

No. 15-2056

United States Court of Appeals for the Fourth Circuit

G.G., BY HIS NEXT FRIEND AND MOTHER, DEIRDRE GRIMM,
Plaintiff-Appellant,

v.

GLOUCESTER COUNTY SCHOOL BOARD,
Defendant-Appellee.

On Appeal from the United States District Court for
the Eastern District of Virginia, Newport News Division
Civil No. 4:15-cv-54

**BRIEF OF THE FOUNDATION FOR MORAL LAW
AS *AMICUS CURIAE*
IN SUPPORT OF APPELLEE AND AFFIRMANCE**

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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 it believes Appellant G.G. is attempting to force the Appellee, the Gloucester County Board of Education (“the Board”), to adopt a policy that is not mandated by either the Constitution or federal statutes and that could result in great long-term harm to students and to society as a whole.

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.

SUMMARY OF ARGUMENT

Believing that the Constitution should be interpreted strictly according to its plain meaning as understood by its Framers, the Foundation fully endorses the

¹ All parties have consented to the filing of this brief. 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.

legal and constitutional arguments of the Board and the amici who have filed in support of the Board. The Foundation agrees that the Constitution is silent on the issue of transgender identification and does not guarantee anyone the right to use facilities that are assigned to those of the opposite sex as determined from birth. The Foundation further agrees that neither the Department of Education's regulation (34 C.F.R. § 106.33) implementing Title IX (20 U.S.C. § 1681(a)), nor Title IX itself, provides the relief that G.G. seeks.

However, rather than restating the legal arguments of the Board and other *amici*, the Foundation will focus instead upon the practical effects, short-term and long-term, of adopting the policies favored by G.G. The Foundation contends that those policies will encourage more young people to question their gender identity, likely causing confusion, trauma, turmoil, and other unfortunate consequences. At a time when so much turmoil, confusion, and uncertainty exists, not only among the general public but also among experts and policy-makers, courts should not force school boards and other governmental entities to adopt policies that encourage students to identify with other than their gender at birth.

ARGUMENT

At least since *Brown v. Board of Education*, 347 U.S. 483 (1954), the Supreme Court has recognized that in deciding a case, judges must take into account the practical effects of their decision on the policies at issue in the case. If this Court

decides that students who reject their own sex as determined at birth (“birth sex”)² are legally or constitutionally entitled to use facilities assigned to the opposite sex, the practical effects would be substantial and could be disastrous.

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.

The National Center for Transgender Equality recently released its 2015 U.S. Transgender Survey examining the lives of people in the United States who reject their birth sex. The survey was conducted online by means of a widely publicized website. A total of 27,715 people from all fifty states, the District of Columbia, and U.S. territories took part in the survey—more than four times the number (6,456) who had participated in a similar survey conducted in 2008-09.³

Oakland, California developmental psychologist Diane Ehrensaft says her practice has seen a fourfold increase in the number of gender-questioning youths in

² The District Court used this term. “For the sake of brevity occasionally in this opinion the term ‘birth sex’ may be used to describe the sex assigned to individuals at their birth.” *G.G. v. Gloucester Cnty. Sch. Bd.*, 132 F. Supp. 3d 736, 739 n.1 (E.D. Va. 2015).

³ S.E. James et al., *The Report of the 2015 U.S. Transgender Survey*, National Center for Transgender Equality (2016), at 4, 18, 21.

recent years.⁴ Bren Fraser, a therapist who works 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.”⁵ Margaret Wenthe, 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.⁶

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?*⁷

⁴ Quoted in Nicholas Weiler, *Transgender Kids: ‘Exploding’ Number of Children, Parents Seek Clinical Help*, California News June 5, 2015, updated August 12, 2016.

⁵ Quoted in Starshine Roshell, *The Sudden Surge of Transgender Teens: Trying to Understand Why So Many Young People Are Challenging Traditional Identities*, Santa Barbara Independent, November 30, 2016.

⁶ Margaret Wenthe, *Transgender Kids: Have We Gone Too Far?*, The Globe and Mail, February 15, 2014. It should be noted that the proportion in San Francisco may not be representative of the nation as a whole.

⁷ Roshell, *Sudden Surge*, *supra* n.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 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.

Government policies, especially federally-mandated government 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.⁸

In fact, however, even surgical alteration of one’s sexual organs does not and cannot change the basic DNA with which a person was born. One physician states:

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.⁹

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.”¹⁰

⁸ 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.

⁹ Richard P. Fitzgibbons, M.D., et al., *The Psychopathology of “Sex Reassignment” Surgery*, Nat’l Catholic Bioethics Q. (April 2009), at 118.

Legislators, school board members, and other policymaking officials may therefore reasonably conclude that publicizing these issues and adopting policies that facilitate rejection of one's birth sex could have the effect of substantially increasing the number of students who seriously question their own gender identity and take steps to act on those thoughts.

II. 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.¹¹

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

¹¹ 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. One commentator observes: "This study shows a 'regret rate' of 2.2%. However what are they actually measuring? 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." 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. 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." TWT,

Other studies, however, show that the percentage who experience regret is much higher. 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.¹² 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.”¹³

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.¹⁴

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-reassignment, have considerably higher risks for mortality, suicidal behaviour, and psychiatric morbidity than the general population.”¹⁵

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

¹² Cited in Walt Heyer, *Transgender Regret Is Real Even if the Media Tell You Otherwise*, TheFederalist.com (Aug. 19, 2015), <https://goo.gl/JBgdMX>.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ 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/>.

- 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.”¹⁶
- 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.¹⁷
- 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.”¹⁸

The 2015 Report of the U.S. Transgender Survey, cited earlier, revealed

disturbing patterns of mistreatment and discrimination and startling disparities between transgender people in the survey and the US population when it comes to the most basic elements of life, such as finding a job, having a place to live, accessing medical care, and enjoying the support of family and community. Survey respondents also experienced harassment and violence at alarmingly high rates.¹⁹

Survey respondents reported that 10 percent experienced family violence because of their gender presentation, 54 percent were verbally harassed in school, 24 percent were physically attacked in school, 13 percent were sexually assaulted in school, and 17 percent left school because of this treatment. Thirty percent reported having been fired, denied a promotion, or otherwise mistreated at work

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Report of the 2015 Transgender Survey, supra n.3, at 4.*

because of their gender identity. Twenty-nine percent were living in poverty, compared to 14 percent of the general population. Fifteen percent were unemployed, compared with 5 percent of the general population. Thirty percent have experienced homelessness; 39 percent have experienced serious psychological distress during the previous month compared to 5 percent of the population; and 40 percent have attempted suicide during their lifetime—nearly nine times the attempted suicide rate in the general population (4.6 percent). 1.4 percent reported living with HIV, compared with only 0.3 percent of the general population.²⁰ Twenty percent have participated in the “underground economy” for income at some time, including “sex work, drug sales, and other currently criminalized work,” nine percent during the past year.²¹

These tragic consequences appear to accompany the desire to be the opposite sex and reflect the general discomfort of the public with behavior the American Psychiatric Association formerly termed the manifestation of a mental disorder.

The 2015 U.S. Transgender Survey results should be approached with a degree of caution. Although the number of respondents (27,715) is impressive, one may question whether those who volunteer to participate in an online survey are representative of the target population as a whole. That persons who actively reject their birth sex experience violence, suicide, and other problems on a level

²⁰ *Id.* at 4-6.

²¹ *Id.* at 158.

disproportionate to the general population does not necessarily mean that their attempt at gender re-identification is the cause of their troubles. Theoretically, those persons may have experienced problems regardless of their attempts to imitate the opposite sex. The Survey seems to reflect the belief of many of its participants that society's attitudes, rather than their own behavior, are the cause of the problem. But even though the cause-and-effect relationships may be disputed, the correlation between a person acting like the opposite sex and experiencing this host of problems is a legitimate cause for concern.

The fact remains: Rejecting one's birth sex has many undesirable side effects. Courts and other governmental agencies should carefully consider this reality when deciding whether to recognize, and give encouragement to, 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 entitled SexChangeRegret.com. He speaks regularly and has authored several books including *Gender, Lies and Suicide; Paper Genders; Perfected with Love;* and *A Transgender's Faith.*²² Coming from a different

²² SexChangeRegret.com.

perspective, ten women who halted their attempt to become men joined to tell their stories in *Blood and Visions: Womyn Reconciling with Being Female*, published in 2015 by Autotomous Womyn's Press.²³

This Court should avoid making sweeping pronouncements that have no basis in the Constitution, common law, or Title IX, and that may encourage behavior that has been demonstrated to be harmful.

III. The policies urged by G.G. violate 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 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

²³ autotomouswomyn.tumblr.com (spellings are as they appear).

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. The January 7, 2015 Opinion Letter of the U.S. Department of Education directed local schools to accommodate gender preferences, but even that letter, now withdrawn,²⁴ did not purport to elevate gender preference to the status of a constitutional right. Therefore, any conflict between this 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

²⁴ See February 22, 2015 Opinion Letter of the U.S. Department of Education.

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. A religious teacher or school staff person who believes that such policies encourage sexual immodesty which may lead to sexual promiscuity, may consider it a violation his/her religious beliefs to be forced to assign a biological girl to a boys’ restroom or locker room.

A teacher or staff person who believes gender identity is fixed by God at birth may consider it a violation of his/her religious beliefs if forced to identify as male a student whom God has created female or if forced to address a child who was born female by a male name. That issue is raised even by the caption of this case which identifies the Respondent as “G.G., by *his* next friend and mother” (emphasis added), even though G.G. was born female and has taken hormones but

has not undergone sex reassignment surgery. 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.²⁵ 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).

In contradicting the teaching of their faith and in a host of other ways, the policies demanded by G.G. 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 2638 (Thomas, J., dissenting). Again, a

²⁵ 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.

conflict between the free exercise of religion as granted by God and guaranteed by the First Amendment and the asserted right to present oneself as the opposite sex in all places and circumstances, must be resolved in favor of religious liberty. This is especially true in light of President Trump's *Executive Order Promoting Free Speech and Religious Liberty* (May 4, 2017).

CONCLUSION

Courts cannot blind themselves to the practical consequences of their decisions and should be most reluctant to make sweeping pronouncements about a subject that has no grounding in the Constitution or in federal statutes. Nor should courts recognize a right, stated in neither the Constitution nor relevant statutes, for one sex to use the bathrooms of the other in defiance of the express religious rights stated in the First Amendment. Instead, state and local agencies, such as the Gloucester County School Board, should be allowed to apply their best wisdom and common sense to the situation to tailor policies that fit the needs and values of the communities they represent.

Dated: May 9, 2017

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Rule 32(a)(7)(B), Fed. R. App. P., because it contains 3,742 words, excluding those parts of the brief exempted by Rule 32(a)(7)(B)(iii), Fed. R. App. P.
2. 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.

/s/ John Eidsmoe

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CERTIFICATE OF SERVICE

I certify that on the 9th day of May, 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/ John Eidsmoe

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