No. 17-301

In the Supreme Court of the United States

KENOSHA UNIFIED SCHOOL DISTRICT NO. 1 BOARD OF EDUCATION, *et al.*,
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 *Amici Curiae* Michigan Association of Christian Schools, Great Lakes Region of the American Association of Christian Schools, and Tim Schmig, the Executive Director, Michigan Association of Christian Schools and the Great Lakes Regional Legislative Director of the American Association of Christian Schools in Support of Petitioners

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STATEMENT OF IDENTITY AND INTERESTS OF *AMICI CURIAE*

Pursuant to Supreme Court Rule 37, *Amici Curiae*, Michigan Association of Christian Schools, Great Lakes Region of the American Association of Christian Schools, and Tim Schmig, the Executive Director, Michigan Association of Christian Schools and the Great Lakes Regional Legislative Director of the American Association of Christian Schools (hereinafter "Amici Curiae"), respectfully submit this brief. *Amici Curiae* urge the Court to protect the rights and privacy of students, school faculty, parents, and Christians nationwide, as required by the U.S. Constitution, Federal law, and State law.[1]

Amici Curiae have special knowledge helpful to this Court in this case. *Amici Curiae* have a significant interest in the protection of the constitutional rights, privacy rights, and religious freedom of students, teachers, school faculty, and parents nationwide. *Amici Curiae* promote educational excellence in the classical tradition, committed to Biblical principles and the values of the Judeo-Christian heritage. *Amici Curiae* are committed to the protection of the legal rights and

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[1] Petitioners granted blanket consent for the filing of *amicus curiae* briefs in this matter. Respondent granted *Amici* consent to file this brief. Pursuant to Rule 37(a), *Amici* gave 10-days' notice of its intent to file this *amicus curiae* brief to all counsel. *Amici* further state that no counsel for any party 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 other than *Amici*, its members, or its counsel made a monetary contribution to the preparation or submission of this *amicus* brief.

freedoms of all Christians within the public schools and are leading advocates in this area.

SUMMARY OF THE ARGUMENT

Amici Curiae urge this Court to grant the Petition for Certiorari because the issues in this case implicate important jurisprudential concerns vital to proper constitutional governance under the rule of law.

Recognizing the biological and physiological differences between men and women, Title IX, as enacted by Congress, expressly allows educational institutions to provide separate facilities based on sex, 20 U.S.C. § 1681(a); 20 U.S.C. § 1686. Its implementing regulation also clearly permits the designation of separate toilet, locker room, and shower facilities based on sex. 34 C.F.R. § 106.33.

The Seventh Circuit deliberately refused to apply the plain meaning of the word "sex," as expressly enacted by Congress in Title IX. Instead, the court, using a sexual stereotyping theory, enacted new social policy by judicially amending Title IX to add "gender identity" to the list of classifications covered by the law.

The Seventh Circuit's *de facto* amendment of Title IX changes the word "sex" to additionally include terms like "gender identity" and "transgender," terms appearing nowhere in Title IX, its enacting regulations, or its legislative history. The court's faulty analysis cannot be reconciled with the plain meaning of the actual language used by Congress in Title IX.

Moreover, this judicial amendment substitutes the will of a politically unaccountable court for that of a politically accountable Congress and President. By

judicially amending Title IX, the Seventh Circuit's Opinion exceeded the scope of its judicial power stated in Article III of the Constitution. Nothing in Article III empowers the court to change or "evolve" the meaning of a federal statute enacted by a Congress politically accountable to the people under Article I of the Constitution. Moreover, nothing in *Marbury v. Madison*'s ubiquitous assertion that it is the province of the Court to say what the law is, empowers the court to say instead what it prefers the law to be. 5 U.S. (1 Cranch) 137 (1803).

Indeed, in amending the meaning of the words of Title IX, the Seventh Circuit bypassed the constitutionally required lawmaking processes delegated exclusively to the politically accountable branches of the Federal government. U.S. Const. art. I.

Additionally, the Seventh Circuit's "interpretation" of Title IX creates a hostile and discriminatory environment for religious faculty, administrators, students, and parents. The Seventh Circuit's revision of Title IX will inevitably lead to authorities infringing on constitutional rights of these religious people. The rights threatened by the court's decision include: 1) the constitutional right to bodily privacy; 2) the fundamental right of parents to control and direct the upbringing of their children; 3) the First Amendment rights of freedom of speech and religious conscience; and 4) the fundamental constitutional liberty and equal protection interests judicially recognized by this Court in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (i.e., the personal identity rights of students, faculty, and staff who find their personal identity not in their sexuality but in Jesus Christ or other faith orientation).

ARGUMENT

I. THE SEVENTH CIRCUIT'S EXTRA-CONSTITUTIONAL OPINION IS IRRECONCILABLE WITH THE PLAIN MEANING OF TITLE IX

The Seventh Circuit ruled that Respondent has a "reasonable likelihood of success on the merits" on a Title IX claim. In doing so, the Seventh Circuit held that Petitioners denied Respondent, biologically a girl, access to the boys' restroom because Respondent is transgender (*i.e.*, Respondent asserts that although she is biologically a female, she self-identifies her gender identity as male). The Seventh Circuit rejected Petitioners' policy that biological girls should be instructed to go to the bathroom with other biological girls, and boys go to the bathroom with other boys. According to the Seventh Circuit, "... it is the policy itself which violates the Act." *Whitaker By Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1050 (7th Cir. 2017). In reaching this erroneous conclusion, the Seventh Circuit refused to apply the plain meaning of the word "sex," as expressly enacted by Congress in Title IX. Instead, the court, using a sexual stereotyping theory, enacted new social policy by judicially amending Title IX to add "gender identity" to the list of classifications covered by the law.

In 1972, Congress passed and President Nixon signed Title IX into law. 20 U.S.C. § 1681*, et seq*. Title IX sought to rectify the inequity women faced in the workforce and to address the earnings gap between the sexes by enabling the progress of women and girls in

education.[2] As legislative history reveals, the law focused on combating the economic disadvantages women faced in the workplace by addressing differential treatment based on sex in education. *See, e.g.*, 118 Cong. Red. 5803-07 (1972).

Title IX, as enacted by Congress, states:

> 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(a).

Notably, Title IX recognizes the biological and physiological differences between men and women. Title IX also pertinently provides that,

> 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.

Likewise, Title IX's implementing regulation, 34 C.F.R. § 106.33, expressly allows for schools to designate separate facilities based upon sex:

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[2] *See, e.g.*, U.S. Dep't of Justice, Civil Rights Division, "Title IX Legal Manual," *available at* https://www.justice.gov/sites/default/files/crt/legacy/2010/12/14/ixlegal.pdf, last visited Jan. 4, 2017.

> 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 provided for students of the other sex.

Id.

As these sections make clear, the word "sex" in Title IX, means male and female. Recognizing the biological and physiological differences between men and women, Title IX therefore expressly allows educational institutions to provide separate facilities based on sex, 20 U.S.C. § 1681(a); 20 U.S.C. § 1686. Its implementing regulation also clearly permits the designation of separate toilet, locker room, and shower facilities based on sex. 34 C.F.R. § 106.33.

The Seventh Circuit's *de facto* amendment of Title IX changes the word "sex" to additionally include terms like "gender identity" and "transgender," words appearing nowhere in Title IX, its enacting regulations, or its legislative history.[3] The court's faulty analysis cannot be reconciled with the plain meaning of the actual language used by Congress in Title IX.

The purpose of Title IX was to prevent discrimination based on biological sex. By necessity,

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[3] *Amici* reject the legitimacy of these recently coined terms as unfounded in science or reason and as the self-serving political rhetoric of a small group of activists. *See, e.g.,* R. Reilly, *Making Gay Okay – How Rationalizing Homosexual Behavior Is Changing Everything*, pp. 11, 47-48, 64, 117-29 (Ignatius Press, 2014) (acceptance and promotion of homosexual behavior is based on politics rather than science).

this means Congress based the law on the premise that there are distinct, genetic differences between a man and a woman. Proponents of "transgenderism" or "gender fluidity," however, contend no distinction between the sexes exist. It cannot be both ways. Either there is a distinction between the sexes or there is not. The entire purpose of Title IX to prevent discrimination based on sex is rendered useless if every person in the country can be both a man and a woman. This is nonsensical and clearly not the intent of Congress. Congress intended Title IX to protect everyone from discrimination against their biological sex, regardless of their self-perceived identity.

Thus, Title IX, as passed and implemented by the politically accountable branches of the government: 1) requires that schools not discriminate on the basis of sex in order to receive Federal funding; 2) clearly states that separate "toilet, locker room, and shower facilities" on the basis sex are permissible; and 3) includes no provisions, legal or otherwise, pertaining to the special treatment of "gender identity" or "transgenderism,"

Indeed, for over 40 years, Title IX has permitted schools to provide separate bathrooms, changing rooms, and showering facilities based on sex, with discretion resting at the state and local school levels. The clear meaning of the legislation was never questioned.[4]

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[4] During the pendency of the appeal in *Gloucester v. G.G.*, a similar case recently before this Court, the Department of Education issued a letter to every Title IX recipient in the country. The letter, drafted during the Obama Administration, essentially directed that a school must allow a biological girl to use the boy's restroom and shower if the girl says she's a boy. The Respondent in *Gloucester* then argued that the Department of Education letter

Certainly, the Seventh Circuit's social engineering experiment must not stand.

Moreover, this judicial amendment substitutes the will of a politically unaccountable court for that of a politically accountable Congress and President. By judicially amending Title IX, the Seventh Circuit's opinion exceeded the scope of its judicial power stated in Article III of the Constitution. In pertinent part, Article III of the Constitution provides that:

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish... (Section 1) The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made,

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provided the "controlling interpretation" of Title IX. It was undisputed that the agency's letter failed to address Title IX's implementing regulations, including 34 C.F.R. § 106.33, that allow for the separation of toilets, locker rooms, and showers based on sex. It was also undisputed that the Department of Education never published the letters and never issued notice of rulemaking regarding its radical new "interpretation" of Title IX. The Great Lakes Justice Center and others called on the Departments of Education and Justice to rescind the letter at issue. The Departments of Education and Justice thereafter rescinded the letter on February 22, 2017. *Available at* https://www.justice.gov/opa/press-release/file/941546/download, last visited September 21, 2017. This Court then vacated the judgment of the Fourth Circuit and remanded the case for further consideration in light of the guidance issued by the Department of Education and Department of Justice on February 22, 2017. *Gloucester v. G.G.*, Case No. 16-273, U.S. (March 6, 2017) (Summary Disposition Order).

> or which shall be made, under their Authority.
> . . .

U.S. Const. art. III, § 2.

The Federal government, including the judiciary, is one of enumerated powers. U.S. const. Art. I, II, III. The Seventh Circuit conspicuously failed to identify any legitimate source of constitutional authority on which it relied when amending the meaning of the Title IX. The simple reason this lower court failed to do so is that no enumerated judicial power exists for the judiciary to amend the duly enacted statutory law of the nation.

Nothing in Article III empowers the Court to change or "evolve" the meaning of a federal statute enacted by a Congress politically accountable to the people under Article I of the Constitution. Moreover, nothing in *Marbury v. Madison*'s ubiquitous assertion that it is the province of the Court to say what the law is, empowers the Court to say instead what it prefers the law to be. 5 U.S. (1 Cranch) 137 (1803).

The Seventh Circuit, wandering far beyond the scope of its Article III powers, improperly permits changeable political preferences of unelected judges to amend a Congressional statute (i.e., Title IX). Thus, the Seventh Circuit amends the word "sex" to instead mean "gender identity" merely because a panel of unelected judges preferred it so.

Moreover, in amending the meaning of the words of Title IX, the Seventh Circuit bypassed the constitutionally required lawmaking processes delegated exclusively to the politically accountable

branches of the Federal government. Article I of the Constitution, expressly provides:

> All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives. *** Every bill which shall have passed the House of Representatives and the Senate, shall, before it become a law, be presented to the President of the United States; if he approve he shall sign it, but if not he shall return it, ...

U.S. Const. art. I, sec. 1, 7.

Although the judicial branch may hold the power to truthfully say what the provisions of a federal statute means, that power does not extend to amending or evolving the meaning of these provisions. That power is delegated to the politically accountable branches of government in Article I. Thus, it is especially troubling that the Seventh Circuit's opinion rejected truth for a lie. Concluding Respondent's Title IX claim had merit where the School District denied Respondent access to the boys' restroom because *he* is transgender denies human biology and natural truth. The facts undisputedly show the School District's action sought to protect the privacy of its male students by denying Respondent access to the boys' restroom because *she* is, in reality, a girl.

Amici Curiae urge this Court, therefore, to grant the Petition for Certiorari.

II. THE SEVENTH CIRCUIT'S "INTERPRETATION" OF TITLE IX CREATES A HOSTILE AND DISCRIMINATORY ENVIRONMENT FOR RELIGIOUS FACULTY, ADMINISTRATORS, STUDENTS, AND PARENTS.

The Seventh Circuit's revision of Title IX will inevitably lead to authorities infringing on constitutional rights of students, faculty, and staff. The rights threatened by the court's decision include: 1) the constitutional right to bodily privacy; 2) the fundamental right of parents to control and direct the upbringing of their children; 3) the First Amendment rights of freedom of speech and religious conscience; and 4) the fundamental constitutional liberty and equal protection interests judicially recognized by this Court in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (i.e., the personal identity rights of students, faculty, and staff who find their personal identity not in their sexuality but in Jesus Christ or other faith orientation).

A. The Right to Bodily Privacy

Every person has a fundamental right to bodily privacy. *See Griswold v. Connecticut*, 381 U.S. 479 (1965), *De May v. Roberts*, 46 Mich. 160 (1881); *Cf. Moore v. East Cleveland*, 431 U.S. 494 (1977); U.S. Const. amend. III, IV. The right to bodily privacy includes a right to privacy in one's fully or partially unclothed body. It also includes the right to be free from the risk of intimate exposure of oneself to the opposite sex, or being forced to endure such exposures by the opposite sex. *See, e.g.*, *Canedy v. Boardman*, 16 F.3d 183 (7th Cir. 1994); *York v. Story*, 324 F.2d 450, 455 (9th Cir. 1963) ("The desire to shield one's

unclothed figure from views of strangers, and particularly strangers of the opposite sex, is impelled by elementary self-respect and personal dignity.").

Throughout history, American law and society maintained a national commitment to protecting citizens, and especially children, from suffering the risk of exposing their bodies, or their intimate activities, to the opposite sex. The same is true of forcing them to be exposed to members of the opposite sex in public and in semi-public contexts, such as bathrooms, dressing rooms, and locker rooms.

Early in our history, the law allowed legal actions against "Peeping Toms." *See e.g.*, *Commw. v. Lovett*, 4 Pa. L.J. Rpts. (Clark) 226 (Pa. 1831). As American law developed after the nation's founding, it disfavored the surreptitious viewing of its citizens to protect their reasonable expectation of privacy.[5] This protection is heightened for children. For example, Federal law makes it a crime to possess, distribute, or even view images of naked children. 18 U.S.C. § 1466A(a)(1). Nearly every state criminalizes the transmission of a naked picture of a minor via email, text messaging, or other electronic means. *See, e.g.*, MCL 750.145a, MCL 750.145c, and MCL 750.145d.

In the late 1800s, as women began entering the workforce, the law developed to protect privacy by mandating that workplace restrooms and changing rooms be separated by sex. Massachusetts adopted the

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[5] *See* Samuel D. Warren & Louis D. Brandeis, "The Right to Privacy" 4 Harv. L. Rev. 193 (1890).

first such law in 1887.[6] By 1920, 43 of the then 48 states had similar laws protecting privacy by mandating sex-separated facilities in the workplace.[7] Because of our national commitment to protect our children from the risk of being exposed to the anatomy of the opposite sex, as well as the risk of being seen by the opposite sex while attending to private, intimate needs, sex-separated restrooms and locker rooms are ubiquitous. Using restrooms and locker rooms in a public school separated by sex are an American social and modesty norm. Historically, the purposeful exposure of one's self to the opposite biological sex has been considered wrongful, and possibly even criminal, behavior. *See e.g.*, *Barnes v. Glen Theatre, Inc*., 501 U.S. 560, 568 (1991).

A child's locker room or restroom has always been a private place to be used exclusively by boys or girls, and a place where members of the opposite biological sex are not allowed.

Freedom from the risk of compelled intimate exposure to the opposite sex, especially for minors, is deeply rooted in our Nation's history and traditions. The ability to be clothed in the presence of the opposite biological sex, along with the freedom to use the restroom and locker room away from the presence of the opposite biological sex, is fundamental to a reasonable person's sense of self-respect and personal

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[6] Act of Mar. 24, 1887, ch. 103, § 2, 1887 Mass Acts, 668, 669.

[7] George Martin Kober, *History of Industrial Hygiene and its Effects on Public Health, in* A HALF CENTURY OF PUBLIC HEALTH 361, 377 (Mazyck P. Ravenal ed., 1921).

dignity. If a public school holds the power to compel its students to disrobe or risk being unclothed in the presence of the opposite sex in order to use its public facilities, then little personal liberty and privacy involving our bodies remain. Minors, in particular, must be free from the compelled risk of exposure of their bodies, or their intimate activities, to the opposite sex in restrooms and locker rooms.

The Seventh Circuit's policy allows a biological girl the right of entry to, and use of, the boy's bath and locker rooms any time she wishes as long as she claims to identify as male. The policy requires children to risk being intimately exposed to those of the opposite sex merely because a member of the opposite sex wants to see them and is willing to state a belief in his or her own gender confusion. Common sense and common decency belie the Seventh Circuit's analysis and conclusions in this case.

Petitioners' request in the lower court was simple, reasonable, and concomitant with the legal and cultural traditions of the United States: follow the standard used in civilized society throughout our nation's history—boys use boy's bathrooms and girls use girl's bathrooms. Using this age-old premise grounded in biological and anatomical truth, everyone can have safe access to restroom and locker room facilities. Because the court's amendment of Title IX will lead to authorities infringing on the bodily privacy rights of students, *Amici Curiae* urge this Court to grant the Petition for Certiorari.

B. The Right of Parents to Direct and Control the Education and Upbringing of their Children

The Seventh Circuit's rewriting of Title IX substantially infringes upon the parents' right to direct and control the education and upbringing of their children. The court's amendment imposes morally relative social engineering into schools by promoting conduct (selecting a "gender identity") contrary to biological truth and the sincerely held religious conscience of a student and/or his or her parents. The Seventh Circuit's analysis and conclusion fails to even allow parents to be notified if their child requests to enter, or if their child will be forced to use a bathroom, shower, or changing room with a child or adult of the opposite sex.

This Court recognizes parental rights to be fundamental rights. *See, e.g.*, *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). Such liberty serves as a powerful limitation on exercises of government authority, including those exercises of authority that impact the parental role in educational matters.

Courts strictly scrutinize government actions that substantially interfere with a citizen's fundamental rights:

> The essence of all that has been said and written on the subject is that only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of [a fundamental right].

Wisconsin v. Yoder, 406 U.S. 205, 215 (1972); *see also Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995); *Widmar v. Vincent*, 454 U.S. 263 (1981); *Church of the Lukumi Babalu Aye, Inc., v. Hialeah*, 508 U.S. 520 (1993).

The fundamental rights standard preserves a parents' fundamental liberty to control and direct the upbringing of their children. The historical underpinnings of the fundamental right of parents to direct and control the upbringing of their children, and the case law in support of it, compels the conclusion that the Seventh Circuit's imposition here violates constitutionally protected fundamental liberty, especially when it infringes upon parental choices grounded in religious conscience. Certainly, no compelling governmental interest exists to impose morally-relative social engineering into schools via promoting conduct (selecting a "gender identity") contrary to biological truth and the sincerely held religious conscience of the parent. None. And even if a compelling interest did exist, the least restrictive means of accomplishing this interest surely must not be the promulgation of a sexual facility policy that threatens both the privacy and safety of other students using the facilities.

The Constitution protects the fundamental right of parents to control and direct the upbringing of their children, including in the sensitive and private matters relevant here. Because the court's amendment of Title IX will lead to authorities infringing on the rights of parents, *Amici Curiae* urge this Court to grant the Petition for Certiorari.

C. The Right to Freedom of Speech and Religious Conscience

The Seventh Circuit's rewriting of Title IX will lead to censorship and punishment for students, faculty, and administrators whose valid religious, moral, political, and cultural views necessarily conflict with the radical new "gender identity" political agenda. For these students, faculty, and administrators, the Seventh Circuit's interpretation of Title IX will lead to unconstitutional interference with and discrimination against their sincerely held religious beliefs and identity, as well as their freedom of speech (e.g., by banning any dissent to the federally-mandated acceptance of sexually fluid access to bathrooms, and locker rooms of the opposite sex).

Under the Constitution, no Federal agency can dictate what is acceptable and not acceptable on matters of religion and politics. The government cannot silence and punish all objecting discourse to promote one political or religious viewpoint. Yet, this is exactly what the Seventh Circuit's decision extra-constitutionally enables.

For over the last half-century the United States Supreme Court has repeatedly upheld the First Amendment rights of students. Indeed, it is axiomatic that students do not "shed their constitutional rights to freedom of speech or expression at the school house gate." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.,* 393 U.S. 503 (1969).

> Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause

> a disturbance. But our Constitution says we must take this risk, and our history says that it is this sort of hazardous freedom—this kind of openness—that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive and often disputatious society.
>
> In order for the [government] to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint. Certainly, where there is no finding and no showing that engaging in the forbidden conduct would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school," the prohibition cannot be sustained.

Id. at 508-09.

Here, the effect of the Seventh Circuit's expansion of Title IX will inhibit, if not ban, the expression of a particular viewpoint and religious belief without any evidence that the belief materially and substantially interferes with the operation of the school. The court's interpretation creates "the ironic, and unfortunate, paradox of . . . celebrating 'diversity' by refusing to permit the presentation to students of an 'unwelcomed' viewpoint on the topic of homosexuality and religion, while actively promoting the competing view." *Hansen v. Ann Arbor Pub. Schools*, 293 F. Supp. 2d 780, 782 (E.D. Mich. 2003). This re-writing of Title IX requires

that everyone get on board with the politically correct "gender identity" or "transsexual" agenda or lose all Federal funding.

The Seventh Circuit's opinion invites authorities to limit the viewpoint of allowable student speech and compels school faculty to politically normalize LGBTQ behavior.

The court's extra-constitutional action here is reminiscent of the broad "anti-harassment" policy struck down as facially unconstitutional in *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200 (3d Cir. 2001). The plaintiffs in *Saxe* sincerely identified as Christians. *Id.* at 203. The plaintiffs, therefore, believed that homosexual behavior is sinful and that their religion required them to speak about homosexuality's negative consequences. *Id.* Plaintiffs feared punishment under the school's policy for discussing and sharing their religious beliefs. *Id.* The Court held that the policy violated the rights of students guaranteed by the First Amendment. *Id.* at 210. The Court found that the "anti-harassment" policy's very existence inhibited free expression because it failed to follow the standard articulated in *Tinker*. *Id.* at 214-15.

Students, faculty, and administrators have a right to articulate their disapproval or concerns with "homosexuality," "gender identity," or "transgenderism" on religious grounds. *See, e.g.*, *Zamecnik v. Indian Prairie School Dist.* # 204, 636 F.3d 874, 875 (7th Cir. 2011). Students have a constitutional right to advocate their religious, political, and moral beliefs about homosexuality "provided the statements are not inflammatory—that is, are not 'fighting words,' which

means speech likely to provoke a violent response amounting to a breach of the peace." *Id.*

Indeed, "a school that permits advocacy of the rights of homosexual students cannot be allowed to stifle criticism of homosexuality . . . *people* in our society do not have a legal right to prevent criticism of their beliefs or even their way of life." *Id.* at 876. A statutory interpretation that punishes a dissenting opinion by promoting another is unconstitutional. *Id.*; *see also Hansen*, 293 F. Supp. 2d at 792-807 (holding a School District's censorship of student speech due to its perceived negative message about homosexuality violated the First Amendment and the Equal Protection Clause of the Fourteenth Amendment); *Glowacki v. Howell Public School Dist*., No.2:11-cv-15481, 2013 U.S. Dist. LEXIS 131760 (Sept. 16, 2013) (holding that a teacher's snap suspension of a student for making a perceived anti-gay comment in class was an unconstitutional infringement on the student's First Amendment freedoms).

Further, the Seventh Circuit's decision fails to adequately respect the First Amendment freedoms of school staff. It will ultimately require school administrators, teachers, and support staff to adopt, implement, and enforce policies that promote the LGBTQ lifestyle. The judicially mandated support, encouragement, and affirmation of LGBTQ behaviors unavoidably conflicts with school faculty members who believe this lifestyle to be contrary to their sincerely held religious conscience. They are forced to either violate their religious conscience and endorse a pro-LGBTQ message under the compulsion of governmental power or face punishment. Nowhere in

the Seventh Circuit's revision of Title IX does the court protect dissenting opinions or sincerely held religious conscience. It must be remembered that "[t]olerance is a two-way street. Otherwise, the rule mandates orthodoxy, not anti-discrimination." *Ward v. Polite*, 667 F.3d 727, 735 (6th Cir. 2012).

As this Court has emphasized, government officials are not thought police: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *W. Virginia State Bd. of Ed. v. Barnette*, 319 U.S. 624, 642 (1943). The Seventh Circuit's new directive patently violates this critical principle.

The Seventh Circuit claims to promote non-discrimination, by discriminating against, silencing, and punishing those who cannot and do not support the LGBTQ lifestyle. This is still a free country, however, and such censorship is still unconstitutional. The Federal Courts cannot and should not create an environment that will undoubtedly chill the First Amendment freedoms of those students and faculty who disagree with the LGBTQ political agenda for valid religious, moral, political, and cultural reasons. Because the court's amendment of Title IX will lead to authorities infringing on the First Amendment rights of faculty, administrators, and students, *Amici Curiae* urge this Court to grant the Petition for Certiorari.

D. The Right to Personal Religious Identity and Autonomy

The Seventh Circuit's Amendment of Title IX will lead to substantial infringements on the Constitutional liberty and equal protection interests recognized by the Supreme Court in *Obergefell*.

This Court's recent ruling in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), created a new constitutional right of personal identity for all citizens. This Court held that one's right of personal identity precluded any state from proscribing same-sex marriage. In *Obergefell*, the Justices in the majority held that "The Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allow persons, within a lawful realm, to define and express their identity." *Id.* at 2593.

Because this Court defined a fundamental liberty right as including "most of the rights enumerated in the Bill of Rights," and "liberties [that] extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs," this new right of personal identity must also comprehend factual contexts well beyond same-sex marriage. Clearly, this newly created right of personal identity applies not just to those who find their identity in their sexuality and sexual preferences—but also to citizens who define their identity by their religious beliefs.

Many Christian people, for example, find their identity in Jesus Christ and the ageless, sacred tenets of His word in the Holy Bible. For followers of Jesus, adhering to His commands is the most personal choice

central to their individual dignity and autonomy. A Christian whose identity inheres in their religious faith orientation, is entitled to at least as much constitutional protection as those who find their identity in their sexual preference orientation. There can be no doubt that this newly created right of personal identity protects against government authorities who use public policy to persecute, oppress, and discriminate against Christian people.

The Seventh Circuit's revision of Title IX will inevitably lead to authorities infringing on the personal identity, liberty, and equal protection this Court established in *Obergefell*. *Id*. at 2607 (noting, "The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered.").

According to *Obergefell*, then, beyond the First Amendment religious liberty protections expressly enshrined in the Bill of Rights, the new judicially-created substantive due process right to personal identity now provides Christian and other religious people additional constitutional protection. Henceforth, government action not only must avoid compelling a religious citizen to facilitate or participate in policies that are contrary to their freedoms of expression and religious conscience protected by the First Amendment, but it must also refrain from violating their personal identity rights secured by substantive due process and equal protection. Because the court's amendment of Title IX will lead to authorities infringing on the

personal religious identity rights that this Court created in *Obergefell*, *Amici Curiae* urge this Court to grant the Petition for Certiorari.

CONCLUSION

For the reasons provided in this brief, *Amici Curiae* urge this Court to grant the Petition for Certiorari. If we allow an unelected judiciary to promulgate statutory policy, we merely create an illusion of a nation willing to protect fundamental freedoms. Such a course inevitably erodes the fundamental foundations of our country, as structural institutions of free government stand for a time, while the essence for which they stand cease to exist. Those who came before us built a constitutional democratic republic upon the Rule of Law. It is now our watch. It is well for us to recall, therefore, the ancient truth that "righteousness exalts a nation." *Proverbs* 14:34. This Honorable Court should grant the Petition for Certiorari to address the unauthorized overreach of the federal judiciary, and to protect the privacy and constitutional rights of all Americans.

Respectfully submitted,

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