**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*

# REPLY BRIEF OF APPELLANTS

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.*

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## SUMMARY OF THE ARGUMENT

Both Appellees argue that maintaining single-sex privacy facilities for male and female students is a "novel" idea, saying that whether a human is male or female is determined by one's subjectively perceived place on a continuum of genders, and not the objective fact that chromosomes determine which half of the reproductive whole each person is.[1] In the context of statutory and constitutional protections for bodily privacy, "male" and "female" are defined by human reproductive nature, not self-perceived "gender."

To be sure, some students identify with a gender—male, female, or something else—different from their sex and then seek public-school resources to affirm that identity. In this case, District Appellees accommodated such students' gender identities in various ways—such as using desired names and pronouns, welcoming changes in dress and grooming, and conforming school records to the chosen gender. But such accommodation crosses a statutory and constitutional line when the District authorizes entry of one sex into the other sex's privacy facilities.

Appellants' authorities demonstrate that the right to bodily privacy is a fundamental human right protected in many contexts—sexual harassment, employment, searches, incarceration, and drug testing law, for example. These

[1] Absent, of course, objectively diagnosable disorders of sexual development, known as being "intersex," which are not at issue in this case.

highly relevant cases demonstrate that the right turns on whether one sex is accessing the opposite sex's privacy area, not on what the opposite sex person thinks about his or her gender. Appellees counter that if there is privacy in such a facility, it exists only behind a stall door or curtain and not within the communal facility itself. But that, combined with their resolute denial of the relevance of objective reproductive differences between males and females, means that there is no principled reason to stop a male coach from entering a girls' locker room to perform job duties just like a female coach could, so long as he has no evil or prurient intent. This Court should recognize and protect the right to bodily privacy *from the opposite sex* in a high school locker room or restroom, and limit the government's power to force young students to accept and affirm another student's self-perception.

Appellees may prevail only if this Court construes sex to mean a malleable continuum of perceived genders—male, female, or something else—and not the long-established legal standard based on our human reproductive nature. Under the American system of separate powers, such a dramatic alteration of meanings of a key statutory and constitutional term is a job for Congress, not the judiciary, and the lower court erred by redefining sex to mean gender identity as applied to privacy facilities.

## ARGUMENT

### I. Applicable Law Protects Bodily Privacy and Prohibits Sexual Harassment Based Upon a Person's Sex, Not Gender Identity.

There is a constitutional right to bodily privacy. *See, e.g.*, *Doe v. Luzerne Cty.*, 660 F.3d 169 (3d Cir. 2011) (finding a Fourteenth Amendment fundamental right to bodily privacy from persons of the opposite sex viewing our partially clothed bodies).[2] Members of one sex merit personal bodily privacy from members of the opposite sex: "The desire to shield one's unclothed figure from views of strangers, and particularly strangers of the opposite sex, is impelled by elementary self-respect and personal dignity." *York v. Story*, 324 F.2d 450, 455 (9th Cir. 1963). Here, *United States v. Virginia*, 518 U.S. 515 (1996), is instructive, as it required Virginia Military Institute ("VMI") to integrate women into its student body, while acknowledging that each sex deserved privacy from the other in living spaces. *Id*. at 550 n.19. Intervenor counters that this dealt only with "training standards," (Br.

[2]The lower court erred in reading *Luzerne Cty.* by opining that the Third Circuit's remand to determine whether the offending officers had viewed Doe's breasts or buttocks proved that there was no "general right to bodily privacy" within a locker room or restroom. But that reading assumed that the officers were within the decontamination area with Doe, *see* J.A. 104 (Op. at 99), when in fact they were not. Instead, they filmed through a surreptitiously opened door and when discovered, the door was closed to again shield Doe's privacy, thus effectively shutting them out of the privacy area. *See Luzerne Cty.*, 660 F.3d at 173. Intervenors err by relying on that passage, (Br. at 29) because Appellants are seeking the same protection that Doe had—closing the door to the opposite sex when they are disrobing. Unlike *Luzerne County*, it is the government itself which is opening the door to the privacy facilities.

at 27) but that ignores the Court's express language: "Admitting women to VMI would undoubtedly require alterations necessary to afford members of each sex privacy from the other sex in living arrangements, and to adjust aspects of the physical training programs." *VMI*, 518 U.S. at 550 n.19. (emphasis added). The Court went so far as to state the obvious: "Physical differences between men and women, however, are enduring: '[T]he two sexes are not fungible.'" *Id*. at 533 (quoting *Ballard v. United States*, 329 U.S. 187, 193 (1946)).

Nor is *VMI* alone in recognizing those differences. In *Johnston v. University of Pittsburgh of Commonwealth System of Higher Education*, 97 F. Supp. 3d 657 (W.D. Pa. 2015), the court determined that there was no Equal Protection or Title IX violation in preventing a biological female who identified as a male from using men's locker rooms, restroom, and showers, *see id*. at 672, due to the University's interest in providing an environment "consistent with society's long-held tradition of performing such functions in sex-segregated spaces based on biological or birth sex," *id*. at 668. The court determined that "the need to ensure the privacy of its students to disrobe and shower outside of the presence of members of the opposite sex" was a sufficiently important government interest to withstand even heightened scrutiny. *Id*. at 669. *See also Faulkner v. Jones*, 10 F.3d 226, 232 (4th Cir. 1993) (recognizing "society's undisputed approval of separate public rest rooms for men

and women based on privacy concerns" due to the "real differences between the sexes"); *State v. Lawson*, 340 P.3d 979, 982 (Wash. App. 2014).[3]

Intervenors dismiss *People v. Grunau*, No. H015871, 2009 WL 5149857 (Cal. Ct. App. Dec. 29, 2009), arguing it dealt with loitering. *See* Intervenor's Br. at 43 n. 21. But what led to that conviction? The man was "standing in the doorway" of the girls' locker room, and stared at the victim girl "for about five seconds" while she was showering in her swimsuit. *Grunau*, 2009 WL 5149857, at * 1, *3. As the *Grunau* court put it, "a girls locker room is a place where a normal female should, and would, reasonably expect privacy, especially when she is performing quintessentially personal activities like undressing, changing clothes, and bathing" since it is "a place that by definition is to be used exclusively by girls and where males are not allowed." *Id*. at *3.

Perhaps the most comprehensive case is *Livingwell (North), Inc. v. Pennsylvania Human Relations Commission*, 606 A.2d 1287 (Pa. Commw. Ct. 1992), which discusses the balance between bodily privacy and nondiscrimination, explaining that businesses may hire on the basis of sex when "customers' privacy

[3] In *Lawson* the court upheld a voyeurism conviction against a man who viewed a woman in the common area of a restroom, holding that "a person has a reasonable expectation of privacy inside a restroom." *Id*. at 982. Those locations where a person has a reasonable expectation of privacy includes "a locker room where someone may undress in front of others." *Id*. Indeed, in "a place that was clearly delineated for use by women only," a person expects privacy from "members of the opposite sex." *Id*.

interests are *entitled to protection* under the law." *Id*. at 1290 (emphasis added). It is of no moment that the court also discussed additional factors relevant to a proprietor's business decisions in that context, such as the potential of undermining business operations or whether alternatives to sex-specific limits were available. *See* District Br. at 30 (citing *Livingwell,* 606 A.2d at 1290). Here we confront the constitutional right to bodily privacy versus the government, which raises the sole issue of whether the government is violating privacy.

Court precedents are backed by strong Pennsylvania policy mandating separate boys and girls facilities as evidenced in Public School Code of 1949, 24 P.S. § 7-740 (requiring schools to have restrooms "used separately, by the sexes"). Since 1949, that privacy provision has been made more explicit by applying swimming pool privacy protection to schools. *See, e.g.*, 25 Pa. Code § 171.16 (requiring schools to follow 28 Pa. Code § 18.62, which requires "separate dressing facilities, showers, lavatories, toilets and appurtenances for each sex" at swimming pools).

Based on the contours of bodily privacy rights, consider again what happened in this case: Joel Doe and Jack Jones discovered the school's covert policy when they were disrobing in the boys' locker room only to discover a female student standing within a few feet of them. In Doe's case, the female student was, like Doe, partially undressed. *See* J.A. 36, 47 (Op. ¶¶ 111-12, 173), 320 (7-17-17 Tr.), 1142-43, 1236-37 (Doe Dep.), 1613, 1620, 1732 (Jones Dep.), 1942, 1946 (Jones

Trial Dep.). Doe and others who were in the locker room went to see Assistant Principal Foley who told them that they needed to tolerate the situation and to make it natural.[4] Mary Smith similarly encountered a male in the girls' restroom, and quickly left the facility, shocked by the encounter, particularly because she and other females changed their clothes in the restroom's common space. *See* J.A. 55-57 (Op. ¶¶ 232, 234, 237), 273, 276 (7-17-17 Tr.), 1390 (Smith Dep.), 2021 (BASD Smith Report). As the *Johnston* court explained, while the question of whether students may use opposite-sex facilities is novel, "the applicable legal principles are well-settled." *Johnston*, 97 F. Supp. 3d at 668.

These events, driven by Appellees' policy, were unconsented opposite-sex encounters in privacy facilities intended under state and federal law to protect the Appellants' personal privacy, and they are properly entitled to an injunction foreclosing further risk of such encounters. Still Appellees argue there are no protections in common areas of locker rooms or restrooms from persons of the opposite sex. Yet if a male maintenance worker walked into the women's locker room or restroom while in use, one would be hard pressed to discount the privacy violation or sexual harassment simply because the women were in the common

[4] The District and Foley denied under oath making these statements, but those denials were proven to be false after an audio tape of the conversation was produced. *See* J.A. 38 (Op. ¶ 123), 325-328, 360 (7-17-17 Tr.), 914-915 (Foley Dep.), 2010-14 (Audio Tr.).

area. A woman's privacy is no less violated when she is in a stall while a male maintenance worker is fixing a sink. Nor would an employer be exonerated by noting that the maintenance worker was well behaved. The bottom line is that privacy facilities are protected for both sexes for each one's privacy, and opposite-sex entry defeats that statutory purpose and the underlying constitutional principle of bodily privacy. And that violation cannot be cured by a variation on victim-shaming—telling the Appellants that they must leave the very facility that was designated to protect their privacy from the opposite sex. That is an unconstitutional condition. *See* Sec. V, *infra*.

## II. The District and Intervenor Wrongly Insist that "Sex" in Statute and Case Law Means Gender Identity.

The protections in case law turn on objective sex and not an individual's sincerely held beliefs about their gender identity. Despite this, Intervenor insists that it is "offensive" to correctly identify a person's sex. But Intervenor's own expert, Dr. Leibowitz, made clear that sex is "the anatomical and physiological processes that lead to or denote male or female," J.A. 70 (Op. ¶ 325), versus "gender" which is "a broader societal construct . . . which is [how] society defines what male or female is within a certain cultural context[, and] [i]t also encompasses gender identity." *Id.* (Op. ¶ 326). And this Court does not sit as

arbiter of social constructs, but rather is to interpret statutory terms in accord with their plain meaning.

Dr. Leibowitz categorizes gender as a "social construct" about masculinity and femininity—which shows that gender identity theory contemplates that one becomes a female by adopting feminine characteristics—perhaps by behavior, or by taking hormones, or by cosmetic surgeries. And importantly, the sole determinant of "gender" as propounded by Dr. Leibowitz is the person's stated identification. *Id.* (Op. ¶ 323) ("Transgender refers to a person's self-assertion of their identity.").

Title IX provides that "[n]o person . . . 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. . . ." 20 U.S.C. § 1681(a). "The task of resolving the dispute over the meaning of [a statute] begins where all such inquiries must begin: with the language of the statute itself." *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989). Because the meaning of sex is biological as is acknowledged by Intervenor's expert, *see* J.A. 70 (Op. ¶ 325), courts should go no further in considering Appellants' radical departure from the long-settled meaning of sex. "In this case it is also where the inquiry should end, for where, as here, the statute's language is plain, 'the sole function of the courts is to enforce it according to its terms.'" *Ron Pair Enters,* 489 U.S. at 241 (internal citations omitted).

Both Appellees insist that one may be considered male or female based only on self-assertion, which may be expressed by some combination of masculine or feminine stereotypical conduct, treating with cross-sex hormones, or eventually, surgical procedures—or none of the above. Yet the very basis of protecting sex under the law is because "sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth." *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973).

Importantly, while the immutability of sex demands heightened protections against almost every form of sex discrimination, as the *VMI* Court made clear, discrimination between male and female in private spaces is not only tolerable, but necessary. The law "recognizes certain distinctions between male and female on the basis of birth sex." *Johnston*, 97 F. Supp. 3d at 671. Besides, "[o]n a plain reading of the statute, the term 'on the basis of sex' in Title IX means nothing more than male and female, under the traditional binary conception of sex consistent with one's birth or biological sex." *Id*. at 676 (quoting *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1222 (10th Cir. 2007)).[5] Were sex to mean something more than

[5]*See* also 28 U.S.C. § 1681(8) (if certain sex-specific activities are provided "for one sex," reasonably comparable ones must be provided to "the other sex"); 28 U.S.C. § 1686 (authorizing "separate living facilities for the different sexes"); 34 C.F.R. §§106.32-106.33 (requiring that facilities "of one sex" be comparable to those for "the other sex"); 118 Cong. Rec. 5807 (1972) (statement of Sen. Bayh) (allowing differential treatment such as "classes for pregnant girls . . ., in sport

our biological differences, our entire structure of sex-based protections necessarily breaks down since the very act of redefining the definition of sex eliminates the sex-based protections on which we rely.

## III. Properly Understood, *Price Waterhouse* Does Not Change the Definition of Sex.

Intervenor relies on *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), and its progeny for the proposition that gender identity is included within the definition of sex in Title VII. *See* Intervenor Br. at 46. However, *Price Waterhouse* created no new protected class for gender identity, but simply held that discrimination on sex stereotypes can be evidence of sex discrimination.

Granted, the Seventh Circuit went further and incorrectly said that gender identity is a protected class or included within the definition of sex. *See Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1048-49 (7th Cir. 2017). But following that opinion would put this Court on the wrong side of a Circuit split.

As the Eleventh Circuit recently put it, "all persons, whether transgender or not, are protected from discrimination on the basis of gender stereotype, and we reasoned that, because those protections apply to everyone, a transgender individual could not be excluded." *Evans v. Ga. Reg'l Hosp.*, 850 F.3d 1248, 1254

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facilities *or other instances where personal privacy must be preserved*") (emphasis added).

(11th Cir. 2017) (internal quotation and citation omitted, emphasis added). That is clear in what *Price Waterhouse* said about sex stereotyping:

> [W]e are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for "[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes." An employer who objects to aggressiveness in women but whose positions require this trait places women in an intolerable and impermissible catch 22: out of a job if they behave aggressively and out of a job if they do not. Title VII lifts women out of this bind.

*Price Waterhouse*, 490 U.S. at 251 (internal citations omitted). The Court still requires the claimant to show "disparate treatment of men and women" and ties Title VII explicitly to women—both points showing that the referent for discrimination under *Price Waterhouse* is sex—being male or female—and not a subjective, self-identified gender. Moreover, manifesting a sex stereotype (against which an employer then may react) is a behavior, not a status, and as Judge Pryor put it, "[t]he willingness to accept that *Price Waterhouse* . . . deal[s] only with behaviors that deviate from gender stereotypes . . . acknowledges that the doctrine of gender nonconformity is not and cannot be an independent vehicle for relief because the only status based classes that provide relief are those enumerated within Title VII." *Evans*, 850 F.3d at 1260 (Pryor, J., concurring), *accord, Etsitty*, 502 F.3d at 1222 ("In light of the traditional binary conception of sex, transsexuals

may not claim protection under Title VII from discrimination based solely on their status as a transsexual.").

*Price Waterhouse* does not support Appellees' novel demands that a male be granted access to a privacy facility so as to be affirmed as a girl. Nor does Appellees' other oft-cited case, *Oncale v. Sundowner Offshore Services*, 523 U.S. 75 (1998), support such a contrary reading of "sex."

> [M]ale-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII. But statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.

*Id*. at 79. Appellees seize *Oncale's* "prohibitions often go beyond the principal evil" language to insist that sex under Titles VII and IX includes gender identity, but cannot show that supplanting the established objective, binary, reproductively-defined taxonomy of male and female with an indistinct continuum of subjectively-discerned genders is "reasonably comparable." It is not, and the *Oncale* decision demonstrates that a few sentences later in the opinion: "The critical issue, Title VII's text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed." *Id.* at 80 (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring)). Both *Price Waterhouse* and *Oncale* confirm that the

referent for discerning discrimination under Title VII is sex—male and female—and that non-conformance to sex stereotypes is not categorically protected, but only an evidentiary avenue to show actual discrimination on the basis of being male or female. In any event, "[u]se of a restroom designated for the opposite sex does not constitute a mere failure to conform to sex stereotypes." *Etsitty*, 502 F.3d at 1224.

This proper reading of *Price Waterhouse* shows that the lower court opinion in *Students & Parents for Privacy v. United States Department of Education*, No. 16-cv-4945, 2017 WL 6629520 (N.D. Ill. Dec. 29, 2017), erred by following *Whitaker*, 858 F.3d 1034 (reading Title IX to categorically protect gender identity), and *Hively v. Ivy Tech Community College of Indiana*, 853 F.3d 339 (7th Cir. 2017) (reading Title VII to categorically protect sexual orientation), both of which misread *Price Waterhouse's* sex stereotyping analysis. Judge Posner admitted as much, saying that "I would prefer to see us acknowledge openly that today we, who are judges rather than members of Congress, are imposing on a half-century-old statute a meaning of 'sex discrimination' that the Congress that enacted it would not have accepted." *Hively*, 853 F.3d at 357 (Posner, J., concurring).

Intervenor clouds this issue with photographs of males who adopted stereotypical female grooming and dress to reflect their perceived gender, and vice versa (even though at the school establishing one's gender identity requires only a

verbal declaration). This is simply an attempt to say that mutable characteristics are tantamount to immutable characteristics, and if enforced, would mean that access to sex-specific communal privacy facilities would turn on perceived masculinity or femininity. Rather than relying on the simple categories of sex, objectively established at birth, Appellees imply gender stereotypes are the real reason to permit a student to use a facility of the opposite sex.

This is already playing out at the school. The District admits that "three other transgender male students requested permission to use different first names . . . and to be addressed by male pronouns. However, none of these students requested to use restrooms and/or locker rooms aligned with their gender identity." District Br. at 3. Those "transgender boys," are using the female facilities, which Appellants agree is their right because their sex is female. But the District Appellees cannot have it both ways by demanding that a transgender boy be in the boys' facilities, while intermingling what the District has deemed to be different sexes—"cisgender" girls with "transgender" boys, both in the girls' facility.

## IV. A Policy Opening Sex-Designated Facilities to Persons of the Opposite Sex Irreparably Injures Appellants and Fails to Balance the Interests of Appellees and the Public Despite Available Reasoned, Compassionate and Lawful Accommodations.

Allowing students of one biological sex into the locker rooms and rest rooms of the opposite sex irreparably harms students. They deserve to have their bodily

privacy respected and to be free from sexual harassment. Protecting students from these violations in no way harms the interests of the District, since following the law cannot harm the District. While Appellees claim that returning to the old policy would harm students who identify with the opposite sex, there are better ways to serve all involved. The United States is unique in the way we seek to permit people to live consistent with their deeply held beliefs. We can show respect for others by granting reasonable accommodations[6] and giving them wide latitude to live their lives consistent with their beliefs identifying with the opposite sex. The school accommodates transgender students through anti-bullying policies, creating a respectful environment, allowing students to wear clothes in accordance with their gender identity, and allowing the use of pronouns and names consistent with that gender identity.[7] Providing transgender students the option to access individual facilities is also a reasonable accommodation, especially when Dr. Leibowitz testified that gender dysphoric youth "are far more likely to want to conceal their physical anatomy and are typically extremely hypervigilant within sex-segregated situations." *See* J.A. 80 (Op. ¶ 366), 412-413 (7-17-17 Tr.), 2113 (Leibowitz Decl. ¶ 21).

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[6] We can learn much about accommodating transgender students from religious accommodations in employment and education where we make reasonable accommodations but need not and cannot violate others' rights in the process.

[7] Amici point to various efforts like these that improve the environment for transgender students. *See, e.g.*, Anti-Defamation League Br. at 16-17, 20.

What is unreasonable is telling other students to seek alternate facilities if they do not want to confront a member of the opposite sex in the very facilities that are supposed to protect one from opposite-sex exposure for the following reasons.

First, Appellants' legal interest is grounded in bodily privacy, rooted in objective sexual differences (which is within Title IX's zone of protection), as well as enjoying the protection propounded by the Supreme Court in *VMI* and similar cases. In contrast, the interest advanced by professed transgender students is first and foremost a presumed right to government affirmation of their individual perceptions—a right not contemplated in Title IX or any Supreme Court authority.

Second, Appellants' rights are grounded in the immutable characteristic of sex and therefore merit greater solicitude from the Court, as opposed to students who ground their stated rights to use opposite sex facilities in affirming the gender with which they identify.

Third, it properly balances conflicting rights, as giving Appellants the choice of either abandoning 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 established unconstitutional conditions doctrine, per Section V, *infra*.

Certainly, the Court is dealing with a situation which provokes an array of emotion, but regulating access to communal facilities by sex while providing

alternative individual facilities will protect the bodily privacy of *every* student and adopts the standard that the *VMI* decision set forth—and provides even more options for individuals wanting yet additional privacy from members of the same sex than is offered by communal facilities. This reasoned solution no more deems professed transgender students as "unacceptable," District Br. at 31, than the Court was saying that men or women were "unacceptable" by authorizing separate living quarters. Such unnecessary, pejorative framing of this issue thwarts, rather than enables, the logical, legal, and compassionate accommodation Appellants propose.[8]

The *Johnston* court summed up the situation well:

> The gravamen of plaintiff's case is [his] desire to [use] a specific [restroom or locker room] based on its particular appeal to [him]. . . .
>
> We are not unsympathetic with [his] desire to have an expanded freedom of choice, but its cost should not be overlooked. If [he] were to prevail, then all [sex-segregated restrooms and locker rooms] would have to be abolished.

*Johnston*, 97 F. Supp. 3d at 678 (paraphrasing *Vorchheimer v. Sch. Dist. of Phila.*, 532 F.2d 880, 888 (3d Cir. 1976)) (alterations from *Johnston*).

[8] Note that Aidan DeStefano, a transgender former student at Boyertown, suggested that other transgender students use private facilities if others who share those spaces are not comfortable with them using the opposite sex facilities. *See* J.A. 87 (Op. ¶ 409), 476-77 (7-17-17 Tr.). Similarly, he stated that he felt no discrimination prior to the school opening such facilities. *See* J.A. 473-74 (7-17-17 Tr.).

Despite Intervenor's contention, administering the prior sex-based policy would not be difficult because students' sex is known not only by the school but by fellow students. Though some students present differently, that is the case under either policy. When students come to know that a student shares their biological sex, there is no reason they would not respond positively, especially given the welcoming attitude of students towards their transgender peers. And since minors—which comprise the vast majority of District students—generally cannot avail themselves of the radical surgeries needed to alter the appearance of their reproductive anatomy, separating students biologically due to anatomical differences is easy to administer, as it has been for decades.

## V. The District's Policy Violates the Unconstitutional Conditions Doctrine.

Throughout their briefs, Appellees make much of the fact that Appellants' privacy is not violated if they leave the designated communal privacy facility and seek to protect their privacy by using an individual facility. And the lower court stated that the school is "not denying any benefit to the plaintiffs because they are exercising a constitutional right." Intervenor Br. at 27-28 (quoting Op. at 139). But the District is explicitly required by state law to provide facilities to be used exclusively by one sex so as to protect bodily privacy, and purports to do so even while, by policy, it violates that purpose. Appellants simply seek access to these facilities provided to them by law so that right to privacy from the opposite sex

will be sustained. Giving the Appellants the choice to abandon the facility to avoid a privacy violation caused by government action—or enter and risk the violation of that right—is an unconstitutional condition. *See* District Br. at 44 (stating that Appellants "have to decide whether to: 1) use the locker rooms and restrooms of their sex, knowing that a transgender student [of the opposite sex] might be using those same facilities, or 2) use alternate private facilities…."). But according to *Koontz v. St. Johns River Water Management District*, 133 S.Ct. 2586, 2594 (2013), denying a benefit unless a right is waived is unconstitutional. Appellants cannot be forced to waive their right to bodily privacy in order to enjoy this government-provided benefit of privacy facilities.

## VI. The School and Pennsylvania Youth Congress Foundation Turn Title IX on its Head.

Appellees claim that Title IX requires locker rooms and restrooms to be opened on the basis of gender identity. It does not. *See, e.g., Johnston, supra*. More specifically, Appellees argue that there is no possible privacy violation by intermixing the sexes in a facility. *See* District Br. at 19, 27; Intervenor Br. at 21, 28, 48, 49. But that is not only difficult to square with the many authorities Appellants cited regarding single-sex privacy facilities, it is in very strong tension with Pennsylvania's indecent exposure statute, which in relevant part reads:

> A person commits indecent exposure if that person exposes his or her genitals in any public place or in any place where there

> are present other persons under circumstances in which he or she knows or should know that this conduct is likely to offend, affront or alarm.

18 Pa.C.S.A. § 3127(a). Authorizing opposite-sex access to privacy facilities raises the risk of violation given the activities in these spaces such as complete locker room nudity, *see* J.A. 60, 63-64 (Op. ¶¶ 259, 287, 289), 1511-12 (Smith Dep.), 1787, 1826 (Roe Dep.), 1986, 1993 (Roe Trial Dep.), and exposed breasts and underwear in the common areas of bathrooms, *see* J.A. 55-56 (Op. ¶¶ 232-33), 271-72, 273-74, 288-89 (7-17-17 Tr.), 1810-1812 (Roe Dep.). The exposure of opposite sex private parts is not nullified by the exposing person's state of mind. *See Act 10, Special Session 1, 1995,* 1995 PA. LAWS 985 (removing the requirement that the exposure be "for the purpose of arousing or gratifying sexual desire"). This demonstrates that serious conflict with other laws arises when courts rewrite key statutory terms to have a meaning contrary to established use. Any change should be left to Congress, which has the capacity to harmonize statutes.

Considering this statute also rebuts Appellees' argument that additional bad acts are necessary to show harassment. When the ineluctable consequence of the District's policy is to violate a state indecency statute, one that does not require "bad acts," that is sufficient to show both a hostile environment and sex harassment under Title IX. And as it is the consequence of deliberate District

action, the "deliberate indifference" standard for student-on-student harassment is certainly inapposite to this analysis.

Bear in mind that Title IX was enacted to create sex-based protections, including freedom from harassment, and opening up such facilities causes the harassment Title IX was designed to prevent. The law is clear that sex-based privacy facilities should continue since a school "may provide separate toilet, locker room, and shower facilities on the basis of sex." 34 C.F.R. § 106.33.[9] In similar recognition of sex-based differences, schools may consider "an employee's sex in relation to employment in a locker room or toilet facility used only by members of one sex," 34 C.F.R. § 106.61. Contrary to Appellees' position, Title IX permits schools "to provide students with certain sex-segregated spaces, including bathroom and locker room facilities, to perform certain private activities and bodily functions consistent with an individual's birth sex." *Johnston*, 97 F. Supp. 3d at 678.[10]

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[9] Appelleees misconstrue the significance of Congress saying that schools "may" rather than "must" provide separate facilities under section 106.33. The issue at the time of passage was whether schools would be forced to abandon such facilities. The answer was no. While Congress could have used the word "must" rather than "may," the point was the same. Nobody anticipated that schools would voluntarily open these facilities, so either term sufficed.

[10] Even if this court were to treat gender identity as a component of sex under Title IX, we would urge the court to define the contours of sex in such a way that the biological component is not lost, and the privacy-protecting biological boundaries contemplated within section 106.33 are still respected.

The school incorrectly claims that the policy "has not resulted in any disruption to the educational program or activity of the district." District Br. at 4. Quite simply, this is wrong. The record shows that two Appellants were considering not returning, *see* J.A. 14, 46 (Op. at 9, ¶ 167), 316-17 (7-17-17 Tr.), and one actually did not return. Each student complained of increased stress and has reduced their use of restrooms.

## VII. Appellees Confuse the Intrusion Upon Seclusion Analysis.

The students rely on the argument as set forth in their principal brief. Intervenor complains that none of the students' cases involve intrusions upon seclusion by fellow users in a common facility, *see* Intervenor Br. at 48, but that is to be expected because we do not expect these areas to seclude us from the same sex who share these spaces.

## VIII. The Policy of Separating Privacy Facilities on the Basis of Sex Does Not Violate Equal Protection.

Intervenor claims that sex-based separation of facilities violates Title IX. *See* Intervenor Br. at 37. They argue that such schools separate all students on the basis of gender identity, except transgender students. But no school that has a sex-based policy utilizes gender, but simply administers its policy on the basis of sex, which caselaw approves. *See Faulkner*, 10 F.3d at 232 (recognizing "society's undisputed

approval of separate public rest rooms for men and women based on privacy concerns").

Instead, the school's new policy violates Equal Protection. Transgender students can choose to use the facilities corresponding to their gender or their sex, giving them more options than other students. *See* District's Br. at 3. Were the school using only gender as the basis to separate facilities, such a basis would still violate Equal Protection since "intermediate scrutiny will reject regulations based on stereotypical and generalized conceptions about the differences between males and females." *Faulkner*, 10 F.3d at 231 (citing *Frontiero*, 411 U.S. at 684-85). Likewise, it would even fail rational basis since neither a person's belief about their gender, nor their adoption of sex-stereotypical attributes bear any rational relation to the government interest in providing spaces where people can enter a state of undress without members of the opposite anatomical/biological sex present. Thus, cases like *Whitaker, supra*, are wrongly decided.

## IX. Appellees' Reliance on Undeveloped Science is Misplaced.

The testimony of Dr. Leibowitz was an exercise in self-rebuttal. He claimed that gender identity theory represented a scientific "consensus," J.A. 508 (7-31-17 Tr.), while admitting that it was a "complex . . . field in evolution," *id.* at 72 (Op. ¶ 335), 588 (7-31-17 Tr.), and that "there is a big debate that many scholars have spent hours and papers writing about" in respect to the baseline question of

whether being transgender is a mental disorder. *Id.* at 73 (Op. ¶ 339), 579 (7-31-17 Tr.). He claimed that WPATH guidelines are "widely used" in the profession, *id.* at 383 (7-17-17 Tr.), but didn't actually know how widely they were used, and could "only hope" that practitioners followed them. *Id.* at 559 (7-31-17 Tr.). He admitted that there was only "limited evidence" regarding the use of privacy facilities to affirm gender identity, *id*. at 77 (Op. ¶ 359), 386 (7-17-17 Tr.), and that no randomized, controlled studies on that subject existed, *see id*. at 2214-15 (Leibowitz Dep.). He claimed he wanted to "do no harm" to his patients, but confessed that he could not estimate the risk that gender affirming treatments might actually be harming patients, *see id*. at 82 (Op. ¶ 374), 526-528 (7-31-17 Tr.), and that the "first ever" U.S. study on the safety of gender affirmation treatment in adolescents has yet to produce any results, *id.* at 81-82 (Op. ¶373), 512-513 (7-31-17 Tr.).

He made the startling admission that using school privacy facilities is also a tool for diagnosing gender dysphoria, which may take six months or more. *See id*. at 72, 77 (Op. ¶¶ 334, 357), 541-42, 544, 546-47, 550 (7-31-17 Tr.), 2172-73 (Leibowitz Dep.). In such an instance a school might authorize access for a professed transgender student to an opposite-sex facility for many months, only to discover that the student was not transgender after all. What of the impact to girls who were obligated to share their locker room with a male for those months? The

expert said he gave no regard to impacts on third parties from his treatment regimens. *See id*. at 82 (Op. ¶ 375), 553-54 (7-31-17 Tr.). Even the "newer and better" gender dysphoria assessment tools he prefers using "have not yet been[] scientifically validated." *Id*. at 72 (Op. ¶ 335), 540 (7-31-17 Tr.). And despite all of of his uncertainty, he would insulate his beliefs from the gold standard of scientific review—controlled, randomized studies—by saying that it is unethical to pursue anything but the gender affirmation model. *See id.* at 82 (Op. ¶ 376), 2214-15 (Leibowitz Dep.). In sum, what Dr. Leibowitz testified to was that the science behind using public schools' privacy facilities as a gender dysphoria diagnostic/treatment tool rests on a foundation of sand.

## CONCLUSION

The law protects everyone's privacy in spaces like locker rooms and restrooms from persons of the opposite sex. Appellants are entitled to a preliminary injunction protecting them in these private spaces, and the court below should be reversed.

Respectfully submitted January 30, 2018.

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## 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.

I further certify that the text of the electronic Brief filed by ECF and the text of the hard copies filed or to be filed with the Court are identical. The electronic copy of the Brief has been scanned for viruses using Trend Micro Virus Protection.

I further certify that this Brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6,413 words as calculated by the word processing program used in the preparation of this brief, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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## CERTIFICATE OF SERVICE

The undersigned hereby certifies that on January 30, 2018, the foregoing was filed electronically and served on the other parties via the court's ECF system. Seven hard copies of the brief have also been sent to the Court via regular mail.

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