

Case No. 17-3113

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

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JOEL DOE, a Minor, by and through his Guardians John Doe and Jane Doe;  
MACY ROE; MARY SMITH; JACK JONES, a Minor, by and through his  
Parents John Jones and Jane Jones,

*Appellants,*

v.

BOYERTOWN AREA SCHOOL DISTRICT; DR. BRETT COOPER, in his  
official capacity as Principal; DR. E. WAYNE FOLEY, in his official capacity as  
Assistant Principal; DAVID KREM, Acting Superintendent,

*Appellees,*

PENNSYLVANIA YOUTH CONGRESS FOUNDATION,

*Intervenor-Appellee.*

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On Appeal from the August 25, 2017 Order of the  
United States District Court for the Eastern District of  
Pennsylvania in Civil Action No. 17-1249 (Smith, J.)

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**BRIEF OF *AMICI CURIAE* WOMEN'S LAW PROJECT, ET AL.,  
IN SUPPORT OF APPELLEES, INTERVENOR-APPELLEE,  
AND AFFIRMANCE OF THE DISTRICT COURT**

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## CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 36.1 and 29(a)(4), the undersigned counsel for *amici curiae* Women's Law Project et al., states that *amici* are non-profit public interest organizations, none of which have parent corporations, and none of which issue public stock.

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## STATEMENT OF INTEREST OF *AMICI CURIAE*

*Amici* are organizations dedicated to the eradication of sex discrimination. Their work is vital to improving the lives of women and girls. *Amici* include organizations that provide direct services to individuals, including students, ranging from crisis intervention and counseling, to assisting in judicial and quasi-judicial systems, including internal grievance proceedings related to Title IX of the Education Amendments of 1972. Many engage in policy advocacy to improve institutional responses to sexually hostile environments at work and school. *Amici* have expertise on Title IX's purpose and application. They submit this brief to aid the Court in evaluating whether the School District's policy permitting transgender students to use the facilities associated with their gender identities creates a sexually hostile environment in violation of Title IX.

The identities of *amici curiae* are as follows: American Association of University Women, California Women's Law Center, Champion Women, Equal Rights Advocates, Gender Justice, Legal Aid at Work, Legal Voice, National Women's Law Center, New Voices for Reproductive Justice, Pennsylvania Coalition Against Rape, Southwest Women's Law Center, Women's Law Center of Maryland, and Women's Law Project. Individual statements of interest of *amici* are attached in an appendix to this brief.

*Amici* are authorized to file this Brief pursuant to Fed. R. App. P. 29(a)(2), as all parties have consented to the filing.

No counsel for a party authored this Brief in whole or in part, and no one other than *amici* or their counsel made any monetary contribution toward the Brief's preparation or submission.

## SUMMARY OF ARGUMENT

The district court rejected Appellant-students' argument that the Boyertown Area School District's ("School District") policy permitting transgender students to use school bathrooms and locker rooms aligning with their gender identity creates a hostile environment in violation of Title IX. This Court should affirm.

Appellant-students' opposition to the School District's facilities policy is based on an incomplete and inaccurate understanding of "sex" that conflicts with the purpose and application of Title IX. Appellant-students argue that a transgender girl is not a girl because her assigned sex at birth was male, and a transgender boy is not a boy because his assigned sex at birth was female. Appellant-students define "sex" based on the presence at birth of a vagina or a penis, but this is not the definition of "sex" under anti-discrimination law.

To meet Congress's goal of eradicating sex discrimination in education, Title IX defines discrimination "on the basis of sex" broadly to include a prohibition on sex stereotyping, including the stereotypes on which Appellant-students' allegations are based. The courts have also ruled that a person's reproductive anatomy is not, in all instances, an accurate signifier of the person's sex. For transgender people — individuals whose deeply felt understanding of their own sex conflicts with their sex assigned at birth — a person's gender identity is the most accurate determinant of their sex. Thus, Title IX does not

provide a legal basis for Appellant-students to deny transgender students equal access to an education. To the contrary, Title IX requires the School District to continue its current policy because the alternative — a policy that segregates students only by biology-based, assigned sex — would discriminate against transgender students by denying them use of facilities in accordance with their gender identity.

Transgender students require access to facilities that align with their gender identities, and their presence in those locker rooms and bathrooms is not objectively offensive to reasonable individuals. Appellant-students allege only that they have been or could be in the presence of students that they have misgendered as the “opposite sex,” students who have done nothing other than what they are supposed to do in the locker room and bathroom. None of this behavior amounts to a sexually hostile environment in violation of Title IX, nor does it subject Appellant-students to any harm. Appellant-students’ allegations are a speculative and discriminatory attempt to impose stereotypical gender norms on the entire school district, directly harming anyone who does not conform to those stereotypes, including transgender students.

## ARGUMENT

### **I. The Appellant-Students' Allegations are Rooted in Sex Stereotypes That Conflict With the Purpose and Application of Title IX**

In passing Title IX of the Education Amendments of 1972, Congress announced that sex discrimination has no place in the American education system. 20 U.S.C. § 1681(a). The law is broad and comprehensive, prohibiting all forms of sex discrimination in educational programs that receive federal funding. *Id.* The statute's prohibition on sex discrimination includes a prohibition on sex stereotyping. *See infra*, Part I.B. As a result, Title IX rejects the premise of Appellant-students' allegations: that an individual's appearance and behavior must conform to the stereotypes commonly associated with that individual's assigned sex (typically based on the presence at birth of a vagina or penis).

#### A. Title IX's Purpose is to Eliminate Sex Stereotypes From Education

Title IX provides, in relevant part, that no person "shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving Federal financial assistance . . . ." 20 U.S.C. § 1681(a). When interpreting this statute, courts have looked for guidance from its prime sponsor, former Senator Birch Bayh of Indiana. *See N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 523-530 & n.13 (1982); *Cannon v. Univ. of Chicago*, 441 U.S. 677, 694-95 & n.16 (1979). When Senator Bayh introduced the amendment that became Title IX over forty years ago,

he noted that sex discrimination, including discrimination based on stereotypes, serves as a barrier to educational opportunities and achievement, declaring that “[i]t is time we change our operating assumptions.” 118 Cong. Rec. 5804 (1972).

Courts have recognized discrimination based on sex stereotyping as a violation of Title IX. *See Wolfe v. Fayetteville, Ark. Sch. Dist.*, 648 F.3d 860, 867 (8th Cir. 2011) (holding that under Title IX, plaintiff-student “was legally required to show . . . the harassment was motivated by either [his] gender or failure to conform with gender stereotypes.”). In *Doe v. Southeastern Greene School District*, the court permitted a student’s Title IX claim to proceed where he alleged that his school district was deliberately indifferent to sex-based harassment based on stereotypes about how boys ought to behave sexually. No. 03-717, 2006 U.S. Dist. LEXIS 12790, \*19-23 (W.D. Pa. Mar. 24, 2006). Courts have also recognized that this prohibition on sex stereotyping includes a prohibition on disparate treatment based on gender identity. *See discussion infra Part II; Whitaker ex rel. Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Education*, 858 F.3d 1034, 1046-50 (7th Cir. 2017).

To reach this interpretation of Title IX, courts have looked to Title VII of the Civil Rights Act of 1964, which applies to discrimination in the employment context. *See Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 616 n.1 (1999) (Thomas, J., dissenting) (citing *Franklin v. Gwinnett Cty. Pub. Sch.*, 503 U.S. 60,

75 (1992)); *Kazar v. Slippery Rock Univ. of Pa.*, 679 F. App'x. 156, 163 (3d Cir. 2017). The U.S. Supreme Court has long interpreted “because of sex” in Title VII broadly, recognizing Congress’s intent to end sex discrimination in all of its forms. To meet this intent, sex discrimination must mean more than discrimination based on a person’s biology or assigned sex. It must also encompass a prohibition on conduct based on sex stereotyping, which the Supreme Court formally acknowledged in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) (plurality opinion), declaring that:

[W]e are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for in forbidding employers to discriminate against individuals on the basis of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.

*Id.* at 251 (internal quotations marks and citation omitted); see *Prowel v. Wise Bus. Forms, Inc.*, 579 F.3d 285, 290 (3d Cir. 2009) (“[E]mployees may—consistent with the Supreme Court’s decision in *Price Waterhouse*—raise a Title VII gender *stereotyping* claim, provided they can demonstrate that ‘their harasser was acting to punish [their] noncompliance with gender stereotypes.’” (quoting *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257, 264 (3d Cir. 2001))).

More recently, a growing number of courts have recognized that there is no line between discrimination “because of sex” and sexual orientation discrimination

because both discriminate based on “assumptions about the proper behavior for someone of a given sex.” *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339, 346 (7th Cir. 2017). Indeed, as a district court in Pennsylvania recently observed, “[t]here is no more obvious form of sex stereotyping than making a determination that a person should conform to heterosexuality.” *EEOC v. Scott Med. Health Ctr.*, 217 F. Supp. 3d 834, 841 (W.D. Pa. 2016). In this line of cases, courts have concluded that anti-discrimination law does not condone the “policing [of] boundaries” based on stereotypes about what behaviors are acceptable for women or for men. *Hively*, 853 F. 3d at 346.

Similarly, courts have interpreted anti-discrimination laws as rejecting the stereotypical assumption that reproductive anatomy defines a person’s societal role. In *Int’l Union, United Auto., Aerospace & Agric. Implement Workers v. Johnson Controls, Inc.*, the Supreme Court held that an employer could not base an employment decision on an employee’s capacity to become pregnant where female infertility was not a bona fide occupational qualification. 499 U.S. 187, 206 (1991). The Court noted:

It is no more appropriate for the courts than it is for individual employers to decide whether a woman’s reproductive role is more important to herself and her family than her economic role. Congress has left this choice to the woman as hers to make.

*Id.* at 211. In essence, the Court recognized that a person’s anatomy does not define who they are or how they should be treated. Appellant-students advocate the completely contrary viewpoint.

These legal authorities demonstrate that there is no place in federally-funded schools for discrimination based on assumptions about a person’s anatomy, sex, or gender identity. Here, Appellant-students’ allegations are based on assumptions about gender that undermine the very purpose of Title IX: the prohibition of the full spectrum of sex discrimination, including discrimination based on sex stereotyping. Thus, Title IX does not support the relief Appellant-students seek.

B. Appellant-students Promote Stereotypes About How Individuals With Certain Assigned Sexes at Birth Must Identify and Behave

Appellant-students Joel Doe, Jack Jones, Mary Smith, and Macy Roe object to the School District’s policy because it permits transgender students to use the bathrooms and locker rooms that correspond to their gender identity as opposed to their assigned sex at birth. JA<sup>1</sup> 181, 183, 185 , 190-91 (Am. Compl.). This policy, according to Appellant-students, “forces” them to be near (or could “force” them to be near) students of the “opposite sex” because, in their opinion, sex refers only to

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<sup>1</sup> References to “JA” are to the corresponding page number within the Joint Appendix.

“one’s biological/anatomical status as either male or female.”<sup>2</sup> JA 160 (Am. Compl.). Appellant-students’ argue that boys or girls must possess specific anatomy in order to identify with a particular sex or gender identity, and people with that anatomy are obligated to behave a certain way. To them, transgender girls are not girls, and transgender boys are not boys.

For example, Joel Doe alleges that he became perplexed when someone who did not comport with Doe’s stereotypical notion of what a boy looks like was in the boys’ locker room. Doe alleged that the person was wearing a bra, an item of clothing that cisgender<sup>3</sup> boys may wear, too. JA 164 (Am. Compl.) Whether this student wore a bra is a disputed fact, JA 36 n.14 (Preliminary Injunction Opinion, hereinafter “Opinion”), but nonetheless, this transgender student did not conform to Doe’s assumptions of what a boy is because of Doe’s narrow definition of “sex.” For Jack Jones, as he indicated by text message to his parents, the person he identified in the boys’ locker room as a member of the “opposite sex,” did not “even look like a guy.” JA 48 (Opinion).

Similarly, Appellant-students Mary Smith and Macy Roe are opposed to having transgender girls use the girls’ facilities because they do not meet the

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<sup>2</sup> *Amici* oppose Appellant-students’ practice of misgendering transgender students by addressing them as “members of the opposite sex” in their complaint and brief, as it further stigmatizes transgender individuals.

<sup>3</sup> “Cisgender” is a term for individuals whose gender identity corresponds with their sex assigned at birth.

stereotypical definition of what a girl is. JA 171-72, 174 (Am. Compl.). For example, Appellant-students conclude that boys and girls have certain anatomy that makes them able to reproduce, alleging that “sex is . . . rooted in our human reproductive nature.” JA 160-61 (Am. Compl.). These assumptions are tied to stereotypical social roles, including the antiquated notion that a woman’s principal role in society is to have children, as well as an incorrect assumption that anatomy has a universal meaning tied to specific identities around sex or gender identity.

Appellant-students admit that they would not oppose using the same school facilities as students who share Appellant-students’ assigned sexes, typically based on biology, not gender identity.<sup>4</sup> JA 44-45, 51, 53, 66 (Opinion). However, Appellant-students admit that they cannot tell another student’s “biological sex” by sight, and there is no evidence in the record about the biological characteristics of the classmates Appellant-students want to oust from the locker rooms and rest rooms. JA 36, 45, 52, 62, 65 (Opinion). Thus, Appellant-students’ objections to these students are not based on any knowledge of their biological characteristics.

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<sup>4</sup> Joel Doe alleges he would not oppose sharing facilities with a student who identifies as a girl, wears a dress, paints her nails, and has long hair so long as she was born with “male” anatomical features at birth. JA 44-45, 52 (Opinion). Similarly, Mary Roe does not object to sharing a restroom or locker room with a transgender boy who underwent gender confirmation surgery and looks like a stereotypical boy so long as he was “born female.” JA 66 (Opinion).

Instead, as Doe’s objection to a person wearing a bra in the boys’ locker room shows, these objections are often based on transgender students’ failure to conform to their concept of what a boy or girl ought to look like. JA 36, 48 (Opinion).

Accordingly, this type of interaction — and the subsequent feelings of humiliation and loss of dignity that Appellant-students assert they experienced — could happen whether the School District chooses to segregate facilities based on gender identity or assigned sex, and it could happen regardless of whether the Appellant-students are male or female. Whatever the School District’s facilities policy may be, Appellant-students would find themselves sharing facilities with students who do not conform to the sex-based norms and stereotypes to which they subscribe.

## **II. The Appellant-Students’ Demand for a Facilities Policy that Segregates Students by Assigned Sex at Birth Would Violate the Title IX Rights of Transgender Students**

Following U.S. Supreme Court precedent on discrimination based on sex stereotyping, courts in this jurisdiction and across the country have found that discrimination against transgender individuals because of their gender identity is sex stereotyping. Appellant-students demand that the School District impose a policy that would require students to use gendered facilities matching their assigned sex at birth or gender-neutral facilities. JA 160 (Am. Compl.). This proposed policy would violate the Title IX rights of transgender students by

singling them out based on their gender identity and denying them use of gendered facilities matching their gender identity.

A school policy that treats transgender students differently from cisgender students is sex discrimination rooted in sex stereotyping. *See Whitaker*, 858 F.3d at 1049 (finding that a student “can demonstrate a likelihood of success on the merits of his claim because he has alleged that the School District has denied him access to the boys’ bathroom because he is transgender”). In *Whitaker*, a school policy prevented a seventeen-year-old transgender boy, Ash, from using the boys’ bathroom. *Id.* at 1040-42. Ash claimed the policy discriminated against him on the basis of sex by requiring him to use the bathroom designated to his sex assigned at birth or gender-neutral facilities. *Id.* Following *Price Waterhouse*’s Title VII analysis, the Seventh Circuit held that Ash had a sex stereotyping claim under Title IX, reasoning:

A Policy that requires an individual to use a bathroom that does not conform with his or her gender identity punishes that individual for his or her gender non-conformance, which in turn violates Title IX. The School District’s policy also subjects Ash, as a transgender student, to different rules, sanctions, and treatment than non-transgender students, in violation of Title IX. Providing a gender-neutral alternative is not sufficient to relieve the School District from liability, as it is the policy itself which violates the Act.

*Id.* at 1049-50.

In finding Ash had a viable sex stereotyping claim, the Seventh Circuit declined to follow its previous narrow interpretation of “sex” discrimination articulated in a case involving a transgender employee. *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081 (7th Cir. 1984). In *Ulane*, the court had interpreted Title VII to mean “it is unlawful to discriminate against women because they are women and against men because they are men.” *Id.* at 1085.

In *Whitaker*, however, the court concluded that: “[*Ulane*’s] reasoning [] cannot and does not foreclose [] transgender students from bring[ing] sex-discrimination claims based upon a theory of sex-stereotyping as articulated four years later by the Supreme Court in *Price Waterhouse v. Hopkins*.” *Whitaker*, 858 F.3d at 1047. The *Whitaker* court rejected as “too narrow” the view that sex stereotyping claims are limited to instances in which a person is adversely treated because their mannerisms or dress do not conform with those typically attributed to their assigned sex. *Id.* at 1048.

Other courts have found policies like the one demanded by Appellant-students to violate transgender students’ Title IX rights by penalizing them for their non-conformity with the stereotypes typically attributed to their assigned sex. *See, e.g., Evancho v. Pine-Richland Sch. Dist.*, 237 F. Supp. 3d 267, 297 (W.D. Pa. 2017) (finding transgender students “demonstrated a reasonable likelihood of showing that Title IX’s prohibition of sex discrimination includes discrimination as

to transgender individuals based on their transgender status and gender identity”); *Handling v. Minersville Area Sch. Dist.*, No. 17-0391, 2017 WL 5632662 (M.D. Pa. Nov. 22, 2017) (denying school district’s motion to dismiss transgender girl’s claim that school policy prohibiting her from using the girls’ bathroom violated her rights under Title IX); *cf. Students & Parents For Privacy v. U.S. Dep’t of Ed.*, No. 16-4945, 2017 WL 6629520, at \*1 (N.D. Ill. Dec. 29, 2017) (holding *Whitaker* “controls and confirms” that the magistrate judge correctly recommended denial of cisgender students’ motion for a preliminary injunction that would require the school district to segregate bathrooms and locker rooms on the basis of students’ assigned sex at birth).

As in *Whitaker*, the court in *Evancho v. Pine-Richland School District* similarly observed that “[c]ourts have long interpreted ‘sex’ for Title VII purposes to go beyond assigned sex as defined by the respective presence of male or female genitalia,” and includes discrimination based on transgender status, gender non-conformity, and sexual orientation. 237 F. Supp. 3d 267, 296-97 (W.D. Pa. 2017) (citing *Prowel*, 579 F.3d 285, *EEOC*, 217 F. Supp. 3d 834, and *Mitchell v. Axcan Scandipharm, Inc.*, No. 05-0243, 2006 WL 456173 (W.D. Pa. Feb. 17, 2006)). In light of strong precedent expansively defining the term “sex,” the court rejected the school district’s argument — also argued by Appellant-students here — that the

term “sex” does not go beyond a binary definition as between men and women. *Evancho*, 237 F.Supp.3d at 296-97; Appellants’ Brief at 34.

Appellant-students ask this court to reject the reasoning in *Evancho* and instead follow *Johnston v. University of Pittsburgh of Commonwealth System of Higher Education*, 97 F. Supp. 3d 657 (W.D. Pa. 2015). Appellant-students argue that *Evancho* is “improperly reasoned,” and that the court “conflated gender with sex, because on the basis of sex everyone was treated equally.” Appellants’ Br. at 31. Their argument is flawed.

First, in *Johnston*, the court applied a narrow, outdated reading of the term “sex” in finding a transgender student, denied use of school facilities designated for men, had no claim for sex stereotyping discrimination. The court narrowly limited sex stereotyping claims to include only adverse actions taken against an employee for non-conformity with the mannerism or dress associated with their assigned sex. In part, the court’s reasoning in *Johnston* is based on dicta in *Ulane* that the Seventh Circuit has since repudiated. Compare *Whitaker*, 858 F.3d at 1048 (declining to apply *Ulane*); with *Johnston*, 97 F. Supp. 3d at 671 (“it is unlawful to discriminate against women because they are a women and against men because they are men”) (citing *Ulane*, 742 F.2d at 1085).

Furthermore, the court’s decision in *Johnston* is an outlier among federal courts. Following the reasoning in *Price Waterhouse*, the Seventh Circuit arrived

at the opposite conclusion reached in *Johnston*. See, *Whitaker*, 858 F.3d at 1048 (transgender student could succeed on his Title IX claim under a theory of sex stereotyping for discrimination based on his transgender status). The Seventh Circuit correctly observed that: “By definition, a transgender individual does not conform to the sex-based stereotypes of the sex that he or she was assigned at birth.” *Id.*

The Seventh Circuit’s decision is consistent with other federal courts that have found no basis to carve out of *Price Waterhouse*’s recognition of sex stereotyping discrimination the particular manifestation of sex discrimination that transgender individuals face because of their gender non-conformity. See, e.g., *Glenn v. Brumby*, 663 F.3d 1312, 1318 n.5 (11th Cir. 2011) (noting *Price Waterhouse* eviscerated *Ulane*’s reasoning and finding “discrimination against a transgender individual because of her gender-nonconformity is sex discrimination”); *Smith v. City of Salem*, 378 F.3d 566, 573 (6th Cir. 2004) (discussing Title VII and the Equal Protection Clause); *Dodds v. U.S. Dep’t of Educ.*, 845 F.3d 217 (6th Cir. 2016) (citing *Smith*, 378 F.3d 566, 576); *Barnes v. City of Cincinnati*, 401 F.3d 729, 737 (6th Cir. 2005) (discussing Title VII); *Schwenk v. Hartford*, 204 F.3d 1187, 1202 (9th Cir. 2000) (discussing the Gender Motivated Violence Act); *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1222 (10th Cir. 2007) (concluding that a transgender employee may claim sex discrimination

under Title VII for discrimination based sex stereotypes); *Bd. of Educ. of Highland Local Sch. Dist. v. U.S. Dep't of Educ.*, 208 F. Supp. 3d 850 (S.D. Ohio 2016) (discussing Title IX and the Equal Protection Clause).

Other courts in this jurisdiction have also declined to follow *Johnston*, and correctly observed that legal precedent on the definition of “sex” has developed considerably since *Johnston*. See e.g., *Evancho*, 237 F. Supp. 3d at 288 n.33 (“This Court believes as *Johnston* predicted might occur that the decisional law has developed further, and has done so rather swiftly. Further, many of the cases relied on in *Johnston*, as to a degree *Johnston* did itself, came to that conclusion based on the absence of precedent from either the Supreme Court or the relevant regional court of appeals squarely ruling on the question.”); *Handling*, 2017 WL 5632662, at \*5 n.2 (“Because Defendant did not argue that this Court should apply *Johnston*, the Court need not engage in a detailed analysis of that case except to say that the Court finds the analysis in the more recent decisions of *Evancho* and *Whitaker* persuasive.”).

### **III. Being in the Mere Presence of a Transgender Person Does Not Amount to a “Hostile Environment”**

Contrary to Appellant-students’ argument, being in the mere presence of a transgender student in a locker room or rest room in no way creates a hostile environment in violation of Title IX. To establish a Title IX violation, Appellant-students must show that being in the mere presence of transgender students is “so

severe, pervasive, and objectively offensive” that “it undermines and detracts from the victims’ educational experience... [and] effectively den[ies] [them] equal access to an institution’s resources and opportunities.” *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 205-06 (3d Cir. 2001) (quoting *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 651 (1999)). There is nothing objectively offensive about sharing facilities with transgender students, and the possibility of brief nudity that Appellant-students fear — which could happen no matter how communal facilities are designated — is neither sexual in nature, nor severe, nor pervasive. The district court properly concluded that the plaintiffs failed to establish the elements of a hostile environment claim.

A. The Alleged “Unwelcome” Conduct is Neither Severe Nor Pervasive

Whether gender-based conduct rises to the level of a sexually hostile environment under Title IX “depends on a constellation of surrounding circumstances, expectations, and relationships,” including how severe or pervasive the conduct is, viewed from both a subjective and objective perspective. *Davis*, 526 U.S. at 651 (citing *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 82 (1998)); Office for Civil Rights, U.S. Dep’t of Education, Revised Sexual Harassment Guidance: Harassment of Students By School Employees, Other

Students, Or Third Parties 5 (2001) (“2001 Guidance”).<sup>5</sup> In this case, Appellant-students allege that the School District’s facilities policy results in their “unconsented exposure” to individuals they misgender as the “opposite sex” in a partial state of undress as well as the possibility that those individuals would be able to view them in a partial state of undress. JA 185 (Am. Compl.). They claim they do not object to similar exposure to and from individuals who share their assigned sexes. JA 185-86.

Conduct that rises to the level of a hostile environment requires more than what Appellant-students complain of here. *Compare, Cruzan v. Special Sch. Dist., No. 1*, 294 F.3d 981, 984 (8th Cir. 2002) (holding school’s policy permitting a transgender faculty member to use the woman’s faculty restroom did not create a hostile environment under Title VII), *with Petril v. Cheney Univ. of Pa.*, 789 F. Supp. 2d 574 (E.D. Pa. 2011) (denying motion to dismiss and permitting plaintiff to pursue claim under Title VII for sexual harassment that included touching and a sexual request while in the locker room). It is correct that visual conduct, such as being forced to view pornographic images or being viewed by a voyeur, can amount to actionable sexual harassment. *See, e.g., Liberti v. Walt Disney World*

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<sup>5</sup> When interpreting Title IX, Courts have afforded “appreciable deference” to the Office for Civil Rights’ 2001 Guidance. *Carmichael v. Galbraith*, No. 12-11074, 2014 WL 2767590, at \*5 (5th Cir. June 19, 2014); *Rosa H. v. San Elizario Indep. Sch. Dist.*, 106 F.3d 648, 658 (5th Cir. 1997) (discussing deference afforded to OCR policy notices on peer sexual harassment).

*Co.*, 912 F. Supp. 1494 (M.D. Fla. Sept. 7, 1995). However, the brief nudity that **may** occur while changing for gym class is not nearly as severe or pervasive as those examples.

Crucially, nudity is not inherently sexual; it depends on the circumstances. *See Ashcroft v. ACLU*, 535 U.S. 564, 579, n 9 (2002) (holding that “pictures of a war victim’s wounded nude body” are not “erotic”). Here, Doe alleges he saw a person he misgenders the “opposite sex” in a partial state of undress. JA 191 (Am. Compl.). This level of undress is about the same amount that is typically seen when people wear bathing suits. No anatomy was fully exposed, and the purpose of the exposure of skin is not sexual in nature. The same is true of Jones, who alleges that he was in his underwear when he saw someone he believes is transgender in the locker room with him. JA 191 (Am. Compl.). The other two Appellant-students, Smith and Roe, did not allege seeing nudity or being seen in a state of undress by a transgender girl, but they fear it happening. JA 173, 175 (Am. Compl.); JA 63 (Opinion).

Brief exposure of skin or parts of the body may occur as students dress into and out of their gym clothes. Briefly viewing this nudity is drastically different from being forced to view sexualized pornographic material in an environment in which it does not belong, such as at a school or in the workplace. *See Hoyle v. Freightliner, LLC*, 650 F.3d 321 (4th Cir. 2011) (holding that a reasonable jury

could find sexualized photos of scantily-clad women, a calendar of women wearing bathing suits in sexually suggestive positions, and a nude screen saver in the workplace to be the basis of a sexually hostile environment under Title VII).

Voyeurism actionable under Title IX is also different from the conduct Appellant-students allege has harmed them, including the fear that their “partially clothed body will be exposed to the opposite sex.” JA 186 (Am. Compl.); *see Phillips v. Donahoe*, No. 12-410, 2013 U.S. Dist. LEXIS 160537, at \*40 (W.D. Pa. Nov. 7, 2013) (holding that a “hostile work environment created by criminal voyeurism would warrant a more aggressive response than an abusive atmosphere attributable to less serious forms of harassment”). Voyeurism involves more invasive conduct than anything Appellant-students allege, and there is no reason to assume that the risk of voyeurism is higher with transgender students than with cisgender students who share the same assigned sex and gender identity as Appellant-students. *See Students*, 2017 WL 6629520, at \*6 (finding unpersuasive similar privacy arguments because “[a] transgender student’s presence in the restroom provides no more of a risk to other students’ privacy rights than the presence of an overly curious student of the same biological sex”).

Unlike conduct involving exposure to pornographic images or victimization by a voyeur, the conduct in this case is non-sexual in nature and does not involve an unexpected level of nudity or exposure for the environment. Merely changing

in the same locker room or using the same, multi-user restrooms does not create a hostile sexual environment in violation of Title IX. As a result, Appellant-students' objection to being in the presence of students who do not conform to their subjective perception of masculinity or femininity is unreasonable, especially in light of the medical, social, and legal trend toward recognition of a person's gender identity as their "sex."<sup>6</sup>

B. The Presence of Transgender Students in a Locker Room or Restroom That Corresponds to Their Gender Identity is Not Objectively Offensive to Reasonable Individuals

There is nothing "objectively" offensive about transgender students, who Appellant-students have misgendered as "the opposite sex." The cases Appellant-students cite to support their position for a higher degree of privacy from transgender students are unpersuasive and distinguishable. For example, *Livingwell, Inc. v. Pa. Human Relations Comm'n*, 606 A.2d 1287 (Pa. Commw. Ct. 1992) and *City of Phila. v. Pa. Human Relations Comm'n*, 300 A.2d 97 (Pa. Commw. Ct. 1973), are twenty-five and forty-five years old, respectively, and do not reflect what is objectively reasonable today. More importantly, neither

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<sup>6</sup> See, e.g., Am. Psychiatric Ass'n, Position Statement on Discrimination Against Transgender and Gender Variant Individuals (2012), [http://www.dhcs.ca.gov/services/MH/Documents/2013\\_04\\_AC\\_06d\\_APA\\_ps2012\\_Transgen\\_Disc.pdf](http://www.dhcs.ca.gov/services/MH/Documents/2013_04_AC_06d_APA_ps2012_Transgen_Disc.pdf) ("Being transgender gender or variant implies no impairment in judgment, stability, reliability, or general social or vocational capabilities; however, these individuals often experience discrimination due to a lack of civil rights protections for their gender identity or expression.").

decision concerns activities by transgender individuals. Here, the students that the Appellant-students seek to oust from the school facilities identify as members of the gender assigned to those facilities. Everyone the school district's policy permits to be there shares the same gender identity, which was not the situation in those earlier cases.

Furthermore, Appellant-students' argument that Title IX's exemptions, which permit sex segregation under certain circumstances but do not require it, somehow make the exclusion of transgender students from school facilities "reasonable" is similarly unpersuasive. JA 187-88 (Am. Compl.); Appellants' Br. at 8, 34. The issue in this case is not whether the school may divide facilities by sex, but which of those gendered facilities is appropriate for a transgender student who identifies with one of those sexes. Title IX's exemptions do not define "sex" and would not permit a definition of "sex" that acts as a barrier to educational access, as it would if "sex" were solely based on anatomy at birth. 34 C.F.R. § 106.34(a); *see supra*, Part II.

#### **IV. The Appellants' Unsubstantiated Concerns About Safety Do Not Justify Discrimination Against Transgender Students**

Appellant-students contend that a policy that segregates students by assigned sex is necessary to protect the safety and privacy of students, especially cisgender girls. Appellants' Br. At 34-37. Their discriminatory arguments are at best purely speculative, and contrary to the lived experiences of transgender students, and do

not warrant different treatment of transgender students from cisgender students. Transgender students, on the other hand, are often targets of discrimination because of their gender identity. Forcing transgender students to use facilities that do not match their gender identity exposes them to bullying, threats of violence and denies them equal opportunity to an education free from harassment.<sup>7</sup>

A. Appellant-students' Concerns Are Merely Speculative and Are Not a Valid Basis to Justify a Policy That Would Discriminate Against Transgender Students

Courts have rejected arguments similar to those made by Appellant-students here, finding that they do not justify denying transgender students the use of the facilities that correspond to their gender identity. *See Whitaker*, 858 F.3d at 1052; *Evancho*, 237 F. Supp. 3d at 280; *Students*, 2017 WL 6629520, at \*6 (“A transgender student’s presence in the restroom provides no more of a risk to other students’ privacy rights than the presence of an overly curious student of the same biological sex”); *Bd. of Educ. of Highland Local Sch. Dist.*, 208 F. Supp. 3d at 874 (concluding that the school district “failed to put forth an ‘exceedingly persuasive justification,’ or even a rational one, for preventing [transgender girl] from using the girls’ restroom”) (quotation marks and citation omitted). In *Highland Local School District*, the plaintiff-school district defended its policy excluding a

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<sup>7</sup> Similar protectionist arguments have historically been used as a pretext for denying women certain employment opportunities and racial minorities access to public facilities. *See, e.g., Johnson Controls, Inc.*, 499 U.S. at 206.

transgender girl from using the girls' restroom on grounds similar to those raised by Appellant-students: to protect the privacy rights and safety of other students. 208 F. Supp. 3d at 874. However, as in the case here, the record before the court was devoid of any evidence to validate the asserted privacy and safety concerns. *Id.* at 874-75.

Appellant-students advance arguments about the risk of sexual assault and harassment, but those fears are baseless. Their claim that the inclusive policy would lead to cisgender students masquerading as transgender in order to prey on students from the opposite sex stigmatizes transgender students and undermines their experiences. Appellant-students have not produced evidence of a single instance in which a transgender student has ever used the school district's policy as an opportunity to victimize another student. JA 129 (Opinion). As the district court observed, "there is nothing to physically stop an individual with bad intentions no matter how the School District assigns bathroom and locker room usage." JA 120 (Opinion). Appellant-students cannot justify discrimination because they feel "uncomfortable." *See Lusardi v. McHugh*, EEOC App. No. 0120133395, 2015 WL 1607756, at \*9 (EEOC Apr. 1, 2015) ("confusion or anxiety cannot justify discriminatory terms or conditions of employment"). To the extent harassment occurs in school facilities, the school district is already obligated to prevent it and address it, for all students.

B. Discrimination Against Transgender Students Would Negatively Impact Their Health and Well-Being and Would Jeopardize Their Access to an Education

Unlike Appellant-students' unsubstantiated claims, "[t]here is no denying that transgender individuals face discrimination, harassment, and violence because of their gender identity." *Whitaker*, 858 F.3d at 1051. According to a study conducted by the National Center for Transgender Equality, and referenced by the Seventh Circuit in *Whitaker*, an alarming rate (78%) of transgender students or gender non-conforming students reported experiencing harassment while in grades K-12. *Id.* (citing Jaime M. Grant et al., *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey*, Nat'l Center for Transgender Equality, at 33 (2011), available at [http://www.transequality.org/sites/default/files/docs/resources/NTDS\\_Report.pdf](http://www.transequality.org/sites/default/files/docs/resources/NTDS_Report.pdf); see also, "Like Walking Through a Hailstorm," *Discrimination against LGBT Youth in U.S. Schools*, Human Rights Watch (2016), available at [https://www.hrw.org/sites/default/files/report\\_pdf/uslgbt1216web\\_2.pdf](https://www.hrw.org/sites/default/files/report_pdf/uslgbt1216web_2.pdf) (finding a lack of policies affirming LGBT youth lead to higher rates of harassment and bullying from classmates and school faculty)). In addition, 24% of transgender students reported being physically attacked because they were transgender.<sup>8</sup> The

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<sup>8</sup> The harm caused by anti-transgender bias disproportionately affects transgender women and girls of color, who are more likely to face discrimination, harassment and violence resulting in death compared to their white counterparts. A

harassment and abuse that transgender students experience in school is real and demonstrable, and it is exactly this type of harm that Title IX was enacted to remedy.

Transgender students who use gendered facilities matching their gender identity are “seeking to do what young people try to do every day—go to school, obtain an education, and interact with their peers.” *Evancho*, 237 F. Supp. 3d at 301-02. Appellant-students’ speculative and unsubstantiated concerns do not justify adopting policies that would prevent transgender students from obtaining an education and interacting with their peers in an environment free from bullying, harassment, and sex stereotyping.

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recent report showed that at least twenty-five transgender people were murdered in the United States in 2017. 80% of the victims were women and girls of color. *See* Mark Lee, *A Time to Act: Fatal Violence Against Transgender People in America in 2017*, Human Rights Campaign (Nov. 2017), available at [http://assets2.hrc.org/files/assets/resources/A\\_Time\\_To\\_Act\\_2017\\_REV3.pdf](http://assets2.hrc.org/files/assets/resources/A_Time_To_Act_2017_REV3.pdf).

## CONCLUSION

For all of the foregoing reasons, *amici* respectfully request that this Court affirm the decision of the district court.

Dated: January 23, 2018

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## COMBINED CERTIFICATIONS OF COUNSEL

The undersigned counsel hereby certifies as follows:

1. The undersigned counsel is a member of the bar of the United States Court of Appeals for the Third Circuit. L.A.R. 28.3(d).
2. This Brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) & 32(a)(7)(B) because this brief contains 6,291 words, as counted by Microsoft Word 2016, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).
3. This Brief complies with the typeface requirement of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally space typeface using Microsoft Word 2016 in 14-point Times New Roman font.
4. A copy of this Brief was served on all counsel of record through the Court's Electronic Case Filing System.
5. The text of the electronic version of the Brief transmitted to the Court on this date is identical to the text of the paper copies to be delivered to the Clerk. L.A.R 31.1(c).
6. A virus check was performed on the PDF version of this Brief using Windows Defender 1.1.14500.5 prior to transmitting it to the Clerk electronically and no virus was found.

Dated: January 23, 2018

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**ADDENDUM OF IDENTIFYING STATEMENTS OF AMICI CURIAE**

**American Association of University Women**

In 1881, the American Association of University Women (AAUW) was founded by like-minded women who had defied society's conventions by earning college degrees. Since then AAUW has worked to increase women's access to education through research, advocacy, and philanthropy. Today, AAUW has more than 170,000 members and supporters, 1,000 branches, and 800 college and university partners nationwide. AAUW plays a major role in mobilizing advocates nationwide on AAUW's priority issues to advance gender equity. In adherence with its member-adopted Public Policy Program, AAUW supports equitable educational climates free of harassment, bullying, and sexual assault, and vigorous enforcement of Title IX and all other civil rights laws pertaining to education.

**California Women's Law Center**

California Women's Law Center (CWLC) is a statewide, nonprofit law and policy center dedicated to advancing the civil rights of women and girls through impact litigation, advocacy and education. CWLC's issue priorities include gender discrimination, reproductive justice, violence against women, and women's health. CWLC places particular emphasis on eliminating all forms of gender discrimination on school campuses, including discrimination based on sexual

orientation and sexual identity. CWLC remains committed to supporting equal rights for transgender folks and to eradicating invidious discrimination in all forms.

### **Champion Women**

Champion Women leads targeted efforts to advocate for girls and women in sports. Focus areas include equal play, such as traditional Title IX compliance in athletic departments, as well as sexual harassment, abuse and violence in sport, and employment, pregnancy and LGBT discrimination. Sport is an important part of every child's education, and is especially empowering for girls and women.

### **Equal Rights Advocates**

Equal Rights Advocates (ERA) is a national civil rights advocacy organization dedicated to protecting and expanding economic and educational access and opportunities for women and girls. Since its founding in 1974, ERA has led efforts to combat sex discrimination and advance gender equality by litigating high-impact cases, engaging in policy reform and legislative advocacy campaigns, conducting community education and outreach, and providing free legal assistance to individuals experiencing unfair treatment at work and in school through our national Advice & Counseling program. ERA has filed hundreds of suits and appeared as *amicus curiae* in numerous cases to defend and enforce students' civil rights in state and federal courts, including before the United States Supreme Court.

ERA firmly believes that a core tenet of Title IX of the Education Amendments of 1972 is to eradicate harmful gender stereotypes that effectively deny access to education programs and facilities to transgender and gender non-conforming students.

### **Gender Justice**

Gender Justice is a nonprofit legal and policy advocacy organization devoted to addressing the causes and consequences of gender inequality, both locally in Minnesota and nationally. Supporting transgender rights has been a priority for Gender Justice since its founding in 2010. Stereotypes and biases based on sex, sexual orientation, gender, gender identity, and gender expression are inextricably linked. Gender Justice seeks to break down the barriers to equality created by these harmful biases. As a result, many of its cases focus on upholding the rights of transgender people. Gender Justice serves many transgender clients who face discrimination based on their gender identity or expression in several different spheres of life, including employment, healthcare, and education.

### **Legal Aid at Work**

Legal Aid at Work (formerly Legal Aid Society-Employment Law Center) is a nonprofit legal services organization based in San Francisco, California, founded in 1916, providing free legal services to low-income and unemployed individuals

who cannot afford private counsel. In addition to our extensive advocacy on behalf of workers to combat discrimination and labor-related violations—including through our Gender Equity & LGBT Rights Program—for over 15 years, Legal Aid at Work has represented students in Title IX matters. Specifically, Legal Aid’s Gender Equity & LGBT Rights Program and Title IX-focused Fair Play for Girls in Sports Project assist individuals facing inequity in workplaces and in schools, to ensure enforcement of Title IX, related civil rights protections, and the provision of equity under the law. As such, the issues presented in this appeal have a direct impact on the clients served by Legal Aid at Work.

### **Legal Voice**

Legal Voice is a non-profit public interest organization based in Seattle that is dedicated to protecting the rights of women and girls through litigation, legislative advocacy, and education about legal rights. Legal Voice’s work includes advocacy to advance the legal rights of lesbian, gay, bisexual, transgender, and queer or questioning (LGBTQ) people, and to ensure the rights of all people to be free from discrimination based on their sex, sexual orientation, gender identity, or gender expression. Legal Voice has participated as counsel and as *amicus curiae* in cases throughout the Northwest and the country. Legal Voice has a strong interest in this case because it raises important issues concerning the

rights of transgender students to use gender-segregated facilities that are consistent with their gender identity.

### **National Women's Law Center**

The National Women's Law Center is a nonprofit legal organization that is dedicated to the advancement and protection of women's legal rights and the expansion of women's opportunities. Since 1972, the Center has worked to secure equal opportunity in education for girls and women through full enforcement of the Constitution and laws prohibiting discrimination. The Center has participated in numerous cases involving gender discrimination, including discrimination against transgender students. The policy at issue in this case relies on the same sort of discriminatory stereotyping that historically has been used to justify discrimination against women in schools and the workplace.

### **New Voices for Reproductive Justice**

New Voices for Reproductive Justice is a Human Rights and Reproductive Justice advocacy organization with a mission to build a social change movement dedicated to the full health and well-being of Black women, femmes, and girls in Pennsylvania and Ohio. New Voices defines Reproductive Justice as the human right of all people to have full agency over their bodies, gender identity and expression, sexuality, work, reproduction and the ability to form families. For the

past fourteen years, the organization has served over 75,000 women of color and LGBTQIA+ people of color through community organizing, grassroots activism, civic engagement, youth mentorship, leadership development, culture change, public policy advocacy, and political education. Examples of New Voices' advocacy efforts in support of the health and well-being of LGBTQIA+ communities have included founding the Lorde-Baldwin Leadership Institute, a leadership development program for queer and transgender people of color, advocating for the passage of an Allegheny County Non-Discrimination ordinance that would protect the civil rights of LGBTQIA+ residents, advocating for the passage of an amendment to the Pennsylvania Human Relations Act in 2014 to expand discrimination protections to include sexual orientation and gender identity or expression, working with the City of Pittsburgh to successfully reinstate the Mayor's Advisory Council on LGBTQIA+ Affairs, and serving on Pittsburgh's Affirmatively Furthering Fair Housing Task Force on the Gender and Sexual Orientation Subcommittee. New Voices stands in staunch opposition to discriminatory laws, policies and actions that deny people access to restrooms that match their gender identity and experiences. These unjust efforts threaten the health and well-being of transgender and gender nonconforming people, especially transgender women of color and youth, who disproportionately face discrimination, harassment, and violence resulting in death. New Voices urges

support for policies that eradicate harmful gender stereotypes from education, strengthen equitable opportunities and protections for LGBTQIA+ people in education, and uphold our constitutional promise to be treated with dignity and respect.

### **Pennsylvania Coalition Against Rape**

Founded in 1975, the Pennsylvania Coalition Against Rape (PCAR) works to eliminate all forms of sexual violence and advocates for the rights and needs of sexual assault victims. PCAR partners with a network of rape crisis centers to bring help, hope, and healing around issues of sexual violence throughout the Commonwealth of Pennsylvania. PCAR mobilizes its mission through training, technical assistance, media advocacy, and public policy change at state and federal levels. Since 2000, PCAR has operated the National Sexual Violence Resource Center—providing training and technical assistance on best practices in sexual violence prevention and response on a national scale. Title IX prohibits gender-based harassment in all educational programs and activities. Title IX ensures that schools are equipped to both prevent and remedy gender-based discrimination. Title IX applies to students across all gender identities, including transgender students. It is well-documented in research, that transgender students are at greater risk for being sexually victimized and harassed than their cisgender counterparts—

whether in a restroom, the hallways, or other campus locations. All students have the right to an education free from sexual harassment and violence. Any harassment or denial of a right or resource based on gender identity is a violation of Title IX and its intent. PCAR is signing onto this amicus brief to ensure the rights of transgender students are upheld, so that all students have access to a safe, nondiscriminatory environment where they learn, live, socialize, and compete as athletes.

### **Southwest Women's Law Center**

The Southwest Women's Law Center (SWLC) is a 501(c)(3) nonprofit organization founded in 2005 to fill a critical gap in legal representation and systemic advocacy on behalf of women in New Mexico. SWLC advocates for policies and systematic changes that provide women with the opportunity to achieve their full economic and personal potential while working to eliminate gender bias and multiple obstacles that confront women based on gender, class, race, disability, age, and/or immigration status. In addition, our work strongly supports protections for all individuals, and we advocate to eliminate the full range of stereotypes and biases that women and LGTB individuals often face.

## **Women's Law Center of Maryland**

The Women's Law Center of Maryland, Inc. is a nonprofit, public interest, membership organization of attorneys and community members with a mission of improving and protecting the legal rights of women. Established in 1971, the Women's Law Center achieves its mission through direct legal representation, research, policy analysis, legislative initiatives, education and implementation of innovative legal-services programs to pave the way for systematic change. The Women's Law Center is participating as an *amicus* in *John Doe v. Boyertown Area School District* because it agrees with the proposition that sex, gender, and sexual orientation are intrinsically intertwined, particularly in the realm of discrimination. The concerns and struggles of the LGBTQ community impact all women, regardless of sexual orientation or gender identity.

## **Women's Law Project**

The Women's Law Project (WLP) is a non-profit legal advocacy organization with offices in Philadelphia and Pittsburgh, Pennsylvania. Its mission is to create a more just and equitable society by advancing the rights and status of all women throughout their lives. Since 1974, WLP has engaged in high-impact litigation, public policy advocacy, and education challenging discrimination rooted in gender stereotypes. WLP represented *amicus curiae* in *Prowel v. Wise Business*

*Forms*, 579 F.3d 285 (3d Cir. 2009), to ensure full enforcement of Title VII's protection against sex discrimination in the workplace for a litigant who suffered harassment based on gender stereotyping. WLP was also instrumental in passage of the Allegheny County Human Relations Ordinance, which prohibits discrimination in employment, public accommodations, and housing based on sex, gender identity, and gender expression. From 2012 to 2016, WLP represented Rainbow Alliance, an LGBTQA-student group, in litigation filed under Pittsburgh's Fair Practices Ordinance challenging the University of Pittsburgh's gendered facilities policies. WLP currently serves on the Pennsylvania Department of Health's Transgender Health Workgroup, a convening of PA advocates and government officials seeking to improve access to comprehensive health care for transgender and gender nonconforming people. Discriminatory policies that deny transgender people access to facilities appropriate for their gender endanger their lives while reinforcing gender stereotypes historically used to discriminate against women within and outside the workplace.