No. 17-301

IN THE
Supreme Court of the United States

KENOSHA UNIFIED SCHOOL DISTRICT NO. 1 BOARD OF EDUCATION AND SUE SAVAGLIO-JARVIS, IN HER OFFICIAL CAPACITY,

Petitioners,

v.

ASHTON WHITAKER, BY HIS MOTHER AND NEXT FRIEND, MELISSA WHITAKER,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF *AMICUS CURIAE* OF THE FOUNDATION FOR MORAL LAW IN SUPPORT OF PETITIONERS

MATTHEW J. CLARK
Counsel of Record
FOUNDATION FOR MORAL LAW
One Dexter Avenue
Montgomery, AL 36104
(334) 262-1245
matt@morallaw.org

Counsel for *Amicus Curiae*

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Constitutions, Statutes, and Regulations

Other Authority

INTEREST OF AMICUS CURIAE[1]

The Foundation for Moral Law ("the Foundation") is a national public-interest organization based in Montgomery, Alabama, dedicated to the defense of religious liberty and the strict interpretation of the Constitution as written and intended by its Framers.

The Foundation has an interest in this case because it believes that the bathroom policy imposed on the Kenosha Unified School District Board of Education ("the Board") by the Seventh Circuit is not required by the Constitution and could result in great long-term harm to students and to society as a whole and also interfere with rights of religious freedom.

SUMMARY OF ARGUMENT

Believing that the Constitution should be interpreted strictly according to its plain meaning as understood by its Framers, the Foundation fully endorses the legal and constitutional arguments of the Board. The Foundation agrees that the Constitution is silent on the issue of transgender identification and does not guarantee anyone the right to use facilities that are assigned to those of the

---

[1] Pursuant to this Court's Rule 37.3, all parties have consented to the filing of this brief. Pursuant to Rule 37.6, *amicus curiae* states that no party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and no person other than the *amicus curiae*, its members, or its counsel, contributed money that was intended to fund preparing or submitting this brief.

opposite sex as determined from birth. This position is also consistent with Department of Education regulations (34 C.F.R. § 106.33) implementing Title IX (20 U.S.C. § 1681(a)).

Rather than restating the legal arguments of the Board, the Foundation will focus instead upon the practical effects, short-term and long-term, of the policies mandated by the Seventh Circuit. *See Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 853 F.3d 1034 (7th Cir. 2017). The Foundation contends that those policies will encourage more young people to question their gender identity, likely causing confusion, trauma, and turmoil in young minds. Authenticating behavior that results in sterility can have tragic consequences for impressionable minors on the cusp of adulthood.

Furthermore, the logical result of mandating that girls may be in the boys' room is that boys may be in the girls' room and then on the girls' track team. Nothing in American law authorizes such mandates. This case provides an opportunity to call a halt to this foolishness before it further proliferates. As James Madison stated in 1785: "The free men of America did not wait till usurped power had strengthened itself by exercise, and entangled the question in precedents. They saw all the consequences in the principle, and they avoided the consequences by denying the principle."[2]

---

[2] "A Memorial and Remonstrance," in 1 *Letters and Other Writings of James Madison* 163 (1865).

ARGUMENT

At least since *Brown v. Board of Education,* 347 U.S. 483 (1954), this Court has recognized that in deciding a case, the Justices must take into account the practical effects of their decision on the policies at issue in the case. If this Court decides that students who reject their own sex as determined at birth ("birth sex")[3] are legally or constitutionally entitled to use facilities assigned to the opposite sex, the practical effects would be substantial and could be disastrous.

I. If schools are required to allow students of one sex as determined at birth to use facilities assigned to the opposite sex, the number of students claiming such rights is likely to increase.

No one knows how many students in the United States reject their birth sex, but the recent focus on such individuals has been accompanied by an increase in reported cases of such behavior.

Oakland, California developmental psychologist Diane Ehrensaft says her practice has seen a fourfold increase in the number of gender-questioning youths in recent years.[4]

---

[3] The term "birth sex" means "the sex assigned to individuals at their birth." *G.G. v. Gloucester Cnty. Sch. Bd.*, 132 F. Supp. 3d 736, 739 n.1 (E.D. Va. 2015).

[4] Quoted in Nicholas Weiler, *Transgender Kinds: 'Exploding' Number of Children, Parents Seek Clinical Help*, California News, June 5, 2015 (updated August 12, 2016).

Bren Fraser, a therapist who works with such clients age seven and up, says, "It's become a specialty for me. … I've seen much more growth in the last two years—even more in the last year."[5]

Margaret Wente, a Canadian newspaper columnist, wrote about the growing prevalence of such behavior:

> A condition that used to be vanishingly rare, perhaps one in 10,000 children or less, now seems common. In a random sampling of 6th- to 8th-graders in San Francisco, kids were asked if they identified as male, female or transgendered—1.3 per cent checked off the transgendered box.[6]

Granted, the increase in youths who openly reject their birth sex does not necessarily mean that the number of youths who experience such urges has increased. In earlier times, youths who felt such impulses were possibly more likely to keep quiet about them. Starshine Roshell, a California journalist, asks:

---

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

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

> Were there always children who felt antsy in their assigned gender —but never safe saying so in a pre-Caitlyn Jenner world? Could the explosion of social awareness be enticing some angsty adolescents to "try out" gender nonconformity as an option they wouldn't have considered before? *And is it insensitive to even ask that?*[7]

But it seems very likely that the attention which has recently been focused upon such behavior has caused many young people to muse: "Maybe I'm really a girl in a boy's body," or the reverse. And many for whom rejection of their birth sex may have been at most a fleeting thought a generation earlier, might now start taking such thoughts very seriously and decide to act on them.

Government policies, especially federally-mandated government policies, that recognize, sanction, and provide special legal protection for such behaviors, may cause some individuals, who otherwise would not have entertained the idea, to conclude that rejecting one's birth sex is an acceptable lifestyle legally, morally, socially, and medically.[8] Thus, the Seventh Circuit's decision, if not reversed, could have the effect of encouraging

---

[7] Roshell, *Sudden Surge*, *supra* n.5.

[8] Until 2013, the *Diagnostic and Statistical Manual of Mental Disorders* of the American Psychiatric Association classified a desire to be the opposite sex as a "disorder," i.e., a mental illness. In May 2013 the softer term "dysphoria" was adopted.

students to question their own gender identity and to take steps to act on those thoughts.

II. The idea that one's sex can be changed is a myth.

Oral argument before the Seventh Circuit[9] began as follows:

> Q: Does the district take the position that there is no such thing as a transgender person? In other words, does the district disagree that any such person exists?
>
> A: No. Transgender people certainly exist, and nobody has ever claimed from our side that transgender students don't exist.

That was a fatal concession. Men cannot become women nor can women become men. They can only pretend to do so. Daily dosing on hormones and disfiguring surgery do not change the reality that sex chromosomes are determined at conception. Females are XX and males are XY. The human egg has an X chromosome and the male contributes either an X or a Y, thus irreversibly defining the sex of the new human being at the instant of conception.

Although the newly conceived human being grows through cell division and specialization, the DNA in the nucleus of every cell in the body contains the

---

[9] Oral argument in No. 16-3522, *Ashton Whitaker v. Kenosha Unified School District* (7th Cir. March 29, 2017), https://goo.gl/S9zcTX.

same sex chromosomes as the original cell.[10] Thus, no person can change his sex but can only mutilate and distort the endowment bestowed at conception. The DNA in young Whitaker's cells does not change simply because she wears male clothes, daily swallows male hormones, or eventually surgically alters her body. In scientific terminology, superficial changes to the phenotype have no effect on the genotype.

Surgical alteration of one's sexual organs does not and cannot change the basic DNA with which a person was born. "It is physiologically impossible to change a person's sex, since the sex of each individual is encoded in the genes—XX if female, XY if male. Surgery can only create the *appearance* of the other sex."[11] Dr. George Burou, a surgeon who has performed over 700 sexual reassignment surgeries, stated, "I don't change men into women. I transform male genitals into genitals that have a female aspect. All the rest is in the patient's mind."[12]

---

[10] The human body contains tens of trillions of cells. Rose Eveleth, *There are 37.2 Trillion Cells in Your Body*, Smithsonian Magazine (Oct. 24, 2013), https://goo.gl/w3B5sk. In almost every individual the 37.2 trillion cells are either all XX or all XY. Genetic oddities may occur but in this case Whitaker does not argue that she is biologically male in any sense, but only that she wants to be treated as a male.

[11] Richard P. Fitzgibbons, M.D., et al., *The Psychopathology of "Sex Reassignment" Surgery*, Nat'l Catholic Bioethics Q. (April 2009), at 118.

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

This Court should not encourage a delusional and tragic journey into unreality by people, often unhappy with life, who falsely imagine that rejecting their God-given identity will somehow make their problems go away. Life is challenging in a fallen world where sin abounds on every side and a lying spirit is the god of this world. *John* 8:44, *2 Corinthians* 4:4. But to imagine that a Frankenstein-style transmogrification into the opposite sex will make life better is a sad delusion. When those who journey down this path find that life is no better on the other side of the hormone bottle, the redoubled anguish prompted by their folly only magnifies the self-loathing that prompted the experiment.

This Court, with no authority to do so in the Constitution or any statute, should refrain from encouraging such misguided behavior. Neither Title IX nor *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), contemplated that treating the sexes equally required educational institutions to bow to the subjective desire to reject one's birth sex.[13] Telling a young woman that she is not a man is not "sex stereotyping" but a simple acknowledgement of reality. The authors of Title IX and the ratifiers of the Equal Protection Clause did not intend to create protected classes of men parading in dresses or

[13] The logical stopping point is not girls in the boys' room, as the Seventh Circuit ordered. Next are crossdressing boys in the girls' room, a far more dangerous situation, and ultimately boys on girls' athletic teams, as crazy an inversion of Title IX as one could imagine.

women growing beards, phenomena formerly associated with circus sideshows.[14]

III. This Court bears some responsibility for the proliferation of the transgender myth.

Lamentably, this Court bears some responsibility for encouraging the journey into unreality reflected in the Seventh Circuit's opinion. In *Roe v. Wade*, 410 U.S. 113 (1973), the Court redefined life in the womb to be mere "potential life" in order to justify a nationwide holocaust of the unborn. That misnomer lingered for decades in this Court's jurisprudence and proliferated through the lower courts.[15] In *Lawrence v. Texas*, 539 U.S. 558 (2003), the Court dignified the act of sodomy with constitutional status, thus denying the biological reality that the human body is designed for joinder of the male with the female. In *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), the Court magnified its embrace of unreality in *Lawrence* by recognizing a form of marriage unknown to human history.

---

[14] A medical researcher states: "For hundreds of years, societies have maintained a certain fascination with the bizarre and the unknown. In the past, persons with congenital disorders that cause excessive body-hair growth have been so dramatized and romanticized that individuals with rare hypertrichosis syndromes became crowd-drawing money-making phenomena in many 19th century sideshow acts." Dirk M. Elston, *Congenital Hypertrichosis Lanuginosa*, Medscape.com (Apr. 17, 2017), https://goo.gl/mkbvtL. Today the freakish sideshow has entered our culture's main arena.

[15] *See* Martin Wishnatsky, *The Supreme Court's Use of the Term "Potential Life": Verbal Engineering and the Abortion Holocaust*, 6 Liberty Univ. L. Rev. 327 (2012).

The campaign for so-called transgender rights, promoted by the media and now gaining a foothold in the courts, builds upon earlier successes in redefining reality. If life in the womb is only "potential," if sodomy is a civil right, and if sodomite "marriage" is equivalent to the real thing, then why can't a girl be a boy or vice versa? Reality, it seems, is plastic, fungible, subject to alteration at the whim of any disordered imagination. The freedom envisioned by the Founders, tied inescapably to the objective reality designed by the Creator, has devolved through rejection of God into whatever absurd fancy a depraved mind can conjure. "Because that, when they knew God, they glorified him not as God, neither were thankful; but became vain in their imaginations, and their foolish heart was darkened." *Romans* 1:21.

Nonetheless, although this Court's embrace of illusionary rights has set the stage for the Seventh Circuit's journey into new dimensions of unreality, by a strange twist of logic this Court's own precedent in *Obergefell* argues in favor of rejecting this latest folly. In *Obergefell*, the majority found as a factual predicate for its gay-marriage edict that one's sexual orientation was genetically immutable. 135 S. Ct. at 2594, 2596. Because those with same-sex attractions were incapable of changing their "identity," the Court argued, they should not be excluded from the institution of marriage. But if sexual orientation is an immutable trait, is not one's sex itself likewise unchangeable? Contrariwise, should this Court determine that "thinking can make it so," it would

have to revisit its *Obergefell* finding that a change in sexual orientation is impossible. Surely, if sexual identity is mutable, then so is sexual desire.

IV. Acting on the illusion that a person may change one's sex can bring tragic consequences.

Advocates of the illusion that a person may change one's sex do not want to acknowledge that some who act on those thoughts later have regrets or unpleasant results. They often cite a Swedish study that found that only 2.2 percent of such persons suffered from sex change regret.[16] One commentator observes:

> What they are actually measuring is the rate of "legal detransition." They measure what percentage of people who undergo a legal name and gender change then undergo a second legal name and gender change. They don't measure people who have regrets but don't detransition legally, or don't detransition at all. It is also possible to detransition and not regret the original transition.

The author continues:

> Because I transitioned 20 years ago, I know many MTF (male-to-female) transitioners

[16] *See* Cecilia Dhejne, et al., *An Analysis of All Applications for Sex Reassignment Surgery in Sweden, 1960-2010: Prevalence, Incidence, and Regrets*, Arch. Sex. Behav. 43(8), May 2014.

> that were in my cohort or even 5-10 years before. What I see is concerning. I am the only one of them that has detransitioned, and most of them would not say they regret their transition and continue to go by feminine pronouns and feminine names. In terms of life outcomes, I would say economically they are mostly doing well. However, socially they are struggling. Most of them are alone. I see a lot of social anxiety, people being unwilling to leave the house. In addition, they still continue to deal with dysphoria and have emotional difficulties.[17]

Other studies agree that the percentage who experience regret is much higher than 2.2%. The *Guardian*, after reviewing one hundred studies of persons who rejected their birth sex, concluded that 20% of such persons regretted their actions, and that many remain severely distressed and even suicidal.[18] As early as 1979 Dr. Charles Ihlenfeld, who had administered hormone therapy to about 500 such persons, said simply: "There is too much unhappiness among people who have had the surgery. Too many of them end as suicides."[19]

---

[17] TWT, *'Regret Rates' Are Not the Sole Measure of Outcomes*, ThirdWayTrans.com (June 29, 2015), https://goo.gl/ICDyT6.

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

[19] *Id.*

While accepting an ESPY Award for exceptional athletic performance in 2015, Bruce/Caitlyn Jenner told the audience that 41 percent of persons who attempt to become the opposite sex also attempt suicide.[20] Consider other evidence:

- A Swedish study of all 324 persons who had been sex-reassigned between 1973-2003 found that "[p]ersons with transsexualism, after sex-reassignment, have considerably higher risks for mortality, suicidal behaviour, and psychiatric morbidity than the general population."[21]

- A 2009 study conducted by the Case Western Reserve University Department of Psychiatry concluded that "90 percent of these diverse [transgendered] patients had at least one other significant form of psychopathology."[22]

- A 2003 Dutch survey of board-certified Dutch psychiatrists concluded that, of 359 patients treated for cross-gender identification, 61 percent had other psychiatric disorders and illnesses, notably personality, mood, dissociative, and psychotic disorders.[23]

---

[20] *Id.*

[21] Cecilia Dhejne et al., *Long-Term Follow-Up of Transsexual Persons Undergoing Sex Reassignment Surgery: Cohort Study in Sweden*, PLOS/ONE, Feb. 22, 2011, *available at* https://goo.gl/tr4ibw.

[22] *Id.*

[23] *Id.*

- In 2013 the University of Louisville conducted a study of 351 individuals who sought to be the opposite sex and found that the rates of depression and anxiety "far surpass the rates of those for the general population."[24]

- The 2015 Report of the U.S. Transgender Survey revealed that 40 percent of survey respondents had attempted suicide during their lifetime—nearly nine times the attempted suicide rate in the general population (4.6 percent).[25]

These tragic consequences appear to accompany the desire to be the opposite sex, a syndrome formerly classified as a mental disorder by the American Psychiatric Association

The fact remains: Rejecting one's birth sex has many undesirable side effects. Courts and other governmental agencies should carefully consider this reality when deciding whether to recognize, and give encouragement to a lifestyle that has no constitutional sanction and could result in tragic consequences for many.

Of the twenty percent (by some estimates) who regret their excursion into life as the opposite sex, most are intimidated into silence, but some have spoken out. Walt Heyer, who underwent a male-to-female sex-change operation at age 42, became

---

[24] *Id.*

[25] S.E. James et al., *The Report of the 2015 Transgender Survey*, National Center for Gender Equality (2016), at 4.

known as Laura Jensen for eight years and then readopted his birth identity. His website is titled SexChangeRegret.com. He speaks regularly and has authored several books including *Gender, Lies and Suicide; Paper Genders; Perfected with Love;* and *A Transgender's Faith*.[26] Coming from a different perspective, ten women who halted their attempt to become men published a book about their experiences.[27]

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

V. The policies mandated by the Seventh Circuit may endanger the rights of many Americans to free exercise of religion.

Religious liberty is the first right guaranteed by the Bill of Rights to the United States Constitution. It is the foremost right because our relationship to God transcends all human relationships, and because God is the Source of all human rights. As Justice Douglas stated in *Zorach v. Clauson,* 343 U.S. 306, 313 (1952): "We are a religious people whose institutions presuppose a Supreme Being." And as he stated for the Court in *Girouard v. United States,* 328 U.S. 61, 68 (1946):

---

[26] SexChangeRegret.com.

[27] *Blood and Visions: Womyn Reconciling with Being Female*, Autotomous Womyn's Press (2015), https://goo.gl/uYgWiY (spellings are as they appear).

> The victory for freedom of thought recorded in our Bill of Rights recognizes that in the domain of conscience there is a moral power higher than the State. Throughout the ages, men have suffered death rather than subordinate their allegiance to God to the authority of the State. Freedom of religion guaranteed by the First Amendment is the product of that struggle.

Nearly 200 years ago, Supreme Court Justice Joseph Story made the same point: "The rights of conscience," he wrote, "are, indeed, beyond the reach of any human power. They are given by God, and cannot be encroached upon by human authority, without a criminal disobedience of the precepts of natural, as well as of revealed religion." 3 Joseph Story, *Commentaries on the Constitution of the United States* § 1870 (1833).

A right as basic as free exercise of religion should not be subordinated to a so-called right to gender preference. This Court has never recognized a "right" to choose one's gender, probably because it is not possible to do so. The Constitution together with its amendments confers no such right, and the concept was utterly foreign to the Framers. Sex-change activists have created this "right" out of thin air.

Any conflict between this purported right to gender identity and the God-given right to free exercise of religion expressly guaranteed by the First

Amendment must be resolved in favor of free exercise of religion.

These policies do pose conflicts with the Free Exercise Clause. Americans have historically believed that God created us male and female (*Genesis* 1:27), commands that marriage is to be between opposite-sex persons only (*Genesis* 2:23-24), forbids same-sex relations (*Leviticus* 18:22; *Romans* 1:24-27), and prohibits both men and women from wearing clothing that pertains to the opposite sex (*Deuteronomy* 22:5). Additionally, one is to practice sexual modesty in the presence of persons of the opposite sex (*1 Timothy* 2:9-10; *Genesis* 3:7, 3:21; *Hosea* 2:9; *Leviticus* 20:17). Not only Christianity but also Islam, Orthodox Judaism, and many other religions hold these beliefs as well some who profess no religion. The monotheistic faiths teach that sexual identify is fixed by God at conception ("male and female created he them," *Genesis 5:2*) and cannot be changed by surgery, hormones, or a decision to identify with the opposite sex.

Allowing students to self-identify as the opposite sex and thus to use restrooms, dressing rooms, lockers, and other facilities assigned to the opposite sex violates the free exercise rights of students who have religious objections to sharing facilities in that manner.

Teachers or school staff who believe that such policies encourage sexual immodesty that may lead to sexual promiscuity, may consider it a violation of

their religious beliefs to be forced to assign a biological boy to a girls' restroom or locker room.

Teachers or school staff who believe gender identity is fixed by God at birth may consider it a violation of their religious beliefs if forced to identify as female a student whom God has created male or if forced to address a child who was born female by a male name. That issue is raised even by the caption of this case which identifies the Respondent as "Ashton Whitaker, by *his* next friend and mother" (emphasis added), even though Whitaker was born female and has taken male hormones but has not undergone sex reassignment surgery. An enactment of the New York City Commission on Human Rights now forbids addressing people by anything but their pronoun of choice—under penalty of law.[28] Such laws, which result from the creation of novel rights to redefine one's sex, violate rights of religious speech and practice.

In the context of the invention of a right to same-sex marriage, Justice Samuel Alito uttered a warning that is also relevant to the growing pressure for recognition of a right to present as the opposite sex: "I assume that those who cling to old beliefs will be able to whisper their thoughts in the recesses of their homes, but if they repeat those views in public, they will risk being labeled as bigots and treated as such by governments, employers, and schools." *Obergefell*

---

[28] *See* Eugene Volokh, *You Can Be Fined for not Calling People 'Ze' or 'Hir,' If That's the Pronoun They Demand That You Use*, Washington Post, May 17, 2016.

v. Hodges, 135 S. Ct. 2584, 2642-43 (2015) (Alito, J., dissenting).

In contradicting the teaching of their faith and in a host of other ways, the policies demanded by Whitaker and mandated by the Seventh Circuit may force people to violate their religious beliefs. As Justice Clarence Thomas recently warned, recognition of new rights that have no basis in the Constitution and offend basic religious precepts creates an inevitable conflict between those new forms of legal compulsion and the religious beliefs they contradict. *Obergefell*, 135 S. Ct. at 2638 (Thomas, J., dissenting). Again, a conflict between the free exercise of religion as granted by God and guaranteed by the First Amendment and the asserted right to be treated as the opposite sex in all places and circumstances, must be resolved in favor of religious liberty.

CONCLUSION

Courts cannot blind themselves to the practical consequences of their decisions and should be most reluctant to make sweeping pronouncements about a subject that has no grounding in the Constitution or in federal statutes. Nor should courts recognize a right, stated in neither the Constitution nor relevant statutes, for one sex to use the bathrooms of the other in defiance of the express religious rights stated in the First Amendment. Instead, state and local agencies, such as the Kenosha Unified School District, should be allowed to apply their best wisdom

and common sense to tailor policies that fit the needs and values of the communities they represent.

This Court should grant the petition for a writ of certiorari and reverse the judgment below.

Respectfully submitted,

MATTHEW J. CLARK
Counsel of Record
FOUNDATION FOR
MORAL LAW
One Dexter Avenue
Montgomery, AL 36104
(334) 262-1245
matt@morallaw.org

Counsel for *Amicus Curiae*

September, 2017