UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CASE NO. 16-3522

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

Plaintiff-Respondent,

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.

Appeal from the United States
District Court for the Eastern
District of Wisconsin

District Court Case
No. 16-CV-943

The Honorable Pamela Pepper

DEFENDANTS-APPELLANTS' REPLY TO PLAINTIFF-APPELLEE'S RESPONSE IN OPPOSITION TO DEFENDANTS-APPELLANTS' MOTION FOR THE EXERCISE OF PENDENT JURISDICTION

Defendants-Appellants, Kenosha Unified School District No. 1 Board of Education and Dr. Sue Savaglio-Jarvis ("KUSD"), hereby submits this reply pursuant to Fed. R. App. P. 27(a)(4) to Plaintiff's response in opposition to KUSD's motion for the exercise of pendent jurisdiction.

I. PENDENT JURISDICTION OVER THE MOTION TO DISMISS IS APPROPRIATE AS THERE ARE COMPELLING REASONS FOR NOT DEFERRING THE APPEAL.

Plaintiff claims that pendent jurisdiction is reserved for "rare cases," citing *Abelesz v. OTP Bank*, 692 F.3d 638, 647 (7th Cir. 2012). While pendent jurisdiction is not taken as a matter of course, this Court will exercise its discretion to review a non-appealable order when there are "compelling reasons" for not deferring the appeal. *See Novoselsky v. Brown*, 822 F.3d 342, 357 (7th Cir. 2016) (citing *Abelesz*, 692 F.3d at 647). The standard is that "[p]endent appellate jurisdiction is a narrow doctrine . . ." not that it is "rarely" granted. *Abelesz,* 692 F.3d at 647.

The narrow pendent jurisdiction doctrine properly encompasses an order denying a motion to dismiss in connection with the granting of a preliminary injunction. *See Swint v. Chambers Cty. Comm'n*, 514 U.S. 35, 50, 115 S. Ct. 1203, 1211–12, 131 L. Ed. 2d 60 (1995). The narrow exception is justified because the "success on the merits" portion of a preliminary injunction is so closely related to a motion to dismiss that when the court makes errors of law in one decision, it directly implicates and effects the other. *See Wisconsin Coal. for Advocacy, Inc. v. Czaplewski*, 131 F. Supp. 2d 1039, 1044 (E.D. Wis. 2001). When a district court bases its decision on a preliminary injunction in its ruling on a dispositive motion,

those two orders are "inextricably intertwined." *Helifix Ltd. v. Blok-Lok, Ltd.*, 208 F.3d 1339, 1345 (Fed. Cir. 2000).

Here, the District Court did not merely cross reference its decision on the motion to dismiss in finding that Plaintiff had demonstrated a likelihood of success on the merits. Instead, the District Court based its finding of success on the merits because it denied the motion to dismiss. *See Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, No. 16-CV-943-PP, 2016 WL 5239829, at *3–4 (E.D. Wis. Sept. 22, 2016). The District Court's reliance on its motion to dismiss ruling in analyzing the injunction makes the two inextricably intertwined.

In ruling on the motion to dismiss, the District Court committed error by failing to address pure questions of law. For example, the Court did not decide if the term "sex" under Title IX includes transgender status or the level of scrutiny to be applied on Equal Protection grounds. *See id.* The District Court then used its legally-flawed ruling on the motion to dismiss as the basis for finding "some likelihood of success on the merits" in the injunction analysis. It is hard to imagine a more compelling example of two issues being more inextricably intertwined. The District Court's reliance upon the motion to dismiss for finding likelihood of success on the merit is a compelling reason for this Court to exercise pendent jurisdiction as resolving these pure legal issues will have a direct impact on both motions.

KUSD is not inviting this Court to find that every injunction order is inextricably intertwined with every motion to dismiss. One can think of many situations where that is not the case. For example, often a motion to dismiss is

denied where there are competing factual claims under well-established legal theories. That situation does not make the motion to dismiss and a subsequent injunction inextricably intertwined where the court weighs the facts and resolves them in favor of one party. Nevertheless, where, as here, the district court erroneously rejects the motion to dismiss where the complaint asserts only claims that are deficient as a matter of law, and then the district court relies upon those same erroneous conclusions in deciding that there has been a showing of likelihood of success on the merits, the "inextricably intertwined" standard is met.

II. REGARDLESS OF PLAINTIFF'S CLAIMED "MULTIPLE AVENUES OF RELIEF" EACH AVENUE WAS FATALLY FLAWED AS A MATTER OF LAW AND THE DISTRICT COURT'S CONCLUSION OF SUCCESS ON THE MERITS WAS ERRONEOUS.

The District Court's finding that "there were several avenues by which plaintiff might obtain relief", *see id.* at *3, was erroneous as each leads to a dead end. The District Court's order on the motion to dismiss ignored issues of law that were ripe for determination under each avenue. The Court clearly did not address the threshold questions of the meaning of "sex" under Title IX. *See id.* Dead end. The Court ignored the level of scrutiny to use in analyzing a claim that "transgender" is entitled to Equal Protection. *See id.* at *4. Dead end. The Court's treatment of Plaintiff's "sex-stereotyping" claim ignored that a policy that segregates bathrooms based on the anatomical differences between men and women can never be "sex-stereotyping." *See Johnston v. Univ. of Pittsburgh of Com. Sys. of Higher Educ.*, 97 F. Supp. 3d 657, 680–81 (W.D. Pa. 2015); *Etsitty v. Utah Transit Authority*, 502 F.3d 1215, 1224 (10th Cir. 2007); *Johnson v. Fresh Mark, Inc.*, 337 F.

Supp. 2d 996, 999–1000 (N.D. Ohio 2003), *aff'd,* 98 F. App'x 461 (6th Cir. 2004). Dead end.

Regardless of the factual evidence Plaintiff submitted to the District Court, as a matter of law all three of these avenues fail. Regardless of the facts, the term "sex" as used in Title IX does not encompass one's gender or transgender. *See Johnston*, 97 F. Supp. At 674; *Texas v. United States*, No. 7:16-CV-00054-O, 2016 WL 4426495, at *14-15 (N.D. Tex. Aug. 21, 2016). Regardless of the facts, a policy that segregates bathrooms based solely on the anatomical differences between men and women can never be "sex-stereotyping." *See Johnston*, 97 F. Supp. 3d at 680–81; *Etsitty*, 502 F.3d at 1224; *Johnson*, 337 F. Supp. 2d at 999–1000. Regardless of the facts, "transgender" has never been recognized by the Supreme Court or this Circuit as being a suspect class that is entitled to heightened or even intermediate scrutiny. *See Johnston*, 97 F. Supp. 3d at 668. KUSD does not ask this Court to accept pendent jurisdiction with the hope that one of the avenues will be blocked. All three are legally flawed.

Dated this 16th day of December, 2016.

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CERTIFICATE OF SERVICE

The undersigned, counsel of record for the Defendant-Appellants hereby certifies that on December 16, 2016, an electronic copy of this reply to Plaintiff-Appellee's response in opposition to Defendant-Appellants' motion for the exercise of pendent jurisdiction was served on counsel for Plaintiff-Appellee through the ECF system as all parties are registered users.

Dated this 16th day of December, 2016.

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