No. 17-301

In the
Supreme Court of the United States

KENOSHA UNIFIED SCHOOL DISTRICT NO.1
BOARD OF EDUCATION, *ET AL.*,
Petitioners,

v.

WHITAKER, *EX REL.* WHITAKER,*
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF OF *AMICI CURIAE* CENTER FOR CONSTITUTIONAL JURISPRUDENCE AND NATIONAL ORGANIZATION FOR MARRIAGE IN SUPPORT OF PETITIONERS

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* See elaboration in Interest of Amici section.

QUESTIONS PRESENTED

1. Whether a school policy requiring boys and girls to use separate bathroom facilities that correspond to their biological sex is sex stereotyping that constitutes discrimination "based on sex" in violation of Title IX.

2. Whether a school policy requiring boys and girls to use separate bathroom facilities that correspond to their biological sex is a sex-based classification triggering heightened scrutiny under an Equal Protection analysis.

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INTEREST OF AMICI CURIAE[1]

The Center for Constitutional Jurisprudence is the public interest law arm of the Claremont Institute, whose stated mission is to restore the principles of the American founding to their rightful and preeminent authority in our national life, including the fundament separation of powers principle implicated by this case that the federal lawmaking power is vested in the Congress, not in the courts, in executive branch agencies, or in private organizations. The Center has previously appeared before this Court as *amicus curiae* in several cases addressing similar separation of powers issues, including *Gloucester County Sch. Bd. v. G.G. ex rel. Grimm*, 137 S.Ct. 1239 (Mar. 6, 2017); *United States v. Texas*, 136 S.Ct. 2271 (2016); *U.S. Dep't of Trans. v. Ass'n of Am. Railroads*, 135 S.Ct. 1225 (2015); and *Perez v. Mortgage Bankers Ass'n*, 135 S.Ct. 1199 (2015).

The National Organization for Marriage ("NOM") is a nationwide, non-profit organization with a mission to protect marriage and the faith communities that sustain it. NOM's leading role in those efforts has necessarily meant that the organization has been involved in many public debates about what constitutes being male and being female, and NOM has consistently advocated that our public policy reflect the truth of marriage, gender and the complementarity of the

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[1] Pursuant to Rule 37.2(a), all parties were notified of and have consented to the filing of this brief. In accordance with Rule 37.6, counsel affirms that no counsel for any party authored this brief in whole or in part and that no person or entity other than *amici* made a monetary contribution to fund the preparation and submission of this brief.

sexes. This has included advocacy in judicial, regulatory, legislative and electoral arenas. For example, NOM has consistently opposed proposals that would redefine "sex" to include "gender identity" at the local, state and federal levels, including supporting a statewide referendum in California and a local referendum in Houston, Texas. NOM has also filed amicus briefs in cases before this court on these issues, including in *Gloucester County*, 137 S.Ct. at 1239. Because of its advocacy and public education activities surrounding gender-identity issues, NOM has been the recipient of scientific reports on sexuality and gender, as well as scores of anecdotal examples of threats to privacy and safety that have occurred in the wake of the adoption of policies that eliminate gender-specific access to intimate facilities such as restrooms, showers, and locker rooms. NOM believes that such evidence should be of concern to this Court.[2]

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[2] * Elaboration on the Caption. The name of the plaintiff (Respondent here) in the caption utilized by the court below, reflecting the caption chosen by Respondent on the amended complaint filed in the district court, reads: "Ashton Whitaker, a minor, by *his* mother and next friend, Melissa Whitaker" (emphasis added). Pet.App. 103a. Respondent was born a girl, as the complaint itself acknowledges. Amended Complaint ¶ 1, Pet.App. 103a. Despite that biological fact, the complaint asserts that "Ash is a boy," *id.*, because "Gender identity—a person's deeply felt understanding of their own gender—is the determining factor of a person's sex," *id.* ¶ 13, Pet.App. 108a. The complaint then alleges that the School District's refusal to treat Ashton Whitaker as a boy because of the asserted gender identity is sex discrimination in violation of both Title IX and the Equal Protection Clause of the Fourteenth Amendment. Pet.App. 138a, 142a. Whether Ashton Whitaker "is a boy" because she self-identifies as a boy, and therefore must be treated as a boy even with respect to access to

SUMMARY OF ARGUMENT

The Seventh Circuit's decision reinterpreting the common word "sex" to include "gender identity" not only distorts the statutory text of Title IX, but it renders a nullity the express statutory and regulatory exemptions for single-sex "living facilities" and "toilet, locker room, and shower facilities."

Its Equal Protection holding has even more profound consequences, as it would, if faithfully applied, render the statutory exemption for single-sex intimate facilities not just a nullity, but unconstitutional.

Particularly in light of the significant privacy concerns that are impacted by both aspects of the Seventh Circuit's decision, review by this Court is warranted.

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intimate private facilities such as restrooms, locker rooms, showers, and dormitories, is therefore a central issue in this litigation.

Respondent's counsel have advanced their client's advocacy position by using the male pronoun throughout the complaint, in their briefs, and even with the case caption. But the use of the male pronoun to describe Respondent is only accurate if one accepts—as *amici* do not—the novel theory that "gender identity" determines one's sex. This Court's Rule 34(c) requires briefs submitted to this Court to include "the caption of the case *as appropriate* in this Court." (Emphasis added). The leading treatise on Supreme Court practice notes that "counsel is not bound by the caption used in the court below; counsel for the petitioner is free to clarify or improve it so as to portray accurately the adversary position of the contending parties before the Court." Stephen M. Shapiro, et al., *Supreme Court Practic*e, Ch. 6.18, p. 432 (10th ed. 2013). In order "to portray accurately [their] adversary position," *Amici* have chosen to utilize a time-honored latin phrase, *ex rel.* (meaning, on behalf of), that is gender neutral in order to avoid the implication that it has acceded to Respondent's theory of the case.

ARGUMENT

I. The Seventh Circuit's Decision Eviscerates An Unambiguous Statutory and Regulatory Exemption from Title IX's Ban on Sex Discrimination that was Designed to Protect Profoundly Important Privacy Interests.

A. Title IX and its implementing regulations specifically allow for separate "living facilities," "toilet, locker room, and shower facilities."

The text of Title IX provides that "no person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance…." 20 U.S.C. § 1681. Introduced by Senator Bayh, Title IX was intended to prohibit sex discrimination in education. David S. Cohen, *Limiting Gebser: Institutional Liability for Non-Harassment Sex Discrimination Under*, 39 Wake Forest L.Rev. 311, 318 (2004). Title IX was intended to give women "an equal chance to attend the schools of their choice, to develop skills they want, and to apply those skills with the knowledge that they will have a fair chance to secure the jobs of their choice with equal pay for equal work" by prohibiting discrimination in "institutions." *Id*. at 319-20. There was a mutual understanding in the Senate that up to this point, "'admission to college [had] not been based on ability only, but also on the particular set of reproductive organs that one possesses.'" 118 Cong. Reg. 5,811 (1972). Title IX's goal, therefore, was to end discrimination on the basis of sex in educational settings.

Yet Title IX's prohibition on sex discrimination was not an absolute mandate barring all distinctions between men and women, including distinctions tied to biological differences or required by common decency. The law also contained an explicit statutory exemption to protect privacy in intimate settings: "notwithstanding anything to the contrary contained in this chapter, nothing contained herein shall be construed to prohibit any educational institution receiving funds under this Act, from maintaining separate living facilities for the different sexes." 20 U.S.C. § 1686. As the Department of Education elaborated in the implementing regulations it adopted shortly after the law's passage, "A recipient may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities for students of the other sex." 34 C.F.R. §106.33 (emphasis added).[3]

This common-sense basis for the exemption of intimate facilities, reflecting profound concerns about privacy that would otherwise be implicated, is also reflected in statements made on the Senate floor in support of Title IX by the law's sponsor. Title IX was meant to serve as a "guarante[e] of equal opportunity in education for men and women," Senator Bayh

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[3] No one has challenged the regulation as beyond the delegated authority of the agency. With good reason. A reasonable "statutory interpretation must account for both the 'specific context in which … language is used' and 'the broader context of the statute as a whole.'" *Utility Air Regulatory Group v. E.P.A.*, 134 S.Ct. 2427, 2442 (2014) (*quoting Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997)). The significant privacy concerns reflected by the statutory exemption for "living facilities" easily encompass the even more acute privacy concerns at issue with the intimate facilities covered by the regulation.

noted. 118 Cong. Rec. 5,808 (1972). It was not "requiring integration of dorms between sexes," as he made clear during an earlier colloquy of what the law would and would not require. 117 Cong. Rec. 30,407 (1971). The intent was not to desegregate "the men's locker room," he stated, but rather to "provide equal access for women and men students to the educational process and the extracurricular activities in a school,…." *Id*.

Although the congressional record reflects the concern that lack of women's dormitories had been used as an "excuse" to deny educational opportunities to women, 118 Cong. Rec. 5,811 (1972), that concern was addressed by the statutory exemption permitting single-sex "living facilities," and the regulatory requirement that such facilities be "comparable," not that single-sex intimate facilities would be prohibited. In other words, Title IX and its implementing regulations permitted "differential treatment by sex" in "instances where personal privacy must be preserved." 118 Cong. Rec. 5,807 (1972); *see also* 117 Cong. Rec. 39,260 (1971) (Sen. Thompson, noting that he would offer the amendment allowing separate living facilities because he was "disturbed" by "the statements that if there is to be no discrimination based on sex then there can be no separate living facilities for the different sexes").

B. By redefining the word "sex" to include "gender identity," the Seventh Circuit's decision eviscerates the statutory and regulatory exemptions for single-sex "living facilities," "toilet, locker room, and shower facilities."

In its decision below, the Seventh Circuit held that Ashton Whitaker could state, and was likely to prevail on, a claim under Title IX on the theory that the School District's refusal to let a biological girl use the single-sex intimate facilities designated for boys merely because she identified as a boy, was a form of "sex-stereotyping." Pet.App. 4a. "A policy that requires an individual to use a bathroom that does not conform with his or her gender identity punishes that individual for his or her gender non-conformance, which in turn violates Title IX," the court held. Pet.App. 28a.

This is not remotely the kind of "sex-stereotyping" claim that was recognized by this Court in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), however. There, this Court recognized in the analogous arena of Title VII employment discrimination that a claim of sex discrimination would lie against an employer who took actions against a woman for failing to dress or act like the employer thought a woman should. *Id.* at 235, 250-51. Ashton Whitaker was not denied access to the boys' restroom because she acted or dressed in ways that were not in conformity with how the school district thought she should act or dress. She was denied access because she is biologically a girl, her "gender identity" notwithstanding. Given the profound implications of the Seventh Circuit's holding, certiorari is warranted to correct that misunderstanding of the "sex-stereotyping" claim this Court recognized in *Price Waterhouse*, if for no other reason.

But there are other reasons for granting the petition that are of even greater moment. En route to its holding, the Seventh Circuit feigned ignorance about

the meaning of the statutory term "sex," then redefined that well-understood term to include the non-statutory concept of "gender identity." The English language is not, or at least should not be, nearly as fluid as that. "In the absence of [a statutory] definition, [the courts should] construe a statutory term in accordance with its ordinary or natural meaning." *F.D.I.C. v. Meyer*, 510 U.S. 471, 476 (1994) (citing *Smith v. United States*, 508 U.S. 223, 228 (1993)); *cf.* L. Carroll, *Alice in Wonderland and Through the Looking Glass* 198 (Messner 1982) ("'When I use a word,' Humpty Dumpty said, in rather a scornful tone, 'it means just what I choose it to mean—neither more nor less'").

More fundamentally, as a result of this manipulation of the language by the Seventh Circuit, the school district must allow a biological girl access to the boys' restroom (and, presumably, the locker room, showers, and overnight sleeping quarters as well), despite the fact that the school district has availed itself of the unambiguous statutory and regulatory authority to maintain separate living and intimate facilities "for the different sexes," namely, its male and female students.

More than just a distortion of the statutory text, the Seventh Circuit's decision eviscerates the statutory and regulatory exemptions for single-sex intimate facilities. Although the record reflects that Ashton Whitaker has been diagnosed with "Gender Dysphoria," Amended Complaint ¶ 25, Pet.App. 112a, at least one state requires schools to allow access to opposite-sex intimate facilities based merely on the student's more subjective, self-proclaimed "gender iden-

tity." Cal. Educ. Code § 221.5(f) ("A pupil shall be permitted to …. use facilities consistent with his or her gender identity, irrespective of the gender listed on the pupil's records"); *see also* American Psychological Association, *Transgender People, Gender Identity, and Gender Expression* (2011) ("Gender identity refers to a person's internal sense of being male, female or something else"), available at http://www.apa.org/topics/lgbt/transgender.aspx. And a number of recent cases involving public accommodations outside the school context have likewise highlighted the significant privacy concerns at stake.

Last year in Seattle, for example, a man citing transgender bathroom laws was able to gain access to the women's locker room at a public swimming pool where little girls were changing for swim practice. Mariana Barillas, *Man Allowed to Use Women's Locker Room at Swimming Pool Without Citing Gender Identity*, The Daily Signal (Feb. 26, 2016).[4] Not only did the man begin to undress in front of the girls, but when asked to leave by staff, he replied: "the law has changed and I have a right to be here." *Id.*

In November of 2015, a Virginia man was arrested and charged with three counts of peeping after filming two women and a minor. *Man Dressed as Woman Arrested for Spying into Mall Bathroom Stall, Police Say*, NBC Washington (Nov. 18, 2015).[5] The man had

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[4] Available at http://dailysignal.com/2016/02/23/man-allowed-to-use-womens-locker-room-at-swimming-pool-without-citing-gender-identity/.

[5] Available at http://www.nbcwashington.com/news/local/Man-Dressed-as-Woman-Arrested-for-Spying-Into-Mall-Bathroom-Stall-Police-Say-351232041.html.

dressed as woman to gain access to the women's restroom within the mall. *Id.*

These are not isolated incidents, but are indicative of similar incidents happening across the country wherever transgender policies are put in place that allow men claiming to be women to access women's restrooms and showers. In Washington State, a woman who had suffered sexual abuse as a child was fired from her job for declining to go along with the YMCA's recent policy mandating that women's locker rooms and showers be open to men. The fact that the policy re-awakened her old trauma was of no moment. C. Mitchell Shaw, *Rape Victim: Transgender Agenda Creates "Rape Culture,"* The New American (July 1, 2016);[6] *see also, e.g.,* Warner T. Huston, *Top Twenty-Five Stories Proving Target's Pro-Transgender Bathroom Policy is Dangerous to Women and Children*, Breitbart News Networks (Apr. 23, 20116)[7] (illustrating a multitude of instances confirming the privacy and safety concerns of many individuals are valid). Similar incidents are also happening in parts of neighboring Canada that have reinterpreted "sex" to include "gender identity." Shortly after Ontario, Canada passed its "gender identity" bill, for example, a man claiming to be transgender gained access to women's shelters where he sexually assaulted several women.

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[6] Available at http://www.thenewamerican.com/culture/faith-and-morals/item/23541-rape-victim-transgender-agenda-creates-rape-culture.

[7] Available at http://www. breitbart.com/big-government/2016/04/23/twenty-stories-proving-targets-pro-transgender-bathroom-policy-danger-women-children/.

Peter Baklinski, *Sexual Predator Jailed After Claiming to be 'Transgender' to Assault Women in Shelter*, Life Site (Mar. 4, 2014).[8]

Cases like these would seem to be an inevitable outgrowth of redefining the term "sex," as the Seventh Circuit has done. For if, contrary to its ordinary meaning, the term "sex" includes "gender identity," which is simply a reflection of one's own "personal internal sense" of one's sex, as the American Psychological Association defines the term, then the explicit statutory and regulatory authority to protect privacy by maintaining single-sex intimate facilities is meaningless. Yet the Seventh Circuit does not even mention the statutory exemption for single-sex "living facilities," and only mentions briefly in passing the parallel regulatory exemption for "separate toilet, locker room, and shower facilities on the basis of sex." Given the profound concerns over student privacy reflected in those exemptions, the Seventh Circuit's failure to even mention, much less come to terms with, those exemptions warrants this Court's review, lest an important policy consideration adopted by Congress be consigned to the dust bin.

II. The Seventh Circuit's Equal Protection Holding Renders Congress's Exemption for Single-Sex Intimate Facilities Unconstitutional.

Even more troubling than the fact that the Seventh Circuit's Title IX holding renders nugatory a significant statutory exemption, its Fourteenth Amend-

[8] Available at http://linkis.com/ www.lifesitenews.com/12D80.

ment Equal Protection holding would render all single-sex intimate facilities policies unconstitutional, and under the parallel Equal Protection component of the Fifth Amendment's Due Process Clause, effectively renders Congress's statutory exemption unconstitutional as well. *See Bolling v. Sharpe*, 347 U.S. 497, 499-500 (1954). In short, the Seventh Circuit has, in practical effect, adopted the very policy position that was of such concern during the debates over ratification of the Equal Rights Amendment in the 1970s that the Amendment was defeated.

Although the Seventh Circuit declined to hold that "transgender status" was itself a suspect classification subject to heightened scrutiny (despite expressing great sympathy with that position), it nevertheless subjected the School District's single-sex bathroom policy to heightened scrutiny on the theory that the policy "shows sex stereotyping." Pet.App. 32a. That itself is a leap beyond this Court's existing precedent that warrants this Court's review. *Cf. City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 441 (1985) (noting that courts should be "very reluctant" to create new suspect classifications).

But the Seventh Circuit's decision does much more than that. By equating classifications based on transgender status with those based on sex, and then holding that the School District's single-sex facilities policy does not survive heightened scrutiny for transgendered students, the Seventh Circuit's holding necessarily means that the policy would not survive heightened scrutiny for non-transgender students either. And neither would the exemptions contained in the federal statute and regulations. Describing the School District's interest in "bathroom privacy" as

merely a "legitimate interest" rather than an "exceedingly persuasive" interest, and by holding that none of the privacy concerns proffered by the School District meet the higher standard under heightened scrutiny, the Seventh Circuit's holding all but guarantees that a lawsuit by a boy seeking access to the girls' restroom, or a girl seeking access to the boys' room, would also succeed. Indeed, all of the scenarios described by the Seventh Circuit to rebut the School District's privacy concerns with respect to transgender students are equally applicable to non-transgender students.

The School District's "policy does nothing to protect the privacy rights of each individual student vis-a-vis students who share similar anatomy," the Court asserts, "and it ignores the practical reality of how Ash, as a transgender boy, uses the bathroom: by entering a stall and closing the door." Pet.App. 35a. The same would presumably be true for non-transgender girls seeking to use the boys' room. Similarly, the Court's claim that a "transgender student's presence in the restroom provides no more of a risk to other students' privacy rights than the presence of an overly curious student of the same biological sex who decides to sneak glances at his or her classmates performing their bodily functions," *id.*, would be equally applicable to a non-transgender boy seeking access to the girls' room.

In other words, the Seventh Circuit's reasoning, if faithfully applied, would render the statutory exemption contained in Title IX allowing school districts to "maintain[n] separate living facilities for the different sexes" unconstitutional even for non-transgender students. In the forty-five years since Title IX was

adopted, no court has even suggested, much less adopted, such a nonsensical position.

Indeed, concerns about the lack of single-sex privacy in intimate facilities is, quite likely, what derailed the Equal Rights Amendment in the 1970s, contemporaneously with the adoption of Title IX. That proposed constitutional amendment provided that "equality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex." Barbara A. Brown, *et al.*, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 Yale L. J. 871, 872 (1971). The amendment was submitted to the States for ratification, but had only been "ratified by thirty states, only eight short of the requisite three fourths majority," before the initial support for it began to dissipate. Orrin G. Hatch, *The Equal Rights Amendment Extension a Critical Analysis*, 2 Harv. J.L & Pub. Pol'y 19, 20 (1979).

Strong advocates against the ratification of the Equal Rights Amendment, such as Phyllis Schlafly, President and Founder of Eagle Forum, expressed concern that the amendment would require "public unisex bathrooms." Juliet Eilperin, *Back to the Future*, The Wash. Post Nat'l Weekly Ed., April 2-8, 2007 at 15 (quoting Caroline Fredrickson of the ACLU - Washington). Schlafly emphasized in her statements opposing the amendment that the "ERA [would] not protect privacy between the sexes in hospitals, prisons, schools, or public accommodations." Eagle Forum, *Era—Do You Know What It Means?* (July 6, 2010)).[9]

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[9] At http://www.eagleforum.org/era/2003/ERA-Brochure.shtml.

Because single-sex bathrooms had never been held to be unconstitutional, the argument that the Equal Rights Amendment would render them unconstitutional and thereby destroy the privacy expectations that attach to the long-standing custom of single-sex facilities, was quite plausible. And it created such a heightened concern that the amendment was defeated.

A similar concern was expressed during debates in Congress over adoption of Title IX as well, but there, the proponents of Title IX were able to mollify the privacy concerns by an express statutory exemption for single-sex privacy in intimate facilities. 117 Cong. Rec. 30,414 (1971). Indeed, Senator Bayh acknowledged that "the equal rights amendment is much broader in scope" than the proposal of Title IX. *Id*.

Whether the Equal Rights Amendment would actually have required "public unisex bathrooms," as its opponents claimed, the risk that it might be so interpreted was enough to derail the ratification. Yet the Seventh Circuit here has now effectively amended the existing Equal Protection Clause to compel the very thing that the American people rejected when they refused to ratify the Equal Rights Amendment. The sensitive policy judgments that are required to deal with privacy issues involving not only those individuals, such as Ashton Whitaker, dealing with Gender Dysphoria, but with biological differences among the sexes more broadly, is best left to the legislative process rather than the constitutional scalpel of the courts. The Seventh Circuit's decision to the contrary warrants review by this Court.

CONCLUSION

The Seventh Circuit's decision below distorts Title IX's statutory text, eviscerates the statutory and regulatory exemptions for single-sex "living facilities" and "toilet, locker room, and shower facilities," and constitutionalizes both errors by a reinterpretation of the Equal Protection Clause that threatens privacy rights and the common-sense decency that inheres in long-standing community customs that provide for separate, single-sex intimate facilities. The petition for the writ of certiorari should be granted to overturn the Seventh Circuit's decision.

September 2017 Respectfully submitted,

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