

No. 17-3113

United States Court of Appeals for the Third Circuit

JOEL DOE, A MINOR, ET AL.,
Plaintiffs-Appellants,

v.

BOYERTOWN AREA SCHOOL DISTRICT,
Defendants-Appellees,

On Appeal from the United States District Court for the
Eastern District of Pennsylvania, Hon. Edward G. Smith
Civil No. 17-1249

**MOTION FOR LEAVE TO FILE AND BRIEF *AMICUS CURIAE*
OF THE FOUNDATION FOR MORAL LAW
IN SUPPORT OF APPELLANTS**

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**MOTION OF FOUNDATION FOR MORAL LAW
FOR LEAVE TO FILE AMICUS BRIEF
IN SUPPORT OF APPELLANTS**

The Foundation for Moral Law (“the Foundation”) (www.morallaw.org) respectfully moves for leave of Court to file the accompanying amicus brief in support of appellants. Rule 29(a)(2), Fed. R. App. P.

The Foundation is a national public-interest organization based in Montgomery, Alabama, dedicated to the strict interpretation of the Constitution as written and intended by its Framers and the right to acknowledge God in the public arena.

The Foundation has an interest in this case because the District Court’s decision not only devalues well-established rights of privacy of constitutional dimension but also legitimizes behavior that is destructive of the well-being of students whose attendance at school is not voluntary. Finally, a careless acceptance of this latest societal excursion into unreality has the potential to interfere with the religious rights of those who accept the Biblical principle that one’s sex is assigned by God. *Genesis* 1:27.

For these reasons, The Foundation for Moral Law requests that the Court grant leave to file the accompanying amicus brief.

Respectfully submitted,

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INTEREST OF AMICUS CURIAE¹

Amicus Curiae Foundation for Moral Law (“the Foundation”), is a national public-interest organization based in Montgomery, Alabama, dedicated to the defense of religious liberty and the strict interpretation of the Constitution as written and intended by its Framers. The Foundation has an interest in this case because the District Court’s decision devalues well-established rights of privacy of constitutional dimension and threatens free exercise rights predicated on the distinction between the sexes. *Genesis* 1:27.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1, Fed. R. App. P., the Foundation hereby discloses that it is a nonprofit corporation and that it has no parent corporations. Because the Foundation is a nonprofit corporation, no corporation holds 10% or more of an ownership interest in the Foundation.

INTRODUCTION AND SUMMARY OF ARGUMENT

The plaintiff in cases about students of one sex using the restroom of the other sex is typically a student who seeks access to the restroom of the other sex. The defendant in such cases is usually a school district that understandably seeks to

¹ All parties have not consented to the filing of this brief. *See* Motion for Leave to File, *supra*. Rule 29(a)(2), Fed. R. App. P. No party or party’s counsel authored this brief in whole or in part, and no party or person other than amicus Foundation for Moral Law contributed money towards its preparation or submission. Rule 29(c)(5), Fed. R. App. P.

maintain the common decencies of life and preserve the modesty and privacy of its students. *See, e.g., G.G. ex rel. Grimm v. Gloucester Cnty. Sch. Bd.*, 822 F. 3d 709 (4th Cir. 2016).

In this case, however, the social revolutionary is the Boyertown Area School District that has violated the privacy rights of both boys and girls by allowing certain confused students freely to access the restrooms of the opposite sex. *See* Plaintiffs’ Opening Brief, at 3-6. The aggrieved students understandably sued to maintain the common decencies of mankind. “Every court has the power to preserve the common decencies of life.” *Johnson v. Johnson*, 201 Ala. 41, 77 So. 335, 338 (1917). Yet the District Court, severely discounting the mental anguish, emotional trauma, and humiliation experienced by the plaintiffs, astonishingly ruled in favor of the school district.

The only way to justify such a gross violation of privacy and decency is to contend that so-called “transgender” students are a new subspecies of mankind entitled to equal-protection rights the same as any other “discrete and insular minority.” *See United States v. Carolene Products Co.*, 304 U.S. 144, 152-153, n. 4 (1938). But that is the fallacy. Although appellants have convincingly demonstrated that the District Court’s decision violates well-established rights of privacy, they have not fully addressed the necessarily antecedent and dispositive fact that transgenderism is a false construct that denies biological reality. This new

manifestation of identity politics rests on the fictional claim that a boy may transform himself into a girl and vice versa.

Offering the Court assistance in exploring this fundamental and conclusive question, this brief demonstrates that the transgender pretense is not only an exercise in unreality, but that its misguided embrace by public schools and courts will inflict untold suffering and misery upon young people by legitimizing a destructive fantasy. Additionally, the free exercise right to respect the Bible's teaching that God created us male and female, *Genesis* 1:27, is endangered by the decision below.

ARGUMENT

I. If schools are required to allow students of one sex as determined at birth to use facilities assigned to the opposite sex, the number of students claiming such rights is likely to increase.

No one knows how many students in the United States reject their birth sex, but the recent focus on such individuals has been accompanied by an increase in reported cases of such behavior. Oakland, California developmental psychologist Diane Ehrensaft says her practice has seen a fourfold increase in the number of gender-questioning youths in recent years.² Bren Fraser, a therapist who works

² Nicholas Weiler, *Transgender Kids: 'Exploding' Number of Children, Parents Seek Clinical Help*, The Mercury News, (June 5, 2015), <https://goo.gl/ZDbEKJ> (last updated Aug. 12, 2016).

with such clients age seven and up, says, “It’s become a specialty for me. ... I’ve seen much more growth in the last two years—even more in the last year.”³

Margaret Wentz, a Canadian newspaper columnist, wrote about the growing prevalence of such behavior: “A condition that used to be vanishingly rare, perhaps one in 10,000 children or less, now seems common. In a random sampling of 6th- to 8th-graders in San Francisco, kids were asked if they identified as male, female or transgendered—1.3 per cent checked off the transgendered box.”⁴ Granted, the increase in youths who openly reject their birth sex does not necessarily mean that the number of youths who experience such urges has increased. In earlier times, youths who felt such impulses were possibly more likely to keep quiet about them.

Starshine Roshell, a California journalist, asks:

Were there always children who felt antsy in their assigned gender — but never safe saying so in a pre-Caitlyn Jenner world? Could the explosion of social awareness be enticing some angsty adolescents to “try out” gender nonconformity as an option they wouldn’t have considered before? And is it insensitive to even ask that?⁵

But it seems very likely that the attention which has recently been focused upon such behavior has caused many young people to muse: “Maybe I’m really a girl in

³ Starshine Roshell, *The Sudden Surge of Transgender Teens: Trying to Understand Why So Many Young People Are Challenging Traditional Identities*, Santa Barbara Independent (Apr. 19, 2016), <https://goo.gl/nnQEiG>.

⁴ Margaret Wentz, *Transgender Kids: Have We Gone Too Far?*, The Globe and Mail (Feb. 15, 2014), <https://goo.gl/x4w5wP>. Please note that the proportion in San Francisco may not be representative of the nation as a whole.

⁵ Roshell, *Sudden Surge*, *supra* n.3.

a boy's body," or the reverse. And many for whom rejection of their birth sex may have been at most a fleeting thought a generation earlier, might now start taking such thoughts very seriously and decide to act on them.

School policies that recognize, sanction, and provide special legal protection for such behaviors, may cause some individuals, who otherwise would not have entertained the idea, to conclude that rejecting one's birth sex is an acceptable lifestyle legally, morally, socially, and medically.⁶ Thus, the District Court's decision, if not reversed, could have the effect of encouraging students to question their own gender identity and to take steps to act on those thoughts.

II. The idea that one's sex can be changed is a myth.

Men cannot become women nor can women become men. They can only pretend to do so. Daily dosing on hormones and disfiguring surgery do not change the reality that sex chromosomes are determined at conception. Females are XX and males are XY. The human egg has an X chromosome and the male contributes either an X or a Y, thus irreversibly defining the sex of the new human being at the instant of conception.

Although the newly conceived human being grows through cell division and specialization, the DNA in the nucleus of every cell in the body contains the same

⁶ Until 2013, the *Diagnostic and Statistical Manual of Mental Disorders* of the American Psychiatric Association classified a desire to be the opposite sex as a "disorder," i.e., a mental illness. In May 2013 the softer term "dysphoria" was adopted.

sex chromosomes as the original cell.⁷ Thus, no person can change his sex but can only mutilate and distort the endowment bestowed at conception. The DNA in a young woman's cells does not change simply because she wears male clothes, daily swallows male hormones, or eventually surgically alters her body. In scientific terminology, superficial changes to the phenotype have no effect on the genotype.

Surgical alteration of one's sexual organs does not and cannot change the basic DNA with which a person was born. "It is physiologically impossible to change a person's sex, since the sex of each individual is encoded in the genes—XX if female, XY if male. Surgery can only create the *appearance* of the other sex."⁸ Dr. George Burou, a surgeon who has performed over 700 sexual reassignment surgeries, stated, "I don't change men into women. I transform male genitals into genitals that have a female aspect. All the rest is in the patient's mind."⁹

This Court should not encourage a delusional and tragic journey into unreality by disconsolate youth who falsely imagine that rejecting their God-given identity will somehow make their existence more bearable. Life is challenging in a fallen

⁷ The human body contains tens of trillions of cells. Rose Eveleth, *There Are 37.2 Trillion Cells in Your Body*, Smithsonian Magazine (Oct. 24, 2013), <https://goo.gl/w3B5sk>. In almost every individual the 37.2 trillion cells are either all XX or all XY. The rare occurrence of genetic oddities merely proves the rule.

⁸ Richard P. Fitzgibbons, M.D., et al., *The Psychopathology of "Sex Reassignment" Surgery*, Nat'l Catholic Bioethics Q. (Apr. 2009), at 118.

⁹ Janice C. Raymond, *The Transsexual Empire* 10 (1979).

world where sin abounds on every side and a lying spirit is the god of this world. *John* 8:44, *2 Corinthians* 4:4. But to imagine that a Frankenstein-style transmogrification into the opposite sex will make life better is a sad delusion. When those who journey down this path find that life is no better on the other side of the hormone bottle, the redoubled anguish prompted by their folly only magnifies the self-loathing that prompted the experiment.

III. Acting on the illusion that a person may change one's sex can bring tragic consequences.

Advocates of the illusion that a person may change one's sex do not want to acknowledge that some who act on those thoughts later have regrets or unpleasant results. They often cite a Swedish study that found that only 2.2 percent of such persons suffered from sex change regret.¹⁰ One commentator observes:

What they are actually measuring is the rate of "legal detransition." They measure what percentage of people who undergo a legal name and gender change then undergo a second legal name and gender change. They don't measure people who have regrets but don't detransition legally, or don't detransition at all. It is also possible to detransition and not regret the original transition.¹¹

The author continues:

Because I transitioned 20 years ago, I know many MTF (male-to-female) transitioners that were in my cohort or even 5-10 years before.

¹⁰ See Cecilia Dhejne, et al., *An Analysis of All Applications for Sex Reassignment Surgery in Sweden, 1960-2010: Prevalence, Incidence, and Regrets*, *Arch. Sex. Behav.* 43(8), May 2014.

¹¹ 'Regret Rates' Are Not the Sole Measure of Outcomes, *ThirdWayTrans.com* (June 29, 2015), <https://goo.gl/ICDyT6>.

What I see is concerning. I am the only one of them that has detransitioned, and most of them would not say they regret their transition and continue to go by feminine pronouns and feminine names. In terms of life outcomes, I would say economically they are mostly doing well. However, socially they are struggling. Most of them are alone. I see a lot of social anxiety, people being unwilling to leave the house. In addition, they still continue to deal with dysphoria and have emotional difficulties.¹²

Other studies agree that the percentage who experience regret is much higher than 2.2%. *The Guardian*, after reviewing one hundred studies of persons who rejected their birth sex, concluded that 20% of such persons regretted their actions, and that many remain severely distressed and even suicidal.¹³ As early as 1979 Dr. Charles Ihlenfeld, who had administered hormone therapy to about 500 such persons, said simply: “There is too much unhappiness among people who have had the surgery. Too many of them end as suicides.”¹⁴

While accepting an ESPY Award for exceptional athletic performance in 2015, Bruce/Caitlyn Jenner told the audience that 41 percent of persons who attempt to become the opposite sex also attempt suicide.¹⁵ Consider other evidence:

- A Swedish study of all 324 persons who had been sex-reassigned between 1973-2003 found that “[p]ersons with transsexualism, after sex-

¹² *Id.*

¹³ Walt Heyer, *Transgender Regret Is Real Even If the Media Tell You Otherwise*, TheFederalist.com (Aug. 19, 2015), <https://goo.gl/JBgdMX>.

¹⁴ *Id.*

¹⁵ *Id.*

reassignment, have considerably higher risks for mortality, suicidal behaviour, and psychiatric morbidity than the general population.”¹⁶

- A 2009 study conducted by the Case Western Reserve University Department of Psychiatry concluded that “90 percent of these diverse [transgendered] patients had at least one other significant form of psychopathology.”¹⁷
- A 2003 Dutch survey of board-certified Dutch psychiatrists concluded that, of 359 patients treated for cross-gender identification, 61 percent had other psychiatric disorders and illnesses, notably personality, mood, dissociative, and psychotic disorders.¹⁸
- In 2013 the University of Louisville conducted a study of 351 individuals who sought to be the opposite sex and found that the rates of depression and anxiety “far surpass the rates of those for the general population.”¹⁹
- The 2015 Report of the U.S. Transgender Survey revealed that 40 percent of survey respondents had attempted suicide during their lifetime—nearly nine times the attempted suicide rate in the general population (4.6 percent).²⁰

These tragic consequences appear to accompany the desire to be the opposite sex, a syndrome formerly classified as a mental disorder by the American Psychiatric Association.

The fact remains: Rejecting one’s birth sex has many undesirable side effects.

Courts and other public schools should carefully consider this reality when

¹⁶ Cecilia Dhejne et al., *Long-Term Follow-Up of Transsexual Persons Undergoing Sex Reassignment Surgery: Cohort Study in Sweden*, PLOS/ONE (Feb. 22, 2011), available at <https://goo.gl/tr4ibw>.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ Sandy E. James et al., *The Report of the 2015 Transgender Survey 4*, National Center for Transgender Equality (2016), available at <https://goo.gl/1JGDxa>.

deciding whether to recognize and affirm a lifestyle that has no constitutional sanction and could result in tragic consequences for many. Of the twenty percent (by some estimates) who regret their excursion into life as the opposite sex, most are intimidated into silence, but some have spoken out. Walt Heyer, who underwent a male-to-female sex-change operation at age 42, became known as Laura Jensen for eight years and then readopted his birth identity. His website is titled SexChangeRegret.com. He speaks regularly and has authored several books including *Gender, Lies and Suicide* (2013); *Paper Genders* (2011); *Perfecting with Love* (2009); and *A Transgender's Faith* (2015). Coming from a different perspective, ten women who halted their attempt to become men published a book about their experiences.²¹

This Court should tread carefully in acknowledging rights that have no basis in the Constitution, common law, or Title IX, and that may encourage behavior that has been demonstrated to be harmful.

IV. The policies ratified by the District Court may endanger the rights of many Americans to free exercise of religion.

Religious liberty is the first right guaranteed by the Bill of Rights to the United States Constitution. It is the foremost right because our relationship to God transcends all human relationships, and because God is the Source of all human

²¹ *Blood and Visions: Womyn Reconciling with Being Female*, Autotomous Womyn's Press (2015), <https://goo.gl/uYgWiY> (spellings are as they appear).

rights. As Justice Douglas stated in *Zorach v. Clauson*, 343 U.S. 306, 313 (1952): “We are a religious people whose institutions presuppose a Supreme Being.” And as he stated for the Court in *Girouard v. United States*, 328 U.S. 61, 68 (1946):

The victory for freedom of thought recorded in our Bill of Rights recognizes that in the domain of conscience there is a moral power higher than the State. Throughout the ages, men have suffered death rather than subordinate their allegiance to God to the authority of the State. Freedom of religion guaranteed by the First Amendment is the product of that struggle.

Nearly 200 years ago, Supreme Court Justice Joseph Story made the same point: “The rights of conscience,” he wrote, “are, indeed, beyond the reach of any human power. They are given by God, and cannot be encroached upon by human authority, without a criminal disobedience of the precepts of natural, as well as of revealed religion.” 3 Joseph Story, *Commentaries on the Constitution of the United States* § 1870 (1833). A right as basic as free exercise of religion should not be subordinated to a so-called right to gender preference. This Court has never recognized a “right” to choose one’s gender, probably because it is not possible to do so. The Constitution together with its amendments confers no such right, and the concept was utterly foreign to the Framers. Sex-change activists have created this “right” out of thin air.

Any conflict between the purported right to gender identity and the God-given right to free exercise of religion expressly guaranteed by the First Amendment must be resolved in favor of free exercise of religion. Americans have historically

believed that God created us male and female (*Genesis* 1:27), commands that marriage is to be between opposite-sex persons only (*Genesis* 2:23-24), forbids same-sex relations (*Leviticus* 18:22; *Romans* 1:24-27), and prohibits both men and women from wearing clothing that pertains to the opposite sex (*Deuteronomy* 22:5). Additionally, one is to practice sexual modesty in the presence of persons of the opposite sex (*1 Timothy* 2:9-10; *Genesis* 3:7, 3:21; *Hosea* 2:9; *Leviticus* 20:17). Not only Christianity but also Islam, Orthodox Judaism, and many other religions hold these beliefs as well some who profess no religion. The monotheistic faiths teach that sexual identify is fixed by God at conception (“male and female created he them,” *Genesis* 5:2) and cannot be changed by surgery, hormones, or a decision to identify with the opposite sex.

Allowing students to self-identify as the opposite sex and thus to use restrooms, dressing rooms, lockers, and other facilities assigned to the opposite sex violates the free exercise rights of students who have religious objections to sharing facilities in that manner. Teachers or school staff who believe that such policies encourage sexual immodesty that may lead to sexual promiscuity may consider it a violation of their religious beliefs to be forced to assign a biological boy to a girls’ restroom or locker room.

Teachers or school staff who believe gender identity is fixed by God at birth may consider it a violation of their religious beliefs if forced to identify as female a

student whom God has created male or if forced to address a child who was born female by a male name. An enactment of the New York City Commission on Human Rights now forbids addressing people by anything but their pronoun of choice—under penalty of law.²² Such laws, which result from the creation of novel rights to redefine one’s sex, violate rights of religious speech and practice.

In the context of the invention of a right to same-sex marriage, Justice Samuel Alito uttered a warning that is also relevant to the growing pressure for recognition of a right to present as the opposite sex: “I assume that those who cling to old beliefs will be able to whisper their thoughts in the recesses of their homes, but if they repeat those views in public, they will risk being labeled as bigots and treated as such by governments, employers, and schools.” *Obergefell v. Hodges*, 135 S. Ct. 2584, 2642-43 (2015) (Alito, J., dissenting).

By contradicting the teaching of their faith and in a host of other ways, the policies adopted by the defendants and ratified by the District Court may force people to violate their religious beliefs. As Justice Clarence Thomas recently warned, recognition of new rights that have no basis in the Constitution and offend basic religious precepts creates an inevitable conflict between those new forms of legal compulsion and the religious beliefs they contradict. *Obergefell*, 135 S. Ct. at

²² See Eugene Volokh, *You Can Be Fined for Not Calling People ‘Ze’ or ‘Hir,’ If That’s the Pronoun They Demand That You Use*, Washington Post (May 17, 2016), <https://goo.gl/hhdgtk>.

2638 (Thomas, J., dissenting). Again, a conflict between the free exercise of religion as granted by God and guaranteed by the First Amendment and the asserted right to be treated as the opposite sex in all places and circumstances, must be resolved in favor of religious liberty.

CONCLUSION

The judgment of the District Court should be reversed.

Respectfully submitted,

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**CERTIFICATION OF BAR MEMBERSHIP,
ELECTRONIC FILING, AND WORD COUNT**

I hereby certify the following:

1. I am a member in good standing of the Bar of the United States Court of Appeals for the Third Circuit.
2. The text of the electronic Brief filed by ECF and the text of the hard copies filed or to be filed with the Court are identical. The electronic copy of the Brief has been scanned for viruses using McAfee Security Scan Plus virus protection software.
3. This brief complies with the type-volume limitation of Rule 32(a)(7)(B), Fed. R. App. P., because it contains 2,942 words, excluding those parts of the brief exempted by Rule 32(a)(7)(B)(iii), Fed. R. App. P.
4. This brief complies with the typeface requirements of Rule 32(a)(5), Fed. R. App. P., and the type style requirements of Rule 32(a)(6), Fed. R. App. P., because it was prepared in Microsoft Word using Times New Roman 14-point type.

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CERTIFICATE OF SERVICE

I certify that on the 20th day of November, 2017, I filed the foregoing document with the Clerk of the Court using the CM/ECF system that will automatically serve electronic copies upon all counsel of record.

/s/ Matthew J. Clark
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