No. 15-2056

In the
United States Court of Appeals for the Fourth Circuit

G.G., by his next friend and mother, Deirdre Grimm,
Plaintiff-Appellant,
v.

GLOUCESTER COUNTY SCHOOL BOARD,
Defendant-Appellee.

On Appeal from the
United States District Court for
the Eastern District of Virginia at Newport News

Brief *Amicus Curiae* of
Public Advocate of the United States,
United States Justice Foundation, and
Conservative Legal Defense and Education Fund
in Support of Defendant-Appellee's Petition for Rehearing *En Banc*

MICHAEL CONNELLY
932 D Street, Ste. 2
Ramona, CA 92065
Attorney for Amicus Curiae
U.S. Justice Foundation

WILLIAM J. OLSON*
HERBERT W. TITUS
JEREMIAH L. MORGAN
WILLIAM J. OLSON, P.C.
370 Maple Avenue W., Suite 4
Vienna, Virginia 22180-5615
(703) 356-5070
Attorneys for Amici Curiae

*Attorney of Record

May 10, 2016

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

Disclosures must be filed on behalf of all parties to a civil, agency, bankruptcy or mandamus case, except that a disclosure statement is **not** required from the United States, from an indigent party, or from a state or local government in a pro se case. In mandamus cases arising from a civil or bankruptcy action, all parties to the action in the district court are considered parties to the mandamus case.

Corporate defendants in a criminal or post-conviction case and corporate amici curiae are required to file disclosure statements.

If counsel is not a registered ECF filer and does not intend to file documents other than the required disclosure statement, counsel may file the disclosure statement in paper rather than electronic form. Counsel has a continuing duty to update this information.

No. 15-2056 Caption: G.G. v. Gloucester County School Board

Pursuant to FRAP 26.1 and Local Rule 26.1,

Public Advocate of the United States, United States Justice Foundation, and Conservative Legal
(name of party/amicus)

Defense and Education Fund

who is amici, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? ☐ YES ☑ NO
   If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☐ NO
   If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑ NO
   If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ William J. Olson Date: May 10, 2016

Counsel for: Public Advocate of the U.S., et al.

CERTIFICATE OF SERVICE

****

I certify that on May 10, 2016 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

/s/ William J. Olson May 10, 2016
(signature) (date)

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES. ii

INTEREST OF *AMICI CURIAE*. 1

ARGUMENT

I. The Panel's Ruling Is Not Limited to the Use of Boys' Restrooms.. 1

II. The DOE Opinion Letter Does Not Merit Auer Deference. 2

III. The Panel Decision Sanctions Sexual Anarchy. 5

CONCLUSION. 8

TABLE OF AUTHORITIES

Page

HOLY BIBLE
Genesis 5:2. 7
Matthew 19:4. 7

CASES
Dickenson-Russell Coal Co. v. Sect'y of Labor, 747 F.3d 251
(4th Cir. 2014). 3

MISCELLANEOUS
S. Chitnis, "Parents out 'black' NAACP leader as white woman,"
USA Today (June 12, 2015). 8
P. McHugh, "Transgenderism: A Pathogenic Meme," Public Discourse
(June 10, 2015). 2, 4
A. Scalia & B. Garner, Reading Law (West: 2014). 3

INTEREST OF *AMICI CURIAE*

Public Advocate of the United States, United States Justice Foundation, and Conservative Legal Defense and Education Fund are nonprofit organizations, exempt from federal income taxation under sections 501(c)(3) or 501(c)(4) of the Internal Revenue Code. Each is dedicated, *inter alia*, to the correct construction, interpretation, and application of the law.[1]

ARGUMENT

I. The Panel's Ruling Is Not Limited to the Use of Boys' Restrooms.

Stating that "[o]nly restroom use is at issue in this case," the panel denies the sweeping scope of its decision (Op. at 7, n.2) based solely on the fact that G.G. "does not participate in the school's physical education programs," and has never "sought, use of the boys' locker room." *Id*. at 7. Conveniently omitted from this account of G.G.'s demands is that G.G. had at first "agreed to use a separate restroom in the nurse's office" and although "pleased to discover that his[2] teachers

[1] *Amici* requested and received the consent of the parties to the filing of this brief *amicus curiae*, pursuant to Rule 29(a), Federal Rules of Appellate Procedure. No party's counsel authored the brief in whole or in part. No party or party's counsel contributed money that was intended to fund preparing or submitting the brief. No person other than these *amici curiae*, their members or their counsel contributed money that was intended to fund preparing or submitting this brief.

[2] Although the parties and the panel use male pronouns to refer to the female plaintiff, this brief uses pronouns based on her "sex."

and the vast majority of his peers respected the fact that he is a boy and treated him accordingly" (Compl. ¶¶ 30-31), changed her mind, having become dissatisfied with the "separate restroom" accommodation, because she felt it was "stigmatizing to have to use a separate restroom." Compl. ¶ 31. There is no reason to believe that G.G., having secured access to the boys' restroom, won't have another change of mind, rejoin the physical education program, and demand access to the boys' locker room, lest separate locker facilities exacerbate her gender "dysphoria."[3]

The panel's feeble attempt to reassure the public that its ruling is limited to restroom usage dissolves completely in light of the fact that the School Board Policy at issue in this case treats restroom and locker room access equally, limiting access to both on the same ground that the panel has, in deference to the Department of Education ("DOE"), struck down. Further, the DOE's Office of Civil Rights ("OCR") letter applies the same principles to restrooms and locker facilities. In deferring to that letter, the panel signals that it would rule in the exact same manner for locker rooms and showers.

---

[3] As Dr. Paul McHugh, University Distinguished Service Professor of Psychiatry at Johns Hopkins Medical School, has observed, "much like any other feeling, [feelings of gender dysphoria] can change at any time, and for all sorts of reasons." *See* P. McHugh, "Transgenderism: A Pathogenic Meme," Public Discourse (June 10, 2015).

II. The DOE Opinion Letter Does Not Merit Auer Deference.

The panel forthrightly admitted that a "straightforward" analysis yields no ambiguity in the meaning of "sex" as it appears in the relevant statutes and regulations: that there are only two sexes, male and female. *See* Op. at 19-20. Nevertheless, the panel concluded that "sex" is ambiguous. *Id.* at 21. How did the panel come to such a conflicting conclusion? It did so by confusing the task of interpretation of the meaning of the word as it appears in the law with the task of applying its plain meaning to specific fact situations:

> Although the regulation may refer unambiguously to males and females, it is silent as to **how** a school should determine whether a transgender individual is a male or female for the purpose of access to sex-segregated restrooms. [Op. at 20 (emphasis added).]

"Finding nothing in the text of the actual regulation to support its [holding]," the panel "seeks to upend the plain language[4] of the regulation by suggesting that [its] interpretation will lead to absurd results,"

> which restroom would a transgender individual who had undergone sex-reassignment surgery use? What about an intersex individual? What about an individual born with X-X-Y sex chromosomes? What about an individual who lost external genitalia in an accident? [Op. at 20.]

None of these questions relates to whether there is any ambiguity in the meaning

---

[4] Dickenson-Russell Coal Co. v. Sect'y of Labor, 747 F.3d 251, 258 (4th Cir. 2014) (words were meant to express their ordinary meaning); *see* A. Scalia & B. Garner, Reading Law at 69-77 (West: 2014).

of the word "sex." Yet, it was solely upon these four abstruse hypotheticals that the panel rested its decision to defer to the DOE "interpretive" letter:

> The Department's interpretation resolves ambiguity by providing that in the case of a transgender individual using a sex-segregated facility, the individual's sex as male or female is to be **generally determined by reference** to the student's gender identity. [Op. at 20-21 (emphasis added).]

In effect, the panel deferred to the DOE's rewriting of the law to resolve four idiosyncratic cases by changing the meaning of "sex" to include "gender identity," despite the fact that there is no indication whatsoever that, when Title IX was enacted in 1972, discrimination "on the basis of sex" was meant to prohibit anything other than discrimination against biological males or biological females.

The OCR letter bases its transparently political administrative decree on a false finding of ambiguity and a false assumption about transgender sex.[5] As dissenting Judge Neimeyer maintains, "[a]ny new definition of sex that excludes reference to physiological differences, as the majority now attempts to introduce, is simply an unsupported reach to rationalize a desired outcome." Op. at 63. Indeed, if the DOE identified a new public policy issue involving gender identity that must be

---

[5] During Dr. McHugh's tenure at Johns Hopkins, that institution pioneered sex-change surgery, concluding "that the practice brought no important benefits" leading it to be discontinued in the 1970's. Transgenderism at 1. He reports that "the most thorough follow-up of sex-reassigned people ... in Sweden ... documents their lifelong mental unrest [with a] suicide rate ... twenty times that of comparable peers." *Id.* at 2. From a lifetime of work in the field, he concludes that "the basic assumption ... that exchange of one's sex is possible" is "nakedly false." *Id.*

resolved, the Constitution vests only Congress with the power to change the law.

III. The Panel Decision Sanctions Sexual Anarchy.

The OCR letter defiantly asserts that, for purposes of Title IX, discrimination based on "gender identity" is "generally" identical to discrimination "on the basis of sex." JA-54.

> The Department's Title IX regulations permit schools to provide **sex-segregated restrooms**, **locker rooms**, **shower facilities**, housing, athletic teams, and single-sex classes under certain circumstances. When a school elects to separate or treat students differently on the basis of sex in those situations, a school **generally** must treat **transgender** students consistent with their **gender identity**. [OCR Letter at 2, JA-55 (emphasis added).]

From this letter, it appears that the OCR interprets Title IX and its Title IX regulations to mandate that those students who have announced that they are "transgender" have an absolute right to access "sex-segregated" restrooms, "locker rooms," "shower facilities," "housing," and "athletic teams." Thus, each individual has the right to determine whether and how the law applies to him.

In his temporary capacity as Acting Deputy Assistant Secretary for Policy, James A. Ferg-Cadima,[6] employs the word "generally" in his letter, creating a loophole that reserves to DOE the complete discretion to grant exceptions to its

---

[6] Mr. Ferg-Cadima appears to have grown weary of being a lobbyist for the Mexican American Legal Defense and Education Fund ("MALDEF") and as legislative counsel for the ACLU of Illinois, finding it more convenient here to change the law by the stroke of his pen rather than persuading Congress to act.

rule. Indeed, the OCR letter "refrains from offering opinions about specific facts, circumstances, or compliance with federal civil rights laws without first conducting an investigation...." JA-55. By refusing to make a blanket interpretative statement, the DOE ensures that education policy in the country is set by an evolving opinion of man, not by a fixed rule of law.[7]

However, the panel's opinion cannot be read as anything other than a blanket insistence that students may choose to be the sex that they are not, and the nation's schools must accommodate how any student "identifies" (*i.e.*, feels) on a given day. To be sure, the panel assumes that G.G. is a biological female, who has been "diagnosed with gender dysphoria," "has undergone hormone therapy," and "has legally changed his name," but has not "had sex reassignment surgery." Op. at 6-7. However, there is nothing in the panel opinion indicating that its decision would be confined to such facts. Rather, the OCR's term "gender identity" is, by definition, a fluid, subjective concept that has no limit, other than how a person "feels." As one of the leading homosexual rights lobby groups has decreed:

Transgender is a term used to describe people whose gender identity

---

[7] If the term "generally" had not been intended to reserve to the federal bureaucracy the authority to apply the rule differently in different cases, the only other option is that the inclusion of the term is an excellent illustration of the rhetorical term "weasel word" — defined as "any word that's used with the intention to mislead or misinform." President Theodore Roosevelt is given credit for popularizing this term in the lexicon of the federal government.

> differs from the sex the doctor marked on their birth certificate. **Gender identity** is a person's internal, personal sense.... For transgender people, the sex they were assigned at birth and their own internal gender identity do not match....
> Many transgender people are prescribed hormones by their doctors to change their bodies. Some undergo surgeries as well. But not all transgender people can or will take those steps....[8]

This definition is truly remarkable, advancing the view that one's sex is arbitrarily determined by a "doctor" placing a "mark" on a "birth certificate" and therefore one's "sex" is nothing more than "assigned at birth" by a human being. It seeks to sweep aside a distinction that has existed since the beginning of time with a repudiation of the Biblically revealed truth that "Male and female created he them." Genesis 5:2. *See also* Matthew 19:4. Relishing their rejection of the created order, such organizations have recruited DOE to join their cause, and now ask federal judges to embrace their position as well.[9]

If society must bow down to an individual choice of sexual identity, what about other characteristics, such as race? Once the federal government determines that we are what we feel, then it can have no principled objection to a white male

---

[8] Transgender FAQ, GLAAD. *See also* the definition of "transgender" provided by the American Psychological Association.

[9] The decision is between polar opposites, there being no middle ground. As Bob Dylan explained: "You're gonna have to serve somebody, yes indeed...; Well, it may be the devil or it may be the Lord; But you're gonna have to serve somebody." B. Dylan, "Gotta Serve Somebody" (1979).

identifying himself as a black female on a U.S. census form. Nor would there be fraud if a student applied for admission at a college or university, representing himself as a member of a favored race to take advantage of a preferential admissions policy. And by the logic of the panel opinion, the NAACP unfairly criticized the self-identified African American woman who had led its chapter in Spokane Washington because she was, in fact, Caucasian.[10]

CONCLUSION

The decision of the panel should be vacated and the case reheard.

Respectfully submitted,

/s/ *William J. Olson*

WILLIAM J. OLSON*
HERBERT W. TITUS
JEREMIAH L. MORGAN
WILLIAM J. OLSON, P.C.
370 Maple Avenue West, Suite 4
Vienna, Virginia 22180-5615
(703) 356-5070

MICHAEL CONNELLY
932 D Street, Ste. 2
Ramona, CA 92065
Attorney for Amicus Curiae
U.S. Justice Foundation

May 10, 2016
*Attorney of record

[10] *See, e.g.,* S. Chitnis, "Parents out 'black' NAACP leader as white woman," *USA Today* (June 12, 2015).

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that service of the foregoing Brief *Amicus Curiae* of Public Advocate of the United States, *et al.*, in Support of Defendant-Appellee's Petition for Rehearing *En Banc*, was made, this 10th day of May, 2016, by the Court's Case Management/ Electronic Case Files system upon the attorneys for the parties.

/s/ *William J. Olson*
William J. Olson
Attorney for *Amici Curiae*