

Case Nos. 20-35813, 20-35815

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

LINDSEY HECOX, ET AL.,

Plaintiffs-Appellees,

v.

BRADLEY LITTLE, ET AL.,

Defendants-Appellants.

AND

MADISON KENYON, ET AL.,

Appellants-Intervenors.

Appeal from the Order dated August 17, 2020 of the
United States District Court for the District of Idaho, Boise,
Honorable David C. Nye, Case No. 1:20-cv-184-DCN.

**BRIEF OF *AMICUS CURIAE* WOMEN'S LIBERATION FRONT
IN SUPPORT OF APPELLANTS AND REVERSAL**

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INTRODUCTION AND INTEREST OF AMICUS CURIAE¹

Amicus is the Women’s Liberation Front (“WoLF”), a non-profit radical feminist organization dedicated to the liberation of women by ending male violence, protecting reproductive sovereignty, preserving woman-only spaces, and abolishing gender and sex discrimination. WoLF has over 800 members who live, work, attend school and play sports across the United States, including nearly 300 in the 9th Circuit. WoLF’s interest in this case stems from its interest in empowering and protecting the safety and privacy of women and girls and preserving women’s sex-based civil rights.² Those rights have been threatened by recent court decisions and agency policies that embrace the vague concept of “gender identity” in a manner that overrides statutory and

¹ No counsel for any party authored any part of this brief, and no party, their counsel, or anyone other than WoLF, has made a monetary contribution intended to fund its preparation or submission, and counsel of record for all parties have consented to its filing.

² *Amicus* uses “sex” throughout to mean exactly what Congress meant when it incorporated the longstanding meaning of that term into Title VII of the Civil Rights Act: “the fundamental distinction, found in most species of animals and plants, based on the type of gametes produced by the individual,” and the resulting classification of human beings into those two reproductive classes: female (women and girls) or male (men and boys). *See Sex, Male, and Female*, MILLER-KEANE ENCYCLOPEDIA AND DICTIONARY OF MEDICINE, NURSING, AND ALLIED HEALTH (7th ed. 2003), <https://medical-dictionary.thefreedictionary.com>.

Constitutional protections that are based explicitly on “sex.” If, as a matter of law, “sex” is no longer understood to be an immutable characteristic, but instead merely a subjective self-declared and mutable “identity” – then the ability to protect female people from sex-based discrimination is greatly diminished.

Plaintiffs ask the Court to proclaim that women and girls are no longer a discrete category worthy of civil rights protection, but men and boys who claim to have a female “gender identity” are. If the Court rules in their favor, it will mark a truly fundamental shift in American law and policy that strips women of their Constitutional right to privacy, threatens their physical safety, undercuts the means by which women can achieve educational equality, and ultimately works to erase women and girls under the law. It would not only revoke the very rights and protections that specifically secure women’s access to school athletics, but would do so in order to extend those rights and protections to men claiming to be women.

WoLF urges the Court to rule in favor of Appellants, reverse the preliminary injunction order below, and affirm the long-standing legal

principle that women and girls are protected under Title IX on the basis of sex.

ARGUMENT

I. WOMEN’S SEX-BASED RIGHTS AND PROTECTIONS ARE NOT AND CANNOT BE DIMINISHED BASED ON IDIOSYNCRATIC AND SUBJECTIVE BELIEFS ABOUT GENDER IDENTITY.

U.S. civil rights law recognizes the need to protect people from the subjective beliefs of others, including subjective beliefs founded on sex-stereotypes. Women and girls are thus protected under the law from subjective beliefs about whether and how women should work, vote, have children or not have children, and how they ought to look and behave.³ Under the law, no longer are women (or men) governed by such regressive beliefs.

³ U.S. Const. amend. XIX (the right to vote cannot be limited on the basis of sex); *Cleveland Bd. of Ed. V. LaFleur*, 414 U.S.632 (1974) (mandatory leave for pregnant teachers violates due process); *Craig v. Boren*, 429 U.S. 190 (1976) (different drinking ages for men and women violates the 14th amendment); *Phillips v. Martin Marietta Corporation*, 400 U.S. 542 (1971) (refusal to hire women with preschool-age children violates the Civil Rights Act of 1964); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (sex stereotyping is a form of sex discrimination); *Roe v. Wade*, 410 U.S. 113 (1973) (women have a right to terminate a pregnancy).

In stark contrast, being “transgender” depends on the continued existence of sex-stereotypes. Plaintiffs’ definition of “transgender” purports to be grounded in science, but in reality describes a personal, quasi-spiritual philosophy. Evidence offered to the court about dysphoria, cross-sex hormones, or “social” “transitioning” is irrelevant because being “transgender” is a matter of self-declaration, not only in culture but also in law. *See, e.g.* Wash. Admin. Code 246-490-075 (revised in 2018 to permit a legal change of the sex designation on one’s birth certificate by completing a simple form)⁴; S.B. 132, 2019-2020 Sen. Reg. Sess. (Cal. 2020) (recently enacted law requiring prison housing placement based on self-declared gender identity, prohibiting consideration of anatomy, hormones, or legal sex). Indeed, though not legally binding, even the World Professional Association for Transgender Health (WPATH) defines “transgender” in a vague and subjective manner, as “an adjective to describe a diverse group of

⁴ Washington’s law includes the option to adopt gender “X,” defined as “a gender that is not exclusively male or female, including, but not limited to, intersex, agender, amalgagender, androgynous, bigender, demigender, female-to-male, genderfluid, genderqueer, male-to-female, neutrois, nonbinary, pangender, third sex, transgender, transsexual, Two Spirit, and unspecified.”

individuals who cross or transcend culturally defined categories of gender.” Eli Coleman, *et. al.*, STANDARDS OF CARE FOR THE HEALTH OF TRANSSEXUAL, TRANSGENDER, AND GENDER NONCONFORMING PEOPLE, 7th edition at 97 (2012) (“WPATH Standards”).

A. “Gender Identity” and “Transgender” are quasi-spiritual concepts that are not bound to gender dysphoria or any medical treatment.

A core concept of gender identity ideology is that the sole criteria for whether somebody is transgender is that they say they are transgender. Memorandum Decision and Order, ER001-087 at 005 (defining “transgender woman” as a male person who self-identifies as female, with no other benchmarks.) *See also Doe 2 v. Shanahan*, 917 F.3d 694, 722 (D.C. Cir. 2019). Under this philosophy, a male becomes a female when he declares himself so, even if he chooses not to “transition.” *Id.*

The belief that there are objective or verifiable requirements to be considered “transgender” is referred to disparagingly as “transmedicalism,” and is considered outdated and “transphobic.” Ben Vincent, TRANSGENDER HEALTH: A PRACTITIONER’S GUIDE TO BINARY AND NON-BINARY TRANS PATIENT CARE 126 (Jessica Kingsley Publishers,

2018). Professionals are strongly discouraged from “gatekeeping” or attempting to verify the sincerity of a person’s declared gender. Asaf Orr, *et. al.*, SCHOOLS IN TRANSITION: A GUIDE FOR SUPPORTING TRANSGENDER STUDENTS IN K-12 SCHOOLS 24, (Human Rights Campaign Foundation, 2015), <https://hrc-prod-requests.s3-us-west-2.amazonaws.com/files/assets/resources/Schools-In-Transition.pdf?mtime=20200713142742&focal=none>.

Plaintiffs foster misconceptions by using the terms “gender dysphoria” and “transgender” more or less interchangeably to support their position. But these terms are not in fact synonymous, and many transgender-identified people do not have gender dysphoria. WPATH Standards at 5. The National Center for Transgender Equality says: “On its own, being transgender is not considered a medical condition. Many transgender people do not experience serious anxiety or stress associated with [their gender identity], and so may not have gender dysphoria.” National Center for Transgender Equality, *What is Gender Dysphoria?*, (July 9, 2016), <https://transequality.org/issues/resources/frequently-asked-questions-about-transgender-people>.

Likewise, gender dysphoria, which is marked by significant distress at the thought of one's sex, is also experienced by people who do not identify as transgender. American Psychiatric Association, *Gender Dysphoria* (2013), (discussing the diagnostic criteria contained in the APA's Diagnostic and Statistical Manual of Mental Disorders (DSM-5)), <http://bit.ly/2Re1MA5>. For example, "crossdressers, drag queens/kings or female/male impersonators, and gay and lesbian individuals" also commonly experience gender dysphoria. WPATH Standards at 7.

WPATH guidelines acknowledge that gender identity and gender dysphoria are distinct concepts. *Id.* at 6, 96. Federal courts have recognized this distinction as well. *Blatt v. Cabela's Retail Inc.*, No. 5 :2014-cv-04822 at 3 (E.D. Pa. 2017); *see also Doe 2* at 696 (2019). Doctors diagnose gender dysphoria using clinical criteria; in contrast, a person's "gender identity" is a subjective experience that is self-identified and unverifiable. Most people who experience gender dysphoria – whether they identify as transgender or not – do so for a limited time, especially if they are young. M.S.C. Wallien, et al., *Psychosexual outcome of gender-dysphoric children*, JOURNAL OF THE

AMERICAN ACADEMY OF CHILD AND ADOLESCENT PSYCHIATRY, 47, 1413–1423 (2008).

Many who identify as transgender identify as one of dozens of “non-binary” gender identities; for example, demigirl (or demiboy), genderqueer, genderfluid, bigender, or another idiosyncratic label a person might invent based on their belief that it “reflect[s] their personal experience.” Human Rights Campaign, *Understanding the Transgender Community*, <https://www.hrc.org/resources/understanding-the-transgender-community> (last visited Nov. 1, 2020). Nearly half of all respondents to the National Transgender Discrimination Survey (NTDS) identify as “non-binary” (neither exclusively male nor exclusively female). S.E. James, *et. al.*, *The Report of the 2015 U.S. Transgender Survey* (National Center for Transgender Equality, 2015).

The lack of a discrete identifiable class of persons claiming some form of “transgender” identity is further evidenced by the considerably different population numbers reported by different sources. Though estimates offered to the district court were under 1% of the general population, a study by the University of Connecticut and the Human Rights Campaign concluded that a “larger portion” of the age group who

participate in Title IX athletics “is identifying somewhere on the broad trans spectrum.” *Understanding the Transgender Community, supra.*

GLAAD, Inc. (formerly the Gay & Lesbian Alliance Against Discrimination) reported in 2017 that 12% of millennials claim to have a gender identity that does not align with their biological sex. GLAAD, *Accelerating Acceptance* at 4 (2017),

https://www.glaad.org/files/aa/2017_GLAAD_Accelerating_Acceptance.pdf. These staggeringly different figures are reported by highly regarded institutions. It is unlikely that the higher numbers – which are primarily reported from the teens and young adults – are purely the result of an increase in formal gender dysphoria diagnoses. Rather, the younger generation is increasingly adopting a quasi-spiritual philosophy regarding one’s relationship with their sexed body and with society at large.

The district court relied on conservative outlier estimates in distinguishing this case from *Clark ex rel. Clark v. Arizona Interscholastic Ass’n.*, 695 F.2d 1126 (9th Cir. 1982), positing that transgender athletes “could not” displace female athletes “to a substantial extent” because less than “one percent of the population”

identified as transgender. ER065 (preliminary injunction order using the standard set forth in *Clark* at 1131). The actual number of transgender-identified individuals is much greater, and because the definition of “transgender” is both subjective and capacious, the true potential for female displacement is unknown, and cannot be dismissed as insubstantial. (Even if the number cited by the district court was accurate, it is a misapplication of *Clark*, and *Amicus* concurs with the legal arguments presented on this matter by the Appellants.)

B. Gender identity ideology focuses on a metaphysical gendered soul over the material reality of biological sex, and prioritizes “affirming” gender identity above all other considerations

Understanding the quasi-spiritual nature of “gender identity” requires an examination of some basic terms. Sex is defined by reproductive function; a male produces sperm and a female produces eggs, gestates, and gives birth.⁵ Although people’s lives and personalities are not defined by their sex, their sex is always defined by their biology. In contrast, a “gender identity” is a subjective statement

⁵ See Sex, Male, and Female, MILLER-KEANE ENCYCLOPEDIA AND DICTIONARY OF MEDICINE, NURSING, AND ALLIED HEALTH (7th ed. 2003), <https://medical-dictionary.thefreedictionary.com/medicine>.

of self-perception grounded in emotion. The district court adopted a circular (and therefore invalid) definition of “gender identity” as a “deep-core sense of self as being a particular gender.” ER005, citing *Doe ex rel. Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518, 522 (3d Cir. 2018). The disconnect of the metaphysical “gender identity” from physical sex is akin to the religious concept of a soul: “the principle of life, feeling, thought, and action in humans, regarded as a distinct entity separate from the body, and commonly held to be separable in existence from the body; the spiritual part of humans as distinct from the physical part.” *Soul Definition*, Dictionary.com (based on Random House Unabridged Dictionary, 2020), <https://www.dictionary.com/browse/soul>.

Spiritual beliefs provide many people with a sense of purpose and a way to make sense of the world. But these beliefs – which are impossible to observe or verify – can neither be imposed on the public nor used to justify eroding civil rights protections against sex-based discrimination. Likewise, girls and women are female whether or not they look or act in a stereotypically feminine manner. To believe that sex is determined by a gendered soul or feminine appearance, rather

than biology, is to believe that femininity is the same thing as being female. This belief is offensive and harmful to women and antithetical to civil rights jurisprudence. Yet the court is being asked to adopt this regressive belief, urged along by declarants testifying about various facets of an ideology not grounded in material reality.

Plaintiffs' declarant in support of their motion for preliminary injunction, Dr. Safer, argues that gender identity is "innate," "durable," and "largely a biological phenomenon." Expert Declaration of Joshua D. Safer, ER244-45, ¶ 17, 18, 21. He asserts that "biological sex' is an imprecise term that can cause confusion," and lists a number of factors that supposedly encompass a person's sex, including factors that have no bearing on sexual reproductive class such as "sex hormone levels" and "gender identity." Supp. Declaration of Joshua D. Safer, ER702-03, ¶19-23.⁶ Importantly, Dr. Safer's list omits gametes entirely. *Id.*

⁶ Dr. Safer thus asserts that how "masculine" or "feminine" one's appearance is ("secondary sex characteristics" such as height, fat distribution, and breast tissue) is a factor in determining one's sex. Under this distasteful theory, a woman who has excess facial hair and male-pattern baldness due to a common medical condition such as polycystic ovarian syndrome would be less than fully female. ER702, ¶ 20-21. The inclusion of "gender identity" as a determinant of biological sex is also offensive, as it further implies that a woman who doesn't feel a strong connection with her "womanhood" is also less female.

However, a fundamental aspect of human biology is the fact that humans (and indeed all sexually-reproducing organisms) reproduce by fusing two types of gametes: sperm (produced by males) and ova (produced by females). *See* n.2, *supra*. The exclusion of gametes from Dr. Safer's list is ideologically driven; since the type of gamete one produces is dispositive in determining one's sex, omitting gametes as a defining factor in sex makes the concept of "gender identity" appear more objective and relevant, while fostering the misimpression that actual physical sex is unknowable and ineffable.

There are also indications that ideology rather than science inspires some of the Expert Declaration of Jack L. Turban. ER248-275. As an initial matter, Dr. Turban never states that sex-segregated sports are "equivalent to gender identity conversion efforts" [GICE], *contra* ER065 (quoting Pltf's Rep. to Opp. For Mot. For Prelim. Injunct., ECF No. 58 at 11), and none of his cited evidence would support that conclusion. Likewise, the professional organizations cited in the declaration do not consider denying a man a place on the women's team to be a form of GICE, nor do they assert that allowing him to play on

the women's team constitutes legitimate "transgender health care."⁷

Nevertheless, Plaintiffs relied on this declaration in contending that refusal to make exceptions to Title IX sex-segregation constitutes GICE, and the district court's ruling reflects this misunderstanding. ER065.

Moreover, Dr. Turban's declaration is based on his own research defining GICE as *any* professional interaction the patient subjectively perceives as not "affirming" of their transgender identity. J.L. Turban, *et. al., Association Between Recalled Exposure to Gender Identity Conversion Efforts and Psychological Distress and Suicide Attempts*

⁷ The American Academy of Child and Adolescent Psychology (AACAP)'s definition of GICE only addresses "therapeutic intervention," defining "conversion therapies" as those which treat certain gender identities or expressions as "pathological." AACAP, *Conversion Therapy*, AMERICAN ACADEMY OF CHILD & ADOLESCENT PSYCHOLOGY (2018), https://www.aacap.org/AACAP/Policy_Statements/2018/Conversion_Therapy.aspx. The American Medical Association (AMA) uses similar language and also identifies some of the prohibited practices, for example aversive conditioning and hypnosis. AMA, *LGBT Change Efforts (so-called "conversion therapy")* (2019), <https://www.ama-assn.org/system/files/2019-12/conversion-therapy-issue-brief.pdf>. Sex-segregation in sports does not meet the AACAP or AMA's definition of GICE because it does not serve as a therapeutic remedy for gender dysphoria, nor does it treat "gender identity" as pathological—it is simply irrelevant in determining eligibility for sex-specific athletic competition.

Among Transgender Adults, JAMA PSYCHIATRY (2020). However, a group of scientists and clinicians recently published a detailed critique exposing “serious methodological flaws” and “unsupported claims” in Dr. Turban’s data and methodology. R. D’Angelo, *et al.*, *One Size Does Not Fit All: In Support of Psychotherapy for Gender Dysphoria* at 1, ARCHIVES OF SEXUAL BEHAVIOR (Oct. 21, 2020), <https://rdcu.be/b9AQi>. According to their analysis, “heeding [Dr. Turban’s] recommendations will limit access to ethical psychotherapy for individuals suffering from [gender dysphoria], further disadvantaging this already highly vulnerable population.” *Id.* at 1-2.

Indeed, even basic human biology or sex education classes would meet Dr. Turban’s definition of GICE. Taken to its logical conclusion, his approach would require public education officials to give a dysphoric adolescent inaccurate information about their body and sexual health in order to “affirm” their identity. Such an approach would deprive *all* students of accurate knowledge in hopes it would avoid distress for a few students.

Dr. Turban’s advocacy is only aimed at favorable mental health outcomes if a patient’s transgender identity is “affirmed.” His

testimony to the district court was given as a “mental health researcher,” ER250, ¶ 4, yet he recently wrote an article for Scientific American arguing *against* mental health research into causes of gender dysphoria and transgender identity. Jack Turban, *The Disturbing History of Research into Transgender Identity*, Scientific American, Oct. 23, 2020, <https://www.scientificamerican.com/article/the-disturbing-history-of-research-into-transgender-identity/>. Dr. Turban ignores the harms caused by “affirmation-only” therapy for the growing number of patients who “feel deeply traumatized by inappropriate transitions.” *One Size Does Not Fit All* at 2. That is particularly troubling because the survey that forms the basis of his research (and his declaration in this case) intentionally disqualified responses from those whose gender dysphoria desists or who “detransition,” and would therefore have benefitted from agenda-free care. *Id.* Dr. Turban’s belief in the gendered soul relies on affirmation just as much as a person who identifies as transgender, thus he denounces even neutral, ethical treatments for gender dysphoria that may secondarily result in desistance from a transgender identity. *Id.*

C. Subjective psychological distress is not a valid legal basis for diminishing protections for women under sex-based civil rights law.

Subjective distress about one's sex has never previously served to define a class of persons protected under civil rights laws. Yet the ruling below ostensibly ends single-sex sports based in part on the largely self-reported propensity of an ill-defined class of individuals to threaten or engage in self-harm. ER063. No law justifies or requires this result.

Plaintiffs contend that doctors essentially “prescribe” the legal remedy they seek: that transgender-identifying males must be permitted to play on girl's and women's sports teams as part of the treatment for gender dysphoria. ER263-64 ¶ 28. The district court's preliminary injunction order went along with that approach, placing on women and girls the burden of giving up athletic and education opportunities supposedly to “treat” male students' mental health needs. The district court did not and cannot identify any legal authority for conscripting women's athletic programs to provide mental health treatment for males.

Setting aside the legal infirmity of that approach, WPATH's extensive guidelines on treatment of dysphoria do not support a court

ruling compelling other people or institutions to behave in a certain way or to act as if the patient's subjective feelings and claims about his gender identity are literally true. On the contrary, WPATH recommends therapeutic techniques focused on building resilience as a means of reducing depression and anxiety. WPATH Standards at 29. The American Psychological Association defines resilience as "the process of adapting well in the face of adversity... or significant sources of stress" and further states that "resilience involves behavior, thoughts, and actions that anyone can learn and develop." American Psychological Association, *Building Your Resilience*, (2012), <https://www.apa.org/topics/resilience>.

Single-sex sports exist for a reason and are critical to women's equality in athletics. If athletes have distress due to the legally permissible sex-segregation in sports, then per official WPATH guidelines the appropriate treatment path would be to learn coping skills and seek social support to manage these feelings.

II. WOMEN AND GIRLS ARE DISADVANTAGED ON THE BASIS OF SEX; THEY LOSE CRITICAL PROTECTIONS IF THE LAW FAILS TO RECOGNIZE THE FEMALE SEX-CLASS.

The biological distinction between men and women has been the criteria by which women have been discriminated against, excluded from public life, exploited, enslaved, sexually abused, and disenfranchised all throughout history. Women are not asked how they identify or how they see themselves before they experience these things. Women's feelings are wholly irrelevant to their condition and standing in this world.

A. The cultural, legal, and physical barriers to athletic participation for women are based on their biological sex.

For many, from the moment she is identified as female at or before birth, a girl enters a pipeline of disparate treatment from her family, community, and the law. In families with limited resources, a son may receive higher quality nutrition and better health care than a daughter. A male child is more likely to attend school, and less likely to be withdrawn by his family before graduation. In no country on earth is he denied – on account of his sex – the right to vote, to work, to own property, to move about society, or to speak his mind freely. In

contrast, girls do not have the same advantageous treatment. Even in the U.S., despite ostensible legal equality between the sexes, there are still significant disadvantages to being born female, including many barriers to women's participation in sports. Women's Sport and Fitness Foundation, *Barriers to sports participation for women and girls*, (2008), <https://www.lrsport.org/uploads/barriers-to-sports-participation-for-women-girls-17.pdf>.

Practical barriers include lack of funding (including low pay for female athletes and many fewer sponsorship opportunities), personal safety, transportation, and facilities access. *Id.* Cultural barriers include religious constraints on "modesty," negative messaging from parents and other adults, and ideas about femininity and competition. *Id.* See also Women's Sports Foundation, *Chasing Equity: The Triumphs, Challenges and Opportunities in Sports for Girls and Women*, (2020) <https://www.womenssportsfoundation.org/wp-content/uploads/2020/01/Chasing-Equity-Executive-Summary.pdf>. One particularly insidious barrier is sexual harassment and abuse from coaches and officials. One advocacy group reported that some girls and

women drop out in response to abuse, and others endure it for the sake of competing, or because of fear, low self-esteem, or isolation. *Id.*

As of 2020, girls in American high schools and colleges still participate in sports at a rate 7-10% lower than boys, and 87% of NCAA schools offered more and higher-quality athletic opportunities to male students. *Id.* Coaches face barriers of their own: 31% of female coaches believed they would risk their job if they spoke up about Title IX and sex-based disparities, 60% reported being paid less than male coaches, and 63% reported facing sex discrimination in the workplace. *Id.*

There has been significant discussion of the differences between men and women in areas such as size, speed, and strength, which necessitate single-sex teams for safety and fair play. But girls and women have additional physiological challenges. Female athletes are far more prone to severe injury even in single-sex competition, especially during the first few weeks of their menstrual cycle. Jason D. Vescovi, *The Menstrual Cycle and Anterior Cruciate Ligament Injury Risk*, Sports Medicine 41, 91-101 (2011). They are also vulnerable to a condition called Female Athlete Triad, which causes osteoporosis, increases in fractures, and psychological issues such as depression,

anxiety, body dysmorphia, and eating disorders. Committee on Adolescent Health Care, *Female Athlete Triad*, American College of Obstetricians and Gynecologists, Committee Opinion No. 702 (June 2017), <https://www.acog.org/en/Clinical/Clinical%20Guidance/Committee%20Opinion/Articles/2017/06/Female%20Athlete%20Triad>. Male athletes lack the same vulnerabilities and thus enjoy a significant competitive advantage over female athletes.

Girls contend with female biological functions even in peak health. Most menstruate once they reach puberty, which can cause monthly disturbances in training schedules and impair performance, particularly if the athlete experiences common symptoms such as premenstrual dysphoric disorder, pain, or heavy bleeding. Rebekka J. Findlay, *How the menstrual cycle and menstruation affect sporting performance: experiences and perceptions of elite female rugby players*, British Journal of Sports Medicine, Vol. 54, Issue 18 (2020), (reporting that three quarters of elite rugby players and half of elite female runners and rowers report that menstrual symptoms adversely affected

their performance). Women can get pregnant, intentionally or not, which can disrupt their participation and even their careers.

With all of this in mind, it is important to remember two facts. One, a male athlete's self-identification as female does not subject him to this same myriad of obstacles female athletes face, so he retains an innate competitive advantage regardless of his subjective identity claims. Two, a female athlete does not escape any of these obstacles, nor does she gain any competitive advantage, by self-identifying as male.

The district court stated that the purpose of Title IX (redressing historic discrimination against women) does not apply to transgender athletes, because they too are a disadvantaged group. ER064. Many men are members of disadvantaged groups due to characteristics such as race, ethnicity, disability, or socio-economic class. Nonetheless, this fact does not entitle individual men to special treatment under legally-permissible programs and policies established to address and prevent sex discrimination. Women's disadvantage – as a class – stems from their sex.

B. Sex stereotyping is not a permissible basis for sports segregation.

Sex is a permissible basis by which most sports can be segregated, because the substantial, enduring physical differences in male and female physiology (and attendant competitive advantage conferred on males) means that the sexes are “not similarly situated in certain circumstances.” *Michael M. v. Superior Court*, 450 U.S. 464, 469 (1981); *United States v. Virginia*, 518 U.S. 515, 533 (1996). Conversely, if there were no innate competitive advantages associated with male physiology, then all sex-segregation in sports would be legally questionable.

Despite being well-settled law, Plaintiffs seek a declaration from the court that exclusively female teams are no longer permissible under law; that they must include males with a “feminine” gender expression or identity. This is directly contrary to the spirit and letter of Title IX and the Equal Protection Clause, under which sex stereotyping has long been recognized as a form of prohibited sex discrimination. As noted by the district judge, courts are not compelled by the Equal Protection Clause to disregard sex differences. ER063, citing *Michael M.*, 450 U.S. at 481; *See also Clark* at 1131. Segregating sports by masculine and

feminine sex stereotypes is no more permissible or logical than segregating by race or sexual orientation.

C. Gender identity advocates seek to open female athletics to any male, with no requirement for cross-sex hormones or a female self-identity.

Although the value and logic of single-sex sports are almost universally recognized, advocates for gender identity ideology inadvertently challenge the entire foundation of single-sex sports in order to justify unfettered access of male athletes to female teams.

A document called “Schools In Transition: A Guide for Supporting Transgender Students in K-12 Schools” was created and widely distributed by several professional organizations including the ACLU and the Human Rights Campaign. Orr, 2015, *supra*. This guide instructs schools to permit male students to play on girls’ sports teams “without posing additional requirements.” *Id.* at 24. It tells schools that “there is no reason to doubt the sincerity” of a male athlete who asserts a transgender identity to compete against females and they should be allowed to do so with no restrictions at all. *Id.* at 28. It informs schools that requiring male athletes to take hormones to “participate in [female] sports is inappropriate.” *Id.* (On this *Amicus* agrees, only

because it is inappropriate for *any* person to be given medically-unnecessary and harmful exogenous hormones for the purpose of creating a more “feminine” or “masculine” superficial appearance.)

In justifying this position, they misappropriate concerns about sexism toward women, describing single-sex athletics as “grounded in sex stereotypes about the differences and abilities of males versus females.” *Id.* Plaintiffs echo this in stating that the Title IX regulations (which protect women’s safety and athletic opportunity) are “based on unwarranted . . . [romantic] paternalism.” Memo. in Supp. of Pltfs’ Mot. for Prelim. Injunct., ECF No. 22-1 at 20 Indeed, Schools In Transition claims that mixed-sex teams do not pose any safety risks to female athletes, since “the safety rules of each sport are designed to protect players of all sizes and skill levels.” *Schools in Transition* at 28. Incredibly, schools are also told by these advocacy groups that they are prohibited from telling the female athletes (or their parents) that they will be competing against male athletes. *Id.* at 27.

Gender identity advocates also believe that male athletes should be able to compete as female even if they do not self-identify as female—so long as they claim not to identify as male. These

organizations argue that people who claim atypical gender identities must be allowed to choose how their sex is treated under the law, and have won some legal victories toward that end. *In the Matter of Jones David Hollister*, 470 P.3d 436, 439 (Or. Ct. App. 2020) (in which the court ruled that a state statute permitting individuals to change the sex designation on their legal documents must allow those who identify as “non-binary” to choose male, female, or non-binary). The court noted that the statute’s previous requirement for medical “transition” was rescinded, thereby “shifting the focus away from physical anatomy to affirming gender identity.” *Id.* at 443.

This reflects a quasi-spiritual belief in the supremacy of a gendered soul, and the comparative irrelevance of the physical body. Dr. Turban echoes this in his declaration, calling sex-segregated teams “unsafe and unethical” for males who self-identify as female, even those who take no cross-sex hormones (and are thus physiologically identical to any other male, with all incumbent athletic advantage). ER263, ¶ 27 n.23. Dr. Turban does not consider how unsafe and unethical it is to force females to choose between competing against males or not competing at all. Physical safety and fair play for girls are simply

obstacles to the emotional fulfillment of male athletes. This directly conflicts with statutory and constitutional provisions which do recognize the existence of a female body – and must do so in order to continue these protections.

D. Challenging the use of sex-based language in the law is a strategy used to intentionally hinder women’s ability to defend their rights.

The 21st century has introduced a new challenge in defending equality: expunging the female sex-class in language and in the law. Plaintiffs seek to redefine “female” to include members of both sexes and redefine “sex” to mean one’s state of mind instead of one’s reproductive class. The advocacy group Gender Spectrum promotes this practice, observing that “the power of language to shape our perceptions of other people is immense.” Gender Spectrum, *The Language of Gender*, <https://www.genderspectrum.org/articles/language-of-gender> (last visited Nov. 1, 2020). Though some judges have chosen to use “preferred” pronouns, there is absolutely no basis in law for a court to *compel* their use by another party. *United States v. Varner*, 948 F.3d 250, 254 (5th Cir. 2020) (“no authority supports the proposition that we may require litigants, judges, court personnel, or anyone else to refer to

gender-dysphoric litigants with pronouns matching their subjective gender identity.”).

Still, the district court directed Intervenors to avoid using male pronouns or the words “male” or “man” to refer to Lindsay Hecox.

ER029. Though this choice was ostensibly motivated by “civility,” the district court acknowledged the Plaintiffs’ true motive for the request: concern that Intervenors’ use of *accurate* language would “prejudice the adjudication of their claims” because so-called “misgendering tactics... will delay and impair efficient resolution.” ER027. Plaintiffs understand that striking all references to Lindsay’s sex increases the chances the court will endorse the notion that biological sex is irrelevant to sports if the person feels they have a feminine “gender identity.”

Plaintiffs’ linguistic strategy worked. Though the district court contended that it was not a factual or legal finding, the prejudicial effect is nonetheless evident in the determination that excluding men and boys from women’s sports is an “invalid interest” if they claim to self-identify as female. ER079; *see also* ER028 (citing *Lynch v. Lewis*, 2014 WL 1813725, at *2 n.2 (M.D. Ga. May 7, 2014) This is precisely the

outcome the 5th Circuit appropriately sought to avoid, for “if a court were to compel the use of particular pronouns... it could raise delicate questions about judicial impartiality... the court may unintentionally convey its tacit approval of the litigant’s underlying legal position.” *Varner*, 948 F.3d at 256.

This compelled speech has irretrievably impacted the record, which now – rife with feminine pronouns and references to Lindsay as female – will unavoidably influence how a neutral arbiter perceives the arguments. The 9th Circuit should follow the 5th Circuit’s lead on the issue of compelled pronouns by “declin[ing] to enlist the federal judiciary in this quixotic undertaking.” *Id.* at 258.

III. *BOSTOCK* DOES NOT PROVIDE RELEVANT OR PERSUASIVE AUTHORITY IN THIS CASE.

The Supreme Court recently decided in *Bostock v. Clayton Cty., Georgia* that “for an employer to discriminate against employees for being homosexual or transgender, the employer must intentionally discriminate against individual men and women in part because of sex,” and that doing so is a violation of Title VII of the Civil Rights Act. 140 S. Ct. 1731, 1743 (2020). Applying the *Bostock* decision to this case would be a significant error, and the 9th Circuit should not strain to

extend whatever principle the Supreme Court aimed to establish in *Bostock* to the setting of school athletics.

A. The Court was explicit that the holding is narrow and is not meant to be applied to other civil rights laws.

Bostock narrowly addressed only the issue of firing an employee who asserts a transgender status. The Court rejected any suggestion that the holding applied to other state or federal sex discrimination laws, saying: “none of [them] are before us; we have not had the benefit of adversarial testing about the meaning of their terms, and we do not prejudge any such question today.” *Bostock* at 1753.

A narrow interpretation of *Bostock* is further supported by the record. Justice Ginsburg asked Plaintiff’s counsel during oral arguments whether his arguments extended to permissible sex segregation in athletics under Title IX, and counsel responded that it: “would not be affected even by the way that the Court decides this case.” Oral Arg. Tr., *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC*, No. 18-107, at 17-18, available at https://www.supremecourt.gov/oral_arguments/argument_transcripts/2019/18-107_c18e.pdf. Since neither the Plaintiffs nor the Court

attempted to address Title IX in that decision, a broad construction of *Bostock* extended unreservedly to Title IX is completely unsupported.

B. Title IX regulations permit differential treatment of the sexes to achieve equal opportunity for girls and women.

The logic used in the *Bostock* decision is this: The employee's sex in that case was generally not relevant to employment decisions under Title VII, so self-identification as the opposite sex was also not relevant to employment decisions. *Bostock* at 1737. In contrast, an athlete's sex is expressly relevant under Title IX regulations, which in some cases *require* differential treatment on the basis of sex in order to assure equal *opportunity*. 34 C.F.R. 106.41(b). The Plaintiffs' argument that sex should be determined by a person's internal sense of their own identity is antithetical to the reasoning behind single-sex teams. *Id.*

The U.S. Department of Education's Office of Civil Rights (OCR) recently affirmed in a Revised Letter of Impending Enforcement Action (relating to a separate matter) that *Bostock* is inapplicable to Title IX athletics, stating:

The logic that an employer must treat males and females as similarly situated comparators for Title VII purposes necessarily relies on the premise that there are two sexes, and that the biological sex of the individual employee is necessary

to determine whether discrimination because of sex occurred. Where separating students based on sex is permissible—for example, with respect to sex-specific sports teams—such separation must be based on biological sex.

In re. Connecticut Interscholastic Athletic Conference, et al, Case No. 01-19-4025 (Aug. 31, 2020) (“Revised OCR letter”) at 35,

<https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/01194025-a2.pdf>. OCR stated further that, if *Bostock* does apply,

then under the logic of that case:

[S]pecial exceptions from single-sex sports teams based on homosexuality or transgender status would themselves generally constitute unlawful sex discrimination, because homosexuality and transgender status are not physiological differences relevant to the separation of sports teams based on sex. In other words, if *Bostock* applies, it would require that a male student-athlete who identifies as female not be treated better or worse than other male student-athletes. If the school offers separate-sex teams, the male student-athlete who identifies as female must play on the male team, just like any other male student-athlete.

Id. at 36.

Moreover, the court in *Bostock* failed to define “transgender” in any meaningful way beyond a person’s assertion that they have a gender identity at odds with their sex. The court reasoned that merely self-identifying as a woman – if a plaintiff alleges that identification was the basis for termination of employment – is sufficient to provide

protection from termination. *Bostock* at 1741. The Court thus did not find it necessary to define what it means to be “transgender” beyond that lowest of etymological bars.

C. *Bostock* did not implicate the rights of other individuals under Title VII in the same manner that the decision below infringes on the rights of women and girls under Title IX.

A critical difference between the provisions of Title VII at issue in *Bostock* and the provisions of Title IX at issue here makes them inapposite: Unlike the harms that would flow from reinterpreting Title IX to prohibit single-sex athletic competitions, extending protection on the basis of “gender identity” in *Bostock* did not violate another employee’s rights under Title VII.

Similarly, restoring a transgender-identified plaintiff’s position with the Georgia General Assembly’s Office of Legislative Counsel under the Equal Protection Clause, as in *Glenn v. Brumby*, 663 F.3d 1312, 1316-19 (11th Cir. 2011), did not infringe the Equal Protection rights of anyone else. Holding that a fire department’s adverse employment action on the basis of transgender identity was cognizable under Title VII, as in *Smith v. City of Salem*, 378 F.3d 566, 573-75 (6th Cir. 2004), did not violate anyone else’s Title VII rights. Deciding that

refusal to give a cross-dressing man a loan application was discrimination “on the basis of sex” under the Equal Credit Opportunity Act, as in *Rosa v. Park W. Bank & Trust Co.*, 214 F.3d 213, 215-16 (1st Cir. 2000), did not violate anyone else’s rights to equal credit opportunity. And applying the Gender Motivated Violence Act to an attempted rape by a prison guard of a prisoner who identified as transgender, as in *Schwenk v. Hartford*, 204 F.3d 1187, 1201-02 (9th Cir. 2000), did not infringe on anyone else’s rights under that Act.

But Title IX is different. Congress enacted Title IX as a remedial statute for the benefit of women. Granting Title IX rights to men who self-identify as women necessarily violates the rights Congress gave women in this law.

CONCLUSION

If the words “women” and “girls” and “female” have no clear meaning; if women and girls do not face barriers to athletic participation because of their sex; if women and girls would have the same opportunity for safe, fair play on co-ed sports teams; if women are

not a discrete legally-protectable category, then one might rightly wonder why the Title IX regulations exist in the first place.

The outcome of this case is a statement on whether the Ninth Circuit will honor the plain text and original intent of Title IX, which is to prohibit discrimination on the basis of sex. Women and girls deserve more than what the district court's ruling gives them, and we urge the Court to overturn the preliminary injunction and to reverse the district court's prejudicial decision to compel speech from the Appellants.

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), the undersigned certifies that this *amicus* brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B). Exclusive of the sections exempted by Fed. R. App. P. 32(f), the brief contains 6,679 words, according to the word count feature of the software (Microsoft Word Version 2010) used to prepare the brief. The brief has been prepared in proportionately spaced typeface using Century Schoolbook 14 point.

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CERTIFICATE OF SERVICE

I hereby certify that on November 19, 2020, I electronically filed the foregoing Brief Of *Amicus Curiae* Women's Liberation Front In Support Of Plaintiff-Appellant And Reversal with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the CM/ECF system, which will accomplish service on counsel for all parties through the Court's electronic filing system.

Dated: Nov. 19, 2020

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