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

PETITION FOR REHEARING EN BANC

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

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

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INTRODUCTION

Privacy matters in bathrooms, locker rooms, and showers because of the anatomical differences between men and women. Its importance is amplified in the context of minor children at school: Joel Doe saw an undressed girl in his locker room.[1] He was told by his principal to make it natural.[2] Mary Smith encountered a boy in her restroom, with the approval of her school.[3] Yet the panel decision rejected the nation's longstanding protections for privacy and against sexual harassment, creating an issue of exceptional importance.

Six students sought a preliminary injunction after the Boyertown Area School District instituted a policy allowing male students to fully undress in and use female privacy facilities when they identify as girls, and vice versa. In affirming the denial of injunctive relief, the panel rejected the significance of bodily privacy from the opposite sex. This rejects the Supreme Court's, Third Circuit's, and Congress's definition of sex, which is grounded in the bodily differences between men and women. Intermingling the sexes in high school locker rooms and restrooms merits a preliminary injunction, just as the Supreme

[1] J.A. at 36.
[2] *Id*. at 38.
[3] *Id*. at 56, 58.

Court issued a stay allowing sex-based privacy facilities to continue in *Gloucester Cnty. Sch. Bd. v. G.G.*, 136 S. Ct. 2442 (2016).

STATEMENT OF COUNSEL

Pursuant to Local App. Rule 35.1, undersigned counsel expresses the belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to decisions of the United States Court of Appeals for the Third Circuit and the Supreme Court of the United States. Consideration by the full court is necessary to secure and maintain uniformity of decisions in this Court. The panel decision is contrary to the following decisions of this Court and the Supreme Court:

- *Gloucester Cnty. Sch. Bd. v. G.G.*, 136 S. Ct. 2442 (2016) (granting stay to maintain sex-based privacy facilities during appeal).

- *Nguyen v. INS*, 533 U.S. 53, 68, 73 (2001) (rejecting plaintiff's argument that childbirth is merely a feminine stereotype rather than an operative biological fact contrasting the sexes).

- *U.S. v. Virginia*, 518 U.S. 515, 533, 550 n.19 (1996) (recognizing the "enduring" "[p]hysical differences between men and women," which make the two sexes distinct and require separate privacy facilities).

- *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (finding that sex stereotypes may be indirect evidence of disparate treatment of the sexes).

- *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) ("[S]ex, like race and national origin, is an immutable characteristic determined solely by the accident of birth.").

- *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).

This case involves questions of exceptional importance because allowing boys into areas where girls are undressed or attending to sensitive personal hygiene, or vice versa, eviscerates bodily privacy, violates students' constitutional rights, and subjects them to sexual harassment.

ARGUMENT

En banc review is necessary because the panel decision disregards precedent regarding sex, a proper reading of Title IX, precedent regarding bodily privacy, and exceptionally important policy implications.

I. The panel misconstrued the nature of sex.

Sex is not the same as gender identity. Conflating these terms confuses the analysis of sexual harassment under Title IX and of the right to bodily privacy. It is the presence of the opposite sex in privacy facilities—restrooms, locker rooms, and showers—that constitutes sexual harassment and that violates privacy. While the panel suggested that the phrase "opposite sex" was confusing,[4] this unambiguous terminology is the norm in sexual harassment and bodily privacy cases.

[4] Oral Argument Audio at 04:23.

Appellees' expert, Dr. Scott Leibowitz, explained that "sex" is "the anatomical and physiological processes that lead to or denote male or female"[5] while "[g]ender identity is one's subjective, deep-core conviction sense of self as a particular gender. In most situations, male or female, but maybe some aspect of both, or in between."[6] Sex and gender identity necessarily stand in contradistinction since "transgender" does not make sense apart from a person's subjective beliefs about their gender differing from their sex.

The panel, in rejecting "sex"[7] and substituting gender identity, discards the Supreme Court's decades-old recognition that sex is based on biological differences.[8] "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). That biological differences define sex rather than exist as mere sex stereotypes is discussed at length in *Nguyen v. INS*, 533 U.S. 53 (2001), involving an equal protection challenge to the statute governing the acquisition of citizenship where only one parent is a citizen. Citizenship is automatically granted when the

[5] J.A. at 70.
[6] *Id*. at 375.
[7] Oral Argument Audio at 04:23.
[8] Likewise, this circuit has recognized the significance of privacy concerns, specifically from the "opposite sex." *Doe v. Luzerne County*, 660 F.3d 169, 177 (3d Cir. 2011).

mother is the citizen, but additional proofs are necessary where the father is the citizen.

> There is nothing irrational or improper in the recognition that at the moment of birth—a critical event in the statutory scheme and in the whole tradition of citizenship law—the mother's knowledge of the child and the fact of parenthood have been established in a way not guaranteed in the case of the unwed father. This is not a stereotype.

Id. at 68. The Court cautioned against "[m]echanistic classification of all our differences as stereotypes." *Id*. at 73. "To fail to acknowledge even our most basic biological differences . . . risks making the guarantee of equal protection superficial, and so disserving it." *Id*. at 73. Nguyen's argument was flawed because he characterized childbirth as a mere stereotype of womanhood, rather than being inextricably tied to the fact of being female—just as the present panel ignored anatomical differences and treated them as mere stereotypes.

Likewise, when the Supreme Court opened Virginia Military Institute (VMI) to women to combat sex discrimination, it pointedly observed the need to alter facilities "to afford members of each sex privacy from the other sex." *U.S. v. Virginia*, 518 U.S. 515, 550 n.19 (1996). Anatomical differences were indisputably at issue. *See id*. at 533 ("[p]hysical differences between men and women," which are "enduring," render "the two sexes . . . not fungible."). And this Court tracked *VMI* by sanctioning an otherwise sex-discriminatory employment policy when the

job duties include accompanying patients to a bathroom. *Healey v. Southwood Psychiatric Hosp.*, 78 F.3d 128, 133-34 (3d Cir. 1996).

The U.S. Department of Education also follows *VMI*, announcing that it would not investigate complaints about lack of access to opposite-sex facilities: "Title IX prohibits discrimination on the basis of sex, not gender identity" and "separating facilities on the basis of sex is not a form of discrimination."[9] This aligns with Title IX and its regulations, which repeatedly reference "one sex," "the other sex," and "both sexes,"[10] binary terms that are inconsistent with the gender identity continuum.[11]

Despite the clear definition of sex scientifically, in caselaw, and in Title IX, this panel asserted that *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) introduced a new understanding of sex, one not based on anatomy.[12] But *Price Waterhouse* only recognized that reliance on sex stereotypes may evidence sex discrimination. *See Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 188–89 (2009)

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[9] Moriah Balingit, *Education Department no longer investigating transgender bathroom complaints*, Washington Post (February 12, 2018), *available at:* https://www.washingtonpost.com/news/education/wp/2018/02/12/education-department-will-no-longer-investigate-transgender-bathroom-complaints/, (last visited June 21, 2018).
[10] *See, e.g.*, 20 U.S.C. § 1681(2) and (8); 34 C.F.R. § 106.33.
[11] J.A. 70-72 (discussing the nonbinary and sometimes fluid aspect to gender).
[12] Opinion at 29.

(explaining controlling opinion in the case).[13] Conversely, it is a violation of *Price Waterhouse* to segregate restrooms and locker rooms as Boyertown has—by evaluating whether a biological girl has a sufficiently male identity to use male privacy facilities.

The panel should not have redefined sex to include gender identity contrary to the clear definition established by the Supreme Court, Congress, and the Department of Education.[14]

II. In conflating sex and gender identity under Title IX, the panel makes it more difficult to combat harassment.

The panel contends that there can be no sexual harassment because there is no disparate impact based on sex.[15] But neither an educational institution under Title IX nor an employer under Title VII should escape liability by fostering an environment that invites sexual harassment against both sexes. Such an

[13] The panel, on page 29, suggested that sex should be uncoupled from biology since *Oncale v. Sundowner Offshore Servs.*, states that "statutory provisions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concern of our legislators by which we are governed." 523 U.S. 75, 79 (1998). But supplanting sex with gender and thus intermingling the sexes is not "reasonably comparable" to preserving the privacy between the sexes in locker rooms and restrooms. As the Tenth Circuit said, the "[u]se of a restroom designated for the opposite sex does not constitute a mere failure to conform to sex stereotypes." *Etsitty v. Utah Transit Authority*, 502 F.3d 1215, 1224 (10th Cir. 2007).

[14] Moreover, with regards to Title IX, it is a legislative function to harmonize new, inconsistent categories into the law.

[15] Opinion at 25-26.

environment was at issue in *Venezia v. Gottlieb Mem'l Hosp., Inc.*, 421 F.3d 468 (7th Cir. 2005), where a husband and wife both raised sexual harassment claims. *See id.* at 471-72. Mr. Venezia was subjected to naked photos and other harassment while his wife was subjected to rumors and a vulgar photograph. *See id*. at 469-70. The Seventh Circuit in distinguishing *Pasqual v. Metropolitan Life Insurance Company*, 101 F.3d 514 (7th Cir. 1996), cited by the present panel,[16] sought to maintain "vicarious liability for the employer with respect to two related employees who are in different settings, reporting to different supervisors, with different co-workers." *Venezia*, 421 F.3d. at 472.

This case is like *Venezia* in that harassment occurs by different persons. Certain students have access to restrooms and locker rooms of the opposite sex. When, for example, a male enters the girls' restroom, he does so because the facility is set aside for girls. A male student entering the girls' restroom sexually harasses the girls in that setting, just as a female entering the boys' restroom harasses boys in that setting. The school, like the *Venezia* employer, is responsible for this harassment since it was invited by the school's policy.

While the panel acknowledged that the sexual harassment need only be severe or pervasive,[17] it concluded that the "mere presence of transgender students

[16] Opinion at 26 n.110.
[17] Opinion at 24 n.99.

in bathrooms and locker rooms"—in other words, students of the opposite sex who may be unclothed and observe others who are unclothed—does not constitute "sexual harassment so severe, pervasive, or objectively offensive and 'that so undermines and detracts from the victims' educational experience that [the plaintiff] is effectively denied equal access to an institution's resources and opportunities.'"[18]

The panel failed to acknowledge the severity of the situation: the policy invites students—indeed, children—of the opposite sex to undress in front of each other. It is all the more severe because of the power differential: those with less power (students) are forced to abandon what they otherwise would not (their own privacy). The policy pressures children to ignore the real bodily differences of the opposite sex and to "make it natural." These minors are forced to withstand these pressures or suffer silently and endure the harassment. In addition to being manifestly severe and objectively offensive—as evidenced by the cases in various contexts cited in Appellants' briefing—the policy also makes the harassment pervasive because such behavior is invited in every multi-user privacy facility. This policy has resulted in a denial of access to the school's resources: for

[18] *Id*. at 26 (quoting *DeJohn v. Temple Univ*., 537 F.3d 301, 316 n.14 (3d Cir. 2008)).

example, one student left the school[19] and all students reduced their use of the facilities.[20]

This is a matter of exceptional importance because opposite sex entry in privacy facilities is sexually harassing.[21] The subjective intent of the opposite sex intruder is not an element of harassment—which is why even a well-meaning maintenance worker of the opposite sex is properly excluded from the other sex's privacy facility.[22]

The panel concluded that Boyertown can escape liability since students who do not want to share multi-user facilities with the opposite sex can retreat

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[19] J.A. at 46; 317.

[20] *Id.* 42-43, 50, 59, 63.

[21] The Second Circuit recognized in an unpublished opinion that entering an opposite sex locker room is an act of sexual harassment. *See Lewis v. Triborough Bridge & Tunnel Auth.*, 31 F. App'x 746, 747 (2d Cir. 2002) (pointing out that "male . . . cleaners frequently engaged in a variety of specific acts of sexual harassment, including entering the . . . women's locker room when female employees were undressed"). In insisting that this case is distinguishable on the basis of additional bad acts, *see* Opinion at 27, the panel missed the point that entry itself constitutes harassment. *See also, Washington v. White*, 231 F. Supp. 2d 71, 80-81 (D.D.C. 2002) (recognizing that a female entering the men's locker room "on five to ten occasions" constituted sexual harassment).

[22] *See, e.g.*, *Norwood v. Dale Maint.*, 590 F. Supp. 1410, 1417 (N.D. Ill. 1984) (upholding sex as a bona fide occupational qualification for restroom janitors due to privacy violations that would otherwise result, which an expert described as "extreme" and resulting in "embarrassment and increased stress"); *Brooks v. ACF Industries*, 537 F.Supp. 1122, 1132 (S.D. W.Va. 1982) (reasoning that "male employees had legitimate privacy rights that would have been violated by a female's entering and performing janitorial duties therein during their use thereof, and to protect those rights, those male employees were entitled to insist that defendant not assign plaintiff to do so").

elsewhere.[23] However, forcing a victim of harassment to seek relief elsewhere leaves the hostile environment intact, awaiting the next student's entry. Such a "solution" underscores the problem—denying "access to an institution's resources and opportunities."[24]

III. The panel decision improperly limits the right to bodily privacy.

A. The panel decision fails to recognize that the right to bodily privacy turns on bodily differences.

The panel took an extreme position. "Regardless of the degree of the appellants' undress at the time of the encounters . . . the School District's policy served a compelling interest."[25] Taken to its logical limits, even complete nudity would not trigger a sufficient privacy interest to outweigh the interest of "preventing discrimination," rather than recognizing (as did the *VMI* court and 34 C.F.R. § 106.33[26]) that there is no discrimination when distinctions are based on real bodily differences between men and women. *See also Nguyen*, 533 U.S. at 73.

The panel recognized that a person has a constitutionally protected privacy interest in his or her partially clothed body,[27] but later exposed its redefinition of sex into gender identity, saying that "the presence of transgender students in these

[23] Opinion at 17-18.
[24] *DeJohn*, 537 F.3d at 316 n.14.
[25] Opinion at 14.
[26] Authorizing sex discrimination in school privacy facilities.
[27] Opinion at 13.

spaces does not offend the constitutional right of privacy. . . ."[28] That can be true only if one accepts that sex is not defined by reproductive nature, but by a psychological state.

Caselaw has consistently recognized the material import of the opposite sex in privacy claims. In fact, the cases cited by the panel when recognizing the "protected privacy interest in his or her own partially clothed body" in footnote 53 deal with privacy between the sexes. "Doe had a reasonable expectation of privacy while in the Decontamination Area, particularly while in the presence of members of the opposite sex." *Luzerne County*, 660 F.3d at 177. Single occupant "bathrooms . . . obviously . . . [were] not intended to be used by both sexes at the same time." *D.R. v. Middle Bucks Area Vocational Technical School*, 972 F.2d 1364, 1375 (3d Cir. 1992). This privacy interest is rooted in anatomical differences. *Fortner v. Thomas*, 983 F.2d 1024, 1030 (11th Cir. 1993) ("special sense of privacy in their genitals") (*quoting Lee v. Downs*, 641 F.2d 1117, 1119 (4th Cir. 1981)). The Sixth Circuit rightly grounded this understanding in "an abundance of common experience" that "there must be a fundamental constitutional right to be free from forced exposure of one's person to strangers of the opposite sex. . . ." *Brannum v. Overton County Sch*. Bd., 516 F.3d 489, 495 (6th Cir. 2008) (internal citations omitted). This is also true in the context of

[28] *Id*. at 22.

"underwear clad teen and pre-teen boys and girls." *Id*. But under the panel's holding, each of those cases would have turned out differently if the opposite sex intruder claimed transgender status—which erases the principle of privacy between the sexes.

B. The panel decision fails to analyze unconstitutional conditions.

The panel recognized "that a person has a constitutionally protected privacy interest in his or her partially clothed body," but failed to address Boyertown's unconstitutionally conditioning the use of multi-user facilities on waiving that right to bodily privacy. Appellants do not allege, as suggested by the panel, that the Constitution requires Boyertown to create separate multi-user facilities. However, state law requires such facilities to be separated by sex, which is fitting for vulnerable minors in a custodial setting who are compelled to attend school. Because all students have a constitutionally protected privacy interest in their partially clothed bodies, and because the Commonwealth bestowed a benefit by statute—namely, the use of sex-specific restrooms and locker rooms—it is axiomatic that the government cannot now condition the use of that benefit on waiving privacy rights.

Unconstitutional conditions are illegal even when the benefit is gratuitous[29]—something that the legislature could give or take away. Here, the

[29] Appellants' Br. at 25.

deprivation is even more severe because the benefit was given to protect the very constitutional right which Boyertown now requires students to forfeit: the right to bodily privacy.

Of course, to avoid this, the panel ultimately concluded that a male's "subjective, deep-core conviction sense of self as a particular gender"[30] supersedes every girl's right to privacy from males in her restroom and locker room, and vice versa. Nowhere is the error of supplanting objective sex with subjective gender identity more obvious than when the panel held that "the presence of transgender students in these spaces does not offend the constitutional right of privacy any more than the presence of cisgender students in those spaces."[31]

C. The panel is incorrect that the new policy serves a compelling governmental interest in preventing discrimination since sex-separated privacy facilities are not discriminatory.

Separating multi-user restrooms and locker rooms on the basis of sex is not gender identity discrimination. All students, regardless of their gender identity are treated equally.[32] Thus, discrimination is not implicated. Importantly, Title IX specifically enumerates sex as the only "basis for separating restroom and locker

[30] J.A. at 375.
[31] Opinion at 22.
[32] Boyertown treats students unequally since three transgender students use the privacy facilities based on their sex and three based on their gender identity. *See* District Br. at 3.

rooms," and Pennsylvania law explicitly *requires* sex-specific privacy facilities. We do not separate privacy facilities because of any protected class, but we separate them *in spite of* sex being a protected class, because bodily privacy from the opposite sex is so fundamental as to justify the differential treatment as discussed more fully in Appellants' principal brief.[33]

D. There is no compelling governmental interest in affirming a student's subjective perception of their gender in every context.

The panel found compelling an interest in "protecting the physical and psychological well-being of minors."[34] But it, and the lower court, failed to address the damaging admissions made by Appellees' expert, Dr. Leibowitz. After raising a broad concern about elevated suicide risks among gender dysphoric persons, he could not cite any study regarding those risks in correlation to usage of any particular restroom,[35] or that cross-sex usage was a necessary treatment.[36] Dr. Leibowitz could not discuss the probability of harm to his patients by his treatments which include cross-sex usage[37] or of harm to third parties.[38] In fact, he presented cross-sex usage as a diagnostic tool,[39] such that a boy may use girls'

[33] Appellants' Br. at 28-31.
[34] Opinion at 15.
[35] J.A. at 82.
[36] *Id*. at 437.
[37] *Id*. at 526-28.
[38] *Id*. at 553-54.
[39] *Id*. at 72, 546.

facilities for months before concluding he is not transgender.[40] While claiming that gender affirmation was the scientific consensus, Dr. Leibowitz admitted that much debate and evolution was underway in the gender identity model.[41] Given Dr. Leibowitz's inability to parse out the impacts and risks related to using school privacy facilities as a treatment or diagnostic tool when the school has a long list of alternate gender affirmation methods,[42] the panel's balancing of harms is not supported by the opposition's own expert.

IV. The exceptionally important policy implications of the panel decision extend well beyond this case.

The panel asserted that Appellants seek privacy "in a space that is, by definition and common usage, just not that private."[43] They are "spaces where it is not only common to encounter others in various stages of undress, it is expected."[44]

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[40] *Id*. at 77, 381.
[41] *Id*. at 540.
[42] There are many ways to affirm the dignity and worth of transgender students without violating privacy. *Id*. at 632 (testimony from the high school principal). Boyertown allowed transgender students to choose the graduation gown matching their gender identity, *id*. at 466, encouraged teachers to use the names and pronouns of preference, and created a nurturing environment, *id*. at 630-32. Aidan DeStefano, a transgender student, counseled other transgender students to use single user facilities if classmates were uncomfortable with the situation. *Id*. at 476-77. The school should provide reasonable accommodations to transgender students in instances where other students' right to privacy is not implicated. The school can encourage a live and let live environment of respect without violating the rights of others.
[43] Opinion at 20.
[44] *Id*.

But it is precisely because we do not expect privacy when sharing locker rooms and restrooms with persons of the same sex, that we prevent the opposite sex from entering. If lack of privacy from the same-sex would render these settings non-private from the opposite sex, there would be no recourse for a male supervisor walking in on a female employee in a locker room so long as there was no additional bad act.

The panel's conclusion that bodily privacy from the opposite sex is not implicated in situations involving persons who are transgender[45] has far reaching implications. For instance, strip searches in school are conducted by persons of the same-sex due to bodily privacy concerns. Based on the panel's reasoning, however, bodily privacy concerns would not be raised by a man who identifies as a woman administering the strip search of a minor girl at school or providing security for the showers at a women's prison. The panel decision should be revisited to correct these issues.

CONCLUSION

For the foregoing reasons, Appellants request rehearing en banc.

[45] *Id*. at 22.

Respectfully submitted, this 2nd day of July, 2018.

By: /s/ Randall L. Wenger

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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.

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

I further certify that this motion complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because it contains 3,896 words as calculated by the word processing program used in the preparation of this motion, excluding the parts of the motion exempted by Fed. R. App. P. 27(a)(2)(B).

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

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CERTIFICATE OF SERVICE

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

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