IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT – CHANCERY DIVISION

NOVA MADAY, Plaintiff, v. TOWNSHIP HIGH SCHOOL DISTRICT 211, Defendant, and STUDENTS AND PARENTS FOR PRIVACY, a voluntary unincorporated association, Proposed Intervenor.	)	Case No. 17 CH 15791 Hon. Thomas R. Allen, Judge Presiding

VERIFIED EMERGENCY PETITION OF STUDENTS AND PARENTS FOR PRIVACY FOR LEAVE TO INTERVENE AS OF RIGHT OR ALTERNATIVELY BY PERMISSION, AND MEMORANDUM OF LAW IN SUPPORT THEREOF

NOW COMES Proposed Intervenor Students and Parents for Privacy (hereafter "Privacy Association"), by and through its attorneys, and petitions this Honorable Court for leave to intervene as of right in this cause, pursuant to 735 ILCS 5/2-408(a)(2) or, in the alternative, for leave to intervene by permission, pursuant to 735 ILCS 5/2-408(b)(2). In support of said motion, Privacy Association states as follows:

(1) Privacy Association is a voluntary unincorporated association that is comprised of dozens of families, including students and their parents, all of whom are residents of Cook County and all of whom are directly impacted by the policies of Township High School District 211 (hereafter "District 211"). Privacy Association exists to advocate for and defend the privacy interests of its student members, particularly with regard to District 211's communal privacy

facilities (hereafter "privacy facilities"), including restrooms, locker rooms, shower rooms, overnight accommodations on school-sponsored trips, and other similar facilities that are lawfully reserved for members of one sex to ensure their bodily privacy while changing clothes or attending to personal hygiene. Privacy Association desires compassionate support for any student who may not feel comfortable using a sex-specific communal facility, and advocates that individualized privacy facilities for such students be made available. Consistent with its concern for all students, Privacy Association also advocates that the use of school privacy facilities to treat or diagnose gender-dysphoric students is not supported by any randomized, controlled scientific research that demonstrates such techniques are safe or effective for the students.

(2) Privacy Association's student membership includes both male and female students who currently attend three District 211 high schools, including minor female student members who attend Palatine High School.

(3) Female student members of Privacy Association who currently attend Palatine High School regularly use the girls' restrooms to relieve themselves and to attend to personal hygiene needs.

(4) Physical Education is a required course for high school students under Illinois law.

(5) Township High School District 211 includes swimming as a required unit of its Physical Education curriculum.

(6) Minor female student members of Privacy Association who currently attend Palatine High School are enrolled in Physical Education for the semester that begins on January 9, 2018 and regularly use the girls' locker rooms to change into athletic or swimming attire prior to participating and/or out of athletic or swimming attire after participating in Physical Education, which is a required course for high school students under Illinois law.

(7) At least one minor female student member of Privacy Association who currently attends Palatine High School also participates in extracurricular sports and regularly uses the girls' locker rooms to change her clothes for those activities.

(8) Student members of Privacy Association object to sharing privacy facilities with a student of the opposite sex, regardless of that student's state of mind regarding his or her sex.[1]

(9) District 211 by policy authorizes "transgender students" to "daily use bathrooms and locker rooms of their gender identity in multiple schools." *A Message from Superintendent Daniel Cates*, December 1, 2017, https://adc.d211.org/wp-content/uploads/2017/12/Sups-Message-12-1-2017.pdf ("Every transgender student in District 211 who has requested use of the locker room of their identified gender has been offered such access . . . . Every day in our schools, transgender students have full access to the bathrooms of their identified gender. Each day, transgender students use the locker room of their identified gender.").

(10) Because of District 211's policy and practice of authorizing opposite sex students to access communal privacy facilities, Privacy Association and individual members of Privacy Association sued District 211 in the United States District Court for the Northern District of Illinois on May 4, 2016, seeking injunctive and declaratory relief, as well as damages, for violations of several of their federal statutory and constitutional rights, including the fundamental right to privacy and violation of Title IX, and of their Illinois statutory rights.

(11) Through its federal lawsuit against District 211, Privacy Association is seeking, among other things, an order requiring District 211 "to permit only biological females to enter and use District 211's girls' locker rooms and restrooms," Compl. at 74 ¶A, *Students and*

[1] As a threshold matter, counsel use "sex" in their briefs to mean male or female as grounded in reproductive biology. Sex is binary, fixed at conception, and objectively verifiable. Counsel use "gender" consistently with gender identity theory: a malleable, subjectively discerned continuum of genders that range from male to female to something else.

Parents for Privacy v. U.S. Dep't of Educ., No. 1:16-cv-04945, 2017 WL 6629520 (N.D. Ill. Dec. 29, 2017), ECF No. 1, as well as similar relief for its male student members.

(12) In the instant case, Plaintiff is a "legal adult" who is a biological male. Pl.'s Compl. 3 ¶ 13; *id.* at 4 ¶ 20 (conceding Plaintiff's "designation as male at birth").

(13) Plaintiff concedes that District 211 has "offered [Plaintiff] use of the girls' locker room . . . if [Plaintiff] agreed to dress in an unspecified privacy area." *Id.* at 12 ¶ 58.

(14) Plaintiff has challenged the policy of District 211 under the Illinois Human Rights Act (hereafter "HRA"), asserting that District 211's policy denies Plaintiff "the full and equal enjoyment of its facilities, namely the girls' locker rooms, based on [Plaintiff's] gender-related identity," *Id.* at 14 ¶ 67, because "[District 211] does not require . . . girls to dress in a privacy area." *Id.* at 12 ¶ 58.

(15) In the Prayer for Relief, Plaintiff has asked this Court to enter an injunction that would require District 211 to give Plaintiff and others similarly situated to Plaintiff "use [of] the locker rooms consistent with their gender identity" and "without restrictions." *Id.* at 14 ¶ A.

(16) Granting the relief requested by Plaintiff will have the effect of invalidating 775 ILCS 5/5-103 (B) (hereafter "HRA's privacy-facility exemption"), which exempts from the HRA "[a]ny facility . . . which is distinctly private in nature such as restrooms, shower rooms, bath houses, health clubs and other similar facilities for which the Department, in its rules and regulations, may grant exemptions based on bona fide considerations of public policy."

(17) Protecting the bodily privacy of students who are under the supervision and control of District officials is a bona fide public policy interest, and further is a duty for District officials who act *in loco parentis* in respect to the students.

(18) Privacy Association seeks to intervene in this action to defend the privacy interests

of its student members as well as the lawfulness of the HRA authorizing sex-specific privacy facilities to be provided in, among other places, public schools.

MEMORANDUM OF LAW

I. PRIVACY ASSOCIATION IS ENTITLED TO INTERVENE AS A MATTER OF RIGHT.

Section 2-408(a)(2) of the Code of Civil Procedure provides that, "[u]pon timely application anyone shall be permitted as of right to intervene in an action . . . when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant will or may be bound by an order or judgment in the action . . . ." 735 ILCS 5/2-408(a)(2). Where intervention as of right is asserted, "the trial court's discretion is limited to determining timeliness, inadequacy of representation and sufficiency of interest; once these threshold requirements have been met, the plain meaning of the statute directs that the petition be granted." *City of Chicago v. John Hancock Mut. Life Ins. Co.*, 127 Ill. App. 3d 140, 144 (1st Dist. 1984). Privacy Association satisfies all three requirements.

Timeliness

Privacy Association's application is timely because it is filed during the initial pleading stage of this lawsuit, just six weeks after the filing of the complaint, and before any substantive motions have been ruled upon by this Court. No responsive pleadings have been filed, nor will they be due for several weeks. Scheduling Order, Dec. 13, 2017, at ¶ 4 ("Defendant shall answer or otherwise plead by February 2, 2018."). A petition filed under such circumstances is certainly timely. *See City of Chicago v. John Hancock Mut. Life Ins. Co.*, 127 Ill. App. 3d at 144 (petition filed within weeks of the commencement of the action, at the first hearing in the matter, "was timely beyond any doubt").

Adequacy of Representation

The test for adequacy of representation is whether the representation of the proposed intervenor's interest by existing parties to the litigation "is or *may be* inadequate." 735 ILCS 5/2-408(a)(2) (emphasis added). *See City of Chicago v. John Hancock Mutual Life Ins. Co.*, 127 Ill. App. 3d at 145 ("[R]epresentation of petitioner's interest will or may be inadequate."). "Applicants for intervention can establish inadequate representation by showing that their interests are different from those of the existing parties." *Joyce v. Explosives Techs. Int'l*, *Inc*., 253 Ill. App. 3d 613, 617 (3d Dist. 1993). As demonstrated below, because Privacy Association's interests are different than the interests of the existing parties—Plaintiff and District 211—Privacy Association is and will be inadequately represented.

Plaintiff cannot adequately represent the interests of Privacy Association because Plaintiff's interests are in direct conflict with Privacy Association's interests. Here, Privacy Association represents the privacy interests of male and female students attending District 211 high schools, including female students attending Palatine High School, whose privacy is directly imperiled by District 211 authorizing the male Plaintiff (and all other similarly situated students who assert a gender identity that differs from their sex) to access communal privacy facilities of the opposite sex, including restrooms and locker rooms used by Privacy Association's members. Decl. of Victoria Wilson in Supp. of Mot. to Intervene ("Wilson Decl.") ¶¶ 3-8, 11. Because of the potential violation of their bodily privacy rights as well as other statutory and constitutional rights, Privacy Association's student members object to being required to share privacy facilities, including restrooms, locker rooms, shower rooms and overnight accommodations, with students of the opposite sex, regardless of those students' state of mind in regard to their sex. Wilson Decl. ¶ 4. Privacy Association is an ardent advocate of its

members' interests and on May 4, 2016, together with several of its individual members, sued District 211 in federal court for injunctive and declaratory relief and damages, seeking, among other things, an order requiring District 211 "to permit only biological females to enter and use District 211's girls' locker rooms and restrooms," Compl. at 74 ¶ A, *Students and Parents for Privacy v. U.S. Dep't of Educ.*, No. 1:16-cv-04945, 2017 WL 6629520 (N.D. Ill. Dec. 29, 2017), ECF No. 1, and similar protections for its male student members. *Id.* Given that Plaintiff seeks "[t]he entry of an order directing District 211" to permit "transgender students, including but not limited to [Plaintiff], to use the locker rooms consistent with their gender identity and . . . without restrictions," Pl.'s Compl. 14 ¶ A, Plaintiff's interests are clearly different than those of Privacy Association. In fact, a ruling by this Court in accordance with what Plaintiff seeks, would require District 211 to permit Plaintiff, whose "female gender identity" admittedly "does not match [Plaintiff's] designation as male at birth," Pl.'s Compl. 4 ¶ 20, to access the very locker rooms and restrooms that Privacy Association seeks through its federal suit to make accessible to biological girls only. Because Privacy Association's interests are in direct conflict with the interests of Plaintiff, Plaintiff cannot be said to adequately represent Privacy Association's interests. Indeed, such a result almost precisely replicates the factual context of the federal lawsuit that the Privacy Association is currently prosecuting against District 211.

Privacy Association's interests in protecting its members' privacy are similarly distinct from the interests of District 211. District 211 by policy authorizes students to access communal privacy facilities based only on the student's asserted gender identity and without regard for the student's sex. *See* Pl.'s Compl. 12 ¶ 58 (conceding "the District . . . offered [Plaintiff] use of the girls' locker room"); *see also id.* at 4 ¶ 20 (conceding Plaintiff's "designation as male at birth"). As recently as December 1, 2017, the Superintendent of District 211 publicly explained that:

> District 211 has provided . . . responsive supports for transgender students for years, including transgender students who daily use bathrooms and locker rooms of their gender identity in multiple schools. Every transgender student in District 211 who has requested use of the locker room of their identified gender has been offered such access . . . .
> . . . .
> . . . Every day in our schools, transgender students have full access to the bathrooms of their identified gender. Each day, transgender students use the locker room of their identified gender. . . . [W]e continue to defend our supports for transgender students . . . . This is our commitment now and throughout whatever challenges are put before us . . . .

A Message from Superintendent Daniel Cates, December 1, 2017, https://adc.d211.org/wp-content/uploads/2017/12/Sups-Message-12-1-2017.pdf (responding to the filing of the instant case). Given that District 211 is committed to defending its policy and practice of authorizing students to enter locker rooms based on those students' self-identified gender as opposed to those students' status as being male or female, its interests are diametrically opposed to the interests of Privacy Association.

Indeed, given that the proposed intervenor has sued District 211 in a separate federal lawsuit over the very policies that Plaintiff here seeks to expand, to the detriment of the proposed intervenor's interests, the interests of the proposed intervenor could not be more dissimilar than the interests of the existing Parties. In and of itself, that demonstrates that the parties' representation of Privacy Association's interests "is or may be inadequate." 735 ILCS 5-2-408(a)(2).

Apart from a divergence of interests, there are other considerations that may affect the adequacy of existing representation, including "the commonality of legal and factual positions; the practical abilities, resources and expertise of the existing parties; and the existing parties' vigor in representing the absent applicant's interests." *Joyce*, 253 Ill. App. 3d at 617 (citing *City of Chicago v. John Hancock Mut. Life Ins. Co.*, 127 Ill. App. 3d at 145). As is set forth in the

proposed motion to dismiss Plaintiff's Complaint that accompanies this petition,[2] Privacy Association, if granted intervention, will argue that Plaintiff's action fails to state a claim because the HRA does not confer a right for the admittedly male Plaintiff to access "[a]ny facility . . . which is distinctly private in nature such as restrooms, shower rooms, bath houses, health clubs and other similar facilities . . .", 775 ILCS 5/5-103, of the opposite sex, including the girl's restroom, locker and changing room, and shower at Palatine High School. Quite to the contrary, such "distinctly private" sex-specific facilities are exempt from the HRA in that the requirements of the Act "shall [not] apply" to such privacy facilities, 775 ILCS 5/5-103. Privacy Association would further argue that any interpretation of the HRA that requires school officials to authorize access to communal privacy facilities on the basis of students' gender identity (as opposed to their sex) is preempted by Title IX's regulations which expressly permit recipients of federal Title IX funds, including District 211, to provide sex-separated "toilet, locker room, and shower facilities," so long as "facilities provided for students of one sex [are] comparable to such facilities provided for students of the other sex." 34 C.F.R § 106.33.[3] Since District 211 authorizes access to such facilities and has vowed to "continue to defend" its policy and practice of authorizing students to access privacy facilities based on their "identified gender," *A Message from Superintendent Daniel Cates*, December 1, 2017, https://adc.d211.org/wp-content/uploads/2017/12/Sups-Message-12-1-2017.pdf, Privacy Association has a reasonable

[2] A proposed motion is required by 735 ILCS 5/2-408(e) ("A person desiring to intervene shall present a petition setting forth the grounds for intervention, accompanied by the initial pleading or motion which he or she proposes to file."). Together with this petition, Privacy Association submits a proposed motion to dismiss Plaintiff's Complaint under §§ 2-619(a)(9) and 2-615 of the Code of Civil Procedure.

[3] Should Privacy Association be granted intervention and should Plaintiff's Complaint survive Privacy Association's Motion to Dismiss, Privacy Association will likely bring counterclaims against District 211, including but not limited to the aforementioned preemption claim, at the time it files its answer to Plaintiff's Complaint pursuant to 735 ILCS 5/2-608.

belief that District 211 will not defend the exercise of the clear statutory authority to regulate access to school privacy facilities based upon sex. Thus, there is not a "commonality of legal . . . positions" between Privacy Association and District 211. *Joyce*, 253 Ill. App. 3d at 617.

Moreover, there is not a commonality of legal and factual positions between Plaintiff and Privacy Association regarding the appropriate treatment for gender dysphoria as a matter of public policy. Plaintiff's Complaint outlines Plaintiff's contention that gender-affirming therapy, treatment, and affirmation by the community of gender-dysphoric individuals' self-identified genders, including through authorizing "the use of restrooms and locker rooms that match [the individual's] gender identity," is the proper approach to care for gender-dysphoric individuals as a matter of public policy. Pl.'s Compl. 5 ¶¶ 24-26; *id.* at 6 ¶¶ 28-29. Plaintiff also asserts that there is a medical and scientific "consensus" that gender affirmation is the optimal approach. *Id.* at 6 ¶ 28. If Privacy Association is granted intervention, Privacy Association will argue that there is not a medical and scientific consensus surrounding gender-affirming treatment of gender dysphoria, particularly in regard to using communal privacy facilities as treatment or diagnostic tools in this context. Given that District 211's policies and practices generally embrace a gender-affirmation approach, Privacy Association has a reasonable belief that District 211 would not raise these factual and legal arguments.

For all of the foregoing reasons, Privacy Association submits that the representation of its interests by the existing parties to the litigation "is or may be inadequate." Accordingly, Privacy Association has satisfied the second requirement for intervention as of right under § 2-408(a)(2) of the Code of Civil Procedure.

Sufficiency of Interest

Privacy Association also satisfies the third requirement, sufficiency of interest. Section 2-

408(a)(2) "requires only that a party seeking to intervene 'will *or may be* bound' . . . and it is settled that an enforceable right or tangible detriment fulfills the requirement." *City of Chicago v. John Hancock Mut. Life Ins. Co.*, 127 Ill. App. 3d at 144 (quoting § 2-408(a)(2)) (emphasis added by the Appellate Court). A decision by this Court declaring that the HRA requires that Plaintiff and others similarly situated be given full access "without restrictions" to the girls' locker rooms based on Plaintiff's identified gender would obviously and indisputably affect Privacy Association's rights. Pl.'s Compl. 14 ¶ A. Such a declaration would deepen the privacy violations and anxiety suffered by Privacy Association's student members using those facilities by increasing the risk of those student members' forced association with, and/or actual exposure to, partially or fully unclothed members of the opposite sex within privacy facilities that are lawfully designated under state and federal authority for male-only or female-only use. "An applicant [for intervention] 'will or may be bound by a judgment' when he stands to gain or lose by direct legal operation and effect of the judgment." *Redmond v. Devine*, 152 Ill. App. 3d 68, 74 (1st Dist. 1987) (quoting § 2- 408(a)(2)). Privacy Association "stands to . . . lose" by direct legal operation and effect of any judgment declaring the HRA applies to privacy facilities and affirmatively requires that opposite-sex individuals be given access to privacy facilities of public schools, based on self-identified gender. *Id.* Thus, Privacy Association should be allowed to intervene as a matter of right.

II. IF, *ARGUENDO*, PRIVACY ASSOCIATION IS NOT ENTITLED TO INTERVENE AS A MATTER OF RIGHT, IT SHOULD BE ALLOWED TO INTERVENE BY PERMISSION.

Assuming, arguendo, that Privacy Association is not entitled to intervene as a matter of right, it should be allowed to intervene by permission. Section 2-408(b)(2) of the Code of Civil Procedure provides that, "[u]pon timely application anyone may in the discretion of the court be permitted to intervene in an action . . . when an applicant's claim or defense and the main action

have a question of law or fact in common." 735 ILCS 5/2-408(b)(2). Privacy Association readily satisfies these two requirements. First, for the reasons set forth in the previous argument, petitioner's application is timely. Second, Privacy Association's "claim or defense and the main action have a question of law or fact in common." One "question of law" that Privacy Association's defense and the main action have in common is whether the HRA applies to distinctly private facilities reserved to the use of one sex. Another "question of law" that Privacy Association's defense and the main action may have in common is whether federal law preempts the HRA from applying to sex-specific privacy facilities in schools that receive federal funding.[4] Finally, a "question of fact" that Privacy Association's defense and the main action have in common is whether there is a scientific and medical consensus that gender-affirming treatment is appropriate as a matter of public policy for school-aged individuals who suffer from gender dysphoria. In the discretion of this Court, Privacy Association may be permitted to intervene under § 2-408(b)(2) "if a timely application is made and the applicant's claim or defense has a question of law or fact in common with the main action." *Caterpillar Tractor Co. v. Lenckos*, 77 Ill. App. 3d 90, 96 (3d Dist. 1979). Assuming, arguendo, that Privacy Association is not entitled to intervene as a matter of right under § 2-408(a)(2), this Court should grant permission to intervene under § 2-408(b)(2).

[4] As indicated in footnote 2, Privacy Association may assert this both as a defense against Plaintiff's claim, as well as a counterclaim against District 211, should Privacy Association be granted intervention and should the Court deny Privacy Association's motion to dismiss the Plaintiff's Complaint.

CONCLUSION

For the foregoing reasons, Privacy Association respectfully requests that this Honorable Court grant its petition for leave to intervene as of right in this cause, pursuant to 735 ILCS 5/2-408(a)(2) or, in the alternative, for leave to intervene by permission, pursuant to 735 ILCS 5/2-408(b)(2).

Respectfully submitted,

/s/Thomas Brejcha
One of Proposed Intervenors' Attorneys

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**Pro hac vice application forthcoming*

Verification

Under penalties as provided by law pursuant to Section 1-109 of the Illinois Code of Civil Procedure, the undersigned certifies that the statements set forth in this Petition are true and correct, except as to matters therein stated to be on information and belief and as to such matters the undersigned certifies as aforesaid that she verily believes the same to be true.

Victoria Wilson — 1-10-18

Victoria Wilson
President, Students and Parents for Privacy

Date

Certificate of Service

I hereby certify that on January 11, 2018, I caused true and correct copies of the foregoing **Verified Emergency Petition of Students and Parents for Privacy for Leave to Intervene as of Right or, in the Alternative, for Leave to Intervene by Permission, and Memorandum of Law in Support Thereof**, and supporting **Declaration of Thomas Brejcha,** and supporting **Declaration of Victoria Wilson**, and **Motion to Dismiss Pursuant to Sec. 2-625** to be served via email delivery on January 11, 2018, before the hour of 5 p.m., sent from Chicago, upon:

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Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct, except as to matters therein stated to be on information and belief and as to such matters the undersigned certifies as aforesaid that he verily believes the same to be true.

/s/Thomas Olp

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT – CHANCERY DIVISION

NOVA MADAY, Plaintiff, v. TOWNSHIP HIGH SCHOOL DISTRICT 211, Defendant, and STUDENTS AND PARENTS FOR PRIVACY, a voluntary unincorporated association, Proposed Intervenor.	)	Case No. 17 CH 15791 Hon. Thomas R. Allen, Judge Presiding

DECLARATION OF VICTORIA WILSON
IN SUPPORT OF
VERIFIED EMERGENCY PETITION OF STUDENTS AND PARENTS FOR PRIVACY FOR LEAVE TO INTERVENE AS OF RIGHT OR ALTERNATIVELY BY PERMISSION

I, Victoria Wilson, state that the following declaration is true and correct, subject to the penalty of perjury, and declare as follows:

1. My name is Victoria Wilson. I am an adult resident of Cook County, Illinois, and have personal knowledge of the facts stated herein.
2. I am the president of a voluntary unincorporated association named Students and Parents for Privacy, which is comprised of dozens of families who are students and their parents or legal guardians, all of whom are citizens of the United States, residents of Cook County, Illinois, and are directly impacted by the policies of Township High School District 211.
3. Student members include both male and female students.

4. Student members object to being required to share privacy facilities, including communal restrooms, locker rooms, shower rooms, and overnight accommodations on school trips, with students of the opposite sex because of the potential violation of their bodily privacy rights as well as other statutory and constitutional rights.
5. Student members currently attend three District 211 high schools, including Palatine High School.
6. Several female student members, at least some of whom are minors under the age of 18, currently attend Palatine High School.
7. Female student members attending Palatine High School regularly use the girls' communal restrooms to relieve themselves and to attend to highly personal hygiene needs.
8. At least one minor female student member attending Palatine High School participates in after school sports through Palatine High School and regularly uses the girls' locker rooms to change clothes for those activities.
9. Illinois law requires all high school students to participate in Physical Education unless they are granted a waiver.
10. Township High School District 211 includes swimming as a required unit of its Physical Education curriculum.
11. Minor female student members attending Palatine High School are enrolled in Physical Education for the semester beginning January 9, 2018 and regularly use the girls' locker rooms to change into appropriate athletic or swimming attire prior to participating and/or out of appropriate athletic or swimming attire after participating in Physical Education.

12. Because District 211's policies authorize opposite sex students to access communal privacy facilities, Students and Parents for Privacy and several individual members sued District 211 in the United States District Court for the Northern District of Illinois on May 4, 2016, seeking injunctive and declaratory relief, as well as damages, for violations of several of their federal statutory and constitutional rights, including the fundamental right to privacy, rights under Title IX, the free exercise of religion, and the free exercise of religion under the Illinois Religious Freedom Restoration Act. A copy of our federal complaint is attached hereto as Exhibit A.

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct, except as to matters therein stated to be on information and belief and as to such matters the undersigned certifies as aforesaid that he verily believes the same to be true.

Executed this 10th day of January, 2018 at Palatine, Illinois

_____

Vicki Wilson, President
Students and Parents for Privacy

12. Because District 211's policies authorize opposite sex students to access communal privacy facilities, Students and Parents for Privacy and several individual members sued District 211 in the United States District Court for the Northern District of Illinois on May 4, 2016, seeking injunctive and declaratory relief, as well as damages, for violations of several of their federal statutory and constitutional rights, including the fundamental right to privacy, rights under Title IX, the free exercise of religion, and the free exercise of religion under the Illinois Religious Freedom Restoration Act. A copy of our federal complaint is attached hereto as Exhibit A.

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct, except as to matters therein stated to be on information and belief and as to such matters the undersigned certifies as aforesaid that he verily believes the same to be true.

Executed this 10th day of January, 2018 at Palatine, Illinois

Victoria Wilson

Victoria Wilson, President
Students and Parents for Privacy

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT – CHANCERY DIVISION

NOVA MADAY, Plaintiff, v. TOWNSHIP HIGH SCHOOL DISTRICT 211, Defendant, and STUDENTS AND PARENTS FOR PRIVACY, a voluntary unincorporated association, Proposed Intervenor.	)	Case No. 17 CH 15791 Hon. Thomas R. Allen, Judge Presiding

MOTION TO DISMISS PURSUANT TO § 2-615

Plaintiff wields the gender identity nondiscrimination provisions of the Illinois Human Rights Act ("HRA") as a sword, trying to force access for a male to enter distinctly private female facilities—specifically, a girls' high school locker room—by conflating the categories of sex and gender identity.[1] But the Legislature has spoken directly to this issue by exempting single-sex privacy facilities from the HRA in accord with established public policy and decisions by the Illinois appellate courts. While the HRA will protect a male presenting as female in many scenarios, the Legislature also protected the bodily privacy of adolescent girls in a high school locker room via the exemption. Plaintiff's Complaint fails as a matter of law, and because it

[1] As before, counsel use "sex" in this brief to mean male or female as grounded in reproductive biology. Sex is binary, fixed at conception, and objectively verifiable. Counsel use "gender" consistently with gender identity theory: a malleable, subjectively discerned continuum of genders that range from male to female to something else. This usage is consistent with the plain language of the HRA as demonstrated below, contra the Plaintiff's conflation of the terms.

relies upon conjecture, speculation, and simply wrong statements rather than well-pled facts. Importantly, Plaintiff's attack on the broad statutory protection for distinctly private facilities would impact not just one high school locker room, but every communal sex-specific privacy facility within a place of public accommodation that is otherwise subject to the HRA. Pursuant to §2-615 of the Code of Civil Procedure, Plaintiff's Complaint for Injunctive and Other Relief ("Pl.'s Compl.") should be dismissed because it fails to state a claim under Illinois law, and further because it rests on no more than conclusory allegations.

I. The Complaint must be dismissed because the HRA insulates distinctly private facilities like girls' locker rooms from intrusion by the opposite sex and does not authorize access to distinctly private facilities based upon self-perceptions of gender.

> A motion to dismiss brought under section 2–615 tests the legal sufficiency of a complaint. On review, the inquiry is whether the allegations of the complaint, when construed in the light most favorable to the plaintiff, and taking all well-pleaded facts and all reasonable inferences that may be drawn from those facts as true, are sufficient to establish a cause of action upon which relief may be granted. Because Illinois is a fact-pleading jurisdiction, a plaintiff must allege facts, not mere conclusions, to establish his or her claim as a viable cause of action. A claim should not be dismissed pursuant to section 2–615 unless no set of facts can be proved which would entitle the plaintiff to recover.

Napleton v. Vill. of Hinsdale, 229 Ill. 2d 296, 305 (2008) (internal citations omitted).

Plaintiff's Complaint is grounded in the HRA which in relevant part states "It is a civil rights violation for any person on the basis of unlawful discrimination to: (A) Enjoyment of Facilities, Goods, and Services. Deny or refuse to another the full and equal enjoyment of the facilities, goods, and services of any public place of accommodation . . . ." 775 ILCS 5/5-102. Public school districts are covered by this provision. 775 ILCS 5/5-101(A)(11).

The Human Rights Act is intended to "secure for all individuals within Illinois the freedom from discrimination against any individual because of his or her race, color, religion, sex, national origin, ancestry, age, order of protection status, marital status, physical or mental disability, military status, sexual orientation, pregnancy, or unfavorable discharge from military

service in connection with employment . . . .” 775 ILCS 5/1-102(A). Two of those protected categories are particularly germane to the instant case and were clearly defined by the Legislature:

> (O) Sex. “Sex” means the status of being male or female.
>
> (O-1) Sexual orientation. “Sexual orientation” means actual or perceived heterosexuality, homosexuality, bisexuality, or gender-related identity, whether or not traditionally associated with the person's designated sex at birth. “Sexual orientation” does not include a physical or sexual attraction to a minor by an adult.

775 ILCS5 /1-103.[2]

Such clear definitions within a statute require that courts “must give effect to its plain and ordinary meaning without resort to other aids of statutory construction.” *Murray v. Chicago Youth Ctr*., 224 Ill. 2d 213, 235 (2007) (internal citations omitted). But even if the Court were to turn to an interpretive aid such as standard dictionary definitions for “sex” contemporaneous with the enactment of the HRA, it would find that sex was consistently defined in respect to human reproductive capacity. *See, e.g.*, *Webster’s New World Dict. of the Am. Language* 545 (rev. ed. 1984) (“either of the two divisions of organisms distinguished as male and female,” where male means “of the sex that fertilizes the ovum,” *id.* at 364, and female means “of the sex that bears offspring,” *id.* at 225); *Random House College Dict*. 1206 (rev. ed. 1980) (“either the male or female division of a species, esp. as differentiated with reference to the reproductive functions”); *Webster’s New Collegiate Dict*. 1054 (1979) (“the sum of the structural, functional, and behavioral characteristics of living beings that subserve reproduction by two interacting parents and that distinguish males and females”); *American Heritage Dict*. 1187 (1976) (“the

[2] The original HRA took effect in 1980, but sexual orientation protection was not added until 2005. Bryan P. Cavanaugh, *How Illinois' New Gay Rights Law Affects Employers and Workers*, 94 Ill. B.J. 182, 182–83 (2006).

property or quality by which organisms are classified according to their reproductive functions"); and *Webster's Third New Int'l Dict.* 2081 (1971) ("the sum of the morphological, physiological, and behavioral peculiarities of living beings that subserves biparental reproduction with its concomitant genetic segregation and recombination which underlie most evolutionary change ...").

Note that grounding the definition of sex in our reproductive nature means that one's sex is objectively determined by such factors as genitalia and chromosomes. This is quite different than gender identity, which Plaintiff admits is "a person's deeply felt, inherent sense of being a particular gender (e.g., a girl or female)." Pl.'s Compl. 4-5 ¶ 22. But Plaintiff tells only part of the story, as gender identity is a subjectively discerned, malleable continuum encompassing everything from male to female to something else:

> Other categories of transgender people include androgynous, multigendered, gender nonconforming, third gender, and two-spirit people. Exact definitions of these terms vary from person to person and may change over time but often include a sense of blending or alternating genders. Some people who use these terms to describe themselves see traditional, binary concepts of gender as restrictive.

Am. Psychological Ass'n, *Answers to Your Questions About Transgender People, Gender Identity, and Gender Expression* 2 (3rd ed. 2014), http://bit.ly/2lGcOeR; *see also* Asaf Orr et al., *Schools in Transition: A Guide for Supporting Transgender Students in K-12 Schools* 5, 7 (2015), http://bit.ly/2di0ltr (describing gender identity as falling on a "gender spectrum" and defining "gender identity" as "a personal, deeply-felt sense of being male, female, both or neither"); Randi Ettner, et al., *Principles of Transgender Medicine and Surgery* 43 (2nd ed. 2016) ("Gender identity can be conceptualized as a continuum, a mobius, or patchwork." (internal citations omitted)).

With this in mind, carefully reading Plaintiff's definition of gender identity reveals the

absence of any state-law basis for Plaintiff's claim to access privacy facilities based on perceived gender identity rather than sex. Plaintiff defines gender identity as "a person's deeply felt, inherent sense of being a particular gender (e.g., a girl or female)." Pl.'s Compl. 4-5 ¶ 22. By defining gender identity as a person's "sense," gender identity clearly falls outside the Legislature's definition of sex as a "status of being male or female." 775 ILCS 5/1-103(O) (emphasis added). And the Legislature recognized that gender identity is distinct from—in fact, disassociated from—being male or female when it stated that a given gender identity may exist "whether or not traditionally associated with the person's designated sex at birth." 775 ILCS 5/1-103(O-1). This Legislative distinction between the subjective, malleable continuum of gender identity and the objective binary of male and female is critical, as the District has full authority under the HRA to reserve use of privacy facilities to one sex:

> § 5-103. Exemption. Nothing in this Article shall apply to:
>
> ....
>
> (B) Facilities Distinctly Private. Any facility, as to discrimination based on sex, which is distinctly private in nature such as restrooms, shower rooms, bath houses, health clubs and other similar facilities for which the Department, in its rules and regulations, may grant exemptions based on bona fide considerations of public policy.
>
> ....

775 ILCS 5/5-103.

Keeping boys out of girls' locker rooms is not actionable under the HRA, at all. This principle is unremarkable, as evidenced by myriad Illinois laws and regulations that mandate separate male and female privacy facilities.[3] Moreover, specifically in the school context, Illinois

[3] *See* 410 ILCS 35/15 (West 1992) (Equitable Restrooms Act requiring substantially more female than male restroom facilities per capita for certain public entertainment venues to solve undue waiting for the females to use facilities); Ill. Admin. Code tit. 77, § 890.810 (2014)

courts have upheld school district policies prohibiting school staff from supervising locker rooms reserved to the use of opposite-sex students. *See Zink v. Bd. of Educ. of Chrisman*, 146 Ill. App. 3d 1016, 1021-22 (4th Dist. 1986) (upholding school employment requirement for male teacher to supervise boys' locker rooms); and *McLain v. Bd. of Educ. of Georgetown Cmty. Unit Sch. Dist. No. 3 of Vermilion Cty*., 66 Ill. App. 3d 1024, 1027 (4th Dist. 1978) (upholding school employment requirement for female teacher to supervise girls' locker rooms). Note that these two decisions in 1978 and 1986 closely preceded the enactment of the express privacy facility exemption of the HRA in 1987, via P.A. 85-867, and courts "must presume that, when the legislature uses a term that has a well-settled legal meaning, the legislature intended it to have that settled meaning" in subsequent enactments. *People v. Harris*, 2013 IL App (1st) 110309, ¶ 13.[4] *McClain* and *Zink* are powerful evidences that the General Assembly intended to maintain boys' locker rooms for males, and girls' locker rooms for females when it amended the HRA.

Creating school policies that violate that overarching state public policy by intermingling

("When public restroom facilities are required by this Part [Illinois Plumbing Code], separate facilities for males and females shall be provided."); Ill. Admin. Code tit. 77, § 890.810 (2014) (requiring staffed gas stations to provide separate restrooms for males and females); Ill. Admin. Code tit. 77, § 890 App. A, TBL. B, n.2 (2014) (permitting substitution of urinals for water closets where the number of fixtures was governed by number of occupants, which implicitly recognizes physiological differences between males and females); Ill. Admin. Code tit. 89, § 410.190(n) (2000) (requiring separate bathroom use for males and females in youth emergency shelters); Ill. Admin. Code tit. 89, § 410.190(p) (2000) (requiring separate male and female showers in youth emergency shelters); Ill. Admin. Code tit. 89, § 409.230(b)(14) (requiring separate bathroom use for males and females in youth transitional housing programs); Ill. Admin. Code tit. 89, § 409.230(b)(16) (requiring shower use to be separate for males and females in youth transitional housing programs).

[4] Although the Legislature's intent to exempt privacy facilities from the HRA is clear and unambiguous, even if one were to see a tension between the provisions protecting gender identity versus those protecting sex, the court is obligated to give effect to both. *In re Jarquan B*., 2016 IL App (1st) 161180, ¶ 23 *reh'g denied* (Oct. 18, 2016), *aff'd sub nom. In re JARQUAN B*., 2017 IL 121483, ¶ 23, and the logical dividing line for the two categories is at the privacy facility door.

the sexes in distinctly private facilities—as District 211 has done—has real consequences: In May, 2016, 136 individuals—63 students and 73 parents associated as Students and Parents for Privacy ("Privacy Association")—sued the District because its policy of intermingling the sexes in privacy facilities had led to several incidents where students' bodily privacy was violated, and the bodily privacy of many others was put at ongoing risk. *Students and Parents for Privacy v. U.S. Dep't of Educ*., No. 1:16-cv-04945, 2017 WL 6629520 (N.D. Ill. Dec. 29, 2017). The instant case replicates that privacy violation risk: Plaintiff, a male, already has gained access (albeit with an inconsequential condition[5]) to the Palatine High School girls' locker room and is authorized to enter girls' bathrooms, when at least three minor female student members of Students and Parents for Privacy are currently attending that school and using those facilities. This replicates the access granted to "Student A" in the federal case: a male student, professing to be female, accessed and used the girls' locker room at Fremd High School within District 211 after he agreed to change behind a curtain—and it was that scenario which was an instrumental factor leading the students and parents to file the federal suit. Privacy Association Pl.'s Compl. 15 ¶ 71-19 ¶ 109.

In sum, although the HRA prohibits invidious discrimination based upon gender identity, it expressly authorizes schools to provide restrooms and locker rooms that are restricted to the use of one sex or the other. If access to privacy facilities were to be granted based upon perceived gender identity rather than sex, it would render the Legislature's express exception a

[5] That condition is that the Plaintiff take some extra effort to protect privacy, such as changing in a stall or behind a curtain. Even if accepted and enforced, such a restriction is immaterial to 775 ILCS 5/5-103, which draws the privacy line at the facility door, not wherever a curtain may be hung. Were it otherwise—if privacy in a girls' restroom or locker room resides only within a commode stall—there would be no reason to exclude a male football coach from walking into the girls' locker room to do his business, so long as he stepped inside a stall.

nullity—there would be a male in the girls' locker room. In light of that, District 211 should maintain girls' privacy facilities for strictly female-only use, but even if it does not, no claim arises under the HRA from the District permitting Plaintiff restricted use[6] when it has full legal authority to deny Plaintiff and every male student any use whatsoever of the girls' locker room.

II. The Complaint must be dismissed because it is grounded in conclusory allegations rather than well-pled facts.

Plaintiff alleges but a single claim of discrimination on the basis of gender identity under the HRA. Pl.'s Compl. 1 ¶ 1, 14 ¶ 67. The issue centers on Plaintiff's demand for unrestricted access to the female locker rooms, and Plaintiff tacitly admits that bodily privacy is an issue therein by stating that Plaintiff is "modest about her body and would takes [sic] steps to avoid other students seeing her body in the locker room," *id.* 2 ¶ 7, and that "[l]ike other students, Nova values privacy and would use the locker room to discretely change her own clothes and not observe anyone else's changing habits or bodies." *Id*. ¶ 8.

Plaintiff attempts to deflect the privacy concern, however, by Plaintiff's prefatory allegation that "[s]tudents at Palatine High School changing for P.E. generally do not completely undress for class and take measures to preserve their privacy while changing." *Id.* ¶ 6. But at ¶ 61, Plaintiff admits that the statement in ¶ 6 is based only "on her conversations with other girls" and thus is no more than speculation grounded in hearsay. Nothing within the Complaint provides a factual basis to say that students are not partially or fully exposed to one another while changing in the school locker rooms.

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[6] It is difficult to square Plaintiff's claims of injury from such an arrangement with Plaintiff's admissions that "Nova is modest about her body and would takes [sic] steps to avoid other students seeing her body in the locker room," Pl.'s Compl. ¶ 7, and that "Nova values privacy and would use the locker room to discretely change her own clothes and not observe anyone else's changing habits or bodies." Id. ¶ 8. A reasonable inference from those admissions would be that the District simply offered a tool for the Plaintiff to protect those interests.

Plaintiff further alleges that "privacy concerns[] about allowing transgender students to use locker rooms and restrooms are 'wholly unfounded in practice,'" Pl.'s Compl. ¶ 11, relying upon the Brief of Amici Curiae School Administrators from Thirty-One States and the District of Columbia at 3, 11-16, *Gloucester County School Board v. G.G.*, 2017 WL 930055 (U.S. 2017). But that brief only reflects the views of individual officials who held various positions within individual schools or school districts scattered across the nation, some of whom were retired. *Id.* at *1A-*30A. For Plaintiff's categorical "unfounded" statement to be credited, one must assume that every one of those amici had comprehensive knowledge of every student or parent privacy complaint arising from gender identity policies in the facilities under their purview from the time of policy enactment until amici signed onto the brief in 2017. There is nothing within the brief that provides the assurance that amici had that knowledge, and it cannot be fairly represented as a systematic, comprehensive audit of privacy complaints within the entities purportedly represented by amici.

But even if comprehensive knowledge were assumed, what the brief really presents is a Catch-22 story: it turns out that the schools which adopted gender identity policies also adopted policies that forced students who complained about opposite sex use of their privacy facility to abandon their use of the communal facility and retreat to individual facilities. *Id.* at *17-*21. Thus, privacy complaints were minimized—if not outright suppressed—by amici's policies, and the brief does not support Plaintiff's unqualified statement that privacy concerns are "unfounded" when gender identity policies thrust students of one sex into the opposite sex's privacy facilities.

Furthermore, Plaintiff's counsel, Mr. Knight, is also counsel of record in Privacy Association's federal lawsuit, in which are stated specific instances of Privacy Association

members encountering opposite-sex students within District 211's privacy facilities. Although Plaintiff and Plaintiff's counsel understandably contest the legal implications thereof, given the facts presented in that case, Plaintiff cannot plausibly state that privacy concerns are categorically "unfounded" when the same district that Plaintiff is suing is being sued for privacy violations arising from its gender identity policies.

This is all the more true when the facts in this case so closely parallel Privacy Association's federal lawsuit: a male student has gained girls' restroom access as well as inconsequentially limited access to the girls' locker room, and demands unfettered access thereto. That the Plaintiff must be considered to be male under the HRA is demonstrated by Plaintiff's own admissions: Compare Complaint ¶ 19 (asserting Plaintiff is a "young woman") with ¶ 22 (gender identity is a "deeply felt, inherent sense of being a particular gender") and ¶¶ 20 and 30 (Plaintiff presents as a girl). The statement in ¶ 19 is incorrect under the clear terminology given by the Legislature through the HRA: being male or female is a status. "Feeling" and "sensing" are subjective perceptions, and "presenting" is a behavior, and the Legislature recognized that such manifestations associated with gender identity were distinct (indeed, disassociated) from sex per 775 ILCS 5/1-103(O-1).

Furthermore, Plaintiff admits to being recognized as having male status at birth, which is currently discordant with Plaintiff's professed gender identity, Pl.'s Compl. 4 ¶ 20, but makes no allegation that Plaintiff was born with an intersex condition that might have lent ambiguity to recognizing Plaintiff as male, nor that Plaintiff's male status was erroneously recorded at birth. In sum, while Plaintiff may have protections under the HRA for feeling, sensing, or presenting in a feminine way in areas covered by the public-accommodation rubric, Plaintiff has no affirmative right to enter opposite sex privacy facilities expressly exempted from HRA coverage

by the Legislature and cannot state a claim for such a right under the plain language of the HRA. Certainly, the clash of Plaintiff's self-perceptions of femininity with the objective fact of being male is undoubtedly very difficult for Plaintiff to navigate, but Plaintiff's legal recourse to gain access to opposite sex facilities would be to ask the Legislature, not this Court, to rewrite the HRA.

The claims in ¶¶ 28-29 as to consensus, efficacy, and safety of gender affirmation treatment (conforming the physical body or appearance to perceived gender via drugs, surgery, or adopting some forms of stereotypical behavior) are no more than an opening salvo in what will likely become a battle of experts should this case not be dismissed. These generic statements are simply coloration for the Plaintiff to frame the case, and are not factual on their face.

Much of the ensuing narrative in ¶¶ 30-58 reflects a school system trying to navigate uncertain legal terrain and numerous efforts by the school to affirm Plaintiff's perceptions (¶ 30, allowed to dress, groom and be named in feminine manner; ¶ 31, uses female restrooms; ¶34, gender marker changed), and the District offered (and Plaintiff accepted) waivers from the physical education class which eliminated any need to change clothes. *Id*.¶¶ 57-59. Ultimately the District offered Plaintiff access to the girls' locker room, subject only to Plaintiff changing in a "privacy area." *Id.* ¶ 58. Thus, the ¶ 59 statement, that the "District has refused to let her use the girls' locker room," is false: it is belied by the prior paragraph's admission. But again, the HRA does not compel the District to authorize any male any access whatsoever to female privacy facilities.

Conclusion

Plaintiff's allegation that "no non-transgender student at District 211 was required to use a separate facility to dress for P.E. class from the common locker room used by the other students of the same gender or forced to use a separate changing area within the locker room,"

id. ¶ 62, ironically admits that the District exercised a portion of the statutory authority conveyed by 775 ILCS 5/5-103(B) to protect the privacy of each sex within distinctly private facilities.

The District has full authority under the HRA to exclude the Plaintiff from any access whatsoever to any portion of the girls' privacy facilities based on the Plaintiff's male status and no claim arises when the District has exercised a portion of that legal authority to limit access to a portion of the facility.[7] Plaintiff's own admissions reveal that Plaintiff has the status of male, and no male has an affirmative right under the HRA to enter distinctly private female facilities. Even aside from the clear letter of the HRA, Plaintiff's allegations in respect to necessary elements of Plaintiff's claim, such as Plaintiff's sex and the risk of privacy violations from intermingling sexes within privacy facilities, are not well-pled facts, but mere speculation, coloration, or simply wrong. Plaintiff's Complaint must be dismissed for failure to state a claim.

Respectfully submitted,

/s/Thomas Brejcha
One of Proposed Intervenors' Attorneys

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**Pro hac vice application forthcoming*

[7] In so stating, Intervenors in no way waive any claim arising under the HRA grounded in its protection for sex, and the District's policies which intentionally intermingle the sexes within District privacy facilities.

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT – CHANCERY DIVISION

NOVA MADAY, Plaintiff, v. TOWNSHIP HIGH SCHOOL DISTRICT 211, Defendant, and STUDENTS AND PARENTS FOR PRIVACY, a voluntary unincorporated association, Proposed Intervenor.	)	Case No. 17 CH 15791 Hon. Thomas R. Allen, Judge Presiding

DECLARATION OF THOMAS BREJCHA
IN SUPPORT OF
VERIFIED EMERGENCY PETITION OF STUDENTS AND PARENTS FOR PRIVACY FOR LEAVE TO INTERVENE AS OF RIGHT OR ALTERNATIVELY BY PERMISSION

I, Thomas Brejcha, on oath, state and declare as follows:

1. My name is Thomas Brejcha, and I am counsel for Students and Parents for Privacy and competent to make this Declaration.

2. Within this past week, this firm agreed to become retained to represent the proposed Intervenor in the captioned action.

3. We discovered today that a preliminary injunction hearing has been scheduled for January 19, 2018. Since the Proposed Intervenor would be affected by an injunction order, it wishes to participate in the preliminary injunction proceeding, as well as in subsequent proceedings, and therefore it must secure the Court's resolution of this motion as soon as possible, causing the need for this emergency petition.

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct, except as to matters therein stated to be on information and belief and as to such matters the undersigned certifies as aforesaid that he verily believes the same to be true.

FURTHER DECLARANT SAYETH NAUGHT.

Executed this 11th day of January, 2018 at Chicago, Illinois.

/s/Thomas Brejcha

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