

No. 16-273

IN THE SUPREME COURT OF THE  
UNITED STATES

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GLOUCESTER COUNTY SCHOOL  
BOARD,

Petitioner,

v.

G.G. by her next friend and mother,  
DEIRDRE GRIMM,

Respondent

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On Writ of Certiorari to the  
U.S. Court Of Appeals for the Fourth  
Circuit

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BRIEF OF AMICI CURIAE DR. JUDITH  
REISMAN AND THE CHILD  
PROTECTION INSTITUTE IN SUPPORT  
OF PETITIONER

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**TABLE OF CONTENTS**

**TABLE OF AUTHORITIES.....ivv**

**INTEREST OF AMICI..... 1**

**INTRODUCTION AND SUMMARY OF ARGUMENT ..... 2**

**LEGAL ARGUMENT ..... 6**

**I. THIS COURT SHOULD REJECT THE DEPARTMENTS’ DIRECTIVE BECAUSE THERE IS NO SCIENTIFIC EVIDENCE FOR THE CONCEPT OF A DIFFERENTIAL “GENDER IDENTITY.” ..... 6**

**II. THIS COURT SHOULD GIVE NO EFFECT TO THE DEPARTMENTS’ INTERPRETATION BECAUSE IT REPLACES SCIENTIFIC REALITY WITH AN ARTIFICIAL SOCIAL CONSTRUCT BUILT UPON CHILD SEXUAL ABUSE, FRAUD AND HUMAN EXPERIMENTATION. .... 20**

A.	Alfred Kinsey Disguises Child Sexual Abuse As Scientific Data On “Pre-Adolescent Orgasm” And Launches The Idea Of Fluid Sexuality.....	21
B.	Dr. Harry Benjamin Used Kinsey’s Concepts To Become The Father Of Transsexualism And Posit The Existence of Seven Sexes.....	26
C.	Dr. John Money Used Kinsey’s Model Of Human Experimentation To Develop His Concept Of Transgenderism And Sex “Re-Assignment.”.....	30
D.	Socio-Political Change Agents Hijack The Language To Further Their Agenda Of Deconstructing Binary Sex.....	37

**III. THIS COURT SHOULD GIVE NO EFFECT TO THE DEPARTMENTS' INTERPRETATION BECAUSE IT IS INIMICAL TO THE HEALTH AND WELFARE OF CHILDREN AND ANTITHETICAL TO THE DEPARTMENTS' GOAL OF PROVIDING A SAFE EDUCATIONAL ENVIRONMENT FOR ALL..... 40**

**A. Giving Effect To The Departments' Guidance Would Mean Sanctioning The Administration Of Irreversible, Harmful, Life-Changing Procedures to Children Without Informed Consent..... 41**

**B. Giving Effect To The Departments' Guidance Would Endanger Children's Mental And Emotional Health And Create Unsafe School Environments..... 46**

**CONCLUSION ..... 55**

## TABLE OF AUTHORITIES

### Cases

<i>Hein v. Freedom From Religion Found., Inc.</i> , 551 U.S. 587 (2007) .....	39
<i>Kosilek v. Maloney</i> , 221 F. Supp. 2d 156 (D. Mass. 2002) .....	29
<i>Obergefell v. Hodges</i> , 135 S. Ct. 2584 (2015) .....	39

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<i>An Interview with John Money</i> , PAIDIKA: THE JOURNAL OF PAEDOPHILIA 12 (Spring 1991) .....	30
Alfred Kinsey, <i>et. al.</i> , SEXUAL BEHAVIOR IN THE HUMAN FEMALE (1953).....	22
Alfred Kinsey, <i>et. al.</i> , SEXUAL BEHAVIOR IN THE HUMAN MALE (1948).....	<i>passim</i>
Alice Sterling Honig, <i>Psychosexual Development in Infants and Young Children: Implications for Caregivers</i> , 55 YOUNG CHILDREN 70, 73 (2000) .....	46, 47
Andrew R. Flores et al., Williams Institute, UCLA School of Law, <i>How Many Adults Identify as</i>	

<i>Transgender in the United States?</i> (June 30, 2016).....	5
Arno Karlen, SEXUALITY AND HOMOSEXUALITY (1971).....	25
Ashley Collman, <i>From coaches sleeping with athletes to substitutes sexting with 15-year-olds: Alabama tops list of states with highest rate of teachers busted for sex with students ...an average of two a month</i> , UK DAILY MAIL, January 15, 2015 .....	52
Cecilia Dhejne, <i>et. al. Long-Term Follow- Up of Transsexual Persons Undergoing Sex Reassignment Surgery: Cohort Study in Sweden</i> , 6 PLoS ONE .....	16
Claudia Winkler, <i>Boy Interrupted</i> , THE WEEKLY STANDARD, 31, 34 (June 19, 2000) .....	36
Dox, Biagio Melloni & Gilbert Eisner, MELLONI'S ILLUSTRATED MEDICAL DICTIONARY, 199 (1979).....	32
Dr. Veritas, " <i>P</i> " for <i>Pedophile</i> , AMERICAN COLLEGE OF PEDIATRICIANS, June 15, 2015, <a href="http://www.acpeds.org/p-for-pedophile">http://www.acpeds.org/p- for-pedophile</a> .....	21

- Emily F. Rothman & Avanti Adhia, *Adolescent Pornography Use and Dating Violence among a Sample of Primarily Black and Hispanic, Urban-Residing, Underage Youth*, 6 BEHAV. SCI. 1 (2016)..... 51
- F.I. Reyes, et. al., *Studies on human sexual development fetal gonadal and adrenal sex steroids*, 37 J. CLIN ENDOCRINOL METAB. 74-78 (1973)..... 8
- G. Blum, Annotation, *Obscenity prosecutions: statutory exemption based on dissemination to persons or entities having scientific, educational, or similar justification for possession of such materials*. 13 A.L.R. 567 (1993) ..... 53
- Gabriele Kuby, THE GLOBAL SEXUAL REVOLUTION: DESTRUCTION OF FREEDOM IN THE NAME OF FREEDOM (2015) ..... 37, 38
- Gary F. Kelly, AMERICA’S SEXUAL TRANSFORMATION: HOW THE SEXUAL REVOLUTION’S LEGACY IS SHAPING OUR SOCIETY, OUR YOUTH AND OUR FUTURE (2012) ..... 25

- Gina Loudon, Ph.D., *The Dark, Untold Story of Transgenderism*, WORLD NET DAILY, June 5, 2015 ..... 35
- Harry Benjamin, M.D., *Introduction to the Second Printing of Rene Guyon, THE ETHICS OF SEXUAL ACTS (1948)*..... 26, 27, 29
- Harry Benjamin, M.D., *7 Kinds of Sex. 27 SEXOLOGY: SEX SCIENCE ILLUSTRATED 436 (Feb. 1961)* ..... 28, 29
- Henk Asscheman, *et. al.*, *A long-term follow-up study of mortality in transsexuals receiving treatment with cross-sex hormones*, 164 EUROPEAN JOURNAL OF ENDOCRINOLOGY, 635 (2011)..... 16
- Jack Drescher & Jack Pula, *Ethical Issues Raised by the Treatment of Gender-Variant Prepubescent Children LGBT Bioethics: Visibility, Disparities, and Dialogue, special report*, 44 HASTINGS CENTER REPORT, S17 (2014) ..... 11

- Jay N Giedd, *et. al.*, *The Teen Brain: Insights from Neuroimaging*, 42 JOURNAL OF ADOLESCENT HEALTH 335–43 (2008) ..... 43
- Jay N. Giedd *et al.*, *Brain Development during Childhood and Adolescence: A Longitudinal MRI Study*, 2 NATURE NEUROSCIENCE 861–63 (October 1999). ..... 43
- Johanna Olson, M.D., *et. al.*, *Baseline Physiologic and Psychosocial Characteristics of Transgender Youth Seeking Care for Gender Dysphoria*, 57 JOURNAL OF ADOLESCENT HEALTH 374 (2015)..... 18
- John Colapinto, *AS NATURE MADE HIM* (2000) ..... 32, 34, 35
- John Money, ed. *SEX RESEARCH RECENT DEVELOPMENTS* (1965)..... 31
- John Money, *Gender Role, Gender Identity, Core Gender Identity: Usage and Definition of Terms*, JOURNAL OF THE AMERICAN ACADEMY OF PSYCHOANALYSIS 397 (1973) ..... 31
- Judith A. Reisman, *et. al.* *KINSEY, SEX & FRAUD* (1990)..... 22

- Judith Reisman, Ph.D., *STOLEN HONOR, STOLEN INNOCENCE (2013)* ..... 24
- Keith Ablow, M.D., *All wrong in California, girls can use urinals in the boys' restroom*, Fox News, January 14, 2014 ..... 48-50
- Larry Cahill, *Why Sex Matters for Neuroscience*, 7 NATURE REVIEWS NEUROSCIENCE, 477-84 (2006) ..... 7
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- Leah Cahan Schaefer & Connie Christine Wheeler, *Harry Benjamin's First Ten Cases (1938-1953): A Clinical Historical Note*, 24 ARCHIVES OF SEXUAL BEHAVIOR 73, 74 (1995) 26, 27, 29
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- M. Lombardo, *Fetal testosterone influences sexually dimorphic gray*

- matter in the human brain* 32 J  
NEUROSCIENCE 674-80 (2012)..... 8
- Mary Beckman, *Crime, Culpability and  
the Adolescent Brain*, 305 SCIENCE  
596 (July 30, 2004)..... 43, 46
- Melanie Bechard, Kenneth Zucker *et. al.*,  
*Psychosocial and Psychological  
Vulnerability in Adolescents with  
Gender Dysphoria: A “Proof of  
Principle” Study*, JOURNAL OF SEX  
AND MARITAL THERAPY, 1, 4-5  
(2016) ..... 17
- Michelle Cretella, M.D., *Gender  
Dysphoria in Children*, AMERICAN  
COLLEGE OF PEDIATRICIANS,  
(August 2016) .....*passim*
- Milton Diamond, Ph.D. & H. Keith  
Sigmundson, M.D., *Sex  
Reassignment at Birth: A Long  
Term Review and Clinical  
Implications*, 151 ARCHIVES OF  
PEDIATRICS AND ADOLESCENT  
MEDICINE 298 (1997) ..... 36
- Milton Diamond, *Transsexuality Among  
Twins: identity concordance,  
transition, rearing, and orientation*,  
14 INTERNATIONAL JOURNAL OF  
TRANSGENDERISM, 24–38 (2014) ..... 10

Miriam Grossman, M.D., YOU'RE TEACHING MY CHILD WHAT? (2009).....	7-9
NATIONAL CENTER FOR EDUCATION STATISTICS U.S. DEPARTMENT OF EDUCATION, & BUREAU OF JUSTICE STATISTICS, OFFICE OF JUSTICE PROGRAMS, U.S. DEPARTMENT OF JUSTICE INDICATORS OF SCHOOL CRIME AND SAFETY: 2013 (2014).....	52
NOVA, <i>Sex Unknown</i> , (PBS October 30, 2001) .....	33
OFFICE FOR CIVIL RIGHTS, U.S. DEPARTMENT OF EDUCATION, SEXUAL HARASSMENT: IT'S NOT ACADEMIC, 10 (2008), .....	40
OFFICE FOR HUMAN RESEARCH PROTECTIONS U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, <i>Nuremberg Code</i> , Section 1 (2016), .....	45
OFFICE OF THE UNDER SECRETARY, U.S. DEPARTMENT OF EDUCATION, EDUCATOR SEXUAL MISCONDUCT: A SYNTHESIS OF EXISTING LITERATURE, 2004 (Dr. Charol Shakeshaft, ed.) .....	51-52
OXFORD ENGLISH DICTIONARY, North American version .....	39

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- Richard B. Corradi, M.D., *"Transgenderism" Is Mass Hysteria Similar To 1980s-Era Junk Science*, THE FEDERALIST, November 17, 2016 ..... 17
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- Robert C. Kolodny, William H. Masters & Virginia E. Johnson, TEXTBOOK OF SEXUAL MEDICINE (1979)..... 36

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United States Department of Justice Civil Rights Division & United States Department of Education Office of Civil Rights, <i>Dear Colleague</i> .....	2, 47, 54
Walt Heyer, <i>Public School LGBT Programs Don't Just Trample Parental Rights. They Also Put Kids at Risk</i> . PUBLIC DISCOURSE, June 13, 2015 .....	51
<i>When Sex Changes Are Involuntary</i> , WORLD NET DAILY, November 17, 2001 .....	30-31
WILLIAM SHAKESPEARE, OTHELLO, THE MOOR OF VENICE act I, sc. I. ....	20

**INTEREST OF AMICI<sup>1</sup>**

Amici are The Child Protection Institute and Judith Reisman, Ph.D., who is Founder of the Institute as well as a research professor at Liberty University School of Law. Dr. Reisman served as Principal Investigator for the United States Department of Justice Office of Juvenile Justice on child sexual abuse and child pornography, and has provided expert reports and testimony in cases worldwide. She is an internationally recognized expert on the history, fraudulent research and societal effects of Dr. Alfred Kinsey. She has authored five books and hundreds of articles dealing with the implications of Kinsey's research on law and public policy.

Amici's extensive information on the history and effects of Kinsey's research on

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<sup>1</sup> Counsel for a party did not author this Brief in whole or in part, and no such counsel or party made a monetary contribution to fund the preparation or submission of this Brief. No person or entity, other than *Amici Curiae* or their counsel, made a monetary contribution to the preparation and submission of this Brief. The Petitioner has filed a blanket consent to the filing of Amicus Briefs on behalf of either party or no party. Consent from Respondent is being filed simultaneously with this Brief.

cultural values and institutions over the last 60 years is monumentally important to this Court's decision. Amici respectfully submit this Brief for the Court's consideration.

### INTRODUCTION AND SUMMARY OF ARGUMENT

Despite having no authorization from Congress and no direction from this Court, the Department of Justice ("DOJ") and Department of Education Office of Civil Rights ("DOE," collectively, the "Departments") have proclaimed that the prohibition against discrimination on the basis of sex under Title IX of the Education Amendments of 1972 "encompasses discrimination based on a student's gender identity, including discrimination based on a student's transgender status."<sup>2</sup> Furthermore,

The Departments interpret Title IX to require that when a student or the student's parent or guardian, as appropriate, notifies the school administration that the student will assert a gender identity that differs from previous

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<sup>2</sup> United States Department of Justice Civil Rights Division & United States Department of Education Office of Civil Rights, *Dear Colleague* (May 13, 2016), Appendix to Petition for a Writ of Certiorari at 126a.

representations or records, the school will begin treating the student consistent with the student's gender identity. Under Title IX, there is no medical diagnosis or treatment requirement that students must meet as a prerequisite to being treated consistent with their gender identity.<sup>3</sup>

The Departments further state that schools must, *inter alia*, make sex-separate bathrooms, locker rooms and other facilities available to students based upon their "gender identity," not their biological sex.<sup>4</sup> School districts face a loss of federal funds if they do not comply.<sup>5</sup>

The Departments acted *ultra vires* by expanding the meaning of "sex" to include "gender identity" without authorization from Congress. They have imperiously imposed upon schools a scientifically unproven sociopolitical ideology that is rooted in the documented serial sexual abuse of infants and children and human experimentation.<sup>6</sup> The Departments are

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<sup>3</sup> *Id.* at 129a-130a.

<sup>4</sup> *Id.* at 134a.

<sup>5</sup> *Id.* at 129a.

<sup>6</sup> As described more fully *infra*, Part II, Alfred Kinsey's book, *SEXUAL BEHAVIOR IN THE HUMAN MALE* (1948) is credited with launching

advancing an *experimental* ideology that replaces biological and social reality with an artificial social construct. The data confirm that 80 to 95 percent of children who claim to have a differential “gender identity” disavow such notions when they attain physical, psychological, and emotional maturity.<sup>7</sup> The artificial construct harms both the children upon whom it is imposed and their peers as it creates the very type of hostile educational

the sexual revolution including the concept of gender fluidity. His reports included “data” on “pre-adolescent” sexual experiences, collected by pedophiles, set forth in five tables, including Table 34:

AGE	NO. OF ORGASMS	TIME INVOLVED	AGE	NO. OF ORGASMS	TIME INVOLVED
5 mon.	3	?	11 yr.	11	1 hr.
11 mon.	10	1 hr.	11 yr.	19	1 hr.
11 mon.	14	38 min.	12 yr.	7	3 hr.
2 yr.	{ 7	9 min.	12 yr.	{ 3	3 min.
	{ 11	65 min.		{ 9	2 hr.
2½ yr.	4	2 min.	12 yr.	12	2 hr.
4 yr.	6	5 min.	12 yr.	15	1 hr.
4 yr.	17	10 hr.	13 yr.	7	24 min.
4 yr.	26	24 hr.	13 yr.	8	2½ hr.
7 yr.	7	3 hr.	13 yr.	9	8 hr.
8 yr.	8	2 hr.		{ 3	70 sec.
9 yr.	7	68 min.	13 yr.	{ 11	8 hr.
10 yr.	9	52 min.		{ 26	24 hr.
10 yr.	14	24 hr.	14 yr.	11	4 hr.

Table 34. Examples of multiple orgasm in pre-adolescent males  
Some instances of higher frequencies.

<sup>7</sup> P.T. Cohen-Kettenis et al., *The treatment of adolescent transsexuals: changing insights*, 5 J. SEXUAL MED. 1892–97 (2008).

environment that the Departments claim to be working to prevent.

The Departments' directive places children at risk by providing sexual predators with greater access to children if they simply masquerade as the opposite sex. This is particularly concerning since less than one percent of students likely identify as transgender.<sup>8</sup> Consequently, the Departments are requiring that 99+ percent of students give up their privacy and safety so that less than one percent can allegedly be made comfortable by entering a private space that matches what they have learned to understand is their "internal sense of gender." The Departments have purported to mandate that students claiming to be transgender cannot be required to use single use facilities, but must be permitted to use group facilities that match their perceived gender, and the natural and

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<sup>8</sup> The number of children has not been estimated, but the latest studies show that only 0.6 percent of adults identify as "transgender." Andrew R. Flores et al., Williams Institute, UCLA School of Law, *How Many Adults Identify as Transgender in the United States?* (June 30, 2016), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/How-Many-Adults-Identify-as-Transgender-in-the-United-States.pdf>.

deeply felt intuitive concerns of other students and their parents cannot alter that determination.<sup>9</sup>

As described below, the dangerous *experimental* worldview underlying the Departments' novel interpretation should be rejected by this Court.

### LEGAL ARGUMENT

#### I. THIS COURT SHOULD REJECT THE DEPARTMENTS' DIRECTIVE BECAUSE THERE IS NO SCIENTIFIC EVIDENCE FOR THE CONCEPT OF A DIFFERENTIAL "GENDER IDENTITY."

Advancements in biotechnology have demonstrated what society has intuitively understood for millennia, *i.e.*, that human beings are conceived as either male or female and there is no scientific basis for a claim that individuals have a separate "gender identity" that can differ from their biological sex. The Departments ignored this inconvenient truth when they announced that the term "sex" in Title IX now includes "gender identity" so that sex-separate private facilities must be turned into unisex social laboratories. This Court should reject the Departments' attempt to

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<sup>9</sup> *Dear Colleague*, App. at 134a.

infuse Title IX with a sociopolitical agenda wholly lacking in evidentiary foundation.

“A baby is conceived genetically male or female. Prenatal brain development is influenced by the same hormones that trigger the development of the reproductive organs.”<sup>10</sup> “The sex of each individual is encoded in the genes—XX if female, XY if male.”<sup>11</sup> Researchers are now able to map DNA.<sup>12</sup> This mapping has proven that there are distinct “male” and “female” blueprints created from the moment of conception.<sup>13</sup> “The striking quantity and diversity of sex-related influences on brain function indicate that the still widespread assumption that sex influences are negligible cannot be justified and probably retards progress in our field.”<sup>14</sup> In fact, scientists now know that the DNA blueprint for a male versus

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<sup>10</sup> Richard P. Fitzgibbons, M.D. et. al., *The Psychopathology of “Sex Reassignment” Surgery Assessing Its Medical, Psychological, and Ethical Appropriateness*, THE NATIONAL CATHOLIC BIOETHICS QUARTERLY, 97, 103 (Spring 2009).

<sup>11</sup> *Id.* at 118.

<sup>12</sup> Miriam Grossman, M.D., YOU’RE TEACHING MY CHILD WHAT? 163-66 (2009).

<sup>13</sup> *Id.* at 164.

<sup>14</sup> *Id.*, citing Larry Cahill, *Why Sex Matters for Neuroscience*, 7 NATURE REVIEWS NEUROSCIENCE, 477-84 (2006).

a female brain is established eight weeks after conception.<sup>15</sup>

The brains of all male infants are masculinized prenatally by their own endogenous testosterone, which is secreted from their testes beginning at approximately eight weeks' gestation. Female infants, of course, lack testes, and therefore, do not have their brains masculinized by endogenous testosterone. For this reason, barring one of the rare disorders of sex development (DSD), boys are not born with feminized brains, and girls are not born with masculinized brains.<sup>16</sup>

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<sup>15</sup> *Id.* at 165.

<sup>16</sup> Michelle Cretella, M.D., *Gender Dysphoria in Children*, AMERICAN COLLEGE OF PEDIATRICIANS, (August 2016) <https://www.acped.org/the-college-speaks/position-statements/gender-dysphoria-in-children>, citing F.I. Reyes, et. al., *Studies on human sexual development fetal gonadal and adrenal sex steroids*, 37 J. CLIN ENDOCRINOL METAB. 74-78 (1973); M. Lombardo, *Fetal testosterone influences sexually dimorphic gray matter in the human brain* 32 J NEUROSCIENCE 674-80 (2012).

Therefore, contrary to theories advanced by those advocating for “transgender” rights (see Part II, *infra*), “we’re not psychological hermaphrodites at birth, potentially masculine or feminine—we are wired for one or the other in the womb.”<sup>17</sup>

The biological reality is that human sexuality is binary by design.

The norm for human design is to be conceived either male or female. Sex chromosome pairs “XY” and “XX” are genetic determinants of sex, male and female, respectively. They are not genetic markers of a disordered body or birth defect.”<sup>18</sup>

Infants are not, except in cases of rare DSDs, “assigned” a sex at birth; “rather birth sex declares itself anatomically in utero and is clearly evident and acknowledged at birth.”<sup>19</sup> Sex can be said to be “assigned” at birth only in the exceedingly rare DSDs, “which are medically identifiable deviations from the human binary sexual norm. Those with DSD have an innate biological condition. The sex of individuals with DSDs is complex and

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<sup>17</sup> Grossman, at 168.

<sup>18</sup> Cretella, *Gender Dysphoria in Children*, at 3.

<sup>19</sup> *Id.*

dependent on a variety of genetic, hormonal, and physical factors.”<sup>20</sup>

Studies of identical twins who share 100 percent of the same DNA from conception and develop in exactly the same prenatal environment have further shown that “gender identity” is not a deviation of the binary sexual norm. “The largest study of twin transsexual adults found that only 20 percent of identical twins were both transidentified.”<sup>21</sup> If genes and/or prenatal hormones contributed significantly to transgenderism, the concordance rates would be close to 100 percent.<sup>22</sup>

Instead, 80 percent of identical twin pairs were discordant. This means that at least 80 percent of what contributes to transgenderism in one adult co-twin consists of one or more non-shared post-natal experiences including but not limited to non-shared family experiences. This is consistent with

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<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 4, citing Milton Diamond, *Transsexuality Among Twins: identity concordance, transition, rearing, and orientation*, 14 INTERNATIONAL JOURNAL OF TRANSGENDERISM, 24–38 (2014).

<sup>22</sup> *Id.*

the dramatic rates of resolution of gender dysphoria documented among children when they are not encouraged to impersonate the opposite sex.<sup>23</sup>

According to the standards of care published by the World Professional Association for Transgender Health (WPATH), “only 6 to 23 percent of boys and 12 to 27 percent of girls treated in gender clinics showed persistence of their gender dysphoria into adulthood.”<sup>24</sup>

This low rate of persistence, absence of scientific evidence and the severe and irreversible nature of the hormonal and surgical interventions used to change children’s bodies from their biological sex to their “perceived” sex, especially in light of children’s plastic, undeveloped brains, have prompted leading researchers to caution against such treatments, calling them “alarming” and

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<sup>23</sup> *Id.*

<sup>24</sup> Jack Drescher & Jack Pula, *Ethical Issues Raised by the Treatment of Gender-Variant Prepubescent Children LGBT Bioethics: Visibility, Disparities, and Dialogue, special report*, 44 HASTINGS CENTER REPORT, S17 (2014).

“disturbing.”<sup>25</sup> This is particularly true due to the fact that:

There are no studies that demonstrate that any of the biological differences being examined have predictive power, and *so all interpretations*, usually in popular outlets, claiming or *suggesting that a statistically significant difference between the brains of people who are transgender and those who are not is the cause of being transgendered or not* — that is to say, that the biological differences determine the differences in gender identity — *are unwarranted*.<sup>26</sup>

After a comprehensive study of research on sexual orientation and gender identity from the biological, psychological and social sciences, epidemiologist Lawrence Mayer and psychiatrist Paul McHugh determined that “the consensus of scientific evidence overwhelmingly supports the proposition that a physically and

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<sup>25</sup> Lawrence S. Mayer, Ph.D. & Paul R. McHugh, M.D., *Sexuality and Gender: Findings from the Biological, Psychological, and Social Sciences*, 50 THE NEW ATLANTIS 12 (Fall 2016).

<sup>26</sup> *Id.* at 104 (emphasis added).

developmentally normal boy or girl is indeed what he or she appears to be at birth. The available evidence from brain imaging and genetics *does not* demonstrate that the development of gender identity as different from biological sex is innate.”<sup>27</sup> They noted that, unlike the differences between the sexes, there are no biological features that can reliably identify transgender individuals as different from others.<sup>28</sup> The idea of “gender identity” is elusive and difficult to define apart from the concepts of biological sex and socially constructed “gender roles.”<sup>29</sup>

In reviewing the scientific literature, we find that *almost nothing is well understood when we seek biological explanations for what causes some individuals to state that their gender does not match their biological sex.* The findings that do exist often have sample-selection problems, and they lack longitudinal perspective and explanatory power. Better research is needed, both to identify ways by which we can help to lower the rates of poor mental health

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<sup>27</sup> *Id.* at 105 (emphasis added).

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 115.

outcomes and to make possible more informed discussion about some of the nuances present in this field.

Yet despite the scientific uncertainty, drastic interventions are prescribed and delivered to patients identifying, or identified, as transgender. This is especially troubling when the patients receiving these interventions are children. We read popular reports about plans for medical and surgical interventions for many prepubescent children, some as young as six, and other therapeutic approaches undertaken for children as young as two. *We suggest that no one can determine the gender identity of a two-year-old.* We have reservations about how well scientists understand what it even means for a child to have a developed sense of his or her gender, but notwithstanding that issue, we are deeply alarmed that these therapies, treatments, and surgeries seem disproportionate to the severity of the distress being experienced by these young people, and are at any rate premature since the majority of children who

identify as the gender opposite their biological sex will not continue to do so as adults.<sup>30</sup>

Studies have shown that adolescents and adults who undergo such treatments have high subsequent rates of mental illness, suicidal ideation and even suicide. Post-operative adult transsexuals were found to have about three times the risk of psychiatric hospitalization, even after adjusting for prior psychiatric problems.<sup>31</sup> Sex-reassigned adults were 4.9 times more likely to attempt suicide and 19.1 times more likely to die by suicide compared to members of control groups.<sup>32</sup>

The results of these recent studies mirror the findings of two European studies which tracked patients who received sex reassignment surgery. The 2011 studies in the Netherlands and Sweden showed that those who underwent sex reassignment surgery and hormone treatments had increased mental illness and a much higher than average rate of premature death. The Netherlands study followed patients at a university gender clinic for an average of 18.5 years.<sup>33</sup> The study found

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<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 111

<sup>32</sup> *Id.*

<sup>33</sup> Henk Asscheman, *et. al.*, *A long-term follow-up study of mortality in transsexuals*

that the patients' "total mortality was 51 percent higher than in the general population, mainly from increased mortality rates due to suicide, acquired immunodeficiency syndrome, cardiovascular disease, drug abuse, and unknown cause."<sup>34</sup> The Swedish study followed 324 people who had sex-reassignment surgery for up to 30 years.<sup>35</sup> The study found "[m]ortality from suicide was strikingly high among sex-reassigned persons, also after adjustment for prior psychiatric morbidity."<sup>36</sup> The study found significantly higher rates of in-patient psychiatric hospitalizations, even when accounting for pre-existing psychiatric problems.<sup>37</sup>

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*receiving treatment with cross-sex hormones*, 164 EUROPEAN JOURNAL OF ENDOCRINOLOGY, 635 (2011**Error! Bookmark not defined.**).

<sup>34</sup> *Id.*

<sup>35</sup> Cecilia Dhejne, *et. al.* *Long-Term Follow-Up of Transsexual Persons Undergoing Sex Reassignment Surgery: Cohort Study in Sweden*, 6 PLoS ONE e16885. doi:10.1371/journal.pone.0016885, available at <http://journals.plos.org/plosone/article?id=10.1371/journal.pone.0016885>.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

In a study of 50 adolescents who were diagnosed with “gender identity disorder,”<sup>38</sup> 54 percent had six or more psychosocial or psychological vulnerability factors, including inpatient psychiatric treatment, psychopharmacological treatment, mood disorders, suicidal ideation and suicide attempts.<sup>39</sup> A similar study revealed that adolescents who reported having gender dysphoria showed three times the rate of moderate to extreme depression and three to

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<sup>38</sup> The Diagnostic and Statistical Manual of Mental Disorders (“DSM”) published by the American Psychiatric Association, is the accepted authority for mental health diagnoses. The DSM-IV-TR used the term “gender identity disorder” to describe people whose subjective beliefs about their gender differed from their biological sex. The APA adopted the term “gender dysphoria” in the DSM-V. Richard B. Corradi, M.D., *“Transgenderism” Is Mass Hysteria Similar To 1980s-Era Junk Science*, THE FEDERALIST, November 17, 2016, <http://thefederalist.com/2016/11/17/psychiatryprofessortransgenderismmasshysteriasimilar1980serajunkscience/>.

<sup>39</sup> Melanie Bechard, Kenneth Zucker *et. al.*, *Psychosocial and Psychological Vulnerability in Adolescents with Gender Dysphoria: A “Proof of Principle” Study*, JOURNAL OF SEX AND MARITAL THERAPY, 1, 4-5 (2016).

four times the rate of suicidal thoughts and attempts, “despite improved understanding and exposure of gender nonconformity within the medical and lay community.”<sup>40</sup>

In addition, Vanderbilt University and London’s Portman Clinic tracked children who reported transgender feelings but who did not undergo medical or surgical treatment. In both cases, 70 to 80 percent of the children spontaneously lost those feelings.<sup>41</sup>

The phenomenon of non-persistence, along with the studies showing that “transgender” youth suffer higher rates of mental health problems, point to the irrationality and even danger of the Departments’ attempt to embrace a scientifically unproven concept and disrupt longstanding protective rules that use biological sex as the criterion for admission to sex-separate facilities.

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<sup>40</sup> Johanna Olson, M.D., *et. al.*, *Baseline Physiologic and Psychosocial Characteristics of Transgender Youth Seeking Care for Gender Dysphoria*, 57 JOURNAL OF ADOLESCENT HEALTH 374, 379 (2015).

<sup>41</sup> Paul McHugh, *Transgender Surgery Isn’t the Solution*, WALL STREET JOURNAL, June 12, 2014, <http://www.wsj.com/articles/paul-mchugh-transgender-surgery-isnt-the-solution-1402615120>

As Drs. Mayer and McHugh concluded, “[t]he scientific evidence summarized suggests we take a skeptical view toward the claim that sex-reassignment procedures provide the hoped for benefits or resolve the underlying issues that contribute to elevated mental health risks among the transgender population.”<sup>42</sup> This is particularly true for children, the majority of whom will not continue to experience gender dysphoria after adolescence.<sup>43</sup> That fact plus the lack of reliable studies on the long-term effects of hormonal and surgical treatment on children led the researchers to “strongly urge caution” regarding such treatments for adolescents.<sup>44</sup>

Overall, “there is a great chasm between much of the public discourse and what science has shown.”<sup>45</sup> That chasm means that this Court should not impose an experimental change in policy, and particularly in rules that protect the health and safety of children by separating the sexes in private spaces. The Departments’ attempt to upend years of protective regulation based upon a socio-political agenda unsupported by science should be rejected by this Court.

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<sup>42</sup> Mayer & McHugh, at 112.

<sup>43</sup> *Id.* at 115.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 116.

**II. THIS COURT SHOULD GIVE NO EFFECT TO THE DEPARTMENTS' INTERPRETATION BECAUSE IT REPLACES SCIENTIFIC REALITY WITH AN ARTIFICIAL SOCIAL CONSTRUCT BUILT UPON CHILD SEXUAL ABUSE, FRAUD AND HUMAN EXPERIMENTATION.**

This Court should also reject the Departments' interpretation of Title IX's prohibition against "sex" discrimination as including "gender identity" because it is based on an artificial social construct that not only disregards biology, psychology and social development, but is based on pseudo-science built upon child sexual abuse and advanced by human experimentation and socio-political ideology.

Shakespeare spoke of such experimentation and its effects through his character Othello:

Is there not charms by which the  
property of youth and maidhood  
May be abused? Have you not read,  
Roderigo, of some such thing?<sup>46</sup>

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<sup>46</sup> WILLIAM SHAKESPEARE, *OTHELLO, THE MOOR OF VENICE* act I, sc. I.

The American College of Pediatricians (“ACP”) summarized the pseudo-scientific history and underlying worldview upon which the Departments have relied in seeking to expand the definition of “sex” to include “gender identity:”

...When I look at the origins of the transgender movement I find John Money and Harry Benjamin, both bisexuals, who failed to condemn pedophiles, and freely associated with them....When I look at sex education in schools, I see Alfred C. Kinsey, and his colleagues, and I see pansexuality and an embracing of pedophilia, along with bestiality.<sup>47</sup>

**A. Alfred Kinsey Disguises Child Sexual Abuse As Scientific Data On “Pre-Adolescent Orgasm” And Launches The Idea Of Fluid Sexuality.**

As noted above, the ideological movement to transform the scientific reality of binary biological sex into a fluid concept embracing

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<sup>47</sup> Dr. Veritas, “*P*” for *Pedophile*, AMERICAN COLLEGE OF PEDIATRICIANS, June 15, 2015, <http://www.acpeds.org/p-for-pedophile>.

“gender identity” can be traced in large part to gall wasp zoologist Alfred Kinsey’s 1948 and 1953 books on male and female sexuality.<sup>48</sup> The books were widely promoted as scientifically sound treatises which “proved” that sexuality is fluid and that children are sexual from birth.<sup>49</sup> Still today, “Alfred Kinsey is known as the father of sexology. His groundbreaking and controversial research on human sexuality profoundly influenced social and cultural values.”<sup>50</sup>

What those relying upon the research have failed to address is that the “groundbreaking” research, and in particular, Kinsey’s claim that children are sexual from birth, was founded on systematic sexual abuse of children and infants.<sup>51</sup> (To quote Shakespeare, “By which the property of youth and maidhood” were indeed violently abused.) Hidden in plain sight in the 1948 book on male

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<sup>48</sup> Alfred Kinsey, *et. al.*, SEXUAL BEHAVIOR IN THE HUMAN MALE (1948) (“Kinsey MALE”); Alfred Kinsey, *et. al.*, SEXUAL BEHAVIOR IN THE HUMAN FEMALE (1953) (“Kinsey FEMALE”).

<sup>49</sup> Judith A. Reisman, *et. al.* KINSEY, SEX & FRAUD, 19 (1990; Kinsey MALE, at 175-80; 638-39.

<sup>50</sup> See LGBT History Month, October: 31 days, 31 icons: Alfred Kinsey, sex researcher, <http://lgbthistorymonth.com/alfred-kinsey>.

<sup>51</sup> Kinsey MALE, at 175-80.

sexuality are five tables in which Kinsey listed “data” on what he called “multiple orgasms in pre-adolescent males.”<sup>52</sup> In fact, the tables list infants as young as two months and children up to age 14 alongside information on the number of “orgasms” they were “observed” having over certain periods of time.<sup>53</sup> In one case, Kinsey listed a 4-year-old as having 26 “orgasms” over the course of 24 hours, meaning that the child was being “observed” around the clock.<sup>54</sup> The book was circumspect about the nature of the “observations,” saying that they came from

the histories of adult males who have had sexual contacts with younger boys and who, with their adult backgrounds, are able to recognize and interpret the boys’ experiences.<sup>55</sup>

What was implicit in the 1948 statement was later made explicit by Kinsey’s co-authors and biographers. The information presented in Tables 30-34 as “scientific data” was in fact records of serial child sexual abuse collected by pedophiles, including Rex King and Nazi Fritz von Balluseck, who used stopwatches and took

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<sup>52</sup> *Id.*, particularly Tables 30-34.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at Table 34, reproduced above.

<sup>55</sup> *Id.* at 177.

meticulous notes that were transmitted to Kinsey.<sup>56</sup> In other words, the “data” used to justify wholesale changes in laws and policies affecting children are not meticulously gathered scientific findings but pedophiles’ journals of their serial child sexual abuse.<sup>57</sup>

Another Kinsey innovation, and one upon which the concept of “gender identity” was built, is the “Kinsey Scale,” which purports to show that sexuality, and in particular what is today known as sexual orientation, is fluid and changeable throughout life.<sup>58</sup> The scale quickly became a convenient tool for graphically depicting Kinsey’s concept of what is now called “gender fluidity:”

Males do not represent two discrete populations, heterosexual and homosexual. The world is not to be divided into sheep and goats. Not all things are black nor all things white. It is a fundamental of taxonomy that nature rarely deals with discrete categories. Only the human mind invents categories and tries to force facts into separated pigeon-holes. The sooner we learn

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<sup>56</sup> Judith Reisman, Ph.D., *STOLEN HONOR, STOLEN INNOCENCE*, 135-39 (2013).

<sup>57</sup> *Id.*

<sup>58</sup> Kinsey *MALE*, at 638-39.

this concerning human sexual behavior, the sooner we shall reach a sound understanding of the realities of sex.<sup>59</sup>

As was true of the “pre-adolescent orgasm” tables, the Kinsey Scale was not based upon scientifically and statistically sound research, but on interviews with prisoners -- 1,400 sex offenders, pedophiles and others who were deceptively portrayed as a representative sample of American men.<sup>60</sup> Based upon that unrepresentative “representative sample,” Kinsey created his seven-point scale graphically depicting his “conclusions” that sexuality was fluid and often changed throughout men’s lives.<sup>61</sup> That scale and the statements underlying it became the

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<sup>59</sup> *Id.* at 639.

<sup>60</sup> Kinsey’s sampling techniques and extrapolation to the general population have been discredited by statisticians and scientists. See Arno Karlen, SEXUALITY AND HOMOSEXUALITY 456 (1971), Gary F. Kelly, AMERICA’S SEXUAL TRANSFORMATION: HOW THE SEXUAL REVOLUTION’S LEGACY IS SHAPING OUR SOCIETY, OUR YOUTH AND OUR FUTURE 7 (2012); Rene A. Wormser, FOUNDATIONS: THEIR POWER AND INFLUENCE 104 (1993).

<sup>61</sup> Kinsey MALE at 639.

cornerstone for the concept of “gender identity” now being promoted by the Departments.

**B. Dr. Harry Benjamin Used Kinsey’s Concepts To Become The Father Of Transsexualism And Posit The Existence of Seven Sexes.**

Kinsey’s concept of gender fluidity was adopted by Dr. Harry Benjamin and later by Dr. John Money, pioneers in the transgender movement. Benjamin is known as the “Father of Transsexualism.”<sup>62</sup> Benjamin’s 1948 introduction to Rene Guyon’s book, *Ethics of Sexual Acts*, illustrates the worldview underlying Benjamin’s work and the Departments’ attempt to upend the concept of binary sexuality and replace it with “gender identity.” “Guyon’s message of sexual freedom is a clarion call to all victims of anti-sexualism and puritanical terror.”<sup>63</sup> Benjamin called for wholesale revision of legal and moral codes based on Kinsey’s work:

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<sup>62</sup> Leah Cahan Schaefer & Connie Christine Wheeler, *Harry Benjamin’s First Ten Cases (1938-1953): A Clinical Historical Note*, 24 ARCHIVES OF SEXUAL BEHAVIOR 73, 74 (1995).

<sup>63</sup> Harry Benjamin, M.D., *Introduction to the Second Printing* of Rene Guyon, THE ETHICS OF SEXUAL ACTS, at a, b (1948).

Unless we want to close our eyes to the truth or imprison ninety-five per cent of our male population, we must completely revise our legal and moral codes. Faced by Guyon's disconcerting candor (and also by Kinsey's unimpeachable figures) even the liberal-minded scientist, believing himself quite free of prejudices, may suddenly discover that he too has retained childhood inhibitions and that his reasoning is impaired by some deeply embedded, ecclesiastical taboos and subconscious repressions. It comes probably a jolt to many, even open-minded people, when they realize that chastity cannot be a virtue because it is not a natural state.<sup>64</sup>

It is that worldview that Benjamin carried forward as he spent 30 years treating patients suffering from "gender dysphoria" by developing strategies to create an atmosphere of acceptance of "gender" separate from biological sex.<sup>65</sup> "Instead of the conventional two sexes, symbolized by Adam and Eve with their anatomical differences, there may be seven or even more – that is to say, at least

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<sup>64</sup> *Id.* at i.

<sup>65</sup> Schaefer & Wheeler, at 74.

seven separate concepts and manifestations of sex, each of more or less vital importance to the individual.”<sup>66</sup> While he did not use the term “gender identity,” Benjamin was promoting that concept by asserting that sex was not binary. At the same time, Benjamin could not deny the realities of biology:

[T]he surgeon’s knife can remove the male organs and also the internal organs of the female, ... not a ‘change of sex,’ but a change of secondary sex characteristics...<sup>67</sup>

Man is male and woman is female because of his or her genetic inheritance...The Y spells male for the offspring, the X female....<sup>68</sup>

Sometimes, but not always, the history of transvestites and transsexualists reveals that as young children they were raised, wholly or partly, as if they belonged to the opposite sex. Their sex of rearing was wrong. The boy was

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<sup>66</sup> Harry Benjamin, M.D., *7 Kinds of Sex*. 27 *SEXOLOGY: SEX SCIENCE ILLUSTRATED* 436, 437 (Feb. 1961).

<sup>67</sup> *Id.* at 438.

<sup>68</sup> *Id.* at 440.

brought up as a girl and the girl as a boy (tomboy).<sup>69</sup>

Nevertheless, Benjamin claimed that “[i]nstead of treating the patient, might it not be wiser and more sensible to treat society educationally so that logic, understanding and compassion might prevail?”<sup>70</sup>

Benjamin provided *NO* scientific evidence for his statements regarding “transsexuals” or for the standards of care he developed, which are still used today.<sup>71</sup> Instead, like Kinsey, Benjamin sought to change prevailing attitudes and particularly Judeo-Christian principles, which he blamed for the distress suffered by “transsexuals.”<sup>72</sup> As was true with Kinsey, Benjamin used a façade of “science” to foment fundamental social transformation.

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<sup>69</sup> *Id.* at 441.

<sup>70</sup> Schaefer & Wheeler, at 91.

<sup>71</sup> *See Kosilek v. Maloney*, 221 F. Supp. 2d 156, 158 (D. Mass. 2002)

<sup>72</sup> *See* Harry Benjamin, *Introduction*, at i.

**C. Dr. John Money Used Kinsey's Model Of Human Experimentation To Develop His Concept Of Transgenderism And Sex "Re-Assignment."**

Kinsey's and Benjamin's animus for Judeo-Christian sexual mores was shared by pedophile apologist<sup>73</sup> Dr. John Money of Johns Hopkins University. In fact, Money is described as hating Judeo-Christian, "repressive religious structures....the anti-masturbatory, anti-sexual fervor."<sup>74</sup> Money coined the term "gender role" to overcome the confusion between "the sex of the genitalia and their activities [and] the nonerotic and nongenital sex roles and activities that are prescribed culturally and

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<sup>73</sup> In an interview published in *Paidika*, an international journal for those advocating for pedophilia, Dr. Money said that adult sex with children is normal and often beneficial and said, "regarding paedophilia [sic] that I would never report anybody." *An Interview with John Money*, PAIDIKA: THE JOURNAL OF PAEDOPHILIA 12 (Spring 1991).

<sup>74</sup> *When Sex Changes Are Involuntary*, WORLD NET DAILY, November 17, 2001, <http://www.wnd.com/2001/11/11692>.

historically.”<sup>75</sup> By 1967 he had developed two terms—“gender role” and “gender identity,” with “gender role” used to refer to empirically observable behavior and “gender identity” to psychological beliefs.<sup>76</sup> Money defined “gender identity” as:

The sameness, unity and persistence of one’s individuality as male, female (or ambivalent), to a greater or lesser degree, especially as experienced in self-awareness and behavior. Gender identity is the private experience of gender role and gender role is the public expression of gender identity.<sup>77</sup>

Money advocated surgery, hormones and behavioral modification to “redefine sex,”<sup>78</sup> and he established the Johns Hopkins clinic for “sex re-assignment” surgeries for adults and

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<sup>75</sup> John Money, *Gender Role, Gender Identity, Core Gender Identity: Usage and Definition of Terms*, JOURNAL OF THE AMERICAN ACADEMY OF PSYCHOANALYSIS 397, 398 (1973).

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 398-99, citing John Money, ed. SEX RESEARCH RECENT DEVELOPMENTS (1965).

<sup>78</sup> *When Sex Changes Are Involuntary.*

children.<sup>79</sup> Money extrapolated information he obtained from studying intersex<sup>80</sup> infants to conclude that all newborns are psychosexual blank slates:<sup>81</sup>

[T]he conclusion that emerges is that sexual behavior and orientation as male or female does not have an innate, instinctive basis. In place of a theory of instinctive masculinity or femininity which is innate, the evidence of hermaphroditism lends support to a conception that, psychologically, sexuality is undifferentiated at birth and that it becomes differentiated as masculine or feminine in the course of the various experiences of growing up.<sup>82</sup>

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<sup>79</sup> John Colapinto, *AS NATURE MADE HIM* 25 (2000).

<sup>80</sup> “Intersex” or “hermaphrodite” individuals are those who are born with both ovarian and testicular tissues and so have ambiguous genitalia. Ida Dox, Biagio Melloni & Gilbert Eisner, *MELLONI’S ILLUSTRATED MEDICAL DICTIONARY*, 199 (1979).

<sup>81</sup> Colapinto at 31-32.

<sup>82</sup> *Id.* at 33-34.

Based on the concept that children are psychosexually neutral at birth, Money developed medical protocols in which infants born with ambiguous genitalia due to rare physical abnormalities were surgically altered and raised to correspond to their altered genitalia.<sup>83</sup> The protocols were expanded to include not only babies with intersex conditions, but also those who, by Money's own evaluation, had genitals that were too small (boys) or too large (girls).<sup>84</sup> If a newborn's genitals did not meet the measurements set by Money, then the natal genitals were removed and re-formed to copy those of the opposite sex. Parents were instructed to raise their child in accordance with the altered genitals.<sup>85</sup> Money used these protocols on babies with what he called "ambiguous" genitalia.

However, until 1967 he had not experimented on children born with normal genitalia which had been later damaged. Bruce and Brian Reimer provided Dr. Money with the opportunity for such an experiment where he could fully test his notion that babies are born psychosexually neutral.<sup>86</sup> The twin boys were

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<sup>83</sup> NOVA, *Sex Unknown*, (PBS October 30, 2001), <http://www.pbs.org/wgbh/nova/transcripts/2813gender.html>.

<sup>84</sup> *Id.* at 3.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

born with anatomically normal genitalia, but Bruce's penis was severely injured in a botched circumcision and was removed.<sup>87</sup> The twins' parents were told there was nothing they could do for their son, but later contacted Dr. Money after seeing him on television.<sup>88</sup> Dr. Money recommended Bruce be castrated and "re-assigned" as a girl.<sup>89</sup> Money deceived the parents, claiming similar operations had been done successfully and that Bruce would easily accept his female anatomy and identity. In fact, no such operations had been done on boys who had been born with normal genitalia.<sup>90</sup>

The surgery was conducted and the Reimers changed Bruce's name to "Brenda" and, as urged by Money, attempted to raise him as a girl.<sup>91</sup> Dr. Money required follow-up visits that included both children, during which Money spoke to the twins explicitly about sex and their genitalia.<sup>92</sup> Money had the children remove their clothes and inspect each other's genitals, often screaming at them demanding compliance until they were afraid of being beaten, complied and stood naked in front of

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<sup>87</sup> Colapinto at 49-64.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 50.

<sup>91</sup> *Id.* at 52-53.

<sup>92</sup> *Id.* at 84-87.

Money and each other.<sup>93</sup> Beginning at age six, Money engaged in what he called therapy sessions in which he would make the twins simulate having sex with each other, claiming this was to reinforce the idea that Bruce was a girl.<sup>94</sup> He also would show the children pornographic images ostensibly to “show you pictures of things that moms and dads do.”<sup>95</sup>

Despite the efforts by Money to persuade Bruce that he was Brenda, the boy did not adjust to his sex “change,” and by 1980 his psychological and emotional distress convinced his parents to reveal the truth.<sup>96</sup> Bruce then transitioned back to male and took the name David.<sup>97</sup> He married and helped parent his wife’s children from a prior marriage but the trauma he and his brother suffered took its toll and they both killed themselves within weeks of each other in 2004.<sup>98</sup>

Nevertheless, for years Money promoted his failed experiment as proof that those born as psychological hermaphrodites can be “re-

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<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 86.

<sup>96</sup> *Id.* at 180-95.

<sup>97</sup> *Id.*

<sup>98</sup> Gina Loudon, Ph.D., *The Dark, Untold Story of Transgenderism*, WORLD NET DAILY, June 5, 2015, <http://www.wnd.com/2015/06/untold-dark-story-of-transgenderism/>.

assigned” through hormones, surgery and behavior modification.<sup>99</sup> A textbook on sexual medicine referenced the case as proof of “the plasticity of human gender identity.”<sup>100</sup> It was not until 1997 that the scientific literature finally reported that Money’s experiment did not prove that gender is fluid and fungible.<sup>101</sup>

As was true with Kinsey, Money built a new sexual paradigm by experimenting on children and disguising it as scientific research. That is the unethical, fraudulent foundation upon which the Departments base their directive that under Title IX “sex” must include “gender identity.” This Court should not sanction such deceptive practices by advancing the Departments’ interpretation.

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<sup>99</sup> Claudia Winkler, *Boy Interrupted*, THE WEEKLY STANDARD, 31, 34 (June 19, 2000).

<sup>100</sup> Robert C. Kolodny, William H. Masters & Virginia E. Johnson, TEXTBOOK OF SEXUAL MEDICINE, 65 (1979).

<sup>101</sup> Milton Diamond, Ph.D. & H. Keith Sigmundson, M.D., *Sex Reassignment at Birth: A Long Term Review and Clinical Implications*, 151 ARCHIVES OF PEDIATRICS AND ADOLESCENT MEDICINE 298 (1997).

**D. Socio-Political Change Agents Hijack The Language To Further Their Agenda Of Deconstructing Binary Sex.**

The unproven concept of “gender identity” being separate from biological sex was also championed in the 1960s and 1970s by feminists and other cultural change agents who wanted to eliminate sexual differences that they saw as oppressive.<sup>102</sup> These change agents used “gender,” much as Money did, to refer to a “social sex” that could differ from one’s “biological sex” in order to overcome unjust discrimination against women rooted in sex stereotypes.<sup>103</sup> They wanted to change the language to counter sex role stereotypes as well as to implement Kinsey’s concept that all manner of sexual activity is normal and harmless,<sup>104</sup> by “deconstructing the binary

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<sup>102</sup> Gabriele Kuby, *THE GLOBAL SEXUAL REVOLUTION: DESTRUCTION OF FREEDOM IN THE NAME OF FREEDOM*, 43-44 (2015)

<sup>103</sup> Cretella, *Gender Dysphoria in Children*, at 2.

<sup>104</sup> Kinsey *MALE*, at 678.

sexual identity of man and woman and what they called ‘compulsory heterosexuality.’”<sup>105</sup>

Enforcing this social policy required a new word, because language doesn’t just reflect reality; it creates it. *Gender* was the magic word. The word *sex* had to be replaced; for prior to that, if someone was asked, “What is your sex?,” they could answer only one of two things; man or woman.<sup>106</sup>

Because the change agents wanted to create a new reality of non-binary sexuality, they adopted a redefined version of the word “gender” which they could then use to “deconstruct binary gender identity.”<sup>107</sup> Those seeking to implement the new paradigm conflated biological sex and sexual orientation to create the redefined concept of “gender” or “gender identity.”<sup>108</sup> This new definition meant change agents could assert that human identity is not based on whether someone is a man or a woman, but on a mutable sexual orientation,<sup>109</sup>

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<sup>105</sup> Kuby, *Global Sexual Revolution*, at 44.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 46-47.

<sup>109</sup> *Id.* at 47.

thus perpetuating Kinsey's claim that sexuality is fluid and changeable throughout life.<sup>110</sup>

Popular culture has embraced the change agents' attempt to make the idea of changeable "gender identity" mainstream, as seen in social media sites listing 71 or more gender choices<sup>111</sup> and the Oxford English Dictionary including "gender-fluid" in its lexicon.<sup>112</sup> However, popular culture's embrace of an unscientific, agenda-driven artificial social construct that denies reality does not justify adopting that social construct as public policy in the manner advanced by the Departments. While popular culture, pop-philosophy and poetry can embrace emerging trends, law and public policy must be founded on logic, reason and precision. *See Obergefell v. Hodges*, 135 S. Ct. 2584, 2630 (2015) (Scalia, J., dissenting); *Hein v. Freedom From Religion Found., Inc.*, 551 U.S. 587, 633 (2007) (Scalia, J. concurring). This Court should not condone the Departments' adoption of an ideologically driven denial of reality

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<sup>110</sup> Kinsey MALE, at 639.

<sup>111</sup> Rhiannon Williams, *Facebook's 71 gender options come to UK users*, THE TELEGRAPH (June 27, 2014), <http://www.telegraph.co.uk/technology/facebook/10930654/Facebooks-71-gender-options-come-to-UK-users.html>

<sup>112</sup> OXFORD ENGLISH DICTIONARY, North American version, <https://en.oxforddictionaries.com/definition/us/gender-fluid>.

wholly unsubstantiated by science. Instead, this Court should reject the Departments' interpretation of "sex discrimination" under Title IX as including "gender identity."

**III. THIS COURT SHOULD GIVE NO EFFECT TO THE DEPARTMENTS' INTERPRETATION BECAUSE IT IS INIMICAL TO THE HEALTH AND WELFARE OF CHILDREN AND ANTITHETICAL TO THE DEPARTMENTS' GOAL OF PROVIDING A SAFE EDUCATIONAL ENVIRONMENT FOR ALL.**

As the DOE instructs school districts, the purpose of Title IX is to provide a safe and nondiscriminatory environment for *all* students.<sup>113</sup> Assuming that is true, then its interpretation of Title IX to include "gender identity," and particularly to compel districts to permit access to sex-separate facilities based solely on perceived gender is in conflict with that purpose. Moreover, the Departments' advocacy for recognition of "transgender" children fosters experimental, life-changing

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<sup>113</sup> OFFICE FOR CIVIL RIGHTS, U.S. DEPARTMENT OF EDUCATION, SEXUAL HARASSMENT: IT'S NOT ACADEMIC, 10 (2008), <http://www2.ed.gov/about/offices/list/ocr/docs/ocrshpam.pdf>.

medical protocols that do not comply with the dictates of medical ethics. Most importantly, the Departments are sanctioning an agenda-driven ideology that threatens the physical, mental and emotional well-being of children.

**A. Giving Effect To The Departments' Guidance Would Mean Sanctioning The Administration Of Irreversible, Harmful, Life-Changing Procedures to Children Without Informed Consent.**

Despite studies showing that 80 to 95 percent of children who report dissonance between their perceived gender and biological sex find that their perceived gender and biological sex correspond by late adolescence, medical protocols for “transgender” children are calling for earlier intervention with puberty-suppressing drugs and cross-sex hormones.<sup>114</sup> These protocols create irreversible sterility and other life-changing effects to which the children, as minors with immature brains, are

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<sup>114</sup> Cretella, *Gender Dysphoria*, at 6; P.T. Cohen-Kettenis, *et. al.*, *The treatment of adolescent transsexuals: changing insights*, 5 J SEXUAL MED., 1892–97 (2008).

unable to give informed consent.<sup>115</sup> Nor can their parents give “informed” consent to such protocols as the long-term consequences of these early interventions are unknown.<sup>116</sup>

There is not a single large, randomized, controlled study that documents the alleged benefits and potential harms to gender-dysphoric children from pubertal suppression and decades of cross-sex hormone use. Nor is there a single long-term, large, randomized, controlled study that compares the outcomes of various toxic synthetic steroids.<sup>117</sup>

Nevertheless, gender clinics encourage treatments that will suppress puberty “to allow the gender dysphoric child time to explore gender identity free from the emotional distress triggered by the onset of secondary sex characteristics.”<sup>118</sup> These treatments will condemn unknown numbers of children to sterility.<sup>119</sup> In addition, use of puberty-suppressing drugs means that the children will

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<sup>115</sup> Cretella, *Gender Dysphoria*, at 6-7.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* at 7.

never develop sperm or eggs.<sup>120</sup> Consequently, they would not even have the chance to harvest and preserve eggs or sperm for future use in assisted reproduction, an option some are given who go through puberty and then begin cross-sex hormones.<sup>121</sup>

Furthermore, neuroscience has documented that children's brains are cognitively immature until *the early to mid-twenties*.<sup>122</sup> Scientists can digitally map how the brain develops, and have found that the portions of the brain that permit processing of complex concepts, such as "gender identity," evaluating risk and making informed decisions are the last to mature, usually not until the early twenties.<sup>123</sup> This means that children are not only legally, but cognitively incapable of giving informed consent to these treatments. Informed consent is a fundamental ethical

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<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> Mary Beckman, *Crime, Culpability and the Adolescent Brain*, 305 *SCIENCE* 596 (July 30, 2004); *See also*, Jay N Giedd, *et. al.*, *The Teen Brain: Insights from Neuroimaging*, 42 *JOURNAL OF ADOLESCENT HEALTH* 335–43 (2008).

<sup>123</sup> *Id.* *See also*, Jay N. Giedd *et al.*, *Brain Development during Childhood and Adolescence: A Longitudinal MRI Study*, 2 *NATURE NEUROSCIENCE* 861–63 (October 1999).

requirement, particularly when, as is true for these early interventions, the treatment is irreversible and life-changing.<sup>124</sup> The Nuremberg Code, developed in response to the human experimentation atrocities in Nazi Germany and still relied on in human research, states:

The voluntary consent of the human subject is absolutely essential. This means that the person involved should have legal capacity to give consent; should be so situated as to be able to exercise free power of choice, without the intervention of any element of force, fraud, deceit, duress, overreaching, or other ulterior form of constraint or coercion; and should have sufficient knowledge and comprehension of the elements of the subject matter involved, as to enable him to make an understanding and enlightened decision. This latter element requires that, before the acceptance of an affirmative decision by the experimental subject, there should be made known to him the nature, duration, and purpose of the

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<sup>124</sup> Cretella, *Gender Dysphoria*, at 7.

experiment; the method and means by which it is to be conducted; all inconveniences and hazards reasonably to be expected; and the effects upon his health or person, which may possibly come from his participation in the experiment.<sup>125</sup>

Children are not legally capable of giving consent. Even if it could be assumed, *arguendo*, that parents can consent on behalf of their children, they still cannot give informed consent because the hazards and the effects upon children's health have not been scientifically determined and therefore cannot be known prior to treatment. By advocating for the inclusion of gender identity in Title IX for elementary and secondary students, the Departments are placing the government's imprimatur on human experimentation and involuntary sterilization of children wholly bereft of informed consent. Such disregard for the health and safety of children as well as the rule of law should not be given any effect by this Court.

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<sup>125</sup> OFFICE FOR HUMAN RESEARCH PROTECTIONS U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, *Nuremberg Code*, Section 1 (2016), <https://history.nih.gov/research/downloads/nuremberg.pdf>.

**B. Giving Effect To The  
Departments' Guidance  
Would Endanger  
Children's Mental And  
Emotional Health And  
Create Unsafe School  
Environments.**

Injecting the confusion and conflict of gender identity into the educational environment will assault and reshape the plasticity of undeveloped young brains with undefined, discordant concepts such as “gender identity” and “gender expression” in conflict with biological reality.<sup>126</sup> Children first recognize the physical differences between boys and girls when they are toddlers.<sup>127</sup> Toddlers between one and one-half to two years of age can and do label their peers correctly by sex.<sup>128</sup> Child development research has also shown that by age three children can answer the question of whether they are a boy or a girl correctly 75 percent of the time.<sup>129</sup> It is an

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<sup>126</sup> Beckman at 596.

<sup>127</sup> Alice Sterling Honig, *Psychosexual Development in Infants and Young Children: Implications for Caregivers*, 55 YOUNG CHILDREN 70, 73 (2000).

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

important part of children's secure, cognitive development to categorize people as male or female in order to understand and define social relationships.<sup>130</sup> It is critical for young children to rely on their natural understanding of each other's sexual role in order to feel generally confident as they face the difficult process of maturing.<sup>131</sup>

Following the Departments' guidance would mean replacing the concrete, objective and accurate understandings of "male" and "female" with the undefined concept of "gender identity." This would deny young children the ability to develop a baseline from which to order their social relationships. Without a foundation, children will become confused and anxious as they will not know how to interact with others. This will be exacerbated by the Departments' requirement that schools use names and pronouns that the "transgender" student prefers, even if they do not correspond to the student's physical characteristics.<sup>132</sup> Children who are just learning to differentiate between boys and girls will be instructed that they must ignore what they know and adopt a fictional pronoun, leaving their immature brains hopelessly confused.

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<sup>130</sup> *Id.* at 74.

<sup>131</sup> *Id.*

<sup>132</sup> *Dear Colleague*, App. at 133a.

Psychiatrists have discussed the potentially traumatic consequences of instructing children to deny biological reality as required by the Departments' interpretation.<sup>133</sup>

The mere fact that teachers and administrators will have to explain to kindergarten and first grade students that they might see girls in the boys' restroom, or boys in the girls' locker room, but that those really aren't kids of the gender they appear to be, could do harm to their own developing sense of security by falsely claiming their gender is fluid, that it well might change for them, too, and that they should be on the lookout for signs that they want to switch.<sup>134</sup>

Telling third grade or seventh grade or tenth grade children, adolescents or teenagers that this issue is settled to such an extent that they should feel comfortable

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<sup>133</sup> Keith Ablow, M.D., *All wrong in California, girls can use urinals in the boys' restroom*, Fox News, January 14, 2014, <http://www.foxnews.com/opinion/2014/01/14/allwrongincaliforniagirlscanuseurinalsinboysrestroom.html>.

<sup>134</sup> *Id.*

with females walking in and seeing them urinating or pulling their pants down to change into football gear is a lie that can steal their ability to trust adults, shake their faith in any form of reality, traumatize them by shaming them and kindle waves of completely unnecessary anxiety related to whether they should be doing some sort of emotional inventory to determine whether they're really going to turn into men, once and for all, or find out they've been suppressing the truth that they're actually women. I don't see anything but toxicity from the notion of a person with female anatomy feeling free to use the urinal in the boys' rest room while a boy stands next to her and uses one, too....

[S]haking the certain knowledge in boys and girls of whether they can count on not being seen naked by the opposite gender, not to mention whether they are themselves actually the gender they thought they were, is a powerful, devious and pathological way to weaken them by making them question

their sense of safety, security and certainty about anything and everything.<sup>135</sup>

In other words, if schools are compelled to adopt the Departments' orders, then instead of being safe, secure places where children can learn about themselves and others, schools will become places of anxiety and confusion. Students will be told that they should disregard their physical and psychological makeup and *what their parents tell them* and embrace the idea that "gender" is an "identity" that incorporates not only physical appearance, but also "a person's internal, deeply felt sense of being either male or female."<sup>136</sup>

Empirical studies and scientific advancements have demonstrated that efforts to "redefine" gender and disassociate it from biological sex create a traumatic environment that is more harmful to students than is an environment in which biological sex remains the standard.<sup>137</sup>

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<sup>135</sup> *Id.*

<sup>136</sup> Samantha Levy, *Trans-Forming Notions of Equal Protection: The Gender Identity Class*, 12 TEMP. POL. & CIV. RTS. L. REV. 141, 143 (2002).

<sup>137</sup> See Walt Heyer, *Public School LGBT Programs Don't Just Trample Parental Rights. They Also Put Kids at Risk*. PUBLIC DISCOURSE,

If schools are compelled to jettison the reality of assigning private spaces by biological sex, then those spaces will also become more dangerous for children. As the DOE itself has determined (perhaps as a result of mainstreaming of pornography<sup>138</sup>), sexual assaults by teachers, coaches and other trusted school employees are already a significant and apparently a growing reality in elementary and secondary schools.<sup>139</sup> A 2004 DOE study found that 9.6 percent of all students in grades 8 to 11 reported “unwanted” educator sexual misconduct.<sup>140</sup> That means that more than 4.5 million students were subject to sexual misconduct by a school employee sometime between kindergarten and 12th grade.<sup>141</sup> A survey released in early 2015 found 781 reports

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June 13, 2015, <http://www.thepublicdiscourse.com/2015/06/15118/>.

<sup>138</sup> See Emily F. Rothman & Avanti Adhia, *Adolescent Pornography Use and Dating Violence among a Sample of Primarily Black and Hispanic, Urban-Residing, Underage Youth*, 6 BEHAV. SCI. 1 (2016).

<sup>139</sup> OFFICE OF THE UNDER SECRETARY, U.S. DEPARTMENT OF EDUCATION, EDUCATOR SEXUAL MISCONDUCT: A SYNTHESIS OF EXISTING LITERATURE, 2004 (Dr. Charol Shakeshaft, ed.).

<sup>140</sup> *Id.* at 17-18.

<sup>141</sup> *Id.* at 18.

of teacher-student sexual misconduct in the media throughout the nation in 2014.<sup>142</sup>

Students will also be at greater risk for assault by fellow students. The DOE's report found that 79 percent of the sexual misconduct reported at elementary and secondary schools involved student perpetrators and student victims.<sup>143</sup> DOE reports show that students are more likely to be victimized at school than away from school.<sup>144</sup> Information revealed in a recent trial of a former prep school student accused of raping a 15-year-old freshman girl as part of a "senior salute tradition" reveals

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<sup>142</sup> Ashley Collman, *From coaches sleeping with athletes to substitutes sexting with 15-year-olds: Alabama tops list of states with highest rate of teachers busted for sex with students ...an average of two a month*, UK DAILY MAIL, January 15, 2015, <http://www.dailymail.co.uk/news/article-2912155/Alabama-s-shame-s-named-state-highest-rate-teacher-student-sex-cases-nation.html#ixzz3m1fTLgh4>.

<sup>143</sup> EDUCATOR SEXUAL MISCONDUCT, at 18.

<sup>144</sup> NATIONAL CENTER FOR EDUCATION STATISTICS U.S. DEPARTMENT OF EDUCATION, & BUREAU OF JUSTICE STATISTICS, OFFICE OF JUSTICE PROGRAMS, U.S. DEPARTMENT OF JUSTICE INDICATORS OF SCHOOL CRIME AND SAFETY: 2013 10-16 (2014) <http://nces.ed.gov/pubs2014/2014042.pdf>.

how sexual misconduct has become part of school “culture.”<sup>145</sup> This culture has developed as schools have been able to expose children to explicit, obscene sexual words and images under “obscenity exemptions.”<sup>146</sup>

The Departments are now compelling schools to implement policies that will increase the risk of victimization. Adopting the Departments’ interpretation of Title IX and the accompanying “gender identity” policies to require access to private spaces on the basis of

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<sup>145</sup> Jennifer Levitz, *Rape Trial Casts Spotlight on New Hampshire Prep School, Case looks at alleged student ‘tradition’ at St. Paul’s School*, WALL STREET JOURNAL, August 25, 2015, <http://www.wsj.com/articles/rape-trial-casts-spotlight-on-new-hampshire-prep-school-1440515074>.

<sup>146</sup> Forty-five states have adopted statutes based on Paragraph 251.4(3)(a) of the 1955 Model Penal Code, which exempts from prosecution dissemination of obscene materials by “institutions or persons having scientific, educational, governmental or other similar justification for possessing obscene material.” G. Blum, Annotation, *Obscenity prosecutions: statutory exemption based on dissemination to persons or entities having scientific, educational, or similar justification for possession of such materials*. 13 A.L.R. 567 (1993).

self-proclaimed perceptions of gender will provide sexual predators with easier access to potential victims. Sexual predators will be able to enter the private spaces of opposite sex students without detection. The Departments have specifically said that schools cannot require independent verification of a student's purported non-conforming gender identity.<sup>147</sup> In fact, according to the Departments, requiring such verification would be viewed as discrimination on the basis of gender identity.<sup>148</sup>

Consequently, a male sexual predator will need only tell school personnel that he "identifies as a female" (or vice versa) and must be granted access to the female restroom, locker room or shower.<sup>149</sup> Furthermore, the Departments include overnight accommodations in the directives, meaning that a student who proclaims that he identifies as a female (or vice versa) must be permitted to room with females on school-sponsored trips.<sup>150</sup> Predators will be able to access their victims with impunity, since anyone complaining about "a boy in the girls' restroom" will be met with charges of discrimination. Rather than facilitating a safe environment for all students,

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<sup>147</sup> *Dear Colleague*, App. at 130a-131a.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*, App. at 134a.

<sup>150</sup> *Id.*, App. at 137a.

the Departments are fostering a more dangerous environment for students who are targeted by sexual predators.

The Departments' interpretation is antithetical to their stated goal of ensuring that all students have a safe school environment. Therefore, this Court should give it no effect.

### CONCLUSION

The Departments' interpretation of Title IX to include discrimination on the basis of "gender identity" is an *ultra vires* act that is wholly unsupported by science and based on fraudulent research built on records of criminal serial child sexual abuse. It sanctions procedures that are inimical to the health and well-being of children and safe learning environments.

For these reasons, this Court should reject the Departments' interpretation and uphold Petitioners' policy maintaining that access to sex-specific facilities is based on biological sex.

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