NO. 16-3522

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

ASHTON WHITAKER, a minor, by his mother and next friend, MELISSA WHITAKER,

Plaintiff-Appellee,

v.

KENOSHA UNIFIED SCHOOL DISTRICT NO. 1 BOARD OF EDUCATION and SUE SAVAGLIO-JARVIS, in her official capacity as Superintendent of the Kenosha Unified School District No. 1,

Defendants-Appellants.

On Appeal from the United States District Court for the Eastern District of Wisconsin, Case No. 2:16-cv-00943-PP
The Honorable Judge Pamela Pepper, Presiding.

BRIEF OF PLAINTIFF-APPELLEE

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Attorneys for Plaintiff-Appellee

APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 16-3522

Short Caption: Whitaker v. Kenosha Unified School District No. 1 Board of Education

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n/a

Attorney's Signature: s/ Joseph J. Wardenski Date: January 23, 2017

Attorney's Printed Name: Joseph J. Wardenski

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** X **No** _____

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Attorney's Signature: s/ Sasha Samberg-Champion Date: January 23, 2017

Attorney's Printed Name: Sasha Samberg-Champion

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** _____ **No** X

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Attorney's Signature: s/ Michael G. Allen Date: January 23, 2017

Attorney's Printed Name: Michael G. Allen

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ____ **No** X

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Attorney's Signature: s/ Robert Friedman Date: January 23, 2017

Attorney's Printed Name: Robert Friedman

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ____ **No** X

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Attorney's Signature: s/ Ilona M. Turner Date: January 23, 2017

Attorney's Printed Name: Ilona M. Turner

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** _____ **No** X

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Attorney's Signature: s/ Alison Pennington Date: January 23, 2017

Attorney's Printed Name: Alison Pennington

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Attorney's Signature: s/ Sasha J. Buchert Date: January 23, 2017

Attorney's Printed Name: Sasha J. Buchert

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Attorney's Signature: s/ Shawn Thomas Meerkamper Date: January 23, 2017

Attorney's Printed Name: Shawn Thomas Meerkamper

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Attorney's Signature: s/ Robert Theine Pledl Date: January 23, 2017

Attorney's Printed Name: Robert Theine Pledl

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JURISDICTIONAL STATEMENT

The Appellants' jurisdictional statement is not complete and accurate. The District Court has subject-matter jurisdiction over this matter under 28 U.S.C. §§ 1331 and 1343(a)(3). Plaintiff's claims raise federal questions under Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq*. ("Title IX"), and the Fourteenth Amendment to the United States Constitution under 42 U.S.C. § 1983.

Defendants appeal from a preliminary injunction orally granted on September 20, 2016, followed by a written order on September 22, 2016. This Court has jurisdiction to review that injunction under 28 U.S.C. § 1292(a)(1). Defendants timely filed their notice of appeal on September 23, 2016.

Defendants also seek to appeal the District Court's September 24, 2016 amended order denying Defendants' Motion to Dismiss. This Court does not have jurisdiction over that portion of Defendants' appeal. A denial of a motion to dismiss is a non-final order that is ordinarily unreviewable under 28 U.S.C. § 1291. On November 14, 2016, in a separately docketed proceeding (No. 16-8019), this Court rejected Defendants' petition for interlocutory review of that order. Defendants then moved this Court to exercise pendent appellate jurisdiction to consider that order. On December 19, 2016, this Court ordered that Defendants' motion would be considered with the merits of this appeal. For the reasons set forth in Plaintiff's response in opposition to Defendants' motion for exercise of pendent jurisdiction [Dkt. 23-1], the order denying the motion to dismiss is not "inextricably intertwined" with the preliminary injunction, so this Court lacks jurisdiction to review that order.

INTRODUCTION AND STATEMENT OF THE ISSUE

Defendants appeal the District Court's grant of a preliminary injunction to Plaintiff Ashton ("Ash") Whitaker, a 17-year-old boy who is a senior at Tremper High School in the Kenosha Unified School District. The injunction bars the school district from denying Ash, who is transgender, equal use of boys' restrooms at school and school-sponsored events; disciplining him for using boys' restrooms; or surveilling his restroom use in any way.

The District Court's order rests on its findings that (1) Ash demonstrated a likelihood of success on the merits of his claims under Title IX and the Equal Protection Clause; (2) Ash would likely suffer irreparable educational, physical, and developmental harms absent the injunction; (3) Ash had no adequate remedy at law for those harms; and (4) the balancing of equities favored Ash, who presented evidence that he had used boys' restrooms for months without incident and that many other schools allow transgender students to use restrooms consistent with their gender identity without issues, whereas KUSD offered no evidence that the injunction would harm it, other students, or the public interest. The District Court made no final determination as to whether KUSD's conduct was unlawful, did not order KUSD to change any policy with respect to anyone other than Ash, and relied heavily on uncontested evidence that the injunction would significantly prevent injuries that Ash would suffer if he remained unable to use boys' restrooms.

The question presented is whether the District Court abused its discretion in entering this limited preliminary injunction while litigation on the merits proceeds.

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

A. Plaintiff's Background

Ash Whitaker is a 17-year-old boy. SA101. He is a senior at Tremper High School ("Tremper"), a public high school operated by Defendants Kenosha Unified School District No. 1 Board of Education and Superintendent Sue Savaglio-Jarvis (collectively, "KUSD" or "Defendants"). Appendix ("A") 2.

Ash is transgender. Supplemental Appendix ("SA") 102; SA129. That is, he was assumed to be a girl and was assigned the female sex at birth, but is male. Ash has consistently identified as a boy since early adolescence and has lived as a boy in all aspects of his life for years. A2; SA102. He has been diagnosed with Gender Dysphoria in Adolescents and Adults ("Gender Dysphoria"), which is a "marked incongruence" between one's gender identity and assigned sex of at least six months' duration, usually resulting in clinically significant distress. A2-3; SA102; SA119-21 (citing Am. Psychiatric Ass'n, *Diagnostic & Statistical Manual of Mental Disorders, Fifth Ed.* 451-52 (2013) ("DSM-5"));[1] SA167 (same). Ash has undertaken a *social transition*—a process to live congruently with his male sex—in line with prevailing standards of care for transgender health. A2-3; SA102; SA121-22 (citing World Prof'l Ass'n for Transgender Health, *Standards of Care for the Health of*

[1] Relevant excerpts of the DSM-5 are attached as Ex. A to the accompanying Addendum. Federal courts may take judicial notice of the diagnostic standards contained in the DSM. *See Jacobs v. N.C. Admin. Office of Courts*, 780 F.3d 562, 565 n.2 (4th Cir. 2015); *United States v. Long*, 562 F.3d 325, 334 n.22 (5th Cir. 2009); *United States v. Cantu*, 12 F.3d 1506, 1509 & n.1 (9th Cir. 1993); *United States v. Johnson*, 979 F.2d 396, 401 (6th Cir. 1992).

Transsexual, Transgender, & Gender Nonconforming People, 7th Version (2012)).[2] Ash adopted a traditionally male name in 2014 (and has since obtained a legal name change), uses male pronouns to refer to himself, and dresses and outwardly presents himself in a traditionally masculine way. A3; A6; SA102. He is undergoing hormone therapy under the care of a pediatric endocrinologist to further align his outward appearance with his male sex. A2-3; SA102. Consequently, his family, friends, teachers, employers, and others know him to be a boy—and treat him as one every day. SA102; SA181.

As part of his social transition, Ash has consistently used male-designated restrooms, at school and elsewhere, since mid-2015. SA104-05; SA107; SA182. This follows his doctors' recommendations and the accepted clinical standards for a gender transition. A4-5; SA126-27.

B. Medical and Psychological Understanding of Gender Identity

As Ash documented to the District Court with uncontested evidence, his sex is male as a practical and scientific matter.

Everyone has a *gender identity*: one's internal sense of his or her own sex. SA118; SA164. Gender identity is immutable and fixed at an early age. SA118; SA166. A growing body of medical evidence establishes that an individual's gender identity has a biological basis, "influenced significantly by genes and by the

[2] A full copy of these standards is available at http://bit.ly/2ev2aHy. This Court has recognized that these standards require a social transition or "real life experience" living in accord with one's gender identity as part of a gender transition. *See Fields v. Smith*, 653 F.3d 550, 553-54 (7th Cir. 2011).

prenatal environment." SA166; *see also* DSM-5 at 451 ("[B]iological factors are seen as contributing, in interaction with social and psychological factors, to gender development.").

Most people's gender identity is congruent with their *assigned sex*—the designation of "male" or "female" at birth, typically based on cursory examination of an infant's external genitalia. SA164. Individuals with an incongruence between gender identity and assigned sex are *transgender*. SA119; SA164.

From a medical perspective, gender identity is the most accurate and appropriate determinant of a person's sex. SA119; SA165. Thus, examination of genitalia is insufficient to determine a transgender individual's sex. SA119; SA164-65 ("No assessment other than gender identity can provide an accurate measure of an individual's sex" and "[a]ttempting to rely on any other sex-related feature would raise intractable problems.") "[M]edical science now recognizes that when an individual's gender identity does not align with the sex assigned at birth, the only effective and ethical treatment is to reclassify the person's sex to correspond to the person's gender identity." SA167.

When transgender people are barred from living in accordance with their gender identity, and forced to instead live as the wrong sex some or all of the time, they are at high risk of experiencing exacerbated symptoms of Gender Dysphoria. A2-3; SA119-20, SA122; SA167. These symptoms may include "'serious and debilitating' psychological distress (including anxiety, depression, and even self-harm or suicidal ideation)," A3, and "impairment in social, occupational, [and] educational . . .

functioning." SA121. Transgender adolescents are particularly vulnerable to these harms: they experience depression, anxiety, self-harm, and suicidal ideation at rates two to three times higher than their peers do. SA127. For students, Gender Dysphoria symptoms can also contribute to educational harms and social isolation. SA199-202.

C. KUSD's Discriminatory Treatment of Ash

KUSD has refused to recognize Ash as a boy in a variety of ways, *see infra* at 8, but only KUSD's policy barring him from using boys' restrooms is covered by this preliminary injunction. A5; A18.

In 2015, in the spring of Ash's sophomore year, Ash asked to use boys' restrooms at school as part of his social transition. A3; SA103. However, KUSD administrators only authorized him to use girls' restrooms or the single-user restroom in the school's main office. A3; SA103. KUSD's decision left Ash with no tenable option. SA103. Since Ash is not a girl and is not seen as a girl by others, using girls' restrooms would be humiliating and stigmatizing to Ash. A13; SA103; SA123, 126-27. Using the single-user restroom would also single out and stigmatize Ash—the only student able to access it—and force him to miss more class time in order to use the more distant facility. A3; SA103. Both options would disrupt his social transition and directly conflict with his medical treatment.

To avoid these consequences, Ash often tried to abstain from using *any* restroom, despite frequently having to spend ten hours a day on campus for school and extracurricular activities. A3; SA103; SA105. To avoid restroom use, Ash

deliberately limited his fluid intake. A3; SA103. This caused him physical discomfort and exacerbated his vasovagal syncope, a condition that can be triggered by dehydration, which renders him susceptible to fainting and migraines. A3-4; SA103; SA134. Unsurprisingly, Ash also experienced frequent stress-related migraines, increased feelings of depression and anxiety, and sleeplessness, A3, SA103, SA133-34, and distraction from his schoolwork. SA105; SA111; SA134.

In the summer of 2015, Ash learned in a newspaper article that the federal government took the position that Title IX permits transgender students to use restrooms matching their gender identity. A4; SA104. Based on that information, he began using boys' restrooms at school in September 2015. A4; SA104. For the first six months of his junior year, Ash used boys' restrooms at Tremper without incident. A4; SA104. Nonetheless, in March 2016, KUSD abruptly began threatening discipline and otherwise taking aggressive steps to stop him from using boys' restrooms. A4; SA105. After the school told Ash's mother that Ash could only use girls' restrooms or a single-user restroom in the main office, Ash renewed his request to use boys' restrooms. A4; SA104; SA181.

This time, an administrator said Ash could not, because school records listed him as "female," which could only be changed with unspecified legal or medical documentation. A4; SA105; SA182. Ash's pediatrician then sent two letters explaining that Ash is transgender and recommending that he use boys' restrooms, A4-5, SA182-83, but KUSD rejected this documentation without explanation. A4-5; SA183. At a later meeting with a district-level administrator, when Ash's mother

asked why Tremper had ignored the pediatrician's recommendations, the administrator offered only that KUSD had "never had a student who identifies as male but was born female" and that, in her view, Title IX did not require KUSD to give Ash access to boys' restrooms. SA107-08; SA184-85.

When Ash continued to use boys' restrooms, school officials reprimanded him. A5; SA107. He was repeatedly pulled out of class—in front of classmates and without warning—and subjected to threats of formal discipline. SA106-07. Further, at the direction of Tremper administrators, security guards began monitoring his restroom usage. A5; SA107; SA184.

In addition to barring Ash from boys' restrooms at school—the only action covered by the injunction—KUSD has discriminated against him in other ways. For example, KUSD refused to list Ash's male name on classroom rosters and other records, resulting in Ash being repeatedly called by his birth name and being referred to as "she" and "her" in other students' presence. SA105-06; SA109. After a teacher nominated him to run for junior prom king, Tremper barred him from running and told him he could only run for prom queen instead—until a protest by Ash's classmates and negative publicity forced the school to back down. A5; SA108-09. The school gave guidance counselors green wristbands for Ash and other transgender students to wear for easier identification and monitoring. A5; SA110; SA186; SA192. And it required Ash to room with girls or by himself on school trips. SA103-04; SA110-11.

D. Harm to Ash

As a result of KUSD's enforcement of its unwritten restroom policy beginning in March 2016, Ash experienced renewed psychological distress and physical harm. SA105; SA108; SA111. Ash's anxiety and depression escalated, he had difficulty completing his homework and focusing in class, and he experienced dizziness, fainting, migraines, sleeplessness, and regular thoughts of suicide. SA108; SA111; SA132-35. He also lived in constant fear of discipline that might affect his chances of getting into college. SA107.

Ash submitted to the District Court an independent clinical evaluation from Dr. Stephanie Budge, a professor of counseling psychology at the University of Wisconsin-Madison and a clinical psychologist whose work focuses on transgender individuals. SA114-18. Dr. Budge, after reviewing Ash's medical records and performing an in-person clinical evaluation in August 2016, concluded that Ash exhibited "significant and constant distress related to how he has been treated by school staff" and "internalized stress related to his gender identity." SA130. Dr. Budge confirmed Ash's Gender Dysphoria diagnosis and found that he suffers from post-traumatic stress disorder, major depressive disorder, social anxiety disorder, and generalized anxiety disorder. SA131-32. She concluded that these conditions resulted from, and were exacerbated by, KUSD's treatment of Ash. SA133-35.

Based on these findings and the dire risks facing mistreated transgender adolescents generally, Dr. Budge concluded that continued interference with Ash's social transition, including banning him from using boys' restrooms, would cause

Ash "significant psychological distress and place [him] at risk for experiencing life-long diminished well-being and life-functioning." SA135.

Dr. Budge conducted two follow-up evaluations of Ash after the injunction; these findings were submitted to this Court when KUSD sought a stay of the injunction. Budge Supp. Dec. [Dkt. 16-7].[3] She found that Ash's symptoms of Gender Dysphoria—anxiety, depression, anger, suicidal ideation, and other distress—had declined significantly and his overall emotional well-being improved greatly in the weeks after the injunction issued. *Id.* at 2-7. One critical finding was that the near-daily suicidal ideation Ash experienced before the injunction was virtually eliminated after he was able to safely access boys' restrooms. *Id.* at 3-4.

Additionally, Dr. Jenifer McGuire, a University of Minnesota professor with expertise in transgender youth development, interviewed Ash and assessed how KUSD's policies affected his educational and social development. SA194-96. Dr. McGuire determined that the harm Ash experienced was not idiosyncratic or surprising, but rather aligns with the normal effects on transgender youth predicted by social science literature. SA199-202. For example, Dr. McGuire found it "consistent with other studies' findings" that Ash experienced increasing feelings of social isolation because KUSD "single[d] him out for differential treatment." SA202. She concluded that access to boys' restrooms was "critical" for Ash to "move forward in a developmentally appropriate manner." SA211-12.

[3] In reviewing an injunction, this Court may consider events in the record that occurred after the entry of the injunction. *See Atl. Richfield Co. v. Oil, Chem. & Atomic Workers Int'l Union, AFL-CIO*, 447 F.2d 945, 948 (7th Cir. 1971).

E. Relevant Procedural History

Ash initiated this litigation on July 19, 2016, alleging that KUSD's discriminatory conduct violated his rights under Title IX and the Equal Protection Clause. On August 15, 2016, in anticipation of the start of the upcoming school year, Ash sought a preliminary injunction seeking to halt KUSD's discriminatory practices by the beginning of the new school year in September.[4]

Ash substantiated the facts described above with numerous declarations. In addition to those from Drs. Budge and McGuire, Ash submitted a declaration from Dr. R. Nicholas Gorton, a physician who primarily treats transgender patients. SA162-68. Further, three educators with experience implementing policies permitting transgender students to use restrooms matching their gender identity stated that they observed positive effects for transgender students and their school communities at large after adopting such policies, with no negative impact on other students. SA238-52. Dr. McGuire similarly explained that "no published empirical studies have shown any harm to students when schools practice more inclusive policies"; in fact, empirical data suggest that "all students benefit." SA209. Ash also presented evidence of other school districts' policies treating transgender students consistent with their gender identity. SA265-327.

[4] In addition to seeking to enjoin KUSD's ban on his use of boys' restrooms, Ash requested that KUSD be enjoined from (1) requiring Ash to display identifiers, such as green wristbands, to identify him as transgender, and (2) referring to Ash by his birth name and female pronouns. The District Court denied these aspects of Ash's motion based on KUSD's representations that it had either ceased or would not take the challenged actions and Plaintiff's consent to limiting the scope of the requested relief. A6.

KUSD opposed Ash's motion and filed a motion to dismiss. In opposing the injunction motion, KUSD primarily argued that Ash's claims fail as a matter of law. The only exhibits KUSD submitted were copies of correspondence with Ash's attorneys, an administrative complaint Ash filed with the Department of Education before filing this lawsuit, and enrollment figures in Wisconsin school districts—all wholly irrelevant to the merits of Ash's claims. KUSD offered nothing to challenge the factual evidence Ash presented regarding his gender identity, the school's actions, or the harmful effects of those actions on him.

The District Court denied KUSD's motion to dismiss and then granted Ash a preliminary injunction requiring KUSD to permit him to use the boys' restrooms. A1-62. In granting the injunction, the court found that Ash had no adequate remedy at law and that the medical and psychological injuries, stigma, and educational harms to which Ash would be continuously subjected absent an injunction constituted irreparable harm. A10-13. It also concluded that the balance of the harms and public interest considerations weighed in Ash's favor, explaining that KUSD provided no evidence that an injunction would impose any expense to KUSD, burden KUSD with any facilities changes or other complex logistics, or violate the privacy of other students. A13-15.

With respect to the merits of Ash's claims, the District Court found it unnecessary to resolve many of the parties' broader doctrinal disagreements regarding the legal protections enjoyed by transgender students in order to find,

based on the complaint's allegations and the evidence before the court, that Ash pleaded valid claims and had some likelihood of success.

In particular, the District Court found it unnecessary to definitively resolve the parties' dispute as to whether Ash's sex is determined by his gender identity for Title IX purposes. It determined that neither Title IX nor its implementing regulations purport to define the term "sex" at all, let alone in a way that resolves the controversy here. A8-9. The question instead should be resolved after further factual development, the District Court found, and for now Ash had adequately pleaded and presented evidence to show that he can ultimately establish that gender identity is a defining aspect of one's sex and that he is a boy. A39-40; A47. Moreover, the District Court found that Ash pleaded—and had a likelihood of proving—discrimination based on sex stereotyping irrespective of the question of whether Title IX requires a school to treat Ash consistent with his male gender identity. A9.

Similarly, with respect to Ash's constitutional claim, the District Court found it unnecessary to decide whether government actions that discriminate against transgender people receive heightened scrutiny. A9. It determined that, based on the pleadings and the evidence before it, Ash had a likelihood of establishing that KUSD's actions failed any level of scrutiny. A9. KUSD's only justification was "that students have a right to privacy," but as the District Court observed, it was "not clear how allowing the plaintiff to use the boys' restroom violates other students'

right to privacy." A9. The District Court rejected KUSD's motion to stay this injunction pending appeal. SA099.

This interlocutory appeal followed.[5]

SUMMARY OF ARGUMENT

The District Court acted well within its discretion in issuing a targeted injunction permitting Ash to use boys' restrooms while this case proceeds. Unrefuted evidence demonstrated that Ash was at grave risk of suffering irreparable harm absent an injunction, including enduring damage to his physical and mental health. By contrast, no evidence suggested that the injunction would harm anyone. Accordingly, the District Court permissibly found that preliminary relief was appropriate if Ash had some chance of success on the merits. He does.

Title IX must be construed broadly to ban all forms of "discrimination on the basis of sex" in education, not just those Congress specifically contemplated. *See Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250-51 (1989). KUSD's policy barring Ash from using boys' restrooms discriminates on the basis of sex and imposes an egregiously unequal educational environment on Ash. The policy facially discriminates on the basis of sex, by barring Ash from the proper sex-segregated restroom. And it is motivated by sex, as KUSD only confirms by arguing that Ash is not "really" a boy.

[5] On November 10, 2016, this Court denied KUSD's request for a stay of the injunction pending appeal. [Dkt. 19]. On December 19, 2016, following briefing on KUSD's motion for pendent jurisdiction, this Court ordered that the motion would be resolved by the merits panel on this appeal. [Dkt. 29-1].

This Court's decades-old Title VII decision in *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081 (7th Cir. 1984), to the extent it might otherwise apply here, does not survive *Price Waterhouse* and *Oncale* and thus does not foreclose Ash's statutory claim. Neither does a regulation implementing Title IX that authorizes schools to maintain sex-segregated restrooms if they wish. Nothing in that regulation or in Title IX itself purports to define "sex" as a matter of law, let alone in any of the constrained ways that KUSD suggests. Rather, that regulation—like Title IX itself—must be applied in each instance so as to further, rather than frustrate, Title IX's purpose of guaranteeing that nobody is denied equal educational opportunities on the basis of sex. As the District Court reasonably found, Ash may establish that KUSD's policy prohibiting him from using boys' restrooms is unlawful discrimination on the basis of sex. And while this Court need not reach the question if it properly adjudicates Ash's Title IX claim, Ash also has a chance of prevailing on his equal protection claim because he faced discrimination based on both his sex and transgender status.

To affirm the narrow injunction at issue here, this Court thus need do no more than apply established Title IX principles in a straightforward manner to the facts of a single case. It need not even hold definitively that Ash is entitled to use boys' restrooms; it need only find that he may ultimately establish that. KUSD errs in asserting that this Court must declare definitively "whether the term 'sex' in Title IX encompasse[s] transgender status" and whether "a student [can] unilaterally declare their gender [and] then demand that they be treated like 'all others' in that

sex classification." KUSD Br. 4. Neither question was decided by the District Court or must be decided on appeal. KUSD similarly errs in suggesting that the relief Ash obtained threatens its ability to have sex-segregated restrooms. KUSD Br. 11-12. Far from it. Ash agrees that the term "sex" refers to being either male or female. He simply seeks to use the *correct* restrooms consistent with *his* sex: male.

Ash seeks no special treatment because he is a transgender boy; he seeks only to be treated the same as all other boys at school. By contrast, KUSD asks this Court to rule, as a matter of law, that Title IX categorically *excludes* a transgender boy like Ash from enjoying the same protections as all other boys as a matter of law, despite his male gender identity. KUSD's position is that Ash—whose male identity is immutable, expressed consistently at school and elsewhere, and supported by medical evidence—may nevertheless be treated differently from other students simply because his birth certificate says "female." The District Court correctly found that Ash has a chance of showing otherwise. This Court should affirm.

ARGUMENT

I. STANDARD OF REVIEW

This Court reviews a district court's grant of a preliminary injunction for abuse of discretion. *See Girl Scouts of Manitou Council, Inc. v. Girl Scouts of USA*, 549 F.3d 1079, 1100 (7th Cir. 2008). This Court "review[s] the court's legal conclusions *de novo*, its findings of fact for clear error, and its balancing of the injunction factors for an abuse of discretion." *Ezell v. City of Chicago*, 651 F.3d 684, 694 (7th Cir. 2011). This Court "accord[s], absent any clear error of fact or an error of law, 'great

deference' to the district court's weighing of the relevant factors." *Ty, Inc. v. Jones Group, Inc.*, 237 F.3d 891, 896 (7th Cir. 2001).

II. REQUIREMENTS OF A PRELIMINARY INJUNCTION

"The purpose of preliminary injunctive relief is to minimize the hardship to the parties pending the ultimate resolution of the lawsuit." *Platinum Home Mortg. Corp. v. Platinum Fin. Grp.*, 149 F.3d 722, 726 (7th Cir. 1998) (quotation marks omitted). This Court applies a two-part analysis in determining whether a preliminary injunction should issue. *See Turnell v. CentiMark Corp.*, 796 F.3d 656, 661-62 (7th Cir. 2015). First, the plaintiff must make a threshold showing that he (1) will likely suffer irreparable harm prior to the case's final resolution without the requested preliminary relief, (2) has no adequate remedy at law for that harm, and (3) has a reasonable likelihood of success on the merits. *See id.* at 662. To establish the requisite likelihood of success, a plaintiff "must demonstrate some probability of success on the merits," but "the threshold is low." *Brunswick Corp. v. Jones*, 784 F.2d 271, 275 (7th Cir. 1986) (quotation marks omitted). "It is enough that the plaintiff's chances are better than negligible." *Id.*

If the plaintiff makes this threshold showing, the court then (1) weighs the irreparable harm the plaintiff faces against the potential irreparable harm to defendants, if any, if the injunction is wrongly granted, and (2) considers the effects, if any, on the public interest. *Turnell*, 796 F.3d at 661-62. "The court weighs the balance of potential harms on a 'sliding scale' against the movant's likelihood of success: the more likely he is to win, the less the balance of harms must weigh in

his favor; the less likely he is to win, the more it must weigh in his favor." *Id.* at 662 (citations omitted).

III. THE DISTRICT COURT REASONABLY CONCLUDED THAT THE EQUITIES OVERWHELMINGLY FAVORED THE GRANT OF A PRELIMINARY INJUNCTION.

A. The District Court did not err in finding that Plaintiff would likely suffer irreparable educational, emotional, and physical harms without the injunction.

KUSD's refusal to allow Ash to use boys' restrooms causes him to experience depression, anxiety, migraines, suicidal ideation, stigmatization, and diminished academic motivation, and places him at risk for long-term injuries to his health and overall development. *See supra* at 9-10. Taking into account this evidence—and the complete absence of opposing evidence from KUSD—the District Court concluded that Ash would be harmed irreparably without the injunction. This was not an abuse of discretion.

1. Courts routinely find irreparable harm when equal treatment is denied.

Ash's injuries stem from unequal treatment, which by its very nature constitutes irreparable harm. The denial of his right to attend school free from discrimination has caused Ash to experience diminished self-worth, stress, stigma, and humiliation from being labeled, and treated as, an "other" by his school. These are core harms that Title IX and the Equal Protection Clause protect against, and they cannot be remedied fully by a damages award. For that reason, courts find irreparable harm in comparable circumstances. *See, e.g.*, *Dodds v. U.S. Dep't of Educ.*, No. 16-4117, 2016 WL 7241402, at *2 (6th Cir. Dec. 15, 2016) (Title IX and Equal Protection Clause claims by transgender student); *Doe v. Dolton Elem. Sch. Dist. No. 148*, 694

F. Supp. 440, 447 (N.D. Ill. 1988) (finding irreparable harm for children living with AIDS segregated in school because "they will suffer the same feelings of inferiority the Supreme Court sought to eradicate in *Brown [v. Board of Education*].").

Indeed, KUSD can point to no decision declining to issue an injunction for lack of irreparable harm after finding a likelihood of success on the merits of a Title IX claim. Nor does it point to such a case brought under the Equal Protection Clause, violations of which courts have recognized constitute irreparable harm as a matter of law. *See, e.g.*, *Brewer v. W. Irondequoit Cent. Sch. Dist.*, 212 F.3d 738, 745 (2d Cir. 2000); *cf., e.g.*, *Ezell*, 651 F.3d at 699.

2. The District Court permissibly found that Ash, without the injunction, would likely suffer serious psychological, physical, and educational injuries for which there is no adequate remedy at law.

Additionally, Ash documented concrete and irreparable injuries warranting injunctive relief. The psychological, physical, and educational harms that Ash would almost certainly endure without the injunction are all well-recognized forms of irreparable harm.

As the District Court explained, irreparable harm is "harm that cannot be prevented or fully rectified by the final judgment after trial." A13 (quoting *Roland Mach. Co. v. Dresser Indus., Inc.*, 749 F.2d 380, 386 (7th Cir. 1984)). Numerous courts have held that "emotional stress, depression and reduced sense of well-being" are unquantifiable injuries that "cannot be adequately compensated for by a monetary award." *Chalk v. U.S. Dist. Ct.*, 840 F.2d 701, 709-10 (9th Cir. 1988) (citation omitted) (collecting cases). Although "[d]amages are the standard remedy

for [physical] personal injury," that is "only because personal injuries can rarely be anticipated in time to prevent them by injunction. . . . [W]here an injunction is possible, the irreparable injury rule is obviously satisfied." Douglas Laycock, *The Death of the Irreparable Injury Rule*, 103 Harv. L. Rev. 687, 709 & nn. 116-17 (1990) (collecting cases). Courts recognize the future risk of physical and emotional harms as potentially irreparable harm. *See, e.g., Bowen v. City of New York*, 476 U.S. 467, 484 (1986) (finding that plaintiffs "would be irreparably injured" by risk of "severe medical setback"); *Marcus v. Sullivan*, 926 F.2d 604, 614 (7th Cir. 1991) (finding irreparable harm when delayed disability benefits subjects claimants to risk of deteriorating health); *United Steelworkers of Am., AFL-CIO v. Fort Pitt Steel Casting, Div. of Conval-Penn, Div. of Conval Corp.*, 598 F.2d 1273, 1280 (3d Cir. 1979) (finding irreparable harm because of "possibility" of "deni[al of] adequate medical care"). Applying these well-settled concepts, courts have found that injuries to a transgender individual caused by discrimination impeding the person's gender transition and the resulting harmful consequences of untreated Gender Dysphoria—including, *e.g.*, depression and suicidal ideation—are irreparable and support an injunction. *See, e.g.*, *Dodds*, 2016 WL 7241402, at *2; *Norsworthy v. Beard*, 87 F. Supp. 3d 1164, 1192 (N.D. Cal. 2015).

Just so here. Ash's use of boys' restrooms is integral to his social transition, a clinically appropriate medical treatment for Gender Dysphoria. *See supra* at 3-4. KUSD's interference with Ash's transition inflicted on him clinically significant psychological injuries (depression, anxiety, and suicidal thoughts) and physical

injuries (migraines and exacerbated symptoms of vasovagal syncope). Indeed, Dr. Budge cautioned that, unless KUSD's discrimination ceased, Ash faced a "risk [of] experiencing life-long diminished well-being and life-functioning." SA135. Dr. Gorton stated that transgender adults "who were allowed to transition at young ages show far more resilience, health, and well-being than those who were forced to live in accordance with their birth-assigned sex." SA168. That evidence more than sufficed to support the District Court's finding of irreparable harm, particularly without contradictory evidence.

Moreover, the District Court also permissibly found that KUSD's discriminatory conduct, if not enjoined, would cause Ash irreparable *educational* harm. *See* A12 (citing *Washington v. Ind. High Sch. Ath. Ass'n, Inc.*, 181 F.3d 840, 853 (7th Cir. 1999)). Although Ash is an excellent student, when not permitted to use the boys' restrooms, he had difficulty concentrating on his schoolwork and struggled through depression and anxiety. SA134-35. The District Court reasonably credited Ash's fear that KUSD's actions would continue to impede his academic work and participation in school, SA108, SA111, and properly concluded that Ash's "spending his last school year" enduring these harms is not something "that can be rectified by a monetary judgment." A13.

On appeal, KUSD argues that the expert testimony described above is insufficient because it does not "quantify" Ash's psychological harm. KUSD Br. 39. This gets it precisely backwards. An injury that is "difficult to prove and quantify" is a "canonical form of irreparable harm." *Turnell*, 796 F.3d at 666. And KUSD fails

to address, and therefore waives any challenge to, the District Court's finding that Ash would suffer educational harm if forced to endure KUSD's discriminatory policy. *See Gable v. City of Chicago*, 296 F.3d 531, 538 (7th Cir. 2002). This likelihood of educational harm—standing alone or combined with the other irreparable harms described above—is irreparable harm justifying a preliminary injunction. *See Washington*, 181 F.3d at 853.

KUSD asserts that emotional suffering never qualifies as irreparable harm because of the potential availability of monetary damages later. *See* KUSD Br. 39. This Court need not reach the question, because Ash also faced *physical* and *educational* injuries absent the injunction. In any event, KUSD's argument overstates the holdings of the cases on which it relies. Those cases involve generic allegations of emotional hardship that are incidental to the core injury claimed. Damages may well suffice to remedy "inevitable disappointment" attendant to lost vacation time, *see Bhd. of Locomotive Engineers & Trainmen v. Union Pac. R.R. Co.*, No. 10-C-8296, 2011 WL 221823, at *5 (N.D. Ill. Jan. 24, 2011).[6] But that injury pales in comparison to the profound harms Ash would almost certainly experience were KUSD's discriminatory conduct not enjoined.

[6] Such harms can constitute irreparable harm even in employment cases where plaintiffs experience depression and other profound emotional harms. *See Sampson v. Murray*, 415 U.S. 61, 92 n.68 (1974) ("[C]ases may arise in which the circumstances surrounding an employee's discharge, together with the resultant effect on the employee, may so far depart from the normal situation that irreparable injury might be found."); *E.E.O.C. v. Chrysler Corp.,* 546 F. Supp. 54, 70 (E.D. Mich. 1982) (finding "depression and a reduced sense of well-being" from employment decision to be irreparable).

KUSD also errs in claiming inconsistency between the irreparable harm finding and Ash's claim for monetary damages. *See* KUSD Br. 40. Damages can *to some extent* compensate Ash, but still be "seriously deficient as compared to the harm suffered." *Foodcomm Int'l v. Barry*, 328 F.3d 300, 304 (7th Cir. 2003). Accordingly, as this Court has explained, monetary damages need not be "wholly ineffectual" for injunctive relief to be appropriate.

3. KUSD's argument that Ash's harms were self-inflicted are baseless.

The District Court permissibly rejected KUSD's contention that Ash's injuries are self-inflicted because (a) he could have used a single-user restroom, or (b) he somehow waited too long to seek this injunction. KUSD Br. 40.

First, the argument that Ash's refusal to use single-user restrooms undermines his showing of harm ignores the uncontested evidence that Ash's use of such restrooms—to which he alone was given a key, and which would make him the *only* Tremper student to use them—would single him out and stigmatize him as different, interfere with his social transition, and, because of their remote locations, cause him to miss more class time than other students. An alternative's availability does not make an injury "truly self-inflicted if not avoided—and thus not irreparable harm" unless the alternative actually minimizes the plaintiff's harm. *See Stuller, Inc. v. Steak N Shake Enterprises, Inc.*, 695 F.3d 676, 679 (7th Cir. 2012). This is particularly so where, as here, the so-called alternative is part of the challenged discrimination.

Second, contrary to KUSD's assertion that Ash's supposed delay in seeking relief is somehow material here, *see* KUSD Br. 41-42, Ash diligently and quickly pursued relief. Delay only informs the injunction analysis as a separate factor if "the defendant has been lulled into a false sense of security or had acted in reliance on the plaintiff's delay." *Ty, Inc.*, 237 F.3d at 903 (quotation marks omitted). KUSD, however, has claimed no such harm.

In any event, all of Ash's actions here were taken with an urgency consistent with his claim of irreparable harm. On April 19, 2016, just weeks after KUSD began actively excluding Ash from boys' restrooms, Ash formally demanded boys' restroom access through counsel. Two weeks later, shortly after KUSD refused that demand, he filed an administrative complaint with the U.S. Department of Education. Less than a month after the school year ended in mid-June, he withdrew that complaint in favor of litigating in court, precisely so he could quickly obtain injunctive relief permitting him equal and healthy enjoyment of his upcoming senior year. Ash's complaint demanded preliminary injunctive relief, and was followed by a formal motion filed just weeks later with numerous supporting declarations. Notably, Ash was on summer break—and therefore not experiencing the daily discrimination at issue here—for most of the period KUSD claims he "delayed" in taking action. By contrast, KUSD's actions—not seeking a stay of the injunction from this Court until two weeks after it was issued and failing to seek an expedited appeal—only confirm the District Court's conclusion that KUSD suffers no harm from the injunction.

The District Court did not abuse its discretion in placing no weight on KUSD's argument that this timeline amounted to unreasonable delay.

B. The District Court properly rejected Defendants' purely conjectural harms to KUSD and the broader public as unsubstantiated.

Defendants assert that the balance of harms nonetheless weighs against the injunction. They contend, without citing evidence, that Ash's use of boys' restrooms harms "*all* students within the school district and the community at large." KUSD Br. 44. Without support, they argue that the injunction "will have the effect of forcing policy changes and stripping KUSD of its basic authority to enact polic[i]es that the [sic] accommodate the need for privacy of all students," and even forces other school districts to "contemplate" their policies towards transgender students. KUSD Br. 44, 47.[7] The District Court correctly rejected these contentions.

KUSD's overwrought predictions are inconsistent with reality: the injunction here does not force KUSD to do anything with respect to anyone other than Ash. No evidence supports KUSD's assertion that any student's privacy rights are impaired by Ash's use of boys' restrooms, whereas actual evidence suggests that Ash's peers support him and that no student has *ever* objected to his restroom use. Given that record, the District Court permissibly declined to credit KUSD's vague and

[7] KUSD also asserts that a Texas district court's injunction against the federal government's enforcement of its transgender student guidance is implicated here. KUSD Br. at 48 (referencing *Texas*, 2016 WL 4426495). Though the appropriateness of that injunction, now on appeal to the Fifth Circuit, is, in any event, questionable, *see Bd. of Educ. of Highland Local Sch. Dist. v. U.S. Dep't of Educ.*, No. 2:16-cv-524, 2016 WL 5372349, at *7 (S.D. Ohio Sept. 26, 2016), it does not prevent individual plaintiffs from litigating Title IX claims.

unsupported prognostications that other students' privacy interests (or parents' rights to control their children's educations, KUSD Br. at 45) would somehow be harmed by the injunction.

IV. THE DISTRICT COURT CORRECTLY FOUND THAT PLAINTIFF SHOWED A LIKELIHOOD OF SUCCESS FOR BOTH HIS TITLE IX AND EQUAL PROTECTION CLAUSE CLAIMS.

The District Court determined that Ash could ultimately establish that KUSD discriminated against him on the basis of sex by excluding him from boys' restrooms (and otherwise treating him differently than other boys in ways not at issue on this appeal). That finding rested on a correct application of the law and the court's first-hand assessment of the facts. To affirm the injunction, this Court need only find that Ash showed a "better than negligible" chance of success on just one of his claims. *See Brunswick*, 784 F.2d at 275. Ash clears that bar easily.

A. Ash demonstrated a likelihood of success on his Title IX sex discrimination claim.

1. *Title IX broadly bans KUSD from discriminating against its students based on sex-based considerations.*

KUSD invites this Court to give Title IX precisely the sort of cramped construction that the Supreme Court, this Court, and other courts around the country have consistently and correctly rejected for decades. Title IX's broad prohibition on sex-based discrimination prohibits schools and other federal funding recipients from "diverse forms of intentional sex discrimination" against any individual based on *any* consideration for which "gender played a motivating part." *See Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 183 (2005); *Price*

Waterhouse, 490 U.S. at 244. Here, there is no dispute that KUSD treated Ash differently than other boys because he is transgender, an inherently gender-based characteristic.

Under Title IX, no person "shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). Similarly, under Title IX's implementing regulations, "no person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any academic, extracurricular, research, occupational training, or other education program or activity operated by a recipient which receives Federal financial assistance." 34 C.F.R. § 106.31(a). The regulations specifically prohibit recipients from discriminating against any student on the basis of sex by, *inter alia*, "[p]rovid[ing] aid, benefits, or services in a different manner" than other students, "[d]eny[ing] any person any such aid benefit, or service," or "[s]ubject[ing] any person to separate or different rules of behavior, sanctions, or other treatment." 34 C.F.R. § 106.31(b)(2)-(4).

Nothing in the text of Title IX or its implementing regulations supports KUSD's argument that Title IX's broadly worded ban on discrimination "on the basis of sex" exclusively bars discrimination based on what KUSD describes as "biological" sex. KUSD Br. 8-9. Similarly, neither the statute nor the regulations support KUSD's further assertion that "biological" sex, in turn, necessarily and exclusively refers to the gender marker on one's birth certificate—notwithstanding evidence in the

record here that gender identity has a significant biological component. SA166. Put simply, KUSD's argument depends on this Court reading Title IX to include a limiting word—"biological"—that Congress did not include, let alone define, and that, in any event, would not necessarily exclude the claim here in light of the biological aspects of gender identity.

Lacking support in the statutory text, KUSD argues that the Congress that enacted Title IX did not anticipate applying the statute to transgender students. Even if that were true—and KUSD's argument to that effect is, at best, unconvincing—it would be irrelevant. The Supreme Court has made clear that the reach of Title IX, one of our country's landmark civil rights laws, is not confined to applications foreseen by Congress at the time of passage.

The coverage of federal sex discrimination statutes extends beyond specific types of sex discrimination that might have been contemplated by the Congresses that enacted them. *See Oncale*, 523 U.S. at 79; *Price Waterhouse*, 490 U.S. at 250-51; *see also Hively v. Ivy Tech Cmty. Coll.*, 830 F.3d 698, 717 (7th Cir. 2016), *reh'g en banc granted, opinion vacated*, 2016 WL 6768628 (7th Cir. Oct. 11, 2016); *Doe v. City of Belleville*, 119 F.3d 563, 572-73 (7th Cir. 1997), *abrogated on other grounds by Oncale*, 523 U.S. 75.[8] Accordingly, Title IX's prohibitions on sex discrimination must be construed expansively, so that the law is given "a sweep as broad as its language." *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 521 (1982); *see also*

[8] *City of Belleville*'s "holding regarding gender stereotypes and application of the *Price Waterhouse* holding" remains good law notwithstanding that *Oncale* nominally abrogated other aspects of its holding. *Hively*, 830 F.3d at 704 n.3.

Jackson, 544 U.S. at 175 ("'Discrimination' is a term that covers a wide range of intentional unequal treatment."). In *Jackson*, the Supreme Court stated that Congress's textual decision not to limit the statute's reach made it inappropriate to speculate about what applications Congress may have intended: "Because Congress did not list *any* specific discriminatory practices when it wrote Title IX, its failure to mention one such practice does not tell us anything about whether it intended that practice to be covered." *Id.*

In particular, discrimination on the basis of "sex" is not limited to discriminatory actions taken against *all* men or against *all* women. Rather, actionable discrimination includes "the entire spectrum of disparate treatment of men and women resulting from sex stereotypes" or where "gender played a motivating part" in such treatment. *Price Waterhouse*, 490 U.S. at 250-51 (internal quotation marks and citations omitted). Accordingly, in *Price Waterhouse*, the Supreme Court approved the validity of a lawsuit that did not contend that the company refused to hire women, but rather that the company punished a particular woman for being too "aggressive" and "macho." *Id.* at 235. It observed that such facts were just an example of the broad protections of sex-discrimination law and "suggest[ed] [no] limitation on the possible ways of proving that stereotyping played a motivating role" in a discriminatory action. *Id.* at 251-52.

After *Price Waterhouse*, it is clear that Title IX and other sex discrimination laws bar not only those policies that crudely discriminate against the entirety of one sex or the other, but also those that otherwise discriminate on the basis of gender, such

as by requiring people to act in certain ways, have a certain appearance, or otherwise conform to gender norms. For example, this Court, in *City of Belleville*, applied *Price Waterhouse* to extend the protections of Title VII to discrimination based on gender, which this Court defined as "the way in which [plaintiff] projected the sexual aspect of his personality." 119 F.3d at 580. Other appeals courts have ruled similarly. *See Smith v. City of Salem*, 378 F.3d 566, 572 (6th Cir. 2004) (observing that "the term 'gender' is one 'borrowed from grammar to designate the sexes as viewed as social rather than biological classes,'" and recognizing that "discrimination because of 'sex' includes gender discrimination") (quoting Richard A. Posner, *Sex and Reason*, 24-25 (1992)); *Schwenk v. Hartford*, 204 F.3d 1187, 1202 (9th Cir. 2000) ("[U]nder *Price Waterhouse*, 'sex' under Title VII encompasses both sex—that is, the biological differences between men and women—*and* gender.")

2. Discrimination based on sex includes discrimination against transgender students.

Given the breadth of Title IX's ban on sex discrimination, as well as the discriminatory and irrational nature of KUSD's policy, the District Court reasonably found that Title IX's protections extend to Ash and other transgender students. In doing so, the District Court broke no truly new ground and resolved no difficult legal issues. Observing that courts confronting similar issues have relied upon somewhat different reasoning, the District Court permissibly found it sufficient that Ash has a likelihood of prevailing under several theories of relief. A8-10. This Court, likewise, can easily affirm the District Court's ruling as a straightforward reading of Title IX as requiring equal treatment of transgender

students—particularly as applied to the undisputed and strong factual record Ash presented at this preliminary stage of the case—and leave harder questions for another day and a fuller record.[9]

Under KUSD's reading of the statute, by contrast, Title IX provides no protection at all to transgender students. Under that reading, KUSD could lawfully do more than just restrict or surveil Ash's restroom use: it could expel him and all other transgender students from school altogether, for any reason or no reason at all, without running afoul of Title IX. That breathtaking result is not consistent with Title IX's plain text, Title IX's broad purpose of giving individuals the right to challenge gender-based discrimination, or the Supreme Court's case law construing Title IX broadly. It also would raise serious constitutional questions that can be avoided by giving Title IX its better reading.

As a preliminary matter, KUSD's claim that it limits *all* students' restroom access to the gender marker on their birth certificates is entirely unsupported by the record. There is no evidence that KUSD ever enforced such a policy before the incidents described in this brief, that such a policy has been written down anywhere, or that it otherwise exists as anything other than *post hoc* justification for discriminatory treatment of a single transgender student.

[9] This Court need not resolve how Title IX might apply under other circumstances, including, *e.g.*, Defendants' imaginary student who "unilaterally declares [his or her] gender" as something other than the student's assigned sex, KUSD Br. 4, perhaps for the purpose of making trouble, and who, unlike Ash, has not been diagnosed with Gender Dysphoria.

But even taking the "policy" at face value, it is plainly rooted in gender-based considerations. KUSD is limiting access to sex-segregated restrooms based on its arbitrary and unsupported view that all boys' birth certificates have a male gender marker, irrespective of other, more reliable indicia of sex. Whatever one's views on the merits of such a policy, it is rooted in sex-based considerations and is therefore subject to challenge under Title IX.

Moreover, KUSD's policy provides Ash unequal access to educational benefits in ways recognized by Title IX's implementing regulations. For example, because of its view of Ash's sex, KUSD provides Ash restroom access "in a different manner" than all other students, 34 C.F.R. § 106.31(b)(2), by requiring him to use the girls' restrooms—unlike all other boys—or be the only student to use single-user restrooms. And it has subjected him to "different rules of behavior [and] sanctions," *id.* § 106.31(b)(4), by requiring staff to actively monitor his restroom usage, removing him from class on multiple occasions to discuss his restroom use, and threatening him with further discipline for using boys' restrooms.

Thus, regardless of whether the policy can be justified—for example, as a legitimate application of the Title IX regulation permitting sex-segregated restrooms—it clearly facially discriminates against Ash based on characteristics that are fundamental aspects of his sex, including his male gender identity and the fact that he is transgender. It also amounts to discrimination based on gender stereotyping: Ash, as a transgender boy, is subject to differential treatment because he does not conform to KUSD's constrained and arbitrary definition of what it

means to be a boy. And while KUSD will have the opportunity to show otherwise, the uncontested evidence so far demonstrates that KUSD's policy wreaks these harms upon Ash while furthering no legitimate purpose.

While this Court has not decided a case involving a transgender plaintiff alleging sex-based discrimination since *Price Waterhouse* and *Oncale*, every circuit court to reach the question has found that unjustified discrimination against transgender people may amount to sex-based discrimination barred by the Constitution and federal statutes. *See G.G. v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 723 (4th Cir. 2016), *cert. granted*, 137 S. Ct. 369 (Oct. 28, 2016) (Title IX); *Dodds*, 2016 WL 7241402, at *2 (citing *Smith*, 378 F.3d at 572-74) (Title IX and Equal Protection Clause); *Glenn v. Brumby*, 663 F.3d 1312, 1316 (11th Cir. 2011) (Equal Protection Clause); *Barnes v. City of Cincinnati*, 401 F.3d 729, 737 (6th Cir. 2005) (Title VII); *Schwenk*, 204 F.3d at 1202 (Gender Motivated Violence Act); *cf. Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1222 (10th Cir. 2007) (applying a narrower view that a transgender plaintiff may state a Title VII claim based on sex stereotyping). Many district courts have followed suit. *See, e.g.*, *Bd. of Educ. of Highland Local Sch. Dist. v. U.S. Dep't of Educ.*, No. 2:16-cv-524, 2016 WL 5372349, at *12 (S.D. Ohio Sept. 26, 2016) (Title IX and Equal Protection Clause), *appeal*

docketed, No. 16-0291 (6th Cir.); *Schroer v. Billington*, 577 F. Supp. 2d 293, 305, 308 (D.D.C. 2008) (Title VII).[10]

The EEOC has also followed the majority approach in adjudicating Title VII cases. *See Lusardi v. McHugh*, EEOC App. No. 0120133395, 2015 WL 1607756, at *6-7 (EEOC Apr. 1, 2015); *Macy v. Holder*, EEOC App. No. 0120120821, 2012 WL 1435995, at *5 (EEOC Apr. 20, 2012). Other agencies have issued regulations after notice and comment that interpret "sex" to include a transgender person's gender identity.[11] And other administrative guidance—including guidance from the Departments of Education and Justice regarding how schools should handle

[10] *See also Roberts v. Clark Cty. Sch. Dist.*, No. 2:15-cv-00388, 2016 WL 5843046, at *8-9 (D. Nev. Oct. 4, 2016) (Title VII); *Carcaño v. McCrory*, No. 1:16-cv-236, 2016 WL 4508192, at *13 (M.D.N.C. Aug. 26, 2016) (Title IX); *Fabian v. Hosp. of Cent. Conn.*, 172 F. Supp. 3d 509, 527 (D. Conn. 2016) (Title VII); *Rumble v. Fairview Health Servs.*, No. 14-cv-2037, 2015 WL 1197415, at *18 (D. Minn. Mar. 16, 2015) (Section 1557 of the Affordable Care Act); *Lopez v. River Oaks Imaging & Diagnostic Grp., Inc.*, 542 F. Supp. 2d 653, 659-60 (S.D. Tex. 2008) (Title VII).

[11] *See, e.g.,* 45 C.F.R. § 92.206 (July 18, 2016) (Department of Health and Human Services final rule defining discrimination "on the basis of sex" under Section 1557 of the Affordable Care Act to include differential treatment of a transgender person compared to non-transgender persons of the same gender identity); 34 C.F.R. § 270.7 (Aug. 17, 2016) (Department of Education regulation under funding program authorized by Title IV of the Civil Rights Act of 1964, amending definition of "sex desegregation" to refer to student assignment based on sex, including, *inter alia*, gender identity and transgender status); 24 C.F.R. § 5.106(b) (Oct. 21, 2016) (Department of Housing and Urban Development final rule directing recipients to treat transgender people consistently with their gender identity in shelters and other facilities, including sex-segregated living and bathing facilities).

situations like the one here—allow or recommend that transgender people have access to restrooms matching their gender identity.[12]

These courts and the EEOC have correctly reasoned that differential treatment of transgender people is a form of sex-stereotyping discrimination because transgender people, by definition, contravene traditional gender norms. *See, e.g.*, *Glenn*, 663 F.3d at 1316 ("A person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes"). They also have reasoned that discrimination based on an individual's gender identity is sex discrimination, since one's gender identity is a deeply rooted and central aspect of how a person experiences and expresses one's sex (and, accordingly, the sex others know a person to be). *See, e.g.*, *Schroer*, 577 F. Supp. 2d at 305; *Macy*, 2012 WL 1435995, at *7. As the District Court found, either analysis leads to the same result: discrimination against transgender individuals for living in accordance with their gender identity is unlawful sex discrimination. *See Macy*, 2012 WL 1435995, at *5 (discrimination against a transgender person as based on "sex," "sex stereotyping," "gender transition/change of sex," and "gender identity" are "simply different ways of stating the same claim of discrimination 'based on . . . sex.'").

[12] *See* SA229-36 (U.S. Dep't of Educ. & U.S. Dep't of Justice, *Dear Colleague Letter on Transgender Students* 3 (May 13, 2016)) ("A school may provide separate facilities on the basis of sex, but must allow transgender students access to such facilities consistent with their gender identity."); *see also* U.S. Dep't of Labor, Occupational Health & Safety Admin., *A Guide to Restroom Access for Transgender Workers* 1 (2015), https://www.osha.gov/Publications/OSHA3795.pdf ("All employees, including transgender employees, should have access to restrooms that correspond to their gender identity.").

In particular, where transgender people have challenged policies or practices excluding them from restrooms matching their gender identity, courts and agencies have concluded that such discrimination is actionable sex-based discrimination. *See G.G.*, 822 F.3d at 723; *Highland Local Sch. Dist.*, 2016 WL 5372349, at *13; *Roberts*, 2016 WL 5843046, at *9; *Carcaño*, 2016 WL 4508192, at *16; *Lusardi*, 2015 WL 1607756, at *10. These decisions also have correctly found, contrary to KUSD's contentions here, that permitting transgender people to use restrooms matching their gender identity is fully consistent with the right of schools and employers to maintain sex-segregated restrooms (as expressly stated in Title IX's regulatory exception in 34 C.F.R. § 106.33).

KUSD simply ignores this authority and thus waives any such argument. Instead, KUSD incorrectly contends that Ash seeks to enforce rights based on "transgender status," KUSD Br. 10, not sex. This misunderstands the central premise of Ash's claim.

Ash's claim is that KUSD may not treat *any* boy the way it treated him—whether because that boy is transgender, because the boy is perceived to be effeminate, or for any other gender-related reason. He is not seeking to create new rights or a new protected class. He simply asserts the same right not to face discrimination based on impermissible gender-related traits, like those at issue in

Price Waterhouse and many subsequent cases. The facts may be different, but the principle is the same.[13]

3. Ulane *does not bar Ash's claims.*

KUSD relies heavily on the argument that this Court's decades-old decision in *Ulane* compels this Court to find that Title IX does not protect transgender students like Ash from discrimination. KUSD Br. 13-17. KUSD is mistaken. *Ulane* is not controlling because its holding is based on an unduly narrow construction of Title VII's (and presumably Title IX's)[14] bar on sex discrimination that does not survive the Supreme Court's intervening decisions in *Price Waterhouse* and *Oncale*. It also is based on factual findings about transgender people and gender identity that do not accord with the evidence in the record here and the District Court's findings.[15]

Although the District Court described both problems with *Ulane*'s application here, A34-38, SA004-05, KUSD offers no explanation for why the court erred, and

[13] For this reason, KUSD's repeated reliance on the Tenth Circuit's *Etsitty* decision is misplaced. Applying *Ulane* and other now-abrogated cases from other circuits, *Etsitty* held only that "transsexuals are not a protected class under Title VII" but expressly declined to decide whether the same facts supported a finding of *sex* discrimination against a transgender plaintiff under *Price Waterhouse*—an argument that Ash advances here. 502 F.3d at 1222-24. As the District Court correctly found, Ash may succeed even under the narrower *Etsitty* approach by showing that KUSD was motivated by impermissible sex stereotypes. A9.

[14] As the District Court observed, because *Ulane* construed Title VII, this Court could view it as binding precedent only for that statute, with no application to Title IX. Ash asks this Court to, instead, find that *Ulane* does not foreclose claims by transgender individuals under either statute.

[15] Defendants also rely heavily on *Johnston v. University of Pittsburgh*, 97 F. Supp. 3d 657 (W.D. Pa. 2015), which dismissed a Title IX claim by a transgender student. *Johnston* is not binding precedent on this or any court. *Johnston* neither adds to *Ulane*'s reasoning nor meaningfully assesses *Ulane*'s vitality in light of *Price Waterhouse* and *Oncale*.

thus it waives any such argument. Regardless, any argument that *Ulane* controls these facts would be mistaken.

First, *Ulane* explicitly relied on a constrained construction of "discrimination based on sex" that cannot be reconciled with the expansive view of actionable gender-based discrimination commanded by subsequent authority. *Ulane* found that Title VII covered only certain "narrow" applications expressly contemplated by Congress—"discriminat[ion] against women because they are women and against men because they are men"—and thus did not extend to, among other things, discrimination against "transsexuals." 742 F.2d.at 1085-86.

Ulane's cramped construction of Title VII—barring only those forms of discrimination contemplated by the enacting Congress—is incompatible with *Price Waterhouse* and *Oncale*. In *Oncale*, the Supreme Court squarely rejected the premise that Title VII's facially broad ban on sex discrimination could be limited to the specific applications Congress might imagined in 1964. 523 U.S. at 79-80. Rather, it held, "statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Id.* at 79.

Other circuits have correctly recognized that *Ulane*'s reasoning has been fatally undermined. *See Glenn*, 663 F.3d at 1318 n.5 ("[F]ederal courts have recognized with near-total uniformity" that *Ulane*'s approach toward discrimination against transgender people was abrogated by *Price Waterhouse*.) (collecting cases); *Smith*, 378 F.3d at 572 ("[T]he district court erred in relying on a series of pre-*Price*

Waterhouse cases from other federal appellate courts [including *Ulane*] holding that transsexuals, as a class, are not entitled to Title VII protection."); *Schwenk*, 204 F.3d at 1201 ("[T]he initial judicial approach taken in [*Ulane* and other cases] . . . has been overruled by the logic and language of *Price Waterhouse*").

This Court, in more recent decisions, has strongly suggested that it too questions *Ulane*'s continuing precedential value. As this Court observed in *City of Belleville*, it was "confident [in *Ulane*] that Congress had nothing more than the traditional notion of 'sex' in mind when it voted to outlaw sex discrimination, but '[i]t is, ultimately, the plain, unambiguous language of the statute upon which we must focus.'" 119 F.3d at 572-73; *see also Hively*, 830 F.3d at 717-18.[16] Moreover, this Court recognized in an Eighth Amendment case that transgender people must be permitted to live congruently with their gender identity under the correct standards of care—and that a prison's refusal to provide a transgender individual appropriate treatment under these standards "serves no valid penological purpose and amounts to torture." *Fields*, 653 F.3d at 553-54, 556. It is impossible to square *Ulane* with this Court's stark acknowledgment of the known harms to transgender people when they cannot live in accord with their gender identity.

KUSD therefore errs in contending that a panel of this Court has no authority to declare *Ulane* overruled by Supreme Court precedent that is contrary to that

[16] A magistrate judge in this Circuit also recently called into question *Ulane*'s continuing applicability to transgender individuals in another Title IX case. *See Students & Parents for Privacy v. U.S. Dep't of Educ.*, Report & Recommendation, No. 16-cv-4945, 2016 WL 6134121, at *14-15 & n.12 (N.D. Ill. Oct. 18, 2016).

decision's core reasoning. KUSD Br. 16-21. To be sure, a panel of this Court recently found itself constrained by doubtful precedent holding that Title VII does not bar discrimination based on sexual orientation. *See Hively*, 830 F.3d at 718. But that was because this Court had reaffirmed that view several times since *Price Waterhouse* and *Oncale*, finding that those cases did not alter its conclusion that sexual orientation discrimination fell outside Title VII's scope. By contrast, this Court has *never* considered whether *Ulane*'s application to transgender plaintiffs can survive *Price Waterhouse* and *Oncale,* even as other circuits have squarely rejected *Ulane*'s continued validity in this context in light of those two cases. This appeal presents that opportunity.

Second, even assuming *Ulane* can survive in some fashion, it relied on outmoded factual premises that are inconsistent with the prevailing understanding of gender identity and what it means to be transgender, an understanding that is reflected in the uncontested evidence in this record. Those factual differences have "robbed [*Ulane*] of significant application or justification" to this case. *Hively*, 830 F.3d at 718 (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 855 (1992)).

In *Ulane*, this Court found that Title VII does not protect "transsexuals" from discrimination based on their "transsexuality." 742 F.2d at 1087 & n.13. The Court characterized the plaintiff, a "transsexual" woman, as "a biological male who takes female hormones, cross-dresses, and has surgically altered parts of her body to make it appear to be female." *Id.* at 1087. This description of a "transsexual," which

informed this Court's application of the statutory term "sex," bears little resemblance to the prevailing medical understanding of transgender people today.

Ulane is predicated on the outdated and incorrect premise that transgender people are not truly the sex they identify with—but are only trying to "make it appear" so. It assumes, as Defendants do here, that a transgender person *changes* his or her sex when undertaking a gender transition. *Id.*; KUSD Br. 3, 9, 29. We now understand—as the uncontested evidence in the record shows—that gender transition is the process by which transgender people *affirm* the innate, immutable sex they had all along. SA118; SA168. *Ulane* also assumed the existence of a "biological" sex synonymous with one's sex assigned at birth (usually based on the appearance of an infant's genitalia). 742 F.2d at 1083. This, too, does not accord with the better-informed understanding today of gender identity and the biological aspects of gender, as reflected in this record. *See supra* at 4-5.

Ulane was not well positioned to govern today's cases, as it did not have the benefit of the three additional decades of medical, social science, and psychological research now available. Since 1984, substantial research-based evidence confirms that gender identity is a core, immutable aspect of one's sex. SA118; SA168. The medical consensus has evolved from viewing transgender people as having a mental disorder to recognizing that Gender Dysphoria is a form of serious distress resulting from the incongruence between gender identity and assigned sex, the only ethical and effective treatment for which is to transition to live congruently with one's gender identity. SA167.

This evolution is exemplified by the decision of the American Psychiatric Association ("APA") to replace "Gender Identity Disorder" with "Gender Dysphoria" in 2013. In 1984, when *Ulane* was decided, the third edition of the APA's *Diagnostic and Statistical Manual of Mental Disorders* (1980) (DSM-III) still referred to transgender boys as "[g]irls with this disorder." DSM-III at 264.[17] By contrast, in DSM-5, the current edition published in 2013, the APA recognizes that "cross-gender identification" is not, in itself, a disorder. DSM-5 at 814. Rather, transgender people have an "identity as female or male at variance with their uniform set of *classic* biological indicators," *i.e.*, their reproductive organs. *Id.* at 451 (emphasis added). DSM-5 further recognizes that one's gender—contrary to being "merely a social construct" as once understood—is actually the product of various social, psychological, *and* biological factors. *Id.*

This scientific evidence and increased societal awareness compels a more nuanced examination of discrimination against transgender people than *Ulane* undertook. Ash has already presented evidence, including expert declarations, to establish these principles and confirm that he is a boy. He is prepared, later in this litigation, to further develop the factual record through expert testimony and other evidence.

Indeed, while this Court may wish to overturn or recognize the abrogation of *Ulane* now as a matter of law, it need not do so in order to affirm the District Court's ruling. Ash is prepared to make a comprehensive record demonstrating that

[17] Relevant excerpts of the DSM-III are attached as Ex. B to the Addendum.

he is a boy and was discriminated against based on sex, contrary to the factual predicates underlying *Ulane*. Whether or not *Ulane* was in any sense "correct" when decided, it cannot control this very different record.

4. The Title IX regulation permitting sex-segregated restrooms does not authorize KUSD to bar Ash from boys' restrooms.

For all the reasons above, any school policy directed at and predominantly affecting transgender students discriminates on the basis of sex. Accordingly, it presumptively is barred by Title IX unless specifically authorized by an exception in the statute or implementing regulations. KUSD argues that the regulation permitting schools to maintain sex-segregated restrooms if they so choose, 34 C.F.R. § 106.33, allows KUSD to ban Ash from using boys' restrooms regardless of whether such a policy otherwise is consistent with Title IX's purposes. But the regulation does no such thing.

The regulation in question authorizes schools to "provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex." 34 C.F.R. § 106.33. That is to say, the regulation authorizes separate sex-segregated restrooms so long as the separate facilities for boys and girls are "comparable." *Id.* This regulation has no statutory corollary. Rather, it implements—and thus must be read to be compatible with—Title IX's general requirement that no student should receive unequal educational benefits based on sex. Like Title IX in general, it is meant to guarantee all students a safe, non-discriminatory educational environment.

The regulation, like the statute it implements, does not purport to define "sex" at all, let alone authorize schools to require a transgender student to use restrooms conflicting with the student's established identity as male or female. It does not refer to "biological sex," "anatomical differences," "birth sex," "birth certificate," or any of the other qualifiers that KUSD asks this Court to read into it. KUSD Br. 11, 24. Whatever might have been the subjective expectations of the Congress that enacted Title IX and the agency that promulgated the regulation as to how sex distinctions would be drawn in contested cases, *see* KUSD Br. 11, those expectations were not codified in the statute or the regulation. Nor is there any reason to think that, in using a term such as "sex," which has long carried many possible meanings, Congress or the agency silently endorsed KUSD's position regarding the issues here. *See G.G.*, 822 F.3d at 721-22 & n.7 (referencing a variety of dictionary definitions of "sex" referring to both physical and social characteristics, including "[o]ne's identity as either male or female" and "the sum of the morphological, physiological, and behavioral peculiarities of living beings . . . typically manifested as maleness and femaleness") (quoting *Am. Heritage Dictionary* 1605 (5th ed. 2011); *Webster's Third New Int'l Dictionary* 2081 (1971)).

Accordingly, the regulation must be applied such that it only authorizes sex segregation for restrooms in a manner that is consistent with, and furthers, Title IX's general non-discrimination requirement. For example, it cannot be applied to authorize school districts to permit only boys who dress in a certain way, or behave in a certain way, to use boys' restrooms. The same principle applies here. KUSD's

application of Title IX as the *basis* for its discrimination is wholly at odds with the statute's objectives of protecting individual students from discrimination.

Here, the District Court reasonably found that Ash is likely to prove that KUSD's actions do not comport with Title IX's general non-discrimination requirement and so they do not fall within the regulatory exception. A9; SA006-07. Ash produced uncontested evidence that, among other things, banning him from boys' restrooms created an egregiously unequal educational environment for him, while not protecting other students' privacy interests or otherwise benefiting any student. Moreover, he produced evidence that the relief he seeks—which is merely to be treated in accordance with his doctors' recommendations and his consistently presented identity at school—requires no difficult line-drawing and poses no other administrative challenges. If anything, it is KUSD's rigid position that restroom use must be determined by what a birth certificate says—a position it never articulated in writing until this litigation—that raises administrative concerns.[18]

Given that record, this Court can affirm without reaching the regulation's application to situations not presented here. It need not decide, for example, how the regulation might be applied where a student's only case for using a particular restroom is a "unilateral[] declar[ation]" of gender, KUSD Br. 4, since Ash is years

[18] Indeed, KUSD's brief suggests both that it may not truly believe that birth certificates are everything and that it has not truly thought out how it would apply its policy in hard cases. At various times, KUSD's brief mentions other things that it, apparently, believes are indicia of "sex" for purposes of restroom use, including "sex change surgeries," other "physical characteristics," and "chromosomes." KUSD Br. 3, 8, 9. Perhaps KUSD believes these are necessarily in alignment with birth-certificate gender markers, but, in reality, they are not. *See supra* at 5.

into his gender transition and has medical evidence and other indicia of his proper "sex" (including, now, a legal name change) to go with it. Only one case is before this Court now, and at a preliminary stage no less. This Court need not decide how Title IX applies in other cases to affirm the District Court's conclusion that Ash has some change of prevailing in *his* case.

In particular, this Court need not decide what level of deference is due to guidance issued by the Departments of Education and Justice providing that a transgender student generally should be permitted to use restrooms corresponding to the student's gender identity, a question currently before the Supreme Court. *See* KUSD Br. 22-28. That guidance, based on the agencies' experience with many comparable cases and knowledge of successful practices in schools around the country, certainly indicates (like the declarations Ash submitted from other school systems that treat transgender students consistent with that guidance) that the relief Ash seeks has proven workable in practice. Thus, the District Court appropriately looked to it as further evidence that Ash is likely to succeed. As a legal interpretation, it merely confirms the correctness of Ash's position, which is a matter of statutory interpretation that does not hinge on that guidance.

* * *

The merits issue presented to this Court is narrow and straightforward, and does not require resolution of many of the broader questions KUSD has briefed. Ash has a clear claim of discrimination "on the basis of sex," which is all that is required to state a claim under Title IX. KUSD has treated him differently from other boys

because he does not conform to KUSD's notions of what a boy should be. That should be the end of the matter under Supreme Court precedent establishing that Title IX bars all discrimination based on gender-based distinctions, including discrimination based on sex stereotyping. In responding that Ash is not "really" a boy, KUSD simply affirms its discriminatory policy. This Court's decision in *Ulane*, to the extent it would otherwise apply here, cannot stand in light of intervening Supreme Court precedent that eviscerates its core reasoning.

Based on the record before it, the District Court reasonably concluded that Ash is likely to show that KUSD's discriminatory policy, as applied to Ash, does not further any of the purposes of 34 C.F.R. § 106.33 and thus is not authorized by that regulation. In particular, the District Court reasonably found that Ash is likely to show that banning him from using boys' restrooms does not protect other students' privacy interests, nor does it lead to any of the problems of administration that KUSD fears. A14. This Court should affirm those findings, and it need go no further to affirm the preliminary injunction.

B. The District Court also permissibly determined that Plaintiff might succeed on his Equal Protection Clause claim.

Because the preliminary injunction was warranted by Ash's likelihood of success on his Title IX claims alone, this Court need not reach the Constitutional question of whether KUSD's actions deprived Ash of equal protection of the laws. In accord with this Court's "mandate to address statutory issues before constitutional ones," *Patriotic Veterans, Inc. v. Indiana*, 736 F.3d 1041, 1046 (7th Cir. 2013), and its concomitant preference to "avoid deciding constitutional questions if the case may

be disposed of on other grounds presented," *Indiana Port Com'n v. Bethlehem Steel Corp.*, 835 F.2d 1207, 1210 (7th Cir. 1987), this Court should construe Title IX and its implementing regulations in a manner that avoids unnecessary constitutional adjudication. That said, the District Court reasonably found that Ash had some likelihood of success on this claim as well, under either rational basis review or intermediate scrutiny. A9. KUSD has relied primarily, both before this Court and below, on the argument that its discriminatory conduct is not covered by the Equal Protection Clause at all. It has made little attempt to argue that its conduct can ultimately survive scrutiny, and any such argument would, in any event, fail on the record before this Court.

1. KUSD's conduct cannot survive intermediate scrutiny.

As a sex-based classification, KUSD's ban on Ash's use of boys' restrooms is subject to intermediate scrutiny. "Parties who seek to defend gender-based government action must demonstrate an 'exceedingly persuasive justification' for that action." *United States v. Virginia*, 518 U.S. 515, 531 (1996) ("*VMI*"); *Hayden ex rel. A.H. v. Greensburg Cmty. Sch. Corp.*, 743 F.3d 569, 577 (7th Cir. 2014). To satisfy this standard, KUSD "must show at least that the classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives." *VMI*, 518 U.S. at 524 (internal quotation marks omitted). "The justification must be genuine, not hypothesized or invented *post hoc* in response to litigation." *Id.* at 533.

Moreover, although this Court can simply apply the heightened scrutiny that is warranted for any sex-based classification, it also may apply heightened scrutiny to discriminatory actions taken because of transgender status because discrimination against transgender people warrants heightened scrutiny in its own right. Heightened scrutiny is warranted when a state actor discriminates "against a minority . . . based on an immutable characteristic of the members of that minority (most familiarly skin color and gender) . . . against an historical background of discrimination against the persons who have that characteristic." *Baskin v. Bogan*, 766 F.3d 648, 654 (7th Cir. 2014). While this Court has not reached the question, several federal courts recently have recognized that discrimination against transgender people fits these prerequisites for heightened scrutiny. *See Highland Local Sch. Dist.*, 2016 WL5372349, at *16; *Adkins v. City of New York*, 143 F. Supp. 3d 134, 138-40 (S.D.N.Y. 2015); *Norsworthy*, 87 F. Supp. 3d at 1191.

The District Court reasonably found that Ash has a likelihood of demonstrating that KUSD's actions fail heightened scrutiny, whether conceptualized as sex discrimination or transgender discrimination. First of all, until this lawsuit was filed, KUSD failed to provide *any* reason justifying excluding Ash from boys' restrooms, other than its view that the medical documentation Ash provided to confirm his gender identity was somehow inadequate. Only after this litigation commenced did KUSD assert an interest in protecting students' privacy as a basis for their actions. Thus, it may well be that Ash can establish that this justification is simply pretextual, making its hypothetical merit immaterial.

Further, KUSD has not come close to making a showing that these purported concerns justify the discrimination at issue here. While there can be no dispute that student privacy is important, KUSD has wholly failed to establish that Ash's use of boys' restrooms violates any other student's privacy. On this record, the District Court reasonably rejected Defendants' privacy concerns as unsubstantiated and contradicted by evidence in the record, specifically Ash's uneventful use of boys' restrooms during his junior year. A14. Other cases have similarly rejected such unsupported reliance on privacy interests as insufficient to deny transgender people access to restrooms corresponding to their gender identity. *See, e.g., Highland Local Sch. Dist.*, 2016 WL5372349, at *17-18; *Roberts*, 2016 WL5843046, at *10; *accord Cruzan v. Special Sch. Dist., No. 1,* 294 F.3d 981, 984 (8th Cir. 2002) (rejecting a sexual harassment claim by a non-transgender woman based on her transgender colleague's use of women's restrooms).[19]

2. KUSD's conduct lacks a rational basis.

This Court need not decide whether heightened scrutiny applies here because, as both the District Court here and another recent decision have recognized, conduct such as KUSD's cannot pass muster under a rational basis analysis, either. *See*

[19] Even if KUSD *could* point to evidence of other students preferring that Ash not use boys' restrooms—which it has failed to do—such subjective preferences would not, by themselves, justify discrimination. *See Lusardi*, 2015 WL 1607756, at *9 ("Allowing the preferences of co-workers to determine whether sex discrimination is valid reinforces the very stereotypes and prejudices that Title VII is intended to overcome"). But this Court need not reach that question, because KUSD has not produced evidence that a single other student objects to Ash's use of boys' restrooms, or that anyone else's privacy has been violated by that use.

Highland Local Sch. Dist., 2016 WL 5372349, at *19 (finding refusal to allow transgender girl to access restroom lacked a rational basis).

Rational basis scrutiny requires a court to determine whether exists a "rational relationship between the disparity of treatment and some legitimate governmental purpose." *Discovery House, Inc. v. Consol. City of Indianapolis*, 319 F.3d 277, 282 (7th Cir. 2003) (citation omitted). This standard is forgiving, but it is not a free pass: courts will "examine, and sometimes reject, the rationale offered by [the] government." *Baskin*, 766 F.3d at 654. When that inquiry uncovers nothing more than an "irrational fear of a harmless group of people," *Milner v. Apfel*, 148 F.3d 812, 817 (7th Cir. 1998), the Equal Protection Clause is violated.

As the District Court observed, Ash could establish that KUSD's actions lacked any rational basis. The record demonstrates that Ash's use of boys' restrooms has no effect on the privacy of his fellow students. He used the boys' restroom for seven months of his junior year without incident, and it was not until a teacher—not a student—brought the issue to the administration's attention that the school took action. Simply put, it was not rational for KUSD to fear that Ash's continued use of the boys' restroom would harm other students—based on nothing more than speculation—when his actual use has had no such effect.

Moreover, other evidence supports a showing that KUSD's treatment of Ash sprung not from concern for other students, but its animus towards or "irrational fear" of Ash. *Id.*; *see also Romer v. Evans*, 517 U.S. 620, 634 (1996). For example, KUSD initially refused to allow Ash to run for prom king when a teacher nominated

him; refused to call Ash by his male name; threatened to make transgender students wear green wristbands; and required Ash to room alone at an orchestra camp where other students all shared suites, despite the fact that a male friend requested to room with him. KUSD offered no contemporaneous explanation for these decisions other than it had never had a transgender student before and felt no obligation to treat him as a boy. There is no plausible connection between KUSD's conduct in this regard and any legitimate privacy interest; all that remains, then, is an "inevitable inference of animus." *Zehner v. Trigg*, 133 F.3d 459, 464 (7th Cir. 1997). But "if the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.'" *Romer*, 517 U.S. at 634. Accordingly, this Court can uphold the injunction based on the District Court's conclusion that Ash will likely succeed in proving his Equal Protection Clause claim under even rational basis review.

CONCLUSION

The Court should affirm the District Court's order entering a preliminary injunction, decline to exercise appellate jurisdiction over the District Court's order denying the motion to dismiss, and remand for further proceedings.

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

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitations set forth in Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure and Seventh Circuit Rule 32. This brief contains 13,906 words in compliance with this Circuit's 14,000-word limit on principal briefs set in Circuit Rule 32(b). I further certify that this brief complies with the typeface and type style requirements of Rule 32(a)(5)-(6) of the Federal Rules of Appellate Procedure and Seventh Circuit Rule 32(a)-(b). This brief has been prepared in proportionally spaced typeface using Microsoft Word 2013 in 12-point Century Schoolbook for the main text and 11-point Century Schoolbook for the footnotes.

/s/ Joseph J. Wardenski
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CERTIFICATE OF SERVICE

I hereby certify that on January 27, 2017, I electronically filed the foregoing Brief of Plaintiff-Appellee with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit using the Court's CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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