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 Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

BRIEF *AMICUS CURIAE* OF CONCERNED WOMEN FOR AMERICA

in support of the Petitioner
and urging reversal

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INTEREST OF *AMICUS CURIAE*[1]

Concerned Women for America ("CWA") is the largest public policy women's organization in the United States with members from all 50 states. Through our grassroots organization, CWA encourages policies that strengthen women and families and advocates for the traditional virtues that are central to America's cultural health and welfare.

CWA actively promotes legislation, education, and policymaking consistent with its philosophy. Its members are people whose voices are often overlooked—average, middle-class American women whose views are not represented by the powerful elite. CWA is profoundly committed to protecting the privacy and safety of its members and its members' children. This commitment is driven in part by the tragic experiences of several of CWA's leaders.

SUMMARY OF THE ARGUMENT

Whether this Court interprets the word "sex" in Title IX and its implementing regulation under a tex-

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[1] Counsel of Record for the Parties received timely notice of the intent to file this brief. Sup. Ct. R. 37.2(a). The parties have consented to the filing of this Brief. A copy of the letter granting consent by Counsel for the Respondent accompanies this Brief. The letter of consent from Counsel for the Petitioner has been lodged with this Court. No counsel for any party has authored this Brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this Brief. No person or entity has made any monetary contribution to the preparation or submission of this Brief, other than the *Amicus Curiae*, its members, and its Counsel.

tualist approach or a purposivist approach, its meaning is "physiological sex" (or "biological sex")[2] and does not include "gender identity." Examining Title IX's purposes reinforces the textual analysis, but it also demonstrates that the Seventh Circuit's definition of "sex" destroys the very privacy and safety protections Title IX was enacted to create. This Court should grant the Petition to settle the meaning of "sex" in Title IX and its implementing regulations and to thereby provide guidance to public schools all across America.

ARGUMENT

I. WHETHER INTERPRETED IN TERMS OF TEXT OR OF PURPOSE, "SEX" MEANS "PHYSIOLOGICAL SEX" IN TITLE IX.

This case turns on the statutory interpretation of a single word, "sex." Thus, the question of *how* statutes ought to be interpreted arises. In some cases, a textualist approach and a purposivist (or legal process) approach to interpretation will produce different results.[3] Not so here.

Instead, this is one of those cases in which the textualist approach and the purposivist approach yield the same result.[4] Here, under either approach,

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[2] In using these two phrases, your Amicus intends them as synonymous phrases, not distinguishable phrases.

[3] *See*, *e.g.*, *Gonzalez v. Thaler*, 132 S. Ct. 641, 663, n.7 (2012) (Scalia, J., dissenting); *Wyeth v. Levine*, 555 U.S. 555, 601-04 (2009) (Thomas, J., concurring in the judgment).

[4] *See*, *e.g.*, *McQuiggin v. Perkins*, 133 S. Ct. 1924, 1941–42 (2013) (Scalia, J., dissenting) (quoting this Court's unanimous decision in *Young v. United States,* 535 U.S. 43 (2002)

"sex" must mean "physiological sex" or "biological sex" and cannot be stretched to include "gender identity." Because "sex" does not include "gender identity," the Seventh's Circuit's sex stereotyping analysis is incorrect, as explained by the Petitioners. Pet. 2-3, 10-20.

II. A KEY PURPOSE OF TITLE IX IS TO PROTECT THE PRIVACY AND SAFETY OF STUDENTS, AND THAT PURPOSE WOULD BE THWARTED BY THE SEVENTH CIRCUIT'S DECISION.

Without using the terms, the Petitioners (hereinafter, "the school district") argue both interpretive approaches and demonstrates that the result is the same under both. *See* especially Pet. 6-7 (explaining the purpose of Title IX) and Pet. 19-20 (arguing from the meaning of the Regulations). As to the purpose of Title IX, the school district correctly notes that in addition to ending discrimination against women, Title IX's other key purpose was to protect the privacy of students of both sexes. *See*, *e.g.*, Pet. 18-19.

This purpose is reflected in Title IX itself, in its legislative history, and in its implementing regulations: Senator Birch Bayh, title IX's chief sponsor explained that the title would "allow discrimination" in

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and citing the discussion of *Young* in John F. Manning, *What Divides Textualists from Purposivists?* 106 Colum. L.Rev. 70, 81–82, and n. 42 (2006). Courts sometimes explicitly state that they would reach the same result under either a textualist or a purposivist approach. *See*, *e.g.*, *Mayers v. Ridley*, 465 F.2d 630, 634 (D.C. Cir. 1972).

those situations "where personal privacy must be preserved." 121 Cong. Rec. 16060. And, thus, in Title IX and in the regulations, one reads that "separate living facilities for the different sexes," 20 U.S.C. §1686, and that "separate toilet, locker room, and shower facilities on the basis of sex," 34 C.F.R. §106.33.

These statutory and regulatory quotations, of course, reinforce the textual analysis of "sex" as "physiological sex" or "biological sex" (upon which your Amicus does not elaborate). It also demonstrates Title IX's *purpose* by noting the intent of the actual "reasonable legislators" who enacted Title IX.[5]

Furthermore, privacy concerns are linked to safety concerns, as addressed by some of the cases cited and quoted by the school district. *See*, *e.g.*, Pet. 26 (*quoting G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 132 F. Supp. 3d 736, 751 (E.D. Va. 2015), *rev'd in part, vacated in part,* 822 F.3d 709 (4th Cir. 2016)).

While there was no dissenting opinion issued by the Seventh Circuit panel, an important dissent was issued in *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709 (4th Cir.), *cert. granted in part,* 137 S. Ct. 369 (2016), and *vacated and remanded,* 137 S. Ct. 1239 (2017).

In that dissent, Judge Niemeyer noted the following:

- Across societies and throughout history, it has been commonplace and universally accepted to

[5] Purposivism's "reasonable legislators" can, of course, be real or hypothetical. *See*, *e.g.*, Stephen Breyer, *Active Liberty: Interpreting Our Democratic Constitution* 88 (2005).

> separate public restrooms, locker rooms, and shower facilities on the basis of biological sex in order to address privacy and safety concerns arising from the biological differences between males and females. An individual has a legitimate and important interest in bodily privacy such that his or her nude or partially nude body, genitalia, and other private parts are not exposed to persons of the opposite biological sex. Indeed, courts have consistently recognized that the need for such privacy is inherent in the nature and dignity of humankind.
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> *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 734 (4th Cir.) (Niemeyer, J., concurring in part & dissenting in part).

- Thus, Title IX's allowance for the separation, based on sex, of living facilities, restrooms, locker rooms, and shower facilities rests on the universally accepted concern for bodily privacy that is founded on the biological differences between the sexes. This privacy concern is also linked to safety concerns that could arise from sexual responses prompted by students' exposure to the private body parts of students of the other biological sex. Indeed, the School Board cited these very reasons for its adoption of the policy, explaining that it separates restrooms and locker rooms to promote *the privacy and safety* of minor children, pursuant to its "responsibility to its students to ensure their privacy while engaging in personal bathroom func-

> tions, disrobing, dressing, and showering outside of the presence of members of the opposite sex. . . ."

Id. at 735 (emphasis original).

As the nation's largest public policy women's organization, your *Amicus* is vitally concerned that Title IX's privacy and safety protections for female (and male) students not be stripped away. This concern is one with a personal component for some of our leaders. As discussed in her book, *Feisty and Feminine*, Concerned Women for America's President, Penny Young Nance, was the victim of a physical assault that would have been a sexual assault but for the arrival of a good Samaritan at just the right moment.[6] Because of that experience, Mrs. Nance has "a deep empathy for women who have been sexually violated in any way . . . . [and] feel[s] a responsibility to help them"—a responsibility that she carries out, in part, through Concerned Women for America. And unfortunately, another of our leaders—Dana Hodges, our Texas state director—also has a personal commitment to addressing this issue. Dana was videotaped in a public restroom stall, opening old wounds:

> Going through this experience was especially traumatic for me as a survivor of rape that happened when I was a teenager. Knowing that someone had violated me again dredged up lots of old memories and emotions. I struggled for over a year to use any public bathroom for fear that there was a recording device hidden

[6] The entire account can be found at Penny Young Nance, *Feisty and Feminine*, 35-38 (2016). The quotation in the above paragraph comes from page 38.

somewhere inside.

Concerned Women for America, "State Director Testifies Before Senate Committee in Support of the Privacy of Women and Children (SB 6)" (last visited Sept. 26, 2017).

Nor are these women the victims of isolated incidents. Sadly, the number of documented intrusions on women's privacy and safety continues to climb. We urge this Court not to discount these accounts and the unique perspective and privacy concerns of women victims of sexual abuse. Their experience is far more common than might be expected. According to the Rape, Abuse & Incest National Network (RAINN), the nation's largest anti-sexual violence organization, an estimated 17.7 million American women had been victims of attempted or completed rape as of 1998.[7] One out of every six American women has been the victim of rape or attempted rape. On average, there is a sexual assault every 98 seconds in the United States.

The statistics are even more alarming for young people, which is especially relevant to this case. The majority of sexual assault victims are under 30 years old. Those aged 18-34 are at the highest risk, comprising 54% of sexual assault victims. Those aged 12-17 comprise another 15% of the victims. Thus, these two age groups account for a disturbing 69% of the victims.

As we know, these experiences do not only affect the victims, but their close family and friends will

[7] This and the following statistics come from RAINN's website: https://www.rainn.org/statistics/victims-sexual-violence (last visited Sept. 26, 2017).

also be significantly affected. Thus, the number of people with reasonable, real life, experience-driven concerns about their privacy and safety in such sensitive spaces as bathrooms, locker rooms, showers, and overnight accommodations is much higher than the number of sexual assault victims alone.

Your *Amicus* has no desire to present a long list of such incidents, which can easily be dismissed as a parade of horribles when specifically placed in the context of the transgender bathroom controversy. Yet, simply stating that these intrusions continue to climb does not do justice to the problem.

Thus, your *Amicus* offers here a just three such incidents in summary fashion. Reports (and actual or attempted debunking of reports) of these incidents can be problematic, in that those on opposite sides of the transgender rights debate may be inclined to accept unsubstantiated reports or to downplay or deny substantiated reports. Thus, your *Amicus* offers incidents reported by *local* broadcast or print media, since 1) such reports are generally based on police involvement and, thus, can be easily confirmed or denied (although, of course, such broadcasts do not necessarily (although sometimes they do) indicate the ultimate outcome of police investigations or criminal prosecution); and 2) such reports—at least in your *Amicus's* judgment—are more likely to be reliable than those offered or rebutted by advocates on either side of the issue. Perhaps the easiest source of such reports—and the one your *Amicus* will draw from—deals with the highly-publicized April 2016 decision of Target stores to allow transgender customers and employees to use

bathrooms and fitting rooms of their choice.[8] That these incidents are not from public schools does not undermine the privacy and safety concerns implicated by the Seventh Circuit's decision.

Synopses of three incidences that have occurred from the time of Judge Niemeyer's opinion cited above follow:

- "A transgender woman was arrested in Idaho on [July 12, 2016] after she allegedly filmed a woman in a Target changing room . . . [The suspect] admitted to making other videos at Target and said she makes the videos for 'the same reason men look at pornography.'"[9]
- "[I]n Brick, New Jersey . . . a man was seen taking pictures of women changing in the stall next to him in a unisex Target dressing room . . . . [M]en and women [are] using what are essentially dressing stalls next to each other."[10]
- Similarly, in Revere, Massachusetts, on June 12, 2016, a man was caught "peeping inside a unisex changing room. The man was apparently in one of the stalls and peered into the

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[8] *See* https://corporate.target.com/article/2016/04/target-stands-inclusivity (last visited Sept. 26, 2017).

[9] Source: KGTV, an ABC and Scripts affiliate in San Diego, CA. http://www.10news.com/news/naional/transgender-woman-caught-filming-in-target-changing-room (last visited Sept. 26, 2017).

[10] Source: WABC, an ABC affiliate in New York, NY. http://abc7ny.com/news/man-seen-reaching-under-stall-with-phone-in-nj-target-dressing-room/1508431/ (last visited Sept. 26, 2017).

> next stall where a young female was changing."[11]

Again, such reports could be multiplied. Further, innumerable other reports that are more attenuated as to cause and effect could be added. And, as noted above, this does not even take into account the fears of women and girls who have been victims of sexual assault in the past or the fears of parents of such victims. Stories of these fears include those of a woman who as a ten-year-old swimmer was abused by her coach; a child abused since infancy who as a college athlete could not bring herself to fully disrobe to shower in a locker room; a woman who was abused and raped between the ages of eight and ten; and an adoptive mother whose young daughter has had numerous accidents at school because she cannot bring herself to use the bathrooms due to memories of abuse.[12]

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[11] Source: WFXT, a Cox Media affiliate in Boston, MA. http://www.fox25boston.com/news/police-searching-for-man-caught-peeping-in-revere-target/341209148 (last visited Sept. 26, 2017).

[12] Your *Amicus* has chosen to use a source for these accounts that does not meet the criterion for its prior reports (in that it is provided by a public interest law firm that litigates this issue, Alliance Defending Freedom, not local media) because your *Amicus* believes that this Court is well able to discount the advocacy elements and understand the non-advocacy content demonstrating the real fear experienced by sexual assault victims. This source is a video available at https://www.youtube.com/watch?v=tg-MAMvkplE (last visited Sept. 26, 2017). The one secondhand account in the video (concerning an incident at a Washington state locker room at the 7:38-9:04 marks) is documented in multiple places. *See*, *e.g.*, http://www.kgw.

Your *Amicus* strongly believes that the protections offered women through Title IX—protections that are plain, based on both the text and the purpose of Title IX—ought not be eliminated based on a false and untenable reading of the word "sex."

CONCLUSION

For the foregoing reasons and for other reasons stated in the school district's Petition, this Court should grant the Petition in order to clarify that the word "sex" in Title IX and its implementing regulations does cannot be stretched to include "gender identity" and that the Seventh Circuit's sex stereotyping analysis is incorrect.

Respectfully submitted,
this 27th day of September, 2017,

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com/news/local/washington/seattle-man-in-womens-locker-room-cites-gender-rule/45248512 (last visited Sept. 26, 2017); and https://www.lifesitenews.com/news/man-strips-in-front-of-girls-in-swimming-pool-locker-says-transgender-law-a (last visited Sept. 26, 2017).