

Conservatives try to convince the Supreme Court to embrace transphobia

Transgender kids trying to go to the bathroom are apparently a “delusional” threat to privacy, safety, and religious liberty.

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This spring, the Supreme Court will consider *Gloucester County School Board v. G.G.*, a case about whether 17-year-old Gavin Grimm should be allowed to use the boys’ bathroom at his Virginia high school. Since Grimm first challenged his school, the Department of Education has released guidance requiring all schools to accommodate transgender students under the “sex” protections found in Title IX.

As a result, Grimm’s case explores both complicated questions about respecting gender identity as well as about how much power federal agencies have to issue such guidance. And this week, those arguing against the Department’s guidance recognizing and affirming Grimm and other transgender students like him submitted their amicus briefs to the Court making their case.

The briefs stem from the usual opponents of LGBT equality, including the Family Research Council, the Liberty Counsel, the Becket Fund for Religious Liberty, the Family Policy Alliance (the advocacy arm of Focus on the Family), and the Alliance Defending Freedom. There is also a brief from a group of major religious organizations—including the Catholic bishops, the Southern Baptist Convention’s Ethics and Religious Liberty Commission, and the Church of Jesus Christ of Latter-Day Saints—and another from 80 members of Congress, all of whom are Republicans.

The collection of briefs contains just about every argument against transgender equality, representing a concerted effort to negate the existence of transgender people and their right to freely integrate with society. Here are some of the themes that emerge from the documents.

Several of the documents reveal their biases with the words they use to describe transgender identities before they even get into the substance of their arguments. For example, the nonword “transgendered” appears throughout many of the briefs, demonstrating a lack of basic understanding that “transgender” is an adjective and being transgender is not something that someone has done to them. The members of Congress brief conspicuously avoids referring to “transgender” people at all, instead constantly referring to “those who identify with the opposite biological sex.”

Several other briefs took subtle rhetorical jabs at the legitimacy of transgender identities. A brief filed by two members of the U.S. Commission on Civil Rights uses the word “actual” and some

scare-quotes to distinguish between “anatomically male students who psychologically ‘identify’ as female with actual female students.” The Alliance Defending Freedom (ADF) brief speaks of students who “profess that they are of a different sex” and refers to their “self-perceived sex.”

Others were more cavalier, outwardly rejecting transgender rhetoric and insisting on referring to Grimm with female pronouns. A brief filed by Christian Educators Association International explains its reasoning for consistently using scare-quotes around “gender identity,” “transgenderism,” and “transsexuality”:

Amici reject the legitimacy of these recently coined terms as unfounded in science or reason. Instead, the terminology is the self-serving political rhetoric of a small group of activists. Amici believe—along with practically all of humanity throughout all of human history—that if a boy says he is a girl, he is not “transgender”; he is denying biology and pretending to be a sex other than his own. We will not participate in adding to such confusion.

And in one of the most extreme examples, a brief filed by some extremist groups like Public Advocate of the United States insists that Grimm is a “girl” suffering from the “illusion” that “she” is a boy. “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,” the brief explains. But that’s not “intended to be provocative or disrespectful,” it explains, but to “correspond to an unchanged and unchangeable reality.”

That brief goes on to suggest that affirming transgender people will require affirming people who believe they are another race (like Rachel Dolezal); people who believe they have different bodies, like that they should amputate limbs (those with so-called “Body Integrity Identity Disorder”); and people who believe they are different species (“otherkin”). In case it needs be said, none of those are substantiated by medical research the way gender dysphoria and the benefits of transition have been for decades.

The attacks on transgender people aren’t just rhetorical. There’s also a ton of bad science littered throughout the briefs.

Dr. Paul McHugh, the Johns Hopkins professor who is the go-to scientist for all conservatives looking to delegitimize transgender people, filed a brief laying out all the junk science he always depends on, like the myth that most trans kids “desist,” or turn out not to be trans. The brief insists that there’s no reason to subscribe to the belief that a trans person actually is the gender they say they are—“any more than an anorexic’s belief that she is overweight changes the fact that she is, in reality, slender.” It also borrows from a volume of junk science produced by the American College of Pediatricians, a fake medical organization that hopes when it espouses conservative religious beliefs to be mistaken for the legitimate American Academy of Pediatricians.

The brief was also signed by Dr. Lawrence Mayer, who coauthored with McHugh the recent report in The New Atlantis report that attempted, rather unconvincingly, to undermine a large swath of pro-LGBT scientific thinking. Back in August, Mayer insisted to ThinkProgress that he is not anti-LGBT and does not believe transgender people are mentally ill. Asked about the fact that their brief describes Grimm’s identity as a “delusion,” a “charade,” and a “false belief,”

Mayer responded a bit more candidly: “Does G.G. insist she [sic] is biologically a boy? That is a delusion.”

Their brief, like their report—and like Mark Regenerus’ junk science attacking same-sex parenting—was funded by The Witherspoon Institute.

A brief filed by the Foundation for Moral Law, the extremist organization founded by ex-Alabama Supreme Court Justice Roy Moore, warns that trans-affirming policies “will encourage more young people to question their gender identity, likely causing confusion, trauma, turmoil, and other unfortunate consequences.” It goes on to prop up myths about transition regret and the debunked claim that suicide rates are higher for people who have surgically transitioned. The author of one of the only studies used to make that claim has repeatedly rejected attempts to draw that conclusion from her research.

The Liberty Counsel’s brief, filed on behalf of Dr. Judith Reisman and The Child Protection Institute, likewise insists that people who transition “have high subsequent rates of mental illness, suicidal ideation and even suicide,” making no accommodation for the high correlation between these consequences and high rates of discrimination that surveys of trans people have repeatedly found. Instead, Reisman actually insists that if schools are trans-affirming, it will somehow make more kids trans, and they will in turn suffer:

Injecting the confusion and conflict of gender identity into the educational environment will assault and reshape the plasticity of undeveloped young brains with undefined, discordant concepts such as “gender identity” and “gender expression” in conflict with biological reality. [...]

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

There is no evidence that kids can be convinced or coerced into being transgender.

Of course, like the scare tactics used to take down Houston’s LGBT protections, many of the briefs are rife with concern that allowing transgender people to use restrooms that match their gender will put women and children at risk. A brief by two self-proclaimed “public safety experts” expounds at length on this belief, warning of two different menaces: sex offenders who will “exploit” trans protections to access women’s spaces, and “immature males who consider it fun to look at naked girls and women or to expose themselves to girls and women in these settings.”

Despite asserting that a trans-affirming policy “markedly increases the risk of sex offenses,” they provide absolutely no evidence to support this claim—probably because there is none.

But several other briefs certainly try. The National Organization for Marriage’s brief, for example, refers to a case last year of a man entering a women’s locker room at a Seattle public

swimming pool. What the brief doesn't mention is that this was a stunt intended to flout the state's transgender protections and that the Washington State Human Rights Commission explicitly explained that he was not actually protected by them.

The Concerned Women for America brief lists several stories of women being violated in restrooms, but only one of them actually involved a transgender person, and she was arrested for behavior that remains illegal regardless of whether she had access to the facilities. A group called Safe Spaces for Women similarly shared several personal comments from women who had been assaulted or otherwise traumatized, but none of their narratives involved a transgender person. "While Safe Spaces for Women bears no animus toward the transgendered [sic] community," the brief asserts, "it is deeply concerned that true sexual predators may take advantage of such policies to victimize women."

The Family Policy Alliance (Focus on the Family's advocacy arm) interestingly partnered with the Women's Liberation Front, a radical feminist group, to file another brief warning of consequences to women. This brief more explicitly relies on the idea that trans women are not women at all but "men" who will steal opportunities from women, including not only access to facilities, but even scholarships and housing for women "merely by 'identifying' as a woman."

Indeed, these groups believe "any man" could simply pretend to be a woman and access resources designed to support women. "If any man becomes eligible for the millions of dollars in female-only scholarships at Title IX institutions merely by "identifying" as a woman, then many will do just that." This assertion is absurd on its face.

Building off the concerns of privacy and safety, several of the briefs also argue that local school boards should be able to make their own determinations about how best to accommodate transgender students.

The brief filed by the Family Research Council (FRC), along with the North Carolina Values Coalition, focuses on this concern. "The federal government has attempted to dictate a one-size-fits-all 'cookie cutter' solution for the entire nation," it complains. "It is impossible, at the federal level, to consider the multitude of factors that may differ from one school district to another."

ADF similarly argues on behalf of districts that want to discriminate against transgender students: "This disregard for local control is all the more egregious when the local decisions actually protect the bodily privacy of every student by regulating access to communal intimate facilities." This is a rather unsurprising argument from ADF, given it is litigating multiple cases on behalf of schools refusing to accommodate transgender students or families objecting to their schools respecting students' gender identities.

These claims imply that school districts might find a better way to discriminate against transgender students that would somehow be acceptable. Like the "states' rights" argument used for years against marriage equality, it's an attempt to get away with discrimination by eliminating federal oversight.

Two of the briefs make particularly telling statements about the supposed need to "balance" accommodations for transgender students against the discomfort other students might have

sharing facilities with them. A brief filed by the National School Boards Association and AASA, The School Superintendents Association, frames the conflict this way:

In devising workable solutions to accommodate transgender students, school officials must consider both the views of transgender students who may feel their gender identity deeply, and therefore may be uncomfortable using facilities that correspond to their biological sex, and the concerns of other students who may feel their privacy is violated by sharing toilet, locker room, and shower facilities with students of the opposite biological sex.

The members of Congress were a bit more blunt:

Accommodations for those who identify with the opposite biological sex must be weighed against the rights and needs of those who do not.

In other words, if local families and school officials think transgender people are disgusting or offensive, they should get to set that as policy in their schools. Actually educating students about gender identity to ameliorate their discomfort isn't an option, because, as FRC argues, many students are "much too young to understand the concept of transgenderism"—despite the fact some of those young students already know that they're trans.

Several briefs focused mainly on moral and religious concerns about transgender people. The brief filed by a coalition of major religious organizations, for example, lays out many different theological arguments for rejecting transgender people. These religious groups worry that they won't be able to discriminate against transgender people and that the result will be massive religious conflict:

Schoolchildren would be taught that gender is not determined by one's birth sex, contrary to their parents' faith. Religious colleges and universities would find it difficult to maintain sex-specific dormitories and other residences. The modesty and privacy of sex-specific facilities, such as showers and changing rooms, could be compromised.

Likewise, they claim protecting gender identity "would impose a stigma on religious people and institutions whose faith dictates that gender identity is determined by one's birth sex." They say religious people and institutions would be increasingly marginalized just for expressing their beliefs, creating a "flashpoint for social tension and conflict."

The Becket Fund for Religious Liberty, which was joined by the General Conference of The Seventh-Day Adventists, argue in their brief that if transgender people are protected in education, that precedent could then extend to housing, health care, and employment. This would be a problem for religious health care providers, shelters, and other institutions who wish to deny service or refuse employment to transgender people. The Becket Fund is representing a bunch of states who challenged the Affordable Care Act's protections for women and transgender patients, which a federal judge suspended earlier this month.

Christian Educators Association International similarly worries about the "freedoms of Christian Americans who cannot support or promote 'transgenderism' based upon their sincerely held religious beliefs." The trans-affirming policy could limit the allowable speech of students who wish to bully, condemn, or otherwise reject their transgender classmates and also likewise

“coerces school faculty members who believe this lifestyle to be sinful to either violate their religious conscience and endorse a pro-LGBTQ message under the compulsion of governmental power or face punishment.”

It’s quite possible that this case could be decided entirely on complicated legal grounds regarding whether the Department of Education had the authority to extend Title IX’s sex protections to transgender students. The Fourth Circuit Court of Appeals’ decision in favor of Grimm didn’t explicitly draw significant conclusions about the legitimacy of transgender people’s identities, but simply deferred to the Department’s guidance.

The Supreme Court could rule on similar grounds; in particular, if it splits 4–4, the Fourth Circuit’s ruling would prevail. Several of the briefs focus on these legal arguments, but underlying their briefs are still anti-trans tones.

For example, the Wisconsin Institute for Law & Liberty brief reveals a bit of bias when it glibly points out that the school “could not have known that reliance on federal funds would one day force it to abandon boys’ and girls’ rooms.”

The Cato Institute similarly admits to anti-trans bias in its brief when it insists that Grimm “remains biologically female, though he has started hormone therapy.” It also calls the Department’s guidance “egregious” and “absurd” and acknowledges that there are “various legitimate concerns individuals have raised about transgender restroom and locker room access.”

The general argument against deference is that the Department’s guidance that transgender students enjoy legal protection under Title IX was too big a change and should have gone through notice-and-comment procedures for such a shift. But the Obama administration saw it differently. As the Department of Justice explained when it challenged North Carolina’s anti-trans law HB2, a person’s gender identity “is the primary factor in terms of establish that person’s sex” and “gender identity and transgender status are inextricably linked to one’s sex and are sex-related characteristics.”

The corollary to this is that if transgender people do not enjoy protections under the category of “sex” as the gender they identify as, then they aren’t really protected under “sex” at all. Grimm is a boy all day, every day. If the law only protects him as a girl, it will never protect him, because he will never complain that he is being discriminated against for being a girl because *he isn’t a girl*.

Thus, the guidance was not a change of policy, but an acknowledgment that since 1972, when Title IX became law, the world has learned a lot about transgender people and transgender people are likewise more visible—including at younger ages. That new knowledge informs the intent of the original law, making the guidance a mere clarification about how the law protects transgender people.

All of the groups and individuals who submitted briefs supporting the Gloucester County School Board, regardless of how they framed their arguments, are still supporting an outcome that erases

transgender people from the protections of law. It remains to be seen if these briefs will compel enough Supreme Court justices to embrace discrimination.