NO. 16-4117

UNITED STATES COURT OF APPEALS
FOR THE
SIXTH CIRCUIT

BOARD OF EDUCATION OF HIGHLAND SCHOOL, *ET AL.*,

Defendants-Appellants,

v.

JANE DOE, A MINOR, BY AND THROUGH HER LEGAL GUARDIANS JOYCE AND JOHN DOE,

Intervenor Third-Party Plaintiff-Appellee,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
HONORABLE ALGENON L. MARBLEY
Civil Case No. 2:16-cv-524

BRIEF OF *AMICI CURIAE* MICHIGAN ASSOCIATION OF CHRISTIAN SCHOOLS, GREAT LAKES REGION OF THE AMERICAN ASSOCIATION OF CHRISTIAN SCHOOLS AND TIMOTHY SCHMIG IN SUPPORT OF DEFENDANTS-APPELLANTS, SEEKING REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *Amici Curiae* state the following:

Amici Curiae consist of no publicly owned corporations that have a financial interest in the outcome. No *Amici Curiae* are subsidiaries or affiliates of a publicly owned corporation.

GREAT LAKES JUSTICE CENTER

/s/ Erin Elizabeth Mersino
Erin Elizabeth Mersino

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INTEREST OF *AMICI CURIAE*

Amici Curiae Michigan Association of Christian Schools, Great Lakes Region of the American Association of Christian Schools, and Tim Schmig, the Executive Director, Michigan Association of Christian Schools and the Great Lakes Regional Legislative Director of the American Association of Christian Schools (hereinafter "*Amici Curiae*") have a significant interest in the protection of the constitutional rights, privacy rights, and religious freedom of students, teachers, school faculty, and parents nationwide. *Amici Curiae* promote educational excellence in the classical tradition, committed to Biblical principles and the values of the Judeo-Christian heritage. *Amici Curiae* are committed to the protection of the legal rights and freedoms of all Christians within the public schools and are leading advocates in this area.

Amici Curiae submit this brief to assist the Court in reviewing the district court's analysis and articulating the reasons for reversing the lower court's findings. This brief is submitted pursuant to Federal Rule of Appellate Procedure 29(a) with the consent of all parties.

STATEMENT OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 29(C)(5)

No party's counsel authored this brief in whole or in part; no party or party's counsel contributed money intended to fund preparing or submitting the brief; and no person other than *Amici Curiae*, its members, or its counsel contributed money

intended to fund preparing or submitting the brief.

BACKGROUND

In 1972, the Congress passed Title IX of the 1972 Education Amendments into law. 20 U.S.C. § 1681, *et seq*. Title IX sought to rectify the inequity women faced in the workforce and to address the earnings gap between the sexes by enabling the progress of women and girls in education. *See, e.g*., U.S. Dep't of Justice, Civil Rights Division, "Title IX Legal Manual," *available at* https://www.justice.gov/sites/default/files/crt/legacy/2010/12/14/ixlegal.pdf, last visited April 18, 2017. The law focused on combating the economic disadvantages women faced in the workplace by addressing differential treatment on the basis of sex in education. *See, e.g.*, 118 Cong. Reg. 5803-07 (1972).

Title IX provides:

> 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). Notably, Title IX recognizes the biological and physiological differences between men and women. Title IX also importantly provides that,

> Notwithstanding anything to the contrary contained in this chapter, nothing contained herein shall be construed to prohibit any educational institution receiving funds under this Act, from maintaining separate living facilities for the different sexes.

20 U.S.C. § 1686. Likewise, Title IX's implementing regulation, 34 C.F.R. § 106.33, necessarily allows for schools to designate separate facilities based upon sex:

> A recipient may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex.

Id. The terms or concept of "gender identity," "transgenderism," and "transsexuality" appear nowhere in Title IX, its enacting regulations, or its legislative history. In sum, Title IX: 1) requires that schools not discriminate on the basis of sex in order to receive federal funding; 2) clearly states that separate "toilet, locker room, and shower facilities" on the basis sex are permissible; and 3) includes *no* provisions, legal or otherwise, pertaining to the special treatment of "gender identity," "transgenderism," or "transsexuality." In the more than 40 years since the statue became law (excepting the very recent political movement to nationally mandate and exalt transgenderism), Title IX has permitted schools to provide separate bathrooms, changing rooms, and showering facilities based on the biological differences between the sexes.

Intervenor/Appellee Jane Doe argued to the district court that Title IX and the Equal Protection Clause of the Fourteenth Amendment required Defendants to grant the eleven-year-old access to elementary school bathrooms that do not correspond to the child's biological sex. In response, the district court distorted the meaning of

the term "sex" in Title IX and effectually amendeded the Equal Protection Clause to advance the transgender political agenda. (Op. at R.95 Page ID#1740-71).

INTRODUCTION

This case involves eleven-year-old Jane Doe, who is biologically a boy but, while a mere kindergartener, was labeled a transgendered girl. Jane Doe seeks to use the girl's bathroom and changing room, and not the private unisex bathroom offered by the elementary school, or else Jane Doe threatens to imminently commit suicide.

Assuredly, some people likely consider the district court's concern for Jane Doe and its accession to her demands an act of tolerance. *Amici* agree that Jane Doe, like all children in the public school, must be treated with the utmost kindness and provided with a supportive educational environment that promotes excellence for both academic and personal growth. But encouraging gender dysphoria or singling out this eleven-year-old as the one elementary school student allowed to enter the bathroom of the opposite sex does not help achieve this result; nor does compelling other public elementary school children to endure such a policy by surrendering their constitutional rights and sacrificing their bodily privacy.

Those who promote their self-created concepts of "tolerance" must consider

the rights of the other children and adults involved,[1] as well as the concept of objective truth.[2] Without recognition of truth, no meaningful conversation is possible. The district court's findings fail to tolerate objective truth and they unfairly eliminate from the conversation numerous legitimate concerns voiced about the extensive adverse effects of its decision.

One's biologically assigned sex is an objective fact. Even the district court admits that in the State of Ohio, one's biological sex is not only genetically immutable, but it is also immutable on a person's birth certificate as a matter of state law. (Op. at R.95, Page ID#1751, fn. 3). The district court, however, also erroneously held that the mutable and subjective notion of "gender identity" should be protected as matter of law. The court described "gender identity" as the subjective and fluid choice to express one's outward appearance, state of mind, behavior, or identity pursuant to one's feelings. It consists of one's appearance, behavior or selected identity as whichever gender(s) one chooses. The district court seems to

[1] The district court inexcusably dismisses as insignificant the affidavits submitted by Appellants documenting the invasion of privacy and damaging psychological effects that will be inflicted on innumerable other innocent young children by intentionally mixing children of different the sexes together in intimate and private areas of the elementary school. As two examples, the record contains the affidavit of the foster parents of two female schoolchildren, both of whom have been victims of sexual assault and feel uncomfortable going into the bathroom and changing their clothes with a member of the opposite biological sex. (Op. at R.95, Page ID#1737).

[2] It is undisputed that Jane Doe is a biological male. (Op. at R.95, Page ID#1732).

accept that gender corresponds with biological sex as a matter of objective fact, determined by chromosomes and genetics; but then asserts gender might also be determined by personal preferences. Therefore, gender identity is potentially no more than a subjective state of mind. It is itself based on no objective facts and can be directly at odds with the objective facts of one's biological and physical constitution.

If a skinny man has body dysmorphia and sees himself as significantly heavier than he is in reality, the self-identification of the man as a heavy-set man does not change the objective truth. The skinny man may dress like a larger man, talk like a larger man, etc. No matter how sincerely he believes that he is heavy, the objective truth is that he is still a skinny man who just thinks he is heavy.

Using another example, if a 6'6" Caucasian man believes he is a 5'6" Asian woman, such a sincere self-identification is not objectively true. He is still, in reality, a 6'6" Caucasian man. No amount of emotion or ideation on his part or empathy on our part can change that fact. Though we should offer him what kindness and help we can, we should not give him the right to dictate our reality or to demand that we accede to his. In both instances, the law must not force others to adopt the man's subjective conception or to placate his misconception of objective fact by affirming that he is heavier, or that he is a 5'6"Asian woman, when that simply is not true.

Our fundamental concepts of liberty and justice prevent government from

forcing citizens to believe or affirm what they do not or cannot believe, just to appease another citizen's ideas. Our laws must be based on facts, not subjective preferences. Subjectivist assertions, no matter how sincere, cannot trump objective facts.

If a judge can require our educational system, on a national level and as a matter constitutional law, to reinforce subjective personality preferences while ignoring objective truth, we are no longer a nation under law—but tyranny. Only tyranny allows the rule-makers and rule-users to impose their will on others arbitrarily, sacrificing the freedom of the many to satisfy the desires of the politically motivated few.

SUMMARY OF THE ARGUMENT

The district court erred by finding plaintiff has a likelihood of success on the merits of Jane Doe's Equal Protection Claim under the Fourteenth Amendment for at least five reasons.

First, the preliminary injunction should be vacated and this case remanded to the district court to consider the effect of the U.S. Department of Education's Guidance Letter dated February 22, 2017 (https://www.justice.gov/crt/page/file/942021/download, last visited April 18, 2017). Given the district court's reliance on an earlier letter that the February 22 letter rescinded, remand is appropriate on this basis alone.

Second, the Constitutional Avoidance Doctrine requires that the court dispose of cases on statutory grounds where possible to avoid unnecessary constitutional rulings. *Ashwander v. TVA*, 297 U.S. 288, 345-48 (1936) (Brandeis, J., concurring). Here, the doctrine demands that this case be adjudicated under Title IX, rather than the Equal Protection Clause, as Title IX expressly precludes the district court's holding.

Third, transgenderism, or subjective gender identity, is not synonymous with one's biological sex under the Equal Protection Clause. Transgender ideation is not an immutable characteristic and should not be judicially elevated to a suspect class requiring heightened scrutiny. In fact, with school-age children in particular, it is highly mutable.[3] Children do not possess a fundamental right to use a bathroom inconsistent with their biological sex in public elementary school.

Fourth, the district court ignored objective biological truths to reach its factual conclusions and misconstrued over a century of case law to reach its novel legal holdings. The United States Supreme Court and the Sixth Circuit have never recognized transgenderism as a suspect class under the Equal Protection Clause; nor have these courts held that the Fourteenth Amendment requires that elementary

[3] *See, e.g.*, Lawrence S. Mayer and Paul R. McHugh, "Part Three: Gender Identity," *Sexuality and Gender: Findings from the Biological, Psychological, and Social Sciences*, *The New Atlantis*, Number 50, Fall 2016, pp. 86-113; American Psychiatric Association: *Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition*, Arlington, VA, American Psychiatric Association, 2013 pp. 451-459.

public schools allow a child into the bathroom designated for children of the opposite sex. In reaching its logically flawed and legally unconstitutional opinion, the district court also failed to consider the school district's legitimate governmental purpose in carrying out its bathroom policies that strive to accommodate the reasonable needs of all students.

Finally, the district court improperly failed to weigh the constitutional rights of other students, parents, teachers, and school administrators. As a result, the district court's ruling will violate those rights unless this Honorable Court intercedes to protect them.

ARGUMENT

I. THE MOST RECENT GUIDANCE LETTER ISSUED BY THE DEPARTMENT OF EDUCATION, ISSUED AFTER THE FILING OF THIS APPEAL, REQUIRES THIS COURT TO VACATE AND REMAND.

This Court should reverse the rulings of the district court. As an initial matter, this Court should vacate the preliminary injunction and remand this case to the district court to consider the effect of the Department of Education's Guidance Letter dated February 22, 2017.

The district court's analysis hinged on the Department of Education's then-current interpretation of Title IX and the deference to which an agency may be entitled under *Auer v. Robbins*, 519 U.S. 452,461 (1997). The district court found the agency's interpretation was not clearly erroneous or inconsistent with Title IX

or its regulations, and therefore satisfied the *Auer* deferential standard of reasonableness. (Op. at R.95 Page ID#1757) (citing *Pauley v. BethEnergy Mines*, 501 U.S. 680, 702 (1991)). The foundational finding of the district court was deference to the agency to "clarify" the term "sex" in Title IX's prohibition on discrimination. In granting its preliminary injunction, the district court relied on this subsequently superseded and flawed agency analysis as a factor in concluding that Jane Doe was likely to succeed on her Title IX claim.

While the district court referenced several Department of Education guidance documents over the past several years in its opinion, only one of those documents is relevant to whether "transgender" students may gain access to school restrooms or locker rooms of the opposite biological sex. *See* (Op. at R.95, Page ID#1732, 17549-54) (the most recent guidance dated May 13, 2016 promulgated just prior to the lower court's issuance of the preliminary injunction,). The previous guidance documents, from 2010 through 2015, do not apply to this case, except as background information.

On February 22, 2017, the Department of Education published a new, superseding guidance document. In this document, the Department of Education expressly withdrew and rescinded the earlier guidance relied upon by the lower court. *See* (https://www.justice.gov/crt/page/file/942021/download, last visited April 18, 2017). The Department of Education found that the May 13, 2016

guidance failed to contain sufficient legal analysis or explanation of how it was consistent with Title IX, and that it did not undergo any formal public comment process. *Id*. The Department of Education also found that due regard must be afforded to the appropriate state and local authorities and that this was lacking in the process of drafting the earlier letter. *Id*. Thus, the issue of whether the district court gave proper deference to a guidance letter, now withdrawn and rescinded, is moot. No court should defer to a rescinded agency letter that the agency has admitted was fatally flawed.

After the Department of Education issued its February 22, 2017 guidance letter, the United States Supreme Court summarily vacated the judgment of the lower court and remanded *Gloucester County Sch. Bd. v. G.G.*, No. 16-273 (U.S. March 6, 2017) (Order) to the U.S. Court of Appeals for the Fourth Circuit, for further consideration of that new letter. Likewise, this Court should vacate the lower court's ruling and remand for further consideration of the Department of Education's interpretation of Title IX, as it is at the core of this appeal.

II. THE DISTRICT COURT ERRONEOUSLY ADJUDICATED JANE DOE'S CONSTITUTIONAL CLAIM AND MISINTERPRETED THE EQUAL PROTECTION CLAUSE.

The most troubling error of the district court opinion is its unconstitutional amendment of the Equal Protection Clause of the Fourteenth Amendment. The district court never should have reached the constitutional argument in the first place

because the Constitutional Avoidance Doctrine required a decision solely on the statutory Title IX grounds. The district court's opinion also requires reversal, however, because the Defendants' actions and bathroom policy do not offend the Equal Protection Clause.

A. The Constitutional Avoidance Doctrine Requires this Court to Avoid Deciding Jane Doe's Constitutional Claim Under the Equal Protection Clause.

Federal appellate courts avoid deciding constitutional issues where, as here, non-constitutional grounds for a decision exist. *See Ashwander v. TVA*, 297 U.S. 288, 345-48 (1936) (Brandeis, J., concurring) (stating, *inter alia*, that where and when possible, the Court should avoid constitutional rulings when exercising the power of judicial review); *see also Muller Optical Co. v. EEOC*, 743 F.2d 380, 386 (6th Cir. 1984) ("The duty to avoid decisions of constitutional questions . . . [is] based upon the general policy of judicial restraint."). It is "a well-established principle governing the prudent exercise of this Court's jurisdiction that normally the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case." *Bond v. United States*, 134 S. Ct. 2077, 2087 (2014) (quoting *Escambia County v. McMillan*, 466 U.S. 48, 51 (1984) (*per curiam*)).

Here, Title IX provides the proper means to dispose of the third-party Intervenor/Appellee's claims in this case. Title IX, expressly allows for separate restrooms based upon sex. 34 C.F.R. § 106.33 ("A recipient may provide separate

toilet, locker room, and shower facilities on the basis of sex"). The School District made a concerted, good faith effort to accommodate Jane Doe in accordance with these provisions. Thus, non-constitutional grounds for a decision resolving the dispute exists here.

B. The District Court Acted Beyond its Article III Powers when it Erroneously Amended the Plain Meaning of the Equal Protection Clause.

The Appellee requests for this Court to do much more than merely apply the Equal Protection Clause to the facts of this case. Appellee invites this court to effectively amend this constitutional provision, a task reserved to the states and the people under Article V of the Constitution. U.S. Const. art. 5.

No power of Judicial review exists under Article III to re-write the Constitution. U.S. Const. art. 3, §§ 1, 2. Indeed, the Constitution assigns politically divisive and controversial public policy-making to the politically accountable branches of government. *See e.g.*, U.S. Const. art. 1, § 8; U.S. Const. amend. X. Under the Constitutional Avoidance Doctrine, this Court should not accept Appellee's invitation to devolve well-established constitutional principles in a radical fashion and then apply their new meaning to violate the well-established constitutional rights of a far greater numbers of citizens.

C. The District Court Erred Because the School District's Rational Bathroom Policy that Ensures Child Safety, Privacy, and Comfort in its Elementary Schools is Now, and Always Has Been, Constitutional under the Equal Protection Clause.

The Equal Protection Clause prohibits a State from "deny[ing] to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. Traditionally, to state a valid claim for sex discrimination under the Equal Protection Clause pursuant to § 1983, a plaintiff must allege the existence of purposeful discrimination because of her or his sex. *See Kitchen v. Chippewa Valley Schs.*, 825 F.2d 1004, 1011 (6th Cir.1987). To establish a prima facie claim under the Equal Protection Clause, a plaintiff must allege: (1) disparate treatment in relation to other similarly situated individuals, and (2) that the discriminatory treatment was based on sex. *Hartsel v. Keys*, 87 F.3d 795, 800 (6th Cir. 1995). The alleged discriminatory treatment must be reviewed by "*objective standards*," and the court should dismiss a plaintiff's "unusual *subjective feelings*." *See Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 56 (2006) (applying Title VII's shifting evidentiary burden, which is equally applicable in § 1983 cases) (emphasis added).

The Equal Protection Clause provides "a direction that all persons similarly situated should be treated alike." *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). The Equal Protection Clause does not prohibit all discrimination nor the creation of legal classifications to forward a legitimate purpose. Instead the Equal Protection Clause only "prohibits discrimination by

government which either burdens a fundamental right, targets a suspect class, or intentionally treats one differently than others similarly situated without any rational basis for the difference." *Rondigo, L.L.C. v. Township of Richmond*, 641 F.3d 673, 681 (6th Cir. 2011) (citations omitted). Therefore, unless a plaintiff can prove that a state actor is unfairly burdening a fundamental right or targeting a suspect class, the challenged classification will be upheld if any rational basis exists to support the classification. Transgenderism is neither a suspect class nor a fundamental right, and the rational actions of the school district do not violate the Constitution. Therefore, this Court should reverse the lower court on this issue.

a. The District Court Erred By Finding That Transgenderism, The Mutable Outward Appearance of Gender That Does Not Correspond to Biological Sex, Constitutes a Suspect Class

The United States Supreme Court has never recognized transgenderism as a suspect class under the Equal Protection Clause. Likewise, the United States Court of Appeals for the Sixth Circuit has never recognized transgenderism or "gender identity" as the basis for creating a new suspect class.

Although recently a few lower courts have inappropriately manufactured a suspect class for citizens advocating "gender identity" or afflicted by gender dysphoria, *see e.g.*, *Fabian v. Hosp. of Cent. Connecticut*, 172 F. Supp. 3d 509, 513 (D. Conn. 2016), these cases conflict with the great weight of jurisprudence interpreting the Equal Protection Clause of the Fourteenth Amendment and current

statutory law, *see, e.g., Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1228 (10th Cir. 2007) (holding that transgenderism is not a suspect class); *E.E.O.C. v. R.G. & G.R. Harris Funeral Homes, Inc.*, 100 F. Supp. 3d 594, 598 (E.D. Mich. 2015) ("transsexual status is currently not a protected class under Title VII"); *Braninburg v. Coalinga State Hosp.*, No. 1:08–cv–01457–MHM, 2012 WL 3911910, at *8 (E.D.Cal. Sept. 7, 2012) ("it is not apparent that transgender individuals constitute a 'suspect' class"); *Jamison v. Davue*, No. S–11–cv–2056 WBS, 2012 WL 996383, at *3 (E.D.Cal. Mar. 23, 2012) ("transgender individuals do not constitute a 'suspect' class, so allegations that defendants discriminated against him based on his transgender status are subject to a mere rational basis review"); *Kaeo–Tomaselli v. Butts*, No. 11–cv–00670 LEK, 2013 WL 399184, at *5 (D.Haw. Jan. 31, 2013) (holding that transgenderism is not a suspect class and that the court could find no "cases in which transgendered individuals constitute a 'suspect' class"); *Lopez v. City of New York*, No. 05–cv–1032–NRB, 2009 WL 229956, *13 (S.D.N.Y. Jan. 30, 2009) (holding that rational basis review applies to claims alleging discrimination due to transgendered status as transgenderism is not a protected class under the Fourteenth Amendment).

Despite a handful of recent, outlying, non-precedential cases, transgenderism has not been recognized as a suspect class for purposes of Title IX or Title VII. And it is certainly not a suspect class for purposes of the constitutional analysis required

under the Equal Protection Clause of the Fourteenth Amendment as it is currently written.

b. The District Court Erroneously Relied on Smith v. City of Salem to Assert That Transgenderism Is a Suspect Class

The district court relied on the holding in *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004) (recognizing a discrimination claim brought under Title VII and the Equal Protection Clause for gender non-conformity). In its reliance, however, the lower court incorrectly characterized *Smith* as paving the way for the court to elevate transgenderism to a suspect class and afford it preferential constitutional treatment in the elementary school setting.

Smith is distinguishable from this case in numerous respects, each sufficient to negate it as applicable legal precedent. First, unlike this case, no government party existed, much less one that had administratively interpreted "sex discrimination." In *Smith*, this Court properly interpreted Title VII absent agency guidance. But here, the Court would be remiss to ignore the Department of Education's February 22, 2017 agency guidance letter rescinding its previous interpretation of "sex" under Title IX as failing to contain legal analysis, as exhibiting inconsistency with the express language in Title IX, and as failing to "undergo any formal public process." (https://www.justice.gov/crt/page/file/942021/download, last visited April 18, 2017). Deciding the meaning of a statutory term without deference to a relevant

agency interpretation is materially different from adjudicating a term's meaning in light of such an interpretation. *Smith* is therefore inapposite.

Second, the *Smith* Court interpreted sex discrimination under Title VII to include "sex stereotyping" and not transgenderism.[4] *See also Barnes v. City of Cincinn*ati, 401 F. 3d. 729, 741 (6th Cir. 2005). Specifically, *Smith* dealt with the practice of sex stereotyping by an employer based on "gender non-conformity." While "gender nonconformity" in *Smith* is similar to "gender identity" in this case, the decision in *Smith* was based on sex discrimination due to "sexual stereotyping," an analytical component wholly absent in the record here. The *Smith* Court defined "sex stereotyping" as occurring when an individual "fails to act and/or identify with his or her gender," recognizing the reality that an individual's actual biological sex or gender does not change when he or she identifies with the opposite gender. *Id*. at 575. The district court, in contrast, misunderstood "gender nonconformity," even to the extent of continually referring to Jane Doe as not only identifying as a female, but as if Jane Doe is actually now a female. But no factual basis exists to jump to such a conclusion.[5] Such a counter-factual assumption is actually inconsistent with

[4] The plaintiff in *Smith* was not transgendered, but transsexual. The terms are not interchangeable. The conditions present significant physical differences. The word "transgender" does not appear, even once, in *Smith,* and *Smith* does not apply as precedent in this case of a transgender student.

[5] "A district court abuses its discretion by . . . judging the outcome based on clearly erroneous factual findings." *Ne. Ohio Coal. for the Homeless v. Husted*, 837 F.3d

Smith, which upheld the right of a male to act in a more female manner, but not to demand that the world recognize him as born or living as a female.

Unlike *Smith*,[6] this case doesn't involve "sex stereotyping" at all. This case presents an evenhanded school policy that seeks to protect the privacy and the rights of elementary school students, while maintaining a positive educational environment, guarded from undue and intimidating distraction.

c. Public School Bathroom Access Separated By One's Personal Identity Rather than One's Biological Sex is Not a Fundamental Right.

The right of a child to access a public school bathroom based on his/her personally assigned gender identity, rather than the child's truthful biological sex, fails to rise to a fundamental right deserving of heightened scrutiny.

i. Transgenderism Differs From Biological Sex and Is Treated Differently From Sex Under the Law.

The terms "sex" and "gender identity" or "transgenderism" are not synonymous, and have never been synonymous. Throughout our history, the Courts

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612, 625 (6th Cir. 2016). The district court frequently referred to plaintiff as an actual girl, ignoring the uncontested fact that Jane Doe is biologically a boy. *See, e.g.*, (Op. at R.95 Page ID#1772) ("The Court orders School District officials to treat Jane Doe as the girl she is, including referring to her by female pronouns and her female name and allowing her to use the girls' restroom at Highland Elementary School.").

[6] *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) also relied upon by the lower court only addressed "sex stereotyping" and not transgenderism.

and Congress have traditionally interpreted "sex" truthfully as an immutable characteristic dependent on one's chromosomal make-up and anatomical characteristics. *See, e.g.*, *United States v. Virginia*, 518 U.S. 515, 533 (1996) (Stevens, J., concurring) ("Physical differences between men and women, however, are enduring: '[T]he two sexes are not fungible; a community made up exclusively of one [sex] is different from a community composed of both.'" (quoting *Ballard v. United States*, 329 U.S. 187, 193 (1946)); *see also Frontiero v. Richardson*, 411 U.S. 677, 686 (1973); *Reed v. Reed*, 404 U.S. 71 (1971); *Schlesinger v. Ballard*, 419 U.S. 498 (1975); *Craig v. Boren*, 429 U.S. 190 (1976); *Michael M. v. Superior Court*, 450 U.S. 464, 473 (1981); *Dobre v. National R.R. Passenger Corp.*, 850 F. Supp. 284, 286 (E.D. Pa. 1993); *Holloway v. Arthur Andersen & Co.*, 566 F. 2d 659, 662 (9th Cir. 1977); *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081 (7th Cir. 1984); *Underwood v. Archer Management Services, Inc.*, 857 F. Supp. 96 (D.D.C. 1994). Indeed, the terms "gender identity" and "transgender" only became popular patois recently to legitimize a political agenda and to rationalize and normalize expressing oneself as a gender contrary to one's actual biological sex.

Courts must continue to recognize truthful biological distinctions as predominant over the subjective concept of "gender identity." This truth has not changed in the wake of *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). For example, courts have upheld state laws requiring truthful information on children's birth

certificates to accurately reflect parentage, even when same-sex couples identify as the parents of the child. *See Smith v. Pavan*, 2016 Ark. 437, 17, 505 S.W.3d 169, 180 (2016). The subjective determination of identifying as the child's natural parent pales in comparison with the legitimate state interest in accurately recording the child's biological parents. When subjective personal identity directly conflicts with objective biological truth, objective biological truth must prevail. This is especially true when the subjective personal identity interferes and impinges on the rights of others, as in this case.

d. The District Court's Order Unconstitutionally Impinges on the Privacy and Constitutional Rights of Other Students, Parents, Teachers and School Administrators.

In granting Jane Doe's demands, the district court ignored the rights and privacy of all the other students, parents, teachers, and school administrators in the Highland School District. The district court failed to show even an iota of empathy to the other elementary school children, who absolutely should not be forced to go to the bathroom, change their clothes, and share private, intimate spaces with members of the opposite biological sex. The district court failed to address the concerns of two female schoolchildren of the Highland School District, both who have been victims of sexual assault. (Op. at R.95, Page ID#1737). The lower court completely ignored their discomfort in sharing bathrooms and changing rooms with a member of the opposite biological sex. Instead of accepting the school officials'

compassionate and well-reasoned compromise resolution of the instant problem, the district court dictated a zero sum game, and it made the overwhelming majority of the affected population the disenfranchised losers.

Amici Curiae argue that choice of bathroom is not a fundamental right and transgenderism is not a protected class deserving of heightened scrutiny. However, even when a court finds that a plaintiff's behavior or expression merits heightened scrutiny, the court must still protect the rights of school administrators to act in the best interests of the rights and privacy of their students and to preserve the educational environment, especially in the context of an elementary school, from disturbances and distractions.

Our jurisprudence recognizes the authority of school officials to protect students from invasion of privacy, impingement of their constitutional rights, and even potential disturbances of the educational environment. *See Morse v. Frederick*, 551 U.S. 393 (2007) (disallowing students from certain expression on school premises to protect the safety of students and maintain an appropriate educational environment); *Dariano v. Morgan Hill Unified Sch. Dist.*, 767 F.3d 764, 776 (9th Cir. 2014) (disallowing students from exercising their fundamental right to free speech because wearing certain t-shirts on school premises could potentially cause a disturbance); *Tinker v. Des Moines Independent School Dist.*, 393 U.S. 503, 513 (1969) ("conduct by the student, in class or out of it, which for any reason . . .

involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom . . . .”). Indeed, while students do not “shed their constitutional rights . . . at the schoolhouse gate,” *id.* at 506, the rights of students “in public school are *not* automatically coextensive with the rights of adults in other settings,” *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986) (emphasis added); *Karp v. Becken*, 477 F.2d 171, 175 (9th Cir.1973) (“the level of disturbance required to justify official intervention is relatively lower in a public school than it might be on a street corner.”).

Courts have limited and balanced not only students’ First Amendment free speech rights, but also students’ Fourth, and Fourteenth Amendment rights for “what is appropriate for children in school.” *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 655–656 (1995); *see also Board of Ed. of Independent School Dist. No. 92 of Pottawatomie Cty. v. Earls*, 536 U.S. 822, 829–830 (2002); *New Jersey v. T.L.O.*, 469 U.S. 325, 340 (1985).

The bodily privacy of children in school bathrooms and locker rooms constitutes an important governmental interest. *Beard v. Whitmore Lake Sch. Dist.*, 402 F.3d 598, 604 (6th Cir.2005) (stating “Students of course have a significant privacy interest in their unclothed bodies.”); *Faulkner v. Jones*, 10 F.3d 226, 232 (4th Cir.1993) (holding that there is an “undisputed approval of separate public rest rooms for men and women based on privacy concerns. The need for privacy justifies

separation and the differences between the genders demand a facility for each gender that is different."). Under our fundamental concept of liberty, where the bodily privacy rights of one child begins is where the "personal identity" rights of another child ends.

School district officials acted reasonably here, as they sought to accommodate Jane Doe and preserve the separation of the biological sexes to prohibit the violation of the privacy rights of all other children in the elementary school. The district court provided no facts or analysis to support the conclusion that the privacy rights of other students were not harmed. (Op. at R.95, Page ID#1765, 66). The lower court's own record reveals that a policy allowing biological boys into the girl's bathroom and changing rooms will inevitably affect the privacy rights of children in the district. (Op. at R.95, Page ID#1737).

Furthermore, the lower court violated the First Amendment rights of the students, parents, teachers, and administrators of the school district. The district court order requires "School District officials to treat Jane Doe as the girl she is, including referring to her by female pronounces and her female name." (Op. at R.95, Page ID#1772). The lower court, however, cannot compel speech or force citizens to share in its opinion that a biological boy, who wishes to be a girl, is then a girl and must be treated as such by everyone with whom he comes into contact.

"If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *W. Virginia State Bd. of Ed. v. Barnette*, 319 U.S. 624, 642 (1943). Students, faculty, parents, and administrators have a right to articulate their disapproval or concerns with "gender identity" or "transgenderism" on biological, personal, and religious grounds "provided the statements are not inflammatory—that is, are not 'fighting words,' which means speech likely to provoke a violent response amounting to a breach of the peace." *Zamecnik v. Indian Prairie School Dist. # 204*, 636 F.3d 874, 875 (7th Cir. 2011). "[P]eople in our society do not have a legal right to prevent criticism of their beliefs or even their way of life." *Id.* at 876; *see also Hansen v. Ann Arbor Pub. Schools*, 293 F. Supp. 2d 780, 792-807 (E.D. Mich. 2003) (holding a School District's censorship of student speech due to its perceived negative message about homosexuality violated the First Amendment and the Equal Protection Clause of the Fourteenth Amendment); *Glowacki v. Howell Public School Dist.*, No. 2:11-cv-15481, 2013 U.S. Dist. LEXIS 131760 (Sept. 16, 2013) (holding that a teacher's snap suspension of a student for making a perceived anti-gay comment in class was an unconstitutional infringement on the student's First Amendment freedoms).

The district court apparently believes its injunction reflects tolerance. It does not. "Tolerance is a two-way street." *Ward v. Polite*, 667 F.3d 727, 735 (6th Cir. 2012). The district court's failure to fairly consider the legitimate privacy concerns and constitutional rights of the vast majority of elementary school children affected by its ruling exemplifies a very biased intolerance, one that places a radical political agenda ahead of the pedagogical and privacy concerns of very young schoolchildren and their parents. The Equal Protection Clause must not be interpreted in a way that violates the rights of countless innocent children in the name of supporting the subjectivist gender identity concerns of one child.

The district court erred by finding a likelihood of success on the merits of Plaintiff's Equal Protection Claim. The district court never should have reached the merits of the claim under the Constitutional Avoidance Doctrine. Furthermore, the Equal Protection Clause does not recognize transgenderism as a fundamental right or a suspect class requiring heightened scrutiny; and under any level of scrutiny, the school district's policy is constitutional because it legitimately protects the constitutional rights of other elementary school children and others in the community.

CONCLUSION

Based on the foregoing, this Court should reverse the opinion of the district court. In the alternative, this Court should vacate the opinion and remand for further

consideration of Title IX with instructions that the Constitutional Avoidance Doctrine bars further consideration of Intervenor/Appellee's Equal Protection Claim under the Fourteenth Amendment, or that the Equal Protection ruling is factually unsupported and erroneous as a matter of law.

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CERTIFICATE OF COMPLIANCE

I certify that pursuant to Fed. R. App. P. 32(a)(7), the foregoing Brief is proportionally spaced, has a typeface of 14 points Times New Roman, and contains 5,972 words, excluding those sections identified in Fed. R. App. P. 32(a)(7)(B)(iii).

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CERTIFICATE OF SERVICE

I hereby certify that on April 26, 2017, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system. I further certify that all of the participants in this case are registered CM/ECF users.

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