UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

STUDENTS AND PARENTS FOR PRIVACY, a voluntary unincorporated association; **C.A.**, a minor, by and through her parent and guardian, **N.A.**; **A.M.**, a minor, by and through her parents and guardians, **S.M.** and **R.M.**; **N.G.**, a minor, by and through her parent and guardian, **R.G.**; **A.V.**, a minor, by and through her parents and guardians, **T.V.** and **A.T.V.**; and **B.W.**, a minor, by and through his parents and guardians, **D.W.** and **V.W.**,

Plaintiffs,

vs.

UNITED STATES DEPARTMENT OF EDUCATION; **ELISABETH D. DeVOS**, in her official capacity as United States Secretary of Education; **UNITED STATES DEPARTMENT OF JUSTICE**; **JEFFERSON B. SESSIONS III**, in his official capacity as United States Attorney General; and **SCHOOL DIRECTORS OF TOWNSHIP HIGH SCHOOL DISTRICT 211, COUNTY OF COOK AND STATE OF ILLINOIS**,

Defendants,

and

STUDENTS A, **B**, and **C**, by and through their parents and legal guardians **Parents A**, **B**, and **C**, and the **ILLINOIS SAFE SCHOOLS ALLIANCE**,

Intervenor-Defendants.

Case No. 1:16-cv-04945

The Honorable Jorge L. Alonso

Plaintiffs' Supplemental Brief Addressing *Whitaker By Whitaker v. Kenosha Unified School District No. 1 Board of Education*, 858 F.3d 1034 (7th Cir. 2017)

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INTRODUCTION

The recent decision in *Whitaker By Whitaker v. Kenosha Unified School District No. 1 Board of Education*, 858 F.3d 1034 (7th Cir. 2017) does not control *Students and Parents for Privacy* because it is easily distinguished on its facts; misinterprets *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989); improperly conflates privacy torts with the constitutional right to bodily privacy; and illogically confuses the concept of gender identity with sex.

I. *Whitaker v. Kenosha Unified School District* is factually distinguishable from the present case.

Whitaker and the instant case are only superficially similar in that *Whitaker* involves a Wisconsin school district which resisted demands from a female student (who professes to be male) to use the boys' restroom facilities as a means of affirming that student's subjective perception of her gender.[1] 858 F.3d at 1040-42. The defendant school properly argued that the female student's use of the restrooms would "infringe[] upon the privacy rights of other students with whom he or she does not share biological anatomy." *Id*. at 1052. The school's theory of the case was grounded in sound legal arguments that its policy was valid under rational review because it was simply keeping privacy facilities separated by sex—not sex stereotypes or gender—pursuant to 34 C.F.R. §106.33. *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), *aff'd sub nom. Whitaker*, 858 F.3d 1034. In that light, it is unsurprising that the school put on only minimal evidence of privacy complaints—specifically, a single complaint lodged by a parent—which led the appellate panel to

[1] Plaintiffs use "sex" herein to denote the objectively verifiable sexes of male and female as grounded in humans being a sexually reproducing species, and the term "gender" as the Defendants use it, to denote a subjectively perceived continuum of genders (or no gender) that is divorced from the fact that humans reproduce sexually. *See* Pls.' Reply to Intervenor-Defs.' Br., Def. Township High Sch. Dist. 211's Mem., and Fed. Defs.' Resp. to Pls.' Obj. to Magistrate's R. & R. 2-4, ECF No. 164. Plaintiffs use pronouns in accord with standard English usage.

characterize the school's constitutional privacy defense as "sheer conjecture and abstraction." *Whitaker*, 858 F.3d at 1052.

In contrast, bodily privacy claims are the very genesis of *Students and Parents for Privacy*, as exemplified by fifty-one families—including sixty-three district students and seventy-three parents—plus the expressive association Students and Parents for Privacy, expressly raising bodily privacy claims. Compl. 7, ECF No. 1.

Although restrooms are involved in both cases, *Students and Parents for Privacy* also challenges intermingling the sexes in school locker rooms—which were not at issue in *Whitaker*—and each of the student Plaintiffs expressly objected to sharing those privacy facilities with members of the opposite sex. *Id.* Moreover, the Plaintiffs recount specific instances where Student A, a male, had entered the girls' locker rooms at William Fremd High School, *id.* at 17-18, including specific allegations by three Girl Plaintiffs who objected to being forced to use their girls' locker room while Student A was present. *Id.* at 21. These girls related that Student A had been proximate to them in the girls' locker room, and they knew that Student A could walk in on them when they were disrobing for their PE class. *Id.* at 23. Girl Plaintiffs also asserted that their need for privacy was heightened in light of the normative and profound changes of a girl's body as she grows into womanhood. *Id.* at 4. Nor are the privacy issues limited to Student A: Student B, a rising freshman entering Fremd High School in the fall of 2017, asserts a male gender identity despite being born female. Decl. of Parent B 2, ECF No. 32-2. Like Student A, Student B claims an interest in using privacy facilities to affirm the student's professed gender identity. Unless District 211 Defendants are willing to restore sex-specific access to privacy facilities, the intermingling of the sexes will continue within the District.

Similarly, Girl Plaintiffs who had mandatory swim class necessarily fully disrobed in their girls' locker room to change into or out of their swimsuits. Unsurprisingly, these girls objected to the male Student A being given unrestricted access to their locker room. Compl. 30, ECF No. 1. And the risk of similar incidents remains, because physical education is a required daily course for all four years of high school in District 211, and students are required to change into physical-education-appropriate clothing for PE class. *Id*. at 20-21.

The *Students and Parents for Privacy* Plaintiffs also brought claims against the Defendants' Restroom Policy because it leads to bodily privacy violations by authorizing transgender-professing students to use restroom facilities that are reserved for the use of the opposite sex. Consequently, all of the Student Plaintiffs must use their schools' multi-user sex-specific restrooms knowing that a student of the opposite biological sex may intrude on their privacy at any time. *Id*. at 33. Again, some Girl Plaintiffs related actual encounters with Student A within their restrooms, and male Plaintiffs are at similar risk of such intrusions as there are female students who perceive themselves to be male in a number of District 211 schools. *Id.*; *see also* Decl. of Parent B 2, ECF No. 32-2 (female rising freshman entering Fremd in the fall of 2017 claims a male gender identity).

And while *Whitaker* documented only one parental complaint regarding the intermingling of sexes in privacy facilities, all seventy-three parents in the instant case "adamantly object to their sons and daughters using restrooms with students of the opposite sex," and further, those parents with daughters in District schools object to their daughters using locker rooms and showers with male students. Compl. 35, ECF No. 1. Additionally, some of the Parent Plaintiffs hold sincere religious beliefs as to teaching their children modesty in respect to the opposite sex, which leads

to religious freedom claims under the First Amendment and RFRA. *Id.* at 70-73. Again, *Whitaker* had no such claims in play.

In sum, no student or parent in *Whitaker* brought legal claims to allege specific privacy violations directly impacting students such as are outlined above. Thus, the *Whitaker* panel gave short shrift to the bodily privacy defense, and did not have to do what this Court must do: weigh the balance of an alleged harm from a school declining to affirm an individual student's psychological condition against the harms arising from potential and actual violations of the constitutional privacy interests of dozens of plaintiff students.[2] The *Whitaker* decision is devoid of any substantive analysis of privacy or parental rights and is thus all but irrelevant as guidance in the instant case.

II. The numerous errors of law in the *Whitaker* decision undercut its authority as an appellate decision.

A. There is no support for an *independent* cause of action for transgender status or sex stereotyping under *Price Waterhouse v. Hopkins*.

The *Whitaker* panel correctly recognized that those who claim transgender status are not excluded from the protection of sex nondiscrimination law, but wrongly extends that observation to conclude that a stand-alone claim exists for transgender status. 858 F.3d. at 1051-52. The flawed reasoning is easily traced: first, the court observed that other circuits have "recognized a transgender plaintiff's ability to bring a sex-stereotyping claim." *Id*. at 1048. This is accurate: a person who is discriminated against because of their sex is not automatically denied redress simply because he or she also claims to be transgender. But then the *Whitaker* panel makes a leap of logic

[2] The fact that the two cases have significantly different facts regarding bodily privacy does not validate the *Whitaker* panel's criticism of the defendant district's development of the record regarding privacy complaints. As discussed herein, defendant district had an obligation to provide for, and maintain, sex-specific privacy facilities as a matter of law, and the *Whitaker* panel's decision errs because it forces the district to intermingle the sexes within privacy facilities.

to say that Whitaker "can demonstrate a likelihood of success on the merits of his claim because he has alleged that the School District has denied him access to the boys' restroom because he is transgender." *Id*. at 1049.

The error in that reasoning is illustrated by *Smith v. City of Salem*, which the *Whitaker* panel cited to support its notion that transgender status is a protected class. *Id.* at 1048-49. But looking into the history of that opinion shows that *Smith* actually rejected the *Whitaker* panel's position. The first, subsequently superseded *Smith* opinion did recognize an independent transgender-status claim by saying that "[d]iscrimination based on transsexualism is rooted in the insistence that sex (organs) and gender (social classification of a person as belonging to one sex or the other) coincide," which is "the very essence of sex stereotyping." *Smith v. City of Salem*, 369 F.3d 912, 921-22 (6th Cir. 2004), *amended and superseded*, 378 F.3d 566 (Aug. 5, 2004), *reh'g en banc denied* (Oct. 18, 2004). The pre-amendment opinion went on to state that "to the extent that Smith . . . alleges discrimination based solely on his identification as a transsexual, he has alleged a claim of sex stereotyping . . . ." *Id*. at 922. But just two months after publishing the opinion, the panel amended its opinion to redact that passage. *See* 378 F.3d 566.

Having corrected its opinion to eliminate the categorical protection for transgender status, the *Smith* panel went on to say that *Price Waterhouse* did "not make Title VII protection against sex stereotyping conditional or provide any reason to exclude Title VII coverage for non sex-stereotypical behavior simply because the person is a transsexual." *Id*. at 574-575. So while transsexuals (or those who profess transgender status) are not denied the protections against sex discrimination afforded by Title VII, they remain bound to show that they were discriminated against based on their sex (male or female). And to establish discrimination "because of . . . sex," they still have to prove that the sex stereotyping resulted in "disparate treatment of men and

women." *Price Waterhouse*, 490 U.S. at 251 (internal quotations and citations omitted). Thus, the *Smith* court made the same mistake that the *Whitaker* panel made, but then recognized the flaw and corrected it.

More fundamentally, this points back to the school's straightforward defense that it was not discriminating against Whitaker because of her appearance, mannerisms, or even her professed gender. Instead, it treated her the same as every other girl by providing access to female-only privacy facilities, just as it provided male-only facilities for the boys as was made clear in district court. *Whitaker*, 2016 WL 5239829 at *1. The school was only asking her to use the facility consistent with her sex—and even offered individual facilities if she was uncomfortable doing so. *Id.* at *2. This is not only equal and lawful treatment of the sexes, but the school is rationally separating the sexes where sex differences really count—such as in restrooms and locker rooms—which is the very point of 34 C.F.R. §106.33 and is constitutionally valid. *United States v. Virginia*, 518 U.S. 515, 550 n.19 (authorizing separate privacy facilities for men and women when ordering the sexes to be integrated at Virginia Military Institute).

The *Whitaker* panel further errs by asserting that sex stereotypes (an inherently mutable class) are protected at the same level as is sex (an inherently immutable class). 858 F.3d. at 1047-48. This position is incorrect as a matter of law for two reasons.

First, as discussed above, sex stereotyping is not an independent cause of action for discrimination, but rather serves only as evidence of sex discrimination. The "doctrine of gender nonconformity is not an independent vehicle for relief; it is instead a proxy a plaintiff uses to help support her argument that an employer discriminated on the basis of the enumerated sex category by holding males and females to different standards of behavior." *Evans v. Georgia Reg'l Hosp.*, 850 F.3d 1248, 1260 (11th Cir. 2017) (Pryor, J., concurring) (rejecting expansion of "sex" in Title

VII to include sexual orientation). Again, both boys and girls were held to the identical standard of using the privacy facility designated for their sex, so there was no discrimination on account of sex. By adhering to the practice authorized by Supreme Court precedent and 34 C.F.R. §106.33, the school was not factoring in any of the masculine stereotypes that Whitaker adopted as part of her stated gender identity, and the *Whitaker* panel did not point to any concrete example in the record of the school doing so. The *Whitaker* panel thus erred in asserting that Whitaker had a sex stereotyping claim. 858 F.3d. at 1049-50.

The *Whitaker* panel's position that sex stereotyping is an independent claim fails for a second reason. The protection of sex via heightened scrutiny arises from its immutability: "[S]ex, like race and national origin, is an immutable characteristic determined solely by the accident of birth" and as such, merits increased protection under the law. *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973). But gender identity is evidenced only by the self-report of the claimant and such mutable sex-related characteristics as the person may adopt via behavior, hormone treatments, or surgery.[3] The *Whitaker* panel apparently (and illogically) accepted that a person may move from the immutable class of male into the immutable class of female by varying some quantum of mutable characteristics. 858 F.3d. at 1040 (relating that Whitaker told her parents that she was a boy, cut her hair and began to wear more masculine clothing, and later adopted Ashton as a first name and used male pronouns). But sex nondiscrimination law protects the immutable categories of male and female, not mutable stereotypes and secondary characteristics which at most may

[3] Notably, whether a person claiming a given gender manifests any characteristics of the opposite sex (or some non-binary gender) is irrelevant to validating their identity. Instead, the sole determinant of sex under Defendants' theory is gender identity, *Expert Decl. of Robert Garofalo*, M.D., M.P.H. 4, ECF No. 79-3, and gender identity is no more than "one's sense of oneself as male or female or something else." Nor can it be said that "one's sense of oneself" is immutable, as evidenced by Student C being born female, then presenting herself as "gender queer," and more recently presenting in a more "masculine manner." Decl. of Parent C 2, ECF No. 32-3.

reflect one's sex. *See, e.g. EEOC v. Catastrophe Mgmt. Sols.*, 852 F.3d 1018, 1030 (11th Cir. 2016) (immutable characteristic of race is protected under Title VII whereas mutable cultural traits are not); *Willingham v. Macon Tel. Publ'g Co.*, 507 F.2d 1084, 1091-1092 (5th Cir. 1975) (holding that sex-specific grooming standards for men vs. women did not violate Title VII because characteristics such as hair length are not immutable); and *id*. at 1092 ("Private employers are prohibited [by Title VII] from using different hiring policies for men and women only when the distinctions used relate to immutable characteristics or legally protected rights."). Unlike a person's immutable sex, the stereotypes manipulated pursuant to gender identity theory are mutable by behavior, drugs, and surgery. Accordingly, statutory protection does not extend to sex stereotypes as a category.

This is consistent with the proper reading of *Price Waterhouse*, which supports no more than sex stereotyping (or gender nonconformity) possibly serving as evidence of sex discrimination, but the claimant must still demonstrate disparate, unequal treatment of males and females. *Price Waterhouse*, 490 U.S. at 251. And there is no disparate treatment in providing sex-specific restroom and locker room facilities for each of the two sexes consistent with the provisions of 34 C.F.R. §106.33 and as authorized by Supreme Court guidance.

B. The *Whitaker* panel conflates constitutional protection for bodily privacy with the tort of intrusion upon seclusion.

The *Whitaker* panel dismissed the school district's privacy defenses first because of the thin record regarding privacy violations or concerns, 858 F.3d. at 1052, and second by saying that "[n]othing . . . suggests that the bathrooms at [the high school] are particularly susceptible to an intrusion upon an individual's privacy" and that students could protect themselves from intrusion upon their seclusion by "act[ing] in a discreet manner." *Id*. This was followed by the curious statement that "those who have true privacy concerns are able to utilize a stall." *Id*. The panel does

not elaborate on what a "true privacy concern" is within a multi-user restroom, but Plaintiffs in the instant case have persuasively argued that bodily privacy is a concern that begins at the door to the facility, not at some curtain or stall within the communal restroom or locker room. *See* Pls.' Resp. to Magistrate's R. & R. 20-23, ECF No. 146.

That is eminently logical, for if it were otherwise there would be no principled reason to prevent male students (or teachers for that matter) from using the common areas of girls' restrooms or locker rooms, or even using a stall within such facilities for its appropriate purpose—for if any of the adolescent girl students within the multi-user facility harbored a "true" privacy concern, they may simply retreat to a stall. This is one more evidence that the position of the *Students and Parents for Privacy* Defendants and the *Whitaker* panel eviscerates the ability of schools to provide sex-separated facilities under 34 C.F.R. §106.33.

Moreover, by saying that privacy is sufficiently protected by an individual acting in "a discreet manner to protect their privacy" or by utilizing a stall, *Whitaker*, 858 F.3d. at 1052, it would appear that the panel was thinking in terms of an intrusion upon seclusion claim, such as is protected under Wisconsin state law: "'[I]nvasion of privacy' means any of the following: (a) Intrusion upon the privacy of another of a nature highly offensive to a reasonable person, in a place that a reasonable person would consider private or in a manner which is actionable for trespass." Wis. Stat. Ann. § 995.50 (West 2014).

What this contemplates is one person's privacy being violated by another private party who acts along the lines of a "peeping Tom" or is a trespasser, and such claims lie equally against members of the same sex as the opposite sex—whereas the constitutional right to bodily privacy is squarely grounded in the differences between the sexes. Indeed, it is well established that there is a "constitutionally protected privacy interest in [one's] partially clothed body" and that a

"reasonable expectation of privacy" exists, "particularly while in the presence of members of the opposite sex." *Doe v. Luzerne Cty.*, 660 F.3d 169, 176-77 (3d Cir. 2011). As the Ninth Circuit put it, "[w]e cannot conceive of a more basic subject of privacy than the naked body. The desire to shield one's unclothed figured from view of strangers, and particularly strangers of the opposite sex, is impelled by elementary self-respect and personal dignity." *York v. Story*, 324 F.2d 450, 455 (9th Cir. 1963).

Accordingly, 34 C.F.R. §106.33 enables the District to align with "society's undisputed approval of separate public rest rooms for men and women based on privacy concerns. The need for privacy justifies separation and the differences between the genders demand a facility for each gender that is different." *Faulkner v. Jones*, 10 F.3d 226, 232 (4th Cir. 1993).[4] *Faulkner* tracks what the Supreme Court has already said on the topic: "Physical differences between men and women, however, are enduring: '[T]he two sexes are not fungible; a community made up exclusively of one [sex] is different from a community composed of both.'" *United States v. Virginia*, 518 U.S. at 533 (quoting *Ballard v. United States*, 329 U.S. 187, 193 (1946)). Importantly, the Court went on to say that "[a]dmitting women to VMI [Virginia Military Institute] would undoubtedly require alterations necessary to afford members of each sex privacy from the other sex in living arrangements . . . ." *Id.* at 550 n.19. These cases show that the right to bodily privacy is "deeply rooted in th[e] [n]ation's history and tradition" and "implicit in the concept of ordered liberty." *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (internal quotations and citations omitted). And there's certainly sufficient history and tradition to show that the right to bodily privacy is fundamental.

[4] In context, "gender" is properly understood as a euphemism for "sex" in *Faulkner*.

Thus, the *Whitaker* panel erred by thinking that the constitutional privacy issue can be resolved by "acting discreetly" or seeking refuge behind a stall door, as might serve where an intrusion upon seclusion is the issue. Under the constitutional right to bodily privacy, the government's obligation is to recognize the real differences between males and females and provide appropriate privacy facilities as permitted by 34 C.F.R. §106.33 and directed by the Supreme Court in *United States v. Virginia*. Yet District 211 intentionally intermingles the sexes within its privacy facilities, and it is no answer to put the burden of curing a constitutional violation on adolescent (and younger) students. That would force the Plaintiffs to act individually to defend their privacy within the very facilities that were ostensibly provided to ensure their privacy.

In sum, by analyzing the privacy interests of students as if the students have a duty to protect themselves against intrusions upon their seclusion while using sex-separated facilities, the *Whitaker* panel improperly discounted the fundamental, constitutional nature of the students' rights to bodily privacy. Unlike *Whitaker*, this Court is presented with specific bodily privacy claims brought by students who are directly impacted by the Defendants' policies and those claims must be analyzed in light of the fundamental, constitutional right to bodily privacy.

C. The *Whitaker* panel fails to define its terms and conflates the contrary concepts of sex and gender.

The *Whitaker* panel erred by ignoring two foundational principles of statutory interpretation: first, the court's job is "to apply faithfully the law Congress has written, it is never [its] job to rewrite a constitutionally valid statutory text under the banner of speculation about what Congress might have done had it faced a question that, on everyone's account, it never faced." *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1725 (2017) (citing to *Magwood v. Patterson*, 561 U.S. 320, 334 (2010) ("We cannot replace the actual text with speculation as to Congress' intent."")). Second is the "cardinal rule . . . that words used in statutes must be given

their ordinary and plain meaning" when not statutorily defined. *Sanders v. Jackson*, 209 F.3d 998, 1000 (7th Cir. 2000).

Although the *Whitaker* panel recognized that "[n]either the statute nor the regulations define the term 'sex,'" 858 F.3d. at 1047, the panel failed to define the term, instead veering into the misguided analysis by which it mistook non-exclusion of a status as necessarily creating a new, independently protected class, as described in § II.A, *supra*.

As Plaintiffs have previously explained, sex and gender are defined very differently: sex objectively means male or female as grounded in the fact of humans reproducing sexually, while gender is a subjectively reported perception that falls somewhere on a fluid continuum. *See* Pls.' Resp. 9-14, ECF No. 146 (briefing the meaning of sex versus gender). The *Whitaker* panel's failure to define its terms and use them consistently led it to an astonishingly wrong conclusion in its Equal Protection Clause analysis:

> Here, the School District's policy cannot be stated without referencing sex, as the School District decides which bathroom a student may use based upon the sex listed on the student's birth certificate. This policy is inherently based upon a sex-classification and heightened review applies. Further, the School District argues that since it treats all boys and girls the same, it does not violate the Equal Protection Clause. This is untrue. Rather, the School District treats transgender students like Ash, who fail to conform to the sex-based stereotypes associated with their assigned sex at birth, differently. These students are disciplined under the School District's bathroom policy if they choose to use a bathroom that conforms to their gender identity.

Whitaker, 858 F.3d. at 1051. The last sentence discloses the confusion of terms: while the privacy facilities were unequivocally reserved to the use of one sex or the other, the closing sentence has meaning only if one's gender is treated exactly the same as sex for the purposes of accessing privacy facilities. And if that is so, then the separation of privacy facilities permitted under 34 C.F.R. §106.33 and directed in *United States v. Virginia* is illusory. This was exactly the point Judge Niemeyer made when dissenting in *G.G. ex rel. Grimm v. Gloucester County School Board*, 822 F.3d 709, 737 (4th

Cir. 2016), *cert. granted in part*, 137 S. Ct. 369 (Mem.) (2016), *and vacated and remanded*, 137 S. Ct. 1239 (Mem.) (2017): the only logical outcome of "including" gender identity with sex under 34 C.F.R. §106.33 is that gender identity supplants sex and thus eliminates the basis by which the facilities are maintained to protect bodily privacy.[5]

The *Whitaker* panel again errs in relying upon the statement that "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," from *Oncale v. Sundowner Offshore Services, Inc*., 523 U.S. 75, 79 (1998), to justify injecting gender identity into Title IX. *Whitaker*, 858 F.3d. at 1048. Relying on *Oncale* is error, first because the subjectively discerned, fluid continuum of gender identity is not "reasonably comparable" to the objectively discerned, fixed binary taxonomy of sex, and second because the United States Supreme Court recently counseled that:

> it is quite mistaken to assume, as petitioners would have us, that "whatever" might appear to "further[] the statute's primary objective must be the law." Legislation is, after all, the art of compromise, the limitations expressed in statutory terms often the price of passage, and no statute yet known "pursues its [stated] purpose [] at all costs." For these reasons and more besides we will not presume with petitioners that any result consistent with their account of the statute's overarching goal must be the law but will presume more modestly instead "that [the] legislature says ... what it means and means ... what it says."

Henson, 137 S. Ct. at 1725 (internal citations omitted). Indeed, *Henson* is instructive, as the case considered whether the Fair Debt Collection Practices Act, which indisputably covered

[5] Among the many confusions rife in gender identity litigation is the premise that a fluid continuum of genders can somehow establish that one falls within one of two fixed classes in a binary taxonomy. As noted in Pls.' Resp. 11-12, ECF No. 146, when gender identity divorces itself from the definitional reality of human reproductive nature—that is, male and female reproductive systems cease to define whether one is male or female—it is then impossible to say that a stereotype is masculine and feminine as there is no longer a fixed, objective class to which the stereotype may relate. *See* Pls.' Resp. 11-12, ECF No. 146 (recounting colloquy in which attorney for professed transgender student insisted that it is improper to characterize any part of the human body as male or female). If one cannot say that a male is a male as a fact of human reproductive biology, the referent for "masculinity" has ceased to exist.

independent debt collectors who were hired by a creditor to collect an outstanding debt, would also cover an entity which purchases a debt and seeks financial gain for itself. *Id.* at 1720. The Court carefully parsed the relevant language, and rejected the premise with a straightforward textual analysis. *Id.* at 1721-1724. The petitioners then turned to a policy argument, claiming that had "Congress known this new industry [debt purchasing] would blossom . . . it surely would have judged defaulted debt purchasers more like (and in need of the same special rules as) independent debt collectors." *Id.* at 1725. In other words, the petitioners were making an *Oncale* "reasonably comparable" argument, and while it was a plausible argument under the facts in *Henson*, the Court was having none of it:

> All this seems to us quite a lot of speculation. And while it is of course our job to apply faithfully the law Congress has written, it is never our job to rewrite a constitutionally valid statutory text under the banner of speculation about what Congress might have done had it faced a question that, on everyone's account, it never faced.

Id. This Court should heed the caution from *Henson*, as it so closely parallels *Ulane v. E. Airlines, Inc*., 742 F.2d 1081, 1084–85 (7th Cir. 1984), which holds that transgender status, standing alone, is not protected under Title VII:

> Even though Title VII is a remedial statute, and even though some may define "sex" in such a way as to mean an individual's "sexual identity," our responsibility is to interpret this congressional legislation and determine what Congress intended when it decided to outlaw discrimination based on sex. The district judge did recognize that Congress manifested an intention to exclude homosexuals from Title VII coverage. Nonetheless, the judge defended his conclusion that Ulane's broad interpretation of the term "sex" was reasonable and could therefore be applied to the statute by noting that transsexuals are different than homosexuals, and that Congress never considered whether it should include or exclude transsexuals. While we recognize distinctions among homosexuals, transvestites, and transsexuals, we believe that the same reasons for holding that the first two groups do not enjoy Title VII coverage apply with equal force to deny protection for transsexuals.

Id. at 1084–85 (internal citation omitted). Both *Ulane* and a proper reading of *Price Waterhouse* make clear that "sex" is properly read in federal sex nondiscrimination law as protecting the

categories of male and female, and if the term is to sweep more broadly than that, then *Henson* reminds us that Congress, not the courts, is the proper forum for rewriting laws.

CONCLUSION

The panel in *Whitaker* did not evaluate the type of constitutional bodily privacy claims, parental rights claims, or religious freedom claims directly raised in *Students and Parents for Privacy* and therefore should not bind this Court. In addition to the lack of factual similarity, its misreading of *Price Waterhouse*, failure to define its terms, and conflating state tort law with constitutional principles seriously undercuts its worth even as a persuasive authority. Plaintiffs thus urge this Court to issue the requested preliminary injunction before the onset of the new school year to avoid further injuries to the student and parent Plaintiffs during the pendency of this action.

Respectfully submitted this the 5th day of July, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that on July 5, 2017, I electronically filed the foregoing document with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following counsel of record who are registered users of the ECF system:

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