No. 15-2056

In the United States Court of Appeals for the Fourth Circuit

G.G., by his next friend and mother, DEIRDRE GRIMM,

Plaintiff – Appellant,

v.

GLOUCESTER COUNTY SCHOOL BOARD,

Defendant – Appellee.

On Appeal from the United States District Court
For the Eastern District of Virginia
No. 4:15-cv-00054-RGD-DEM

BRIEF OF AMICI CURIAE WOMEN'S LIBERATION FRONT AND FAMILY POLICY ALLIANCE IN SUPPORT OF APPELLEE

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INTEREST OF *AMICI CURIAE*

Amici are the Women's Liberation Front ("WoLF"), an organization of radical feminists dedicated to the liberation of women by ending male violence, regaining reproductive sovereignty, and preserving women-only spaces, and the Family Policy Alliance ("FPA"), a Christian organization dedicated to helping pro-family Americans unleash their citizenship for a nation where God is honored, religious freedom flourishes, families thrive, and life is cherished.[1]

Pro-family Christians and radical feminists may not agree about much, but they agree that Appellant's attempt to redefine "sex" to mean "gender identity" is a truly fundamental shift in American law and society.[2] If successful, it would strip women of their privacy, threaten their physical safety, undercut the means by which women can achieve educational equality, and ultimately work to erase women's very existence. It revokes the rights and protections Congress enacted

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

[2] *Amici* use "sex" throughout to mean exactly what Congress meant in 1972: The binary biological classification of human beings as either female ("women") or male ("men").

specifically to secure *women's* access to education in order to extend Title IX to cover men *claiming* to be women.

Three bad consequences would follow if this Court were to reverse the District Court's decision and redefine "sex" in Title IX to mean "gender identity".

First, women will lose their physical privacy and face an increased risk of sexual assault. To understand the magnitude of this, it is important to recognize that the result of such redefinition would go far beyond the narrow confines of one student and a high-school restroom.

Title IX and its implementing regulations do not distinguish between restrooms and any other sex-segregated space. Title IX speaks only in terms of "living facilities": "Nothing contained herein shall be construed to prohibit any educational institution receiving funds under this Act, from maintaining separate living facilities for the different sexes." 20 U.S.C. § 1686. And the specific Title IX regulation at issue here refers to "separate toilet, locker rooms, and shower facilities". 34 C.F.R. § 106.33. Thus redefining "sex" in Title IX to mean "gender identity" allows any man to justify his presence in any women-only

space – restroom, locker room, shower, dormitory, etc. – simply by claiming to "identify" as a woman.

And just as neither Appellant - nor anyone else, in the long history of this litigation - has offered any principle by which to distinguish restrooms from every other sex-segregated space, no one has offered any principle by which this redefinition is confined just to students. Title IX applies to students, faculty, administrators, other employees, *and anyone else who walks into* any Title IX institution. Thus any male teacher, professor, administrator, employee, or visitor who "self-identifies" as female must, as a matter of law, also be granted access to all of those single-sex spaces.

Apropos of the physical dimensions of this issue, Title IX applies to more than just schools – it applies to every museum, library, and other institution or other "education program or activity receiving Federal financial assistance" that receive the billions of dollars in such assistance every year.[3]

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[3] Federal "on-budget funds for education" includes $9.5 billion for "other education programs", which "includes libraries, museums, cultural activities, and miscellaneous research." U.S. Department of Education, National Center for Education Statistics, *Digest of Education Statistics 2014* (available at http://nces.ed.gov/pubs2016/2016006.pdf), p. 730 and

Thus redefining "sex" to mean "gender identity" means that (1) any man, (2) has the legal right to enter any female-only space, (3) in any Title IX institution, (4) based solely on his purely subjective and self-interested statement that he "identifies" as a woman.

This last point bears repeating: "Gender identity" is purely a function of self-identification subject to absolutely no limits in terms of who may invoke it, for how long, or for what purpose. Redefining "sex" to mean "gender identity" allows *any* man to "identify" as a woman, for *any* purpose, for however long he desires to do so. For women's privacy and safety, the implications of this are terrifying.

But because men have been forcing themselves on women for thousands of years with virtual impunity, a new pretext for stripping women of their privacy and making them more vulnerable to everything from voyeurism to groping to rape may actually be the least remarkable of the consequences that would follow if Appellant were successful.

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n.3. These funds are distributed by DOE and by the Departments of Agriculture, Commerce, Defense, Energy, Health and Human Services, Homeland Security, Housing and Urban Development, Labor, State, Transportation, Treasury, and Veterans Affairs, and more than 20 independent agencies. *Id.*, pp. 733-738.

Just as the implications of redefining "sex" to mean "gender identity" go beyond the physical spaces at issue in this case, they go far beyond physical spaces, period. More pernicious than the loss of those single-sex spaces is the loss of scholarships for women, the primary means by which women are trying to overcome the centuries – millennia – of educational discrimination. If any man becomes eligible for the millions of dollars in female-only scholarships at Title IX institutions merely by "identifying" as a woman, then many will do just that. For women, this means the loss of an indispensable tool in their struggle to achieve equality in education.

The consequences of such redefinition would also ripple across federal law far beyond Title IX: If "sex" means "gender identity" in that statute, then there is no reason to think that it means anything else in any other. The benefits of every other remedial system that Congress has enacted to counteract our society's centuries of pervasive discrimination against women would be opened to any man who "identifies" as a woman.

The last and most serious consequence of legally redefining "woman" to mean anyone who claims to be one, is that "woman" – as

humankind has *always* recognized "woman" – will cease to exist. Women's immutable existence will be legally altered to include any man who wishes to be deemed a woman, for whatever reason, at whatever time and for however long it suits him.

Even at times and in places where women are the property of men (as many still are around the globe) and have few rights beyond those granted by their owners they, like all women, still possess their own experience and legal status derived from their biological reality. But if "sex" means nothing more than self-determined "gender identity", those women will share a status no longer available to "the people formerly known as women" in the United States. If, as a matter of law, anyone can be a woman, then no one is a woman.

WoLF

WoLF has had a longstanding interest in the proper interpretation of Title IX. WoLF filed an amicus in support of certiorari from this Court's previous decision in this case and then, with Family Policy Alliance, an amicus on the merits in the Supreme Court. WoLF had previously filed its own challenge to the 2016 federal government guidance that expanded the application of the "sex" means "gender

identity" doctrine to all Title IX sex-segregated facilities. (*Women's Liberation Front v. U.S. Department of Justice et al.*, No. 1:16-cv-00915 (D.N.M. August 11, 2016.)[4]

Family Policy Alliance

FPA's interest in this case is tied directly to its advocacy for policies that protect the privacy and safety of women and children in vulnerable spaces such as showers and locker rooms. Together with its state allies, FPA launched the "Ask Me First" campaign (www.askmefirstplease.com) to empower women and children to advocate for their privacy and safety rights before government officials who might not otherwise consider those most affected by redefining Title IX. As a Christian organization, FPA believes that all human beings are created in the image of God and that both sexes uniquely reveal part of His nature. Because of this, FPA opposes policies that would endanger or eliminate either sex.

[4]WoLF voluntarily dismissed its case following the revocation of that guidance.

SUMMARY OF ARGUMENT

The question before this Court is what Congress meant in 1972 when it used the word "sex" in Title IX: "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. § 1681(a).

Amici make four arguments in support of Appellee. First, in addition to the contemporary dictionary definitions of "sex" that Appellee cites, there are numerous examples of Congress, the Executive Branch and the courts all using the word "sex" to mean the physiological differences between men and women. Congress has routinely used both "sex" and "gender identity" in statutes; it would not do so if they meant the same thing. Similarly, for decades the Executive Branch has expressly distinguished between "sex" and "gender identity". President Obama, for example, used both terms in no fewer than four separate Executive Orders, Presidential Memoranda and Presidential Proclamations. And rounding out the Constitutional triad, the Supreme Court has – without exception – said that "sex" is an

"immutable characteristic", and not something that each person can simply change whenever they feel like it.

Second, Appellant cites cases in which the federal courts have extended statutory or Constitutional provisions to include "gender identity" discrimination as support for why this Court should do likewise under Title IX. Those cases provide no basis for so interpreting Title IX, because extending such protection under those laws did not infringe upon rights granted to anyone else. Most of those cases arose under Title VII, but not allowing employers to fire an employee just because he or she identifies as "transgendered" *does not violate the Title VII rights of any other employee*. In contrast, extending Title IX to include "gender identity" would *necessarily* revoke the very rights and protections Congress granted women in that statute.

Third, as noted above, there are significant policy reasons for not legislating such a change in Title IX. Redefining "sex" to mean "gender identity" would create terrible risks for women's physical safety and privacy, and would be a *de facto* repeal of the voyeurism and indecent exposure laws that could no longer protect women from any man who simply "identifies" as a woman. It would take one of the primary tools

for women's education – female-only scholarships – and make them available to any man who "identified" as a woman. And if "sex" means "gender identity" in Title IX, the same would presumably be true in other remedial statutes Congress enacted for the benefit of women.

Finally, the most ominous policy consequence is that such redefinition would completely erase women's separate legal existence. If any man can be a woman, for any reason, at any time, and for however long he wishes, then no one is a woman.

ARGUMENT

I. ALL THREE BRANCHES OF THE FEDERAL GOVERNMENT HAVE CONSISTENTLY USED THE WORD "SEX" TO MEAN THE PHYSIOLOGICAL DIFFERENCES BETWEEN WOMEN AND MEN.

In addition to the contemporary dictionary definitions of "sex" that focus without exception on the physiological differences between men and women (Appellee's Supp. Br. pp. 24-25), other indications from when Title IX was enacted demonstrate what Congress meant by "sex". For example, when Congress ordered the military to open the service academies to women in1975, it was very clear about the differences between men and women:

> [T]he Secretary of the military department concerned shall take such action as may be necessary and appropriate to insure that . .

> . (2) the academic and other relevant standards required for appointment, admission, training, graduation, and commissioning of female individuals shall be the same as those required for male individuals, *except for those minimum essential adjustments in such standards required because of physiological differences between male and female individuals.*

Pub. L. 94–106, § 803(a); codified at 10 U.S.C. § 4342 note (emphasis added). If "male" and "female" were simply a matter of self-identification, it would have made no sense for Congress to refer to the "physiological differences" between them. Appellee gives several examples of Congress using "gender identity", *and* either "sex" or "gender", in the same statutory provisions (Appellee's Supp. Br. pp. 29-30); presumably, Congress would not use both if it intended them to mean the same thing.

Not only did Congress use "sex" to mean the binary physiological division of humans into women and men, the other branches of the federal government also regarded "sex" as physiologically determined.

Less than a year after Congress enacted Title IX, the Supreme Court noted that "sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth[.]" *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973). In fact, throughout all of the Supreme Court's sex discrimination jurisprudence, not once has it even

hinted that "sex" meant anything other than "an immutable characteristic determined solely by an accident of birth". *See, e.g.*, *Craig v. Boren*, 429 U.S. 190, 212 (1976)(Stevens, J., concurring)(sex "is an accident of birth"); *City of L.A. Dep't of Water & Power v. Manhart*, 435 U.S. 702, 727 (1978)(Burger, C.J., dissenting)("categorizing people on the basis of sex, the one acknowledged immutable difference between men and women"). And, most recently, the Court noted that, for two people of the same sex, "their immutable nature dictates that same-sex marriage is their only real path to this profound commitment." *Obergefell v. Hodges*, 135 S.Ct. 2584, 2594 (2015).

And what is true as to both Congress and the Supreme Court is also true as to the Executive Branch. While parts of the Obama Administration insisted that "sex" meant "gender identity", that did not seem to be the President's opinion, who consistently used *both* "sex" *and* "gender identity" in the same sentence. In 2010, President Obama asked the Secretary of the Department of Health and Human Services to begin a rulemaking concerning rights of hospital patients: "You should also provide that participating hospitals may not deny visitation privileges on the basis of race, color, national origin, religion, *sex,*

sexual orientation*, gender identity*, or disability." Presidential Memorandum of April 15, 2010, 75 F.R. 20511 (emphasis added).

In 2011, pursuant to his authority under 8 U.S.C. § 1182(f) to suspend entry of certain aliens into the United States, President Obama did just that as to:

> any alien who planned, ordered, assisted, aided and abetted, committed or otherwise participated in, including through command responsibility, widespread or systematic violence against any civilian population based in whole or in part on race; color; descent; *sex;* disability; membership in an indigenous group . . . birth; or sexual orientation *or gender identity*, or who attempted or conspired to do so.

Presidential Proclamation No. 8697, 76 F.R. 49277 (emphasis added). In 2012, President Obama formed the "Working Group on the Intersection of HIV/AIDS, Violence Against Women and Girls, and Gender-related Health Disparities", and ordered it to, *inter alia*, "provide information on . . . (iv) research and data collection needs regarding HIV/AIDS, violence against women and girls, and gender-related health disparities to help develop more comprehensive data and targeted research (*disaggregated by sex, gender, and gender identity*, where practicable)". Presidential Memorandum of March 30, 2012, 77 F.R. 20277 (emphasis added).

On July 21, 2014, the President issued Executive Order 13672, which amended two previous Executive Orders. The President amended four separate provisions of Executive Order 11246 (September 24, 1965), concerning discrimination by government contractors and subcontractors, adding "gender identity" to the prohibited categories of discrimination, each of which *already* included "sex".

The President also amended Executive Order 11478 (August 8, 1969), concerning discrimination in federal employment, by adding "gender identity" to the prohibited categories of discrimination that included "race, color, religion, sex, national origin, handicap, or age discrimination". Thus President Obama also did not believe that the word "sex" (and when used in the specific context of prohibited discrimination) meant "gender identity" when it was used either by President Johnson in 1965 or by President Nixon in 1969.

If, as Appellant insists, "sex" is identical to "gender identity", then there was no reason for President Obama to keep using both terms in his official statements. The only reason for the President to have done so is that they mean different things.

The same is true elsewhere in the Executive Branch. For more than 30 years, the Board of Immigration Appeals has consistently described "sex" as an "immutable characteristic", beginning with the seminal case of *Matter of Acosta*, 19 I. & N. Dec. 211, 233 (BIA 1985):

> [W]e interpret the phrase "persecution on account of membership in a particular social group" to mean persecution that is directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic. The shared characteristic might be an innate one such as sex, color, or kinship ties, or in some circumstances it might be a shared past experience such as former military leadership or land ownership.

The *Acosta* doctrine of "immutable characteristics" has been cited in dozens of cases reviewing BIA decisions (most recently in *Garay Reyes v. Lynch*, 842 F.3d 1125, 1131 (9th Cir. 2016)), and the BIA's position that "sex" is an "immutable characteristic" has apparently never been questioned.[5]

Nor is the BIA alone at the Justice Department. For decades, DOJ insisted that discrimination by the federal government against transgendered individuals was *not* discrimination on the basis of sex.

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[5] At other times, BIA refers to "sex" simply as an "innate" characteristic, *e.g.,* "innate characteristics such as sex or family relationship". *Matter of C-A-,* 23 I. & N. Dec. 951, 959 (BIA 2006).

As recently as 2011, the Department of Justice maintained, as to its own employment practices, that claims of discrimination on the basis of "gender identity" were simply not cognizable under the prohibition of discrimination on the basis of "sex".

DOJ's position was rejected only in *Macy v. Holder*, Appeal No. 0120120821 (EEOC April 20, 2012), which expressly stated that it was overruling a long line of cases affirming the government's view that discrimination on the basis of "gender identity" did not fall within the meaning of discrimination on the basis of sex. *Id.* at 25, n.16, citing, *inter alia*, *Kowalczyk v. Department of Veterans Affairs*, Appeal No. 01942053, p. 4 (EEOC December 27, 1994)("The Commission finds that the agency correctly concluded that appellant's allegation of discrimination based on her acquired sex (transsexualism) is not a basis protected under Title VII and therefore, the final agency decision properly dismissed this basis") and *Cassoni v. United States Postal Service*, Appeal No. 01840104, p. 4 (EEOC September 28, 1984) (rejecting Title VII claim of "gender identity" sex discrimination because: "Absent evidence of Congressional intent to the contrary, and in light of the aforementioned case law, this Commission finds that the

phrase 'discrimination because of sex' must be interpreted in accordance with its plain meaning").

It was only in 2014 that Attorney General Holder suddenly announced that he had "determined that the best reading of Title VII's prohibition of sex discrimination is that it encompasses discrimination based on gender identity". Yet in that same document he candidly admitted "that Congress may not have had such claims in mind when it enacted Title VII" in 1964.[6]

In sum, the history of how Congress, the Supreme Court, and the Executive Branch have all consistently used the word "sex" since 1972 shows that there is no credible basis for concluding that "sex" meant anything but the physiological differences between men and women when Congress enacted Title IX in 1972 or when the Department of Health, Education and Welfare ("HEW") issued the Title IX regulations in 1975.

[6] *Treatment of Transgender Employment Discrimination Claims Under Title VII of the Civil Rights Act of 1964*, December 15, 2014, p. 2 (available at https://www.justice.gov/file/188671/download).

II. EXTENDING OTHER LAWS TO REMEDY "GENDER IDENTITY" DISCRIMINATION PROVIDES NO BASIS FOR DOING SO UNDER TITLE IX.

Appellants cite a series of cases in which courts have applied other statutes or Constitutional provisions to remedy "gender identity" discrimination. But there is a critical, dispositive difference between Title IX and the laws at issue in those cases makes them inapposite: Extending protection on the basis of "gender identity" to those plaintiffs did not violate anyone else's rights under those laws. In contrast, doing so with Title IX *necessarily* violates women's rights to privacy, safety, and access to educational opportunities. In other words, so extending Title IX defeats the very purposes for which it was enacted.

Restoring a transgender plaintiff's job because of an Equal Protection Clause violation (*Glenn v. Brumby,* 663 F.3d 1312, 1316-19 (11th Cir. 2011)) did not infringe anyone else's Equal Protection rights. Holding that being fired on the basis of "transgender identity" was cognizable under Title VII (*Smith v. City of Salem,* 378 F.3d 566, 573-75 (6th Cir. 2004)) would not violate anyone else's Title VII rights.[7]

[7] The same holds for each of the other Title VII decisions cited by Appellant: *Finkle v. Howard County*, 12 F. Supp.3d 780 (D. Md. 2014); *Hart v. Lew*, 973 F. Supp.2d 561 (D. Md. 2013); *Barnes v. City of*

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 ("ECOA") (*Rosa v. Park W. Bank & Trust Co.*, 214 F.3d 213, 215-16 (1st Cir. 2000)) did not violate anyone else's ECOA rights. Applying the Gender Motivated Violence Act ("GMVA") to an attempted rape of a transgender prisoner by a prison guard (*Schwenk v. Hartford,* 204 F.3d 1187, 1201-02 (9th Cir. 2000)) did not infringe anyone else's rights under the GMVA. And requiring a hospital to treat a transgender patient with the same standard of care as other patients (*Rumble v. Fairview Health Servs.*, No. 14-CV-2037 SRN/FLN, 2015 WL 1197415 (D. Minn. Mar. 16, 2015)) did not violate anyone else's rights under the Affordable Care Act.

But Title IX is different. Congress enacted Title IX as a remedial statute for the benefit of women, and granting Title IX rights to men who claim they are women *necessarily violates* the rights Congress gave women in this law and works to defeat Title IX's very purpose. In

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Cincinnati, 401 F.3d 729 (6th Cir. 2005); *Schroer v. Billington*, 577 F. Supp.2d 293 (D.D.C. 2008); *Muir v. Applied Integrated Tech., Inc.*, No. 13-0808, 2013 WL 6200178 (D. Md. Nov. 26, 2013); *Mia Macy v. Holder*, EEOC DOC 0120120821, 2012 WL 1435995 (Apr. 20, 2012).

contrast, in each of the cited cases, recognizing rights and providing remedies under the various statutory and Constitutional provisions to people who identified as transgender did not infringe on any rights Congress or the Founders extended to anyone else.

It is worth noting that in *Etsitty v. Utah Transit Authority*, 502 F.3d 1215 (10th Cir. 2007), the Tenth Circuit recognized this precise issue in the context of Title VII. Etsitty, a male bus driver whose self-declared "gender identity" was female, was fired by the defendant transit agency because bus drivers use public restrooms on their routes, and Etsitty insisted on using women's restrooms.

Relying on *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), Etsitty claimed that "terminating her because she intended to use women's restrooms is essentially another way of stating that she was terminated for failing to conform to sex stereotypes." *Etsitty*, 503 F.3d at 1224. While courts have generally recognized *Price Waterhouse* "sex stereotyping" employment discrimination claims in cases involving "transgendered" plaintiffs, the Tenth Circuit understood the inherent limits of this doctrine when it collided with other people's rights (*id.*):

> However far *Price Waterhouse* reaches, this court cannot conclude it requires employers to allow biological males to use women's

restrooms. Use of a restroom designated for the opposite sex does not constitute a mere failure to conform to sex stereotypes.

III. REDEFINING "SEX" TO MEAN "GENDER IDENTITY" WOULD BE TERRIBLE PUBLIC POLICY.

A. Women's Privacy and Safety

Appellant casually dismisses concerns about allowing any man unfettered access to women-only spaces because, "If a school has a legitimate concern that a student is falsely claiming to be transgender, a letter from a doctor or parent can easily provide corroboration." Appellant's Supp. Br. 42-43.

To begin with, that statement directly contradicts Appellant's earlier insistence that "gender identity" is a purely subjective "internal sense" of self, referring "to one's sense of oneself as belonging to a particular gender." Br. of Appellant, Doc. 73, p. 3. Appellant's position appears to have evolved into that being "transgender" requires a doctor's note.

Moreover, Appellant's new position raises far more questions than it resolves, starting with how can anyone judge the validity of a claim about something that is purely a matter of self-identification?

But let's assume that somehow parents or physicians "know" the "truth" about whether someone is "transgendered". What if the student insists that he or she is "transgender," but his/her parents or family doctor disagree? Do schools adjudicate the question and decide between the competing claims? What evidence would they consider? What if the parents say one thing, and the doctor another? Or the parents disagree between themselves? What if two doctors disagree? Things quickly degenerate into a Monty Python routine:

"I'm transgendered."

"No, you're not."

"Yes, I am."

"I'm your mother and I say you're not."

"But I feel like I'm transgendered."

"Well, you didn't last week."

"But I do now."

"No, you don't."

"But I am."

"Your doctor says you're not."

"No, your doctor says I'm not; my doctor says that I am."

Etc., etc.

Replacing an objective physiological standard with pure self-identification creates a myriad of such intractable problems.

Let's go beyond restrooms, and even locker rooms and showers. Redefining "sex" to mean "gender identity" means that the hundreds of colleges and universities that have women-only dormitories must allow any man who "identifies" as a woman to live in them. Thus women who believed that they would have the personal privacy of living only with other women will be surprised to discover that men will be their roommates, simply on the basis of their "gender identity."

At the University of Pennsylvania, for example, undergraduate rooms are designated single-sex unless students request gender-neutral housing.[8] But any man who "identifies" as female will be legally entitled to room with women, the very women who wanted single-sex housing and did not ask for gender-neutral rooms. At South Carolina's Wofford College, Marsh Hall (like most of the College's housing) has single-sex

[8] http://cms.business-services.upenn.edu/residential-services/applications-a-assignments/assignments-faq.html

hallways and bathrooms; that will no longer be the case if "sex" is redefined as "gender identity".[9]

Privacy is one thing; violence is another. The violence Appellant proposes to do to the statute is reflected in the violence that will result if Title IX is so redefined. Appellant wants to mandate that almost every school in the U.S. must allow men to invade women's privacy and threaten their physical safety in the places heretofore reserved exclusively for them. That *any* man can justify his presence in *any* women's restroom, locker room, or shower by saying, "I identify as a woman" will not escape the notice of those who already harass, assault, and rape thousands of women every day.

The first report of the White House Task Force to Protect Students from Sexual Assault begins with the sentence, "One in five women is sexually assaulted in college."[10] More recent data has shown that the problem is even worse than that – *more than 10% of college women experienced sexual assault in a single academic year*, with almost half of those women reporting *more than one such assault*

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[9] http://www.wofford.edu/residenceLife/marsh/

[10] *Not Alone*, April 2014, p. 2 (available at www.justice.gov/ovw/page/file/905942/download).

during that time.[11] Moreover, a majority of those assaults were committed by "students, professors, or other employees of the school", the very people who could have no better excuse to be in places where they should not be than being able "identify" as a woman. *Id.,* p. 104. Allowing any man to claim he has such a right seriously undermines the laws designed to protect women in these places.

For example, in Maryland it is a crime "to conduct visual surveillance of . . . an individual in a private place without the consent of that individual". Md. Code Ann., Crim. Law § 3-902(c)(1); the statute defines "private place" as "a room in which a person can reasonably be expected to fully or partially disrobe and has a reasonable expectation of privacy" (*id.*, § 3-902(a)(5)(i)), such as dressing rooms, restrooms (*id.*, § 3-902(a)(5)(ii)), and any such room in a "school or other educational institution". *Id.*, § 3-902(a)(5)(i)(6).

Since any man could assert that he has a legal right to be in the women's locker room because he "identifies as female", it is impossible to see how either this or similar laws in other states could ever be

[11] U.S. Department of Justice, Bureau of Justice Statistics, *Campus Climate Survey Validation Study Final Technical Report*, January 2016, p. 85 (available at www.bjs.gov/content/pub/pdf/ccsvsftr.pdf).

enforced. Giving predators the convenient pretext of a right to be precisely where women are at their most vulnerable also renders similar statutes in other states simply inapplicable to these types of crimes: In many states, the relevant statute criminalizes only covert or "surreptitious" observation.[12] For example, in Virginia, "It shall be unlawful for any person to use a peephole or other aperture to secretly or furtively peep, spy or attempt to peep or spy into a restroom, dressing room, locker room, [etc.]." Va. Code Ann. § 18.2-130(B).[13]

But it is *not* illegal for a man to walk into a women's locker room in Virginia and openly ogle the women there, because there is nothing "secret or surreptitious about" that action – just the opposite. Redefining "sex" to mean "gender identity" *effectively decriminalizes this predatory sexual activity* and gives a get-out-of-jail free card to any predator who smiles and says, "But I identify as a woman".

[12] Presumably those states never considered that such predators would be open about their activities.

[13] The North Carolina statute uses similar language "peep secretly". N.C. Gen. Stat. § 14-202.

B. Preferences Addressing Historical and Systemic Discrimination

After centuries of second-class treatment in all matters educational, if "sex" is redefined to mean "gender identity", the very preferences used to remedy that history and encourage women's education – most importantly, scholarships for women – will now be reduced by the demands of any men who "identify" as women. Every women's scholarship at Title IX schools that has been created by the school itself, or by the federal or state government would, as a matter of federal law, now be open to all such men.

Virtually all schools have such endowed scholarships, *e.g.*, the University of Virginia's Class of 1975 Marianne Quattrocchi Memorial Scholarship, whose purpose is "to attract female candidates to Darden [School of Business] who otherwise might not attend."[14]

Given the struggles women have gone through to become lawyers (*see, e.g.*, Ruth Bader Ginsburg, *The Progression of Women in the Law*, 28 Val. U. L. Rev. 1161 (1994)), it is not surprising that law schools also have established such scholarships. Yale Law School, for example, has

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[14] http://www.darden.virginia.edu/mba/financial-aid/scholarships/affinity/.

the Joan Keyes Scott Memorial scholarship for women students, the Lillian Goldman Perpetual Scholarship Fund, "for students in financial need who have a demonstrated interest in women's rights, with a preference for women students", and the Elizabeth Warke Brem Memorial Fund, "for scholarships at Yale Law School with a preference for Hispanic women students".[15]

Even the federal government offers such scholarships, *e.g.,* the National Oceanic and Atmospheric Administration's Dr. Nancy Foster Scholarship Program, which "provides support for master's and doctoral studies in oceanography, marine biology, maritime archaeology and all other science, engineering, social science and resource management disciplines involving ocean and coastal areas particularly by women and members of minority groups."[16]

Twenty years ago, the Supreme Court eloquently described how women's physiology was used as an excuse to deny them education:

> Dr. Edward H. Clarke of Harvard Medical School, whose influential book, *Sex in Education*, went through 17 editions, was perhaps the most well-known speaker from the medical community opposing higher education for women. He maintained

[15] http://bulletin.printer.yale.edu/htmlfiles/law/alumni-and-endowment-funds.html.

[16] http://fosterscholars.noaa.gov/aboutscholarship.html.

> that the physiological effects of hard study and academic competition with boys would interfere with the development of girls' reproductive organs. See E. Clarke, *Sex in Education* 38-39, 62-63 (1873); *id., at 127* ("identical education of the two sexes is a crime before God and humanity, that physiology protests against, and that experience weeps over"); see also H. Maudsley, *Sex in Mind and in Education* 17 (1874) ("It is not that girls have not ambition, nor that they fail generally to run the intellectual race [in coeducational settings], but it is asserted that they do it at a cost to their strength and health which entails life-long suffering, and even incapacitates them for the adequate performance of the natural functions of their sex."); C. Meigs, *Females and Their Diseases* 350 (1848) (after five or six weeks of "mental and educational discipline," a healthy woman would "lose . . . the habit of menstruation" and suffer numerous ills as a result of depriving her body for the sake of her mind).

United States v. Virginia, 518 U.S. 515, 536 n.9 (1996). It is ironic that while women's bodies were once used as an excuse to deny them education, now women's educational opportunities will be curtailed by saying that there is actually no such thing as a "female" body: Women, after all, are simply anyone who "identifies" as such.

Congress enacted Title IX to ensure women's equal access to educational opportunity; it is difficult to imagine a more absurd interpretation than reading it to allow men to help themselves to one of the primary means of assuring that access.

C. Impact on Other Remedial Statutes

If "sex" is ambiguous in Title IX, then there is no logical reason why "sex" or "female" or "woman" or "girl" is any less ambiguous when used in any other law designed to remedy centuries of discrimination against women.

Nearly thirty years ago, Congress enacted the Women's Business Ownership Act of 1988 to "remove, insofar as possible, the discriminatory barriers that are encountered by women in accessing capital and other factors of production" (Pub. L. 100-533, § 101), and created the National Women's Business Council, of which at least four members would be "women". *Id.*, § 403(b)(2)(A)(ii). In 1992, noting that "women face significant barriers to their full and effective participation in apprenticeable occupations and nontraditional occupations", Congress enacted the Women in Apprenticeship and Nontraditional Occupations Act (Public Law 102-530, § 1(a); codified at 29 U.S.C. § 2501(a)), in order to "expand the employment and self-sufficiency options of women" in these areas via grants, technical assistance and studies. *Id.*, §1(b); codified at 29 U.S.C. § 2501(b).

In 2000, Congress amended the Small Business Act to create the Procurement Program for Women-Owned Small Business Concerns (Pub. L. 106-554, § 811; codified at 15 U.S.C. § 637(m)) in order to create preferences for women-owned (and "economically disadvantaged" women-owned) small businesses in federal contracting. In 2014, Congress again amended the Small Business Act (Pub. L. 113-291, § 825; codified at 15 U.S.C. § 637(m)) to include authority to award sole-source contracts under this program. Neither in 1988, nor 1992, nor 2000, nor 2014, nor in any other remedial statute did Congress define "woman", so presumably the benefits of these programs would soon become equally available to any man who "identifies" as one.

Just as with Title IX scholarships, allowing men to take advantage of remedial programs and benefits Congress intended for women works to perpetuate the very problems these programs were intended to fix.

While *amici* are concerned that men will say that they are women for the purpose of helping themselves to benefits Congress intended for actual women, redefining "sex" to mean "gender identity" in Title IX would also affect all other federal statutes which explicitly incorporate

Title IX's definition of "sex discrimination". For example, the federal government spends billions of dollars a year for "youth workforce investment activities", "adult employment and training activities", and "dislocated worker employment and training activities". 29 U.S.C. § 3181. All of these programs are subject to Title IX's nondiscrimination provisions. 29 U.S.C. § 3248(a)(1)-(2). The same is also true for Public Health Service block grants to states for general purposes (42 U.S.C. § 300w-7(a)), for mental health and substance abuse (42 U.S.C. § 300x-57(a)), for maternal and child health (42 U.S.C. § 708(a)), and a myriad of other federal programs.[17]

Finally, *amici* also note that men might take advantage of the "sex" means "gender identity" definition to avoid particular obligations imposed on them, *e.g.*, selective service: "[I]t shall be the duty of every male citizen of the United States, and every other male person residing in the United States . . . to present himself for and submit to registration[.]" 50 U.S.C. § 3802(a). In the event of war, no doubt

[17] This redefinition would also wreak havoc with many federal statistics. If a man who "identifies" as a woman is mugged, was the crime committed against a man or a woman? If a man who "identifies" as a woman is diagnosed with cancer, will that be recorded as part of male or female morbidity statistics?

demographers will be astonished by the sudden surge in the female population.

D. Erasing Women

It was really not that long ago that the Supreme Court noted approvingly that married women had a limited independent legal existence apart from their husbands:

> The identity of husband and wife is an ancient principle of our jurisprudence. It was neither accidental nor arbitrary and worked in many instances for her protection. There has been, it is true, much relaxation of it but in its retention as in its origin it is determined by their intimate relation and unity of interests, and this relation and unity may make it of public concern in many instances to merge their identity, and give dominance to the husband.

Mackenzie v. Hare, 239 U.S. 299, 311 (1915). Women may have escaped the bonds of such doctrines and achieved their independent legal existence, but that status is now threatened by redefining "sex" to mean "gender identity".

Worse than enabling men to help themselves to women's bodies and women's remedial or protective programs, that redefinition poses a truly existential threat: A legal *ukase* decreeing that there really is no such thing as a woman. When the law requires that any man who wishes (for whatever reason) to be treated as a woman *is* a woman, then

"woman" (and "female") lose all meaning. With the stroke of a pen, women's existence – shaped since time immemorial by their unique and immutable biology – would have been eliminated. Women, as they have been known forever, will simply no longer exist.

CONCLUSION

For the reasons given herein, the decision of the District Court should be affirmed.

Respectfully submitted,

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Certificate of Compliance With Rule 32(g)(1)

This brief complies with Rule 32(g), F.R.A.P., and this this Court's Order of April 13, 2017, and contains 6,482 words.

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Certificate of Service

I certify that on May 14, 2017, I served on counsel of record for all parties a copy of the foregoing Brief of Amici Curiae Women's Liberation Front and Family Policy Alliance via the Court's CM/ECF system.

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