

**UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

Case No. 17-3113

JOEL DOE, a minor; by and through his Guardians JOHN DOE and JANE DOE; MARY SMITH; JACK JONES, a minor; by and through his Parents JOHN JONES and JANE JONES; and MACY ROE,

Appellants

v.

BOYERTOWN AREA SCHOOL DISTRICT; DR. BRETT COOPER, in his official capacity as Principal*; DR. E. WAYNE FOLEY, in his official capacity as Assistant Principal*; DAVID KREM, Acting Superintendent*,

Appellees

and

PENNSYLVANIA YOUTH CONGRESS FOUNDATION,

Appellee-Intervenor

**OPPOSITION TO PROPOSED *AMICI* SCHOOL
ADMINISTRATORS FROM THIRTY STATES AND THE DISTRICT
OF COLUMBIA MOTIONS FOR LEAVE TO FILE *AMICI CURIAE*
BRIEF AND APPENDIX**

APPEAL FROM THE ORDER DATED AUGUST 25TH, 2017 OF THE
UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT
OF PENNSYLVANIA AT DOCKET NO. 5:17-CV-01249-EGS DENYING
APPELLANTS' MOTION FOR PRELIMINARY INJUNCTION

CATHY R. GORDON, PA 56728
JACOB KRATT, PA 316920
LITCHFIELD CAVO LLP
420 Fort Duquesne Blvd., Suite 600
Pittsburgh, PA 15222

RANDALL L. WENGER, PA 86537
JEREMY L. SAMEK, PA 205060
INDEPENDENCE LAW CENTER
23 North Front St.
Harrisburg, PA 17101

412-291-8246
412-586-4512 Fax
gordonc@litchfieldcavo.com
kratt@litchfieldcavo.com

KELLIE FIEDOREK, DC 1015807 FL
74350
CHRISTIANA HOLCOMB, CA 277427
ALLIANCE DEFENDING FREEDOM
440 First St. NW, Suite 600
Washington, DC 20001
(202) 393-8690
kfiedorek@ADFlegal.org
cholcomb@ADFlegal.org

(717) 657-4990
(717) 545-8107 Fax
rwenger@indlawcenter.org
jsamek@indlawcenter.org

GARY S. MCCALED, AZ 018848
ALLIANCE DEFENDING FREEDOM
15100 N. 90th St.
Scottsdale, AZ 85260
(480) 444-0020
(480) 444-0028 Fax
gmccaleb@ADFlegal.org

**The District Court dismissed the individual Defendants/Appellees from the case on November 7, 2017, pursuant to agreement of the parties.*

INTRODUCTION

While the court has broad discretion to grant motions for leave to file *amicus* briefs, the Motions to file the *Amici Curiae* Brief and Appendix of the School Administrators from Thirty States and the District of Columbia (“proposed *amici*”) should be denied.

Proposed *amici* have enforced policies that obligate schoolchildren to use restrooms and locker rooms and to share accommodations on extended school trips with members of the opposite sex,¹ or to abandon the multi-user privacy facilities altogether to avoid their bodily privacy being violated. The Proposed Brief and Appendix claim it is “unfounded” to suppose that any privacy issues arose in the wake of such policies. Such assertions are grounded only in personal anecdotes of officials who failed to demonstrate that they have the comprehensive knowledge necessary to support their assertions. Furthermore, many of the proposed *amici* enforced gender identity policies that replaced sex with gender identity and suppressed or discounted dissent, especially dissent directed to administrators who were the key individuals pushing for the change.

¹ Many of the accommodations offered to students of one sex based on their “sincerely held, core gender identity” with the opposite sex, *see* Proposed App. at 18, are not in dispute as they do not infringe on the rights of any other student. However, accommodating anyone’s beliefs, even those that are sincerely held, by permitting them to use privacy facilities with members of the opposite sex is an improper and illegal accommodation.

And while proposed *amici* proclaim that they “recognize that all students deserve the equal respect of, and treatment by, their educators, those same educators repeatedly paint dissenting students as racist bigots. Such gratuitous attacks on opponents of their sexual theory have been rejected by the Chief Justice of the United States Supreme Court, and should be rejected here. *See Obergefell v. Hodges*, 135 S. Ct. 2584, 2626 (2015) (Roberts, C.J., dissenting) (“It is one thing for the majority to conclude that the Constitution protects a right to same-sex marriage; it is something else to portray everyone who does not share the majority’s ‘better informed understanding’ as bigoted.”).

Furthermore, even if proposed *amici* could demonstrate the necessary comprehensive knowledge of complaints regarding privacy facilities under new gender identity policies, the reality is that school officials may provide testimony that is inaccurate or simply wrong. The proposed brief should be denied because it lacks foundation and reliability for the position asserted. Finally, the Appendix operates as additional factual assertions and argument, thus violating the applicable page and word count, and should be rejected for that reason alone.

ARGUMENT

I. The Administrators Cannot Have Comprehensive Knowledge They Claim.

The Proposed *amici* broadly claim that no actual problems whatsoever materialized in their schools consequent to adopting gender identity affirmation policies, Prop. Br. 3, yet *amici* are only individual officials who served (and some are now retired) for a period of time in various schools or districts—and make no effort to demonstrate that they had personal, comprehensive knowledge of privacy facility or gender identity policy complaints sufficient to support their global claims of trouble-free implementation and enforcement of such policies.

Proposed *amici* claim in their experience:

- That “none of those fears and concerns [related to privacy violations] has materialized in the form of actual problems in their schools,” Prop. Br. at 3;
- That for “extended field trips, students share accommodations in accordance with their gender identity. These policies and practices have functioned smoothly and without disruption to students’ lives,” Prop. Br. at 5; and
- That in the instant case, Appellants’ concerns about constitutional and statutory violations are “unfounded,” Prop. Br. at 6.

Proposed *amici* join the Appellees in rejecting the idea that privacy is violated by a person of the opposite sex using restrooms, locker rooms, and sharing overnight accommodations on school trips as long as the person of the opposite sex

has a strong belief about their gender identity. Prop. Br. at 3. At bottom, proposed *amici* reason that because privacy cannot be violated when a transgender boy uses a male privacy facility, or a transgender girl uses a female facility, no problems could materialize. But such assertions are not claims that problems have not occurred, they are claims that the proposed *amici* believe problems cannot arise based on their asserted premise, and such is not helpful to this court.

Moreover, if the proposed *amici*'s categorical "unfounded" statement is 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. 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*. Indeed, some *amici* signed on to the brief but were not even interviewed, Prop. Br. at 2, so there is absolutely no information as to what they knew, or did not know, about complaints in their respective schools or districts.

Although the proposed *amici* understandably contest the legal implications of this case, given the facts presented in this case, they cannot plausibly state that privacy concerns are categorically "unfounded" when they failed to lay a

foundation for the knowledge they claim—and when Boyertown is being sued for privacy violations arising from its policies resulting in Joel Doe’s, Mary Smith’s, and Jack Jones’ encounter with members of the opposite sex in privacy facilities, as are several other districts across the United States.

II. The Proposed Brief and Appendix are Unreliable.

Even if comprehensive knowledge were assumed when it certainly was not proven, 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. Proposed Br. at 21.² Thus, privacy complaints from dissenting students were deflected—if not outright suppressed—by proposed *amici*’s policies, and the brief does not support their unqualified statement that privacy concerns are “unfounded” when gender identity policies thrust students of one sex into the other sex’s privacy facilities.

² Indeed, rather than treat students as having a legitimate interest in privacy from the opposite sex, *amici* instead institutionalized the unconstitutional conditions doctrine. Demanding the students choose to either abandon a facility legally designated by state and federal law to protect their right to bodily privacy, or suffer the violation thereof by refusing to abandon the facility’s use, violates the unconstitutional conditions doctrine. See, Appellants’ Br. at 24-25, 45; Appellants’ Reply Br. at 19-20.

III. The Proposed *Amici* Claim to Respect All Students While Deeming Dissenting Students as Tantamount to Racists.

The proposed *amici* assure the reader that they “are respectful of the needs and concerns of all of their students.” But that respect evidently does not extend to dissenting students of one sex who simply want to use their privacy facilities without the presence of the other sex. Mr. Bourgeois demonstrated this dubious “respect” by analogizing students who object to gender identity policies—such as a student who objects to disrobing with a member of the opposite sex in a locker room, or a female student dealing with her period while a male student occupies the adjacent stall in the girls’ room—by analogizing such students to *racists*:

[W]e’re not going to tell the transgender student they can’t go where they’re comfortable. I can still remember the remnants of white people being uncomfortable with black people being in same locker rooms and restrooms, so it’s not about whether everyone is “comfortable.” Just because some people were uncomfortable didn’t mean you treated people as second-class citizens.

Proposed Br. at 21. Mr. Bourgeois was joined by Arthur DeBenedetto, who was equally blunt: “The outcry [is] similar to the arguments put forth by those who were faced with black students in white schools.” *Id.*

First, such pejorative framing of very legitimate objections—such as raised by the Appellants in this case—is beyond the pale of vigorous advocacy. At a minimum, if the proposed brief is accepted, those passages (and any similar

passages in cited interviews) must be stricken as scandalous and immaterial to the issues in this case.

Second, this demonstrates the barriers that a dissenting student faces: their objections are likely not to be met with an open ear and desire to understand, but by being consigned to the realm of racism. This telling admission by *amici* as to how they view dissenters further demonstrates the unreliability of the data proffered to prove that problems resulting from separating privacy facilities based on beliefs about gender identity rather than sex are “unfounded.”

The administrators’ accusation that people who are uncomfortable using privacy facilities with the opposite sex are the equivalent of racists is not only wrong,³ but the Administrators themselves, by virtue of the policies they claimed to enact, are segregating privacy facilities on an impermissible basis.⁴

³ Where sex based distinctions exist, such distinctions are only “justified by an important governmental interest in recognizing demonstrated differences between males and females.” *Faulkner v. Jones*, 10 F.3d 226, 231 (4th Cir. 1993), *citing* *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982); *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973). We recognize “society’s undisputed approval of separate public restrooms for men and women based on privacy concerns. The need for privacy justifies separation. . . .” *Faulkner v. Jones*, 10 F.3d at 232. That is why “same-sex restrooms [and] dressing rooms” are allowed “to accommodate privacy needs” and why “white only rooms,” which have no basis in bodily privacy, are illegal. *Chaney v. Plainfield Healthcare Ctr.*, 612 F.3d 908, 913 (7th Cir. 2010). Mary Smith, an African American herself, finds it offensive to compare sex based privacy facilities with racism. *See* J.A. 293-94 (7-17-17 Tr.).

⁴ When it comes to personal facility use, the demonstrated anatomical differences in the two binary sexes and the separating of privacy facilities on those differences,

Finally, the proposed brief should be denied as unreliable because, as the facts in this case show, even reasonably contemporary memories of school officials about problems arising from separating privacy facilities based on beliefs about gender identity rather than sex may prove to simply be false.

For example, Principal Foley attempted to coerce Joel Doe and other classmates to disregard their bodily privacy and to keep using the locker room with the female students. When the directly affected students confronted the Principal about their concerns—including whether these boys could be kept separate from girls—Mr. Foley told Joel Doe and several of his peers that they “just needed to tolerate it” and “make it as natural as they possibly could.” *See* J.A. 38 (Op. ¶ 123), J.A. 2008-15 (Audio Tr.), J.A. 325-328, 350, 360 (7-17-17 Tr.). Dr. Foley denied under oath that he was asked whether there was a way to separate the boys

is the premier example of when intermediate scrutiny is easily met. *See, Faulkner*, 10 F.3d at 232. However, “intermediate scrutiny will reject regulations based on stereotypical and generalized conceptions about the differences between males and females.” *Id.* We cannot separate privacy facilities based on irrelevant characteristics like race, who we are attracted to, what we wear, how many stereotypes about the opposite sex or gender roles we adopt or do not adopt. Nor do we do so on the basis of what we believe about things like where we fall on a gender spectrum or continuum. To do so would not meet intermediate scrutiny and violates the Equal Protection Clause. Separation on those basis has no relation to the government interest in providing spaces where people can enter a state of undress without members of the opposite sex present. But the School Administrators did just that by segregating privacy facilities on irrelevant characteristics, based entirely on some students’ feelings and desire to adopt stereotypes associated with the opposite sex and to live their lives based on their deeply held identification with societies constructs about the opposite sex.

from the situation, and also denied telling the students to “tolerate it” and “make it as natural as they possibly could.” *See* J.A. 914-15 (Foley Dep.). But then an audio transcript of that meeting was produced, directly contradicting this sworn testimony, *see* J.A. 2010-14 (Audio Tr.), and confirming Joel Doe’s account of the meeting. Given the willingness of proposed *amici* to categorize objecting students as racists, and this evidence of a school official misremembering what was a rather memorable meeting about a most unusual topic, one must approach the reliability of so many individual memories with a very high degree of skepticism. And in sum, aggregating what amount to officials’ anecdotes falls far short of the comprehensive knowledge that would be needed to justify the dogmatic denials of problems by proposed *amici*.

IV. The Solution to the “Problems” that the School Administrators Allege to Solve are Violations of the Law.

The Administrators’ argue that for “transgender students to use sex-specific facilities that do not correspond to their gender, [would be a] situation that only creates more problems while solving none.” Proposed Br. at 3. But regulating the use of privacy facilities on the basis of stereotypical masculine or feminine appearances rather than sex, is a classification based on sex stereotypes, and treads on dangerous ground. A person who is transgender, an effeminate gay person who is not transgender, or a person who is gender neutral may all dress in similar stereotypical clothing, which *amici* implies would be a problem, but their sex is the

only relevant and permissible criteria. Against that, as explained in footnote 4, *supra*, and in Appellant’s principal brief and reply brief, *amici’s* interest in segregating facilities based on the sincerely held beliefs about the nature of gender does not comport with statutory and constitutional privacy interests, engages in sex stereotyping discrimination in violation of *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989),⁵ and violates Equal Protection.

V. The Appendix Asserts Facts and Legal Argument, Which Violates the Limit on Length for *Amicus* Briefs.

Fed R. App. P. 29(a)(5) requires that *amicus* briefs be no more than half the size of the principal briefs. An appendix should not be used as a clever instrument to get around the page and word limitations. All other parties are subject to page limits. The appendix is simply a method to disregard and bypass those restrictions that even the parties are subject to, and should be denied for that reason alone. Indeed, the Proposed Appendix provides 26 pages of additional text. And more tellingly, even with an additional 26 pages to recite *amici’s curriculum vitae*, there is no evidence whatsoever that the *amici* have the comprehensive knowledge of privacy facility complaints at their respective facilities to support their dogmatic

⁵ Maintaining separate privacy facilities on the basis of sex, on the other hand, does not engage in stereotyping discrimination. *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1224 (10th Cir. 2007) (“Use of a restroom designated for the opposite sex does not constitute a mere failure to conform to sex stereotypes.”).

claims about the complete lack of complaints or disturbances on their respective campuses.

CONCLUSION

For the foregoing reasons, this Court should deny the Administrator's Motion for leave to file an *amici* brief and appendix.

Respectfully submitted February 2, 2018.

By: /s/ Randall L. Wenger

CATHY R. GORDON, PA 56728
JACOB KRATT, PA 316920
LITCHFIELD CAVO LLP
420 Fort Duquesne Blvd., Suite 600
Pittsburgh, PA 15222
412-291-8246
gordonc@litchfieldcavo.com
kratt@litchfieldcavo.com

KELLIE FIEDOREK, DC 1015807 FL
74350
CHRISTIANA HOLCOMB, CA 277427
ALLIANCE DEFENDING FREEDOM
440 First St. NW, Suite 600
Washington, DC 20001
(202) 393-8690
kfiedorek@ADFlegal.org
cholcomb@ADFlegal.org

RANDALL L. WENGER, PA 86537
JEREMY L. SAMEK, PA 205060
INDEPENDENCE LAW CENTER
23 North Front St.
Harrisburg, PA 17101
(717) 657-4990
(717) 545-8107 Fax
rwenger@indlawcenter.org
jsamek@indlawcenter.org

GARY S. MCCALED, AZ 018848
ALLIANCE DEFENDING FREEDOM
15100 N. 90th St.
Scottsdale, AZ 85260
(480) 444-0020
gmccaleb@ADFlegal.org

Attorneys for Appellants

CERTIFICATION OF BAR MEMBERSHIP,
ELECTRONIC FILING AND WORD COUNT

I hereby certify that I am a member in good standing of the Bar of the United States Court of Appeals for the Third Circuit.

The electronic copy of the response has been scanned for viruses using Trend Micro Virus Protection.

I further certify that this response complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because it contains 2,579 words as calculated by the word processing program used in the preparation of this brief, excluding the parts of the response exempted by Fed. R. App. P. 27(a)(2)(B).

I further certify that this brief complies with the typeface requirements of Fed. R. App. P. (32)(a)(5) and type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14 point Times New Roman font.

/s/ Randall L. Wenger

RANDALL L. WENGER, PA 86537

INDEPENDENCE LAW CENTER

23 North Front St.

Harrisburg, PA 17101

(717) 657-4990

(717) 545-8107 Fax

rwenger@indlawcenter.org

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on February 2, 2018, the foregoing was filed electronically and served on the other parties via the court's ECF system.

/s/ Randall L. Wenger

Randall L. Wenger

INDEPENDENCE LAW CENTER

23 North Front St.

Harrisburg, PA 17101

rwenger@indlawcenter.org