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### The “Animus” Briefs: Attacks on the Seventh Circuit’s Sound Analysis of Transgender Bathroom Rights in Public Schools

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**THE “ANIMUS” BRIEFS:  
ATTACKS ON THE SEVENTH CIRCUIT’S SOUND  
ANALYSIS OF TRANSGENDER BATHROOM  
RIGHTS IN PUBLIC SCHOOLS**

BRENNAN B. HUTSON\*

Cite as: Brennan B. Hutson, *The “Animus” Briefs: Attacks on the Seventh Circuit’s Sound Analysis of Transgender Bathroom Rights in Public Schools*, 13 SEVENTH CIRCUIT REV. 222 (2017), at <https://www.kentlaw.iit.edu/sites/ck/files/public/academics/jd/7cr/v13/hutson.pdf>.

INTRODUCTION

The Seventh Circuit recently granted a preliminary injunction to permit a transgender high school student to use the bathroom in accordance with his gender identity, striking down the school district’s unwritten sex-based bathroom policy.<sup>1</sup> In doing so, the Seventh Circuit has created the nation’s only firm sanctuary from bathroom discrimination for transgender students.

The school district petitioned for a writ of certiorari to the Supreme Court of the United States.<sup>23</sup> The *amicus* briefs in support of

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<sup>1</sup> Whitaker by Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ., 858 F.3d 1034 (7th Cir. 2017), *petition for cert. filed*, (U.S. Aug. 28, 2017) (No. 17-301).

<sup>2</sup> *Id.*

<sup>3</sup> In the intervening time between writing and publishing this Comment, Ashton graduated from high school and the Kenosha School District has settled the matter with Ashton Whitaker for \$800,000.00. See Fortin, Jacey, *Transgender Student’s Discrimination Suit is Settled for \$800,000.00*, NEW YORK TIMES (Jan 10, 2018) <https://www.nytimes.com/2018/01/10/us/transgender-wisconsin-school-lawsuit.html>.

the school district's petition appeal to speculative fear and misrepresent the established law upon which the Seventh Circuit relied in reaching its pro-transgender decision. Likewise, the Supreme Court of the United States, the Department of Justice, and the Department of Education have all expressed early indications of hostility to transgender discrimination protections.<sup>4</sup>

Part I of this Comment lays a foundation of necessary contextual information for understanding transgender rights. It also explains various terms essential to analysis of transgender issues and discusses problems transgender individuals face on a routine basis.<sup>5</sup> Part II presents the legal context in which transgender bathroom rights in public schools arise, including relevant statutes and subsequent judicial precedent. Part III delves into the Seventh Circuit's grant of injunction in favor of a transgender high school student in *Whitaker Ex. Rel. Whitaker v. Kenosha School District*, barring the school district from enforcing its unwritten sex-classification bathroom policy.<sup>6</sup> Part IV discusses the movement against transgender rights,

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This specific case will not reach the Supreme Court of the United States, but the issue of transgender bathroom policies in public schools will likely return before the Court; one student living in the Seventh Circuit has already filed suit against his Indiana high school. *See* Hussein, Fatima, *Transgender High Schooler Sues Evansville Schools for Bathroom Access*, THE INDY STAR (Feb. 27, 2018) <https://www.indystar.com/story/news/2018/02/27/transgender-high-schooler-sues-evansville-schools-restroom-access/373393002/>.

<sup>4</sup> Casual observers of news and social media in 2017 are likely aware of the rising tide against transgender individuals. That animus is codified in the actions of the Attorney General and the White House. *See* STATEMENT BY ATTORNEY GENERAL JEFF SESSIONS ON THE WITHDRAWAL OF TITLE IX GUIDANCE, DOJ 17-214 (D.O.J.), 2017 WL 696633; *see also* Tillett, Emily, *Trump Announces Military Ban on Transgender Service Members*, CBS NEWS (July 26, 2017), <https://www.cbsnews.com/news/trump-announces-ban-on-transgender-service-members-in-military-twitter/>.

<sup>5</sup> This Comment recognizes that gender and sexuality are fluid concepts that occur on a spectrum, and human beings often do not fit neatly into one category. *See The Kinsey Scale*, KINSEY INSTITUTE OF INDIANA UNIVERSITY, <https://www.kinseyinstitute.org/research/publications/kinsey-scale.php> (last accessed Nov. 21, 2017).

<sup>6</sup> *Whitaker*, 858 F.3d at 1034.

specifically focusing on the *amicus* briefs submitted in favor of the Kenosha School District’s writ of certiorari to the Supreme Court of the United States. Finally, this Comment concludes by arguing that the Seventh Circuit’s analysis of transgender issues is the only appropriate analysis under existing law, urges the Supreme Court and other courts to adopt the Seventh Circuit’s reasoning, and further argues that the arguments levied in the *amicus* briefs are predominantly rooted in animus, not sound legal analysis.

### I. WHAT IS A TRANSGENDER PERSON?

“Transgender” is “an umbrella term for person whose gender identity or expression (masculine, feminine, other) is different from their sex (male, female) at birth.”<sup>7</sup> Understanding the distinction between “sex” and “gender identity” is essential to understanding transgendered people. “Sex” refers to the biological DNA makeup of a human being that determines that human’s reproductive organs.<sup>8</sup> Over 99% of humans are born with chromosomes and sex organs that are either male or female.<sup>9</sup> This binary is present in nearly all mammals.<sup>10</sup> Essentially, sex is an objective measure of whether an individual has reproductive organs with sperm that can fertilize eggs during the reproductive process (male), or sex organs with eggs that can be fertilized during the reproductive process (female).<sup>11</sup>

<sup>7</sup> *Lesbian, Gay, Bisexual, and Transgender Health*, CENTERS FOR DISEASE CONTROL AND PREVENTION (May 18, 2017), <https://www.cdc.gov/lgbthealth/transgender.htm>.

<sup>8</sup> *Gender and Genetics*, WORLD HEALTH ORGANIZATION (last visited Nov. 14, 2017), <http://www.who.int/genomics/gender/en/index1.html#Sex%20Chromosome%20Abnormalities>.

<sup>9</sup> *How Commons Is Intersex?*, INTERSEX SOCIETY OF NORTH AMERICA (last visited Sep. 30, 2017), <http://www.isna.org/faq/frequency>.

<sup>10</sup> WERNER A MUELLER ET AL., DEVELOPMENT AND REPRODUCTION IN HUMANS AND ANIMAL MODEL SPECIES (2015).

<sup>11</sup> *Gender and Gender Identity* PLANNED PARENTHOOD (2017), <https://www.plannedparenthood.org/learn/sexual-orientation-gender/gender-gender-identity>

Gender, by contrast, refers to societal and cultural expectations of individuals based on his or her sex.<sup>12</sup> This concept is succinctly illustrated by the history of clothing for young children in the United States. An 1884 photograph of President Franklin Delano Roosevelt as a toddler shows the young boy with: (1) long, curly locks of hair; (2) a knee-length pink dress; (3) an ornate frilly hat with a ribbon on it; and (4) Mary Jane shoes with calf-high socks.<sup>13</sup> The social convention in 1884 expected young boys to wear dresses until age 6 or 7, which was the time of their first haircut.<sup>14</sup> This trend lasted for some time; in June of 1918, an article from “Earnshaw’s Infants’ Department Store” explained that “the generally accepted rule is pink for the boys, and blue for the girls.”<sup>15</sup> Over time, that trend switched. American culture now widely accepts that pink clothing and accessories are appropriate for female babies and blue for male babies. This assignment is so engrained in the culture that a 2017 Buick Encore commercial features a woman going to a baby shower with a pink cake and subsequently rushing around town trying to get a blue cake because she learned last-minute that the baby was a male.<sup>16</sup>

This arbitrary switch in males’ baby clothing from pink to blue is a perfect example of how society’s own stereotypes about sex assignment are purely social in construction. Baby males and baby females do not choose their clothing and nothing about the two colors is innately tied to sex organs. Yet baby males are overwhelmingly dressed in blue while baby females are overwhelmingly dressed in pink. Thus, this color assignment exists purely because of external societal pressures.

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<sup>12</sup> Krieger, Nancy, *Genders, sexes, and health: What are the connections- and why does it matter?* INT. J. EPID. 34(4):652-7 (Aug. 2003).

<sup>13</sup> Maglaty, Jeanne, *When Did Girls Start Wearing Pink?* SMITHSONIAN MAGAZINE (April 4, 2011), <https://www.smithsonianmag.com/arts-culture/when-did-girls-start-wearing-pink-1370097/?no-ist>.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *About 2017 Buick Encore Preferred TV Commercial, 'Baby Shower' Song by Matt and Kim* ISPOT.TV (last visited Nov. 21, 2017), <https://www.ispot.tv/ad/wAxW/2017-buick-encore-oh-boy>.

When children grow up, these stereotypes based on sex evolve: male children are often expected to wear short hair, play sports, wrestle with other males, or play with toy vehicles and army figures. By contrast, female children are expected to be dainty and gentle, wear dresses, or play with dolls. Adult males are often expected to be rough, strong, short-haired, independent, and aggressive; adult females are often expected to be submissive, gentle, small, friendly, and pretty. These expectations (or stereotypes) may aptly apply to many males and females, but of course society is full of females who are rough, strong, short-haired, independent and aggressive (and vice versa). The discrepancy between societal expectations on the basis of sex and each individual’s desire to embrace those expectations creates a vast, fluid gender identity scale.

“Gender identity” refers to an individual’s own internal understanding of one’s own gender.<sup>17</sup> “Gender expression” is a term “used to describe one’s outward presentation of their gender.”<sup>18</sup> A male adult who internally feels more aligned with society’s expectations of female adults may take steps to transition from a man to a woman by wearing clothing, makeup, jewelry, shoes, hair products, undergarments, and fingernail accessories expected of female adults.

A transgender person is a person whose sex is different from their gender identity.<sup>19</sup> Transgender people face a litany of daily struggles. In addition to society’s direct mistreatment of transgender people for being different, such as staring or harassing,<sup>20</sup> transgender people are forced to wrestle with the decision about where to use the bathroom in public multiple times per day. Because buildings in the United States

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<sup>17</sup> *Lesbian, Gay, Bisexual, and Transgender Health*, CENTERS FOR DISEASE CONTROL AND PREVENTION (May 18, 2017), <https://www.cdc.gov/lgbthealth/transgender.htm>.

<sup>18</sup> *Id.*

<sup>19</sup> *What Does Transgender Mean?* GLAAD (last visited Nov. 14, 2017), <https://www.glaad.org/transgender/transfaq>.

<sup>20</sup> 75% of transgender youth feel unsafe at school. *See Issues: Youth & Students* NATIONAL CENTER FOR TRANSGENDER EQUALITY (Oct. 3, 2017), <http://www.transequality.org/issues/youth-students>.

are designed to have bathrooms segregated by sex, transgender individuals are routinely forced into choosing which bathroom is appropriate. A female who identifies as a man, who may have had breast reduction surgery and years of hormone therapy causing a lower voice and more body and facial hair, typically feels more comfortable in the bathroom with other low-voiced, bearded people without breasts. For transgender individuals, going to the bathroom in accordance with gender identity is a vital aspect of transition.

In 2016, North Carolina passed a law banning cities from allowing transgender individuals to use public bathrooms in accordance with gender identity.<sup>21</sup> Sixteen other states considered legislation restricting bathroom access to transgender people.<sup>22</sup> These efforts to prevent transgender individuals from using bathrooms in accordance with their gender identity is indicative of conservative social pressures against transgender rights. A petition to boycott Target retail stores gathered over 1.5 million signatures after the store announced that it would permit transgender individuals to use the bathroom of their gender identity.<sup>23</sup> The petition argues that the rule allows men to “simply say he ‘feels like a woman today’ and enter the women’s restroom”; it goes on to assert that such a policy “is exactly how sexual predators get access to their victims.”<sup>24</sup> This animus against transgender people attempting to use the bathroom of their gender identity, or perhaps merely wanton disregard for the rights of transgender people in lieu of defending from the specter of sexual predators, has trickled down into public schools. One of those public

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<sup>21</sup> Kopan, Tal, Scott, Eugene, *North Carolina Governor Signs Controversial Transgender Bill*, CNN [date], <http://www.cnn.com/2016/03/23/politics/north-carolina-gender-bathrooms-bill/index.html>

<sup>22</sup> Kralik, Joellen *'Bathroom Bill' Legislative Tracking*, NATIONAL CONFERENCE OF STATE LEGISLATURES (July 28, 2017), <http://www.ncsl.org/research/education/-bathroom-bill-legislative-tracking635951130.aspx>.

<sup>23</sup> *Sign the Boycott Target Pledge!* AMERICAN FAMILY ASSOCIATION April 20, 2016), <https://www.afa.net/activism/action-alerts/2016/04/sign-the-boycott-target-pledge/>.

<sup>24</sup> *Id.*

schools is in the Kenosha Unified School District in Wisconsin, where transgender student Ashton Whitaker was subjected to his school’s unwritten rule that students must use the bathroom of their sex organs and not their gender identity.<sup>25</sup>

## II. THE EVOLUTION OF TRANSGENDER RIGHTS

Ashton Whitaker brought suit against the school district under Title IX of the Education Amendments Act of 1972, 20 U.S.C. § 1681, *et seq.*, (“Title IX”) and the Equal Protections Clause of the Fourteenth Amendment of the United States Constitution.<sup>26</sup> While some states have laws that may protect or restrict transgender rights, this Comment limits discussion to Title IX and the Equal Protections Clause in the context of transgender discrimination.

### A. Title IX Generally

Title IX of the Education Amendments Act of 1972 was enacted only eight years after the Civil Rights Act of 1964. The Civil Rights Act spurred unprecedented workforce participation by women, who subsequently faced a significant earnings gap compared to male counterparts.<sup>27</sup> The public began to realize that equal opportunity in the workplace did little help to women who had unequal opportunity in the education system.<sup>28</sup> To remedy this problem, Congress passed Title IX, which prohibited sex discrimination in any school receiving federal money.<sup>29</sup>

Title IX provides, in part, that “[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied

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<sup>25</sup> Whitaker By Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ., 858 F.3d 1034, [page number] (7th Cir. 2017), *petition for cert. filed*, (U.S. Aug. 28, 2017) (No. 17-301).

<sup>26</sup> *Id.* at 1042.

<sup>27</sup> *Title IX Legislative History* DEPARTMENT OF JUSTICE, (last visited Nov. 21, 2017), <https://www.justice.gov/crt/title-ix#II>.

<sup>28</sup> *Id.*

<sup>29</sup> 20 U.S.C.A. § 1681(a).



the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”<sup>30</sup> Public schools, therefore, are prohibited from subjecting any person to separate or different rules, sanctions, or treatment on the basis of sex.<sup>31</sup> Title IX has been used, among other things, to prevent discrimination against pregnant women,<sup>32</sup> inequitable funding of women’s athletic programs,<sup>33</sup> and improper policies regarding sexual harassment in schools.<sup>34</sup>

Because both Title VII and Title IX prohibit sex discrimination in various realms of the public, the Seventh Circuit has turned to Title VII jurisprudence in deciding Title IX cases and vice versa.<sup>35</sup> The Seventh Circuit first dealt with gender identity discrimination in the context of a Title VII employment case in *Ulane v. Eastern Airlines, Inc.*<sup>36</sup> That 1984 decision held that transsexuals<sup>37</sup> were not protected under Title VII.<sup>38</sup> In so deciding, the court noted that both the Eighth and Ninth Circuits had already held that discrimination against transsexuals was not prohibited under Title VII.<sup>39</sup> The *Ulane* court further reasoned that the plaintiff was discriminated against on the

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<sup>30</sup> 20 U.S.C.A. § 1681(a).

<sup>31</sup> See 34 C.F.R. § 106.31(b)(2)-(4).

<sup>32</sup> See, e.g., North Haven Board of Ed. v. Bell, 456 U.S. 512 (1982) (holding that discrimination on the basis of pregnancy amounted to sex discrimination).

<sup>33</sup> See, e.g., Jackson v. Birmingham Board of Education, 544 U.S. 167 (2005) (holding that a coach could bring suit on behalf of his girls’ basketball team inferior funding).

<sup>34</sup> See, e.g., Rost ex rel. K.C. v. Steamboat Springs RE-2 School Dist., 511 F.3d 1114 (10th Cir. 2008).

<sup>35</sup> Smith v. Metropolitan School Dist. Perry Tp., 128 F.3d 1014, 1023 (7th Cir. 1997).

<sup>36</sup> 742 F.2d 1081 (7th Cir. 1984).

<sup>37</sup> *Ulane*, 742 F.2d at 1084. The word “transsexuals” refers to transgender individuals who have already undergone sex reassignment surgery.

<sup>38</sup> *Id.* at 1087.

<sup>39</sup> *Id.* at 1086, citing *Sommers v. Budget Marketing, Inc.*, 667 F.2d 748, 750 (8th Cir. 1982) and *Holloway v. Arthur Anderson & Co.*, 566 F.2d 659, 662-62 (9th Cir. 1977).

basis of being a transsexual, not on the basis of being a female or being a male.<sup>40</sup> The court pointed to the lack of Congressional intent regarding transsexuals and determined that the plain language of the term “sex” did not allow for an interpretation that included discrimination on the basis of being a transsexual.<sup>41</sup>

The Supreme Court brought sea change to Title VII sex discrimination analysis in *Price Waterhouse v. Hopkins*.<sup>42</sup> In *Price Waterhouse*, a female former employee of an accounting firm sued the firm for sex discrimination, arguing that she was denied promotion because she did not fit the stereotypical expectations of a female.<sup>43</sup> Her supervisors complained of her conduct being “macho,” expressed distaste with her profanity “only because it was a lady using foul language,” and advised that she should “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.”<sup>44</sup> The Court declared: “we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group.”<sup>45</sup> This decision was the first to firmly establish that gender stereotyping is an actionable form of sex discrimination.<sup>46</sup>

The Seventh Circuit applied the reasoning from *Price Waterhouse* to conclude that employers could not discriminate on the basis of sexual orientation in *Hively v. Ivy Tech Cmty. Coll. of Indiana*.<sup>47</sup> The Seventh Circuit, sitting *en banc*, reasoned that an employer discriminating against a woman for being in a relationship

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<sup>40</sup> *Id.* at 1087.

<sup>41</sup> *Id.*

<sup>42</sup> 490 U.S. 228 (1989) *superseded* by statute on other grounds, 42 U.S.C. § 2000e-5(g)(2)(B) (1991), as stated in *Landgraf v. USI Film Prods.*, 511 U.S. 244, 251 (1994).

<sup>43</sup> *Id.* at 235.

<sup>44</sup> *Id.* at 235.

<sup>45</sup> *Id.* at 231.

<sup>46</sup> *Id.* at 258.

<sup>47</sup> 853 F.3d 339 (7th Cir. 2017) (*en banc*). *Hively* involved a professor at a college who was passed over for promotion on five occasions and alleged she was being discriminated against on the basis of her sexual orientation as a lesbian.

with a woman is engaging in sex discrimination because that employer would not discriminate against a man for being in a relationship with a woman.<sup>48</sup> The court also compared sexual orientation discrimination to anti-miscegenation statutes prohibiting marriage between white people and black people that were held unconstitutional in *Loving v. Virginia*.<sup>49</sup> In comparing the two cases, the *Hively* court noted that the *Loving* Court outright rejected the argument that the anti-miscegenation statutes “punish equally both the white and the Negro participants in an interracial marriage.”<sup>50</sup> Likewise, the *Hively* court rejected the argument that sexual orientation discrimination punished men and women equally for homosexuality.<sup>51</sup> The *Hively* decision overruled a series of Seventh Circuit cases that held that sexual orientation discrimination was not prohibited under Title VII.<sup>52</sup>

The Seventh Circuit is the only federal appellate court to apply the *Price Waterhouse* Title VII gender stereotyping framework to discrimination on the basis of sexual orientation, while some lower district courts have embraced the analysis.<sup>53</sup> Less than a month before the Seventh Circuit decided *Hively*, the Eleventh Circuit affirmed its decades of precedent that sexual orientation discrimination was *not* prohibited under Title VII.<sup>54</sup> The Eleventh Circuit pointed out that the First, Second, Third, Fourth, Sixth, Seventh, Eighth, Ninth, and Tenth Circuits also held that Title VII does not include sexual orientation

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<sup>48</sup> *Id.*

<sup>49</sup> 388 U.S. 1 (1967).

<sup>50</sup> *Hively*, 653 F.3d at 347 (citing *Loving*, 388 U.S. at 8).

<sup>51</sup> *Id.* at 348.

<sup>52</sup> See *Doe v. City of Belleville, Ill.*, 119 F.3d 563 (7th Cir. 1997); *Hamm v. Weyauwega Milk Prods.*, 332 F.3d 1058 (7th Cir. 2002); *Hamner v. St. Vincent Hosp. and Health Care Ctr., Inc.*, 224 F.3d 701 (7th Cir. 2000); *Spearman v. Ford Motor Co.*, 231 F.3d 1080 (7th Cir. 2000).

<sup>53</sup> Sprain, Pueschel, & Heyen, *Seventh Circuit Court Rules Sexual Orientation is Protected Class: Kimberli Hively v. Ivy Tech Community College*, THE NATIONAL LAW REVIEW (April 6, 2017), <https://www.natlawreview.com/article/seventh-circuit-court-rules-sexual-orientation-protected-class-kimberly-hively-v-ivy>.

<sup>54</sup> *Evans v. Georgia Regional Hospital*, 850 F.3d 1248 (11th Cir. 2017).

discrimination.<sup>55</sup><sup>56</sup> In the context of transgender discrimination, however, the First, Sixth, Ninth, and Eleventh Circuits have recognized that the *Price Waterhouse* reasoning applies.<sup>57</sup>

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<sup>55</sup> *Evans v. Georgia Regional Hospital*, 850 F.3d 1248, 1256-57 (11th Cir. 2017) (citing *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 259 (1st Cir. 1999) (“Title VII does not proscribe harassment simply because of sexual orientation.”); *Simonton v. Runyon*, 232 F.3d 33, 36 (2d Cir. 2000) (“Simonton has alleged that he was discriminated against not because he was a man, but because of his sexual orientation. Such a claim remains non-cognizable under Title VII.”); *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257, 261 (3d Cir. 2001) (“Title VII does not prohibit discrimination based on sexual orientation.”); *Wrightson v. Pizza Hut of Am.*, 99 F.3d 138, 143 (4th Cir. 1996), abrogated on other grounds by *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 118 S.Ct. 998, 140 L.Ed.2d 201 (1998) (“Title VII does not afford a cause of action for discrimination based upon sexual orientation...”); *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 762 (6th Cir. 2006) (“[S]exual orientation is not a prohibited basis for discriminatory acts under Title VII.”); *Hamner v. St. Vincent Hosp. & Health Care Ctr., Inc.*, 224 F.3d 701, 704 (7th Cir. 2000) (“[H]arassment based solely upon a person's sexual preference or orientation (and not on one's sex) is not an unlawful employment practice under Title VII.”); *Williamson v. A.G. Edwards & Sons, Inc.*, 876 F.2d 69, 70 (8th Cir. 1989) (“Title VII does not prohibit discrimination against homosexuals.”); *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061, 1063-64 (9th Cir. 2002) (A)n employee's sexual orientation is irrelevant for purposes of Title VII); *Medina v. Income Support Div.*, 413 F.3d 1131, 1135 (10th Cir. 2005) (“Title VII's protections, however, do not extend to harassment due to a person's sexuality).

<sup>56</sup> The D.C. Circuit has not ruled on the issue.

<sup>57</sup> See *Glenn v. Brumby*, 663 F.3d 1312, 1316–19 (11th Cir. 2011) (holding that terminating an employee because she is transgender violates the prohibition on sex-based discrimination under the Equal Protection Clause following the reasoning of *Price Waterhouse*); *Smith v. City of Salem, Ohio*, 378 F.3d 566, 573–75 (6th Cir. 2004) (holding that transgender employee had stated a claim under Title VII based on the reasoning of *Price Waterhouse*); *Rosa v. Park W. Bank & Trust Co.*, 214 F.3d 213, 215–16 (1st Cir. 2000) (holding that a transgender individual could state a claim for sex discrimination under the Equal Credit Opportunity Act based on *Price Waterhouse*); *Schwenk v. Hartford*, 204 F.3d 1187, 1201–03 (9th Cir. 2000) (holding that a transgender individual could state a claim under the Gender Motivated Violence Act under the reasoning of *Price Waterhouse*).

### *B. Equal Protection Clause Generally*

The Equal Protection Clause of the Fourteenth Amendment “is essentially a direction that all persons similarly situated should be treated alike.”<sup>58</sup> This provision protects against “intentional and arbitrary” discrimination.<sup>59</sup> When a statute draws classifications between groups of people or sects, it is generally presumed to be lawful if the discriminatory practice is “rationally related to a legitimate state interest.”<sup>60</sup> This rational basis test does not apply when the statute’s classification is based on sex,<sup>61</sup> however, as sex-based classifications are subject to “heightened scrutiny.”<sup>62</sup> Courts reason that classifications on the basis of sex require heightened scrutiny because sex “frequently bears no relation to the ability to perform or contribute to society.”<sup>63</sup>

In order to justify a classification on the basis of sex, the government must demonstrate that its justification for the classification is “exceedingly persuasive.”<sup>64</sup> Therefore, this heightened standard requires the government to prove that its classification “serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives.”<sup>65</sup> The difference between these two standards is significant. Determining whether to apply a rational basis test or heightened scrutiny to transgender discrimination cases essentially amounts to determining the winner of the case because the rational basis test is an extremely low bar for government actors to satisfy.<sup>66</sup>

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<sup>58</sup> *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985) (citing *Plyler v. Doe*, 457 U.S. 202, 216, (1982)).

<sup>59</sup> *Vill. Of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (*per curiam*).

<sup>60</sup> *City of Cleburne*, 473 U.S. at 440.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *United States v. Virginia*, 518 U.S. 515, 533 (1996).

<sup>65</sup> *Id.* at 524.

<sup>66</sup> *City of Dallas v. Stanglin*, 490 U.S. 19, 26 (1989).

This burden for the government is so minimal that the Supreme Court has called rational basis “the most relaxed and tolerant form of judicial scrutiny under the Equal Protection Clause.”<sup>67</sup> By contrast, classifications analyzed under heightened scrutiny present a significantly bigger hurdle.

C. *Title VII and Equal Protections Applied to Transgender Bathroom Rights*

In 2016, the Fourth Circuit addressed transgender public school bathroom rights in *G.G. ex rel. Grimm v. Gloucester County School Bd.*<sup>68</sup> In *Grimm*, a transgender high school student challenged his school’s biological sex-based bathroom policy under the Equal Protections Clause and Title IX, arguing that the policy discriminated against him on the basis of sex and seeking injunctive relief to be allowed to use the bathroom in accordance with his gender identity.<sup>69</sup> The court reversed the district court’s dismissal of the student’s claims on procedural grounds and remanded the case to the district court to reconsider the injunction.<sup>70</sup> In his concurrence, Senior Circuit Judge Andre Davis argued that the Fourth Circuit “would be on sound ground in granting the requested preliminary injunction on the undisputed facts in the record.”<sup>71</sup> That concurrence laid out the elements of a preliminary injunction and determined that the transgender student was likely to succeed on the merits of his Title IX claim.<sup>72</sup> Neither the majority nor the concurrence addressed the equal protection claim, focusing instead on the Title IX claim in light of the Obama-appointed Department of Education’s recommended

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<sup>67</sup> *Id.*

<sup>68</sup> 822 F.3d 709 (4th Cir.), cert. granted in part, 137 S. Ct. 369, (2016), and vacated and remanded, 137 S. Ct. 1239 (2017).

<sup>69</sup> *Grimm*, 822 F.3d at 710.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 727 (Davis, J. concurring).

<sup>72</sup> *Id.* (Davis, J. concurring).

interpretation of “sex.”<sup>73</sup> On remand, the district court granted the preliminary injunction and simply stated: “Judge Davis explained why.”<sup>74</sup> The Fourth Circuit denied the school district’s motion to stay the injunction pending appeal.<sup>75</sup>

The school district applied to recall and stay the preliminary injunction in the Supreme Court of the United States.<sup>76</sup> Then, on August 3, 2016, a few weeks before the student, who identified as a boy, began his senior year of high school, the Supreme Court granted the application and stayed the preliminary injunction, forcing the boy to use the girls’ restroom.<sup>77</sup> Justice Stephen Breyer penned a concurrence explaining his decision to force a transgender boy to use the girls’ bathroom until the Supreme Court got around to hearing the case, stating, “I vote to grant the application as a courtesy.”<sup>78</sup> The Supreme Court subsequently granted certiorari on October 28, 2016.<sup>79</sup>

Before the Court could hear the case, however, the Justice Department and the Department of Education withdrew guidance to schools that interpreted Title IX to include transgender discrimination within the realm of sex discrimination.<sup>80</sup> This revocation of regulatory guidance prompted the Court to vacate its grant of certiorari and remand the case to be considered in light of the new guidance.<sup>81</sup> The student has since graduated from the high school, and his case has been remanded to the district court to determine whether his claim is moot.<sup>82</sup>

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<sup>73</sup> *Id.* at 710 (majority opinion).

<sup>74</sup> *G.G. v. Gloucester Cty. Sch. Bd.*, No. 4:15CV54, 2016 WL 3581852, at \*1 (E.D. Va. June 23, 2016), vacated, 853 F.3d 729 (4th Cir. 2017), as amended (Apr. 18, 2017).

<sup>75</sup> *G.G. v. Gloucester Cty. Sch. Bd.*, 654 F. App’x 606 (4th Cir. 2016).

<sup>76</sup> *Gloucester Cty. Sch. Bd. v. G.G. ex rel. Grimm*, 136 S. Ct. 2442 (2016).

<sup>77</sup> *Gloucester*, 136 S. Ct. at 2442.

<sup>78</sup> *Id.* (Breyer, J. Concurring).

<sup>79</sup> *Gloucester Cty. Sch. Bd. v. G.G. ex rel. Grimm*, 137 S.Ct. 369 (Mem)

<sup>80</sup> STATEMENT BY ATTORNEY GENERAL JEFF SESSIONS ON THE WITHDRAWAL OF TITLE IX GUIDANCE, DOJ 17-214 (D.O.J.), 2017 WL 696633.

<sup>81</sup> *Gloucester*, 137 S.Ct. 1239 (Mem).

<sup>82</sup> *Grimm v. Gloucester Cty. Sch. Bd.*, 869 F.3d 286 (4th Cir. 2017).

Accordingly, without guidance from regulatory bodies and without the Fourth Circuit’s determination, the issue was completely undecided before the Seventh Circuit heard Ash Whitaker’s case.

### III. ASH WHITAKER V. KENOSHA UNIFIED SCHOOL DISTRICT

#### A. *Factual Background*

Ashton Whitaker (“Ash”) is a high school student in the Kenosha Unified School District who was ultimately granted a preliminary injunction allowing him to use the bathroom of his gender identity.<sup>83</sup> Ash was born female, but he identifies as man.<sup>84</sup> During his freshman and sophomore years of high school, Ash changed his name legally and began to wear masculine clothing, cut his hair, use male pronouns, and request that teachers use male pronouns when referring to him.<sup>85</sup> His therapist diagnosed him with Gender Dysphoria, which is recognized by the American Psychiatric Association as a medical classification of sex and gender identity conflict.<sup>86</sup> The school notified Ash that despite his identity as a man, he was only permitted to use the girls’ restroom or a gender-neutral restroom far from his classrooms.<sup>87</sup> Ash feared that if he used the gender neutral bathroom and arrived late to the majority of his classes, he would draw more attention to his transition.<sup>88</sup> Ash also noted that he felt using the girls’ bathroom undermined his gender identity.<sup>89</sup> As a result, Ash resolved to avoid using the bathroom altogether and significantly reduced his water intake so that he could go all day without using the bathroom.<sup>90</sup>

This restriction on his water intake caused medical problems such as fainting and seizures because Ash was diagnosed with

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<sup>83</sup> *Whitaker*, 858 F.3d at 1040-43.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*



vasovagal syncope.<sup>91</sup> Moreover, Ash suffered from stress-related migraines, depression, anxiety, and suicidal thoughts as a result of the bathroom policy.<sup>92</sup> Ash provided the school with a letter from his doctor recommending that Ash be allowed to use the boys' restroom, but the school did not waver from its position.<sup>93</sup> Ash also submitted a letter from his counsel demanding that the school permit him to use the boys' restroom, but the school responded by repeating its policy.<sup>94</sup>

When these attempts to resolve the situation failed, Ash filed suit in the Eastern District of Wisconsin against the school district under Title IX, 20 U.S.C. § 1681, *et seq.*, and the Equal Protection Clause of the Fourteenth Amendment.<sup>95</sup> On the same day of filing, Ash moved for a preliminary injunction to allow him to use the boys' restroom, pending the outcome of the litigation.<sup>96</sup> The school district filed a motion to dismiss and a motion in opposition to the preliminary injunction.<sup>97</sup>

The district court denied the school district's motion to dismiss, finding that Ash alleged facts sufficient to support a claim of gender stereotyping under *Price Waterhouse* and that the school articulated "little in the way of a rational basis for the alleged discrimination" under Equal Protection Clause analysis.<sup>98</sup> Relying on

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<sup>91</sup> *Id.* Vasovagal syncope is a malfunction in the nervous system that causes dilated blood vessels in the legs and slowed heart rate, causing reduced blood flow to the brain and subsequent fainting. See Mayo Clinic Staff, Vasovagal syncope, MAYO CLINIC (Aug. 4, 2017), <https://www.mayoclinic.org/diseases-conditions/vasovagal-syncope/symptoms-causes/syc-20350527><https://www.mayoclinic.org/diseases-conditions/vasovagal-syncope/symptoms-causes/syc-20350527>.

<sup>92</sup> *Whitaker*, 858 F.3d at 1042-43.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, No. 16-CV-943-PP, 2016 WL 5239829, at \*3 (E.D. Wis. Sept. 22, 2016), *aff'd sub nom. Whitaker By Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034 (7th Cir. 2017).

that same reasoning, the district court granted Ash’s motion for a preliminary injunction, enjoining the school district from: (1) denying him to use the boys’ restroom; (2) enforcing any policy against him that would prevent him from using the boys’ restroom; (3) disciplining him for using the boys’ restroom; and (4) monitoring his bathroom use in any way.<sup>99</sup> The school district appealed the injunction to the Seventh Circuit.<sup>100</sup>

### B. Seventh Circuit Analysis

The Seventh Circuit analyzed the district court’s injunction grant by beginning with the basic requirements of a preliminary injunction.<sup>101</sup> A party seeking a preliminary injunction must show: (1) that he will suffer irreparable harm absent preliminary injunctive relief during the pendency of his action; (2) inadequate remedies at law exist; and (3) he has a reasonable likelihood of success on the merits of his claims.<sup>102</sup> If all three can be demonstrated, the court balances the potential harm to the moving party against potential harm to other parties or the public.<sup>103</sup>

The court in *Whitaker* determined that the evidence of Ash’s medical conditions, coupled with the bathroom policy’s exacerbation of those medical conditions, was a sufficient showing of likelihood of irreparable harm.<sup>104</sup> The court further pointed out that the school district’s decision to force Ash into far-away bathrooms that caused him to be late for class would “further stigmatize him and cause him to miss class time, or avoid the use of the bathroom altogether at the expense of his health.”<sup>105</sup> The court then rejected the school district’s argument that any harm Ash may suffer could be remedied with

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<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Whitaker*, 858 F.3d 1034 (7th Cir. 2017).

<sup>102</sup> *Id.* at 1044.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* 1045.

<sup>105</sup> *Id.*

monetary damages.<sup>106</sup> Ash had alleged prospective self-harm, including suicide, which would preclude any remedy at law.<sup>107</sup> After establishing that Ash satisfied the first two elements required of a preliminary injunction, the court turned to the merits of Ash's claim and balanced prospective harm to the parties and the public in granting the preliminary injunction.<sup>108</sup>

i. Title IX analysis

The *Whitaker* court began its analysis by noting that courts in the Seventh Circuit look to Title VII in construing Title IX.<sup>109</sup> The school district argued that the court should rely on *Ulane*, where the Seventh Circuit held that transsexuals are not protected under Title VII.<sup>110</sup> The court conceded that some other courts agreed with the school district's argument, only to emphatically reject that argument, simply stating: "We disagree."<sup>111</sup> The court dismantled the school district's *Ulane* argument citing the Supreme Court's decision in *Price Waterhouse*, which came five years after the *Ulane* decision: "this court and others have recognized a cause of action under Title VII when an adverse action is taken because of an employee's failure to conform to sex stereotypes."<sup>112</sup> Moreover, the court reiterated that the Seventh Circuit, sitting *en banc*, held that homosexuals discriminated against on the basis of their sexual orientation can state a Title VII claim on the basis of sex stereotyping.<sup>113</sup>

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<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at 1047 (citing *Smith v. Metro. Sch. Dist. Perry Twp.*, 128 F.3d 1014, 1023 (7th Cir. 1997) (noting that "it is helpful to look to Title VII to determine whether the alleged sexual harassment is severe and pervasive enough to constitute illegal discrimination on the basis of sex for purposes of Title IX.")).

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

The school district argued that Ash could not show a likelihood of success because its unwritten policy “is not based on whether the student behaves, walks, talks, or dresses in a manner that is inconsistent with any preconceived notions of sex stereotypes.”<sup>114</sup> In rebuttal, the court explained that transgender individuals do not conform to the sex-based stereotypes of their birth sex, adding that the Eleventh and Sixth Circuits have also recognized the transgender sex-stereotyping cause of action under Title VII.<sup>115</sup> The court held that Ash could demonstrate a likelihood of success on the merits of his Title IX claim because he alleged that the school district denied him access to the boys’ bathroom based on stereotypes expected of his birth sex.<sup>116</sup>

ii. Equal Protection Claim

Once the court determined a likelihood of success on the merits of the Title IX claim, it was unnecessary to even address the Equal Protection claim because the injunction would be permissibly granted under any likely successful theory of recovery.<sup>117</sup> However, the court addressed the Equal Protection claim nonetheless.<sup>118</sup> In this endeavor, the court deviated from the Fourth Circuit’s reasoning in *Grimm*, where the injunction analysis was limited to a Title IX claim under the Department of Justice’s interpretation of the word “sex.”<sup>119</sup>

In analyzing the Equal Protection claim, the *Whitaker* court refused to apply a rational basis test, reasoning that transgender individuals are a suspect class in light of the historical discrimination against them based on immutable characteristics of their gender identities.<sup>120</sup> The court noted that because the bathroom policy could

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<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 1048 (citing *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011); and *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004)).

<sup>116</sup> *Whitaker*, 858 F.3d at 1048.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Grimm*, 822 F.3d at 710.

<sup>120</sup> *Whitaker*, 858 F.3d at 1052.

not even be articulated without mentioning sex, it was inherently based on a sex-classification triggering heightened scrutiny.<sup>121</sup>

Under a heightened scrutiny standard, the school district had the burden of showing that its justification for its bathroom policy was both genuine and exceedingly persuasive.<sup>122</sup> However, the school district had difficulty articulating why its bathroom policy justification was genuine and exceedingly persuasive. The court's opinion borders on harsh in its continued outright rejection of each proffered reason.<sup>123</sup> First, the court discussed the procedural requirements of the bathroom policy, which the court reiterated was an unwritten policy.<sup>124</sup> The school district alleged that the unwritten policy required students to use the restroom of their birth certificate, but the court pointed out that Wisconsin birth certificates require sex-assignment surgery (a procedure only available to adults) to alter sex classification, ultimately precluding Ash from taking advantage of such an option.<sup>125</sup>

Moreover, the court argued that a Minnesota student could have a birth certificate changed without any surgery, and that if a Minnesota student moved to the Kenosha school district with the appropriate birth certificate and not the appropriate genital organs for the bathroom policy, the entire policy would be undermined.<sup>126</sup> This disconnect between policy and practice illustrated to the court that the policy was more arbitrary than it was reasonable.<sup>127</sup> Finally, the court noted that the school district does not even require birth certificates for enrolment, and will accept a passport as identification.<sup>128</sup> Because the State Department only requires a doctor's note to alter sex classification, the court found that the school district's requirements based on the birth certificate instead of the passport even further

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<sup>121</sup> *Id.* at 1051.

<sup>122</sup> *Id.* at 1052.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* at 1051.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

demonstrated that the policy was more likely driven by arbitrary animus rather than genuine and exceedingly persuasive justification.<sup>129</sup>

Another point the court offered involved no actual analysis of the specific facts of *Whitaker*, but instead focused on the practical use of bathrooms in general.<sup>130</sup> The court posited that a transgender student’s presence in the restroom “provides no more of a risk to other students’ privacy rights than the presence of an overly curious student of the same biological sex who decides to sneak glances at his classmates.”<sup>131</sup> The school district’s only reasoning for its argument that transgender students invade the privacy of other students was that the transgender students possess physically different genitals than the other students in the bathroom of their choosing.<sup>132</sup> The court countered that the school makes no effort to provide separate restrooms for pre-pubescent boys and girls from those who have gone through puberty even though they have significantly different sex organs.<sup>133</sup> This point draws on the commonsense notion that most Americans never see anyone’s genitals in the bathroom. Without any commonsense, reasonable, or persuasive justifications for the regulation of bathroom use, the school district failed to demonstrate why its sex classification was permissible under the Equal Protection Clause.

### iii. Balance of harms favor Ash

Having established the elements of a preliminary injunction, the court moved on to discussing the balance of harms between the public good and Ash Whitaker’s likely prospective harm.<sup>134</sup> Once a moving party has met its burden of establishing the threshold requirements for a preliminary injunction, the court must balance the

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<sup>129</sup> *Id.* at 1053.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.* at 1052.

<sup>132</sup> *Id.* at 1053.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

harms faced by both parties and the public.<sup>135</sup> The court brought powerful and pragmatic reasoning to the table in finding that Ash was substantially more likely to suffer harm than the public.

The school district argued that the injunction's harm would extend to a violation of the "privacy" of its 22,160 students in the district.<sup>136</sup> It argued that allowing a transgender student to use a bathroom that did not conform with birth sex would disrupt the privacy of other students using the same bathroom.<sup>137</sup> The school district also levied the argument that the injunction harms the public as a whole because it would force other school districts to also risk being in violation of Title IX, thereby placing federal funding at risk.<sup>138</sup>

The Seventh Circuit emphatically disagreed. First, the court noted that Ash used the boys' bathroom for six months without any incident, and that it was only when a *teacher*, not a student, reported Ash to school administrators that the school took notice.<sup>139</sup> In fact, the school district made no showing of any student complaint about Ash at any point before or during litigation, which effectively removed any possibility of arguing that Ash's presence in the boys' room bothered any students whatsoever.<sup>140</sup> In response to the school district's argument that the preliminary injunction infringed upon the parents' ability to direct the education of their children, the court simply stated that the school district offered "no evidence that a parent has ever asserted this right. These claims are all speculative."<sup>141</sup>

Next, the court referenced the *amici* briefs of school administrators from twenty-one states, who together were responsible for educating

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<sup>135</sup> *Girl Scouts of Manitou Council, Inc. v. Girl Scouts of U.S. of Am., Inc.*, 549 F.3d 1079, 1100 (7th Cir. 2008); *see also* *Turnell v. CentiMark Corp.*, 796 F.3d 656, 662 (7th Cir. 2015).

<sup>136</sup> *Whitaker*, 858 F.3d at 1054.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

approximately 1.4 million students.<sup>142</sup> The *amici* statements emphatically and uniformly agreed that “the frequently-raised and hypothetical concerns about a policy that permits a student to utilize a bathroom consistent with his or her gender have simply not materialized.”<sup>143</sup> This finding poked a major hole in the Kenosha School District’s argument that allowing Ash Whitaker to use the boys’ bathroom would harm the public.

These minor grievances based on hypothetical concerns that never tangibly materialized were scant justification for refusing to grant the injunction in the face of the overwhelming evidence that using the incorrect bathroom harmed Ash on a medical, emotional, social, and physical level. Accordingly, the court granted the preliminary injunction and signaled to school districts across the Seventh Circuit that transgender bathroom policies would not fare well in federal courts within the Seventh Circuit. The school district then petitioned for a writ of certiorari to the Supreme Court of the United States on August 27, 2017.<sup>144</sup>

#### IV. SEVENTH CIRCUIT REASONING UNDER ATTACK

The Seventh Circuit has laid out a perfect roadmap for any court addressing transgender bathroom rights in public schools. Meanwhile, the Supreme Court’s stay of injunction in the Fourth Circuit case *Grimm v. Gloucester County* is a concerning forecast of possible infringements on transgender rights. These threats to transgender rights go beyond the judiciary.<sup>145</sup> The Trump administration mounts pressure against schools as the Department of

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<sup>142</sup> *Id.*

<sup>143</sup> *Id.* at 1055.

<sup>144</sup> *Whitaker By Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034 (7th Cir. 2017), *petition for cert. filed*, (Aug. 28, 2017) (No. 17-301).

<sup>145</sup> STATEMENT BY ATTORNEY GENERAL JEFF SESSIONS ON THE WITHDRAWAL OF TITLE IX GUIDANCE, DOJ 17-214 (D.O.J.), 2017 WL 696633; *see also* Tillet, Emily, *Trump Announces Military Ban on Transgender Service Members*, CBS NEWS (July 26, 2017) <https://www.cbsnews.com/news/trump-announces-ban-on-transgender-service-members-in-military-twitter/>.



Education and Department of Justice retreat from the pro-transgender rights position of the Obama administration.<sup>146</sup>

On February 22, 2017, the Department of Justice and the Department of Education revoked the Obama-era Title IX guidance on transgender student bathroom use that interpreted “sex discrimination” to include transgender discrimination.<sup>147</sup> On July 26, 2017, the sitting President of the United States announced that transgender individuals would no longer be permitted in the military, a major departure from the status quo under the Obama administration.<sup>148</sup> On October 5, 2017, the Attorney General Jeffrey Beauregard Sessions announced that the Department of Justice would reverse its guidance on Title VII, stating that Title VII also does not apply to gender identity discrimination.<sup>149</sup>

As the executive branch shows its hand as hostile towards transgender rights, the Supreme Court has not made any rulings on the issue since its stay of injunction in *Gloucester County*.<sup>150</sup> Despite these forces opposing transgender rights, the Seventh Circuit is a guiding light for courts deciding this issue. The arguments levied against the Seventh Circuit in *amicus* briefs submitted in favor of the school district’s petition for a writ of certiorari, however, pose an acute threat to transgender students across the country if heeded by the Supreme Court of the United States.

<sup>146</sup>STATEMENT BY ATTORNEY GENERAL JEFF SESSIONS ON THE WITHDRAWAL OF TITLE IX GUIDANCE, DOJ 17-214 (D.O.J.), 2017 WL 696633; *see also* Tillett, Emily, *Trump Announces Military Ban on Transgender Service Members*, CBS NEWS (July 26, 2017) <https://www.cbsnews.com/news/trump-announces-ban-on-transgender-service-members-in-military-twitter/>.

<sup>147</sup>STATEMENT BY ATTORNEY GENERAL JEFF SESSIONS ON THE WITHDRAWAL OF TITLE IX GUIDANCE, DOJ 17-214 (D.O.J.), 2017 WL 696633.

<sup>148</sup>Tillett, Emily, *Trump Announces Military Ban on Transgender Service Members*, CBS NEWS (July 26, 2017) <https://www.cbsnews.com/news/trump-announces-ban-on-transgender-service-members-in-military-twitter/>.

<sup>149</sup>Moreau, Julie, *Federal Civil Rights Law Doesn’t Protect Transgender Workers, Justice Department Says*, NBC NEWS (Oct. 5, 2017) <https://www.nbcnews.com/feature/nbc-out/federal-civil-rights-law-doesn-t-protect-transgender-workers-justice-n808126>

<sup>150</sup>*Gloucester County*, 137 S. Ct. at 369.

A. *The “Animus Briefs”*

In its petition for a writ of certiorari, the Kenosha school district noted the *Grimm* decision and enticed the Court with an opportunity to address the case again:

This issue is not new to this Court. In *Gloucester Cty. Sch. Bd. v. G.G. ex rel. Grimm* this Court granted review to address, in part, the Department of Education’s interpretation of Title IX that funding recipients providing sex-separated facilities must generally treat transgender students consistent with their gender identity. When the Department of Education’s guidance was later withdrawn, this Court was deprived of an opportunity to address these issues and the case was remanded to the Fourth Circuit. This case provides the Court with a clean vehicle to decide the same underlying important issues without the additional, complicating layers related to addressing administrative review and deference.<sup>151</sup>

In the intervening month, nine *amici curiae* briefs were filed by parties in opposition to the Seventh Circuit’s ruling.<sup>152</sup> The

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<sup>151</sup> Petition for Writ of Certiorari, p. ii.

<sup>152</sup> See generally Brief for Eagle Forum Education & Legal Defense Fund as Amicus Curiae Supporting Petitioners, *Kenosha v. Whitaker* (No. 17-301); Brief for the Michigan Association of Christian Law Schools et al. as Amici Curiae Supporting Petitioners, *Kenosha v. Whitaker*, (No. 17-301); Brief for the Foundation for Moral Law et al. as Amicus Curiae Supporting Petitioners, *Kenosha v. Whitaker*, (No. 17-301); Brief for the Concerned Women For America, et al. as Amicus Curiae Supporting Petitioners, *Kenosha v. Whitaker*, No. 17-301 (petition

organizations filing the briefs were notable conservative interest groups, including The Family Research Council,<sup>153</sup> The Eagle Forum Education & Legal Defense Fund,<sup>154</sup> Michigan Association of Christian Schools,<sup>155</sup> The Foundation for Moral Law,<sup>156,157</sup> and Concerned Women for America.<sup>158</sup> Many of these briefs displayed profound insensitivity or misunderstanding about transgender rights issues. One *amicus* brief, submitted by Citizens United<sup>159</sup> and more aptly called an “animus brief,” referred to Ash Whitaker as “she”<sup>160</sup> and began its argument by stating that “Plaintiff Ash Whitaker is a girl who currently self-identifies as a boy.”<sup>161</sup> The Citizens United brief is a picture-perfect example of animus towards transgender individuals.

The Citizens United brief justified its use of “she” in reference to Ash by stating, “[t]o do otherwise sacrifices the plain meaning of

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for cert. filed Aug. 25, 2017); Brief for Citizens United, et al. as Amicus Curiae Supporting Petitioners, *Kenosha v. Whitaker*, No. 17-301 (petition for cert. filed Aug. 25, 2017); Brief for William J. Bennett as Amici Curiae Supporting Petitioners, *Kenosha v. Whitaker*, No. 17-301 (petition for cert. filed Aug. 25, 2017).

<sup>153</sup> Brief for Family Research Council, et al. as Amici Curiae Supporting Petitioners, *Kenosha v. Whitaker*, No. 17-301 (petition for cert. filed Aug. 25, 2017).

<sup>154</sup> Brief for Eagle Forum Education & Legal Defense Fund, *supra* at n. 152.

<sup>155</sup> Brief for the Michigan Association of Christian Law Schools, *supra* at n. 152.

<sup>156</sup> Brief for the Foundation for Moral Law, *supra* at n. 152.

<sup>157</sup> The Foundation for Moral Law was founded by former Alabama state judge Roy S. Moore, who was twice removed from the Alabama Supreme Court for violating the Alabama Canons of Judicial Ethics. Judge Moore has been in the national spotlight for soliciting sex from underage girls. *See* Ruhle, Stephanie, *Breaking Down the Nine Allegations Against Roy Moore*, MSNBC, (Nov. 16, 2017) <http://www.msnbc.com/velshi-ruhle/watch/breaking-down-the-9-allegations-against-roy-moore-1097428547965>.

<sup>158</sup> Brief for the Concerned Women For America, *supra* at n. 152.

<sup>159</sup> Citizens United is a conservative nonprofit organization. *See* generally, *About*, CITIZENS UNITED (last visited Nov. 21, 2017) <http://www.citizensunited.org/index.aspx>.

<sup>160</sup> Citizens United is not alone in calling Ash “she” despite his gender identity. The Foundation for Moral Law submitted a brief calling Ash “she” throughout. *See* Brief for the Foundation for Moral Law, *supra* at n. 152.

<sup>161</sup> Brief for Citizens United, *supra* at n. 152.

the English language on the altar of political correctness.”<sup>162</sup> After establishing that it would refuse to call Ash “he,” the Citizens United brief went on to compare the plaintiff in *Gloucester County* to Ash Whitaker, cynically calling their suits against their schools “test cases.”<sup>163</sup> More concerning, it stated: “it should not come as a surprise that a female plaintiff was selected in each case. A boy in his senior year of high school who would seek to spend time in the girls’ restroom would have presented the circuit court with a very different set of facts and concerns.”<sup>164</sup> It did not explain what “different set of facts and concerns” would be at issue if Ash were born male and had a doctor’s diagnosis of gender dysphoria, and instead left the grim implications to the reader’s imagination.<sup>165</sup>

Another alarming argument Citizens United offered in its “animus brief” was that the Seventh Circuit “failed to consider the harm being done to Ash Whitaker by her mother, her counselors, and her physicians” by treating her with hormone therapy.<sup>166</sup> It did not explain how the medical treatment Ash received was relevant to the restroom litigation.<sup>167</sup> The brief went on for pages with subversive, malicious comments, including: “transgender persons are not suicidal because they are discriminated against, but because they suffer from a mental illness;”<sup>168</sup> “in countless transgender cases across the country, the ‘suicide card’ is being played;”<sup>169</sup> and “what is to stop the varsity boys’ lacrosse team from deciding *en masse* that they are all girls, and barging into the girls’ locker room while the cheerleading squad is changing clothes?”<sup>170</sup>

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<sup>162</sup> *Id.* at 4.

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> *Id.* at 9.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.* at 18.

<sup>169</sup> *Id.* at 15.

<sup>170</sup> *Id.* at 11.

These stances frame the primary arguments brought against the Seventh Circuit in the “animus” briefs, which are essentially as follows: (1) the “plain meaning” or “plain text” of Title IX does not apply to transgender bathroom rights, which is illustrated in Citizens United’s refusal to even call Ash “he” in the name of “political correctness”; (2) gender dysphoria is a mental illness and should be treated as a disability by law, which is illustrated in Citizens United’s argument that Ash’s mother and doctors are doing him harm in treating him with hormone therapy; and (3) permitting transgender individuals to use the restroom of their gender identity will enable sexual predators to victimize women more often, which is illustrated in Citizens United’s cryptic warning that Ash’s case would contain a “different set of facts and concerns” if Ash were born male and transitioned to a woman.

i. The “plain meaning” argument

One common argument in the *amici* briefs was that the plain language of Title IX refers to discrimination on the basis of biological sex and not on the basis of gender identity.<sup>171</sup> This argument is an attack on the way the Seventh Circuit applied *Price Waterhouse* Title VII sex-stereotyping framework to Title IX transgender bathroom rights. William J. Bennett, who the *New York Times* once named the “leading spokesman of the Traditional Values wing of the Republican Party,”<sup>172</sup> argued in an *amici* brief he submitted in support of the school district that proscribing “on the basis of sex” is a question of statutory interpretation.<sup>173</sup> In support of this argument, Bennett went through the standard canons of construction, spanning fourteen pages, from dictionary definitions to legislative history, ultimately arriving at the conclusion that Congress intended the word “sex” to

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<sup>171</sup> Brief for William J. Bennett, *supra* at n. 152; Brief for Citizens United, *supra* at n. 152; Brief for the Michigan Association of Christian Law Schools *supra* at n. 152; Brief for Eagle Forum Education & Legal Defense Fund *supra* at n. 152.

<sup>172</sup> Bennett, William, *About Bill Bennett*, BILL BENNETT SHOW (Feb. 2017) <https://billbennettshow.com/bio/>.

<sup>173</sup> Brief for William J. Bennett, *supra* at n. 152.

refer to biological and physiological sex.<sup>174</sup> After firmly establishing that Congress intended to refer to biological and physiological sex instead of gender identity, Bennett never stated how or why this fact related to the matter of Ash Whitaker, foregoing any application of his conclusion.<sup>175</sup>

The Eagle Forum Education & Legal Defense Fund<sup>176</sup> also argued that the “plain meaning” of Title IX refers to biological sex.<sup>177</sup> The Eagle Forum argued that in light of the fact that Title IX was intended to refer to biological sex and not gender identity, the “Seventh Circuit’s reliance on *Price Waterhouse* and its progeny is also misplaced.”<sup>178</sup> It went on to state that regulating “how boys and girls dress (*e.g.* clothing, jewelry, hair length) differs fundamentally from segregating restrooms by sex.”<sup>179</sup> Its analysis was limited to the facts of *Price Waterhouse* itself,<sup>180</sup> arguing that the plaintiff in *Price Waterhouse* who employers thought too masculine for a woman “still used the women’s restroom.”<sup>181</sup>

ii. The “transgender people are mentally ill” argument

Like the Citizens United “animus” brief, the Eagle Forum brief also argued that Ash Whitaker has a “disability.”<sup>182</sup> Applying this

<sup>174</sup> *Id.* at 5-19.

<sup>175</sup> *Id.* at 19.

<sup>176</sup> The Eagle Forum Education & Legal Defense Fund is a conservative interest group and states on its website, “we oppose liberal propaganda in the curriculum through global education and Political Correctness.” *See Description*, EAGLE FORUM (last visited Nov. 21, 2017) <http://eagleforum.org/misc/descript.html>.

<sup>177</sup> Brief for Eagle Forum Education & Legal Defense Fund, *supra* at n. 152.

<sup>178</sup> *Id.* at 14.

<sup>179</sup> *Id.*

<sup>180</sup> Eagle Forum curiously refers to the famous *Price Waterhouse* case as “*Hopkins*,” even though most federal judges would recognize the well-known case as “*Price Waterhouse*.” One can only speculate as to why Eagle Forum would seek to distance its discussion from the well-known *Price Waterhouse* body of law.

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

logic, it asserted that Ash should have to exhaust the remedies of the Individuals with Disabilities Education Act before filing suit.<sup>183</sup> The Eagle Fund brief did not go as far as the Citizens United brief's outright claim that all transgendered people are mentally ill,<sup>184</sup> but instead posited, "whether or not [sic] 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]."<sup>185</sup> It did not analyze the definition of "disability" under the IDEA, nor how a transgender person may or may not fit that definition, despite the fact that the other federal legislation for disabled individuals, the ADAA, explicitly excludes transgender people.<sup>186</sup>

Applying this reasoning to the Equal Protection claim, the Eagle Forum argued that Ash was discriminated against on the basis of "disability," which is not a suspect class under Equal Protection Clause jurisprudence.<sup>187</sup> The Eagle Forum rejected the notion that Ash was discriminated against on the basis of sex and rejected the use of heightened scrutiny in analyzing the classification-based regulation of bathrooms.<sup>188</sup> Under rational basis review nearly any regulation is permissible so long as it is merely rationally related to a legitimate government interest.<sup>189</sup> The privacy of other students is a legitimate governmental interest, so a policy that is simply rationally related to

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<sup>183</sup> *Id.*

<sup>184</sup> Brief for Citizens United, *supra* at n. 152 ("it appears to be the *modus operandi* of the transgender movement across the country – to claim suicidal feelings, brought on by various defendants").

<sup>185</sup> Brief for Eagle Forum Education & Legal Defense Fund, *supra* at n. 152.

<sup>186</sup> The Americans with Disabilities Act, 42 U.S.C. §12101- 12213 ("ADA") expressly excludes "transsexualism" from the definition of "disability" under ADA. *See* 42 U.S.C. §12211(b)(1).

<sup>187</sup> Brief for Eagle Forum Education & Legal Defense Fund, *supra* at 16; *see also* Bd. of Trs. v. Garrett, 531 U.S. 356, 365-67 (2001) (holding that disability is not a suspect class and should be analyzed under rational basis review).

<sup>188</sup> Brief for Eagle Forum Education & Legal Defense Fund, *supra* at n. 152.

<sup>189</sup> Nordlinger v. Hahn, 505 U.S. 1, 11-12 (1992).

such a goal would pass the rational basis test.<sup>190</sup> A policy that demands sex-segregated bathrooms would almost certainly meet that criteria in most courts and would be permissible under the Equal Protection Clause.

### iii. The scare-tactics argument

The most prevalent argument proffered in the “animus” briefs played to speculative fear of transgender people generally as well as policies involving transgender bathroom use.<sup>191</sup> The Foundation for Moral Law brief’s entire first argument was that if schools implement such bathroom policies, “the number of students claiming such rights is likely to increase.”<sup>192</sup> It cited several studies pointing to the gradual increase of openly transgender people, arguing that “[i]n earlier times, youths who felt such [transgender] impulses were possibly more likely to keep quiet about them.”<sup>193</sup> It concluded, “[t]hus, the Seventh Circuit’s decision, if not reversed, could have the effect of encouraging students to question gender identity and to take steps to act on those thoughts.”<sup>194</sup> It did not explain why encouraging students to ponder gender identity is inherently negative, but instead relied on the assumption that any reader would be able to infer that transgender people are somehow inferior.<sup>195</sup>

In addition to the fear of transgenderism in general, these “animus” briefs make outlandish arguments that permitting transgender individuals to use the bathroom of their gender identity will enable sexual predators to more easily victimize women in

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<sup>190</sup> *Skinner v. Ry. Labor Executives Ass’n*, U.S. 602, 626 (1989) (holding that protecting privacy is a legitimate government interest).

<sup>191</sup> Brief for William J. Bennett, *supra* at n. 152; Brief for Citizens United, *supra* at n. 152; Brief for the Concerned Women For America, *supra* at n. 152; Brief for the Foundation for Moral Law, *supra* at n. 152.

<sup>192</sup> *Id.* at 3.

<sup>193</sup> *Id.* at 4.

<sup>194</sup> *Id.* at 5-6.

<sup>195</sup> *Id.*



bathrooms, locker rooms, showers, and dressing rooms.<sup>196</sup> This argument echoes that of the aforementioned petition to boycott Target retail stores when it implemented a pro-transgender bathroom policy nationwide. Even though Ash Whitaker's case was explicitly about using the bathroom and the parties stipulated that Ash does not use the school's locker rooms, showers, or dressing rooms, these briefs overwhelmingly analyzed the speculative danger of transgender bathroom policies specifically in the context of locker rooms and dressing rooms.

The Concerned Women for America<sup>197</sup> animus brief unironically invoked its own gender identity by arguing that the Seventh Circuit's ruling in favor of Ash's gender identity is a safety concern: "[a]s 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."<sup>198</sup> Without ever explaining why a pro-transgender bathroom policy would affect bathroom safety, the Concern Women's brief asserted that two of its leaders have been sexually assaulted (one of whom was videotaped in a women's bathroom when she was a teenager, decades before any sort of transgender bathroom law)<sup>199</sup> and proceeded to list three separate instances in which Target stores had problems of "peeping toms" after it implemented its transgender bathroom policy.<sup>200</sup> It did not state whether these three instances were more than the usual amount of instances. Aside from this handful of anecdotes, the brief did not provide any statistical data to prove that transgender

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<sup>196</sup> Brief for William J. Bennett, *supra* at n. 152; Brief for Citizens United, *supra* at n. 152; Brief for the Concerned Women For America, *supra* at n. 152; Brief for the Foundation for Moral Law, *supra* at n. 152.

<sup>197</sup> Concerned Women for America is a conservative nonprofit "built on prayer and action." See generally, <https://concernedwomen.org/about/> ("We believe marriage is between one man and one woman, that sexual activity outside of that marriage is sin, and that God created the human race male and female.").

<sup>198</sup> Brief for the Concerned Women For America, *supra* at n. 152.

<sup>199</sup> *Id.* at 6-7.

<sup>200</sup> *Id.* at 9.

bathroom policies could possibly lead to an increase in bathroom sexual assault, and instead relied on the reader’s inference.

William J. Bennett’s brief better articulated the fear-mongering offered in the Concerned Women brief and at least granted the concession that it is not transgender individuals themselves who pose a safety concern, but non-transgender sexual predators who would take advantage of the opportunity to enter a bathroom of the opposite sex.<sup>201</sup> Bennett argued transgender bathroom policies *could* be “exploited by *non-transgender* sexual predators who *falsely* assert” that they are transgender.<sup>202</sup> Bennett then cited six occasions in which transgender bathroom policies were allegedly exploited by sexual deviants, including one where a man ran into the women’s locker room and stripped naked, screaming that he was allowed to be there in light of the new rule.<sup>203</sup> To magnify the horror of the handful of instances cited, Bennett points out that studies show two-thirds of sexual assault instances go unreported, bringing the speculative total to a mere eighteen.<sup>204</sup> Yet, like the Concerned Women’s brief, Bennett’s brief did not point to any statistics, studies, or data that demonstrate that pro-transgender bathroom policies would have any effect on the number of sexual assaults in restrooms.

### B. *The Flawed Reasoning in the “Animus” Briefs*

Each of the three primary arguments raised in the several “animus” briefs are fundamentally flawed. First, the plain language of Title IX referring to biological sex has no bearing on whether the school district relied on sex stereotyping in forcing Ash to use the restroom that his sex stereotypically uses. Second, gender dysphoria is not a mental illness, and even if it is, it certainly does not amount to a

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<sup>201</sup> Brief for William J. Bennett, *supra* at n. 152.

<sup>202</sup> *Id.*

<sup>203</sup> *Id.* at 21; see also Bult, Laura, *Seattle Man Undresses in Women’s Locker Room at Local Pool To Test New Transgender Bathroom Rule*, N.Y. DAILY NEWS (Feb. 17, 2016) <http://www.nydailynews.com/news/national/wa-man-women-bathroom-test-transgender-ruling-article-1.2535150>.

<sup>204</sup> Brief for William J. Bennett, *supra* at n. 152.

disability because it does not impair any major life activity and it is explicitly excluded from federal disability legislation. Third, there is no evidence of transgender bathroom policies causing an increase in instances of sexual assault.

i. The “plain meaning” argument does not rebut the Seventh Circuit ruling

Even if one accepts at face value the notion that Title IX and Title VII apply only to sex-based discrimination, the sex-stereotyping cause of action recognized in *Price Waterhouse* nonetheless accommodates transgender discrimination claims. As the Seventh Circuit properly noted in *Whitaker*, the school district attempted to force Ash to use the restroom in accordance with the stereotype expected of his birth sex.<sup>205</sup> Moreover, the school district explicitly used the word “sex” in its unwritten policy, which demonstrated that the policy was clearly sex-based.<sup>206</sup>

Furthermore, arguing that the policy treats males and females equally is no more persuasive than the arguments for anti-miscegenation statutes in *Loving v. Virginia*, where Virginia argued that the law punished whites and blacks equally for interracial marriage.<sup>207</sup> The *Loving* court outright rejected that argument.<sup>208</sup> Likewise, the argument that is grounded in the idea that the bathroom policy punishes males and females equally for using the opposite bathroom should be rejected as a futile attempt to discriminate on the basis of gender identity.

Finally, although Citizens United argues that calling Ash “he” is to “sacrifice the plain meaning of the English Language at the altar of political correctness,”<sup>209</sup> referring Ash as “he” is wholly within the confines of the plain meaning of English. Ash presents himself as a

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<sup>205</sup> *Whitaker*, 858 F.3d at 1048.

<sup>206</sup> *Id.*

<sup>207</sup> 388 U.S. 1 (1967)

<sup>208</sup> *Id.*

<sup>209</sup> Brief for Citizens United, *supra* at n. 152.

man, dresses like a man, calls himself a man, and styles his hair like a man.<sup>210</sup> Accordingly, he is a man, and calling him “he” is no sacrifice to anyone, let alone some grandiose hypothetical “altar of political correctness.”<sup>211</sup>

- ii. Gender dysphoria is not a mental illness and is not a disability under the law

Because gender roles are no more than social constructs,<sup>212</sup> the refusal to conform to gender roles cannot logically be a mental illness. In fact, according to the American Psychiatric Association, “gender nonconformity is not in itself a mental disorder.”<sup>213</sup> Therefore, gender dysphoria is not a mental disorder.

However, even if one assumes that gender nonconformity *is* a mental illness, it certainly does not fit the legal requirements of a disability. A disability, generally, is a physical or mental *impairment* that *limits* one or more life activities.<sup>214</sup> Nothing about transitioning genders impairs anything about a transgender person’s life. If anything, it frees them from the constraints of society’s arbitrary stereotypes and expectations of their birth sex. The only impairment to a transgender person’s life from gender dysphoria is societal harassment, like that exhibited in the “animus” briefs. Therefore, because transgender people are not disabled, the argument that Ash should file under the IDEA also fails.

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<sup>210</sup> *Whitaker*, 858 F.3d at 1038.

<sup>211</sup> Brief for Citizens United, *supra* at n. 152.

<sup>212</sup> *See generally*, Section II.

<sup>213</sup> *DSM-5: Gender Dysphoria*, AMERICAN PSYCHIATRIC ASSOCIATION 2013 (last visited Nov. 21, 2017)

[https://www.psychiatry.org/File%20Library/Psychiatrists/Practice/DSM/APA\\_DSM-5-Gender-Dysphoria.pdf](https://www.psychiatry.org/File%20Library/Psychiatrists/Practice/DSM/APA_DSM-5-Gender-Dysphoria.pdf).

<sup>214</sup> 42 U.S.C §12102(1)(a).

iii. Pro-Transgender Bathroom Policies Are Not a Safety Threat.

The argument that transgender bathroom policies are likely to increase bathroom sexual assault is unconvincing because there is no evidence demonstrating the speculative fear whatsoever. The handful of anecdotes the various briefs cite are no more than anecdotes and do nothing to show a trend or correlation, much less causation. This fear-based argument should fail immediately with such a vacancy of evidence.

Finally, to answer the Citizen United question, “what is to stop the varsity boys’ lacrosse team from deciding *en masse* that they are all girls, and barging into the girls’ locker room while the cheerleading squad is changing clothes?”<sup>215</sup> Simply put, the answer would be “a note from a doctor diagnosing gender dysphoria,” which is what Ash Whitaker immediately provided his school upon beginning his transition.<sup>216</sup> But Citizens United appears too wrapped up in animus to parse legal issues in this submission to the highest court in the United States. The Seventh Circuit addressed this disingenuous argument in *Whitaker*, which Citizens United must have missed: “[t]his is not a case where a student has merely announced that he is a different gender. Rather, Ash has a medically diagnosed and documented condition. Since his diagnosis, he has consistently lived in accordance with his gender identity.”<sup>217</sup> For the Citizens United brief to simply toss Ash in with the hypothetical sexually predatory athletes “barging” in on unsuspecting and vulnerable cheerleaders is a gross mischaracterization of Ash’s simple request to go the bathroom with the other boys.

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<sup>215</sup> Brief for Citizens United, *supra* at n. 152.

<sup>216</sup> *Whitaker*, 858 F.3d at 1053.

<sup>217</sup> *Id.*

## CONCLUSION

The legal groundwork upon which the Seventh Circuit came to its decision in *Whitaker* is unassailable. In order to come to another conclusion, a court deciding these issues must deviate from that firm reasoning. As such, the Seventh Circuit’s analysis should serve as a guiding light to other courts presiding over transgender bathroom rights litigation. Regardless of the current political atmosphere, or of the ongoing animus against transgender individuals displayed in the “animus” briefs, the judicial branch must stand undeterred. The executive branch and the legislative branch may test the judiciary’s protections of transgender rights with statutes, regulatory interpretations, and executive orders, but the analysis should remain the same: forcing individuals to use certain bathrooms that violate their gender identity is no different than sex stereotyping in any other context. The Supreme Court of the United States should find the same.