UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE KNOXVILLE DIVISION

STATE OF TENNESSEE, *et al.*, *Plaintiffs*, v. **U.S. DEPARTMENT OF EDUCATION,** *et. al.*, *Defendants.*	Case No. 3:21-cv-00308 **MOTION FOR LEAVE TO FILE *AMICUS* BRIEF**

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF PLAINTIFFS

Amicus Curiae the U.S. Chapter of the Women's Human Rights Campaign (WHRC USA) hereby moves for leave to file an *amicus* brief in support of Plaintiffs' Complaint for Declaratory and Injunctive Relief.

Founded in 2020, WHRC USA is the U.S. chapter of the global Women's Human Rights Campaign (WHRC). WHRC is a group of volunteer women from across the globe dedicated to protecting women's sex-based rights. WHRC includes academics, writers, organizers, activists, legal professionals, artists, and health practitioners, among others, and aims to represent the breadth of the human female experience. The founders of the WHRC created the Declaration on Women's Sex-Based Rights (Declaration)[1] to lobby nations to maintain language protecting women and girls on the basis of sex rather than "gender" or "gender identity." The Declaration has been signed by over 20 thousand people across the world, including over 3000 residents of

[1] Declaration on Women's Sex-Based Rights, www.womensdeclaration.com (last visited October 25, 2021).

the U.S., many of whom reside within the Sixth Circuit. WHRC USA filed an *amicus* brief before the Ninth Circuit the matter of *Hecox v. Little*, which is currently pending before the U.S. District Court for the District of Idaho to determine factual questions related to mootness (9CA No. 20-35815, D.C. No. 1:20-cv-00184-DCN Document 43 Filed 11/19/2020).

WHRC USA supports the claims and arguments set forth in the Complaint for Declaratory and Injunctive Relief and seeks to argue further that this matter presents novel constitutional questions in that the executive actions that are the subject of the Complaint constitute unconstitutional sex discrimination under Equal Protection Clause of the 14th Amendment. These arguments can most effectively be presented for the Court's consideration via an *amicus* brief.

Dated: October 26, 2021

Respectfully Submitted,

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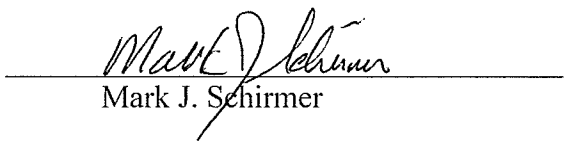

Mark J. Schirmer

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE KNOXVILLE DIVISION

STATE OF TENNESSEE, *et al.,*	)	
	)	
Plaintiffs,	)	
	)	Case No. 3:21-cv-00308
v.	)	
	)	
U.S. DEPARTMENT OF EDUCATION, *et. al.,*	)	***AMICUS CURIAE* BRIEF**
	)	
Defendants.	)	
	)	

AMICUS CURIAE BRIEF ON BEHALF OF WOMEN'S HUMAN RIGHTS CAMPAIGN USA

Amicus Women's Human Rights Campaign USA (WHRC USA) hereby submits this *amicus* brief in support of Plaintiff's Complaint for Declaratory and Injunctive Relief. WHRC USA supports the claims and arguments set forth in the Complaint for Declaratory and Injunctive Relief and argues further that this matter presents novel constitutional questions in that the executive actions that are the subject of the Complaint likely constitute unconstitutional sex discrimination under Equal Protection Clause of the 14th Amendment.

INTRODUCTION AND STATEMENT OF INTEREST

Founded in 2020, WHRC USA is the U.S. chapter of the global Women's Human Rights Campaign (WHRC). WHRC is a group of volunteer women from across the globe dedicated to protecting women's sex-based rights. WHRC includes academics, writers, organizers, activists,

legal professionals, artists, and health practitioners, among others, and aims to represent the breadth of the human female experience. The founders of the WHRC created the Declaration on Women's Sex-Based Rights (Declaration) to lobby nations to maintain language protecting women and girls on the basis of sex rather than "gender" or "gender identity."[1] The Declaration has been signed by over 20 thousand people across the world, including over 3000 residents of the U.S., many of whom reside within the Sixth Circuit. WHRC USA filed an *amicus* brief before the Ninth Circuit the matter of *Hecox v. Little*, which is currently pending before the U.S. District Court for the District of Idaho to determine factual questions related to mootness (9th Circuit No. 20-35815, D. Idaho No. 1:20-cv-00184-DCN Document 43 Filed 11/19/2020).

The orders and memos that are the subject of this litigation are procedurally flawed, grossly misinterpret the U.S. Supreme Court's decision in *Bostock v. Clayton County*, 590 U.S. ___ (2020), and threaten plaintiffs' constitutional rights for all of the reasons set forth in the Complaint for Declaratory and Injunctive Relief. WHRC USA further asserts that they impair the right of women and girls to equal protection under the law by redefining sex to include so-called "gender identity" in a manner that ignores the material reality of biological sex and the fact that women and girls exist as a distinct class of persons who are entitled to equal protection.

[1] Declaration on Women's Sex-Based Rights, www.womensdeclaration.com (last visited October 25, 2021).

ARGUMENT

1. The Orders and Memos Implicate the Equal Protection Clause of the 14th Amendment, which Prohibits Unlawful Discrimination on the Basis of Sex

It is beyond dispute that women and girls are entitled to equal protection of the laws on the basis of sex under the Equal Protection Clause of the 14th Amendment. This question was settled in 1971 by the Supreme Court in the matter of *Reed v. Reed*, where an Idaho statute expressly granted males a legal advantage over females in the administration of probate estates. *See Reed v. Reed*, 404 U.S. 71 (1971).[2]

The Idaho law in question stated the "[a]dministration of the estate of a person dying intestate must be granted to some one or more of the persons hereinafter mentioned, and they are respectively entitled thereto in the following order:

1. The surviving husband or wife or some competent person whom he or she may request to have appointed.

2. The children.

3. The father or mother. . . "

It then went on to state: "Of several persons claiming and equally entitled to administer, *males must be preferred to females*, and relatives of the whole to those of the half blood." (emphasis added). *See Reed*, 404 U.S. at 72 n.2 and 73.

The parties were Sally and Cecil Reed, the parents of Richard Reed, who had died intestate. Because Richard had no spouse or children, the administration of his estate would fall to either Sally or Cecil, and because of the provision of the law preferring males over females, the probate court granted the privilege to Cecil. Sally filed suit. Cecil prevailed throughout the

[2] See also *Craig v. Boren*, 429 U.S. 190 (1976) and *U.S. v. Virginia*, 518 U.S. 515 (1996).

lower courts, but the Supreme Court eventually ruled that the Idaho law unconstitutionally deprived Sally of her right to equal protection of the law on the basis of sex. In its ruling, the Supreme Court stated that "[t]he objective of [the applicable law] clearly is to establish degrees of entitlement of various classes of persons in accordance with their varying degrees and kinds of relationship to the intestate. Regardless of their sex, persons within any one of the enumerated classes of that section are similarly situated with respect to that objective. By providing dissimilar treatment for men and women who are thus similarly situated, the challenged section violates the Equal Protection Clause." *Id.* at 77.

It is not an exaggeration to say that our society is in the midst of a crisis when it comes to understanding sex and gender, and this litigation presents this Court with an opportunity to set the record straight. Sex is nothing other than "the distinction between male and female" or "the property or character by which an animal is male or female." *Black's Law Dict.* "Sex." Gender, on the other hand, is defined as a "difference between men and women based on culturally and socially constructed mores, politics, and affairs." *Black's Law Dict.* "Gender." Gender is literally defined as being *in contrast to* "the biological sex of a living creature." *Id.* (emphasis added).

The orders and memos that are the subject of the Complaint turn all of this plain meaning on its head by defining sex to include "gender identity." They make "gender identity" a subcategory of sex. By doing so, they simply ignore the material reality of sex and the fact that every single human being is immutably, observably, and innately either female or male, regardless of any individual person's subjective identity. In other words, the orders and memos in question insist that the plaintiffs define sex in a manner that ignores the material reality of sex.

It is perfectly obvious that the Idaho law blatantly and explicitly expressed a preference for male people over female people on the basis of sex and the Supreme Court eventually

rightfully held that this violated the constitution. So-called "gender identity" had nothing to do with it. If "gender identity" were in fact a subcategory of sex, Sally Reed could simply have saved everyone a lot of time and declared to the probate and higher courts that she had the right to a preference in administering Richard's estate because she "identified as male."

Enshrining the vague notion of "gender identity" in the law is disruptive to the very idea of suspect classes, which have thus far been based on immutable, observable, and innate traits, of which sex is one. Sally Reed's legal team, which included the late Justice Ruth Bader Ginsburg, persuaded the Supreme Court to protect women and girls on the basis of sex in part by noting that "[s]ex, like race and lineage, is an immutable trait, a status into which the class members are locked by the accident of birth." Brief for Appellant at 20, *Reed v. Reed*, 404 U.S. 71 (1971).[3]

It is important, both legally and socially, to acknowledge that women and girls make up a distinct sex class and have been historically discriminated against precisely on that basis. As stated in the brief filed in the Supreme Court on behalf of Sally Reed:

> In very recent years, a new appreciation of women's place has been generated in the United States. Activated by feminists of both sexes, courts and legislatures have begun to recognize the claim of women to full membership in the class "persons" entitled to due process guarantees of life and liberty and the equal protection of the laws. But the distance to equal opportunity for women—in the face of the pervasive social, cultural and legal roots of sex-based discrimination—remains considerable. In the absence of a firm constitutional foundation for equal treatment of men and women by the law, women seeking to be judged on their individual merits will continue to encounter law-sanctioned obstacles.

Id. at 10.

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[3] *Document 20: Melvin L. Wulf, Ruth Bader Ginsburg, Allen R. Derr, Pauli Murray, and Dorothy Kenyon, Brief for Appellant, Reed v. Reed, no. 70-4 (1971).* In *How and Why Was Feminist Legal Strategy Transformed*, 1960-1973? (Binghamton, NY: State University of New York at Binghamton, 2007), available at https://documents.alexanderstreet.com/d/1000675826 (last visited October 24, 2021).

The argument, as valid today as it was in 1971, was that the Equal Protection Clause protects women and girls on the basis of sex because women and girls had historically been discriminated against on that very basis. The Supreme Court explicitly ruled that sex-based discrimination was subject to legal scrutiny. This Court should uphold this legacy by clarifying that sex cannot constitutionally be redefined to include "gender identity" because that would eliminate women and girls as a sex class. We cannot pretend that sex-based oppression, both historical and contemporary, does not exist by simply ignoring the fact that women and girls exist as a coherent category of people.

Notably, in arguing that the Equal Protection Clause protects women and girls as a sex class, Sally Reed's legal team reminded the Supreme Court that equal *legal* rights for women and girls need not, and constitutionally *must not*, come at the expense of the *privacy* rights of women and girls:

> The "separate restroom" canard continues to be invoked as justification for perpetuation of "a sharp line between the sexes." E.g., Amending the Constitution to Prohibit State Discrimination Based on Sex, 26 The Record of the Association of the Bar of the City of New York 77, 80 (1971). This Court's recognition of the fundamental right to personal privacy in *Griswold* v. *Connecticut*, 381 U.S. 479 (1965), indicates that separate restrooms are not in jeopardy. The basic interest shared by members of both sexes in personal privacy surely justifies, and may even require, separation of the sexes in restrooms, sleeping quarters in prisons and other public institutions, separate living quarters for male and female members of the Armed Forces, police practices by which the search of a woman can be conducted only by another woman, and the search of a man only by another man. See T. Emerson, In Support of the Equal Rights Amendment, 6 Harv. Civ. Rts. Civ. Lib. L. Rev. 225, 231-32 (1971).

Id. at 19, n.13. The attorneys representing Sally Reed might be shocked to learn that the defendants are effectively, in fact, subjecting women and girls (and men and boys, for that matter) to precisely such privacy violations by ignoring that sex is a coherent category at all.

Unlike sex, which is biological and grounded in material reality, so-called "gender identity" is simply an idea in a person's head about whether the person belongs to a particular sex class or to none at all. To the extent that "gender identity" is even real (which is a topic of much debate in society today), it is entirely subjective. Prominent clinicians and organizations also assert that a person's subjective sense of "gender identity" can be fluid and change over the course of a lifetime. Jack Turban, a child psychiatry fellow at Stanford University who has co-written a textbook on pediatric gender identity, assured his followers on social media that "All gender identities are valid. *Including those that change over time*." (emphasis added).[4] The supposed fluidity of "gender identity" renders it completely at odds with the immutable nature of protected classes such as sex, race and lineage.

The orders and memos that are the subject of this litigation threaten to topple the Equal Protection Clause's entire edifice of sex-based legal protections for women and girls by completely redefining sex to include "gender identity."

2. The Orders and Memos Fail Under Intermediate Scrutiny

To survive an Equal Protection challenge, a distinction based on sex must satisfy intermediate scrutiny, which requires demonstrating that the distinction is substantially related to an important government interest. *See Vitolo, et al. v. Guzman*, 999 F.3d 353, [NEED PIN CITE] (6th Cir. May 27, 2021), citing *United States v. Virginia*, 518 U.S. 515, 524 (1996); *Craig v.*

[4] Jack Turban (@jack_turban), Twitter (Aug. 27, 2021, 10:00 AM), https://twitter.com/jack_turban/status/1431255190376697857. *See also* Jack Turban MD MHS, *Stanford Profiles*, https://profiles.stanford.edu/jack-turban (last visited October 25, 2021) ("Jack Turban MD MHS is a researcher, medical journalist, and chief fellow in child and adolescent psychiatry at Stanford University School of Medicine. He is co-editor of the book Pediatric Gender Identity: Gender-affirming Care for Transgender and Gender Diverse Youth.").

Boren, *supra* n.2. The orders and memos that are the subject of this litigation discriminate on the basis of sex by redefining sex altogether. The defendants have not presented a single legitimate government interest in obliterating the legal category of sex, so this Court need not even get to the question of whether the orders and memos are "substantially related" to such an interest.

Legislation need not explicitly favor males over females to deny women full protection of the law on the basis of sex. When courts are unable (or unwilling) to differentiate between men and women for the purposes of Equal Protection, women are rendered unable to remedy any discrimination based on female-specific biological functions such as pregnancy and breastfeeding. In *Ames v. Nationwide Mutual Insurance Company, et al.*, Angela Ames sued her former employer alleging sex and pregnancy discrimination under the Iowa Civil Rights Act and sex and pregnancy discrimination under Title VII of the Civil Rights Act of 1964. Ames was breastfeeding at the time of the suit and alleged she felt she "had no other choice" but to resign from her job in part because Nationwide failed to provide her with a sufficiently private and hygienic space to express milk while working. The United States District Court for the Southern District of Iowa rejected Ames's claim and, unfairly in our view, granted summary judgment on behalf of the employer, stating that "lactation is not a physiological condition experienced exclusively by women who have recently given birth" in part because "it is a scientific fact that even men have milk ducts and the hormones responsible for milk production." *Ames v. Nationwide Mutual Insurance Company, et al.* at [NEED PIN CITE] and [NEED PIN CITE], S.D. Iowa 4:11-cv-00359 RP-RAW (Oct. 16, 2012), *aff'd*, No. 12-3780 (8th Cir. 2014).

If sex is eliminated as a coherent category in law, all efforts to remedy past, present and future sex discrimination against women by way of the Equal Protection Clause will be ineffective due to the inability to differentiate between male and female. Sex-neutral analysis of

sex-specific issues such as pregnancy and breastfeeding simply denies women the protection afforded to them by the inclusion of "sex" as a suspect class in the Equal Protection Clause.

To date, the majority of cases dealing with the Equal Protection Clause's applicability to sex discrimination cases dealt with laws and policies that explicitly favored one sex over the other. In *Reed*, as discussed, it was a state law that stated an explicit preference for males over females in the administration of probate estates. In *Craig v. Boren*, *see supra* n.2, it was a state law that permitted women to consume beer at the age of 18 but restricted men to only be permitted to drink beer at the age of 21. In *U.S. v. Virginia*, *see supra* n.2, it was a public university's policy of allowing only males to matriculate. To be sure, we are dealing with a different question here, which is the legal obliteration of sex completely. To the best of our knowledge, no federal court has examined the applicability of the Equal Protection Clause to this exact situation.[5] This case thus presents this Court with an opportunity to address this important area of law and to determine whether the obliteration of sex as a coherent category is constitutional. We would argue that it is not.

3. A Preliminary Injunction is Needed to Protect Women and Girls on the Basis of Sex Nationally

The Court must consider four factors in determining whether a preliminary injunction should issue: (1) whether the moving party has shown a likelihood of success on the merits; (2)

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[5] *Meriwether v. Hartop,* 6th Circuit No. 20-3289 (2021) held that a public university professor could not constitutionally be compelled to use opposite-sex pronouns and titles for students in his classroom. *Hecox v. Little*, 9th Circuit No. 20-35815, D. Idaho No. 1:20-cv-00184-DCN; *Soule v. Conn. Assoc. of Sch.*, 2nd Circuit No. 21-1365, D. Connecticut No. 3:20-cv-00201-RNC; *Grimm v. Gloucester Cnty.*, S.Ct. No. 20-1163 (2021), *cert. denied*; and others have addressed related claims concerning various laws and policies that either expressly protect women and girls as a class or purpose to prevent discrimination on the basis of so-called "gender identity." To the best of our knowledge, no federal court has expressly addressed the question whether laws and policies that obliterate sex violate the Equal Protection Clause.

whether the moving party will be irreparably injured absent an injunction; (3) whether issuing an injunction will harm other parties to the litigation; and (4) whether an injunction is in the public interest. *Vitolo v. Guzman*, 999 F.3d at [NEED PIN CITE], citing *Nken v. Holder*, 556 U.S. 418, 434 (2009).

In constitutional cases, the first factor is typically dispositive. *Id.* at [NEED PIN CITE], citing *Roberts v. Neace*, 958 F.3d 409, 416 (6th Cir. 2020) (order) (per curiam). "When constitutional rights are threatened or impaired, irreparable injury is presumed." *Id.* at [NEED PIN CITE], quoting *Obama for Am. v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012). And no cognizable harm results from stopping unconstitutional conduct, so "it is always in the public interest to prevent violation of a party's constitutional rights." *Id.* at [NEED PIN CITE], quoting *Deja Vu of Nashville, Inc. v. Metro. Gov't of Nashville & Davidson Cnty.*, 274 F.3d 377, 400 (6th Cir. 2001) (citation omitted).

We believe that the question whether obliterating sex as a coherent category by redefining it to include "gender identity" is an important question of law that warrants consideration, and that a court considering that question would find that the argument has a clear likelihood of success on the merits because women and girls simply cannot be protected on the basis of sex if sex is redefined out of existence.

The defendants in this matter are not the only federal individuals or agencies that have taken steps to obliterate sex in the law. Since the promulgation of Executive Order 13988, several federal agencies have taken concrete action to obliterate sex. For example, on February 11, 2021, the Department of Housing and Urban Development (HUD) announced that it will interpret the Fair Housing Act in a manner that redefines sex to include gender identity for

housing purposes.[6] The memo was issued to: (1) the Office of Fair Housing and Equal Protection (FHEO); the Fair Housing Assistance Program Agencies (FHAP); and the Fair Housing Initiatives Program Grantees (FHIP). It did three things, retroactively to January 20, the day the President signed Executive Order 13988:

- Directed the FHEO to begin *immediately* accepting complaints alleging sex discrimination on the basis of "gender identity" in housing against any entity that is governed by the Fair Housing Act (which includes "nearly all housing, including private housing, public housing, and all housing that receives federal funding" according to HUD's website);
- Ordered all FHAP agencies to "explicitly prohibit discrimination because of gender identity … or … include prohibitions on sex discrimination that are interpreted and applied to include discrimination because of gender identity" (these are state and local agencies that administer fair housing laws); and
- Required all FHIP organizations to "interpret sex discrimination under the Fair Housing Act to include discrimination because of sexual orientation and gender identity." FHIP organizations are fair housing organizations and other non-profits that receive HUD funding to assist people who believe they have been victims of housing discrimination.

What all of this means is that there can effectively be *no* female-only housing – including domestic violence shelters, rape shelters, or college dormitories. If any housing entity covered by the Fair Housing Act (which is virtually all housing in the U.S.) wants to exclude a man and that man complains that he is being discriminated against on the basis of his self-proclaimed "gender identity," he is likely to prevail. Because, again, each of these agencies is now required to interpret the word sex in a manner that ignores biological sex.

[6] U.S. Department of Housing and Urban Development, "Memorandum: Implementation of Executive Order 13988 on the Enforcement of the Fair Housing Act" (February 11, 2021), https://www.hud.gov/sites/dfiles/PA/documents/HUD_Memo_EO13988.pdf (last visited October 25, 2021).

On May 10, 2021, the Department of Health and Human Services (HHS) announced that it will interpret and enforce Section 1557 of the Affordable Care Act (ACA) to redefine sex to include "gender identity."[7] That means that women will not be permitted to demand female health care providers for any gynecological care in any health care facility that is governed by the ACA. In doing so, HHS blatantly distorted language of the Affordable Care Act, which does not, in fact, define sex to include "gender identity." On its website, HHS states: "Section 1557 prohibits discrimination on the basis of race, color, national origin, sex (including sexual orientation and gender identity), age, or disability in covered health programs or activities." This is patently false. Section 1557 of the ACA makes no mention of "gender identity" whatsoever.

All of these administrative actions are grounded in a gross misrepresentation of the U.S. Supreme Court's decision in a case called *Bostock v. Clayton County*, as explained in the Complaint for Declaratory and Injunctive Relief. Very few Americans understand that this is happening. No federal agency is being honest with Americans about what these developments mean for women and girls. These agencies have simply stated that "gender identity" is something that needs to be protected in the law, without ever telling us what it means, or why it needs to be protected. What it means is the complete obliteration of sex in the law and the annihilation of the rights, privacy, and safety of women and girls. Americans deserve to be told the truth. Our society has simply not grappled with the implications of enshrining words like "gender identity" in law and policy. The time to do that is now.

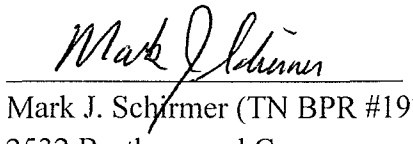
CONCLUSION

[7] U.S. Department of Health and Human Services, "HHS Announces Prohibition on Sex Discrimination Includes Discrimination on the Basis of Sexual Orientation and Gender Identity" (May 10, 2021), https://www.hhs.gov/about/news/2021/05/10/hhs-announces-prohibition-sex-discrimination-includes-discrimination-basis-sexual-orientation-gender-identity.html (last visited October 25, 2021).

In conclusion, the defendants' orders and memos threaten to topple the entire edifice that the U.S. judiciary has built to protect the equal rights of women and girls as a sex class under the Equal Protection Clause of the 14th Amendment. This Court must act to prevent that by issuing the declaratory and injunctive relief the plaintiffs are requesting in this matter.

Dated: October 26, 2021

Respectfully Submitted,



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Stated under penalty of Perjury October 26, 2021

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