No *Shepard's* Signal™
As of: June 1, 2017 1:21 PM Z

Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.

United States Court of Appeals for the Seventh Circuit

March 29, 2017, Argued; May 30, 2017, Decided

No. 16-3522

Reporter
2017 U.S. App. LEXIS 9362 *

ASHTON WHITAKER, BY HIS MOTHER AND NEXT FRIEND MELISSA WHITAKER, Plaintiff-Appellee, v. KENOSHA UNIFIED SCHOOL DISTRICT NO. 1 BOARD OF EDUCATION, et al., Defendants-Appellants

Prior History: **[*1]** Appeal from the United States District Court for the Eastern District of Wisconsin. No. 2:16-cv-00943-PP — Pamela Pepper, Judge.

Whitaker v. Kenosha Unified Sch. Dist. No. 1, 2016 U.S. Dist. LEXIS 129678 (E.D. Wis., Sept. 22, 2016)

Core Terms

school district, restroom, transgender, bathroom, sex, boys', gender, preliminary injunction, district court, stereotypes, transition, argues, harms, Girl, preliminary injunctive relief, birth certificate, irreparable harm, classification, gender-neutral, privacy, merits, motion to dismiss, denial of motion, biological, facilities, sex-based, likelihood of success, right to privacy, sex-stereotyping, individual's

Case Summary

Overview
HOLDINGS: [1]-In a transgender student's suit challenging a high school's refusal to permit him to use the boys' restroom, where in granting the student's motion for injunctive relief the district court referenced a prior decision denying a motion to dismiss, there was no *28 U.S.C.S. § 1291* appellate jurisdiction because there was no final judgment and referencing the denial decision did not inextricably intertwine the two orders to warrant pendent appellate jurisdiction; [2]-There was irreparable harm because use of the boys' restroom was integral to the student's transition and emotional well-being; [3]-There was no adequate remedy at law and the student was likely to succeed on his Title IX and equal protection claims; [4]-The balance of the hardships favored an injunction particularly because the student had used the bathroom for nearly six months without incident.

Outcome
Decision affirmed.

LexisNexis® Headnotes

Civil Procedure > Appeals > Appellate Jurisdiction > Final Judgment Rule

HN1[] Ordinarily, an order denying a motion to dismiss is not a final judgment and is not appealable. *28 U.S.C.S. § 1291* provides federal appellate courts with jurisdiction over appeals from all final decisions.

Civil Procedure > Appeals > Appellate Jurisdiction > Final Judgment Rule

HN2[] Pendent appellate jurisdiction is a discretionary doctrine. It is also a narrow one, While pendent appellate jurisdiction is a controversial and embattled doctrine, the U.S. Supreme Court recognized a narrow path for its use in Clinton v. Jones, where it found that a collateral order denying presidential immunity was inextricably intertwined with an order that stayed discovery and postponed trial, and was therefore, reviewable on appeal.

Civil Procedure > Appeals > Appellate Jurisdiction > Final Judgment Rule

HN3[] When applicable, the appellate jurisdiction doctrine allows for review of an otherwise unappealable interlocutory

order if it is inextricably intertwined with an appealable one. This requires more than a close link between the two orders. Judicial economy is also an insufficient justification for invoking the doctrine and disregarding the final-judgment rule. Rather, appellate courts must satisfy themselves that based upon the specific facts of this case, it is practically indispensable that they address the merits of the unappealable order in order to resolve the properly-taken appeal. Pendent appellate jurisdiction should not be stretched to appeal normally unappealable interlocutory orders that happen to be related—even closely related—to the appealable order. Such a high threshold is required because a more relaxed approach would allow the doctrine to swallow the final-judgment rule.

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > Appeals > Standards of Review > Questions of Fact & Law

Civil Procedure > Appeals > Standards of Review > Clearly Erroneous Review

HN4[] A preliminary injunction is an extraordinary remedy. It is never awarded as a matter of right. Appellate courts review the grant of a preliminary injunction for the abuse of discretion, reviewing legal issues de novo, while factual findings are reviewed for clear error. Substantial deference is given to the district court's weighing of evidence and balancing of the various equitable factors.

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

Civil Procedure > ... > Injunctions > Grounds for Injunctions > Balance of Hardships

Civil Procedure > ... > Injunctions > Grounds for Injunctions > Irreparable Harm

Civil Procedure > ... > Injunctions > Grounds for Injunctions > Likelihood of Success

Civil Procedure > ... > Injunctions > Grounds for Injunctions > Public Interest

HN5[] A two-step inquiry applies when determining whether preliminary injunctive relief is required. First, the party seeking the preliminary injunction has the burden of making a threshold showing: (1) that he will suffer irreparable harm absent preliminary injunctive relief during the pendency of his action; (2) inadequate remedies at law exist; and (3) he has a reasonable likelihood of success on the merits. If the movant successfully makes this showing, the court must engage in a balancing analysis, to determine whether the balance of harm favors the moving party or whether the harm to other parties or the public sufficiently outweighs the movant's interests.

Civil Procedure > ... > Injunctions > Grounds for Injunctions > Irreparable Harm

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

Civil Procedure > Appeals > Standards of Review > Clearly Erroneous Review

Civil Procedure > Appeals > Standards of Review > Questions of Fact & Law

HN6[] A moving party must demonstrate that he will likely suffer irreparable harm absent obtaining preliminary injunctive relief. This requires more than a mere possibility of harm. It does not, however, require that the harm actually occur before injunctive relief is warranted. Nor does it require that the harm be certain to occur before a court may grant relief on the merits. Rather, harm is considered irreparable if it cannot be prevented or fully rectified by the final judgment after trial. Because a district court's determination regarding irreparable harm is a factual finding, it is reviewed for clear error.

Civil Procedure > Remedies > Injunctions > Grounds for Injunctions

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN7[] A moving party must demonstrate that he has no adequate remedy at law should the preliminary injunction not issue. This does not require that he demonstrate that the remedy be wholly ineffectual. Rather, he must demonstrate that any award would be seriously deficient as compared to the harm suffered.

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

Civil Procedure > ... > Injunctions > Grounds for

Injunctions > Likelihood of Success

HN8[] A party moving for preliminary injunctive relief need not demonstrate a likelihood of absolute success on the merits. Instead, he must only show that his chances to succeed on his claims are better than negligible. This is a low threshold.

Education Law > ... > Gender & Sex Discrimination > Title IX > Scope of Title IX

Education Law > ... > Gender & Sex Discrimination > Title IX > Protected Individuals

HN9[] Title IX of the Education Amendments provides that no person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving Federal financial assistance. 20 U.S.C.S. § 1681(a); 34 C.F.R. § 106.31(a). Covered institutions are, therefore, among other things, prohibited from: (1) providing different aid, benefits, or services; (2) denying aid, benefits, or services; and (3) subjecting any person to separate or different rules, sanctions, or treatment on the basis of sex. 34 C.F.R. § 106.31(b)(2)—(4). Pursuant to the statute's regulations, an institution may provide separate, but comparable, bathroom, shower, and locker facilities. 34 C.F.R. § 106.33.

Labor & Employment Law > ... > Gender & Sex Discrimination > Scope & Definitions > Gender Stereotypes

Labor & Employment Law > Discrimination > Title VII Discrimination > Scope & Definitions

HN10[] Following Price Waterhouse, courts have recognized a cause of action under *Title VII of the Civil Rights Act of 1964, 42 U.S.C.S. § 2000e et seq.*, when an adverse action is taken because of an employee's failure to conform to sex stereotypes.

Labor & Employment Law > Discrimination > Title VII Discrimination > Scope & Definitions

Labor & Employment Law > ... > Gender & Sex Discrimination > Scope & Definitions > Gender Stereotypes

HN11[] Several district courts have found that a transgender plaintiff can state a claim under *Title VII of the Civil Rights Act of 1964, 42 U.S.C.S. § 2000e et seq.*, for sex discrimination on the basis of a sex-stereotyping theory.

Constitutional Law > Equal Protection > Nature & Scope of Protection

Constitutional Law > Equal Protection > Judicial Review > Standards of Review

HN12[] The *Equal Protection Clause of the Fourteenth Amendment* is essentially a direction that all persons similarly situated should be treated alike. Generally, state action is presumed to be lawful and will be upheld if the classification drawn by the statute is rationally related to a legitimate state interest.

Constitutional Law > Equal Protection > Judicial Review > Standards of Review

Constitutional Law > Equal Protection > Gender & Sex

HN13[] The *Equal Protection Clause* rational basis test does not apply when a classification is based upon sex. Rather, a sex-based classification is subject to heightened scrutiny, as sex frequently bears no relation to the ability to perform or contribute to society. When a sex-based classification is used, the burden rests with the state to demonstrate that its proffered justification is exceedingly persuasive. This requires the state to show that the classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives. It is not sufficient to provide a hypothesized or post hoc justification created in response to litigation. Nor may the justification be based upon overbroad generalizations about sex. Instead, the justification must be genuine.

Constitutional Law > Equal Protection > Gender & Sex

HN14[] If a state actor cannot defend a sex-based classification by relying upon overbroad generalizations, it follows that sex-based stereotypes are also insufficient to sustain a classification. All persons, whether transgender or not, are protected from discrimination on the basis of gender stereotype.

Civil Procedure > ... > Injunctions > Grounds for Injunctions > Balance of Hardships

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN15[] Once a moving party has met its burden of establishing the threshold requirements for a preliminary injunction, a court must balance the harms faced by both parties and the public as a whole. This is done on a "sliding scale" measuring the balance of harms against the moving party's likelihood of success. The more likely he is to succeed on the merits, the less the scale must tip in his favor. The converse, however, also is true: the less likely he is to win, the more the balance of harms must weigh in his favor for an injunction to issue. Substantial deference is given to a district court's analysis of the balancing of harms.

Counsel: For ASHTON WHITAKER, by his mother and next friend, Melissa Whitaker, Plaintiff - Appellee: Robert Theine Pledl, Attorney, PLEDL & COHN, Milwaukee, WI; Joseph John Wardenski, Attorney, Sasha M. Samberg-Champion, Attorney, RELMAN, DANE & COLFAX PLLC, Washington, DC; Shawn Thomas Meerkamper, Attorney, Alison Pennington, Attorney, Ilona M. Turner, Attorney, TRANSGENDER LAW CENTER, Oakland, CA.

For KENOSHA UNIFIED SCHOOL DISTRICT NO. 1 BOARD OF EDUCATION, SUE SAVAGLIO-JARVIS, Defendants - Appellants: Ronald S. Stadler, Attorney, MALLERY & ZIMMERMAN, Milwaukee, WI.

For ALLIANCE DEFENDING FREEDOM, Amicus Curiae: Jordan W. Lorence, Attorney, ALLIANCE DEFENDING FREEDOM, Washington, DC; Gary McCaleb, Attorney, Jeremy D. Tedesco, Attorney, ALLIANCE DEFENDING FREEDOM, Scottsdale, AZ.

For SCHOOL ADMINISTRATORS FROM TWENTY-ONE STATES AND THE DISTRICT OF COLUMBIA, Amicus Curiae: Kyle Palazzolo, Attorney, LAMBDA LEGAL DEFENSE & EDUCATION FUND, Chicago, IL.

For FORGE, INC., INDIANAPOLIS CHAPTER OF P-FLAG, INC., GENDERS & SEXUALITIES ALLIANCE NETWORK, GENDER EXPANSIVE KIDS AND **[*2]** COMPANY, Amici Curiae: Julia Renee Lissner, Attorney, AKERMAN LLP, Chicago, IL.

For GAY STRAIGHT ALLIANCE FOR SAFE SCHOOLS, INC., ILLINOIS SAFE SCHOOLS ALLIANCE, INDIANA YOUTH GROUP, INC., GENDER SPECTRUM CHARITABLE FUND, Amici Curiae: Maureen Alger, Attorney, COOLEY GODWARD KRONISH LLP, Palo Alto, CA.

For NATIONAL WOMEN'S LAW CENTER, Amicus Curiae: Charles A. Rothfeld, Attorney, MAYER BROWN LLP, Washington, DC.

For KATHERINE R ALLEN, NADAV ANTEBI-GRUSZKA, M.V. LEE BADGETT, Amici Curiae: Mark E. Haddad, Attorney, SIDLEY AUSTIN LLP, Los Angeles, CA.

Judges: Before WOOD, Chief Judge, and ROVNER and WILLIAMS, Circuit Judges.

Opinion by: WILLIAMS

Opinion

WILLIAMS, *Circuit Judge*. Ashton ("Ash") Whitaker is a 17 year-old high school senior who has what would seem like a simple request: to use the boys' restroom while at school. However, the Defendants, the Kenosha Unified School District and its superintendent, Sue Savaglio, (the "School District") believe that the request is not so simple because Ash[1] is a transgender boy. The School District did not permit Ash to enter the boys' restroom because, it believed, that his mere presence would invade the privacy rights of his male classmates. Ash brought suit, alleging that the **[*3]** School District's unwritten bathroom policy[2] violates *Title IX of the Education Amendments Act of 1972* and the *Fourteenth Amendment's Equal Protection Clause*.

In addition to filing suit, Ash, beginning his senior year, moved for preliminary injunctive relief, seeking an order granting him access to the boys' restrooms. He asserted that the denial of access to the boys' bathroom was causing him harm, as his attempts to avoid using the bathroom exacerbated his vasovagal syncope, a condition that renders Ash susceptible to fainting and/or seizures if dehydrated. He also contended that the denial caused him educational and emotional harm, including suicidal ideations. The School District vigorously objected and moved to dismiss Ash's claims, arguing that Ash could neither state a claim under Title IX nor the *Equal Protection Clause*. The district court denied the motion to dismiss and granted Ash's preliminary injunction motion.

On appeal, the School District argues that we should exercise pendent appellate jurisdiction to review the district court's decision to deny the motion to dismiss. However, we decline this invitation, as the two orders were not inextricably intertwined and we can review the grant of the preliminary injunction without reviewing the denial of the motion to dismiss.

[1] We will refer to the Plaintiff-Appellee as "Ash," rather than by his last name, as this is how he refers to himself throughout his brief.

[2] We will refer to the School District's decision to deny Ash access to the boys' restroom as a "policy," although any such "policy" is unwritten and its exact boundaries are unclear.

The School District also [*4] argues that we should reverse the district court's decision to grant the preliminary injunction for two main reasons. First, it argues that the district court erred in finding that Ash had demonstrated a likelihood of success on the merits because transgender status is neither a protected class under Title IX nor is it entitled to heightened scrutiny. And, because the School District's policy has a rational basis, that is, the need to protect other students' privacy, Ash's claims fail as a matter of law. We reject these arguments because Ash has sufficiently demonstrated a likelihood of success on his Title IX claim under a sex-stereotyping theory. Further, because the policy's classification is based upon sex, he has also demonstrated that heightened scrutiny, and not rational basis, should apply to his Equal Protection Claim. The School District has not provided a genuine and exceedingly persuasive justification for the classification.

Second, the School District argues that the district court erred in finding that the harms to Ash outweighed the harms to the student population and their privacy interests. We disagree. The School District has failed to provide any evidence of how [*5] the preliminary injunction will harm it, or any of its students or parents. The harms identified by the School District are all speculative and based upon conjecture, whereas the harms to Ash are well-documented and supported by the record. As a consequence, we affirm the grant of preliminary injunctive relief.

I. BACKGROUND

Ash Whitaker is a 17 year-old who lives in Kenosha, Wisconsin with his mother, who brought this suit as his "next friend."[3] He is currently a senior at George Nelson Tremper High School, which is in the Kenosha Unified School District. He entered his senior year ranked within the top five percent of his class and is involved in a number of extracurricular activities including the orchestra, theater, tennis, the National Honor Society, and the Astronomical Society. When not in school or participating in these activities, Ash works part-time as an accounting assistant in a medical office.

While Ash's birth certificate designates him as "female," he does not identify as one. Rather, in the spring of 2013, when Ash was in eighth grade, he told his parents that he is transgender and a boy. He began to openly identify as a boy during the 2013-2014 school year, when he entered [*6] Tremper as a freshman. He cut his hair, began to wear more masculine clothing, and began to use the name Ashton and male pronouns. In the fall of 2014, the beginning of his sophomore year, he told his teachers and his classmates that he is a boy and asked them to refer to him as Ashton or Ash and to use male pronouns.

In addition to publicly transitioning, Ash began to see a therapist, who diagnosed him with Gender Dysphoria, which the American Psychiatric Association defines as "a marked incongruence between one's experienced/expressed gender and assigned gender ... ."[4] *Am. Psychiatric Ass'n, Diagnostic & Statistical Manual of Mental Disorders* 452 (5th ed. 2013). In July 2016, under the supervision of an endocrinologist at Children's Hospital of Wisconsin, Ash began hormone replacement therapy. A month later, he filed a petition to legally change his name to Ashton Whitaker, which was granted in September 2016.

For the most part, Ash's transition has been met without hostility and has been accepted by much of the Tremper community. At an orchestra performance in January 2015, for example, he wore a tuxedo like the rest of the boys in the group. His orchestra teacher, classmates, and [*7] the audience accepted this without incident. Unfortunately, the School District has not been as accepting of Ash's requests to use the boys' restrooms.

In the spring of his sophomore year, Ash and his mother met with his guidance counselor on several occasions to request that Ash be permitted to use the boys' restrooms while at school and at school-sponsored events. Ash was later notified that the administration had decided that he could only use the girls' restrooms or a gender-neutral restroom that was in the school's main office, which was quite a distance from his classrooms. Because Ash had publicly transitioned, he believed that using the girls' restrooms would undermine his transition. Additionally, since Ash was the only student who was permitted to use the gender-neutral bathroom in the school's office, he feared that using it would draw further attention to his transition and status as a transgender student at Tremper. As a high schooler, Ash also worried that he might be disciplined if he tried to use the boys' restrooms and that such discipline might hurt his chances of getting into college. For these reasons, Ash restricted his water intake and attempted to avoid using [*8] any restroom at school for the rest of the school year.

Restricting his water intake was problematic for Ash, who has been diagnosed with vasovagal syncope. This condition renders Ash more susceptible to fainting and/or seizures if dehydrated. To avoid triggering the condition, Ash's

[3] Because Ash is a minor without a duly appointed representative, pursuant to Rule 17 of the Federal Rules of Civil Procedure, he may assert these claims only through a "next friend" or guardian ad litem.

[4] We take judicial notice of the Diagnostic and Statistical Manual pursuant to Rule 201 of the Federal Rules of Evidence.

physicians have advised him to drink six to seven bottles of water and a bottle of Gatorade daily. Because Ash restricted his water intake to ensure that he did not have to utilize the restroom at school, he suffered from symptoms of his vasovagal syncope, including fainting and dizziness. He also suffered from stressrelated migraines, depression, and anxiety because of the policy's impact on his transition and what he perceived to be the impossible choice between living as a boy or using the restroom. He even began to contemplate suicide.

In the fall of 2015, Ash began his junior year at Tremper. For six months, he exclusively used the boys' restrooms at school without incident. But, in February 2016, a teacher saw him washing his hands at a sink in the boys' restroom and reported it to the school's administration. In response, Ash's guidance counselor, Debra Tronvig, again told Ash's mother that he was [*9] permitted to only use the girls' restrooms or the gender-neutral bathroom in the school's main office. The next month, Ash and his mother met with Assistant Principal Holly Graf to discuss the school's policy. Like before, Ms. Graf stated that Ash was not permitted to use the boys' restrooms. However, the reason she gave this time was that he was listed as a female in the school's official records and to change those records, the school needed unspecified "legal or medical documentation."

Two letters submitted by Ash's pediatrician, identifying him as a transgender boy and recommending that he be allowed to use male-designated facilities at school were deemed not sufficient to change his designation. Rather, the school maintained that Ash would have to complete a surgical transition ... a procedure that is prohibited for someone under 18 years of age ... to be permitted access to the boys' restroom. Further, not all transgender persons opt to complete a surgical transition, preferring to forgo the significant risks and costs that accompany such procedures. The School District did not give any explanation as to why a surgical transition was necessary. Indeed, the verbal statements made [*10] to Ash's mom about the policy have never been reduced to writing. In fact, the School District has *never* provided any written document that details when the policy went into effect, what the policy is, or how one can change his status under the policy.

Fearing that using the one gender-neutral restroom would single him out and subject him to scrutiny from his classmates and knowing that using the girls' restroom would be in contradiction to his transition, Ash continued to use the boys' restroom for the remainder of his junior year.

This decision was not without a cost. Ash experienced feelings of anxiousness and depression. He once more began to contemplate suicide. Nonetheless, the school's security guards were instructed to monitor's Ash's restroom use to ensure that he used the proper facilities. Because Ash continued to use the boys' restroom, he was removed from class on several occasions to discuss his violation of the school's unwritten policy. His classmates and teachers often asked him about these meetings and why administrators were removing him from class.

In April 2016, the School District provided Ash with the additional option of using two single-user, gender-neutral restrooms. [*11] These locked restrooms were on the opposite side of campus from where his classes were held. The School District provided only one student with the key: Ash. Since the restrooms were not near his classrooms, which caused Ash to miss class time, and because using them further stigmatized him, Ash again avoided using the bathrooms while at school. This only exacerbated his syncope and migraines. In addition, Ash began to fear for his safety as more attention was drawn to his restroom use and transgender status.

Although not part of this appeal, Ash contends that he has also been subjected to other negative actions by the School District, including initially prohibiting him from running for prom king, referring to him with female pronouns, using his birth name, and requiring him to room with female students or alone on school-sponsored trips. Furthermore, Ash learned in May 2016 that school administrators had considered instructing its guidance counselors to distribute bright green wristbands to Ash and other transgender students so that their bathroom usage could be monitored more easily. Throughout this litigation, the School District has denied that it considered implementing the wristband [*12] plan.

A. Proceedings Below

In the spring of 2016, Ash engaged counsel who, in April 2016, sent the School District a letter demanding that it permit him to use the boys' restroom while at school and during school-sponsored events. In response, the School District repeated its policy that Ash was required to use either the girls' restroom or the gender-neutral facilities. On May 12, 2016, Ash filed an administrative complaint with the United States Department of Education's Office for Civil Rights, alleging that this policy violated his rights under Title IX. To pursue the instant litigation, Ash chose to withdraw the complaint without prejudice.

On July 16, 2016, Ash commenced this action and on August 15, he filed an Amended Complaint alleging that the treatment he received at Tremper High School violated Title IX, *20 U.S.C. §1681, et seq.*, and the *Equal Protection Clause of the Fourteenth Amendment.* That same day, Ash, in a motion for preliminary injunction, sought to enjoin the

enforcement of the School District's policy pending the outcome of the litigation. The next day, the School District filed a motion to dismiss and filed its opposition to the preliminary injunction shortly thereafter.

After a hearing on the motion to dismiss, the district court denied **[*13]** the motion. The next day, it heard oral arguments on Ash's motion for preliminary injunction. A few days later, the district court granted the motion in part and enjoined the School District from: (1) denying Ash access to the boys' restroom; (2) enforcing any written or unwritten policy against Ash that would prevent him from using the boys' restroom while on school property or attending school-sponsored events; (3) disciplining Ash for using the boys' restroom while on school property or attending school-sponsored events; and (4) monitoring or surveilling Ash's restroom use in any way. This appeal followed.

In a separate appeal, the School District petitioned this court for permission to file an interlocutory appeal of the district court's denial of its motion to dismiss. Although initially the district court certified the order denying the motion to dismiss for immediate interlocutory appeal pursuant to *28 U.S.C. § 1292(b)*, it revoked that certification when it concluded that it had erred by including the certification language in its initial order. Therefore, we denied the School District's petition for interlocutory review of the motion to dismiss for lack of jurisdiction. *See Kenosha Unified Sch. Dist. No. 1 Bd. of Educ. v. Whitaker, 841 F.3d 730, 731-32 (7th Cir. 2016)* **[*14]** . In the alternative, the School District urged this court to exercise pendent jurisdiction over the order denying the motion to dismiss because the district court had partially granted the preliminary injunction. But since we lacked jurisdiction to consider the petition for interlocutory appeal, we also lacked a proper jurisdictional basis for extending pendent jurisdiction. *Id. at 732*. Therefore, in this appeal, the School District was directed to seek pendent appellate jurisdiction, which it has now done.

II. ANALYSIS

The School District raises two issues on appeal. First, that this court should assert pendent jurisdiction over the district court's decision to deny its motion to dismiss and second, that the district court erred in granting Ash's motion for preliminary injunction. We will address each issue in turn.

A. Pendent Jurisdiction Is Not Appropriate

HN1[↑] Ordinarily, an order denying a motion to dismiss is not a final judgment and is not appealable. *See 28 U.S.C. § 1291* (providing federal appellate courts with jurisdiction over appeals from all final decisions). But, the School District again urges us to assert pendent appellate jurisdiction to consider the denial of the motion to dismiss. We decline **[*15]** the invitation.

HN2[↑] Pendent appellate jurisdiction is a discretionary doctrine. *Jones v. InfoCure Corp., 310 F.3d 529, 537 (7th Cir. 2002)*. It is also a narrow one, *Abelesz v. OTP Bank, 692 F.3d 638, 647 (7th Cir. 2012)*, which the Supreme Court sharply restricted in *Swint v. Chambers County Commission, 514 U.S. 35, 115 S. Ct. 1203, 131 L. Ed. 2d 60 (1995)*. After *Swint*, we noted in *United States v. Board of School Commissioners of the City of Indianapolis, 128 F.3d 507 (7th Cir. 1997)*, that pendent appellate jurisdiction is a "controversial and embattled doctrine." *Id. at 510*. Nonetheless, the Supreme Court recognized a narrow path for its use in *Clinton v. Jones, 520 U.S. 681, 707 n.41, 117 S. Ct. 1636, 137 L. Ed. 2d 945 (1997)*, where it found that a collateral order denying presidential immunity was inextricably intertwined with an order that stayed discovery and postponed trial, and was therefore, reviewable on appeal.

HN3[↑] When applicable, the doctrine allows for review of an "otherwise unappealable interlocutory order if it is inextricably intertwined with an appealable one." *Montano v. City of Chicago, 375 F.3d 593, 599 (7th Cir. 2004)* (quoting *Jones, 310 F.3d at 536*) (internal quotation marks omitted). This requires more than a "close link" between the two orders. *Id. at 600*. Judicial economy is also an insufficient justification for invoking the doctrine and disregarding the final-judgment rule. *McCarter v. Ret. Plan for Dist. Managers of Am. Family Ins. Grp., 540 F.3d 649, 653 (7th Cir. 2008)*. Rather, we must satisfy ourselves that based upon the specific facts of this case, it is "practically indispensable that we address the merits of the unappealable order in order to resolve the properly-taken appeal." *Montano, 375 F.3d at 600* (quoting *United States ex rel. Valders Stone & Marble, Inc. v. C-Way Constr. Co., 909 F.2d 259, 262 (7th Cir. 1990))* (internal quotation marks omitted); *see also Abelesz, 692 F.3d at 647* (" **[*16]** [P]endent appellate jurisdiction should not be stretched to appeal normally unappealable interlocutory orders that happen to be related—even closely related—to the appealable order."). Such a high threshold is required because a more relaxed approach would allow the doctrine to swallow the final-judgment rule. *Montano, 375 F.3d at 599* (citing *Patterson v. Portch, 853 F.2d 1399, 1403 (7th Cir. 1988))*.

As we discuss below, the district court determined that Ash sufficiently demonstrated a likelihood of success on the merits of his claims and that preliminary injunctive relief was warranted. In doing so, the district court referenced its decision to deny the School District's motion to dismiss. The School District contends that this rendered the two decisions inextricably intertwined. Therefore, it reasons that pendent