidenced through many areas of law. For example, females "using a women's restroom expect[] a certain degree of privacy from . . . members of the opposite sex." *State v. Lawson*, 340 P.3d 979, 982

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[13] Scott F. Gilbert, *Developmental Biology* (6th Ed. 2000), https://www.ncbi.nlm.nih.gov/books/NBK9983/.

[14] Defined as "[a] form of reproduction that involves the fusion of two reproductive cells (gametes) in the process of fertilization. Normally, especially in animals, it requires two parents, one male and the other female." *Oxford Dictionary of Biology* (7th ed. 2015). It is essential to human survival, as "[s]exual reproduction, unlike asexual reproduction, therefore generates variability within a species." *Id.*

(Wash. Ct. App. 2014). Similarly, teenagers are "embarrass[ed] . . . when a member of the opposite sex intrudes upon them in the lavatory." *St. John's Home for Children v. W. Va. Human Rights Comm'n*, 375 S.E.2d 769, 771 (W. Va. 1988). Allowing opposite-sex persons to view adolescents in intimate situations, such as showering, risks their "permanent emotional impairment" under the mere "guise of equality." *City of Phila. v. Pa. Human Relations Comm'n*, 300 A.2d 97, 103 (Pa. Commw. Ct. 1973).

These privacy interests are why a girls' locker room has always been "a place that by definition is to be used exclusively by girls and where males are not allowed." *People v. Grunau*, No. H015871, 2009 WL 5149857, at *3 (Cal. Ct. App. Dec. 29, 2009). As the Kentucky Supreme Court observed, traditionally "there is no mixing of the sexes" in school locker rooms and restrooms. *Hendricks v. Commw.*, 865 S.W.2d 332, 336 (Ky. 1993); *McLain v. Bd. of Educ. of Georgetown Cmty. Unit Sch. Dist. No. 3 of Vermilion Cty.,* 384 N.E.2d 540, 542 (Ill. App. Ct. 1978) (refusing to place male teacher as overseer of school girls' locker room). And the right is reciprocal—what holds true for placing a male in girls' privacy facilities is no less true for placing a female in boys' privacy facilities.

II. The transgender students' interest in having the government affirm their self-perceived genders is inconsistent with the purpose of Title IX.

Under the now-rescinded federal guidance, the Department of Education implausibly insisted that

sex included gender identity,[15] thus empowering students who professed a gender different than their sex to claim the right to enter sex-specific privacy facilities based exclusively upon their gender identity. But unlike sex (which is binary, fixed, objectively discerned, and rooted in human reproduction), gender identity is a malleable, subjectively determined continuum ranging from male to female to something else:

> Other categories of transgender people include androgynous, multigendered, gender nonconforming, third gender, and two-spirit people. Exact definitions of these terms vary from person to person and may change over time but often include a sense of blending or alternating genders. Some people who use these terms to describe themselves see traditional, binary concepts of gender as restrictive.

Am. Psychological Ass'n, *Answers to Your Questions About Transgender People, Gender Identity and Gender Expression* 2 (3rd ed. 2014), http://www.apa.org/topics/lgbt/transgender.pdf; *see also* Asaf Orr, et al*., Schools in Transition: A Guide*

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[15] The better reading of the federal position prior to the rescission of the guidance documents was that gender identity is the sole determinant of sex when regulating access to privacy facilities under 34 C.F.R. § 106.33, as persuasively demonstrated by Judge Niemeyer in a recent dissent. *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.,* 822 F.3d 709, 737 (4th Cir. 2016) (Niemeyer, J., dissenting), *mandate recalled and stayed*, 136 S. Ct. 2442 (2016), *cert. granted*, 137 S. Ct. 369 (2016), *vacated and remanded*, 137 S. Ct. 1239 (2017).

for Supporting Transgender Students in K-12 Schools 5, 7 (2015) (describing gender identity as falling on a "gender spectrum" and defining "gender identity" as "[a] personal, deeply-felt sense of being male, female, both or neither"), http://bit.ly/2di0ltr (last visited Sept. 25, 2017); and Randi Ettner, et al., *Principles of Transgender Medicine and Surgery* 43 (2d ed. 2016) ("Gender identity can be conceptualized as a continuum, a mobius, or patchwork." (internal citations omitted)).[16]

This subjectively perceived gender identity is divorced from the primary human sex characteristic—one's reproductive system. This was brought home in a colloquy during oral argument in the Highland case, in which the court sought to confirm that the intervening, professed male-to-female fifth grade student had male genitalia—to which the student's counsel responded that it was "inappropriate to label any part of [the student's] body as male."[17] Hr'g Tr. at 61, *Bd. of Educ. of the Highland*

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[16] Notably, gender is malleable, as demonstrated within the context of these Title IX cases, where one intervening student in *Students and Parents for Privacy* was admittedly born female, but then identified as "gender queer" before transitioning again to present "in a masculine manner" for a number of months. *See* Decl. of Parent C in Supp. of Mot. to Intervene at 2 ¶ 4, *Students and Parents for Privacy v. U.S. Dep't of Educ.*, No. 1:16-cv-04945, 2016 WL 6134121 (N.D. Ill. Oct. 18, 2016), ECF No. 32-3.

[17] Which begs the deeper question of how, absent the objective, definitional primary sex characteristic of the male or female reproductive system, one might even be able to say that a given sex stereotype is "masculine" or "feminine."

Local Sch. Dist. v. U.S. Dep't of Educ., No. 2:16-cv-524 (S.D. Ohio Sept. 20, 2016), ECF No. 94.

Gender identity theory thus denies the definitional nature of the primary sex characteristic—one's reproductive tract—which robs "male" and "female" of any real meaning: the *reductio ad absurdum* of gender identity theory is that every sex-related characteristic becomes merely a stereotype, leaving subjective gender identity as the sole determinant of what "sex" a person is.[18]

Because gender identity divorces itself from the reproductively based physical differences between men and women, there is no basis for a transgender student to advance a bodily privacy claim concurrently with his or her demand to access opposite-sex privacy facilities. Instead, as consistently seen in their affidavits, their claim is that they must access communal privacy facilities of the opposite sex so that their perceived sex is affirmed as real by school authorities and fellow students.[19]

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[18] *C.f. R.M.A. v. Blue Springs R-IV Sch. Dist.*, No. WD80005, slip. op. at 16-18 (Mo. Ct. App. July 18, 2017) (discussing professed transgender plaintiff's attempt to argue sex-discrimination based on transgender status as a "'gender-related trait'" and examining sex-stereotyping arguments under *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), but affirming the dismissal of a complaint for failure to state a claim for "'discrimination on the grounds of sex'" under the Missouri Human Rights Act, finding that denying access to "the boys' restroom and locker room" to a person "transitioning from female to male" did not constitute such discrimination).

[19] This affirmation interest is evidenced in the affidavits of the Respondent in this case, *see* Supplemental Declaration of Ashton Whitaker at 1 ¶ 4 and at 3 ¶ 11, *Whitaker v. Kenosha Unified*

And that is an interest that is nowhere to be found in the text, legislative history, or plain meaning of Title IX and its implementing regulations.

III. Title IX may enforce only those legal interests consistent with its objectives.

An "agency's power to regulate . . . must always be grounded in a valid grant of authority from

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School District No. 1 Board of Education, 858 F.3d. 1034 (7th Cir. 2017) (No. 16-3522), ECF No. 16-2; Declaration of Ashton Whitaker at 3 ¶ 11 and at 4 ¶ 18, *Whitaker v. Kenosha Unified School District No. 1 Board of Education*, No. 2:16-cv-00943, 2016 WL 5239829 (E.D. Wis. Sept. 22, 2016), ECF No. 10-1; and by the intervening students in *Students and Parents for Privacy*, *see* Declaration of Parent A in Support of Motion to Intervene at 4 ¶12 and at 6 ¶ 19, *Students and Parents for Privacy v. United States Department of Education*, No. 1:16-cv-04945, 2016 WL 6134121 (N.D. Ill. Oct. 18, 2016), ECF No. 32-1; Declaration of Parent B in Support of Motion to Intervene at 3 ¶ 8, at 4 ¶ 12, at 5 ¶ 17, and at 6 ¶ 21, *Students and Parents for Privacy v. United States Department of Education*, No. 1:16-cv-04945, 2016 WL 6134121 (N.D. Ill. Oct. 18, 2016), ECF No. 32-2, *but see* at 4 ¶ 14 (Student B uses girls' locker room even while using boys' restrooms); Declaration of Parent C in Support of Motion to Intervene at 2 ¶ 6, at 3 ¶ 10, and at 4 ¶ 12, *Students and Parents for Privacy v. United States Department of Education*, No. 1:16-cv-04945, 2016 WL 6134121 (N.D. Ill. Oct. 18, 2016), ECF No. 32-3; in *Highland Local School District*, *see* Verified Complaint-in-Intervention at 10-11 ¶ 31, *Board of Education of the Highland Local School District v. United States Department of Education*, 208 F. Supp. 3d 850, No. 2:16-cv-00524 (S.D. Ohio 2016), ECF No. 15-1; and in *Doe v. Boyertown Area School District*, *see* Declaration of Proposed Intervenor Aidan DeStefano in Support of Motion for Leave to Intervene at ¶¶ 11, 13, 17, 18, 19, 20, *Doe v. Boyertown Area School District*, No. 5:17-cv-01249, 2017 WL 3675418 (E.D. Pa. Aug. 25, 2017), ECF No. 7-3.

Congress." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 123 (2000). Here, Congress authorized agencies implementing Title IX to "issu[e] rules, regulations, or orders of general applicability which shall be *consistent with achievement of the objectives of the statute* . . . ." 20 U.S.C.A. § 1682 (emphasis added); *see also MCI Telecomms. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 231 n.4 (1994) (noting that every congressional delegation of power implies that the agency is "bound . . . by the ultimate purposes" of the statute).

Title IX's purpose is to "prohibit[] sex discrimination by recipients of federal education funding." *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 173 (2005). When Congress enacted Title IX in 1972, dictionaries defined "sex" as referring to the biological distinctions between men and women.[20] That Congress intended a binary understanding of the term "sex" is confirmed by Title IX's text, which repeatedly references "both sexes" and "students of

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[20] *See Franciscan All., Inc. v. Burwell*, 227 F. Supp. 3d 660, 688, 688 n.24 (N.D. Tex. 2016); *see also G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 736 (4th Cir. 2016) (Niemeyer, J., dissenting) (noting dictionaries contemporaneous to Title IX's enactment relied on biological distinctions to define sex, and including the following, among other, examples: *The Random House College Dictionary* 1206 (rev. ed. 1980) ("either the male or female division of a species, esp. as differentiated with reference to the reproductive functions"); *American Heritage Dictionary* 1187 (1976) ("The property or quality by which organisms are classified according to their reproductive functions"); *The American College Dictionary* 1109 (1970) ("the sum of the anatomical and physiological differences with reference to which the male and the female are distinguished . . .")).

one sex" as compared with "students of the other sex." *See*, *e.g.*, 20 U.S.C. § 1681(a)(2) (discussing "students of both sexes"); *id.* § 1681(a)(8) (discussing activities "provided for students of one sex" and "for students of the other sex"); *see also Franciscan All.*, 227 F. Supp. at 687.

In open conflict with this male/female taxonomy, enforcing gender identity theory would obligate schools which provide sex-specific privacy facilities pursuant to 34 C.F.R. § 106.33—locker rooms, showers, and restrooms—to authorize students professing a gender other than their sex to use those privacy facilities based on that gender rather than their sex. In short, the sexes would be intermingled in what is supposed to be a single-sex privacy facility.

If humans reproduced asexually, 34 C.F.R. § 106.33 would never have been conceived. But we do not, and our private reproductive body parts engender privacy issues in these government-controlled privacy facilities where the right to bodily privacy should be protected by school officials (who, standing *in loco parentis*, have a duty to protect all students' rights). Instead, gender identity theory violates this vital privacy interest by intentionally placing an anatomical girl inside adolescent males' privacy facilities in *Kenosha*, and vice versa in other cases, which utterly defeats the purpose of 34 C.F.R. § 106.33.

CONCLUSION

Protecting students' bodily privacy under 34 C.F.R. § 106.33 is wholly within the scope of Title

IX, so the Petitioners are squarely in the heart of Title IX when they reject demands to open sex-specific privacy facilities to gender-based access. Title IX does not create the new personal-affirmation right asserted by Respondent—the right for a student to have his or her subjectively perceived gender be affirmed by the government, without any regard for other students' bodily privacy.

The transgender students certainly must have their bodily privacy protected, and schools do well to provide individualized privacy facilities to this end. Respondent's challenging adolescence merits compassion and reasoned support.

Yet when it comes to expanding the meaning of "sex" in Title IX, Respondent's proper recourse is to Congress, not the courts. *Amicus* thus urges this honorable Court to grant the petition for a writ of certiorari and to correct the lower court's misreading of the statute by confirming that the plain meaning of sex in Title IX supports providing sex-specific male and female privacy facilities under 34 C.F.R. § 106.33.

Respectfully submitted,

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