

No. 16-273

IN THE
Supreme Court of the United States

GLOUCESTER COUNTY SCHOOL BOARD, *Petitioner*,
v.
G.G., BY HIS NEXT FRIEND AND MOTHER, DEIRDRE
GRIMM, *Respondent*.

On Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

**Brief *Amicus Curiae* of Public Advocate of the
United States, U.S. Justice Foundation, and
Conservative Legal Defense and Education
Fund in Support of Petitioner**

JOSEPH W. MILLER
U.S. Justice Foundation
932 D Street, Ste. 2
Ramona, CA 92065
Attorney for Amicus Curiae
U.S. Justice Foundation

ROBERT J. OLSON*
HERBERT W. TITUS
WILLIAM J. OLSON
JEREMIAH L. MORGAN
WILLIAM J. OLSON, P.C.
370 Maple Ave. W., Ste. 4
Vienna, VA 22180-5615
(703) 356-5070
wjo@mindspring.com
Attorneys for Amici Curiae
January 10, 2017

**Counsel of Record*

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INTEREST OF THE *AMICI CURIAE*¹

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STATEMENT

In April 2014, a very confused 17-year-old girl identified as “G.G.” told her parents that she thought

¹ It is hereby certified that counsel for the parties have consented to the filing of this brief; 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.

² Brief *Amicus Curiae* of Public Advocate of the United States, *et al.* (May 10, 2016) <http://lawandfreedom.com/wordpress/wp-content/uploads/2016/05/Gloucester-amicus-brief.pdf>.

she was really a boy, not a girl. G.G. v. Gloucester County School Board, 132 F. Supp. 3d 736, 739 (E.D. Va. 2015). G.G.’s parents took her to see a psychologist who, rather than helping her with her problem, encouraged the illusion that she is a boy, and recommended that G.G., even though a minor, begin taking steps (including hormone replacement therapy) to become a “male.” *Id.* In July 2014, based on the recommendations of the psychologist, G.G. legally changed her first name to a male name. *Id.*³

A month later, upon returning to school for the new year, G.G. notified her high school that she⁴ was no longer a girl. *Id.* at 739-40. In the months that followed, school records were falsified to reflect that

³ G.G. initiated this litigation anonymously, but has since chosen to make both her name and her case public, including writing articles explaining her demands. *See, e.g.*, G.G., “Why Can’t I Use the Boys’ Bathroom at School?” American Civil Liberties Union Blog, December 22, 2014, <http://goo.gl/9l8Nbp>.

⁴ Although petitioner uses “he” and “him” to refer to G.G., these *amici* believe that doing so improperly cedes important ground in the name of political correctness. While the Fourth Circuit remarkably claimed it “displayed hostility” to refer to G.G. as “young lady,” (822 F.3d at 709) *amici*’s references to G.G. as “she” and “her” is not intended to be provocative or disrespectful; rather, it is intended to correspond to an unchanged and unchangeable reality. *See* “Every Cell Has a Sex,” Chapter 2 of “Exploring the Biological Contributions to Human Health: Does Sex Matter?” National Academy of Sciences, 2011, <http://goo.gl/fvllvs> (“there are multiple, ubiquitous differences in the basic cellular biochemistry of males and females.... Many of these differences do not necessarily arise as a result of differences in the hormonal environment of the male and female but are a direct result of the genetic differences between the two sexes.”).

G.G. was now a boy, and school staff were told to refer to G.G. as a “him.” *Id.* In a further effort to accommodate G.G., the school provided her a neutral-sex bathroom in the school nurse’s office. *Id.* However, soon after the start of the new school year, G.G. was not content using the “gender-neutral” bathroom, and demanded that she be allowed to use the boys’ bathrooms. *Id.* At first, the school board kowtowed to G.G.’s demands but, after an outcry from other parents, reversed itself, prohibiting her from using the boys’ bathroom. *Id.* The school then installed three unisex bathrooms open to all students, but G.G. refused to use them, continuing her demand to use the boys’ bathroom, even though she is a girl. *Id.* at 741.

Within days of the Gloucester School Board’s decision barring G.G. from the boys’ bathroom, a “transgender”⁵ male self-identifying as a female,⁶ and self-identifying as a lawyer,⁷ wrote a letter to the

⁵ “It’s just now starting to sink in that I could lose my job with the Feds just because I’m trans.” From Emily Prince twitter feed “@emily_esque” November 19, 2016, <http://goo.gl/gycs64>.

⁶ This person is apparently seeing an endocrinologist for hormone replacement therapy. See Emily Prince twitter feed “@emily_esque” Dec. 15, 2016, <http://goo.gl/E5rcH9>.

⁷ While a person might “identify” as a gender different from their actual sex and have others be compelled by judges to accept that fiction, one cannot simply “identify” as a lawyer and have it be so. Emily T. Prince claims to be a “Beltway lawyer” but there is no record of any active lawyers with that name in the records of the Virginia Bar, the Maryland Bar, the District of Columbia Bar, or the California Bar. Indeed, martindale.com lists no “Emily

United States Department of Education (“DOE”), asking whether the Department had any “guidance or rules” relating to the Gloucester school board’s decision to bar G.G. from the boys’ bathroom. Petition for Certiorari (“Cert. Pet.”) at 8.

Just over three weeks later, the DOE responded, claiming that it was DOE’s policy that a person’s “sex” under the statute should be interpreted “consistent with their gender identity.” 132 F. Supp. 3d at 745. In other words, according to DOE, a person’s “sex” is determined by whatever “gender” one wants to be, and schools must accept that at face value. Armed with the DOE guidance letter, G.G. brought suit against the school board claiming a violation of Title IX of the Education Amendments of 1972. 822 F.3d at 717.⁸ In pertinent part, that statute provides that schools which receive federal funding may not discriminate against a person on the basis of sex. Cert. Pet. at 4. However, federal regulations recognize that such “discrimination” is permissible in “toilet, locker room, and shower facilities.” *Id.*

Prince” with the middle initial “T” anywhere in the United States. It is not known whether “Emily T. Prince” is a lawyer, or may be pretending to be a lawyer, or using a fictitious name to go with his fictitious gender.

⁸ The very first sentence of G.G.’s complaint in federal district court counter-factually asserts that “G.G. is a 16-year-old boy....” Complaint at 1.

Although the district court agreed with the school board (based on a plain reading of the statute),⁹ the Fourth Circuit deferred to the definition of “sex” championed by the DOE.¹⁰ Defining “sex” to equate to “gender identity,” the panel turned the statute on its head, essentially permitting the DOE to repeal the statute through “interpretation.”

SUMMARY OF ARGUMENT

In its zeal to eliminate the ability of schools to discriminate on the basis of sex in bathrooms, the court below ignores analytical holes in its decision that render it nonsensical.

This brief addresses the second of the two issues on which *certiorari* was granted: whether the Department of Education’s letter interpretation of Title IX and 34 C.F.R. § 106.33 should be given effect. The court of appeals chose to defer to the Department’s interpretation of “sex” in a manner that creates a result that no one has even argued was intended by Congress. Moreover, that interpretation would operate to negate both the statute and the Department’s implementing regulations which authorize discrimination between the sexes in areas where personal privacy concerns are greatest, such as “separate toilet, locker room, and shower facilities.” These regulations are solidly grounded in the

⁹ 132 F. Supp. 3d at 746.

¹⁰ 822 F.3d at 719.

legislative history of Title IX. *See* Brief of Petitioner at 7-9.

Moreover, the Department of Education's letter is both radical and irrational. It rejects and repudiates the created order and the combined wisdom of the ages that sex is binary — male or female. The Department chose to ignore this well-established meaning of the statutory term chosen by Congress — “sex” — confusing that fixed biological category with the fluid and evolving 21st Century concept known as “gender,” which is determined by how one feels about himself at any given time.

In reaching this conclusion, the court of appeals first falsely attributed to the Gloucester County School Board the position that sex is determined exclusively by reference to external genitalia. In classic straw man fashion, finding that this definition did not adequately explain sex, the court rejected it. In its place, the court adopted an unintelligible definition of “sex” based on “the sum of ... differences” and the “sum of ... peculiarities” between the male and female sexes. The court of appeals departed from the rule of construction that requires statutory words be given their ordinary meaning — not a meaning invented by an agency or by a court.

Despite the court of appeals' embrace of the notion that gender is self-chosen, it implicitly considered sex to be binary — male and female. The court apparently considered its decision as one opening the boys room to girls, and the girls room to boys. But if one determines his own gender, there are vastly more choices than the

two assumed. Modern reflections of how people view “gender” is shown by Facebook, which identified 71 genders before it stopped counting. Are separate toilet, locker room, and shower facilities to be provided to each gender found in a government school? The court of appeals also ignored the growing literature about gender fluidity, whereby gender vacillates on a daily basis, or even more frequently. The American people were recently introduced to this concept when a “lesbian transgendered gay woman” actor was permitted to participate in both male and female categories for Best Supporting Actor and Actress. The court of appeals appeared to give little thought to the logical consequences of its deferential decision. In truth, it is completely unworkable.

Moreover, if one’s sexual nature can be determined by choice, then why would that precedent not apply to race as well? Indeed, that position was advanced by the Caucasian ex-President of the Spokane chapter of the NAACP who pretended to be black, but was “outed” by her parents as a white woman. If the court of appeals decision is to stand, why should sex be treated differently than race? And if one may choose their own race, how would that legal principle be used by students seeking college admissions and assistance from scholarship programs?

By allowing one’s immutable characteristics to be converted into matters of personal preference, the damage which the unfortunate opinion of the court of appeals would cause is incalculable. It is necessary for this Court to intervene and to lead the federal judiciary back to normalcy by overturning the Fourth

Circuit's deferential, irrational, and unworkable decision.

ARGUMENT

I. TODAY'S SEX SMORGASBORD — SOMETHING FOR EVERYONE?

In a case such as this, even a statement of the issue presented requires a definition of terms. Generally, one's "sex" is defined as "a person's biological status."¹¹ Until the last few years, a person's sex was generally considered an objective fact, but now some assert that it is arbitrarily "assigned at birth." The term "gender" historically was either used as a synonym for "sex," or else referred to whether nouns in Romance language were masculine, feminine, or neuter.¹² Today, however, "gender"¹³ is increasingly

¹¹ "Definitions Related to Sexual Orientation and Gender Diversity in APA Guidelines and Policy Documents," American Psychological Association, <http://goo.gl/LK5DmD>.

¹² See Webster's 1828 American Dictionary of the English Language ("In grammar, a difference in words to express distinction of sex; usually a difference of termination in nouns, adjectives and participles, to express the distinction of male and female.").

¹³ The word "**transvestite**," or "a person, especially a male, who assumes the dress and manner usually associated with the opposite sex," was coined between 1925-1930. The word "**transsexual**," or "a person having a strong desire to assume the physical characteristics and gender role of the opposite sex," was invented between 1955-1960. Finally, the term "**transgender**," or "a person whose gender identity does not correspond to that

described as “a person’s private sense and subjective experience,”¹⁴ while one’s “sexual orientation” is defined as a person’s “emotional, romantic and/or sexual attractions to men, women, or both sexes.”¹⁵ In short, these days “sex” is **who you are**, “gender” is **how you feel about who you are**, and “sexual orientation” is **who you like**.

Throughout human history, sex has been binary — male or female.¹⁶ So-called “advances” in medicine, though, have provided an opportunity for some to create confusion. Men these days can be surgically manipulated to appear as women, and women as men,

person’s biological sex assigned at birth,” is the newest of all, being created about 1970-1975. See www.dictionary.com. Today, the politically correct understanding is that a transvestite is a person who simply dresses a certain way and does not relate to sexuality, while a transsexual is a person who is taking affirmative steps such as HRT or surgery to “become” another sex, while transgender is a more all-inclusive term. In this brief, *amici* use the term “transgender” for identification purposes only. In reality, transgenderism and transsexuality are closely related to transvestitism, as all attempts to change one’s “sex” or “gender” are a mirage — superficial, meaningless and, in the end, unavailing — as one’s sex is fixed at birth.

¹⁴ “Gender Identity Development,” Boundless Psychology, Jul. 3, 2014, <http://goo.gl/VqNiyN>.

¹⁵ “Sexual Orientation & Homosexuality,” American Psychological Association, <http://www.apa.org/topics/lgbt/orientation.aspx>.

¹⁶ See Genesis 1:27. Due to genetic abnormalities, a very small number of “intersex” individuals are born with reproductive anatomy that is neither typically male or female. See http://www.isna.org/faq/what_is_intersex.

through hormonal treatment and “sex reassignment surgery.”¹⁷ Scientists claim to have developed artificial wombs,¹⁸ which presumably could in the future be implanted into males to allow them to “give ‘birth.’” Researchers even believe they could create a “male egg” so that two men could “conceive” without the aid of a woman.¹⁹ And “three-parent babies” are now all the rage.²⁰ One day science may be able to clone individuals or enable a person to manipulate biology to such a degree so as to “conceive” a baby without the aid of another human being — creating something of a high tech hermaphrodite sex akin to the reproduction of the common garden snail.²¹

“Sexual orientation” generally was delineated into **heterosexual** (straight) and **homosexual** (gay/lesbian or “queer”). To that was added **“bisexual”** (attracted to both men and women),

¹⁷ See, e.g., “Gender Reassignment Surgery,” policy of Aetna, effective Sep. 29, 2016, <http://goo.gl/jyYzVy>.

¹⁸ See R. McKie, “Men Redundant? Now We Don’t Need Women Either,” *The Guardian*, Feb. 10, 2002, <http://goo.gl/Ce17ms>.

¹⁹ See A. Onion, “Scientists Say Two Men Could Conceive,” *ABC News*, Sep. 25, 2015, <http://goo.gl/AoDXl9>.

²⁰ See I. Sample, “‘Three-parent’ babies explained: what are the concerns and are they justified?” *The Guardian*, Feb. 2, 2015, <http://goo.gl/Od1we0>; see also T. Hesman Saey, “Three-Parent Babies Explained: IVF technique that led to recent birth of boy one of several,” *Science News*, Oct. 18, 2016, <http://goo.gl/PU8peB>.

²¹ See “How Do Snails Reproduce?” *UCSB ScienceLine*, <http://scienceline.ucsb.edu/getkey.php?key=2578>.

“**pansexual**” or “omnisexual” (attraction to all genders), and “**asexual**” (not attracted to anyone or anything).²² Indeed, some academics and activists today question whether “zoophilia”²³ (sexual attraction towards animals) and “pedophilia”²⁴ (sexual attraction towards children) are legitimate sexual orientations, reminiscent of the pederasty of ancient Greece. Large interest groups have formed around this ever-changing sexual nomenclature.²⁵

The idea of “gender” is evolving to the point where it can encompass anything the mind can conceive. In February of 2014, Facebook added 58 gender options to its users’ profiles.²⁶ By June of that year, UK Facebook users could select from 71 options.²⁷ By February of 2015, Facebook no longer defines gender

²² “Bisexual / Pansexual Identities,” LGBT Center, UNC Chapel-Hill, <http://goo.gl/DVlvUg>.

²³ J. Bering, “Animal Lovers: Zoophiles Make Scientists Rethink Human Sexuality,” *Scientific American*, Mar. 24, 2010, <http://goo.gl/jt2e0H>.

²⁴ “Many Experts Now View Pedophilia as a Sexual Orientation,” *Los Angeles Times*, Jan. 16, 2013, <http://goo.gl/cvBT8r>.

²⁵ *See, e.g.*, J. Ware, “Zoophiles protest against German bestiality ban,” *The Local De*, Feb. 1, 2013, <http://www.thelocal.de/20130201/47711>.

²⁶ R. Goldman, “Here's a List of 58 Gender Options for Facebook Users,” *ABC News*, Feb. 13, 2014, <http://goo.gl/7kN9jM>.

²⁷ R. Williams, “Facebook's 71 gender options come to UK users” *The Telegraph*, June 27, 2014, <http://goo.gl/Oez31M>.

at all, allowing each person to choose one's own gender instead of being "pigeon-holed" by only 71 options.²⁸ In a blank space provided, a Facebook user can become any "gender" that one wishes, subject only to the limits of expression on the ASCII keyboard. Perhaps one of the most interesting genders offered is the Native American "two-spirit" gender, which includes both male and female elements.²⁹ Nevertheless, although it is easy to be diverted into gender studies, the task at hand is to discover the meaning of "sex" as used in a federal statute, not as used in an academic discussion.

II. IN ORDER TO HAVE REACHED ITS CONCLUSION, THE COURT OF APPEALS REWROTE THE DICTIONARY DEFINITION OF "SEX."

Noah Webster's Dictionary of 1828 defines "sex" simply, as "[t]he distinction between male and female."³⁰ Today, almost 200 years later, "sex" is still defined by Merriam-Webster as "either of the two major forms of individuals that occur in many species and that are distinguished respectively as female or male especially on the basis of their **reproductive**

²⁸ "58 gender options not enough? Facebook now allows unlimited custom identities," RT News, Feb. 27, 2015, <http://goo.gl/RZPTA3>.

²⁹ See S. Laframboise & M. Anhorn, "The Way of the Two Spirited People: Native American concepts of gender and sexual orientation," *Dancing to Eagle Spirit Society*, 2008, <http://goo.gl/NIj8Xi>.

³⁰ <http://webstersdictionary1828.com/Dictionary/sex>

organs and structures.³¹ The American Heritage Dictionary defines “sex” as “[e]ither of the two divisions, designated female and male ... on the basis of their **reproductive organs and functions.**”³² Black’s Law Dictionary traditionally has defined “sex” as the “sum of the peculiarities of **structure and function** that distinguish a male from a female organism.” Black’s Law Dictionary, 8th Edition, Thomson West (2004).³³ Other dictionaries generally support the ancient view that sex is based on (1) reproductive organs, (2) structures, and (3) functions. And last, but certainly not least, the Holy Bible states “male and female created He them.” Genesis 1:27 (King James Version).

Not surprisingly, the court of appeals found it difficult to dispute the plain meaning of this simple word “sex” as it appears in the statute. The court admits that “(1) the language itself, (2) the specific context in which that language is used, and (3) the

³¹ <https://www.merriam-webster.com/dictionary/sex> (emphasis added).

³² <http://www.thefreedictionary.com/Sex> (emphasis added).

³³ That definition has been consistent through the Fourth Edition of Black’s Law Dictionary published in 1968. The Court of Appeals, however, cites to the current 10th Edition of Black’s Law Dictionary, published in 2014, which has included “gender” in a secondary definition as a synonym for “sex.” *See id.* at 721 n.7. Rather than recognizing that “gender,” like “sex,” has historically been binary (male and female), the court reads this recently updated definition as referring to “gender” as “implicitly recogniz[ing] the limitations of a nonmalleable, binary conception of sex.” *Id.*

broader context of the statute or regulation as a whole” all point to the fact that the word “sex” unambiguously “refers to male and female students.” 822 F.3d at 720. And, as the court must admit, “G.G.’s ... sex ... is female...” *Id.* at 715. The court quickly follows its admission by noting that “G.G.’s gender identity is male” (*id.*), but of course that is not her sex. Her sex is — and forever will be — female. The remainder of the court’s opinion constitutes a futile effort to circumvent that reality.

A. First, the Panel Attributes to the Board an Argument that the Board Never Made, Creating the Proverbial Straw Man.

The panel below erroneously claims that the Board would define sex “with **reference exclusively to genitalia**,” (*id.* at 720), a term which means the “the organs of reproduction, **especially the external organs**.”³³

This is most certainly not what the Board argued below. On the contrary, the Board repeatedly made clear that its position was the same as stated in the policy it adopted, which was “its existing practice of providing separate restrooms and locker rooms based on a student’s biological sex.” Response Brief by Appellee Gloucester County School Board, ECF #47 at 6. The Board noted that it “uses the terms ‘biological sex’ and anatomical sex interchangeably,” and that “the two phrases mean the same thing — G.G. was

³³ <http://www.dictionary.com/browse/genitalia> (emphasis added).

born with female reproductive organs.” *Id.* at 13. n.2. Of course, none of the terms the Board uses — “**biological sex**,” “**anatomical sex**,” and “**reproductive organs**” — can be marginalized as referring only to external genitalia. On the contrary, external genitalia are only one component of those terms. For a millennia, the definition of sex has been threefold: a person’s “**reproductive organs**” (internal and external), their “**structures**,”³⁴ and their “**functions**.”³⁵

By claiming that genitalia is all that differentiates the sexes, the court of appeals sows confusion about the real meaning of one’s “sex.” The panel attempts to introduce ambiguity with various straw men questions such as “which restroom would a transgender individual who had undergone sex-reassignment surgery use?” *Id.* at 720-21.³⁶

³⁴ The biological definition of “structure” is the “mode of organization; construction and arrangement of tissues, parts, or organs.” www.dictionary.com.

³⁵ The word “function” is defined as “the purpose for which something is designed or exists; role.” www.dictionary.com.

³⁶ The court’s exclusive focus on external genitalia is further revealed by its posing the question as to which bathroom a man should use “who lost [his] external genitalia in an accident” — as if he perhaps now is a woman. *Id.* at 721.

B. Next, the Panel Overlooks Each of the Components of One’s “Sex.”

Focusing only on genitalia, such as a man who has had his penis reshaped into a vagina,³⁷ or a woman who has had an artificial penis constructed where none existed, the court’s efforts are unavailing, because even after “sexual reassignment surgery” (“SRS”), and even when supplemented by hormone therapy, the man’s “sex” is still male and the woman’s “sex” is still female. A male may have the appearance of a vagina (or even a breast augmentation), but he does not have a uterus, Fallopian tubes, and ovaries.³⁸ He does not ovulate, and he does not menstruate. If his blood is tested, he is still genetically male. Likewise, while a female may have prosthetic testes, and a flap of skin representing a penis through which urination is possible by way of a lengthened urethra,³⁹ the prosthetic testes are not real and do not, never did, and never will produce sperm. Moreover, she is not capable of producing semen, and does not have an epididymis, spermatic cords and ductus deferens, seminal vesicles, a prostate

³⁷ See M. Bryant, “Transgender lesbian shares VERY graphic account of what it is really like to undergo gender reassignment surgery,” Mail Online, Mar. 25, 2016, <http://goo.gl/K7pvDV>.

³⁸ See T. Taylor, “Female Reproductive System,” Inner Body, <http://goo.gl/1xRywm>.

³⁹ See S. Monstrey, P. Ceulemans & P. Hoebeke, “Sex Reassignment Surgery in the Female-to-Male Transsexual,” U.S. National Library of Medicine, National Institutes of Health, Aug. 25, 2011, <http://goo.gl/5nAMGh>.

gland, or an ejaculatory duct.⁴⁰ And, of course, if her blood were tested, she is still genetically female.

In short, while some external genitalia can be surgically manipulated to **appear** differently, or even to give the **appearance** of proper function, internal **reproductive organs** cannot so easily be changed. Moreover, a person's "**structure**" overall (genes, chromosomes, DNA — the makeup of the tissues that comprise his body) do not change simply because he or she has had a novel surgery. Finally, each individual's "**function**" — one's purpose — has not changed. The man's sexual function is to be a male and to reproduce in that function, while a woman's sexual function is to be a female and to reproduce in that function. While each may alter the external **appearance** of their sex, one cannot change the "function" of their sex. This holds true whether one believes in a created order, or godless evolutionism.

C. Finally, the Court Created An Incomprehensible Definition of Sex In Order to Achieve the Result It Desired.

Even after rejecting the straw man of a supposed invitation by the Board to look only at external genitalia to determine sex, the court of appeals does not adopt the obvious dictionary definition. Instead, the court creates its own definition, overlooking all of the objective criteria for determining sex — "reproductive organs," "structures," and "functions."

⁴⁰ See T. Taylor, "Male Reproductive System," Inner Body, <http://goo.gl/jYriif>.

The court seizes one part of a definition of “sex” that describes on “**the sum of ... differences**” and the “**sum of ... peculiarities**” between the male and female sexes. *Id.* at 721 (emphasis added).

But, rather than analyzing the **parts that make up that sum** (reproductive organs, structures, and functions), the court asserts that “sex” is some kind of a social science smorgasbord of “**various factors**” including “**varying** physical, psychological, and social **aspects.**” *Id.* at 721-22 (emphasis added). See Petitioner’s Brief at 29.

Defining “sex” in this vague manner enables the court to abandon any concrete definition, adopting instead an amorphous conceptualization of “sex” as a metaphysical experience of the individual, rather than as an objective, fixed scientific standard. In other words, according to the court of appeals, “sex” can mean almost anything. The court has departed from the rule of construction that words be given their ordinary meaning,⁴¹ and instead invented its own — incredible — meaning of the term “sex.”⁴²

⁴¹ See A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts (Thomson-West 2012) at Section 25.

⁴² The court of appeals reversed the district court on the theory that the “Ferg-Cadima letter” was not contrary to the letter or spirit of the DOE regulation, but rather **filled in a gap** that the regulation did not address, and therefore was entitled to Auer deference. See G.G. v. Gloucester County School Bd., 822 F.3d 709, 721-23 (4th Cir. 2016). As dissenting Judge Niemeyer pointed out, however, that holding effectively amended both Title IX and the DOE regulation (34 C.F.R. § 106.33), by effectively

At the end of the Court of Appeals' analysis, "sex" is transformed from "a person's biological status" to "a person's private sense and subjective experience." It is no wonder the court declares itself unqualified to determine a person's sex, instead deferring to President Obama's Department of Education which, in turn, defers to how each individual feels on any given day.

The reality, though, is that a man cannot use "gender reassignment surgery," hormone replacement therapy, or even creative pronouns in order to "become" a woman any more than a 40-year-old can use a tummy tuck and a face lift to "become" a 20-year-old. At best, these physiological changes give only the **appearance** of something, but they are not reality — they are simply a mask. Just below the surface, the so-called "woman" is still a man, and the 20-year-old is still a 40-year-old — even if one "feels" younger than he or she is.

III. ADOPTING THE COURT OF APPEALS' DEFINITION OF "SEX" LEADS TO CHAOS, NOT ACCOMMODATION.

The Court of Appeals' definition of "sex" is unworkable, at every level. For example, it is difficult to see how, under Title IX, "[a] recipient may provide separate toilet, locker room, and shower facilities on the basis of sex" if "sex" means "gender" and a person's "gender" is whatever he says it is. Such a rule would

substituting the word "gender identity" for the word "sex." *See id.* at 735-37.

be somewhat analogous to a 65 mph speed limit where drivers get to decide how fast they were going.⁴³ Each speeder’s defense would be “no officer, I identify as a 30 mile-per-hour driver.” Students will quickly learn that they can go into whatever bathroom they want at any time and, if confronted, can simply allege to identify as that particular gender. Such an interpretation of “sex” by the lower court makes a mockery of the statute.

Additionally, by equating “sex” with “gender identity,” the court’s opinion seems to be operating under the false assumption that gender, like sex, is binary — that there will be only two bathrooms (boys and girls), and that the student will get to choose which one of the two applies to him. However, while there are only two sexes, we know now that far more than two genders have already been “identified.” See Section I, *supra*. Indeed, if gender is a personal question, then the boundaries are limitless, and there could be as many as 7.4 billion different unique genders — one for each person on earth. Unfortunately for the lower court, words of a statute are required to mean something knowable⁴⁴ — and

⁴³ See Obi-Wan Kenobi, “You don’t need to see his identification. These aren’t the droids you’re looking for.” https://www.youtube.com/watch?v=GO_xfR64qSk

⁴⁴ See Reading Law at 69, 71 (“Interpreters should not be required to divine arcane nuances or to discover hidden meanings.... Some theorists deny that plain meaning or ordinary meaning ever exists. But common experience proves the contrary. In everyday life, the people to whom rules are addressed continually understand and apply them.”).

how can “sex” have any meaning at all if it can mean any of 7.4 billion different things?⁴⁵

For example, would a Native American “two-spirit” gender use the boys’ bathroom or the girls’ bathroom? What if such a person demands a separate, gender appropriate bathroom option, claiming that neither the boys’ or girls’ room is adequate? Would the school be forced to install a third set of restrooms or risk a Title IX lawsuit? If so, will student bathrooms in public schools be replaced with a line of at least 71 porta-potties, stretching as far as the eye can see, in order to accompany each new gender that is recognized by professors teaching gender and sexuality studies?⁴⁶

Moreover, if schools are permitted to maintain only two sets of restrooms for boys and girls,⁴⁷ which restroom would someone who is “genderqueer” or “gender fluid” use? There are those who believe that such persons vacillate between (or among) genders, such as depending on the time of day, or company that

⁴⁵ If the DOE interpretation is indeed correct, that the term “sex” in the statute really means “gender identity,” that would render the statute unconstitutionally vague, because an average person would have no idea who is regulated, and what conduct is permitted and prohibited.

⁴⁶ <http://goo.gl/FC66uv>

⁴⁷ Even this is unlikely, given that at least one public school has ordered its teachers to stop calling children “boys and girls” and replace such pronouns with neutral terms like “students and scholars.” T. Starnes, “NC school to teachers: Don’t call students ‘boys and girls,’” Fox News, Aug. 16, 2016, <http://goo.gl/GmpIia>.

they are keeping.⁴⁸ For example, the “gender-fluid performer” Kelly Mantle soon will be permitted to participate in the Oscars under both male and female categories for Best Supporting Actor/Actress.⁴⁹ Mantle describes himself as a “lesbian transgendered gay woman,”⁵⁰ a term that defies analysis.

At least one judge has waved his wand and declared a man to be eligible for legal recognition as a “non-binary” third gender.⁵¹ Will such a person be permitted to use the girls’ room in the morning, and then use the boys’ room after lunch? What if a person claims to be both a man and a woman — at the same time? What becomes of the statutory text authorizing permissible discrimination under the statute in such a case? With such diversity of gender, will schools be forced one day to abandon any notion of segregated

⁴⁸ See L. Booker, “What it means to be gender-fluid,” CNN, Apr. 13, 2016, <http://goo.gl/nztZVW>.

⁴⁹ See A. Yohannes, “Gender-Fluid Actor Kelly Mantle Makes Oscars History,” NBC News, Dec. 12, 2016, <http://goo.gl/9H7g4B>.

⁵⁰ See http://logosrupaulsdragrace.wikia.com/wiki/Kelly_Mantle; M. Pressberg, “Gender Fluid Performer Kelly Mantle Eligible in Male and Female Oscar Categories,” The Wrap, Dec. 9, 2016, <http://goo.gl/ZI0vRg>.

⁵¹ See K. Foden-Vencil, “Neither Male Nor Female: Oregon Resident Legally Recognized As Third Gender,” National Public Radio, June 17, 2016, <http://goo.gl/SOoLLC>. See also a Maine man, Phelan Moonsong, who was permitted to wear “goat horns” on his driver’s license. “Maine Man Allowed To Wear Goat Horns In Driver’s License Photo,” CBS Boston, Dec. 20, 2016, <http://goo.gl/3OCO5Y>.

bathrooms, and move to bathrooms with no sex or gender restrictions at all? The result very well could be a field day for pranksters, such as when the University of Michigan Ann Arbor permitted each student to designate his own pronoun, and one student stated that “I henceforth shall be referred to as: His Majesty....”⁵²

Finally, how would the court of appeals’ opinion apply to the numerous other situations which are likely to arise if the concept of “sex” as “gender identity” permeates every aspect of American law and culture? What if:

1. a girl wants to join the varsity football team?
2. a boy wants to compete against only girls on the cross country team?
3. a boy with working boy parts wants to use a communal shower with girls with working girl parts?
4. a boy wants to play girls’ field hockey, because there is no male version of that sport?⁵³
5. a boy wants to share hotel room with girls on school trips?
6. a male “transgender” teacher wants to accompany young girls on field trips, stay with

⁵² P. Van Voorhis, “Student officially changes his personal pronoun to ‘His Majesty’ on campus roster,” *The College Fix*, Sep. 28, 2016, <http://www.thecollegefix.com/post/29230/>.

⁵³ *See, e.g.*, The International Olympic Committee, which recently ruled that “transgender athletes can take part in Olympics without surgery.” Associated Press, January 24, 2016, <http://goo.gl/ggVqDC>.

them in hotel rooms, and help them with feminine “issues”?

7. a male teacher wants to use the female bathroom with underage girls?
8. a male teacher or school security guard claims he is a woman and suggests that he conduct pat downs/searches on female students suspected of hiding contraband?

IV. IF A WOMAN CAN BE A MAN, A HOST OF OTHER “TRANS” PERSONS WILL FOLLOW.

If “gender dysphoria” is now a legitimate medical condition rather than a mental disorder,⁵⁴ then it would not come as a surprise that there might be all sorts of other similar “dysphorias.” After all, as one social commenter has observed, “the underlying question, as different ‘trans’ identities vie for authenticity, is why we allow some parts of our identity to be chosen, but not others?”⁵⁵ Indeed, if a man can pretend that he is a woman, and vice versa, why can’t one likewise pretend a variety of other make-believe things that are not so?

⁵⁴ See W. Parry, “Gender Dysphoria: DSM-5 Reflects Shift In Perspective On Gender Identity,” Huffington Post, June 4, 2013, <http://goo.gl/eOGIpF>.

⁵⁵ K. Quarmby, “Impostors: Caitlyn Jenner identifies as a woman, Rachel Dolezal as black. Why should one be legitimate and the other condemned?” Aeon, Oct. 29, 2015, <http://goo.gl/2jSO08>.

A. Trans Racial.

One new “trans” phenomena that has recently come into the limelight is the claim that a person may be “trans racial” or “trans ethnic.” The American people were introduced to this concept by Rachel Dolezal, the Caucasian ex-President of the Spokane chapter of the NAACP who, after years of her pretending to be black, was “outed” by her parents as a white woman.⁵⁶ Indeed, the President of the Family Policy Institute of Washington already appears to have convinced several students at the University of Washington that he is a 7-year-old, six-foot-five-inch Chinese woman, rather than an adult, five-foot-nine-inch white man.⁵⁷ After all, if “sex” is not fixed at birth, but instead based on how a person “feels,” then why not one’s race as well?

Accepting the idea of racial dysphoria would allow a person of any color to avoid the “race-conscious admissions process” (sanctioned by Grutter v. Bollinger, 539 U.S. 306 (2003)) of a college or university by simply claiming to be whatever race is being given preferential treatment at the time.⁵⁸ Of

⁵⁶ See C. McGreal, “Rachel Dolezal: ‘I wasn’t identifying as black to upset people. I was being me,’” *The Guardian*, Dec. 13, 2015, <http://goo.gl/iLmqMt>.

⁵⁷ See <https://www.youtube.com/watch?v=xfO1veFs6Ho>.

⁵⁸ For example, it is reported that Asian college applicants are not “fessing up” to their race on their applications because of recognition they are discriminated against in favor of other minority students. “Some Asians’ college strategy: Don’t check

course, the college or university might expel the student on the ground that he had filed a misleading application. But would that then open the door to a case such as this one, with the expelled student claiming the expulsion violated Title VI of the Civil Rights Act (42 U.S.C. Section 2000d), by discriminating “on the basis of [race], including [racial] identity” as applied “to persons whose [subjective racial] identity diverges from their physiolog[ical race].” *See* Pet. at 2, 8.⁵⁹

Interestingly, the biggest critics of demands made by other types of “trans” (such as “transracial”) are transgender persons, attacking the legitimacy of other “trans” persons while demanding acceptance for themselves.⁶⁰

B. Transabled.

Perhaps the strangest new identity crisis to hit the market is the idea of being “transabled,” also known as “Body Integrity Identity Disorder,” or “the desire or the need for a person identified as able-bodied by other people to transform his or her body to obtain a physical

‘Asian,’” USA Today, Dec. 4, 2011, <http://goo.gl/QuReAw>.

⁵⁹ *See, e.g.*, Bureau of Alcohol, Tobacco, Firearms and Explosives Form 4473 which asks two separate questions, one about a person’s ethnicity and the other about race, inviting a variety of answers that blur distinct racial and ethnic categories.

⁶⁰ *See* T. Lewis, “Is ‘Transracial’ Identity Real? 11 Opinions That Will Leave You Thinking,” *Essence*, June 15, 2015, <http://goo.gl/v4lnmg>.

impairment.”⁶¹ The transabled are “people [who feel] like impostors in their [fully working] bodies.” *Id.* For example, one man “cut off his right arm with a ‘very sharp power tool,’” and another “dropped an incredibly heavy concrete block on his legs...” *Id.* One woman (already fluent in Braille) “got a sympathetic psychologist to pour drain cleaner in her eyes” to blind her.⁶² Thrilled with the results, the woman claimed that “‘I really feel this is the way I was supposed to be born, that I should have been blind from birth.’” *Id.*

The transabled, like the transracial, “ha[ve] been **met with great resistance in ... transgender circles...**” S. Boesveld, *infra*. (emphasis added). For their part, the transabled seek, unlike transgenders, seek to be added to the Diagnostic and Statistical Manual of Mental Disorders in order that it “might legitimize their experience...” *Id.* And, of course, “there is a **wide overlap between mentally ill people who are “transabled” and those who are transgender.**” *See, e.g.*, Chloe Jennings-White, born a man,⁶³ now claiming to be a woman, and married to a

⁶¹ *See* S. Boesveld, “Becoming disabled by choice, not chance: ‘Transabled’ people feel like impostors in their fully working bodies,” *Canada National Post*, June 3, 2015, <http://goo.gl/QBZpu1>.

⁶² *See* B. Neff, “North Carolina Woman Identifies As Blind, Pours Drain Cleaner In Her Eyes,” *The Daily Caller*, Oct. 1, 2015, <http://goo.gl/xnEIgA>.

⁶³ Until at least 1996, this person was a man named “Clive Jennings-White.” B. Higgins, “Chemistry Lab,” *Los Angeles Times*, July 18, 1996, <http://goo.gl/ZCYZ3T>.

“woman” named Danielle Saint-Marie⁶⁴ (who is also a transgender man).⁶⁵ Jennings-White claims “that nature made a mistake by giving [him] working legs.”⁶⁶ *See also* blogger “Marie,” who describes himself thusly: “Personally I am a transsexual. I had GRS (genital reassignment surgery) in October 2005 with a well-recognised surgeon in North America. I am also transabled: I have a desire to be moderately/severely deaf....”⁶⁷

It is not hard to draw further parallels between the transgender and the transabled, such as the obvious parallel between a man who would have his arm removed (transabled), and a man who have his penis removed (transgender).

With the upswing in those identifying as “transabled,” countries with universal health care (like Canada and Britain) will need to determine whether the taxpayer must foot the medical bill to destroy or

⁶⁴ *See* D. Moye, “Chloe Jennings-White Wants Operation To Be Permanently Disabled,” *The Huffington Post*, July 20, 2013, <http://goo.gl/mqj8hS>.

⁶⁵ *See* D. Sainte-Marie, “Pride: I Am Self Identified!” *Lulu.com* (2014), <http://goo.gl/PJQmly>.

⁶⁶ *See* U. Kloster, “I live like a disabled person even though I’m physically healthy... and now want a surgeon to cut my spinal cord: Rare condition has made woman, 58, disown her legs,” *Mail Online*, July 16, 2013, <http://goo.gl/I9Y7la>.

⁶⁷ *See* Marie, “A comparison between transsexuality and transableism,” *transabled.org*, Feb. 6, 2007, <http://goo.gl/twWhtp>.

remove perfectly good bodily parts, and thereafter pay disability benefits to the newly disabled!⁶⁸

C. Trans Species and Otherkin.

Finally if a person’s race or disability can be self-defined, then why not his species — or “otherkin,”⁶⁹ as they call themselves? Such persons reportedly identify as wizards, dragons, elves, trolls, potted plants, dogs, wolves, and just about anything else one can imagine.⁷⁰ Apparently, some even “identify” as inanimate objects or anime characters (called “otakukin”). See Baker-Whitelaw, *infra*.

The “otherkin” are quick to point out that they are very different from “furries,”⁷¹ or those “who focus on anthropomorphic animals and are known for dressing

⁶⁸ See W. Huston, “Next Aggrieved Group: ‘Transabled’—People Who Want to Purposefully Disable Themselves,” *Breitbart*, June 2, 2015, <http://goo.gl/41WKZi>. Recently, California has funded the first sexual reassignment surgery for a prison inmate. D. Thompson, “California Funds 1st US Inmate Sex Reassignment,” *Associated Press*, Jan. 6, 2017, <http://goo.gl/cvJfwD>.

⁶⁹ Defined as “a term used by people who identify as nonhuman, either in a spiritual sense or in terms of genuine physical dysphoria.” G. Baker-Whitelaw, “Meet the people who don’t identify as human,” *The Week*, Jul. 21, 2015, <http://goo.gl/lKfgCQ>.

⁷⁰ M. Read, “From Otherkin to Transethnicity: Your Field Guide to the Weird World of Tumblr Identity Politics,” *Gawker*, Sep. 6, 2012, <http://goo.gl/dwDALf>.

⁷¹ <http://i.huffpost.com/gen/2403864/images/o-FURRIES-face-book.jpg>

up [and] aren't the same thing as otherkin, many of whom don't dress up or change their appearances at all." M. Read, *infra*. Unlike furrries, otherkin literally and truly believe that they are a different type of being stuck in a human being's body, such as "where they felt as if they had a tail or as if they could move their ears more than the physical ears would move..." Baker-Whitelaw, *infra*. In other words, these persons resemble the behavior of The Jungle Book's Mowgli, who was startled to discover that he was not, in fact, a wolf.⁷²

Of course, "[t]o someone who thinks of him- or herself as otherkin, the issue is one not of mental illness but of freedom of expression." Baker-Whitelaw, *infra*. And, before one dismisses such claims as nonsense, it is worth noting that, for each of the mental health disorders discussed so far, there are Harvard-educated professors and clinical psychologists⁷³ standing by, ready to legitimate each successive form of lunacy, claiming that it should be embraced rather than medicated. In other words, "[t]here really is no limit to what people are willing to accept as a valid identity..." M. Read, *infra*.

⁷² But if, for example, a human being can be considered a canine, why not the other way around? Can Fido get a driver's license, or bring a Section 1983 action against the dogcatcher who put him in the pound?

⁷³ See Baker-Whitelaw, *infra* (Dr. Jan Dirk Blom, an expert in clinical lycanthropy) ("Human experience and behaviour is so diverse, and only so little of it tends to be presented as 'normal' in the media, that communities such as these should be embraced and encouraged by us all.")

Additionally, as with the “transabled,” before explaining away “otherkin” as simply a form of mental illness that is totally different from being “transgender,” it is important to note **“many otherkin also identify as transgender themselves.”** Baker-Whitelaw, *infra*. (emphasis added). *See, e.g.*, Emily T. Prince, the transgender lawyer who obtained the original DOE letter, self-identifies as a “Sworn Knight of the Transsexual Empire” and whose twitter feed is littered with pictures, videos and discussions of “anime,” cartoon figures, and role playing games.⁷⁴

Even though it appears that many transgender persons also identify as “otherkin,” it is interesting that, as with the “transabled,” it is none other than the trans community that is perhaps least accepting of “otherkin,” believing that they are “encroaching on trans identities.” Baker-Whitelaw, *infra*. The otherkin counter that “otherkin aren’t seeking to reduce credibility for anyone’s gender identity or be hateful. We just want to be.” *Id.*

V. TRANSGENDERISM IS A DANGEROUS DELUSION.

The decision of the court of appeals may be politically correct, but it is based on a false narrative. It should be unquestioned that the term “sex” both as a word of the English language and as used in the statute means biological sex. Transgenderism, on the other hand, is a delusion. It does not exist. It is a

⁷⁴ https://twitter.com/emily_esque/media?lang=en

made-up word for a made-up world. No one can change one's biological sex, no matter how many surgeries one undergoes or how many drugs one takes.⁷⁵

Only a few days ago, a transgender “man” named Jionni Conforti sued a Catholic run hospital in New Jersey for refusing to perform a hysterectomy on “him.”⁷⁶ Of course, the hospital pointed out, it does not and could not perform a hysterectomy on a man, which is what Conforti claims “himself” to be. Indeed, the opening lines of “his” complaint claim that “Plaintiff Jionni Conforti [is] a man,” which he alleges is “his true sex,” and claims he was “incorrectly assigned the sex of female at birth.” Conforti v. St. Joseph’s Healthcare System, Inc., U.S.D.C. N.J., Docket No. 17-0050, ECF #1, para 2-3, 26.

How then, can Conforti undergo a hysterectomy? **Because she is a woman**, of course. Conforti was perfectly happy to pretend that she is a man — until that meant she could not undergo a female surgical procedure.

⁷⁵ The Obama Administration’s FDA now proposes that, when it comes to blood donations, “male or female gender be taken to be self-identified and self-reported” as opposed to based on one’s biological sex. This permits transgender “women” (men), up to 56 percent of whom have HIV, to donate contaminated blood while claiming to be “women.” See Comments of Public Advocate of the United States, November 25, 2016, <http://goo.gl/VQifgs>.

⁷⁶ S. Somashekhar, “Transgender man sues Catholic hospital for refusing surgery,” The Washington Post, January 6, 2016, <http://goo.gl/OX6gEA>.

It is easy to see that, at some point, legitimization of mental illness will cause real problems for courts and judges who are supposed to apply real laws to the real world. Then again, Justice William O. Douglas once argued in a famous dissent that trees should have standing. Sierra Club v. Morton, 405 U.S. 727, 743 (1972). That would seem especially to apply to a person who thinks he is a tree.

Even one of the most respected liberal feminist authors in the country, Camille Paglia, has claimed that the “Transgender Mania” is “a symptom of [the] West’s cultural collapse.” Paglia notes that “[s]ex reassignment surgery, even today with all of its advances, cannot in fact change anyone’s sex ... You can define yourself as a trans man, or a trans woman, as one of these new gradations along the scale. But ultimately, every single cell in the human body, the DNA in that cell, remains coded for your biological birth.”⁷⁷

The delusion of transgenderism also victimizes children. When it comes to teenagers like G.G., who wish to “transition” to another sex, Paglia claims that “[p]arents are now encouraged to subject the child to procedures that I think are a form of child abuse.”⁷⁸ The

⁷⁷ See S. Dorman, “Paglia: ‘Transgender Mania’ is a Symptom of West’s Cultural Collapse,” CNS News, Nov. 3, 2015, <http://goo.gl/cLYqAe>; <https://www.youtube.com/watch?v=I8BRdwgPChQ>.

⁷⁸ See, e.g., P. Boghani, “When Transgender Kids Transition, Medical Risks are Both Known and Unknown,” Frontline, June 30, 2015, <http://goo.gl/VN5hQS>.

hormones to slow puberty, actual surgical manipulations, etcetera. I think that this is wrong, that people should wait until they are of an informed age of consent.” *Id.* Many children now being brutalized by the medical establishment likely will agree once they become adults.

To permit each person to determine his, her, or its gender — and then to equate that with sex — defies logic, common sense, and makes a mockery of the statute. Indeed, such an “interpretation,” forcing a school to take a person at his word when it comes to his sex, *de facto* repeals the statute, which on its face permits certain forms of discrimination based on sex. Such silliness — permitting the citizen to tell the government whether, how, and to what extent a statute applies to him — would never be permitted in any other context. It leads to complete unenforceability of the statute and, indeed, to lawlessness.

CONCLUSION

The lower court’s decision should be reversed and remanded.

Respectfully submitted,

JOSEPH W. MILLER
U.S. Justice Foundation
932 D Street, Ste. 2
Ramona, CA 92065
Attorney for Amicus Curiae
U.S. Justice Foundation

**Counsel of Record*
January 10, 2017

ROBERT J. OLSON*
HERBERT W. TITUS
WILLIAM J. OLSON
JEREMIAH L. MORGAN
WILLIAM J. OLSON, P.C.
370 Maple Ave. W., Ste. 4
Vienna, VA 22180-5615
(703) 356-5070
wjo@mindspring.com
Attorneys for Amici Curiae