No. 23-2568

In the United States Court of Appeals for the Seventh Circuit

D.P., a minor by mother and next friend, A.B.

Plaintiffs - Appellees,

v.

MUKWONAGO AREA SCHOOL DISTRICT and JOSHEPH KOCH

Defendants - Appellants.

On Appeal from the United States District Court for the Eastern District of Wisconsin No. 2:23-cv-00876, Hon. Lynn Adelman.

AMICUS CURIAE BRIEF OF WOMEN'S DECLARATION INTERNATIONAL USA IN SUPPORT OF DEFENDANTS – APPELLANTS

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INTRODUCTION AND STATEMENT OF INTEREST

Our entire society—globally, including the U.S. judiciary—appears to be gripped by the notion that there is a category of people called "transgender" who are somehow members of the opposite sex, members of a nonexistent third sex, or for whom the category of sex is irrelevant, even though most people know sex is real and relevant in various situations.[1] Sex is a material reality, even if some people claim to have identities inconsistent with their sex.

Women's Declaration International (WDI, of which WDI USA is one chapter) is made up of women from every walk of life—from law and government to the hard sciences, the culture-shaping professions, and the nation-building trades. We are lesbians, heterosexual women, and bisexual women. We are mothers and child-free women. We are women of all races, ethnicities, and religions. We are more than 39,000 individuals and 547 organizations from 160 nations. We work to advance the Declaration on Women's Sex-Based Rights in law, policy, and culture all over the world.[2]

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[1] *See, e.g.,* SurveyUSA, *Strong Majorities Prefer Female-Only Interactions for Women, Girls, in Athletics, Restrooms, Other Situations* ("4 of 5 Nationwide Say Word 'Women' Means Adult Humans Who are Biologically Female") (Sept. 28, 2023).

[2] Declaration on Women's Sex-Based Rights, "The Declaration reaffirms women and girls' sex-based rights, and challenges the discrimination we experience from the replacement of the category of sex with that of 'gender identity.'" (2019).

WDI USA is a politically nonpartisan organization, but its supporters generally consider themselves to be liberal, very liberal, or progressive. Of the roughly 7000 U.S. signatories to the Declaration, around 30 percent are Democrats and 34 percent are Independents (many having left the Democratic Party, no doubt due to opposition to the Party's support for "gender identity"). Seven percent are Republicans and the rest are either unaffiliated or prefer not to say.

WDI USA's interest in this matter stems from our interest in protecting women and girls as a sex class, including the female students who attend school and school-sponsored events in the Mukwonago Area School District (the District). It is the position of *amicus* that the District's policy comports with both the Equal Protection Clause of the 14th Amendment, U.S. Const. amend. XIV, § 1, and Title IX of the Education Amendments Act of 1972, 20 U.S.C. § 1681 *et seq*.[3] In view of our expertise on these matters, we have a unique perspective to offer the court.

No counsel for a party authored this brief in whole or in part. No party or counsel for a party contributed money that was intended to fund preparing or

[3] The District requires students to use bathrooms that align with their sex, except under certain circumstances. In its policy, the District uses the phrase "sex assigned at birth." *Amicus* disagrees with the use of that language because sex is not "assigned at birth," but rather observed and recorded, with 99.08 percent accuracy. In addition, *amicus* does not agree that any student should be able to access an opposite-sex bathroom or locker room under any circumstance. Nonetheless, *amicus* understands that the District is doing its best to accommodate all of its students and commends the District for taking its strong stand.

submitting this brief. No person—other than WDI USA, its members, or its counsel—contributed money intended to fund preparing or submitting this brief. WDI USA has separately filed a Motion for Leave to file, as required by Federal Rule of Civil Procedure 29(b)(2).

SUMMARY OF ARGUMENT

The question of whether U.S. schools may legally and constitutionally maintain single-sex bathrooms, locker rooms, and similar facilities has been before the federal judiciary for at least a decade. Most Americans would be puzzled, at best, to learn that this is even a question for federal courts to grapple with. *Of course* schools should be permitted to maintain single-sex intimate facilities such as bathrooms, locker rooms, and the like. This matters to most, if not all students, regardless of sex. It matters especially to female students and their parents, for a variety of reasons.

It ought to matter to all women and to all parents and grandparents of school-age children, especially girls.

It is time to put this matter to rest, and this panel has the opportunity to further that objective by ruling that the District's policy comports with the law and the constitution; overruling *Whitaker v. Kenosha Unified School District No. 1 Board of Education*, 858 F.3d 1034 (7th Cir. 2017), and *A.C. v. Metropolitan School District of Martinsville*, 75 F.4th 760 (7th Cir. 2023), *cert. denied*, No. 23-392 (Jan. 16,

2024); and clarifying that "transgender status" is not a quasi-suspect class for equal protection purposes. *Amicus* urges this panel to do so.

ARGUMENT

The question of whether U.S. schools may legally and constitutionally maintain single-sex bathrooms, locker rooms, and similar facilities has been before the federal judiciary for at least a decade.

Grimm v. Gloucester County, No. 4:2015-cv-00054 ECF No. 57 (E.D. Va. 2015), began in 2015, when Gavin Grimm legally challenged a newly adopted policy of the Gloucester County school district, where Gavin was attending high school. Gavin was a girl who called herself a boy. The policy that Gavin was challenging required students to use either multi-user restrooms that corresponded with their sex or newly constructed single-user restrooms available to either sex. *See id*. at 2.

After winding its way up and down the federal judiciary for several years, the Supreme Court eventually declined to take the matter up on *certiorari*, leaving in place a Fourth Circuit decision that school district single-sex bathroom policies violate both Title IX and the Equal Protection Clause, *see Grimm v. Gloucester County*, 972 F.3d 586 (4th Cir. 2020), *cert. denied* (June 28, 2021).

The Court of Appeals for the Third Circuit came to a similar conclusion in the matter of *Doe v. Boyertown*, 897 F.3d 518 (2018), *cert. denied* (May 28, 2019). During oral arguments before the Circuit's three-judge panel, one judge admonished

the students' attorney not to use the phrase "opposite sex" during arguments because he found that the phrase "complicates the discussion."[4] It is not clear why a federal judge would find the phrase "opposite sex" complicated. The U.S. Supreme Court, after all, used the phrase "opposite sex" four times in its landmark decision in *Obergefell v. Hodges*, ruling that states may not constitutionally prohibit same-sex marriage. *See, e.g., Obergefell v. Hodges* 135 S. Ct. 2584, 2593 (2015) ("The petitioners in these cases seek to find that liberty by marrying someone of the same sex and having their marriages deemed lawful on the same terms and conditions as marriages between persons of the opposite sex.").

And, of course, previous three-judge panels of this court came to similar conclusions in both *Whitaker* and *Martinsville*. However, as this panel noted in its June 12 decision in this case, the Court of Appeals for the Eleventh Circuit has ruled in the opposite direction. *See* Op. at 11, No. 23-2568 (June 12, 2025), *citing Adams v. St. Johns County School Board*, 57 F.4th 791 (11th. Cir. 2022) (*en banc*).

It is the position of *amicus* that the District's policy comports with both Title IX and the Equal Protection Clause, and that *Whitaker* and *Martinsville* should be overruled.

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[4] Oral Argument at 4:22, *Boyertown*, https://www2.ca3.uscourts.gov/oralargument/audio/17-3113Doev.BoyertownAreaSchoolDist.mp3.

I. The District's policy comports with Title IX

Title IX of the Education Amendments of 1972 reads, simply: "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. 38 § 1681 *et seq*.

It was enacted into law and signed by President Nixon in 1972. Although it has come to be associated primarily with women's sports, its original intention was to protect women and girls throughout the educational arena. One of its primary authors and fiercest proponents was Representative Patsy Mink, a Japanese-American woman born on a Hawaii sugar plantation who eventually made her way to the House of Representatives. When she died in 2002, the law was renamed in her honor. So although it is commonly known as Title IX, its official name is the Patsy Mink Equal Opportunity in Education Act.

In 1975, under President Ford, the U.S. Department of Health, Education, and Welfare (today, the Department of Education, or "Department") promulgated implementing regulations to govern enforcement of Title IX in the nation's schools. *See* 34 C.F.R. Part 106. These regulations explicitly permitted sex separation under certain circumstances. For example, recipients of federal funding under Title IX were permitted to maintain sex-specific housing facilities, 34 C.F.R. § 106.32(b)(1);

toilet, locker room, and shower facilities, 34 C.F.R. § 106.33; human sexuality classes, 34 C.F.R. §106.34(a)(3); scholarships, 34 C.F.R. § 106.37(c)(2); and sports teams, "where selection for such teams is based upon competitive skill or the activity involved is a contact sport," 34 C.F.R. § §106.41(b). In other words, in 1975, the Department understood that when equality of the sexes in law and policy is the goal, separating students by sex makes sense under certain circumstances.

As the Court of Appeals for the Eleventh Circuit held in 2022, the meaning of the word "sex" was unambiguous at the time of enactment, and remains so. *See Adams*, 57 F.4th at 812. This is true even if some people (in this case, D.P.) claim to have opposite-sex "gender identities."

The Biden Administration's Department of Education created havoc for the federal judiciary when it finalized a proposed rule change to redefine sex to include the sexist, homophobic, and nebulous concept of "gender identity" in April 2024, *see* "Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance," 89 Fed. Reg. 33,474 (Apr. 29, 2024). Fortunately for women and girls as a sex class and for the material reality of sex, that rule was vacated in January of this year. *See Tennessee, et al. v. Cardona, et al.*, No. 24-072-DCR (E.D. Ky. Jan. 9, 2025). As the same court had previously noted in preliminarily enjoining the rule from taking effect in various states, "[t]here are two sexes: male and female." *Id*. at 1 (June 17, 2024).

The District's policy of separating students by sex in bathrooms and other facilities is therefore consistent with Title IX's mandate that federal funding recipients not discriminate on the basis of sex.

II. The District's policy comports with the Equal Protection Clause

In 1971, the Supreme Court held for the first time that the promise of equal protection under the Constitution applies to women. *See Reed v. Reed*, 404 U.S. 71 (1971). In that matter, an Idaho statute expressly granted men an advantage over women in the administration of probate estates. The law stated: "Of several persons claiming and equally entitled to administer, *males must be preferred to females*, and relatives of the whole to those of the half blood" (emphasis added). *Reed*, 404 U.S. at 72 n.2 and 73.

The parties were Sally and Cecil Reed, the parents of Richard Reed, who had died intestate. Because Richard had no spouse or children, the administration of his estate would fall either to Sally or Cecil, and because of the law's provision preferring males over females, the probate court granted the privilege to Cecil. Sally challenged that decision. Cecil prevailed throughout the lower courts, but the Supreme Court eventually ruled that the Idaho law unconstitutionally deprived Sally of her right to equal protection of the law on the basis of sex. In its ruling, the Court stated: "By providing dissimilar treatment for men and women who are thus

similarly situated, the challenged section violates the Equal Protection Clause." *Id*. at 77.

The Idaho law at issue there blatantly and explicitly expressed a preference for male people over female people. The Supreme Court held, rightfully, that this preference violated the Constitution. So-called "gender identity" had nothing to do with it. If "gender identity" were in fact a subcategory of sex, Sally Reed could simply have saved everyone a lot of time and declared to the probate and higher courts that she had the right to a preference in administering Richard's estate because she "identified as" male.

The argument, as valid today as it was in 1971, was that the Equal Protection Clause protects women and girls on the basis of sex because women and girls have historically been discriminated against on that very basis. The Court explicitly ruled that sex-based discrimination was subject to legal scrutiny and this court should now uphold that legacy. Society cannot pretend that sex-based oppression, both historical and contemporary, does not exist by simply ignoring the fact that women and girls exist as a coherent category of people.

Notably, in arguing that the Equal Protection Clause protects women and girls as a sex class, Sally Reed's legal team (which included the late Justice Ruth Bader Ginsburg) reminded the Court that equal legal rights for women and girls need not,

and constitutionally must not, come at the expense of the privacy rights of women and girls. *See* Appellant Br. at 19, n.13, *Reed*, 404 U.S.

Reed proved to be the beginning of the Supreme Court's long and venerable history of applying intermediate scrutiny to claims of sex-based discrimination under the Equal Protection Clause for the purpose of protecting women and girls from unfair treatment under the law. *See, e.g.*, *United States v. Virginia*, 518 U.S. 515 (1996); *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975); *City of Los Angeles Department of Water and Power v. Manhart*, 435 U.S. 702 (1978); *Arizona Governing Committee v. Norris*, 463 U.S. 1073 (1983); *Frontiero v. Richardson*, 411 U.S. 677 (1973).

This court should respect that important legacy by maintaining the material reality of sex as a quasi-suspect class and by ruling explicitly that "transgender status" is not a similar quasi-suspect class to sex for equal protection purposes (let alone a suspect class).

As the Court of Appeals for the Sixth Circuit explained in *Skrmetti*, "[t]he bar for recognizing a new suspect class is a high one." *L.W., et al. v. Skrmetti, et al.*, 83 F. 4th 460 (No. 23-5600 at 33) (6th Cir. 2023). That court ruled that "transgender status" is not a quasi-suspect class because "transgender" is not immutable and because so-called "transgender people" do not constitute a politically powerless group. *See id*. at 34-35. It was right to do so.

On the question of immutability, *amicus* would like to draw the court's attention to the definition of "transgender" offered by the American Civil Liberties Union (ACLU), which represented the original plaintiffs in that matter: "a broad range of identities and experiences that fall outside of the traditional understanding of gender."[5] It continues: "Some of those identities and experiences include people whose gender identity is different from the sex they were assigned at birth, people who transition from living as one gender to another or wish to do so (often described by the clinical term 'transsexual'), people who 'cross-dress' part of the time, and people who identify outside the traditional gender binary (meaning they identify as something other than male or female). Some transgender people describe themselves as gender variant or gender nonconforming. Not everyone who doesn't conform to gender stereotypes, however, identifies as transgender. Many people don't conform to gender stereotypes but also continue to identify with the gender assigned to them at birth, like butch women or femme men."[6]

No court should want to be the court that establishes a quasi-suspect class for a group of people that, at least according to the ACLU, includes part-time cross-dressers.

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[5] ACLU, *Transgender people and the law*, at 19-20, https://www.aclu.org/sites/default/files/field_pdf_file/lgbttransbrochurelaw2015electronic.pdf.

[6] *Id*. at 20.

The Supreme Court affirmed, ruling that a Tennessee law that prohibits the administration of puberty blockers and opposite-sex hormones to minors does not violate the Equal Protection Clause. *See United States v. Skrmetti*, No. 23-477, 2025 WL 1698785 (June 18, 2025). In affirming, the Supreme Court majority did not expressly state that "transgender status" is not a quasi-suspect class. However, Justices Barrett, Thomas, and Alito all would have ruled that way. *See id*. (Barrett, J., Thomas, J., and Alito, J., concurring separately).

Amicus agrees with the Sixth Circuit and the concurring Supreme Court justices. *See, especially,* Barrett, J., "The Equal Protection Clause does not demand heightened judicial scrutiny of laws that classify based on transgender status."

CONCLUSION

It is frequently said that policies allowing students (or anyone) to access spaces designated for the opposite sex based on "gender identity" are "inclusive" or "compassionate." *Amicus* disagrees. Policies that allow men and boys access to spaces designated for women and girls in effect exclude and are decidedly not compassionate to women and girls as a sex class.

Amicus also thinks it is a cruel lie to tell people (especially children) that they are the sex opposite to what they are. Sex is material and cannot be changed. The most compassionate thing anyone can do for people who genuinely believe that they are the opposite sex is encourage them to accept themselves as they are.

Amicus therefore urges the court to: (1) rule that the District's policy comports with both Title IX and the Equal Protection Clause; (2) overrule both *Whitaker* and *Martinsville*; and (3) state explicitly that "transgender status" is not a quasi-suspect class for purposes of equal protection.

Dated: July 24, 2025

Respectfully Submitted,
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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), the undersigned hereby certifies that:

1. This brief complies with the type-volume limitation, as provided in Circuit Rule 32.2 and Fed. R. App. P. 29(b)(4), because, exclusive of the exempted portions of the brief as provided by Fed. R. App. P. 32(f), the brief contains 2885 words.

2. This brief complies with the type-face and type-style requirements, as provided in Fed. R. App. P. 32(a) and Circuit Rule 32 because the brief has been prepared in proportionally spaced typeface using Microsoft Word for Office 365 in 14-point Times New Roman font.

3. As permitted by Fed. R. App. P. 32(g)(1), the undersigned has relied upon the word count feature of this word processing system in preparing this certificate.

Dated: July 24, 2025

/s/ Kara Dansky
Kara Dansky

CERTIFICATE OF SERVICE

I hereby certify that on [DATE], 2025, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the appellate PACER system. Participants in the case who are registered PACER users will be served by the appellate PACER system.

Dated: July 24, 2025

/s/ Kara Dansky
Kara Dansky