**No. 17-301**

IN THE

# Supreme Court of the United States

KENOSHA UNIFIED SCHOOL DISTRICT NO. 1 BOARD OF EDUCATION, *ET AL.*, *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 Public Advocate of the United States, Conservative Legal Defense and Education Fund, Citizens United, Citizens United Foundation, and U.S. Justice Foundation in Support of Petitioners**


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## INTEREST OF THE *AMICI CURIAE*[1]

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- G.G. v. Gloucester County School Board, Brief *Amicus Curiae* of Public Advocate of the United States, *et al.*, U.S. Court of Appeals for the Fourth Circuit (May 10, 2016).

- Gloucester County School Board v. G.G., Brief *Amicus Curiae* of Public Advocate of the United

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[1] It is hereby certified that counsel for the parties have consented to the filing of this brief; that counsel of record for all parties received notice of the intention to file this brief at least 10 days prior to the filing of it; that no counsel for a party authored this brief in whole or in part; and that no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

States, *et al.*, U.S. Supreme Court (January 10, 2017)

- G.G. v. Gloucester County School Board, Brief *Amicus Curiae* of Public Advocate of the United States, *et al.*, U.S. Court of Appeals for the Fourth Circuit (May 15, 2017)

## SUMMARY OF ARGUMENT

The court of appeals concluded that the Kenosha School District's desire to protect student privacy in restrooms was utterly without merit. The court rejected out of hand the long standing and universal practice of restroom separation by sex, based on nothing more than the judges' own policy preferences. Moreover, the court's opinion was utterly oblivious to the numerous adverse consequences that would flow from its decision, applying not just to restrooms but to school locker rooms and showers as well, which will lead to all manner of disruption and injury to students.

Transgender plaintiffs often attempt to obscure the scope of the rulings they seek by alleging details of their particular case, such as a diagnosis, hormone use, and surgery. But all that is required to be "transgender" is a person's declaration that it is so. Thus, this case is not just about one girl student wanting to use the boys' restrooms. Rather, it is a part of the broader transgender movement, the goal of which is to eliminate society's delineation of persons by sex. If the word "sex" is judicially redefined from a biological constant to include "gender," a fluid concept that is self-defined and self-declared, the result will be

sexual anarchy where each student will decide whether and how the rules apply to them.

This Court's intervention in this case is necessary to reject the lower courts' use of the preliminary injunction standard. The panel found that in this case there was an irreparable injury, with no adequate remedies at law, based on allegations that a 17-year old girl might engage in self-harm, including suicide, if she were not permitted to use the boys' restrooms. Threats of suicide at the preliminary injunction stage are not unique to this case, but also appear in other cases involving transgender plaintiffs. Standing cannot be based on threats of self-harm. Transgenderism is a mental disorder, and numerous studies have found that the vast majority those who suffer from "gender dysphoria" also suffer from additional serious mental disorders. Many transgendered persons are also severely depressed, often to the point of being suicidal. Although some "experts" claim it is best to pander to the delusion of transgenderism, that treatment has little effect on mental health outcomes, which generally resolve without any treatment or indulgence.

This case calls this Court to exercise its supervisory power to restore order in the lower federal courts, bringing to an end the lawless practice of federal judicial amendment of the Civil Rights Act of 1964, which occurred in the panel's decision as well as the Seventh Circuit's *en banc* decision in Hively v. Ivy Tech. Unless this court acts now, it will leave unrebutted retired Judge Richard Posner's position

that, in deciding cases, a federal judge can just "forget about the law."

## ARGUMENT

### I. THE PANEL OPINION OVERLOOKED THE INEVITABLE ADVERSE CONSEQUENCES OF ITS DECISION.

#### A. Insensitive to Genuine Privacy and Modesty Concerns, the Court Ignored How Its Ruling Would Be Applied to Other Cases.

As was true in the case of G.G. v. Gloucester County, 822 F.3d 709, 714 (4th Cir. 2015), the Plaintiff in this case, Ash Whitaker, is a girl who currently self-identifies as a boy, and who seeks to use the boys' restroom.[2] Whitaker v. Kenosha School District, 858 F.3d 1034, 1039 (7th Cir. 2017). Insofar as these two are test cases, it should not come as a surprise that a female plaintiff was selected for each case. A boy in his senior year of high school who would seek to spend time in the girls' restroom would have presented the circuit court with a very different set of facts and concerns, which careful plaintiff selection allowed the panel to ignore. Nevertheless, the circuit court

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[2] The pronouns "he" and "she" are defined in relation to sex, not gender. Thus, in their brief, these *amici* use pronouns that correspond to biological sex. Since it is undisputed that Ashton Whitaker is a biological female, *amici* refer to her accordingly. To do otherwise sacrifices the plain meaning of the English language on the altar of political correctness.

obviously knew that its ruling would not be limited to allowing a single girl into the boys' restroom, but would be controlling authority in a case involving a boy seeking access to the girls' restroom as well.

Additionally, the circuit court contended the protection of student "privacy" was without support and wholly speculative — instead based on "sheer conjecture and abstraction."[3] *Id.* at 1052. The chief support for its dismissive view rested solely upon the allegation that few formal complaints had been made, enabling the court to adopt its trendy, cosmopolitan view calling it "common sense":

> A transgender student's presence in the restroom provides no more of a risk to other students' privacy rights than the presence of an overly curious student of the same biological sex who decides to sneak glances at his or her classmates performing their bodily functions. Or for that matter, any other student who uses the bathroom at the same time. Common sense tells us that the communal restroom is a place where individuals act in a discreet manner to protect their privacy and those who have true privacy

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[3] Contrast the superficial dismissal of "privacy" considerations afforded by the courts below with this Court's in-depth treatment of the atextual right of privacy it found so compelling in cases much as Griswold v. Connecticut, 381 U.S. 479 (1965), Roe v. Wade, 410 U.S. 113 (1973), and Lawrence v. Texas, 539 U.S. 558 (2003).

> concerns are able to utilize a stall.[4] [*Id.* at 1052.]

The circuit court also claimed that it should not matter how students "look anatomically" because the School District did not draw a line between "pre-pubescent and post-pubescent children...." *Id.* at 1052-53. The circuit court was apparently oblivious to the fact that the Kenosha School District, like most school districts, separates students into three age groups — younger students (elementary schools), transitional age students (middle schools), and older students (high schools).[5] Certainly one of the important reasons for administering different schools for different age groups is the desire to minimize the mixing of pre-pubescent and post-pubescent children. Moreover, Ash Whitaker was a high school student, but the court's ruling was not limited to high schools, and would constrain the policies of elementary schools and junior high schools, where students could be expected to be even more traumatized by sharing their restrooms with persons of the opposite sex.

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[4] Some school officials have removed the doors from student bathrooms. *See* K. Albertson, "Open-Stall Policy Halts Marion School Graffiti," Daily Inter Lake (Mar. 11, 2011). Should the court's ruling apply where stalls do not have doors? Further, the court did not address the issue of urinals, where biological girls can observe biological boys. Nor did the court show any concern for "peeping toms" and their ilk who would seize the opportunity to subvert the school's social order. *See* C. Greenwood, "Twisted Peeping Tom who amassed 11,000 pictures of girls after hacking their PCs escapes jail," The Daily Mail (May 30, 2014).

[5] http://www.kusd.edu/schools.

Further, if allowed to stand, the circuit court's ruling will not be limited to restrooms. Government schools also separate the sexes for locker rooms and showers. The circuit court's ruling would allow a 17-year-old boy access to the girls' showers and locker rooms — but the circuit court conveniently ignored that issue as well. Tellingly, the court's sole reference to showers and locker facilities was a citation to the provision in Title IX which expressly authorizes schools to provide separate, but comparable, shower and locker room facilities. Whitaker at 1047. Consider how the court's dismissive summary of the School District's position would have read if the plaintiff had been male and the issue involved showers: "the court is not clear how allowing [a boy] to use the [girls' shower] violates other students' right to privacy." Whitaker, 2016 U.S. Dist. LEXIS 129678, *12.

The circuit court also failed to specify any minimum standard to obtain access to the other sex's restroom. Would self-identification be all that is required of other students? Would a diagnosis by a "counselor" of gender dysphoria be required? Is there a minimum time period during which one must self-identify to gain access to the other sex's restroom? *See* further discussion in Section II, *infra*.

The circuit court made much of the fact that "Ash had publicly transitioned," including (i) the wearing of a tuxedo while playing in the orchestra in front of an audience, and (ii) the asking that she be referred to as a "he" — changes which were allegedly "accepted" by "his" teachers and classmates. Whitaker at 1040.

However, even after asserting that Ash's transition had been widely accepted, the lower court did not blink when it found that "Ash began to fear for his safety as more attention was drawn to his restroom use and transgender status." *Id.* at 1042. Both conclusions cannot be true: either Ash Whitaker had "publicly transitioned," and that change was "accepted"; or "he" had not, and was in fear for "his" safety, seeking to avoid disclosure of "his" status.

Lastly, to bolster its view that there were no legitimate "privacy" concerns, the circuit court relied on the political opinions of certain government school administrator *amici*. No effort was made to consider the views of anyone else, much less the parents of the school children.[6]

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[6] Perhaps this is one of the reasons that parents are increasingly concluding that government schools are the wrong place to educate their children. *See* E. Christakis, "Americans Have Given Up on Public Schools. That's a Mistake," *The Atlantic* (Oct. 2017). Decisions of this sort only incentivize the exodus from government schools. *See* website of Exodus Mandate Ministry. ("The evidence is abundant that Christian children cannot continue to thrive within the government school system as they have done in years past.... [T]he current government system has radically turned against Christian children, their beliefs and even against Christian teachers.") *See* interview of E. Ray Moore (Chaplain, Lt. Col. USAR Ret.) by Dr. James Dobson (Mar. 20-21, 2017). Part One. Part Two. *See also* L. Laurence, "More than 40 families pull children from school that forced transgender lesson on 5-year-olds," LifeSite News (Sept. 22, 2017).

### B. The Circuit Court Never Considered the Harm Being Done to Ash Whitaker by Her Mother, Her Counselors, and Her Physicians.

The circuit court purported to balance the importance of yielding to the desires of the plaintiff adolescent against the needs of the other students, but never considered the harm being done to Ash Whitaker herself, who brought this case as a minor, by her next friend, her mother. *See* Petition for Certiorari at iv.

For example, the lower court completely overlooked one of the little-discussed consequences of the hormone therapy that Ash allegedly had begun — that it can be irreversible, like surgery,[7] causing a female to become sterile.

To be sure, Ash was diagnosed as suffering from "Gender Identity Disorder ... later renamed Gender Dysphoria" (Whitaker at 1048), but there is no evidence that Ash was made aware that, in a large percentage of cases, the condition resolves as a child

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[7] In 1979, Johns Hopkins Medical Center, the site of the first sex change operations in the nation, had "discontinue[d] surgical interventions [even] for sex changes for adults." L. Mayer & P. McHugh, Sexuality and Gender, Part Three: Gender Identity. However, this year, Hopkins has made the decision to return to "cooperating with a mental illness" (P. McHugh, "Surgical Sex: Why we stopped doing sex change operations," First Things (Nov. 2004)), succumbing to political pressure to resume euphemistically called "gender-affirmation surgeries."

matures.[8] However, if the child is treated with hormone therapy while still a minor, based on permission granted by a parent,[9] incalculable, life-long injury can be incurred without the individual's true informed consent. *See* Lawrence S. Mayer & Paul R. McHugh, "Sexuality and Gender," The New Atlantis (Fall 2016). In its rush to make new law, the court never considered the effect on the plaintiff and others like her.

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[8] Even psychiatric data show that failure to support gender confusion likely leads to the best outcome, as most children outgrow this condition. According to the DSM-5, "In natal [biological] males, persistence [of gender dysphoria] has ranged from 2.2% to 30%. In natal females, persistence has ranged from 12% to 50%." American Psychiatric Association, "Gender Dysphoria," DSM-5, 455.

[9] Consider that children as young as five years old are thought by some to be able to make irreversible decisions about their bodies. *See* C. Stern, "'It was his choice': Parents of five-year-old transgender boy share their son's transition story with the world," Daily Mail (Apr. 21, 2015). When a parent guides a child to make an irreversible sexual choice, they are counted among those "eunuchs, which were made eunuchs of men...." Matthew 19:12. The making of eunuchs was widespread throughout pagan times, including in ancient Greece and Rome, and in Muslim Caliphates, where men were castrated to make them more docile. Eunuchs were used to supervise harems and to work as government officials. *See* T. Johnson & R. Wassersug, "Islamic State Lacks Key Ingredient to Make 'Caliphate' Work: Eunuchs," The Conversation (Oct. 20, 2014). *See, e.g.*, discussion of the Ethiopian eunuch who was a high-ranking government official. Acts 8:27-39.

## II. THE TRANSGENDER MOVEMENT, OF WHICH THIS CASE IS A PART, OPENS A PANDORA'S BOX.

The entire transgender movement rests on the presupposition that each person has the power to determine not only one's own perceived gender, but also one's own sex. Under the circuit court's opinion, it is Ash's opinion about how she feels which is dispositive. This opens the door to student sexual anarchy, transferring power from the school board to each individual student, who decides for herself what rules she will follow and which she will evade. Because the modern term "gender" is inherently limitless and self-defined, anyone can simply declare his sexual personae and act accordingly.

After Ash is granted access to the boys' restroom, what is there to stop this newly conferred power from being misused? Indeed, who can even say when such a power is being misused? For example, what is to stop a student from claiming she is "gender fluid," so as to allow her to use whatever restroom is located closest to a given classroom? What is to stop a young woman from claiming to be a young man, so that she can spend a little "quality time" with her beau in the boys' restroom? And what is to stop the varsity boys' lacrosse team from deciding *en masse* that they are all girls, and barging into the girls' locker room while the cheerleading squad is changing clothes?

In an attempt to alleviate and minimize these concerns, those who favor opposite-sex access to restrooms and other facilities routinely attempt to

show how the so-called transgender plaintiff in a particular case is quite serious about his transgenderism — such as that he has taken objective steps to demonstrate the sincerity of his claims of being a member of the opposite sex. For example, plaintiffs routinely allege having taken such actions as:

- having announced the transgenderism to family, friends, and school officials;
- having met with a therapist, psychologist, or psychiatrist who specializes in "gender dysphoria";
- having received a medical diagnosis;
- having begun hormone replacement therapy;
- having undergone a sex-camouflaging operation of the genitals;
- dressing as or otherwise mimicking the behavior typical to the opposite sex;
- having legally changed names to one typical of the opposite sex; and
- obtaining an amended birth certificate.

The obvious purpose of allegations such as these is to attempt to show that the relief sought in any particular case is limited to nothing more than a single student matching a complex profile seeking access to a restroom in a single school.

But the self-defining nature of gender itself negates these attempts at reassurance. How "serious" does a self-professing "transgender" person have to be? How much "proof" does he need to provide of his transition? Is a medical diagnosis required for a

condition that is self-defined and self-declared? And what is to stop a transgender person from changing his or her mind tomorrow, and wanting to switch back? What of those who already claim to be "gender-fluid," switch sex back and forth depending on mood?

It seems abundantly clear that transgenderism is not simply the first step on a slippery slope — it is the entire ballgame. If sex is defined as whatever any given person wants it to be at a given time, there can be no distinctions made on the basis of sex. As soon as a person is empowered to announce his sex, all separations by sex are obliterated. No court can rationally assume that the repercussions of the lower court's decision will be anything short of monumental and catastrophic, undermining any type of restriction by sex in government schools today. Who knows what else tomorrow may bring?

## III. THE RISK OF SUICIDE IS A CHIMERA, TOTALLY INSUFFICIENT TO SUSTAIN A FINDING OF IRREPARABLE HARM.

This Court should grant this petition, for no other reason than to strike down the lower courts' gross misapplication of the preliminary injunction factors in order to further the transgender movement's political agenda. In upholding the district court's grant of a preliminary injunction against the school board in this case, the court of appeals found that the Plaintiff (i) had established she was likely to suffer **irreparable injury**, and (ii) that she would have **no adequate remedies at law** to right that wrong. *See* Whitaker v. Kenosha Unified School District, 858 F.3d

1034, 1045-46 (7th Cir. 2017). Both of those findings, however, were predicated entirely on the Plaintiff's alleged suicidal tendencies that would be exacerbated if she did not get her way in the courts.[10] *Id.* at 1045-46.

The district court found that, because Ash was asked to use the female bathrooms at her school, she "reported current **thoughts of suicide**," claiming that the school's policy was "'**directly causing** significant psychological distress'" at the "'risk for experiencing life-long diminished well-being and life-functioning.'" Whitaker at 1045 (emphasis added).[11] Additionally, the lower court found that this "potential harm — [Ash's] **suicide** ... cannot ... be compensated by monetary damages." *Id.* at 1046 (emphasis added). Finally, the lower court took specific note that Ash's suicide claims were backed up by "expert opinions that supported Ash's assertion that [she] would suffer irreparable harm," including possible suicide. *Id.* at 1045.

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[10] It appears that the only other group that routinely seeks preliminary injunctions based on risk of suicide consists of inmates and prisoners. *See* Braggs v. Dunn, 14-cv-00601 (M.D.Al.), Dkt. #1075. https://www.splcenter.org/sites/default/files/documents/tro_motion.pdf.

[11] This is a remarkable conclusion in its own right since, even though Ash was **asked** to use the girls' restrooms, she apparently refused to do so — and apparently **always** used the male restrooms in defiance of the rules, without punishment. *Id.* at 1041.

### A. In Countless Transgender Cases Across the Country, the "Suicide Card" Is Being Played.

The district court's recitation of the possible suicide risk as grounds for a preliminary injunction is not unique. Rather, it appears to be the *modus operandi* of the transgender movement across the country — to claim suicidal feelings, brought on by various defendants' actions. Plaintiffs argue vociferously that judges must grant preliminary injunctions or else run the risk that they might very well take their own lives. And some courts, like those below, readily yield to that demand.

There are numerous cases where suicide risk has been alleged by transgenders seeking preliminary injunctions. In a 2016 challenge to North Carolina's H.B. 2 "bathroom bill," the ACLU claimed that "[t]he cost of not assigning sex based on gender identity is dire. Attempted suicide rates in the transgender community are over 40%, which is a risk of death that far exceeds most other medical conditions."[12] So brazen were the ACLU's claims in that case that there was not even any attempt to link bathroom use by the particular plaintiffs with any suicidal tendencies of the particular plaintiffs — rather, the argument was that, since transgender persons commit suicide in large numbers, it is best to just give them whatever they

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[12] Carcaño v. McCrory, 16-cv-00236 (M.D.N.C.), Dkt. #22, p. 10.

want, whatever the circumstances.[13] As authority for its claim, the ACLU cited none other than Dr. Randi Ettner, who was one of the "experts" in this case. *See* Carcaño v. McCrory, 16-cv-00236 (M.D.N.C.), Dkt. #22, Attachment #5.

Dr. Ettner also contributed expert testimony concerning suicide in G.G. v. Gloucester County.[14] Indeed, Dr. Ettner[15] appears to have made a career out of testifying that countless transgender persons are about to commit suicide if courts do not give them the preliminary injunctions they seek. *See also* Ashley Diamond v. Owens, No. 15-50 (M.D.Ga.) Dkt. #3, p. 29 ("Dr. Ettner also determined that Plaintiff was experiencing severe physical and psychological harm due to her lack of [appropriate treatment], including ...

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[13] Likewise, in a July 2017 Proposed Findings of Fact accompanying a preliminary injunction motion in Pennsylvania district court, the ACLU cited an "expert" for the proposition that prohibiting **any** transgender student (no one in particular) from using their bathroom of choice "undermine[s] the benefits of their social gender transition" and "places children at greater risk for mental health problems, including suicide." Doe v. Boyertown Area School District, 17-1249 (E.D.Pa.), Dkt. #48, pp. 15-16, https://www.aclu.org/sites/default/files/field_document/048_basd_proposed_fof_col.pdf.

[14] *See* G.G. v. Gloucester County, No. 15-cv-54 (E.D.Va.) Dkt. #18.

[15] There appears to have been some judicial confusion about Dr. Ettner's sex. The district court in the Gloucester case referred to Dr. Ettner as "he" (G.G. v. Gloucester County, 132 F.Supp.3d 736, 749 (E.D.Va. 2015), while the court of appeals in that case referred to Dr. Ettner as "her." G.G. v. Gloucester County, 822 F.3d 709, 727-28 (4th Cir. 2016).

suicidality....”); Manning v. Hagel, No. 14-1609 (D.C.), Dkt. # 2, p. 10 (“Dr. Ettner opined that dire medical consequences, including possibly self-castration and suicide, are inevitable if hormone therapy and access to female grooming standards continue to be withheld.”). In at least one case, Dr. Ettner has even gone so far as to testify that a plaintiff may commit suicide even where the plaintiff “denie[d] suicidal ideation....” Norsworthy v. Beard, No. 15-15712 (9th Cir.), Dkt. #27, p. 14.[16]

Interestingly, courts routinely refuse to take the “suicide” bait in cases involving transgender prisoners. In 2014, the First Circuit, sitting *en banc*, addressed attempts by transgenders to use threats of suicide to extract concessions (in this case sexual reassignment surgery) from prison officials. Although numerous so-called “experts” had testified that “‘it is quite likely that Michelle [a man] will attempt suicide again if [he] is not able to change [his] anatomy,’” the court refused to be manipulated, noting that “The DOC’s concern—regarding the **unacceptable precedent that would be established in dealing with future threats of suicide** by inmates **to force the [defendants] to comply with the prisoners’ particular demands** — cannot be discounted as a minor or invalid claim.” Kosilek v. Spencer, 774 F.3d 63, 71, 94 (1st Cir. 2014) (emphasis added), *cert. denied* in Kosilek v. O’Brien, 135 S.Ct. 2059 (2015).

[16] http://cdn.ca9.uscourts.gov/datastore/general/2015/06/14/15-15712%20Answering%206-5-15.pdf.

Statistically speaking, every transgender person who is denied access to the restroom of choice (or experiences any other form of alleged discrimination) could be said to have some increased risk of suicide, and thus automatically meet the irreparable harm and no adequate remedy prongs of the preliminary injunction test. That would be absurd. Simply belonging to a certain class of people does not automatically pre-qualify one for an "extraordinary" legal remedy. Otherwise, literally every transgender person would be irreparably harmed any time anyone did anything the transgender person felt was discriminatory.

### B. Transgender Persons Are Not Suicidal because They Are Discriminated Against, but because They Suffer from a Mental Illness.

No mentally healthy person would kill himself if not permitted to use the restroom of his choice. Yet, we are told that transgender persons are willing to take their own lives if they are not permitted to reshape American society into their own image. Indeed, mental health "experts" tell us that we must all play along with mass delusion of transgenderism, lest we harm the sensitivities of transvestites and they, in turn, harm themselves.

Of course, not all "experts" agree with this counter-intuitive "treatment." In the G.G. case, several renowned physicians, experts in pediatrics and mental health, testified that reaffirmation of delusion is not the appropriate treatment for transgenderism: "[f]or

instance, an anorexic child is not encouraged to lose weight. She is not treated with liposuction. Instead, she is encouraged to align her belief with reality – *i.e.*, to see herself as she really is. Indeed, this approach is not just a good guide to sound medical practice. It is common sense."[17]

Even if the treatment modalities suggested by plaintiffs' "experts" may have some place in a psychiatrist's office, they have no place in the courtroom. Even though the "Diagnostic and Statistical Manual of Mental Disorders" (DSM-5) recently replaced "Gender Identity Disorder" to be called "Gender Dysphoria," the condition is still considered a mental health disorder.[18] Plaintiff herself acknowledges that she suffers from this mental disorder. Dkt. #12, para. 15. As such, the law has no place pretending that men are women and that women are men, so as not to trigger those who are suffering from mental health problems.

It may seem remarkable that Dr. Ettner and other such "experts" seem able to find suicide risk in every transgender case, but there may be a simple explanation. Dr. Ettner's testimony may less relate to facts particular to any specific transgender person, but

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[17] Brief of *Amici Curiae* Dr. Paul R. McHugh, M.D., Dr. Paul Hruz, M.D., Ph.D., and Dr. Lawrence S. Mayer, Ph.D. in Support of Petitioner in Gloucester County School Board v. G.G., (U.S. Sup. Ct. No. 16-273) at 11.

[18] *See* http://dsm.psychiatryonline.org/doi/abs/10.1176/appi.books.9780890425596.dsm14; *see also* https://www.psychiatry.org/patients-families/gender-dysphoria/what-is-gender-dysphoria.

rather reflect more on the transgender community generally. In Texas v. United States, 12 liberal-leaning states along with the District of Columbia filed an *amicus* brief claiming that "[t]here are direct links between bathroom access and transgender health. A recent study analyzing the relationship between access to college bathrooms and suicidality found a correlation: transgender people who had been denied access to bathroom facilities were nearly 20% more likely to have attempted suicide" than other transgenders. *See* M. Kutner, Newsweek, "Denying Transgender People Bathroom Access Is Linked to Suicide" (May 1, 2016).

However, transgender persons apparently attempt suicide at staggering rates — regardless of their access to bathrooms.[19] One study found that "40% of transgender adults reported having made a suicide attempt. 92% of these individuals reported having attempted suicide before the age of 25."[20] Another study found similarly high rates of suicide risk even among **post-operative** transgenders, indicating that the alleged "cure" for transgenderism has little effect

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[19] States' *Amicus Curiae* Brief in Opposition to Plaintiffs' Application for Preliminary Injunction in Texas v. United States (Civil Action No. 7:16-cv-00054-O) (U.S. District Court for the Northern District of Texas, Wichita Falls Division), http://agportal-s3bucket.s3.amazonaws.com/uploadedfiles/Another/News/Press_Releases/StatesAmicusBrief.pdf.

[20] http://www.thetrevorproject.org/pages/facts-about-suicide.

on mental health outcomes.[21] Similarly, Dr. Paul McHugh reported in 2004 that, while:

> only a few [transgenders] regretted [obtaining surgery,] in every other respect, they were **little changed in their psychological condition**. They had much the same problems with relationships, work, and emotions as before. The hope that they would emerge now from their emotional difficulties to flourish psychologically had not been fulfilled.... With these facts in hand I concluded that Hopkins was fundamentally cooperating with a mental illness.[22]

### C. There Is No Legal Cure for Ash's Transgenderism.

It seems self-evident that if the end-all-be-all surgical "cure" does not solve the underlying mental illness, then there is no reason to believe that transgender plaintiffs will stop having suicidal tendencies if courts simply craft special legal remedies, ordering the public to participate in their delusion.

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[21] *See* C. Dhejne, *et al.*, "Long-Term Follow-Up of Transsexual Persons Undergoing Sex Reassignment Surgery: Cohort Study in Sweden," PLOS (Feb. 22, 2011) http://journals.plos.org/plosone/article?id=10.1371/journal.pone.0016885.

[22] *See* P. McHugh, "Surgical Sex: Why We Stopped Doing Sex Change Operations," First Things (Nov. 2004) (emphasis added) https://www.firstthings.com/article/2004/11/surgical-sex.

In reality, the rampant risk of self-harm by transgenders is not being "caused" by the actions of well-meaning legislatures, school boards, and businesses across the country. Rather, the risk stems from the underlying mental health issues inherent to the transgender community. In addition to transgenderism itself being a mental disorder, one study found that nearly two-thirds of transgender persons have been diagnosed as having at least one additional "DSM-IV Axis I" mental health disorder.[23] A similar European study had similar results, finding that 70 percent of transgenders had at least one additional mental disorder.[24] Remarkably, this 70 percent figure was arrived at even though "[p]atients were excluded from the study if they were experiencing psychosis at the time of assessment." *Id.* Since transgenderism is by definition a mental illness, it is unsurprising that those who have this illness have other mental illnesses, and poor levels of health (not just mental health) and well-being in general.[25]

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[23] M. Meybodi, *et al.*, "Psychiatric Axis I Comorbidities among Patients with Gender Dysphoria," NCBI (Aug. 11, 2014) https://www.ncbi.nlm.nih.gov/pubmed/25180172?log$=activity.

[24] *See* G. Heylens, *et al.*, "Psychiatric characteristics in transsexual individuals: multicentre study in four European countries," The British Journal of Psychiatry (Feb. 2014) http://bjp.rcpsych.org/content/204/2/151.full.

[25] Those who identify as "transgender" experience high levels of depression, attempts at suicide, abuse of alcohol and drugs, rates of infection with sexually transmitted diseases such as AIDS, homelessness, and unemployment. Of course, the cause of each of these problems is attributed to society, rather than being at all due to the mental health problems of trangender persons

No mentally healthy person would contemplate suicide because they have been asked (but apparently not ever required) to use a restroom different from the one they prefer. On the contrary, Ashton Whitaker's alleged contemplation of suicide is traceable not to the actions of the Kenosha Unified School District in this case, but to her preexisting mental health problems — problems that are (by definition) common to all transgenders.[26]

Unfortunately, rather than rejecting the Plaintiff's form of legal blackmail, and referring Ashton Whitaker to the mental health care that she apparently needs, the courts below instead pandered to her mental illness, substituting the judicial bench for the psychiatrist's couch.

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themselves. *See* K. Schreiber, "Why Transgender People Experience More Mental Health Issues," Psychology Today (Dec. 16, 2016) https://www.psychologytoday.com/blog/the-truth-about-exercise-addiction/201612/why-transgender-people-experience-more-mental-health.

[26] *See* D. Payne, "The Transgender Suicide Rate Isn't Due to Discrimination," The Federalist (July 7, 2016) http://thefederalist.com/2016/07/07/evidence-the-transgender-suicide-rate-isnt-due-to-discrimination/.

## IV. THE DECISION OF THE SEVENTH CIRCUIT COURT OF APPEALS CONSTITUTES ANOTHER LAWLESS ACT OF JUDICIAL WILL BEING SUPERIMPOSED ON AN ACT OF CONGRESS.

The panel's unanimous decision below is a shocking abuse of judicial power, declaring that discrimination based on "sex" under Title IX of the Civil Rights Act of 1964 includes a type of discrimination never envisioned by Congress. Nevertheless, the court found that the school district was guilty of sex discrimination. The circuit court's decision follows the path recently established by the Seventh Circuit in its equally shocking April 4, 2017 decision in Hively v. Ivy Tech Cmty. Coll., 853 F.3d 339 (7th Cir. 2017), also involving the meaning of the word "sex" in Title VII of the 1964 law. Unfortunately, Ivy Tech Community College chose not to seek this Court's review of that decision, apparently emboldening this Seventh Circuit panel to cast off all pretense of adhering to the constitutional duty to say what the law is, not revise the law to fit changing times.

In Hively, the majority opinion attached a new meaning to the term "sex" in Title VII, despite the fact that the decision admitted that:

> the Congress that enacted the Civil Rights Act in 1964 and chose to include sex as a prohibited basis for employment discrimination ... **may not have realized or**

> **understood the full scope of the words** it chose. [Hively at 345 (emphasis added).]

Judge Sykes' dissent (joined by Judges Bauer and Kanne) explained that the Hively decision constituted a judicial usurpation of the legislative function, and is not:

> faithful to the statutory text, read fairly, as a reasonable person would have understood it when it was adopted. The result is **a statutory amendment courtesy of unelected judges**. [Hively at 360 (Sykes, J., dissenting) (emphasis added).]

And Judge Posner's concurrence was even more defiant about what the Hively court was, in fact, doing, deliberately changing the meaning of a word chosen by Congress:

> The majority opinion states that Congress in 1964 "may not have realized or understood the full scope of the words it chose." This could be understood to imply that the statute forbade discrimination against homosexuals but the framers and ratifiers of the statute were not smart enough to realize that. **I would prefer to say that theirs was the then-current understanding of the key word—sex.** "Sex" in 1964 meant gender, not sexual orientation. What the framers and ratifiers understandably didn't understand was how attitudes toward homosexuals would change in

> the following half century. [Hively at 357 (Posner, J., concurring) (emphasis added).]

Upon leaving the bench, Judge Posner even more clearly revealed his personal contempt for any constraint on his exercise of federal judicial power:

> **I pay very little attention to legal rules, statutes, constitutional provisions,"** Judge Posner said. "A case is just a dispute. The first thing you do is ask yourself — **forget about the law** — what is a sensible resolution of this dispute?" [A. Liptak, "An Exit Interview With Richard Posner, Judicial Provocateur," New York Times (Sept. 11, 2017) (emphasis added).]

Decisions such as Hively and Whitaker are grounded in the personal views of judges, not the text of statutes, and cannot be allowed to stand.

## CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted.

Respectfully submitted,


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