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 *AMICUS CURIAE* OF EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

The questions presented are:

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 of the Education Amendments of 1972, 20 U.S.C. § 1681(a).

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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Mark Walsh, *The School Law Blog: Wisconsin District Asks Supreme Court to Resolve Transgender Restroom Issue*, EDUCATION WEEK (Aug. 28, 2017) 5

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INTEREST OF *AMICUS CURIAE*

Amicus curiae Eagle Forum Education & Legal Defense Fund[1] ("EFELDF") is a nonprofit corporation headquartered in Saint Louis, Missouri. Since its founding in 1981, EFELDF has defended federalism and supported autonomy in areas of predominantly

[1] *Amicus* files this brief with all parties' consent, with 10 days' written notice; *amicus* has lodged respondent's written consent to the filing of this brief, and petitioners have lodged their blanket consent. Pursuant to Rule 37.6, counsel for *amicus* authored this brief in whole, no party's counsel authored this brief in whole or in part, and no person or entity – other than *amicus* and its counsel – contributed monetarily to preparing or submitting the brief.

local concern, such as education. EFELDF has a longstanding interest in limiting Title IX to its anti-discrimination intent, without intruding further into local control over schools. For these reasons, EFELDF has direct and vital interests in the issues before this Court.

STATEMENT OF THE CASE

This litigation began when a minor, biologically female high school student ("Whitaker") with gender dysphoria sought to begin living as a male; as part of that effort, Whitaker sued the Kenosha Unified School District No. 1 Board of Education and its Superintendent (collectively, "Kenosha") for denying access to the boys' restrooms at school. The district court granted Whitaker a preliminary injunction, which the school appealed to the Seventh Circuit. The Seventh Circuit upheld the preliminary injunction under both Title IX and the Equal Protection Clause. Kenosha now asks this Court to review the Seventh Circuit's decision on the preliminary injunction.

Constitutional Background

Under Article III, federal courts cannot issue advisory opinions, *Muskrat v. U.S.*, 219 U.S. 346, 356-57 (1911), but must instead focus on the cases or controversies presented by affected parties before the court. U.S. CONST. art. III, §2. Appellate courts review jurisdictional issues *de novo, Steel Co. v. Citizens for a Better Environment,* 523 U.S. 83, 94-95 (1998), and can raise them *sua sponte*, requiring dismissal where jurisdiction is lacking: "For a court to pronounce upon the meaning or the constitutionality of a state or federal law when it has no jurisdiction to do so is, by very definition, for a court to act *ultra vires*." *Id.* at

101-02. "'All of the doctrines that cluster about Article III – not only standing but mootness, ripeness, political question, and the like – relate in part, and in different though overlapping ways, to … the constitutional and prudential limits to the powers of an unelected, unrepresentative judiciary in our kind of government.'" *Allen v. Wright,* 468 U.S. 737, 750 (1984) (*quoting Vander Jagt v. O'Neill,* 699 F.2d 1166, 1178-79 (D.C. Cir. 1983) (Bork, J., concurring)).

The Equal Protection Clause prohibits state and local government from "deny[ing] to any person within its jurisdiction the equal protection of the laws," U.S. CONST. amend. XIV, §1, cl. 4. Courts evaluate equal-protection injuries under three standards: strict scrutiny for classifications based on factors like race or national origin, intermediate scrutiny for classifications based on sex, and rational basis for everything else. *U.S. v. Virginia*, 518 U.S. 515, 567-68 (1996) (Scalia, J., dissenting) (collecting cases).

Statutory Background

Congress modeled Title IX on Title VI of the Civil Rights Act of 1964, except that Title IX prohibits sex-based discrimination in federally funded education. *Compare* 42 U.S.C. §2000d *with* 20 U.S.C. §1681(a). Like Title VI, Title IX prohibits only intentional discrimination (*i.e.*, action taken *because* of sex, not merely *in spite of* sex). *Alexander v. Sandoval*, 532 U.S. 275, 282-83 & n.2 (2001). Similarly, like Title VI, Title IX authorizes funding agencies to effectuate the statutory prohibition via rules, regulations, and orders of general applicability. 20 U.S.C. §1682.

Regulatory Background

The federal Department of Health, Education & Welfare ("HEW") issued the first Title IX regulations in 1975. *See* 40 Fed. Reg. 24,128 (1975). When it was formed from HEW, the Department of Education ("DOE") copied HEW's regulations, with DOE substituted for HEW as needed. 45 Fed. Reg. 30,802 (1980). The rest of HEW became the federal Department of Health & Human Services ("HHS"). Both agencies retain their own rules for the recipients of their funding, as do all federal funding agencies, such as the U.S. Department of Agriculture ("USDA"). 7 C.F.R. pt. 15a. These rules all *allow* recipients to maintain sex-segregated restrooms: "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," 7 C.F.R. §15a.33 (USDA), 34 C.F.R. §106.33 (DOE); 45 C.F.R. §86.33 (HHS), without *requiring* anything.

Factual Background

EFELDF adopts the facts as stated in Kenosha's petition (at 5-6). In addition to those facts, however, two additional facts are relevant here.

First, the student who was a senior when the Seventh Circuit issued its decision on May 30, 2017, Pet. App. 1a, 3a, predictably has graduated. "On Ash Whitaker's second to last day of high school, he learned that he had won a major civil rights case at a federal appeals court." Mark Joseph Stern, *A Trans Teen Explains Why He Took His School to Court (and*

Won), SLATE (June 13, 2017);[2] Mark Walsh, *The School Law Blog: Wisconsin District Asks Supreme Court to Resolve Transgender Restroom Issue*, EDUCATION WEEK (Aug. 28, 2017)[3] ("Whitaker … graduated from Tremper High School in Kenosha in June"). Moreover, EFELDF is not aware of any record evidence or otherwise reasonable prospect of future disciplinary action that would keep Whitaker under continued threat from the purported harms protected by the preliminary injunction here (*i.e.*, restroom access on school property and at school events, discipline, and monitoring or surveillance). Pet. App. 60a.

Second, gender dysphoria's persistence rate over time is as low as 2.2% for males and 12% for females. Am. Psychiatric Ass'n, Diagnostic & Statistical Manual of Mental Disorders 455 (5th ed. 2013). Put differently, up to 88% of females and more than 97% of males with gender dysphoria might resolve to their biological sex. Moreover, at the time of Title IX's enactment, gender dysphoria was considered a "disorder." *Farmer v. Brennan*, 511 U.S. 825, 829 (1994).

SUMMARY OF ARGUMENT

Whitaker's graduation moots interim relief like the preliminary injunction being appealed, given that there is no ongoing threat of the type of harms that

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[2] Available at http://www.slate.com/blogs/outward/2017/06/13/ash_whitaker_discusses_transgender_lawsuit_and_7th_circuit_victory.html (last visited Sept. 26, 2017).

[3] Available at http://blogs.edweek.org/edweek/school_law/2017/08/wisconsin_district_asks_suprem.html (last visited Sept. 26, 2017).

the preliminary injunction enjoined (Section I). Although judicial precedents are presumptively correct and valuable, the Seventh Circuit's decision here is neither correct nor valuable.

First, under Title IX, all of the tools of statutory construction suggest that Congress in 1972 intended to prohibit discrimination on the basis of biological sex (Section II.A.1). *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), and its progeny on impermissible sex-based stereotypes are not to the contrary; instead, these "stereotype" cases concern how males and females act or dress, not who is male or who is female (Section II.A.2). Finally, the statute most relevant to Whitaker's situation is not Title IX but the Individuals with Disabilities Education Act, 20 U.S.C. §§1400-1482 ("IDEA"), because Whitaker's condition fits the scope of that statute's protection (Section II.A.3).

Second, under the Equal Protection Clause, the Seventh Circuit incorrectly – and gratuitously – read this Court's precedents on sex-based discrimination to apply here when Kenosha treats male and female transgender students exactly the same. In any event, if IDEA applies, this §1983 action is preempted by IDEA's elaborate enforcement mechanisms, which are very deferential to state and local education (Section II.B.1). Assuming *arguendo* that §1983 claims were permissible here, Whitaker's claims of discrimination on the basis of a medical condition would warrant rational-basis review, not the heightened scrutiny afforded to sex-based discrimination (Section II.B.2).

Finally, given an incorrect decision of dubious value to the legal community that has become moot

through no fault of Kenosha, the normal – and fair – course is to remand with instructions to vacate the lower-court rulings under review, allowing future proceedings to address the merits, either in this case for damages or by unrelated future litigants in the Seventh Circuit (Section III).

ARGUMENT

This Court should reject the sea change[4] that the Seventh Circuit panel and Whitaker propose to make to Title IX and the Equal Protection Clause. While EFELDF would prefer to leave these issues for state and local resolution, Congress has the power to amend its Spending Clause statutes or to enact new statutes via the Fourteenth Amendment, if Congress considers that course sound. The job that falls to this Court is to reign in lower courts to avoid trammeling constitutional norms for enacting statutes and creating rights. Indeed, the Seventh Circuit's constitutional ruling was gratuitous, given its Title IX ruling. The substantive question of what schools should do with regard to transgender students is important, but the liberty interest that resides in our republican form of government – with separated powers and dual sovereigns – is infinitely more important.

I. WHITAKER'S GRADUATION SHOULD MOOT THE PRELIMINARY INJUNCTION.

When students obtain a preliminary injunction against policies at a school, their graduation moots

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[4] Although Whitaker may wish to use only the restroom, the legal theory that Whitaker presses would apply to all issues under Title IX (*e.g.*, locker rooms, sex-segregated sports teams).

the preliminary injunction. *Bd. of Sch. Comm'rs v. Jacobs*, 420 U.S. 128, 129 (1975); *Bd. of Educ. v. Nathan R.*, 199 F.3d 377, 378 (7th Cir. 2000). Indeed, some educational policies are moot when plaintiffs merely *approach* graduation. *Camreta v. Greene*, 563 U.S. 692, 711 (2011) (*citing DeFunis v. Odegaard*, 416 U.S. 312 (1974)). Stated more fully, injunctive relief becomes moot "[w]hen subsequent events make it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Id.* (alterations and internal quotations omitted). The expectation that a behavior would recur is simply a back-end, mootness-based instance of the requirement that enforcement-based litigation must show a "credible threat" of enforcement to establish a case or controversy. *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979). As explained in this section, the need for a preliminary injunction has become moot on appeal.

The preliminary injunction enjoins Kenosha from:

> (1) denying … Whitaker access to the boys' restrooms;
>
> (2) enforcing any policy, written or unwritten, against the plaintiff that would prevent him from using the boys restroom during any time he is on the school premises or attending school-sponsored events;
>
> (3) disciplining the plaintiff for using the boys restroom during any time that he is on the school premises or attending school-sponsored events; and
>
> (4) monitoring or surveilling in any way … Whitaker's restroom use.

Pet. App. 60a. None of these enjoined activities seem likely to recur now that Whitaker has graduated.

Although Kenosha never disciplined Whitaker for violating Kenosha's policies before the injunction issued, Pet. at 6, Whitaker "worried that he might be disciplined if he tried to use the boys' restrooms and that such discipline might hurt his chances of getting into college," Pet. at 7a. With Whitaker graduated and in college, those enforcement concerns appear not to survive. *Babbitt*, 442 U.S. at 298; *Jacobs*, 420 U.S. at 129. *Amicus* EFELDF respectfully submits that Whitaker faces no credible risk of post-graduation enforcement of Kenosha's policies.

To the extent that Whitaker could claim a need for post-graduation injunctive relief, based on "someday" plans to return to school as a visitor, those plans should not suffice to establish an ongoing case or controversy: "'some day' intentions – without any description of concrete plans, or indeed even any specification of when the some day will be – do not support a finding of the 'actual or imminent' injury that our cases require." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564 (1992). Moreover, if those plans would arise subsequent to the complaint, Whitaker must seek to supplement – as opposed to amend – the complaint, *compare* FED. R. CIV. P. 15(a) *with id.* 15(d), thus requiring remand to consider not only Whitaker's new claims but also any resulting prejudice to Kenosha. *Foman v. Davis*, 371 U.S. 178, 182 (1962); *Bausch v. Stryker Corp.*, 630 F.3d 546, 562 (7th Cir. 2010). Accordingly, Whitaker's plans to return to school after graduation would be irrelevant here.

Under the circumstances, EFELDF respectfully submits that the preliminary-injunction issue has become moot.

II. THE SEVENTH CIRCUIT'S DECISION IS SEVERELY FLAWED ON THE MERITS.

Before analyzing the appropriate remedy for the mootness that has arisen on appeal, *amicus* EFELDF nonetheless examines the merits of the Seventh Circuit's decision:

> As always when federal courts contemplate equitable relief, our holding must also take account of the public interest. *Judicial precedents are presumptively correct and valuable* to the legal community as a whole. They are not merely the property of private litigants and should stand unless a court concludes that the public interest would be served by a *vacatur*.

U.S. Bancorp Mortg. Co. v. Bonner Mall Partnership, 513 U.S. 18, 26-27 (1994) (emphasis added). Here, EFEDLF seeks to rebut any presumption of the correctness or value for the panel's gambit here. While the Title IX merits are merely incorrect, the constitutional analysis both lacks value and even warrants censure.

A. Title IX does not authorize female students with gender dysphoria to compel a school to treat them as boys for permissibly sex-segregated facilities such as restrooms and locker rooms.

While it is fanciful to think that Congress in 1972 intended "sex" to include "gender identity," that is exactly what Whitaker must prove to prevail under

Title IX. *See* 20 U.S.C. §1681(a). As Spending Clause legislation in an area – education – of traditional state and local concern, courts must read Title IX narrowly – within the notice provided by Congress – as to what the statute requires. *Sossamon v. Texas*, 563 U.S. 277, 291 (2011) (clear-statement rule); *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006) (courts "must ask whether [Spending Clause legislation] furnishes clear notice regarding the liability at issue in this case"); *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 230 (1947) (presumption against preemption). Honoring these interpretive guideposts compels the conclusion that Title IX does not apply here.

1. Treating students differently on the basis of gender dysphoria is not discrimination on the basis of sex.

Quite simply, because Kenosha's policy applies equally to biological females seeking to use boys' restrooms and biological males seeking to use girls' restrooms, Kenosha does not discriminate *on the basis of sex*. The differential treatment, if any, is on the basis of gender dysphoria (*i.e.*, students without gender dysphoria were allowed into their bathroom of choice, while students with gender dysphoria were not). Differential treatment on the basis of gender dysphoria is not what Title IX prohibits unless the statutory term "sex" means gender identity. *See* 20 U.S.C. §1681(a). Numerous tools of statutory construction confirm that "sex" means no such thing.

First, in several areas outside of Title IX, federal statutes use "gender identity" separately from "sex," *see*, *e.g.*, 42 U.S.C. §13925(b)(13)(A), implying that the

two phrases mean different things. *Maracich v. Spears*, 133 S.Ct. 2191, 2205 (2013) (statutes must be read to avoid interpreting phrases as mere surplusage). Indeed, efforts to amend Title IX to add "gender identity" have failed, *see* Pet. at 31, which also implies that "sex" does not already include "gender identity" under Title IX. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 442-43 (1987); *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 380-81 (1969).

Second, when Congress enacted Title IX in 1972 and extended the statutory reach in 1988, the then-controlling judicial constructions from this Court and the unanimous courts of appeals held that the word "sex" did not include gender identity.[5] Under the circumstances, this Court should regard the sex-versus-gender-identity dispute as decided by the Congress that enacted Title IX, consistent with that unanimous judicial understanding. *Tex. Dep't of Housing & Cmty. Affairs v. Inclusive Communities Project, Inc.*, 135 S.Ct. 2507, 2520 (2015). Congress can amend the law, but until then Title IX hinges on biological sex.

Third, the narrow construction and clear notice required by the Spending Clause, as well as the presumption against preemption for the educational

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[5] This Court recognized that the term "sex" referred to "an immutable characteristic determined solely by the accident of birth" "like race and national origin." *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973); *accord Knussman v. Maryland*, 272 F.3d 625, 635 (4th Cir. 2001) (same, quoting *Frontiero*); *Garcia v. Gloor*, 618 F.2d 264, 270 (5th Cir. 1980); *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081, 1084 (7th Cir. 1984); *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748, 750 (8th Cir. 1982); *Holloway v. Arthur Anderson & Co.*, 566 F.2d 659, 664 (9th Cir. 1977).

field, compel a narrow reading, absent clear notice and a clear and manifest congressional purpose. *Murphy*, 548 U.S. at 296; *Santa Fe Elevator,* 331 U.S. at 230. Indeed, "[w]hen the text of [a purported] pre-emption clause is susceptible of more than one plausible reading, courts ordinarily accept the reading that disfavors pre-emption." *Altria Group, Inc. v. Good,* 555 U.S. 70, 77 (2008) (interior quotation omitted). These interpretative rules clearly favor a biological-sex interpretation.

Fourth, although the Seventh Circuit conflates Title IX and Title VII, *see also* Section II.A.2, *infra* (regarding "stereotype" cases), this Court's use of Title VII standards in sexual-harassment cases does not go that far. *See Davis ex rel. LaShonda D., v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 651 (1999); *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 75 (1992). Quite the contrary, where there are differences between the two statutes, this Court holds precisely the opposite: the Spending-Clause legislation and Title VII "*cannot* be read in *pari materia*." *United Steelworkers v. Weber*, 443 U.S. 193, 206 n.6 (1979) (first emphasis added). Sensibly enough, like things are alike, except where they are different.[6]

For all the foregoing reasons, Title IX does not regulate differential treatment on the basis of gender identity.

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[6] Although opinions like *Davis*, 526 U.S. at 650, use "gender" loosely to argue that Title IX prohibits discrimination "on the basis of gender," these opinions use "sex" and "gender" interchangeably and do not hinge on sex-versus-gender issues. *Davis* and similar opinions merely uses "gender" to mean "sex," without holding "sex" to mean "gender."

2. The *Price Waterhouse* "stereotype" cases on which the Seventh Circuit relied are inapposite.

The Seventh Circuit's reliance on *Price Waterhouse* and its progeny is also misplaced. These "stereotype" cases concern females' exhibiting masculine traits or males' exhibiting feminine traits. For purposes of her doing her job, it did not matter whether Ms. Hopkins wore dresses or men's suits. However she dressed, she still used the women's restroom. Indeed, it would have been sex discrimination to require a mannishly dressed Ms. Hopkins to use the men's restroom, when all other women could use the women's restroom.

Regulating how boys and girls dress (*e.g.*, clothing, jewelry, hair length) differs fundamentally from segregating restrooms by sex. Whatever the respective merits of dress codes versus sex-segregated restrooms, the *Hopkins* line of cases concerns only the former, not the latter. Whatever impact *Hopkins* has on employers' or schools' ability to require masculinity in men or femininity in women, male employees and students remain male, and female employees and students remain female. The *Hopkins* line of sex-stereotype cases says nothing about which bathroom we use.

3. As between Title IX and IDEA, IDEA applies here.

As indicated, Whitaker did not suffer differential treatment *on the basis of sex*. Instead, the differential treatment, if it occurred, was on the basis of gender dysphoria. While Title IX plainly does not apply, *see*

20 U.S.C. §1681(a), *amicus* EFELDF submits that IDEA arguably applies here.

Until recently – and thus when not only Title IX but also IDEA and its predecessor were enacted – Whitaker's condition would have been considered a "disorder." *Farmer*, 511 U.S. at 829. Even if contemporary medical views are less judgmental, the fact remains that Whitaker has not only "stress-related migraines, depression, and anxiety" but also suicide ideation. Pet. App. 8a. Thus, whether or not transgenderism *per se* remains a disorder under current medical views, *Whitaker's condition* – with migraines, depression, anxiety, and suicide ideation – nonetheless potentially could qualify as a "disability" under IDEA. 20 U.S.C. §1401(3).[7] If so, the bathroom issue would be left to the school systems to decide in the first instance, bolstered by appeals to state education authorities, and from there to federal courts.

While different states and school boards may decide the issue differently as a policy matter, federal courts would give their decisions and policies "due weight" because the "'preponderance of the evidence' is by no means an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they review." *Bd. of Educ. v. Rowley*, 458 U.S. 176, 206 (1982). *Amicus* EFELDF respectfully submits that this issue would be

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[7] The Americans with Disabilities Act, 42 U.S.C. §§12101-12213 ("ADA") expressly excludes transsexualism from the definition of "disability" under ADA, 42 U.S.C. §12211(b)(1), which suggests that the condition could qualify as a disability absent such an exclusion. IDEA is silent on the issue.

better handled under IDEA's administrative process than by allowing plaintiffs to file suit without exhausting those administrative remedies.

B. Discrimination on the basis of gender dysphoria is not discrimination on the basis of sex under the Equal Protection Clause.

As indicated, equal-protection analysis applies different levels of judicial scrutiny, depending the basis for the discrimination. As relevant here, discrimination on the basis of sex faces intermediate scrutiny: "To succeed, the defender of the challenged action must show at least that the classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives." *Virginia*, 518 U.S. at 524. By contrast, discrimination on the basis of non-suspect criteria – such as medical condition – faces rational-basis review. *Bd. of Trs. v. Garrett*, 531 U.S. 356, 365-67 (2001). As explained in Section II.A, *supra*, moreover, the differential treatment (if any) here is based not on sex but on gender dysphoria.

Even though the Seventh Circuit's Title IX decision made it unnecessary to decide constitutional questions, the Seventh Circuit gratuitously pressed on to decide that transgender-based discrimination is discrimination based on sex. Before explaining why the Seventh Circuit was substantively wrong, *amicus* EFEDLF emphasizes that it was wrong to reach the question *at all*:

> If there is one doctrine more deeply rooted than any other in the process of

> constitutional adjudication, it is that we ought not to pass on questions of constitutionality … unless such adjudication is unavoidable.

Spector Motor Serv., Inc. v. McLaughlin, 323 U.S. 101, 105 (1944); *Matal v. Tam*, 137 S.Ct. 1744, 1755 (2017); *U.S. v. Walker*, 673 F.3d 649, 660 (7th Cir. 2012). By reaching a constitutional issue not required by the case before them, the panel judges exceeded the judicial role.

1. <u>IDEA precludes Whitaker's resort to §1983.</u>

As indicated in Section II.A.1, *supra*, Whitaker did not suffer differential treatment *on the basis of sex*, and IDEA applies better than Title IX to differential treatment on the basis of gender dysphoria. Section II.A.3, *supra*. Before reaching the constitutional question, there should have been an inquiry into what, if any, other statutes apply. *Spector Motor Serv.*, 323 U.S. at 105. If IDEA had been found applicable, that finding would have been dispositive both because Whitaker did not exhaust IDEA's administrative process, and because IDEA "is the exclusive avenue through which the child and his parents or guardian can pursue their claim." *Smith v. Robinson*, 468 U.S. 992, 1013 (1984) (preempting action under 40 U.S.C. §1983).

2. <u>The rational-basis test applies to – and is met here for – disparate treatment on the basis of gender dysphoria.</u>

As long as transgender boys and girls are treated the same, there is no discrimination on the basis of

sex – and thus no heightened scrutiny – within the meaning and ambit of *Virginia*, 518 U.S. at 524. That alone resolves the constitutional issue that the Seventh Circuit decided against Kenosha. If it were necessary to complete the constitutional analysis by applying the rational-basis test applicable here to Whitaker's condition, *Garrett*, 531 U.S. at 365-67, Whitaker could not prevail.

To demonstrate unlawfully unequal treatment, Whitaker must establish that the government action does not "further[] a legitimate state interest" and lacks any "plausible policy reason for the classification." *Nordlinger v. Hahn*, 505 U.S. 1, 11-12 (1992). The privacy interest of other students is a legitimate governmental interest, *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 626 (1989); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 658 (1995); *Virginia*, 518 U.S. at 550 n.19, and it easily satisfies the rational-basis test

Moreover, unlike heightened scrutiny, rational-basis review does not require narrowly tailoring policies to legitimate purposes: "[rational basis review] is not a license for courts to judge the wisdom, fairness, or logic of legislative choices," *F.C.C. v. Beach Communications, Inc.,* 508 U.S. 307, 313 (1993), and a policy "does not offend the Constitution simply because the classification is not made with mathematical nicety or because *in practice it results in some inequality*." *Id.* at 316 n.7 (interior quotations omitted, emphasis added). Under this Court's precedents, that is not a battle Whitaker can win.

III. *VACATUR* IS THE ONLY APPROPRIATE REMEDY.

Amicus EFEDLF respectfully submits that this is an open-and-shut case for *vacatur*: "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." *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 394 (1981). While *vacatur* is the "established (though not exceptionless) practice in this situation," *Camreta*, 563 U.S. at 712, none of the exceptions apply here.

The relevant statute authorizes appellate courts to "direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances." 28 U.S.C. §2106. Unless the party seeking *vacatur* has caused the nonjusticiability on appeal, that party "ought not in fairness be forced to acquiesce in" a ruling that could not be appealed on its merits. *Bancorp*, 513 U.S. at 25; *U.S. v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950) ("those who have been prevented from obtaining the review to which they are entitled should not be treated as if there had been a review"). Kenosha in no way caused mootness here.

For both Kenosha (in future merits proceedings for damages) and unrelated litigants in the Seventh Circuit, *vacatur* "clears the path for future relitigation of the issues between the parties, preserving the rights of all parties, while prejudicing none by a decision which was only preliminary." *Alvarez v. Smith*, 558 U.S. 87, 94-95 (2009) (interior quotations

and alterations omitted). As explained in Section II, *supra*, moreover, the panel decision has no value as a precedent.

CONCLUSION

The petition for a writ of *certiorari* should be granted and the preliminary injunction and decision below summarily vacated as moot.

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