No. 24-38

IN THE

Supreme Court of the United States

BRADLEY LITTLE, GOVERNOR OF IDAHO, *et al.*,

Petitioners,

v.

LINDSAY HECOX, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICUS CURIAE* WOMEN'S DECLARATION INTERNATIONAL USA IN SUPPORT OF PETITIONERS AND REVERSAL

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INTRODUCTION AND INTEREST OF *AMICUS CURIAE*[1]

Women's Declaration International (WDI, of which WDI USA is one chapter) is an all-volunteer global organization of women who fight to protect women and girls as a sex class. We are made up of women from every walk of life—from law and government to the hard sciences, the culture-shaping professions, and the nation-building trades. We are lesbians, straight women, and bisexual women. We are mothers and child-free women. We are women of diverse races, ethnicities, and religions. Globally, we are more than 38,000 individuals and 518 organizations from 160 nations. But in our diversity we have a single message: Never again will we return to a world where women are defined by the patronizing, regressive, and oppressive stereotypes of gender, of which "gender identity" is one form.

WDI USA works to advance the Declaration on Women's Sex-Based Rights (the Declaration)[2] throughout U.S. law, policy, and practice. WDI USA is a nonpartisan organization, but its supporters generally consider themselves to be liberal, very liberal, or progressive. Of the roughly 6,500 U.S. signatories to the Declaration, around 30 percent are Democrats and 34 percent are Independents (many having left the Democratic Party, no

1. No counsel for a party authored this brief in whole or in part. No party or counsel for a party contributed money that was intended to fund preparing or submitting this brief. No person—other than WDI USA, its members, or its counsel—contributed money intended to fund preparing or submitting this brief.

2. Declaration on Women's Sex-Based Rts. (January 2019), https://www.womensdeclaration.com/en/.

doubt due to opposition to the Party's support for "gender identity"). Seven percent are Republicans and the rest are either unaffiliated or prefer not to say.

The Declaration reaffirms women's sex-based rights, including women's rights to reproductive integrity and the elimination of all forms of discrimination against women and girls that result from the redefinition of the category of sex to include "gender identity."[3] The Declaration contains nine Articles, two of which are relevant here: Articles VII and VIII. Article VII reaffirms women's and girls' rights to the same opportunities as men and boys to participate actively in sports and physical education, including the right to teams, competitions, facilities, and changing rooms that exclude men and boys, including men and boys who claim to have female "gender identities."[4] Article VIII calls for the elimination of all forms of violence against women, including the provision of single-sex spaces under certain circumstances, such as restrooms, showers, and changing rooms, and any other enclosed spaces where individuals are housed or may be in a state of undress. It maintains that such facilities should not include men and boys who claim to have female "gender identities."[5] The Idaho "Fairness for Women's Sports Act," *see* Idaho Code §§ 33-6201–06, is consistent with Articles VII and VIII of the Declaration.[6]

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3. *Id*., Introduction.

4. *Id*., Art VII.

5. *Id*., Art VIII.

6. "Interscholastic, intercollegiate, intramural, or club athletic teams or sports that are sponsored by a public primary or secondary school, a public institution of higher education, or any

WDI USA is interested in this appeal first because, as an organization, we cannot protect women and girls from sex discrimination, invasions of their sexual privacy, and violence against women and girls, if sex is redefined to mean an amorphous continuum of subjectively felt "genders" that may not be related to sex at all. Second, the ruling below is in direct conflict with two Articles of the Declaration—the primary tool we use to advocate on behalf of women and girls as a sex class. Third, the linguistic destabilization caused by the uncritical use of words like "transgender" (including in this Court's decision in *Bostock v. Clayton County*, 590 U.S. 644 (2020)) is producing massive confusion throughout society as well as in law, about what basic words like "women," "girls," "lesbians," "men," "boys," "sex," and "gender" mean, and WDI USA has expertise in how the Court can avoid such damaging and unnecessary confusion. In view of its work on these issues, WDI USA has a meaningful perspective to offer the Court.

SUMMARY OF ARGUMENT

This Court has an opportunity to rule on the related but distinct questions of (1) whether schools may, consistent with Title IX and the Equal Protection Clause of the Fourteenth Amendment, maintain single-sex sports teams and certain single-sex spaces; and (2)

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school or institution whose students or teams compete against a public school of institution of higher education shall be expressly designated as one (1) of the following based on biological sex: (a) Males, men, or boys; (b) females, women, or girls; or (c) Coed or mixed." Idaho Code § 33-6201–06(1); "Athletic teams or sports designated for females, women, or girls shall not be open to students of the male sex." Idaho Code § 33-6201–06(2).

whether states may, consistent with the same provisions of law, mandate that they do so. To be sure, only the latter question is directly implicated in this matter; however, should the Court elect to hear the matter, its decision will have implications for the former.

For years, the Federal Judiciary has been mired in litigation about these questions, a result predicted by Justice Alito in his dissent in *Bostock* (*Bostock*, 590 U.S. at __, Alito, J., dissenting) ("Although the Court does not want to think about the consequences of its decision, we will not be able to avoid those issues for long. The entire Federal Judiciary will be mired for years in disputes about the reach of the Court's reasoning."). However, although the questions have had a particular salience since that decision was issued, similar questions have been presented in numerous cases in the years before and after it was issued. *See*, *e.g.*, *Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518 (3d Cir. 2018), *cert. denied*; *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586 (4th Cir. 2020), *cert. denied; A.C. v. Metropolitan Sch. Dist. of Martinsville*, 75 F.4th 760 (7th Cir. 2023), *cert. denied.*

There are at least three reasons for granting *certiorari* in this case: (1) The nation's district and circuit courts are bitterly split on how those questions should be answered, causing confusion and chaos across the country; (2) At least seven district courts have ruled that recent administrative rule changes amending the Title IX regulations, *see* 34 C.F.R. Part 36, exceed the Department of Education's statutory authority or are otherwise unlawful (and one has gone in the other direction), and lower courts would benefit from this Court's guidance on the questions presented here; and (3) The ruling below

cements in the law the idea that sex either is not real or does not matter, in a manner that concretely harms women and girls as a sex class, using language that is inconsistent with material reality. *Amicus* urges this Court to grant petitioners' petition for *certiorari* and to reverse the Ninth Circuit's decision affirming the district court's grant of a preliminary injunction.

ARGUMENT

I. THE NATION'S DISTRICT AND CIRCUIT COURTS ARE BITTERLY SPLIT ON HOW THE QUESTIONS PRESENTED IN THIS MATTER SHOULD BE ANSWERED, CAUSING CONFUSION AND CHAOS ACROSS THE COUNTRY.

Several federal courts have ruled that schools may not maintain single-sex spaces under Title IX and the Constitution and/or that *Bostock* should be read broadly for various purposes. *See*, *e.g.*, *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586 (ruling that Bostock applies to Title IX claims and that maintaining single-sex spaces violates the Equal Protection Clause); *Doe v. Boyertown Area Sch. Dist.*, 897 F.3d (refusing to enjoin a school policy allowing students to use bathrooms and locker rooms consistent with their "gender identities" regardless of sex in a case about Title IX and the right to bodily privacy); *Grabowski v. Arizona Bd. of Regents*, 69 F.4th 1110, 1118 (9th Cir. 2023) (ruling that *Bostock* applies to Title IX claims); *A.C. v. Metropolitan Sch. Dist. of Martinsville*, 75 F.4th (ruling that *Bostock* applies to Title IX); and *Doe v. Snyder*, 28 F.4th 103, 114 (9th Cir. 2022) (ruling that *Bostock* is broad

enough to address claims regarding Medicaid coverage of surgeries related to "gender identity").

But numerous other courts have come to the opposite conclusion. *See*, *e.g.*, *Adams v. School Bd. of St. Johns Cnty.*, 57 F.4th 791 (11th Cir. *en banc*. 2022) ("sex" in Title IX, at the time of enactment, meant biological sex); *Pelcha v. MW Bancorp, Inc.*, 988 F.3d 318, 324 (6th Cir. 2021) (*Bostock* extends no further than Title VII); *Neese v. Becerra*, 640 F. Supp. 3d 668 (N.D. TX. 2022) (*Bostock* does not extend to Section 1557 of the Affordable Care Act or Title IX); *Tennessee v. United States Dept. of Educ.*, 615 F. Supp. 3d 807, 839 (E.D. Tenn. 2022) (Department of Education guidance creates rights for students and obligation for schools that do not appear in *Bostock*, Title IX or its implementing regulations); *Meriweather v. Hartop*, 992 F.3d 492, 510 n.4 (6th Cir. 2021) (it does not follow that principles announced in Title VII context automatically apply in the Title IX context.); and *Texas v. United States*, 201 F. Supp. 3d 810 (N.D. Texas 2016) (a 2016 Department of Education "Dear Colleague Letter" sent to schools to allow students to use the bathroom, locker rooms and showers of the student's choosing contradicted Title IX).

Simply put, our nation's schools are at a loss as to what the law says about whether they may, must, or may not maintain single-sex sports and certain spaces and the federal courts have been inconsistent in their determinations of those questions. Roughly twenty states have laws on the books stating that they must do so. Others have laws that may or may not address the questions directly, but nonetheless impact schools' ability to administer their programs by prohibiting discrimination

on the basis of "gender identity." Finally, as discussed in Section II, *infra*, this is all happening during a time when the Department of Education has redefined sex to include "gender identity" in the Title IX implementing regulations and seven federal courts have enjoined that regulatory redefinition in twenty-two states, as to certain specific schools and individuals, and arguably nationwide. It is time for this Court to say plainly what the word "sex" means under Title IX and the Equal Protection Clause and *amicus* urges the Court to do so by granting the petition for *certiorari* and reversing the Ninth Circuit's decision in this case.

II. AT LEAST SEVEN DISTRICT COURTS HAVE RULED THAT RECENT RULE CHANGES AMENDING THE TITLE IX REGULATIONS, *SEE* 34 C.F.R. PART 36, EXCEED THE ADMINISTRATION'S STATUTORY AUTHORITY OR ARE OTHERWISE UNLAWFUL (AND ONE HAS GONE IN THE OTHER DIRECTION), AND LOWER COURTS WOULD BENEFIT FROM THIS COURT'S GUIDANCE ON THE QUESTIONS PRESENTED HERE.

Title IX of the Education Amendments of 1972 reads, simply: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. 38 § 1681 *et seq.* It was enacted into law and signed by President Nixon in 1972. Although it has come to be associated primarily with women's sports, its original intention was to protect women and girls throughout the educational arena. One of its fiercest

proponents was Representative Patsy Mink, a Japanese-American woman born on a Hawaii sugar plantation who eventually made her way to the House of Representatives. When she died in 2002, the law was renamed in her honor. So although it is commonly known as Title IX, its official name is the Patsy Mink Equal Opportunity in Education Act.

In 1975, under President Ford, the U.S. Department of Health, Education, and Welfare (today, the Department of Education, or "Department") promulgated implementing regulations to govern enforcement of Title IX in the nation's schools. *See* 34 C.F.R. Part 106. These regulations explicitly permitted sex-separation under certain circumstances. For example, recipients of federal funding under Title IX were permitted to maintain sex-specific housing facilities, 34 C.F.R. § 106.32(b)(1); toilet, locker room, and shower facilities, 34 C.F.R. § 106.33; human sexuality classes, 34 C.F.R. § 106.34(a)(3); scholarships, 34 C.F.R. § 106.37(c)(2); and sports teams, "where selection for such teams is based upon competitive skill or the activity involved is a contact sport," 34 C.F.R. § 106.41(b). In other words, in 1975, the Department understood that when equality of the sexes is the goal, separating students by sex makes sense under certain circumstances.

In June 2022, the Department announced new proposed changes to the Title IX regulations redefining the word "sex" to include "gender identity" for all Title IX purposes. In doing so, the Department relied heavily on this Court's decision in *Bostock* (even though the Court explicitly limited the reach of its ruling to Title VII in that case). The Department received over 250 thousand public comments to that proposed rule (the most in the

Department's rule-making history). In April 2024, the Department made the rule final and announced that it would go into effect on August 1, 2024 ("Final Rule," *see* Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 89 Fed. Reg. 33,474 (Apr. 29, 2024)).

However, the Final Rule is not in effect in twenty-two states or with respect to certain specific individuals, groups, and schools where various federal district courts have enjoined it:

> *See Louisiana, et al. v. Department of Education, et al.* (W.D.LA. 3:24-CV-00563, June 13, 2024) (plaintiffs likely to succeed on the merits of their claims that the Final Rule is contrary to law under the Administrative Procedures Act, violates the Free Speech Clause of the First Amendment, violates the Free Exercise Clause of the First Amendment, violates the Spending Clause, and is arbitrary and capricious in accordance with Title 5 U.S.C. § 706 (2)(A) of the APA); *Tennessee, et al. v. Cardona, et al.* (E.D.KY. 2: 24-072-DCR, June 17, 2024) (clarifying that there are only two sexes (male and female) and holding that plaintiffs are likely to succeed on the merits of their claims that the Final Rule contravenes the plain text of Title IX by redefining "sex" to include gender identity; violates government employees' First Amendment rights, and is the result of arbitrary and capricious rulemaking); *Kansas, et al. v. Department of Education, et al.* (D.KS. 24-4041-JWB, July 2, 2024)

(plaintiffs likely to succeed on the merits of their claims that the Final Rule is contrary to Title IX, violates the major questions doctrine, violates the Spending Clause and the individual Plaintiffs' constitutional rights, and is arbitrary and capricious); *Carroll Independent School District v. Department of Education, et al.* (N.D.TX. 4:24-cv-00461-O, July 11, 2024) ("The Final Rule undermines over fifty years of progress for women and girls made possible by Title IX. Worse still, the Final Rule endangers not only women and girls, but all students. Just like the subjective nature of ever-changing gender identity, the Department of Education picks and chooses which 'niche' group to prioritize regardless of the consequences for everyone else and regardless of its authority. Functionally displacing Title IX's understanding of 'sex' while refusing to define it, the Department of Education's Final Rule has no basis in reality. This cannot be."); *Texas, et al. v. United States of America, et al.* (N.D.TX. 2:24-CV-86-Z, July 11, 2024) ("The Final Rule inverts the text, history, and tradition of Title IX: the statute protects women in spaces historically reserved to men; the Final Rule inserts men into spaces reserved to women. Defendants invoke *Bostock v. Clayton County*, 590 U.S. 644 (2020) to rationalize the Final Rule's inversion of the statutory text but do not adequately explain why that Title VII employment case controls this Title IX education case, which instead implicates women's athletics, safety, and sex-

> specific facilities in a different setting: schools, colleges, and universities."); *Arkansas, et al. v. Department of Education, et al.* (E.D.MO. 24-cv-00636, July 24, 2024); and *Oklahoma v. Cardona, et al.* (W.D.OK. 5:24-cv-00461 July 31, 2024) (plaintiffs likely to succeed on merits of claims that Final Rule exceeds statutory authority, conflicts with major questions doctrine, violates First Amendment and Spending Clause, and is arbitrary and capricious).[7]

Louisiana blocked the Final Rule from taking effect in Louisiana, Mississippi, Montana, and Idaho. *Tennessee* blocked it from taking effect in Tennessee, Kentucky, Ohio, Indiana, Virginia, and West Virginia. *Kansas* blocked it from taking effect in Kansas, Alaska, Utah, and Wyoming and with respect to the school attended by an individual plaintiff; the schools attended by the children of the group Moms for Liberty; and the schools attended by the members of the groups Young America's Foundation, and Female Athletes United.[8] *Carroll*

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7. One district court has gone in the other direction. On July 30, 2024, the District Court for the Northern District of Alabama denied the plaintiffs' motion for a stay of the effective date or a preliminary injunction enjoining the Final Rule. *Alabama, et al. v. Cardona, et al.* (N.D.AL. 7:24-cv-00533, July 30, 2024). The next day, the Eleventh Circuit Court of Appeals reversed and granted the plaintiffs' motion for an administrative injunction. *Id.* (11th Cir. 24-12444, July 31, 2024).

8. More than 670 institutions across 50 states and territories are covered by this injunction. *See* Katherine Knott and Jessica Blake, *Nearly 700 More Colleges Don't Have to Comply with New Title IX RULE*, Inside Higher Ed (July 17, 2024), https://www.

blocked it from taking effect in the Carroll Independent School District. *Texas* blocked it from taking effect in Texas and as against two individual plaintiffs. *Arkansas* blocked it from taking effect in Arkansas, Missouri, Iowa, Nebraska, North Dakota, and South Dakota, and as to one individual plaintiff. *Oklahoma* blocked it from taking effect in Oklahoma. Both the Fifth and Sixth Circuits have declined to stay the injunctions imposed in their circuits, *see Louisiana, et al. v. Department of Education, et al.*, No. 24-30399 (5th Cir. July 17, 2024); *Tennessee, et al. v. Cardona, et al.*, No. 24-5588 (6th Cir. July 17, 2024).

This situation is not tenable.

Schools and the students who attend them are being treated differently across the country with respect to whether the Department is permitted to enforce rules that deny the material reality of sex. Students in different states and, in some instances, students at schools within a single state, are being told different things with respect to whether women and girls are legally and constitutionally permitted to have access to single-sex sports and certain single-sex spaces. The question of what sex means under Title IX is obviously at issue in the present matter, and the lower courts would benefit from this Court's guidance as to that urgent question, as this litigation progresses across the country.

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insidehighered.com/news/government/2024/07/17/title-ix-rule-hold-more-670-colleges.

III. THE RULING BELOW CEMENTS IN THE LAW THE IDEA THAT SEX EITHER IS NOT REAL OR DOES NOT MATTER, IN A MANNER THAT CONCRETELY HARMS WOMEN AND GIRLS AS A SEX CLASS, IGNORING DECADES' WORTH OF CASE LAW AND USING LANGUAGE THAT IS INCONSISTENT WITH MATERIAL REALITY.

The years 1971 and 1972 were pivotal for advancing the rights and liberties of women and girls as a sex class, thanks in part to this Court. Laws that give men and boys the right to compete against women and girls in sports and access female-only spaces are regressive, sexist, and insulting. Laws like the Idaho statute at issue here are designed to protect women and girls and should be upheld under both Title IX and the Equal Protection Clause.

In 1971, this court held for the first time that the promise of equal protection under the Constitution applies to women. *See Reed v. Reed*, 404 U.S. 71 (1971). As in this matter, that case concerned an Idaho state law. That Idaho statute expressly granted men an advantage over women in the administration of probate estates. The law stated: "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). *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 law's provision preferring males over females, the probate court granted the privilege to Cecil. Sally challenged

that decision. Cecil prevailed throughout the lower courts, but this 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 Court stated: "By providing dissimilar treatment for men and women who are thus similarly situated, the challenged section violates the Equal Protection Clause." *Id.* at 77.

The Idaho law at issue there blatantly and explicitly expressed a preference for male people over female people. This Court held, rightfully, 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.

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 have historically been discriminated against on that very basis. This Court explicitly ruled that sex-based discrimination was subject to legal scrutiny and the Court should now uphold that legacy. Society 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 (which included the late Justice Ruth Bader Ginsburg) reminded the 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. *See* Appellant Br. at 19, n.13, *Reed*, 404 U.S. The attorneys who represented Sally Reed might be shocked to learn that respondents are now asking the Court to subject women and girls to precisely such privacy violations by ignoring that sex is a coherent category at all by invalidating a state law that expressly protects women and girls on the basis of sex.

Reed proved to be the beginning of this Court's long and venerable history of applying intermediate scrutiny to claims of sex-based discrimination under the Equal Protection Clause for the purpose of protecting women and girls from unfair treatment under the law. *See*, *e.g.*, *United States v. Virginia*, 518 U.S. 515 (1996); *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975); *City of Los Angeles Department of Water and Power v. Manhart*, 435 U.S. 702 (1978); *Arizona Governing Committee v. Norris*, 463 U.S. 1073 (1983); *Frontiero v. Richardson*, 411 U.S. 677 (1973). One year later, President Nixon signed Title IX, protecting women and girls in the educational arena on the basis of sex.

In the face of these important developments for women and girls, our entire society—globally, including the U.S. Court of Appeals for the Ninth Circuit[9]—now appears to be gripped by the idea that there is a category of people called "transgender" who are somehow members of the

9. *E.g.*, "The Act, however, bars all transgender girls and women from participating in, or even trying out for, public school female sports teams at every age, from primary school through college, and at every level of competition, from intramural to elite teams." *Hecox, et al. v. Little, et al.*, No. 20-35813 (9th Cir. June 7, 2024) at 11.

opposite sex, members of a nonexistent third sex, or for whom the category of sex is irrelevant, even though most people know sex is real and relevant in various situations, including in sports and intimate spaces such as locker rooms.[10] According to polling WDI USA conducted in November 2023, across the political spectrum, four out of five voters nationwide say that the word "women" means adult humans who are biologically female. Eighty-four percent of voters say an all-female high school basketball team should face opponents who are female only and 85 percent say when a female gym member is showering and changing in the women's locker room, the other users in the locker room should be female only.[11] This Court has exacerbated the problem by using the word "transgender" and the phrase "transgender status" uncritically and without definition. See *Bostock*, 590 U.S., *passim*.

Despite the frequent use of "gender" as a euphemism for "sex" in polite conversation, "sex" and "gender" are not synonyms. The term sex refers to the observable fact of the distinction between female and male—based on genetic characteristics and reproductive biology—not a mutable status that everyone, as if by accident, is "assigned at birth."[12] Women and girls are the female

10. *See* SurveyUSA Mkt Research Study #26869, *Strong Majorities Prefer Female-Only Interactions for Women, Girls in Athletics, Restroom, Other Situations* (Sept. 25-27, 2023), https://www.surveyusa.com/client/PollReport.aspx?g=42574e21-871e-4023-9ef2-d9b5b39f47c8.

11. *See id.*

12. *See* Kathleen Stock, *Changing the concept of "woman" will cause unintended harms*, The Economist (Jul. 6, 2018), https://www.economist.com/open-future/2018/07/06/changing-the-concept-of-woman-will-cause-unintended-harms.

sex.[13] Sex is established at conception, when an X sperm or a Y sperm fertilizes an egg.[14] It is easily identifiable and recorded with nearly 100% accuracy.[15]

In contrast to sex, "gender" refers to a set of stereotypes imposed on women (and girls) and men (and boys) on the basis of sex. It is, in the words of feminist scholar Sheila Jeffreys, the "foundation of the political system of male domination."[16] For feminists, gender is purely a social construction loaded with various patriarchal roles, values, and expectations. For example,

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13. *See* Andrea Orwoll, *Pregnant "Persons": The Linguistic Defanging of Women's Issues and the Legal Danger of "Brain-Sex" Language*, 17 Nev. L.J. 670, 693 (2017) ("There are undeniable legal consequences of living in a female body. . . . Thus, woman specific language must be used in legal discussions of sex-based discrimination. . . .").

14. *See* Risa Aria Schnebly, *Sex Determination in Humans*, The Embryo Project Encyclopedia (Jul. 16, 2021), https://embryo.asu.edu/pages/sex-determination-humans.

15. *See* Colin Wright, *A Biologist Explains Why Sex Is Binary*, The Wall Street Journal (Apr. 9, 2023) (refuting arguments that the existence of intersex people renders "sex" indeterminate).

16. Sheila Jeffreys, Gender Hurts: A Feminist Analysis of the Politics of Transgenderism (Routledge 2014), 1; *see also* Sandra Lee Bartky, *Shame and Gender*, in Femininity and Domination (Routledge 1990), 84 ("What patterns of mood or feeling, then, tend to characterize women more than men? Here are some candidates: shame; guilt; the peculiar dialectic of shame and pride in embodiment consequent upon a narcissistic assumption of the body as spectacle; the blissful loss of self in the sense of merger with another; the pervasive apprehension consequent upon physical vulnerability, especially the fear of rape and assault.").

women in our society are expected to wear high heels in order to comply with the rules of womanhood and to attract the attention of men, even though it has been shown time and again that wearing high heels impairs mobility and causes lower back pain, sore calves, foot pain, angle sprains, constricted blood vessels, crooked feet, and weakened ligaments. Women are also expected to be sweet, docile, and subservient to men. This is all still true, notwithstanding the gains that feminists have made over the years. Feminists call for the abolition of gender because gender is a prison that keeps women in a position of subservience to men. For feminists, in other words, gender is the problem, not the solution.

The concept of "gender identity" manipulates offensive, regressive, sexist stereotypes for a particularly harmful purpose—to deny women the coherent, objective legal taxonomy that anchors the jurisprudence of women's rights. On its face, "gender identity" refers to a person's subjective identity, not to his or her sex, and appears to be defined by whatever feeling the person has of what it means to "be of the gender with which he or she identifies" and whatever expression the person gives that feeling. When men and boys claim to "identify as" women or girls, "gender identity" reduces women to regressive stereotypes about what it means to be female, deprives women of agency to define their role in the world for themselves, lures young homosexuals wanting to escape homophobia into the belief that they can do so by changing sex, and subjects women to sex-based discrimination. As Jeffreys notes:

> Transgenderism depends for its very existence on the idea that there is an 'essence' of gender, a psychology and pattern of behavior, which is suited to persons with particular bodies and identities. This is the opposite of the feminist view, which is that the idea of gender is the foundation of the political system of male domination."[17]

How can a man or boy "feel" or "sense" that he is a woman and express that feeling by wearing dresses, earrings, and makeup, except by having lived in a society where that is demanded and expected of women?

One hundred percent of human beings—all eight billion of us, including those affected by differences of sexual development, see *infra*—are either female or male, and none of us conforms 100 percent to the stereotypes imposed on us on the basis of sex. Society appears to have been persuaded that there is some coherent category of human beings called "transgender." There isn't.

The Human Rights Campaign (HRC) defines the word "transgender" to mean an "umbrella term for people whose gender identity and/or expression is different from cultural expectations based on the sex they were assigned at birth."[18] In a similar vein, the U.K. organization Stonewall defines the word "trans" to mean an "umbrella term to describe people whose

17. Jeffreys, *supra* n.16 at 1.

18. Human Rights Campaign, *Glossary of Terms* (last updated May 31, 2023), https://www.hrc.org/resources/glossary-of-terms.

gender is not the same as, or does not sit comfortably with, the sex they were assigned at birth."[19] Stonewall continues: "Trans people may describe themselves using one or more of a wide variety of terms, including (but not limited to) transgender, transsexual, gender-queer (GQ), gender-fluid, non-binary, gender-variant, crossdresser, genderless, agender, nongender, third gender, bi-gender, trans man, trans woman, trans masculine, trans feminine and neutrois."[20]

The American Civil Liberties Union (ACLU), which represents respondent in this matter, defines the term "transgender" to mean "a broad range of identities and experiences that fall outside of the traditional understanding of gender."[21] It continues: "Some of those identities and experiences include people whose gender identity is different from the sex they were assigned at birth, people who transition from living as one gender to another or wish to do so (often described by the clinical term 'transsexual'), people who 'cross-dress' part of the time, and people who identify outside the traditional gender binary (meaning they identify as something other than male or female). Some transgender people describe themselves as gender variant or gender nonconforming. Not everyone who doesn't conform to gender stereotypes, however, identifies as transgender. Many people don't conform to gender stereotypes but also continue to

19. Stonewall, *List of List of LGBTQ+ terms*, https://www.stonewall.org.uk/list-lgbtq-terms.

20. *Id.*

21. ACLU, *Transgender people and the law*, at 19-20, https://www.aclu.org/sites/default/files/field_pdf_file/lgbttransbrochurelaw2015electronic.pdf.

identify with the gender assigned to them at birth, like butch women or femme men."[22]

But if the word "transgender" is an "umbrella term" that encompasses all of these various categories of people and identities (and it is, according to HRC, the ACLU, and Stonewall, three of the most vocal organizations in the world championing the "rights of transgender people"), it cannot possibly denote a coherent singular category of people.

Furthermore, sex is not "assigned at birth." This expression was developed to indicate that medical professionals had "assigned" a sex to members of a tiny class of babies whose sex could not easily be determined because their genitals were ambiguous at birth, but who were all nonetheless genetically either female or male (these are known as people with differences of sexual development, or DSDs).[23] That objectively diagnosed condition is not related to the subjective feelings at the root of "gender identity" ideology, but "gender identity" advocates intentionally repurpose the phrase to imply that sex, by including "gender identity," is arbitrary or not binary. Their use of the term is not aimed at scientific accuracy, but rather ideological advocacy.

In *Adams v. School Board of St. Johns County*, 57 F.4th 791 (11th Cir. *en banc*. 2022), the Eleventh Circuit Court of Appeals was asked, among other things, to determine whether the word "sex" was ambiguous at the

22. *Id*. at 20.

23. *See* Jessica A. Clarke, *Sex Assigned at Birth*, 122 Colum. L. Rev. 1821, 1834-36 (2022).

time of the enactment of Title IX of the Civil Rights Act. It had no trouble determining that it was not:

> Reputable dictionary definitions of "sex" from the time of Title IX's enactment show that when Congress prohibited discrimination on the basis of "sex" in education, it meant biological sex, i.e., discrimination between males and females. See, e.g., Sex, American Heritage Dictionary of the English Language (1976) ("The property or quality by which organisms are classified according to their reproductive functions."); Sex, American Heritage Dictionary of the English Language (1979) (same); Sex, Female, Male, Oxford English Dictionary (re-issued ed. 1978) (defining "sex" as "[e]ither of two divisions of organic beings distinguished as male and female respectively, "female" as "[b]elonging to the sex which bears offspring," and "male" as "[o]f or belonging to the sex which begets offspring, or performs the fecundating function of generation"); Sex, Webster's New World Dictionary (1972) ("[E]ither of the two divisions, male or female, into which persons, animals, or plants are divided, with reference to their reproductive functions."); Sex, Female, Male, Webster's Seventh New Collegiate Dictionary (1969) (defining "sex" as "either of two divisions of organisms distinguished respectively as male or female," "female" as "an individual that bears young or produces eggs as distinguished from one that begets young," and "male" as "of, relating to, or being the sex that begets young by performing the fertilizing function"); Sex,

> Random House College Dictionary (rev. ed. 1980) ("[E]ither the male or female division of a species, esp. as differentiated with reference to the reproductive functions").

Adams, 57 F.4th at 812.

Notwithstanding respondents' absurd contention that some men are women (or some boys are girls) if they say so, comply with sex stereotypes traditionally associated with femininity, and/or take drugs and have surgeries to change their bodies, the meaning of the word sex has not changed since this Court ruled that women and girls are entitled to equal protection on the basis of sex or since Congress enacted Title IX the following year, prohibiting discrimination on the basis of sex in education.

CONCLUSION

This case presents an opportunity for this Court to resolve a bitter and divisive split among the federal district and circuit courts about whether schools may legally and constitutionally maintain single-sex sports (and the related question of whether such schools may legally and constitutionally maintain single-sex spaces such as locker rooms and bathrooms) and whether states may mandate that they do so. By taking this case, the Court can provide guidance to lower courts that are grappling with the legality and constitutionality of the 2024 Title IX Final Rule. Finally, this Court can and should rule definitively that women and girls (and no men and boys) are female under Title IX and the Equal Protection Clause in an opinion that uses clear and accurate language. The nation's schools, courts, and women and girls as a sex class are

counting on this Court to settle these matters and *amicus* urges the Court to grant the petition for *certiorari* and reverse.

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