

# 10-30378

---

---

UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

JANE DOE, ET AL.,

*Appellant,*

v.

VERMILION PARISH SCHOOL BOARD, ET AL.,

*Appellees.*

---

On Appeal from the United States District Court  
for the Western District of Louisiana at Lafayette

---

**BRIEF OF *AMICI CURIAE***  
**NATIONAL WOMEN'S LAW CENTER *ET AL.***  
**IN SUPPORT OF**  
**PLAINTIFFS-APPELLANTS' BRIEF URGING REVERSAL**

---

---

NATIONAL WOMEN'S LAW CENTER  
Marcia D. Greenberger  
Fatima Goss Graves  
Lara S. Kaufmann  
11 Dupont Circle, NW, Ste. 800  
Washington, DC 20036  
Telephone: 202.588.5180  
Facsimile: 202.588.5185  
Email: mgreenberger@nwlc.org;  
lkaufmann@nwlc.org; fgraves@nwlc.org

MORRISON & FOERSTER LLP  
Judson E. Lobdell  
Angela E. Kleine  
425 Market Street  
San Francisco, CA 94105-2482  
Telephone: 415.268.7000  
Facsimile: 415.268.7522  
Email: jlobdell@mof.com;  
akleine@mof.com

**Docket No. 10-30378**

---

---

**UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT**

JANE DOE, ET AL.

*Appellant,*

v.

VERMILION PARISH SCHOOL BOARD, ET AL.,

*Appellees.*

---

On Appeal from the United States District Court  
for the Western District of Louisiana at Lafayette

---

**CERTIFICATE OF INTERESTED PERSONS**

Pursuant to Local Rule 28.2.1, the undersigned counsel of record certifies that none of the amici or their counsel have any financial interest in the outcome of this appeal. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

Dated: June 4, 2010

s/ Judson E. Lobdell  
Judson E. Lobdell

**TABLE OF CONTENTS**

	<b>Page</b>
TABLE OF AUTHORITIES .....	iii
INTEREST OF AMICI CURIAE.....	1
INTRODUCTION AND SUMMARY OF ARGUMENT .....	2
ARGUMENT .....	3
I. THE DISTRICT COURT DEPARTED FROM CONTROLLING LAW WHEN IT FAILED TO APPLY THE PROPER CONSTITUTIONAL STANDARD TO THE CLASSIFICATION AT ISSUE.....	3
A. The Standard for Review of Sex-Based Classifications Is Well- Established.....	3
B. The Heightened Scrutiny Standard Has Been Critical in Dismantling Stereotyped Gender Classifications. ....	4
C. The District Court Disregarded the Controlling Standard.....	6
II. SEX STEREOTYPING, AT ISSUE IN THIS CASE, HARMS BOTH WOMEN AND MEN AND IS PRECISELY THE HARM THAT HEIGHTENED SCRUTINY WAS MEANT TO ADDRESS.....	10
A. The Supreme Court Has Firmly Rejected Overbroad Generalizations and Gender Stereotypes as a Basis for Denying Educational Opportunities. ....	10
B. Pseudo “Scientific” Justifications Advanced to Support Many Single-Sex Education Programs Today Perpetuate the Outmoded Stereotypes and Overbroad Generalizations Rejected by the Supreme Court.....	16
III. APPLICATION OF THE PROPER CONSTITUTIONAL STANDARD IN THIS CASE WOULD HAVE COMPELLED THE OPPOSITE RESULT.....	21
CONCLUSION .....	26

**TABLE OF AUTHORITIES**

	<b>Page(s)</b>
<b>CASES</b>	
<i>Califano v. Goldfarb</i> , 430 U.S. 199 (1977) .....	9, 15
<i>Craig v. Boren</i> , 429 U.S. 190 (1976) .....	6, 9, 13, 22
<i>Frontiero v. Richardson</i> , 411 U.S. 677 (1973) .....	4, 9
<i>Griggs v. Duke Power Co.</i> , 401 U.S. 424 (1971) .....	8
<i>Hunt v. Cromartie</i> , 526 U.S. 541 (1999) .....	8
<i>J.E.B. v. Alabama ex rel T.B.</i> 511 U.S. 127 (1994) .....	5, 6, 10
<i>Kirchberg v. Feenstra</i> , 450 U.S. 455 (1981) .....	6
<i>Mississippi Univ. for Women v. Hogan</i> , 458 U.S. 718 (1982) .....	<i>passim</i>
<i>Orr v. Orr</i> , 440 U.S. 268 (1979) .....	9
<i>Personnel Adm’r of Mass. v. Feeney</i> , 442 U.S. 256 (1979) .....	8
<i>United States v. Crew</i> , 916 F.2d 980 (5th Cir. 1990).....	8
<i>United States v. Virginia</i> , 518 U.S. 515 (1996) .....	<i>passim</i>
<i>Weinberger v. Weisenfeld</i> , 420 U.S. 636 (1975) .....	4, 8, 9, 13

**STATUTES**

20 U.S.C.  
 §§ 1681 *et seq.*..... 2, 8

42 U.S.C.  
 §§ 2000e *et seq.*..... 8

**OTHER AUTHORITIES**

*Arrowhead Will Offer Separate Classes for Boys, Girls,*  
 Milwaukee Journal Sentinel, Mar. 9, 2006 ..... 20

Brian A. Nosek, *National Differences in Gender–Science Stereotypes Predict National Sex Differences in Science and Math Achievement*,  
 106 Proceedings of the Nat’l Acad. of Sci. of the U.S. 10593 (2009) ..... 13

David S. Cohen, *No Boy Left Behind? Single-Sex Education and the Essentialist Myth of Masculinity*, 84 Ind. L.J. 135 (2009) ..... 16

Elizabeth Weil, *Teaching to the Testosterone*, New York Times Magazine,  
 Mar. 2, 2008 ..... 20

Institute for Women’s Policy Research, *Fact Sheet: The Gender Wage Gap by Occupation* (Apr. 2010). ..... 14

International Boys’ School Coalition, *Why a Boys’ School in the 21st Century*..... 16

Janet Shibley Hyde, *The Gender Similarities Hypothesis*, American Psychologist (Sept. 2005)..... 17

Kathryn Prater, *Tailoring Classes Capitalizes on Learning Differences, School Says*, Lansing State Journal, Oct. 19, 2009 ..... 19

Leonard Sax, *Six Degrees of Separation*, Educational Horizons 190 (Spring 2006)..... 16

Leonard Sax, *Why Gender Matters* (2005)..... 18

Lise Eliot, Ph.D., <i>Pink Brain, Blue Brain: How Small Differences Grow Into Troublesome Gaps, and What We Can Do About It</i> (2009).....	16, 18
Mary Gatta & Mary Trigg, <i>Bridging the Gap: Gender Equity in Science, Engineering and Technology</i> (Ctr. for Women & Work 2001).....	14
Michael Gurian & Arlette C. Ballew, <i>The Boys and Girls Learn Differently Action Guide for Teachers</i> 27 (2003).....	18
National Coalition of Girls Schools, <i>Gender and the Brain</i> .....	16
Nat'l Women's Law Ctr., <i>Tools of the Trade: Using the Law to Address Sex Segregation in High School Career and Technical Education</i> (2005).....	15
Rena Havner, <i>Single-Sex, Different Opinions</i> , Mobile Press-Register, Nov. 24, 2008.....	20
South Carolina Department of Education, <i>Musical Math Chairs Lesson Plan</i> .....	20
South Carolina Department of Education, <i>Parachute Drop Lesson Plan</i> .....	19
Stephen Jay Gould, <i>The Mismeasure of Man</i> (1981).....	19
U.S. Department of Labor, <i>May 2009 National Occupational Employment and Wage Estimates: United States</i> ,.....	15
U.S. Department of Labor, <i>U.S. Bureau of Labor Statistics, Women in the Labor Force: A Databook, Report 1018, Table 11</i> (Sept. 2009).....	15

**INTEREST OF AMICI CURIAE**

*Amici curiae* are organizations that have a strong interest in the effective enforcement of the U.S. Constitution and anti-discrimination statutes in order to ensure equal educational opportunities for all students. *Amici* submit this brief to address two very troubling aspects of the decision below: (1) the District Court’s failure to apply heightened scrutiny – the proper and well-established standard for reviewing sex-based classifications under the Equal Protection Clause – to its analysis of the constitutionality of single-sex public school classes, and its failure to even consider whether Defendants had met their burden under the Equal Protection Clause to justify their decision to implement a single-sex program; and (2) the District Court’s failure to recognize that sex stereotyping, like that implemented in the single-sex program at issue in this case, harms both boys and girls, as well as women and men, and is precisely the harm that heightened scrutiny was meant to address. The Supreme Court has made it very clear that the Constitution’s Equal Protection Clause safeguards the rights of all children to equal educational opportunities and a public education free of gender stereotypes.

Statements of interest of *amici* are attached in Appendix A.

## INTRODUCTION AND SUMMARY OF ARGUMENT

The Supreme Court examines official classifications denying rights or opportunities based on sex with “skeptical scrutiny.” *United States v. Virginia*, 518 U.S. 515, 531 (1996). This heightened standard of review is necessary and appropriate given the potential for and actual harm caused by sex-based classifications, particularly those based on overbroad stereotypes about purported differences between males and females. In this case, the District Court departed from well-established precedent and failed to apply any heightened level of scrutiny to Vermilion Parish’s classification of students by sex, despite abundant evidence that the single-sex classes at issue would not pass constitutional muster.<sup>1</sup> For these reasons, the District Court’s decision must be reversed.<sup>2</sup>

<sup>1</sup> While this brief focuses on the Equal Protection Clause, the single-sex program at issue also violates Title IX of the Education Amendments of 1972, which prohibits sex discrimination in educational programs or activities by federal funding recipients. 20 U.S.C. §§ 1681 *et seq.*

<sup>2</sup> Because an evidentiary preliminary injunction hearing was held and no further fact finding is necessary, this Court should remand and order the District Court to issue a preliminary injunction to Plaintiffs, enjoining Defendants from continuing the illegal single-sex program in Vermilion Parish.



## ARGUMENT

### **I. THE DISTRICT COURT DEPARTED FROM CONTROLLING LAW WHEN IT FAILED TO APPLY THE PROPER CONSTITUTIONAL STANDARD TO THE CLASSIFICATION AT ISSUE.**

#### **A. The Standard for Review of Sex-Based Classifications Is Well-Established.**

There should be no confusion about the constitutional standard to be applied to sex-based classifications. The Supreme Court has held repeatedly that any state actor, including a public school, seeking to classify individuals on the basis of their sex “must carry the burden of showing an exceedingly persuasive justification for the classification.” *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982) (internal citations omitted). A school may satisfy that burden only by showing at “least that the classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives.” *Virginia*, 518 U.S. at 524 (internal citations omitted). Moreover, the exceedingly persuasive justification must be “genuine, not hypothesized or invented post hoc in response to litigation,” and it may not “rely on overbroad generalizations about the different talents, capacities, or preferences of males and females.” *Id.* at 533; *Hogan*, 458 U.S. at 724-26. Absent such a justification, the sex-based classification is unlawful. Furthermore, “[t]he burden of

justification is demanding and it rests entirely on the state.” *Virginia*, 515 U.S. at 533.

**B. The Heightened Scrutiny Standard Has Been Critical in Dismantling Stereotyped Gender Classifications.**

As the Supreme Court has held time and time again, the heightened scrutiny standard is critical to ensuring that individuals are not deprived of rights and opportunities on the basis of the immutable characteristic of sex. *See Frontiero v. Richardson*, 411 U.S. 677, 684 (1973) (plurality) (holding that benefits given by the U.S. military to families of service members cannot be given out differently because of the service member’s sex, and noting that a heightened standard of review was needed due to the United States’s “long and unfortunate history of sex discrimination”). The Court has recognized that the standard is necessary to root out classifications by sex that are based on “romantic paternalism,” i.e., unexamined assumptions about what is in the best interest of women and girls. *Id.* Heightened scrutiny is also necessary because sex classifications tend to assume the universality of traditional gender roles and to penalize those who do not conform to those roles. *See, e.g., Weinberger v. Weisenfeld*, 420 U.S. 636 (1975) (striking down a provision of the Social Security Act distinguishing between men and women with respect to the rights of a surviving parent with minor children to survivors’ benefits, because the distinction was based on an archaic and overbroad generalization that

male workers' earnings are vital to their families' support but that female workers' earnings are not). And heightened scrutiny is necessary because conclusions about what is appropriate for "most women" cannot form the basis for excluding all women — or all men — from an opportunity. *Virginia*, 515 U.S. at 550.

In developing the heightened scrutiny standard, the Supreme Court has made clear that sex-based classifications are not to be taken lightly, no matter the context, and with good reason. Unexamined sex-based classifications harm both women and men, often denying them access to benefits and opportunities based on nothing more than overbroad generalizations and outmoded stereotypes. For example, in *Mississippi University for Women v. Hogan*, the Supreme Court struck down the exclusion of men from a state-run nursing school because it perpetuated the stereotyped view of nursing as an exclusively women's job. *Hogan*, 458 U.S. at 729-30. Even though there were coeducational nursing programs in that state that the plaintiff could have attended, excluding him from a state-supported educational opportunity because he was a man was held impermissible. *Id.* at 724 n.8. The Court made clear that the test for determining whether a sex-based classification is valid "must be applied free of fixed notions concerning the roles and abilities of males and females." *Id.* at 724-25. And in *J.E.B. v. Alabama ex rel T.B.*, the Court applied heightened scrutiny to strike down sex-based peremptory challenges in jury selection, holding that "[d]iscrimination in jury selection, whether based on race or

on gender, causes harm to the litigants, the community, and the individual jurors who are wrongfully excluded from participation in the judicial process.” 511 U.S. 127, 139-40 (1994). In doing so, the Court refused to “condone the same stereotypes that justified the wholesale exclusion of women from juries and the ballot box,” noting the “long and unfortunate history of sex discrimination, a history which warrants the heightened scrutiny we afford all gender-based classifications today.” *Id.* at 136 (citation omitted).

**C. The District Court Disregarded the Controlling Standard.**

Heightened scrutiny applies to any “gender-based government action,” *Virginia*, 518 U.S. at 531, and should have been applied to the program challenged here. Vermilion Parish classified students by sex, and its plan calls for “the segregation of [the school] by sex.” (ROA USCA5 2884.) In other words, girls may not attend the boys’ classes, and boys may not attend the girls’ classes. Defendants thus bore the burden of showing an exceedingly persuasive justification for that classification. *Virginia*, 518 U.S. at 531, 532-33; *see also Craig v. Boren*, 429 U.S. 190 (1976); *Kirchberg v. Feenstra*, 450 U.S. 455 (1981).

Yet, the District Court rejected Plaintiffs’ Equal Protection claim because it found “there was not enough evidence presented to show that Principal Dupuis or the Vermilion Parish School Board *intended* to discriminate against any child by creating or implementing this program.” (ROA USCA5 2888 (emphasis in

original).) But the government's intent to discriminate is established as a matter of law where, as here, the statute makes a facial "classification based on gender." *See Virginia*, 518 U.S. at 532-33. The classification is by definition sex discrimination, and the question that a reviewing court therefore faces is whether the defendant has demonstrated that the discrimination is based on an exceedingly persuasive justification and is substantially related to an important state interest.

After ignoring the facial discrimination in the plan here, the District Court then compounded its error, explaining that Plaintiffs had not proven an intent to discriminate because they had not marshaled evidence that Defendants "intended to cause an adverse effect on males or females . . . by implementing the same-sex program" (ROA USCA5 2888). In other words, the District Court held that in order to succeed on an Equal Protection challenge to a sex-based classification, a plaintiff must demonstrate that the classification was intended to harm students of one gender. But under the Constitution, it is only when a law is facially gender-neutral that a plaintiff must demonstrate not only a discriminatory impact but also a purpose to undertake the challenged action not merely in spite of, but because of, that discriminatory impact.<sup>3</sup> *See Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979); *see also Hunt v. Cromartie*, 526 U.S. 541, 546 (1999).<sup>4</sup>

<sup>3</sup> *United States v. Crew*, relied on by the District Court, is in accord. There, a

The “intent to harm” standard imposed by the District Court is a repudiation of decades of equal protection cases. These cases hold that defenders of sex-based classifications will often assert that they advance the best interests of both men and women, but those benign justifications alone will not preserve such classifications in the face of heightened scrutiny. *See, e.g., Weinberger*, 420 U.S. at 648 (“the mere recitation of a benign, compensatory purpose” is not sufficient to overcome the heightened scrutiny hurdle). Indeed, a long line of critical Supreme Court cases striking down sex-based classifications would have come out differently — to the detriment of men and women alike, as well as American society as a whole — if the “intent to harm” standard fashioned by the District Court had been applied, including *Hogan* and *Virginia*. *See, e.g., Orr v. Orr*, 440 U.S. 268 (1979) (striking down law that allowed women but not men to receive alimony); *Califano v. Goldfarb*, 430 U.S. 199, 217 (1977) (striking down Social Security provision that defendant convicted of distributing cocaine near a school argued that the schoolyard statute was unconstitutional because it disproportionately impacted racial minorities who are more likely to live in densely populated urban areas. 916 F.2d 980, 984 (5th Cir. 1990). The statute did not discriminate against racial minorities on its face. Thus, the court tested whether the statute had a disparate impact on minorities and whether the law reflected a discriminatory intent.

<sup>4</sup> Under federal anti-discrimination statutes, proving a discriminatory impact does not require a showing of the intent to cause harm. *See, e.g.,* Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681 *et seq.*; Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*; *Griggs v. Duke Power Co.*,

calculated women's benefits in a more advantageous way than men's); *Craig*, 429 U.S. at 204 (holding that state statute prohibiting the sale of beer to males under the age of 21, but only to females under the age of 18 — ostensibly for traffic safety purposes — violated the Equal Protection Clause because “proving broad sociological propositions by statistics is a dubious business, and one that inevitably is in tension with the normative philosophy that underlies the Equal Protection Clause. . . . [and] the [statistical] showing offered by the appellees does not satisfy us that sex represents a legitimate, accurate proxy for the regulation of drinking and driving”); *Weinberger*, 420 U.S. at 643-45 (striking down Social Security provision giving female survivors greater benefits than male survivors, because distinction was based on archaic and overbroad generalization that male workers' earnings are vital to their families' support but that female workers' earnings are not); *Frontiero*, 411 U.S. at 690-91 (plurality) (holding that benefits given to U.S. military families cannot be apportioned differently based on a service member's sex).

Because of the long history of and continuing sex discrimination in this country and the potentially far-reaching and damaging impact of official sex-based classifications, courts must carefully scrutinize them and apply an exacting standard. That is what the District Court should have done — but failed to do — in this case. 401 U.S. 424 (1971).

**II. SEX STEREOTYPING, AT ISSUE IN THIS CASE, HARMS BOTH WOMEN AND MEN AND IS PRECISELY THE HARM THAT HEIGHTENED SCRUTINY WAS MEANT TO ADDRESS.**

One of the key harms of state actors' reliance on sex classifications is their promotion of stereotypes that "ratify and reinforce prejudicial views of the relative abilities of men and women." *J.E.B.*, 511 U.S. at 140. Such stereotypes "have wreaked injustice in so many . . . spheres of our country's public life," *id.*, such as education, job training, employment, child rearing, and civic participation, to name a few. Courts must thus pay *particularly* close attention to sex classifications that are steeped in overbroad generalizations or outmoded stereotypes about men and women (or boys and girls). Accordingly, such distinctions have drawn close attention from the Supreme Court, as they go to the core of what the heightened scrutiny standard was meant to address and cannot serve as the basis for an "exceedingly persuasive justification."

**A. The Supreme Court Has Firmly Rejected Overbroad Generalizations and Gender Stereotypes as a Basis for Denying Educational Opportunities.**

In the context of single-sex public education, the Supreme Court has firmly rejected the notion that theories of gender-based developmental differences or typically female and male tendencies in learning constitute an exceedingly persuasive justification sufficient to survive intermediate scrutiny. Indeed, the Court has held that these are just the sort of generalizations that the Constitution rejects as



a basis for sex classifications, because they inappropriately obscure and ignore the individual's capacities and tendencies.

In *United States v. Virginia*, the State of Virginia maintained that women should not attend the Virginia Military Institute (VMI), Virginia's elite state-run military academy, because they would not succeed in the school's competitive, adversarial atmosphere. 518 U.S. 515 (1996). Virginia eventually created a program for female students, the Virginia Women's Institute for Leadership (VWIL), but that program "deemphasize[d]" military education and instead used a "cooperative method" of education to reinforce women's self-esteem. *Id.* at 547-51. Virginia deliberately did not make VWIL a military institute, and VWIL could not offer women the "opportunity to experience the rigorous military training for which VMI is famed." *Id.* at 548. Virginia defended the exclusion of women from VMI and the different teaching methods between VMI and VWIL, as based on "important differences between men and women in learning and developmental needs" and purported "psychological and sociological differences" that Virginia described as "real" and "not stereotypes." *Id.* at 549. For example, it put forward witness testimony about typically male or female "tendencies." *Id.* at 541. The State also presented expert testimony that "[m]ales tend to need an atmosphere of adversativeness," while "[f]emales tend to thrive in a cooperative atmosphere." *Id.* VMI's expert on educational institutions testified: "I'm not saying that some

women don't do well under [the] adversative model . . . undoubtedly there are some [women] who do;" but, he said, "educational experiences must be designed 'around the rule' . . . not 'around the exception.'" *Id.*

While noting that the United States did not challenge VMI's experts' conclusions regarding the average capacities and preferences of men and women, the Court nevertheless firmly rejected the argument that sex-based classifications were appropriately justified by "generalizations about 'the way women are,'" or "estimates of what is appropriate for *most women*" — these assumptions, the Court held, "no longer justify denying opportunity to women whose talent and capacity place them outside the average description." *Id.* at 550 (emphasis in original). The Court explained:

[T]ime and again since this Court's turning point decision in *Reed v. Reed*, 404 U.S. 71 (1971), we have cautioned reviewing courts to take a 'hard look' at generalizations or 'tendencies' of the kind pressed by Virginia, and relied upon by the District Court . . . . State actors controlling gates to opportunity, we have instructed, may not exclude qualified individuals based on 'fixed notions concerning the roles and abilities of males and females.'

*Id.* at 541 (internal citations omitted). That is, even assuming the accuracy of expert assertions that males and females on average have different educational needs, these "average" differences are not a basis for excluding members of one sex from a particular educational opportunity. *See also Craig*, 429 U.S. at 201-202 (statistical

differences between males' and females' likelihood of drunk driving did not support "using a gender line as a classifying device"); *Weisenberger*, 420 U.S. at 645 (while there was some empirical support for the notion that men are more likely than women to be the primary breadwinners in their families, that did not justify denying equal benefits to women who do work and significantly contribute to their families' support).

The Court has taken a "hard look" at assumptions about traditional male and female roles because the persistence of sex stereotypes — not only at school but also in the workplace — translate into real limitations on the long-term opportunities for men and women. "Stereotypes that men are naturally more talented and interested in math and science are thought to influence the science, technology, engineering, and math aspirations and achievements of boys and girls, men and women." Brian A. Nosek, *National Differences in Gender–Science Stereotypes Predict National Sex Differences in Science and Math Achievement*, 106 Proceedings of the Nat'l Acad. of Sci. of the U.S. 10593 (2009) (internal citations omitted). And "[r]esearchers suggest that children internalize belief systems about 'appropriate' careers for them to enter at the youngest ages (as early as prekindergarten). They then carry these belief systems throughout their educational career and adult job tenure." Mary Gatta & Mary Trigg, *Bridging the*

*Gap: Gender Equity in Science, Engineering and Technology 9-10* (Ctr. for Women & Work 2001).

As a result, many women have been relegated to occupations that pay less, and offer fewer benefits and less job security than traditionally male jobs. As noted in a recent report by the Institute for Women's Policy Research, "[t]he gender wage gap and occupational segregation — men primarily working in occupations done by other men, and women primarily working with other women — are persistent features of the US labor market." Institute for Women's Policy Research, *Fact Sheet: The Gender Wage Gap by Occupation* (Apr. 2010), available at <http://www.iwpr.org/pdf/C350a.pdf>. And occupational segregation works a real economic harm, as fields traditionally dominated by men tend to offer better pay, benefits and job security than traditionally female-dominated fields. *Id.* Women make up nearly half of the workforce, yet occupy only 13.5 percent of architecture and engineer jobs, 3.9 percent of installation maintenance and repair jobs, and only 2.5 percent of construction jobs — all occupations that pay substantially more than fields that are traditionally female, such as cosmetology, child care, and nursing. U.S. Department of Labor, *U.S. Bureau of Labor Statistics, Women in the Labor Force: A Databook, Report 1018, Table 11* (Sept. 2009), available at <http://www.bls.gov/cps/wlf-databook-2009.pdf> (last visited June 2, 2010). In fact, the highest median wage for a traditionally female field (\$17.10 for health

professions) is lower than the lowest median wage for a traditionally male field (\$18.83 for automotive technicians and mechanics). Overall occupations in traditionally male-dominated categories pay an average median hourly wage of \$20.16, compared to just \$15.47 on average for work in traditionally female fields — an annual wage gap of \$9,762.<sup>5</sup> The Supreme Court has recognized that there are concrete and long-lasting economic implications from gender stereotypes, such that policies based on those stereotypes cannot survive heightened scrutiny. *See, e.g., Califano*, 430 U.S. at 207, 217 (striking down law relying on “role-typing” because it meant that female wage earners who work and pay Social Security taxes at the same rate as their male colleagues stood to receive less protection for their spouses than male wage earners did, solely because of sex-based assumptions about their families’ needs).

<sup>5</sup> NWLC calculations based on Bureau of Labor Statistics, U.S Department of Labor, *May 2009 National Occupational Employment and Wage Estimates: United States*, available at [http://www.bls.gov/oes/current/oes\\_nat.htm#31-0000](http://www.bls.gov/oes/current/oes_nat.htm#31-0000). For methodology and comparable analysis, see Nat’l Women’s Law Ctr., *Tools of the Trade: Using the Law to Address Sex Segregation in High School Career and Technical Education* 4–7 (2005), available at <http://www.nwlc.org/pdf/NWLCToolsoftheTrade05.pdf>.

**B. Pseudo “Scientific” Justifications Advanced to Support Many Single-Sex Education Programs Today Perpetuate the Outmoded Stereotypes and Overbroad Generalizations Rejected by the Supreme Court.**

Many single-sex education programs adopted across the country are based on harmful sex stereotypes disguised as “science.” Indeed, an increasingly common justification for separating boys and girls in school is the claim that differences between boys’ brains and girls’ brains make it extremely difficult for students of both genders to succeed in the same classroom. *See, e.g.,* David S. Cohen, *No Boy Left Behind? Single-Sex Education and the Essentialist Myth of Masculinity*, 84 Ind. L.J. 135, 138 (2009); Leonard Sax, *Six Degrees of Separation*, Educational Horizons 190 (Spring 2006), available at [http://www.boysadrift.com/ed\\_horizons.pdf](http://www.boysadrift.com/ed_horizons.pdf); National Coalition of Girls Schools, *Gender and the Brain*, available at <http://www.ncgs.org/aboutgirlsschools/thereasearch/genderthebrain/>; International Boys’ School Coalition, *Why a Boys’ School in the 21st Century*, available at <http://www.theibsc.org/page.cfm?p=3>. But the reality is that “overall, boys’ and girls’ brains are remarkably alike.” Lise Eliot, Ph.D., *Pink Brain, Blue Brain: How Small Differences Grow Into Troublesome Gaps, and What We Can Do About It* 5 (2009). Separation of the sexes based on these theories about average differences between boys and girls, even assuming they are true, harms students by limiting the educational opportunities available to them

based solely on assumptions that *all* girls and *all* boys conform to these averages, when in reality the differences *among* boys and *among* girls are far greater than average differences between boys and girls as groups. *See, e.g.*, Janet Shibley Hyde, *The Gender Similarities Hypothesis*, *American Psychologist* 581-92 (Sept. 2005). Moreover, teaching students in different ways based on their sex can reinforce sex stereotypes in the minds of boys and girls themselves, thus further limiting students' opportunities. As Plaintiffs' expert Dr. Diane Halpern, former President of the American Psychological Association, observed: "By teaching to perceived differences, in many cases, educators unwittingly ignored the power of schooling in shaping gender ideologies." (ROA USCA5 1419 (internal citation omitted).)

Proponents of the modern theory that differences between boys' brains and girls' brains require boys and girls to be educated separately instruct teachers to plan their classes around extreme and overbroad generalizations about boys and girls. For example, single-sex education advocate Michael Gurian — excerpts of which were distributed to teachers in the program at issue in this case — advises:

- "Girls often cannot master physics or calculus in high school, with everything written on the board and the boys and the teacher going so fast."
- "Girls have difficulty learning some math . . . for biological reasons. Adolescent males receive surges of the hormone testosterone five to seven times a day; this can increase spatial skills, such as higher math."

But girls may perform well on math tests only “a few days per month” due to their “menstrual cycle.”

- “Boys participate more in sports activities . . . mainly as a result of the nature of male and female brains. . . . 100 percent female participation in athletics “isn’t neurologically or hormonally realistic.”

Michael Gurian & Arlette C. Ballew, *The Boys and Girls Learn Differently Action Guide for Teachers* 27, 100 (2003); ROA USCA5 781-782).

Similarly, Leonard Sax, leader of the National Association of Single-Sex Public Education and another so-called expert cited in the dissertation that formed the basis for the program at issue, claims:

- Punishing by “power assertion works best for boys . . . . ‘Power assertion’ means physical restraint, corporal punishment, or the treatment of the same.” Leonard Sax, *Why Gender Matters* 181 (2005).
- “[I]t’s useful for young males to engage in play-fighting,” while for females, it’s useful to practice “taking care of a little baby.” *Id.* at 61-62 (drawing conclusions from primate studies).
- A “preference for violent stories seems to be normal . . . for boys, while the same preference in . . . girls suggests a psychiatric disorder.” *Id.* at 59.
- “Rule of thumb: moderate stress improves boy’s performance on tests . . . whereas the same stress *degrades* young girls’ performance.” Therefore, teachers’ “de-stressing the classroom [for girls], by removing the time constraints [on tests], and having the girls kick off their shoes” is a “good” idea. “After all, in real life very few tasks are truly time-constrained.” *Id.* at 91-92.

This so-called “science” echoes the nineteenth century “medical” stereotypes rejected in *Virginia*. See 518 U.S. at 536-37. Even reliance on purported



differences between male and female brains harkens back to the nineteenth century scientists who proclaimed that the measurement of the skull and its contents (“craniometry”) revealed profound differences between the sexes and amongst the races. Stephen Jay Gould, *The Mismeasure of Man* 74 (1981). Evolutionary biologist Stephen Jay Gould deconstructed the data in those studies and found them all flawed; he cautioned that so-called “scientists” can interpret statistics to support “common prejudices.” *Id.* And here, despite the lack of any significant distinctions between the brains of boys and girls, there is a movement to develop single-sex programs based on Sax’s and Gurian’s “theories,” using materials and training from Sax and Gurian to guide teachers in stereotyped instruction for girls and boys.

Recent examples include:

- In a single-sex school in Lansing, Michigan, the boys participate in “competitive activities,” while girls have “tea parties that teach social skills and manners.” Kathryn Prater, *Tailoring Classes Capitalizes on Learning Differences, School Says*, Lansing State Journal, Oct. 19, 2009.<sup>6</sup>
- Published South Carolina Department of Education sample lesson plans regarding the Berlin Airlift involved the creation of parachutes: “The boys get to toss the chutes in a competitive manner, the girls get to decorate the chutes.” *Parachute Drop Lesson Plan*, available at <http://www.ed.sc.gov/agency/Innovation-and-Support/Public-School-Choice/SingleGender/Documents/Girls678SSHO.pdf>

<sup>6</sup> Available on Westlaw at 2009 WLNR 20728334.

- In a school in Wisconsin, the School Superintendent spoke of the advantage of separating the sexes during science class: “Males are not really interested in rote, repetitive, mundane exercises, compared with creative hands-on projects that culminate in something with a different level of understanding. They always use the example in these articles that you can put a group of girls doing a science lab, and they’re going to follow the directions, they’re going to go through the process and may not even understand what happened in the science lab, but they got the right answers.” Kay Nolan, *School to Explore Science of Gender; Arrowhead Will Offer Separate Classes for Boys, Girls*, Milwaukee Journal Sentinel, Mar. 9, 2006, at 3B.<sup>7</sup>
- Another South Carolina lesson plan encouraged a musical chairs game in which girls were given an extra chair to reduce the stress of being eliminated from the game. *Musical Math Chairs Lesson Plan*, available at <http://www.ed.sc.gov/agency/Innovation-and-Support/Public-School-Choice/SingleGender/Documents/Girls678MathIW.pdf>.
- An Alabama middle school asked girls to describe “their dream wedding cake.” The boys’ class listed action verbs used in sports. Rena Havner, *Single-Sex, Different Opinions*, Mobile Press-Register, Nov. 24, 2008, at a1.
- Single-sex classes in another public school used hunting analogies in a lesson for boys and dishwashing analogies for girls. Elizabeth Weil, *Teaching to the Testosterone*, New York Times Magazine, Mar. 2, 2008, at 38.

The potential for schools to reinforce harmful gender stereotypes and cause long-term effects on students’ lives reinforces the need to apply the proper, heightened level of scrutiny to sex-based classifications by public schools.

<sup>7</sup> Available on Westlaw at 2006 WLNR 4051829.

### **III. APPLICATION OF THE PROPER CONSTITUTIONAL STANDARD IN THIS CASE WOULD HAVE COMPELLED THE OPPOSITE RESULT.**

In this case, the District Court applied its own standard — supported by no Supreme Court precedent — to the evidence that the Parish’s classes for boys and girls were differentiated based entirely on archaic sex stereotypes. (ROA USCA5 2888-2889.) Indeed, the District Court’s opinion does not even cite to either of the two Supreme Court cases that directly address single-sex public education, *Virginia* or *Hogan*. At no point did it even articulate the controlling standard. The standard crafted by the District Court required a showing of intent to harm students and permitted a sex classification based on an unsupported conclusion that the government actor sought to act in the best interests of the children. If allowed to stand, the District Court’s standard would permit classifications based on precisely the overbroad generalizations, stereotypes and unsupported conclusions regarding boys’ and girls’ best interests that the Supreme Court has rejected time and time before, turning the well-established Equal Protection analysis on its head.

The single-sex classes at Rene A. Rost Middle School strike at the core of what the Equal Protection Clause is all about. Not only are the school’s single-sex classes based on a study that is biased and riddled with errors, but they implement “gender specific teaching methods” based on exactly the types of damaging stereotypes that heightened scrutiny was designed to address.

The study by school principal David Dupuis, which the District Court found was the basis for the school district's single-sex classes (ROA USCA5 2889), attempts to disguise sex stereotypes as science. The District Court held that the Dupuis study is "extremely flawed," and offered to take judicial notice of its many statistical and analytical errors.<sup>8</sup> (ROA USCA5 2217, 2889.) Data that are not accurate, from which no reliable conclusions can be drawn, cannot provide an exceedingly persuasive justification for separating students by sex. *Craig*, 429 U.S. at 201-04 (rejecting questionable statistics about drunk driving by men and women as justification for law restricting the sale of beer to men and not women, and noting that "prior cases have consistently rejected the use of sex as a decision making factor even though the statutes in question certainly rested on far more predictive empirical relationships than this").

In addition to the study's analytical flaws, it was based on overbroad generalizations that ignore the wide variations among boys and among girls. For example, Dupuis's study asserts, "Males learn best in kinesthetic activities, and

<sup>8</sup> These include (i) miscalculation of simple averages, (ii) reporting grade point average increases when the supporting data actually indicates decreases, and (iii) the failure to include numerous failing grades in same-sex classes that would have had a significant effect on the study's results. (*See* ROA USCA5 626-630.) Furthermore, Principal Dupuis failed to apply universally accepted statistical methods to the data, rendering his conclusions scientifically invalid. (ROA USCA5 1508-1523.)

females may be content to simply observe.” (ROA USCA5 711.) And “[b]oys . . . are more likely . . . to enjoy argument and lively classroom debate . . . .” (ROA USCA5 713.) The study also relied upon the works of Michael Gurian and Leonard Sax discussed above, whose “scientific” conclusions are based on generalizations and gender stereotypes. *See supra* at 16; ROA USCA5 708-710, 737-730.

The Vermilion Parish School Board authorized Dupuis to create single-sex classrooms with different, “gender-specific teaching methods” for the boys’ and girls’ classrooms at Rene A. Rost, and also authorized the practice parish-wide. (ROA USCA5 at Pltf. H. Ex. 30, VP20000510; Def. Ex. 1 (June 4, 2009 minutes).) According to Dupuis’s study the program focuses on “gender-specific methods, strategies, and pedagogy.” (ROA USCA5 736.) Teachers would receive “gender-specific” training sessions on a weekly basis, and teachers were to be encouraged to tailor methods based on the gender of the students in their class. (ROA USCA5 719-720.) Defendants admit that “under the program . . . different teaching strategies are used in the single-sex classes in order to tailor learning towards the strengths and needs of boys and girls.” (ROA USCA5 1255.)

The record also confirms that teachers instructed boys’ and girls’ classes differently. For example, when a district administrator visited the school, she immediately noticed that both the seating patterns and the learning techniques were different in the girls’ and boys’ classes. Girls were “placed side-by-side because

they read a lot of body language and boys don't," while boys were taught with "action" methods, and girls received instruction based on "storytelling" and "personal issues." (ROA USCA5 2760-2762.) School syllabi were tailored to the stereotypical interests and abilities of both genders. For example, the boys were given a quiz about bikes, while the girls were given a quiz about bracelets. (ROA USCA5 2362-2366; ROA at Pl. H. Ex. 47 at 15, 18.) Boys in one English class read *Where the Red Fern Grows*, while the girls were assigned *The Witch of Blackbird Pond*. (ROA USCA5 1185, 1907.) A teacher explained her selection of different books: "boys are more interested in sports and fishing and hunting and . . . girls were interested in princesses and magic and fairy tales." (ROA USCA5 1987-1988.) Another teacher explained, "[g]irls tend to be . . . a little more emotional, sympathetic . . . . The [girls'] book is . . . kind of . . . [a] love triangle mixed with this accusation of witchcraft." (ROA USCA5 1286 n.5.)

The District Court's ruling ordered the Vermilion Parish School Board to implement the Judge's own 10-point plan for single-sex classes for the coming school year, focusing almost entirely on improving notice to parents and on the number of single-sex classes that should be offered. (ROA USCA5 2889-2891.) However, because of the Defendants' failure to show an exceedingly persuasive justification for the single-sex plan, the plan is unconstitutional both as implemented and as modified by the order of the District Court.

\* \* \*

The inaccurate, unreliable, and inconclusive study on which Vermilion Parish's single-sex classes are based and the harmful stereotypes about differences in the interests and abilities of boys and girls that it claims supports the differentiated instruction simply cannot survive heightened constitutional scrutiny. The District Court's failure to so find is reversible error.

## CONCLUSION

For the reasons stated above, the District Court's decision should be reversed and remanded for the issuance of a preliminary injunction to Plaintiffs.

Dated: June 4, 2010

s/ Judson E. Lobdell

Marcia D. Greenberger  
Fatima Goss Graves  
Lara S. Kaufmann  
NATIONAL WOMEN'S LAW CENTER  
11 Dupont Circle, NW, Ste. 800  
Washington, DC 20036  
Telephone: 202.588.5180

Judson E. Lobdell\*  
Angela E. Kleine  
MORRISON & FOERSTER LLP  
425 Market Street  
San Francisco, California 94105-2482  
Telephone: 415.268.7000

\*Counsel of Record



**APPENDIX A**  
**STATEMENTS OF INTEREST OF AMICI**

For more than 128 years, the *American Association of University Women* (AAUW) has been a catalyst for the advancement of women and their transformation of American society. AAUW's more than 100,000 members and donors belong to a community that breaks through educational and economic barriers so all women have a fair chance. With more than 1,000 branches across the country, AAUW works to promote equity for all women and girls through education, research, and advocacy. AAUW is committed to the vigorous enforcement of Title IX and all other civil rights laws pertaining to education. AAUW also believes that the principles of nondiscrimination and applicable civil rights laws should be strictly adhered to in both coeducational and single-sex class settings.

*Professor Ann C. McGinley* is the William S. Boyd Professor of Law at the William S. Boyd School of Law at the University of Nevada, Las Vegas. Professor McGinley is an internationally known scholar in the areas of employment law, employment discrimination, and gender issues in law. She graduated *cum laude* from the University of Pennsylvania Law School, where she was an editor of the

University of Pennsylvania Law Review. She clerked for Judge Joseph S. Lord III of the United States Court for the Eastern District of Pennsylvania and has practiced law in the areas of civil rights and commercial litigation. She has written more than 25 law review articles and a casebook. She has written extensively on gender issues in employment and is currently working on two books on masculinity and law.

The *Anti-Defamation League* was founded in 1913 to advance goodwill and mutual understanding among Americans of all creeds and races, and to secure justice and fair treatment for all. Today, it is one of the world's leading civil and human relations organizations combating anti-Semitism, all types of prejudice, discriminatory treatment and hate. The League is committed to protecting the civil rights of all persons, and to assuring that each person receives equal treatment under law.

Founded in 1991, the *Asian American Justice Center* (AAJC) is a national non-profit, non-partisan organization whose mission is to advance the human and civil rights of Asian Americans and build and promote a fair and equitable society for all. AAJC engages in litigation, public policy, advocacy and community education on a range of issues of importance to the civil rights community. Committed to supporting policies that enable individuals to advance in and make

their fullest contributions to society, AAJC has a long-standing record of advocating for equal opportunity in the educational setting.

The *Asian American Legal Defense and Education Fund* (AALDEF), headquartered in New York City and founded in 1974, is a national organization that protects and promotes the civil rights of Asian Americans. By combining litigation, advocacy, education, and organizing, AALDEF's Educational Equity and Youth Rights Project promotes the rights of Asian American students in kindergarten through twelfth grade public education. AALDEF has an interest in the intersection of racial and gender discrimination, and in the negative impact of gender stereotypes on both male and female Asian American students.

The *California Women's Law Center* (CWLC) is a private, nonprofit public interest law center specializing in the civil rights of women and girls. The California Women's Law Center was established in 1989 to address the comprehensive civil rights of women and girls in the following priority areas: Gender Discrimination, Women's Health, Reproductive Justice and Violence Against Women. Since its inception, CWLC has placed a strong emphasis on eradicating sex discrimination. CWLC has authored numerous amicus briefs, articles, and legal education materials on this issue. The *Doe v. Vermilion Parish* case raises questions within the

expertise and concern of the California Women's Law Center. Therefore, the California Women's Law Center has the requisite interest and expertise to join in the amicus brief in the *Vermilion Parish* case.

The *Connecticut Women's Education and Legal Fund* (CWEALF) is a non-profit women's rights organization dedicated to empowering women, girls and their families to achieve equal opportunities in their personal and professional lives. CWEALF defends the rights of individuals in the courts, educational institutions, workplaces and in their private lives. Since 1973, CWEALF has provided legal education and advocacy and conducted research and public policy work to advance women's rights.

*Professor David S. Cohen* is an associate professor at Earle Mack School of Law at Drexel University where he teaches constitutional law. Before joining Drexel, Professor Cohen was a staff attorney for seven years with the Women's Law Project in Philadelphia where he litigated a variety of sex discrimination cases including those related to reproductive rights, Title IX, and LGBT family law. Professor Cohen has written extensively about Title IX and the Equal Protection Clause. His recent scholarship has focused on the particular harms of sex segregation, exploring the ways that sex segregation, in education and beyond, helps

to create and perpetuate men's dominance over women and other men as well as constricts identity by forcing men and women, as well as boys and girls, to fit essentialized gender norms.

*Equal Rights Advocates* is a nonprofit legal organization dedicated to protecting and expanding economic and educational access and opportunities for women and girls. Since 1974, ERA has worked to eradicate all forms of gender discrimination, including illegal discriminatory practices that deny women advancement opportunities, equal compensation, and access to certain occupations.

ERA has litigated a number of landmark cases to improve workplace and educational conditions, so all women can realize their full potential.

The *Feminist Majority Foundation* (FMF) is a non-profit organization dedicated to eliminating sex discrimination and to the promotion of women's equality and empowerment. FMF programs focus on advancing the legal, social, economic, education, and political equality of women with men; countering the backlash to women's advancement; and recruiting and training young feminists to encourage future leadership for the feminist movement. To carry out these aims, FMF engages in research and public policy development, public education programs, litigation, grassroots organizing efforts, and leadership training programs.

FMF's Education Equity Program has created a major review of research in its *Handbook for Achieving Gender Equity through Education, 2<sup>nd</sup> Edition, 2007*, and co-chairs the single-sex education task force of the National Coalition for Women and Girls in Education.

The *Gay, Lesbian and Straight Education Network* (GLSEN): GLSEN is the leading national organization focused on ensuring safe schools for all students. Established nationally in 1995, GLSEN envisions a world in which every child learns to respect and accept all people, regardless of sexual orientation or gender identity/expression. GLSEN seeks to develop school climates where difference is valued for the positive contribution it makes to creating a more vibrant and diverse community. As an advocate for fair treatment and protection against discrimination for young people in public schools, GLSEN joins this *amici* brief to help ensure that courts apply the correct equal protection standard to sex-based classifications and that educational policy is not based on gender stereotypes which harm all children – especially those who do not conform to stereotypical notions of how males and females should act.

*Legal Momentum* (formerly NOW Legal Defense and Education Fund) has worked to advance women's rights for nearly forty years. Legal Momentum

pioneered the implementation of Title IX with PEER, its nationwide Project on Equal Education Rights, from 1974-1992, by giving parents and educators tools to eradicate sex stereotypes and discrimination in schools. It was co-counsel in *Garrett v. Board of Education*, 775 F.Supp. 1004 (E.D. Mich. 1991), which successfully challenged the establishment of all-male academies by the Detroit Public Schools as a violation of the Equal Protection clause of the Fourteenth Amendment, and has appeared as *amicus curiae* in numerous cases concerning the right to be free from sex discrimination, sex stereotyping or sexual harassment in education, including *Fitzgerald v. Barnstable School Committee, et al.*, 129 S.Ct. 788 (2009), and *U.S. v. Virginia*, 518 U.S. 515 (1996).

The *League of United Latin American Citizens* (LULAC) seeks to advance the economic condition, educational attainment, political influence, housing, health and civil rights of the Hispanic population of the United States. From LULAC's founding in 1929, the organization has been involved in advocating for civil and human rights and litigating to enforce those rights. The first case litigated by LULAC, in 1946 (*Mendez v. Westminster School District*) established that the segregation of students into separate schools based on their national origin was unconstitutional.

*Legal Voice* (formerly the Northwest Women's Law Center) is a non-profit organization that works to advance the legal rights of women in the Pacific Northwest through litigation, education, legislative advocacy, and the provision of legal information and referral services. Since its founding in 1978, Legal Voice has been dedicated to protecting and securing equal rights for women and their families, including in the workplace, in educational institutions, and elsewhere. Toward that end, the Legal Voice has participated as counsel and as amicus curiae in cases throughout the Northwest and the country, including numerous cases establishing girls' and women's rights to be free from sex discrimination and sexual harassment in schools. Legal Voice continues to serve as a regional expert and leading advocate in litigation and in legislative efforts to protect equal educational opportunity for women and girls.

The *Mexican American Legal Defense and Educational Fund* (MALDEF) is a national civil rights organization established in 1968. Its principal objective is to promote the civil rights of Latinos living in the United States through litigation, advocacy and education. MALDEF's mission includes a commitment to ensure equal educational opportunities for Latinos. MALDEF has represented Latino and minority interests in civil rights cases in federal courts throughout the nation. During



its 40-year history, MALDEF has litigated numerous school desegregation cases on behalf of Latino students.

The *National Women's Law Center* (NWLC) is a nonprofit legal advocacy organization dedicated to the advancement and protection of women's rights and the corresponding elimination of sex discrimination from all facets of American life. Since 1972, the NWLC has worked to secure educational equity through full enforcement of constitutional rights and Title IX. The Center has appeared either as counsel or as an amicus in numerous cases involving the Equal Protection Clause and Title IX in the Supreme Court and in federal circuit courts of appeals.

*Professor Nancy Cantalupo* is an Assistant Dean and Adjunct Professor of Law at Georgetown University Law Center. She also volunteers as "Faculty Counsel" to students accusing other students of sexual violence under Georgetown Law's student disciplinary code. Prior to and while studying to become an attorney, she built and directed a campus-based Women's Center, where she was an advocate for educational equity for women students, faculty and staff in all aspects of campus life and decision-making. She currently teaches several courses on women's rights and her scholarship focuses on gender equity in education. She recently published an article on campus peer sexual violence, *Campus Violence: Understanding the*

*Extraordinary through the Ordinary*, 35 J.C. & U.L. 613 (2009), and her current work-in-progress deals with single-sex education. An early draft of this paper was used by Citizens Commission on Civil Rights to supplement comments to the Office for Civil Rights, Department of Education in July 2002 and April 2004. The expanded version includes an extensive analysis of the full corpus of Supreme Court equal protection jurisprudence on sex-based classifications and applies conclusions from that analysis to the sex-segregated education context.

*Professor Nancy Levit* is the Curators' and Edward D. Ellison Professor of Law at the University of Missouri-Kansas City School of Law. She is the Secretary of the Association of American Law Schools Section on Women in Legal Education. She is also the recipient of the Missouri Governor's Award for Teaching. Her areas of research include constitutional law and gender studies. As the author of a book and several articles about sex segregation in education—*The Gender Line: Men, Women and the Law* (NYU Press 2000); *Embracing Segregation: The End of Racial Desegregation and the Beginning of Government-Sponsored Sex Segregation in Schools*, 2005 U. Ill. L. Rev. 455; *Separating Equals: Educational Research and the Long Term Consequences of Sex Segregation*, 67 Geo. Wash. U. L. Rev. 451 (1999)—Professor Levit has argued that public support of sex segregated education is unconstitutional and unwise as a matter of social policy.

The *National Alliance for Partnerships in Equity* (NAPE) is a consortium of state and local agencies, corporations, and national organizations committed to the advancement of equity and diversity in classrooms and workplaces. As an equity organization with deep roots in career and technical education (or vocational education) – where public schools segregated by sex until the 1970s – NAPE supports a strong legal framework for protecting men and women, and especially girls and boys, from sex discrimination. The 5th Circuit’s ruling in *Doe v. Vermilion Parish School Board* substantially changes the longstanding application of heightened scrutiny to sex-based classifications, and NAPE opposes the diminishment of the constitutional standard.

The *National Asian Pacific American Women’s Forum* (NAPAWF) is the only national, multi-issue Asian and Pacific Islander (API) women's organization in the country. Our mission is to build a movement to advance social justice and human rights for API women and girls. NAPAWF believes that a race and gender analysis is critical to the development of fair and just civil rights policies. Educational access was one of our founding platform areas, and NAPAWF believes that educational institutions must adopt curricula, policies and programs that encourage rather than hinder the full participation and success of API women and

girls. NAPAWF is concerned about the new standard the district court articulated in this case and particularly how the application of this standard could exacerbate existing discrimination experienced by API women and girls. For these reasons, we are interested in joining the *amicus* brief in *Doe v. Vermilion Parrish School Board*.

The *National Association of Women Lawyers* (NAWL), founded in 1899, is the oldest women's bar association in the country. NAWL is a national voluntary organization with members in all fifty states, devoted to the interests of women lawyers, as well as all women. Through its members, committees and the Women's Law Journal, it provides a collective voice in the bar, courts, Congress and the workplace. NAWL stands committed to ensuring equality and fairness for women. Through its *amicus* work, NAWL has been a strong and clear voice for enforcement of statutory law and standards as set through case law that enforce laws designed to protect men and women from discrimination and harassment based on sex.

The *National Center for Lesbian Rights* (NCLR) is a national non-profit legal organization dedicated to protecting and advancing the civil rights of lesbian, gay, bisexual, and transgender (LGBT) people and their families through litigation, public policy advocacy, and public education. Since its founding in 1977, NCLR has played a leading role in securing fair and equal treatment for LGBT people in

cases across the country involving constitutional and civil rights, including numerous cases vindicating the rights of LGBT and gender non-conforming students under Title IX and other non-discrimination laws.

The *National Council of Jewish Women* (NCJW) is a grassroots organization of 90,000 volunteers and advocates who turn progressive ideals into action. Inspired by Jewish values, NCJW strives for social justice by improving the quality of life for women, children, and families and by safeguarding individual rights and freedoms. NCJW's Resolutions state that the organization endorses and resolves to work for “comprehensive services and policies that enable all children to succeed in school” and our Principles state that “equal rights and equal opportunities for women must be guaranteed.” Consistent with our Principles and Resolutions, NCJW joins this brief.

*NCLR* (“the National Council of La Raza”) is a private, nonprofit, nonpartisan organization established in 1968 to reduce poverty and discrimination and improve life opportunities for Hispanic Americans. NCLR works toward this goal through two primary, complementary approaches: capacity-building assistance to support and strengthen Hispanic community-based organizations and applied research, policy analysis, and advocacy. NCLR recognizes the importance of

applying heightened scrutiny to sex-based classifications under the Equal Protection Clause, and believes the failure to do so would have a negative impact on the educational opportunities of Hispanic students.

The *National Council of Negro Women, Inc.* (NCNW) is a council of 39 affiliated national African American women's organizations and over 240 sections, connecting nearly 4 million women worldwide. NCNW's mission is to lead, develop and advocate for women of African descent as they support their families and communities. NCNW fulfills that mission through research, advocacy and national and community-based health, education and economic empowerment services and programs in the United States and Africa. Through section and affiliate volunteers in 34 states, NCNW addresses local needs while impacting communities nationwide.

The *National Council of Women's Organizations* (NCWO) is a nonpartisan coalition of 230 progressive women's groups that represent 12 million American women. Our focus is on those policy issues that impact women and their families, particularly education, healthcare, employment, reproductive rights, housing, poverty, and equal access. For 25 years, NCWO has worked to educate

policymakers and the public about programs, projects, and systems that promote equal access for girls and women in both public and private schools.

The *National Indian Education Association* is a member supported, non-profit organization dedicated to supporting traditional Native cultures and values, in order to enable Native learners to become contributing members of their communities, to promote Native control of educational institutions, and to improve educational opportunities and resources for American Indians, Alaska Natives, and Native Hawaiians throughout the United States. NIEA is dedicated to keeping high quality education accessible regardless of gender, ethnicity, or socio-economic status.

The *National Organization for Women Foundation* is a 501(c)(3) organization devoted to furthering women's rights through education and litigation. Created in 1986, NOW Foundation is affiliated with the National Organization for Women, the largest feminist organization in the United States, with hundreds of thousands of contributing members in hundreds of chapters in all 50 states and the District of Columbia. Since its inception, NOW Foundation's goal has been to achieve equal rights for all women and to assure that women and girls have equal access to education.

The *National Partnership for Women & Families* is a nonprofit, nonpartisan organization that uses public education and advocacy to promote fairness in the workplace, access to quality health care, and policies that help women and men meet the dual demands of work and family. The National Partnership has a longstanding commitment to equal opportunity for women and to monitoring the enforcement of antidiscrimination laws in education and in the workplace. The National Partnership has devoted significant resources to combating sex and race discrimination and has filed numerous briefs amicus curiae in the federal circuit courts of appeal to advance women's opportunities.

*People for the American Way Foundation* (PFAWF) is a nonpartisan citizens' organization established to promote and protect civil and constitutional rights. Founded in 1980 by a group of religious, civic, and educational leaders devoted to our nation's heritage of tolerance, pluralism, and liberty, PFAWF now has hundreds of thousands of members nationwide. PFAWF has been actively involved in litigation and other efforts to combat discrimination, and is particularly concerned that our nation's anti-discrimination laws be properly interpreted and vigorously enforced.



*Pick Up the Pace* is a San Francisco-based non-profit organization whose mission is to identify and eliminate barriers to women's advancement in the workplace, emphasizing the role of law in combating glass ceiling discrimination, cognitive bias, gender stereotyping and work/family conflict. Established in 2005, the organization seeks to raise awareness of cutting edge gender bias issues in the workplace through public education and legal advocacy, most recently as *amicus curiae* before the United States Supreme Court in *Burlington Northern & Santa Fe Railway Co. v. Sheila White*, *BCI Coca-Cola Bottling Co. v. EEOC*, *Ledbetter v. Goodyear Tire & Rubber Company, Inc.* and *AT&T v. Hulteen*.

The *Sargent Shriver National Center on Poverty Law* (Shriver Center) champions social justice through fair laws and policies so that people can move out of poverty permanently. Our methods blend advocacy, communication, and strategic leadership on issues affecting low-income people. National in scope, the Shriver Center's work extends from the Beltway to state capitols and into communities building strategic alliances. Through its Women's Law and Policy Project, the Shriver Center works on issues related to women and girls' access to quality education at all levels. Discriminatory education policies and practices have a negative impact on women and girls' immediate and long-term educational achievements and economic security. Non-discrimination in education is the surest

path out of poverty and toward economic well-being. The Shriver Center has a strong interest in the eradication of unfair and unjust education policies and practices that limit educational opportunities, which in turn, serve as a barrier to economic equity.

*Sociologists for Women in Society* is the world's largest association of sociologists concerned with gender issues and the publisher of a highly respected journal, *Gender & Society*. Our concerns include any threat to academic freedom or any initiatives that support, maintain, or implement policies that stand to perpetuate gender inequality.

The *Southeast Asia Resource Action Center* (SEARAC) is a national advocacy organization that advances the interests of Cambodian, Laotian, and Vietnamese Americans by empowering communities through advocacy, leadership development, and capacity building to create a socially just and equitable society. In order to create a socially just and equitable society, access for all students to education equitable high quality education is one of our main policy priorities. The education needs of many Southeast Asian American students are often overlooked because of the “model minority” stereotype – a misconception that all Asian Americans excel academically and face no obstacles. This misconception

overshadows the dire needs of individual Asian American ethnic groups and further hinders any actions that should be taken to address these disparities. SEARAC believes that educational institutions should adopt curricula, policies, and programs that encourage rather than hinder the full participation of all students. We have seen how damaging stereotypes could be for certain communities and how the application of this standard could lead to further injustices. For these reasons, we are interested in joining the *amicus* brief in *Doe v. Vermilion Parrish School Board* which challenges gender based stereotypes in education.

The *Southwest Women's Law Center* is a nonprofit women's legal advocacy organization based in Albuquerque, New Mexico. Its mission is to create the opportunity for women to realize their full economic and personal potential by eliminating gender discrimination, helping to lift women and their families out of poverty, and ensuring that women have control over their reproductive lives. The Southwest Women's Law Center is committed to eliminating gender discrimination in all of its forms and ensuring broad and meaningful enforcement of anti-discrimination laws and constitutional prohibitions on sex discrimination.

The *Union for Reform Judaism* ("Union") is the congregational arm of the Reform Jewish Movement in North America, including 900 congregations

encompassing 1.5 million Reform Jews. The Union has a long-standing commitment to equal rights and social justice, including as those are applied to the treatment of women and girls in education and other realms. The Union continues to support efforts to correct current discriminatory practices in education, private industry, and government.

The *Washington Lawyers' Committee for Civil Rights and Urban Affairs* is a non-profit civil rights organization established to eradicate discrimination by enforcing federal and local civil rights laws. In the Committee's 40-year history, its attorneys have represented thousands of individuals discriminated against on the basis of gender, race, religion, national origin, disability and other protected categories, and in cases alleging discrimination in public accommodations, education, employment, housing and prisons. The Committee's cases range in size from individual cases to nationwide pattern and practice cases. From its extensive civil rights litigation history, the Committee has amassed expertise in the issues of law and procedure raised in the present matter.

*Wider Opportunities for Women* (WOW) works nationally and in its home community of Washington, DC to achieve economic independence and equality of opportunity for women and their families at all stages of life. For over 45 years,

WOW has been a leader in the areas of nontraditional employment, job training and education, welfare to work and workforce development policy. Since 1995, WOW has been devoted to the self-sufficiency of women and their families through the national Family Economic Security (FES) Project. Through FES, WOW has reframed the national debate on social policies and programs from one that focuses on poverty to one that focuses on what it takes families to make ends meet. Building on FES, WOW has expanded to meet its intergenerational mission of economic independence for women at all stages of life with the Elder Economic Security Initiative. WOW believes that education and employment options should be open to all, and in particular that women should be encouraged to pursue paths that have not been traditionally female.

The *Women's Law Project* (WLP) is a non-profit public interest law firm with offices in Philadelphia and Pittsburgh, Pennsylvania. Founded in 1974, the WLP works to abolish discrimination and injustice and to advance the legal and economic status of women and girls through litigation, public policy development, public education and individual counseling. The WLP has worked throughout its history to eliminate sex discrimination in education. The WLP represented the plaintiffs in *Newberg v. School Dist. of Phila.*, 26 Pa. D. & C. 3d 682 (Ct. C.P., Phila. Co.), *aff'd* 478 A. 2d 1352 (Pa. Super Ct. 1984), in which the court enjoined the

exclusion of girls from Philadelphia's Central High School as unconstitutional. The WLP is familiar with the inequities that may result from single-sex education and strongly believes in the need to maintain strong protections against discrimination in education consistent with the U. S. Constitution.

## **CERTIFICATE OF COMPLIANCE**

I, JUDSON E. LOBDELL, hereby certify that the foregoing Brief Amici Curiae of the National Women's Law Center, the American Association of University Women, Professor Ann C. McGinley, the Anti-Defamation League, the Asian American Justice Center, the Asian American Legal Defense and Education Fund, the California Women's Law Center, the Connecticut Women's Education and Legal Fund, Professor David S. Cohen, Equal Rights Advocates, the Feminist Majority Foundation, the Gay, Lesbian and Straight Education Network, Legal Momentum, the League of United Latin American Citizens, Legal Voice, the Mexican American Legal Defense and Educational Fund, Professor Nancy Cantalupo, Professor Nancy Levit, the National Alliance for Partnerships in Equity, the National Asian Pacific American Women's Forum, the National Association of Women Lawyers, the National Center for Lesbian Rights, the National Council of Jewish Women, NCLR, the National Council of Negro Women, Inc., the National Council of Women's Organizations, the National Indian Education Association, the National Organization for Women Foundation, the National Partnership for Women & Families, People for the American Way Foundation, Pick Up the Pace, the Sargent Shriver National Center on Poverty Law, Sociologists for Women in Society, the Southeast Asia Resource Action Center, the Southwest Women's Law

Center, the Union for Reform Judaism, the Washington Lawyers' Committee for Civil Rights and Urban Affairs, Wider Opportunities for Women, and the Women's Law Project in Support of Plaintiffs-Appellants' Brief Urging Reversal complies with the type-volume limitation of Fifth Circuit Rule 32.2.7(b). This brief contains a total of 5,185 words, exclusive of the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii), as counted by Microsoft Office Word 2003, the word processing software used to prepare the brief. This brief is set in Times New Roman, a proportionally space typeface, in 14-point size.

Dated: June 4, 2010

/s/ Judson E. Lobdell

Judson E. Lobdell



## CERTIFICATE OF SERVICE

I, MICHELLE EKAS, hereby certify that on this date I filed and served the Brief *Amici Curiae* of the National Women's Law Center, the American Association of University Women, Professor Ann C. McGinley, the Anti-Defamation League, the Asian American Justice Center, the Asian American Legal Defense and Education Fund, the California Women's Law Center, the Connecticut Women's Education and Legal Fund, Professor David S. Cohen, Equal Rights Advocates, the Feminist Majority Foundation, the Gay, Lesbian and Straight Education Network, Legal Momentum, the League of United Latin American Citizens, Legal Voice, the Mexican American Legal Defense and Educational Fund, Professor Nancy Cantalupo, Professor Nancy Levit, the National Alliance for Partnerships in Equity, the National Asian Pacific American Women's Forum, the National Association of Women Lawyers, the National Center for Lesbian Rights, the National Council of Jewish Women, NCLR, the National Council of Negro Women, Inc., the National Council of Women's Organizations, the National Indian Education Association, the National Organization for Women Foundation, the National Partnership for Women & Families, People for the American Way Foundation, Pick Up the Pace, the Sargent Shriver National Center on Poverty Law, Sociologists for Women in Society, the Southeast Asia Resource Action Center, the

Southwest Women's Law Center, the Union for Reform Judaism, the Washington Lawyers' Committee for Civil Rights and Urban Affairs, Wider Opportunities for Women, and the Women's Law Project, in Support of Plaintiffs-Appellants' Brief Urging Reversal, by electronic filing.

Dated: June 4, 2010

s/ Michelle Ekas

Michelle Ekas