

Case No. 17-3113

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

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

**AMICUS CURIAE BRIEF ON BEHALF OF WOMEN'S LIBERATION
FRONT IN SUPPORT OF APPELLANTS' PETITION FOR REHEARING
EN BANC**

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

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

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, counsel for *amicus* certify that (1) *amicus* does not have any parent corporations, and (2) no publicly held companies hold 10% or more of the stock or ownership interest in *amicus*.

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INTERESTS OF AMICUS CURIAE

Amicus is the Women’s Liberation Front (“WoLF”), an organization of radical feminists dedicated to the liberation of women by ending male violence, regaining reproductive sovereignty, preserving female-only spaces, and abolishing gender. WoLF has nearly 500 members who live, work, and attend public schools across the United States, including in Pennsylvania.

WoLF’s interest in this case stems from its interest in protecting the safety and privacy of women and girls. WoLF previously challenged the May 13, 2016, Guidance issued by the Obama Administration that expanded the application of the “sex-means-gender identity” doctrine to all sex-segregated spaces at Title IX schools (*Women’s Liberation Front v. U.S. Department of Justice et al.*, No. 1:16-cv-00915 (D.N.M. August 11, 2016)). WoLF also submitted an *amicus* brief in the United States Supreme Court in the case of *Gloucester County School Bd. v. G.G.*, U.S., 137 S. Ct. 1239 (2017) (mem.) (vacating *G.G. v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709 (4th Cir. 2016), and remanding). WoLF seeks to ensure that the Boyertown Area School District gives effect to the sex-based protections that the U.S. Department of Education established in its implementing regulations.

STATEMENT OF AUTHORSHIP

Pursuant to Federal Rule of Appellate Procedure 29.4 this confirms that this Brief was not authored in whole or in part by counsel for a party, that no party or counsel for a party contributed money that was intended to fund preparing or submitting the Brief and no person, other than the amicus curiae, its members or its counsel, contributed money that was intended to fund preparing or submitting the Brief.

SUMMARY OF ARGUMENT

Women and girls have the right to spaces that are free of men and boys, particularly in situations where they are required to be partially-clothed. This is well-established under federal law, as Title IX’s implementing regulations allow Title IX recipients to provide separate toilet, locker room, and shower facilities on the basis of sex, provided that such facilities are comparable.¹ Boyertown Area School District receives Title IX funding, and thus has the legal ability under federal law to create distinct, sex-segregated facilities on the basis of sex.

Sex and “gender identity” (or “gender-related identity”) are distinct concepts. Sex refers to the state of being either male or female.² In contrast, “gender” and “gender identity” refer to nothing more than the degree to which one embraces or rejects stereotypical roles, personality, or behavioral traits, and

¹ See 34 C.F.R. § 106.33.

² Despite the Panel’s suggestion during oral argument that the words “sex” and “opposite sex” are confusing, the Third Circuit knows perfectly well what the word “sex” means. See, e.g., *Doe v. Mercy Catholic Medical Center*, 850 F.3d 545, 552 (2017) (“We start, of course, with Title IX’s language, *North Haven Board of Education v. Bell* . . . , which says, ‘No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any *education program or activity* receiving Federal financial assistance,’ 20 U.S.C. § 1681(a)” (emphasis in original)). The Supreme Court is also well aware, as evidenced by the landmark decision *Obergefell v. Hodges*, in which the Court used the phrase “same-sex” a total of 165 times throughout the Syllabus and the various Opinions. *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

clothing fashions that are socially imposed on men and women. There is no credible support for the argument that “gender identity” is innate, has a supposed “biological basis,” or that every human being has a “gender identity” that is somehow unconnected to their sex. The Panel acknowledges as much when it states that “[a] person’s gender identity is their subjective, deep-core sense of self as being a particular gender.”³ “Gender identity” may be a sincerely-held belief system, but the Panel provides no basis in law for elevating such beliefs over female students’ material and legally-protected needs for privacy and bodily-integrity.

We urge the Court to grant Appellants’ Petition for a Rehearing *En Banc*.

ARGUMENT

I. THE PANEL’S DECISION IS ILLOGICAL, RELIES ON CONSIDERATIONS THAT ARE IRRELEVANT TO THE QUESTION OF SEX DISCRIMINATION, AND CREATES AN INCOHERENT LEGAL CATEGORY OF PERSONS BASED SOLELY ON SELF-IDENTIFICATION AND BELIEF.

The Panel’s ruling rests on the extraordinary claim that a male person who claims to “feel like” a female person must automatically be given access to a host of rights and spaces that were hard-won by women and girls. As an initial matter, the notion that women and girls “identify” with a set of sex-based stereotypes or ways of thinking is sexist on its face. Further, while the Panel asserts that

³ Op. at 4.

“transgender individuals may experience ‘gender dysphoria,’”⁴ it also defines “transgender” according to ineffable, unverifiable, subjective beliefs, making all the medical evidence cited by the Panel irrelevant. In other words, this is not a case about discrimination against people who have been diagnosed as having “gender dysphoria;” it is a case about people who – for any reason or no reason at all – claim to identify as the opposite sex.

Even if the Panel’s definition of “transgender” required a formal diagnosis, subjective distress has never previously been recognized as a basis for granting or denying civil rights protections under the law. Yet the Panel’s ruling erases single-sex protections based on the self-reported propensity of an ill-defined class of individuals to threaten or engage in self-harm.⁵ No law justifies or requires this result.

Moreover, this is misleading and manipulative. There are many groups of individuals with high-levels of self-reported attempts or completed suicide,⁶ while,

⁴ Op. at 5.

⁵ Op. at 5-6, 15.

⁶ See, e.g., Gary Barker, *Why Do So Many Men Die by Suicide?*, Slate (June 28, 2018), <https://amp.slate.com/human-interest/2018/06/are-we-socializing-men-to-die-by-suicide.html?>; Jennifer Wright, *Why a Pro-Life World Has a Lot of Dead Women in it*, Harper’s Bazaar (June 28, 2018), <https://www.harpersbazaar.com/culture/features/amp10033320/pro-life-abortion/>; Irina Ivanova, *Farmers in America are facing an economic and mental health crisis*, Money Watch (June 29, 2018), <https://www.cbsnews.com/news/american-farmers-rising-suicide-rates-plummeting-incomes/>; Rand Corporation, *Invisible Wounds of War* (2008), <https://www.rand.org/pubs/monographs/MG720.html>.

conversely, some groups that have historically been subject to sex-based and race-based discrimination exhibit very low rates of suicide and self-harm. Indeed, if oppression were determined by suicide rates, white men would be roughly three times as oppressed as Black, Hispanic, or Asian Pacific Islander individuals in the U.S., even more so for white men living in Montana.⁷ The court further recognizes in its ruling the need to be concerned about the mental health and wellness not only of students identifying as transgender, but of lesbian, gay, and bisexual individuals.⁸ If the law cannot recognize sex, then it cannot recognize anyone's sexual orientation, just as the category of "cisgender" forbids the law to recognize any compelling interest in protecting the sex-based rights of women and girls.

II. "WOMEN AND GIRLS" IS A MEANINGFUL LEGAL CATEGORY OF PEOPLE, WORTHY OF CIVIL RIGHTS PROTECTION, SAFETY, AND PRIVACY, AS CONGRESS INTENDED IN ENACTING TITLE IX.

Sex and "gender identity" (or "gender-related identity") are distinct concepts. The word "sex" has meaning – specifically, the distinction between male and female.⁹ The words "male" and "female" also have meaning. "Male" means "an individual of the sex that is typically capable of producing small, usually

⁷ Suicide Prevention Resource Center, *Racial and Ethnic Disparities*, <https://www.sprc.org/racial-ethnic-disparities> (last visited July 5, 2018); American Found. for Suicide Prevention, *State Fact Sheet for Montana*, <https://afsp.org/about-suicide/state-fact-sheets/#Montana> (last visited July 5, 2018).

⁸ Op. at 6. N. 17.; Cf. *supra* n.2, discussing *Obergefell v. Hodges*.

⁹ See *Sex*, Black's Law Dictionary (10th ed. 2014); see also n. 11-12 *infra*.

motile gametes (such as sperm or spermatozoa) which fertilize the eggs of a female.”¹⁰ “Female” means “of, or relating to, or being the sex that typically has the capacity to bear young or produce eggs.”¹¹

There is no dispute that the individual Appellants, and, in fact, all students in Boyertown, each belong to one or the other sex. There is simply no logical reason that Appellants should be forced to share intimate spaces with members of the opposite sex.

In stark contrast to sex, “gender” and “gender identity” refer to nothing more than the degree to which one embraces or rejects stereotypical roles, personality, or behavioral traits, and clothing fashions that are socially imposed on men and women.¹² There is no credible support for the argument that “gender identity” is innate, has a supposed “biological basis,” or that every human being has a “gender

¹⁰ *Male*, Merriam-Webster.com, Merriam-Webster (July 1, 2018), <http://www.merriam-webster.com/dictionary/male> (last visited July 3, 2018); *see also* n.2, *supra*.

¹¹ *Female*, Merriam-Webster.com, Merriam-Webster (June 27, 2018), <http://www.merriam-webster.com/dictionary/female> (last visited July 2, 2018); *see also* Nat’l Inst. for Health, Genetics Home Reference: X chromosome (Jan. 2012), <https://ghr.nlm.nih.gov/chromosome/X> (last visited July 2, 2018); Daphna Joel, Genetic-gonadal-genitals sex (3G-sex) and the misconception of brain and gender, or why 3-G males and 3-G females have intersex brain and intersex gender, 27 *Biology of Sex Differences*, no. 3, Dec. 2012, at 1.

¹² *See* Op. at 29, quoting *Whitaker by Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1048 (7th Cir. 2017) (“By definition, a transgender individual does not conform to the sex-based stereotypes of the sex that he or she was assigned at birth.”)

identity” that is somehow unconnected to their sex. The Panel acknowledges as much when it states that “[a] person’s gender identity is their subjective, deep-core sense of self as being a particular gender.”¹³ “Gender identity” is simply a belief system that has been invented and adhered to by a small subset of society.¹⁴

Defining “sex” to mean “gender identity” under federal civil rights law, which Appellees seek to do, would be a fundamental shift in American law and society. It would also strip women and girls of our privacy, threaten our physical safety, undercut the means by which women and girls can achieve educational equality, and ultimately work to erase the very existence of women and girls as a legally-protected class. There have been many instances involving males who “identify as women” taking advantage of so-called “gender neutral” intimate spaces, or using spaces designed for women, with the express purpose of violating the privacy and

¹³ See Op. at 4. Notwithstanding the Panel’s disingenuous suggestions during oral argument that the words “sex” and “opposite sex” are confusing, the Third Circuit knows perfectly well what the word “sex” means. See, e.g., *Doe v. Mercy Catholic Medical Center*, 850 F.3d 545, 552 (2017) (“We start, of course, with Title IX’s language, *North Haven Board of Education v. Bell* 456 U.S. 512, 520, 102 S.Ct. 1912, 72 L.Ed.2d 299 (1982), which says, ‘No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any *education program or activity* receiving Federal financial assistance,’ 20 U.S.C. § 1681(a)” (emphasis in original).

¹⁴ See Rebecca Reilly-Cooper, *Gender is Not a Spectrum* (Aeon June 28, 2016); Cordelia Fine, *Delusions of Gender: The Real Science Behind Sex Differences* (Icon Books, 2010).

safety of women and girls.¹⁵ Title IX was enacted to remedy centuries of discrimination within, and exclusion from, the educational arena committed against women and girls. No amount of belief in so-called “gender identity” changes that. Giving male students unfettered access to the girls’ locker room allows any boy to justify his presence in the girls’ locker room simply by uttering the magic words, “I identify as female.”

Second, legally redefining “female” as anyone who claims to be female results in the erasure of female people as a protected class.¹⁶ If the Panel’s ruling stands, that will be yet another contribution to the contemporary phenomenon of legally altering the words “women and girls” to include any man or boy who wishes to be deemed a woman or girl, for whatever reason. If, as a matter of law, *anyone* can be a woman, then *no one* is a woman, and Title IX has no meaning whatsoever. The Panel’s ruling effectively erases Title IX.

¹⁵ See, e.g., *Transgender Woman Is Charged With Voyeurism at Target in Idaho*, New York Times (July 4, 2016), <https://www.nytimes.com/2016/07/15/us/target-transgender-idaho-voyeurism.html>; *Police: Man in bra and wig found in women’s bathroom*, KOMO News (Mar. 16, 2012), <http://komonews.com/archive/police-man-in-bra-and-wig-found-in-womens-bathroom>.

¹⁶ See Ruth Barrett, ed., *Female Erasure* (Tidal Time Publishing, LLC, 2016).

III. TO THE EXTENT THAT “GENDER IDENTITY” EXISTS AS A BELIEF SYSTEM, IT IS GROUNDED IN SEXIST AND REGRESSIVE STEREOTYPES.

Gender is simply a set of sex-based stereotypes that operate to oppress female people. Further, to assert that women and girls have a “deeply felt” identification with the set of sex-based stereotypes that are imposed on us is insulting to women and girls who reject the prison of femininity, including many lesbians.

The entire concept of “gender identity” is rooted in the notion that males and females have particular sex-specific ways of feeling and thinking, but scientists have demonstrated again and again that there is simply no such thing as a “female” brain or a “male brain.”¹⁷ This science demonstrates that gender identity is not innate. It is, instead, a “socially imposed division of the sexes.”¹⁸ It is a collection of sex-based stereotypes that our society imposes on people on the basis of sex, where women are understood to like particular clothing and hair styles and to have nurturing, unassuming personalities, whereas men are said to like a different set of

¹⁷ See, e.g., Karen Kaplan, *There’s No Such Thing as a ‘Male Brain’ or a ‘Female Brain’ and Scientists Have the Scans to Prove It*, L.A. Times (Nov. 30, 2015), <http://www.latimes.com/science/sciencenow/la-sci-sn-no-male-female-brain-20151130-story.html>; Lila MacLellan, *The biggest myth about our brains is that they are “male” or “female,”* Quartz (Aug. 27, 2017), <https://qz.com/1057494/the-biggest-myth-about-our-brains-is-that-theyre-male-or-female/>.

¹⁸ Gayle Rubin, *The Traffic in Women* 179 (1975); see also n. 4-6, *supra*.

styles and to have ambitious, outgoing personalities, for example.¹⁹ This is simply old-fashioned sexism.

IV. THERE ARE NUMEROUS HARMFUL CONSEQUENCES OF ALLOWING INDIVIDUAL STUDENTS TO SELF-IDENTIFY THEIR “GENDER IDENTITY” IN LIEU OF THEIR SEX.

There are numerous additional consequences to allowing individuals, including students, to simply self-identify their “gender identity.” One is that male people will be given access to women’s most intimate and vulnerable spaces, such as domestic violence refuges, homeless shelters, and women’s prisons.²⁰ Another is that male people will be able to compete in sports as females, which puts female athletes at a disadvantage.²¹ Allowing individuals to “self-identify their gender”

¹⁹ See, e.g., Op. at 5; *Amicus* Brief of the National PTA, *et al.* in Support of Appellees, quoting a self-described “trans girl” as stating, “When I was little I loved to play with dolls and play dress up. I loved painting my nails too. Wearing my mom’s high heels was my favorite!” These stories peddle the offensive stereotype that a child who is a girl must like playing with dolls, dressing up, painting nails, and wearing heels.

²⁰ Sam Pazzano, *Predator who claimed to be transgender declared dangerous offender*, Toronto Sun (Feb. 26, 2014), <http://torontosun.com/2014/02/26/predator-who-claimed-to-be-transgender-declared-dangerous-offender/wcm/fc2c70f0-blal-41e2-85db-bec9d0012ce5>.

²¹ Cam Smith, *Connecticut transgender sprinter Andraya Yearwood wins two state titles amidst controversy*, USA Today (June 7, 2017), <http://usatodayhss.com/2017/connecticut-transgender-sprinter-andraya-yearwood-wins-two-state-titles-amidst-controversy>.

results in the elimination of numerous rights for women.²² If crimes are reported as having been committed by males who claim some sort of “woman identity,” the result will be skewed crime statistics, making it appear that female people are committing a higher percentage of crime than we actually do. If medical patients are recorded according to self-declared “gender identity” for purposes of recording vital statistics, that will undermine the Center for Diseases Control’s ability to conduct sex-specific public health research. These are just a sampling of the long-term consequences of allowing individuals to self-identify their “gender identity.”

CONCLUSION

The outcome of this case is a statement on whether the Third Circuit will honor the plain text and original intent of Title IX, which is to prohibit discrimination on the basis of *sex*, not “gender identity.” Women and girls deserve more than what the Panel’s ruling gives them, and we urge the Court to rehear this matter *en banc*.

²² *Transgender Rights: The Elimination of the Human Rights of Women*, GenderTrender, <https://gendertrender.wordpress.com/2013/07/11/transgender-rights-the-elimination-of-the-human-rights-of-women/amp/> (last visited July 3, 2018).

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***CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME
LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE
REQUIREMENTS***

- 1) This brief complies with the type-volume limitation of Fed. R. App. P. 29(b)(4) because this brief contains 2591 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

- 2) This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2016 in 14-point Times New Roman font.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on July 9, 2018, the foregoing was filed electronically and served on the other parties via the court's ECF system.

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