No. 21-35228

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ANITA NOELLE GREEN,

Plaintiff-Appellant,

v.

MISS UNITED STATES OF AMERICA, LLC, a Nevada limited liability corporation, D/B/A United States of America Pageants,

Defendant-Appellee.

Appeal from the Order dated April 8, 2021 of the United States District Court for the District of Oregon, Honorable Michael W. Mosman, Case No. 3:19-cv-02048.

BRIEF OF *AMICUS CURIAE* WOMEN'S LIBERATION FRONT IN SUPPORT OF APPELLEE

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CORPORATE DISCLOSURE STATEMENT

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INTRODUCTION AND INTEREST OF AMICUS CURIAE[1]

Amicus is the Women's Liberation Front ("WoLF"), a non-profit radical feminist organization dedicated to the liberation of women by ending male violence, protecting reproductive sovereignty, preserving woman-only spaces, and abolishing gender and sex discrimination. WoLF has nearly 1,000 members who live, work, attend school and use public accommodations across the United States, including more than 300 in the 9th Circuit. Several WoLF members have lost employment and have been shunned by professional networks simply for believing that human sex is immutable. WoLF's public speaking events have been targeted by bomb threats and violent protests solely because WoLF rejects the concept of gender identity.

WoLF's interest in this case stems from its interest in empowering and protecting the safety and privacy of women and girls and preserving women's sex-based civil rights.[2] Those rights have been

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

[2] *Amicus* uses "sex" throughout to mean "the fundamental distinction, found in most species of animals and plants, based on the type of gametes produced by the individual," and the resulting classification of human beings into those two reproductive classes: female (women and girls) or male (men and boys). *See* Sex, Male, and Female, Miller-Keane Encyclopedia And Dictionary Of Medicine, Nursing, And Allied Health (7th ed. 2003), https://medical-dictionary.thefreedictionary.com.

threatened by recent court decisions and agency policies that embrace the vague concept of "gender identity" in a manner that overrides statutory and Constitutional protections that are based explicitly on "sex." If as a matter of law "sex" is no longer understood to be an immutable characteristic, but instead merely a subjective self-declared and mutable "identity," then the ability to protect female people from sex-based discrimination is greatly diminished.

Green asks the Court to proclaim that women's Constitutional rights to free expression and association are unprotected when they choose to promote women. He also asks the Court to reverse more than a century of jurisprudence that established protections for women's right to autonomy from male control. If the Court rules in his favor, it will mark a truly fundamental shift in American law and policy that strips women of their Constitutional right to privacy, to free speech, and to freedom of association; threatens their physical safety by proclaiming that women are not permitted to exclude males from any space or activity; and undercuts the means by which women can achieve success. Such a shift ultimately works to erase women and girls under the law.

Finally, Green's claims that women are not a historically marginalized group and that he is a biological female are facially absurd. WoLF urges the Court to rule in favor of Appellees by confirming the district court's decision to grant the defendant's motion to dismiss and to affirm the right of women to fully exercise their Constitutional rights and meaningfully participate in society.

ARGUMENT

I. THE IMPORTANCE OF FIRST AMENDMENT PROTECTIONS FOR WOMEN, A HISTORICALLY MARGINALIZED GROUP

Green argues that men who view themselves as women are more oppressed than actual women, who are themselves oppressed and subjugated on the basis of sex. However, Green enjoys all the legal rights and privileges associated with his maleness. In no country on earth or moment in human history would Green be denied – on account of his sex – the right to vote, to work, to own property, to move about society, to control his body's reproductive functions or to speak his mind freely. Men who do not adhere to sex-based stereotypes do not

experience any female-specific obstacles to the full enjoyment of their legal rights.

The rights to freedom of speech and of association guaranteed by the first amendment were critical to the advancement of women's rights in the last century, and continue to be a vital tool in the fight to maintain these rights.

Green acknowledges that historically marginalized groups can have events and resources limited only to members of those groups, though contrasts this to the female-only pageant at issue here. 1-SER-129-130. 1-SER-177. He also uses civil rights-era case law such as *Hearts of Atlanta* to bolster his case, demonstrating that Green does not see women as a historically marginalized group. Opening Brief, Dkt. 16 at 53. Instead, he views the exclusion of men from female-only spaces as something akin to white supremacy.

A. Women are a historically marginalized group.

The patriarchal oppression of women can be traced back to the beginning of recorded history. Women, in most times and/or places, have been confined, exploited, and even owned by men who want to

control women's reproductive and social abilities. *See* GERDA LERNER, THE CREATION OF PATRIARCHY: VOL. 1, 1986. This has taken myriad forms, from ancient Sumerian concubinage practices, to the state-ordered murder of female royals who failed to produce male heirs, to discriminatory hiring practices of mothers in the 1960s, to contemporary domestic and sexual violence. *Id.* Women have been controlled and disadvantaged on the basis of their immutable, material status as women--and the desire of men to control their domestic, sexual, and especially their reproductive labor. Elizabeth V. Spelman, *Women As Body, Ancient and Contemporary Views*, 8 FEMININST STUDIES
109 (1982) (discussing how women's only value, historically, has been their bodies and their reproductive capacities). *See also* Saraswathi Vedam et. al., *The Giving Voice to Mothers study: inequity and mistreatment during pregnancy and childbirth in the United States*, 16 REPRODUCTIVE HEALTH 77 (2019) https://doi.org/10.1186/s12978-019-0729-2.

Women are not asked how they identify or how they see themselves before they experience these things. Women's feelings are

wholly irrelevant to their condition and standing in this world. The treatment of the suffragists, who were simply advocating for the right of women to vote, is a perfect case study. Women seeking the fundamental right to vote were arrested (some held in indefinite detention), force fed, subjected to terrible police brutality, lost custody of their children, and even gave their lives. Lizzie Pook, *Groped, imprisoned and force-fed: what the suffragettes really went through*, *Stylist* (2018), *available at* https://www.stylist.co.uk/visible-women/suffragettes-force-fed-imprisoned-uk-tactics-punishment-history/188085 (last accessed Oct. 15, 2021).

The vulnerabilities of the female sex, and the lack of autonomy afforded them, have kept women out of the male-dominated public sphere for thousands of years. Women could not (and in some places still cannot) inherit property or titles in most societies. They could not (and in some places still cannot) study at universities, serve in the military, or be treated as credible witnesses in courtrooms. Women have been (and in some places still are) the longstanding victims of marital rape clauses, discriminated against in hiring practices and compensation (when they were allowed to join the workforce at all) and

unprotected from domestic abuse as long as public peace was not disturbed. *Timeline of Legal History of Women in the United States*, NATIONAL WOMEN'S HISTORY ALLIANCE, (last accessed Oct. 21, 2021) https://nationalwomenshistoryalliance.org/resources/womens-rights-movement/detailed-timeline/. Women have been (and in some places still are) barred from practicing medicine or law, unable to vote or to run for office.[3]

It was not, in many places in the world, including in the social tradition of western civilization, until the 1800s that women began to gain autonomy, legal protection, and equality with men. *See generally*, JOAN HOFF, LAW, GENDER, AND INJUSTICE, A LEGAL HISTORY OF U.S. WOMEN, 1991. In the United Kingdom, our legal progenitor, legislation to give women custody over their children for the first time was not passed until 1839, in the Custody of Infants Act, 2 & 3 Vict. c. 54. *See*

[3] Arabella Mansfield was granted admission to practice law in Iowa in 1869, making her the first woman lawyer. Louis Haselmayer, Belle A. Mansfield, 55 WOMEN LAWYERS J. 2, 46-54 (1969). Ada H. Kepley becomes the first woman in the United States to graduate from law school in 1870. Am. Bar Ass'n, "13 Pioneering Women in American Law", ABA J., available at https://www.abajournal.com/gallery/historical_women/767 (last accessed Oct. 17, 2021). Elizabeth Blackwell became the first woman to graduate from medical school in 1849 and opened the New York Infirmary for Women and Children with her sister, Emily Blackwell, and Marie Zakrzewska, in 1857. Beth Howard, "Women physicians over the centuries", Yale Medicine Magazine 27 (Spring 2018), available at https://medicine.yale.edu/news/yale-medicine-magazine/YM-Spring2018-Web_348382_43933_v1.pdf (last accessed Oct. 17, 2021); see also Elizabeth Blackwell, PIONEER WORK IN OPENING THE MEDICAL PROFESSION TO WOMEN (Longmans, Green & Co. 1895), available at https://digital.library.upenn.edu/women/blackwell/pioneer/pioneer.html (last accessed Oct. 17, 2021).

also UK Parliament, *Custody Rights and Domestic Violence* (last accessed Oct. 15, 2021), *available at* https://www.parliament.uk/about/living-heritage/transformingsociety/private-lives/relationships/overview/custodyrights/. Out of more than 5,000 years of recorded history, women have had a legal right to their own children for a little more than 3% of it.

It wasn't until 30 years later that legislation, the Married Women's Property Act 1870, granted married women the right to own and inherit property and wages on their own. *See also* Rachel Ablow, *"One Flesh" One Person, and the 1870 Married Women's Property Act*, Branch Collective (May 2012), *available at* http://www.branchcollective.org/?ps_articles=rachel-ablow-one-flesh-one-person-and-the-1870-married-womens-property-act (last accessed October 15, 2021).

In America, the Supreme Court of the United States ruled that married women could be excluded from the practice of law in 1873. *Bradwell v. Illinois*, 83 U.S. 130 (1873). In *Muller v. Oregon*, 208 U.S. 412 (1908), the Supreme Court of the United States upheld a law that

limited women to a 10-hour workweek. It was not until 1919 that the 19th Amendment was passed to guarantee women the right to vote nationwide. U.S. Const. amend. XIX.

Minimum wages were first upheld for the welfare of women and children, who earned such poor wages that they were unable to support themselves independently; the Equal Pay Act was not enacted until 1963. *Adkins v. Children's Hospital*, 261 U.S. 525 (1923); Equal Pay Act (Pub. L. 88-38) (1963). Women did not even have the right to control their own fertility with contraceptives until 1965, and employers could refuse to hire women with children until 1971. *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Phillips v. Martin Marietta Corp.*, 400 US 542 (1971). Laws exempting marital rape from prosecution were not eliminated from American law until the 1970s, with Nebraska passing the first legislative ban on marital rape in 1975.[4]

The legal equality women now have in the United States is a blip on the radar of human history. This progress is not inevitable, not

[4] Joann Ross, *Making Marital Rape Visible: A History of American Legal and Social Movements Criminalizing Rape in Marriage*, 2 "Invading the Domestic Forum and Going Behind the Curtain": Nebraska's Elimination of the Marital Rape Exemption and the Development of Coordinated Victim's Services 86-126 (2015) (unpublished Ph.D. dissertation, University of Nebraska) (on file with the University of Nebraska-), *available at* https://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1085&hx0026;context=historydiss (last accessed Oct. 17, 2021).

linear, and is threatened by coercive actions such as the one brought by Appellant Green.

Women still have a long way to go in certain areas, and many of our remaining challenges are not as simple as passing a law. Women bear a disproportionate impact of ostensibly "gender-neutral" policies such as poor parental leave policies and lack of paid sick time. *E.g.*, Gaëlle Ferrant et al., *Unpaid Care Work: The missing link in the analysis of gender gaps in labour outcomes*, OECD Dev. Centre, (2014). There is an interesting tendency, evidenced in Green's pleadings as well as some of the *amicus* briefs, to cast women as the oppressors of trans-identified men. Brief of *Amici Curiae* Lambda Legal Defense and Education Fund, Transgender Legal Defense and Education Fund, and National Center for Lesbian Rights in Support of Plaintiff-Appellant and Reversal, Dkt. 24 at 5, 6, 11; *Amicus Curiae* Brief of the State of Oregon in Support of Appellant Anita Noelle Green, Dkt. 23. Several of these briefs use case law intended to rectify historical injustice to women in their arguments. Dkt. 24 at 5, 6, 11. *See also* Dkt. 23 at 7, 8, 23. It is perplexing to read that the National Center for Lesbian Rights,

among others, is actually arguing against the right of women to exclude men from an all-female enterprise.

The crux of Green's argument is that women should not be permitted to speak for themselves, keep space for themselves, or define themselves. It is not enough for Green to call himself a woman; he also asks the government to compel others to say they view him as a woman. The state of Oregon takes this misogynistic posture when it states that Appellee has no right to "pick which members of the public it will serve." Oregon even references *Roberts* to refer to the female-only pageant as a "unique evil." Dkt. 23 at 26 (citing *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), quoting *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 810 (1984).)

U.S. women can still be, and are, disciplined, fired, or harassed in the workplace for stating verifiable facts, including that human beings, like all mammals, cannot change sex. This Court should reject Green's invitation to erase and rewrite the long and well-documented history of discrimination against women on the basis of their sex.

B. Women have the right to express that only biological females are women, and to freely associate only with women.

As an initial matter, *amicus* concurs with the arguments presented by Appellee on the issue of free expression and free association, including their analysis of *Hurley*, *Dale*, *Barnette*, and *Meriwether*.[5] Appellee's Answering Brief, Dkt. 38. *Amicus* also concurs with Appellee's argument that rejection of the term "cisgender" in itself expresses a message about femaleness and womanhood. *Id.* at 57-58. Women are not required to "identify" with a feminine "gender" as a precondition to being recognized as members of the female sex class. Furthermore, some things are so obvious and so settled - like the definitions of sex, man, and woman - that one wouldn't expect there must be a record of a person believing it. Green might as well ask why there is no record that Appellee believes the sky is blue. Even if sex distinctions were a matter of opinion or faith, a person is not required to

[5] *Hurley v. Irish-American Gay, Lesbian, & Bisexual Group of Boston*, 515 U.S. 557 (1995); *Meriwether v. Hartop*, 992 F.3d 492 (6th Cir. 2021); *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943); *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000).

make a statement about somebody else's specific spiritual beliefs in order to maintain their right not to share that belief.

It is a fundamental truth that separation between women and men is sometimes necessary in order to create equitable conditions between the sexes. This is the reason why U.S. civil rights law usually allows single-sex spaces and services. For example, Title IX permits female-only sports teams, Title VII allows hospitals to provide same-sex health care providers for intimate exams, and Title VI allows federal funds to go to domestic violence shelters and rape crisis centers that provide women-only services. 20 U.S.C. § 1681 et seq.; 42 U.S.C. § 2000d; 42 U.S.C. § 2000e.

Because of the long history of political and social oppression by men, the right of women to assemble outside of the presence of men is critical to women's ability to continue to push for political and social change on behalf of women as a political class. While *amicus* does not share the perspective of Miss United States of America in terms of its belief in the use of pageants as an expression of empowerment for women, Appellee is nevertheless entitled to speak and associate only with women in order to further this message.

II. GENDER IDENTITY IDEOLOGY IS UNSCIENTIFIC, REGRESSIVE, AND HARMFUL TO WOMEN.

While feminism has sought to improve women's status by dismantling sex-stereotyping, the concept of "transgender" depends on the continued existence of these same sex-stereotypes. This is an undisputed fact in this case - one of Appellant Green's central arguments is that his embrace of feminine stereotypes makes him actually female.

Girls and women are female whether or not they look or act in a stereotypically feminine manner. To believe that sex is determined by a gendered soul or feminine appearance, rather than biology, is to believe that femininity is the same thing as being female. This belief is offensive and harmful to women and antithetical to civil rights jurisprudence. Yet the court is being asked to adopt this regressive belief, urged along by Appellant Green.

A. Sex is objective and immutable, while gender is socially constructed and is harmful and oppressive to women and girls.

"Sex" and "gender" both have distinct definitions and criteria. Sex is an immutable characteristic based in reality. It is defined by reproductive function; a male produces sperm and a female produces eggs, gestates, and gives birth. Sex, Male, and Female, Miller-Keane Encyclopedia And Dictionary Of Medicine, Nursing, And Allied Health (7th ed. 2003), https://medical-dictionary.thefreedictionary.com.

The National Institute of Health (NIH) describes sex as "a classification based on biological differences… between males and females rooted in their anatomy and physiology. By contrast, gender is a classification based on the social construction (and maintenance) of *cultural* distinctions between males and females." [emphasis added.] National Institute of Health Institute of Medicine (US) Committee on Assessing Interactions Among Social, Behavioral, and Genetic Factors in Health; Hernandez LM, Blazer DG, editors. *Genes, Behavior, and the Social Environment: Moving Beyond the Nature/Nurture Debate.* Washington (DC): National Academies Press (US); 2006. 5, Sex/Gender, Race/Ethnicity, and Health. Available from: https://www.ncbi.nlm.nih.gov/books/NBK19934/.

The World Health Organization (WHO) agrees, defining "gender" as "the socially constructed roles, behaviour, activities and attributes that a particular society considers appropriate for men and women." World Health Organization, *Gender, Equity, and Human Rights in Western pacific*, found at https://www.who.int/westernpacific/health-topics/gender-equity-and-human-rights(last accessed Oct. 28, 2021). WHO further notes that these socially constructed roles "give rise to gender inequalities, i.e., differences between men and women that systematically favor one group." *Id.*

B. "Gender identity" and "transgender" have no objective definitions, and are based on harmful sex-based stereotypes.

Although people's lives and personalities are not defined by their sex, their sex is always defined by their biology. By contrast, a "gender identity" is a subjective statement of self-perception. Under gender identity ideology, a woman is simply a person who "identifies" as a woman. But what exactly does it mean to "identify" as a woman? Identifying as a member of the female *sex* would mean identifying as a

member of the reproductive class that produces eggs, gestates, and gives birth. Of course, that is nonsense.

Instead, to "identify as a woman" means embracing the socially constructed gender roles that are imposed upon women. Green says this explicitly when he describes himself multiple times as "stereotypically female," and says that there is "no meaningful distinction between plaintiff and any of defendant's cisgender female contestants." Opening Brief at 57. Green believes that femaleness is defined by femininity, which is a socially constructed role that by design keeps women in a subordinate, subservient position. That is what Green believes about women's natural state. Feminists have been fighting against this toxic system for generations.[6]

As a further note on the First Amendment, the belief that womanhood is defined by "stereotypical" femininity should be considered an opinion rather than an uncontroverted fact. For the government to compel belief in a quasi-spiritual concept like this, to the

[6] Raymond, Janice. *Doublethink: A Feminist Challenge to Transgenderism*. Spinifex Press, 2021 at 28 "Self-declared women are not women, and attempts to define themselves as such are bogus. Pretending that the female body and the experience of living as a woman are irrelevant — but should be accessible to men — is insulting to women" *See also* Raymond, Janice. *The Transsexual Empire: The Making of the She-Male*. The Beacon Press, 1979.

exclusion of objective reality about sex, is unconstitutional, tyrannical, and Orwellian.

i. Gender identity ideology promotes homophobia and women as an inferior sex class.

Gender identity ideology promotes homophobia by pathologizing same-sex attraction and gender nonconforming behavior. Indeed, the vast majority of children with gender dysphoria do not grow up to identify as transgender, but rather become same-sex attracted adults. M.S.C. Wallien, et al., *Psychosexual outcome of gender-dysphoric children,* Journal of the American Academy of Child and Adolescent Psychiatry, 47, 1413–1423 (2008).

In contrast to the psychosexual outcomes of dysphoric children, adult men who identify as transgender are overwhelmingly heterosexual; they claim to identify as "lesbians." Sánchez, Francisco J.; Vilain, Eric (2013). *Transgender Identities: Research and Controversies*. In Patterson, Charlotte J.; D'Augelli, Anthony R. (eds.). Handbook of Psychology and Sexual Orientation. Oxford University Press.. There is a long history of violent practices aimed at actual lesbians, including so-called “corrective rape.” Hawthorne, Susan (2005). "Ancient Hatred And

Its Contemporary Manifestation: The Torture Of Lesbians". *Journal of Hate Studies*, found at http://journals.gonzaga.edu/index.php/johs/article/view/65 (last accessed Oct. 28, 2021). The BBC recently reported on the harmful impact on lesbians - including sexual harassment and even rape - of insisting that people ought to be attracted to "gender identity" (regardless of a person's sex), instead of sex. Caroline Lowbridge, *We're being pressured into sex by some trans women,* BBC News, October 26, 2021, found at https://www.bbc.com/news/uk-england-57853385.

The report also discussed the phenomenon of the "cotton ceiling," which is a term used by gender activists to describe lesbian refusal to have sex with men who identify as women. Planned Parenthood even held a workshop on how to help heterosexual men have sexual relationships with lesbians. *Id.* The state of Oregon unfortunately cosigns this newfangled conversion therapy, stating in its *amicus* that when lesbians reject sexual interactions with trans-identified males, the lesbians are engaging in discrimination and causing hardship for these men. Dkt. 23 at 7.

Heterosexual men with adult-onset gender dysphoria also have a high incidence - some estimates are upwards of 75% - of a paraphilia called autogynephilia, whereby a man becomes sexually aroused by the idea of himself as a woman. Cantor, James M.; Sutton, Katherine S. (2014). "Paraphilia, Gender Dysphoria, and Hypersexuality". In Blaney, Paul H.; Krueger, Robert F.; Millon, Theodore (eds.). Oxford Textbook of Psychopathology. Oxford University Press. pp. 593, 602–604. *See also* Sanchez at 47-48. Turning a paraphilia into a protected characteristic, and the government endorsing its elevation above and beyond protections based on sex, shows exactly where women and girls stand in the state of Oregon.

Oregon also notes that nearly one-third of children of trans-identified men stop speaking to their fathers after they "transitioned." Dkt. 23 at 7. In contrast, only 6% of children end their relationships with their mothers when they "transition." *Id.* Why the sex disparity? Why would so many children accept trans-identified mothers but turn away from trans-identified fathers? Oregon, with no apparent curiosity into this phenomenon, describes these children as "discriminating" against their parents. *Id.*

C. Gender identity ideology is inconsistent and incoherent.

A core concept of gender identity ideology is that the sole criteria for whether somebody is transgender is that he or she says that he or she is transgender. *See Doe 2 v. Shanahan*, 917 F.3d 694, 722 (D.C. Cir. 2019). Under this philosophy, a male becomes a female when he declares himself so. *Id.*

Many who identify as transgender identify as one of dozens of "non-binary" gender identities; for example, demigirl (or demiboy), genderqueer, bigender, or another idiosyncratic label a person might invent based on his or her belief that it "reflect[s] their personal experience." Human Rights Campaign, *Understanding the Transgender Community*, https://www.hrc.org/resources/understanding-the-transgender-community (last visited Oct. 24, 2021). In fact, nearly half of all respondents to the National Transgender Discrimination Survey (NTDS) identify as "non-binary" (neither exclusively male nor exclusively female). S.E. James, *et. al.*, *The Report of the 2015 U.S. Transgender Survey* (National Center for Transgender Equality, 2015). Still, while gender and gender identity may evolve along with fashionable philosophies, sex is immutable. Appellant Green could wake

up tomorrow and no longer identify as a woman, and nothing will have objectively changed. Green could decide to identify as nonbinary, genderfluid, "clowngender," or even "greengender,"[7] but regardless of his personal beliefs or how many pageants he enters, he will always be male.

D. Gender identity ideology promotes harmful laws and policies.

i. Dismantling single-sex spaces and services.

Governmental and societal acceptance and promotion of gender identity ideology allows any man to invade women's spaces, such as this pageant, women's sports, women's homeless shelters, shelters for battered women, women's prisons, and other places and resources dedicated to the support of women. Each time a man colonizes these spaces, he is not only taking up resources which have been designated to women, but he is potentially harming women as well. This potential harm occurs either by putting women at physical and psychological risk in women's shelters or prisons, or by taking their opportunities to

[7] Yes, these are all real "gender identities." *See* LGBTA Wiki, *Greengender*, https://lgbta.wikia.org/wiki/Greengender (last accessed Oct. 28, 2021).

compete and earn recognition in competitions. This is the plain exploitation, by males, of women for their resources and opportunities.

ii. Stifling and undermining the first amendment.

Gender advocates encourage the view that it is discriminatory when people do not speak and act at all times as though claimed gender identities represent biological reality. Gender advocates also encourage the view that a refusal to express belief in people's gender identities is legally actionable discrimination. Appellant Green called it "imperative" to recognize both "trans women and cis women." 4-ER-702. Green understands that his claim of being a male "woman" is unpersuasive unless those around him will agree that women can be male or female. This is what the *Meriwether* court labeled "struggle over the social control of language in a crucial debate about the nature and foundation, or indeed real existence, of the sexes." *Meriwether* at 508.

This struggle over the control of language is spreading across the United States. The American Bar Association, for example, has proposed changes to ethics Rule 8.4, which would make it an ethical violation for an attorney to use sex-based pronouns for somebody who identifies as the opposite sex, in almost any context, or else be subject to

discipline from the state bar. Kristine A. Kubes, *The Evolution of Model Rule 8.4(g): Working to Eliminate Bias, Discrimination, and Harassment in the Practice of Law,* American Bar Association, March 12, 2019, found at https://www.americanbar.org/groups/construction_industry/publications/under_construction/2019/spring/model-rule-8-4/. The ABA joins judges in states like Connecticut, as well as attorneys at formerly-esteemed institutions like the ACLU, who have called for litigants to be forced to refer to men as "women" or "females," *even in cases where sex is relevant*, such as in sports or prisons. Jack Crowe. *Connecticut Transgender Athletes Case: Attorneys Ask Judge to Recuse after He Forbids Them from Describing Trans Athletes as 'Male'*, National Review, found at https://www.nationalreview.com/news/attorneys-for-connecticut-high-school-runners-ask-judge-to-recuse-after-he-forbids-them-from-describing-trans-athletes-as-male/.

Gender identity speech restrictions are also taking hold for public employees in many jurisdictions. New York state now requires its (publicly employed) correctional officers to use "preferred pronouns." New York City actually characterizes "misgendering" as sexual

harassment reportable under the Prison Rape Elimination Act. *The Prevention of Sexual Victimization in Prison*, New York State Department of Corrections and Supervision, found at https://doccs.ny.gov/system/files/documents/2020/05/dc053ec-05-20.pdf. This policy has the added effect of falsely increasing statistics on sexual victimization against people who identify as transgender while incarcerated. This policy also risks giving the appearance of an increase in victimization over time, because older data would not reflect this convention. Activists can then use this data to bolster their case for mixed-sex prisons, claiming that transgender prisoners experience increased rates of sexual harassment. National Center for Transgender Equality, *Police, Jails, and Prisons*, found at https://transequality.org/issues/police-jails-prisons (last accessed October 28, 2021).

Such practices also have grave implications for victims' rights. In the UK, an older woman giving testimony about being the victim of a violent physical assault was repeatedly interrupted and admonished by the judge for not referring to her male attacker as "she". Melanie Newman, *Warning over transgender guidance to judges*. The Law

Society Gazette, February 24, 2020, found at https://www.lawgazette.co.uk/news/warning-over-transgender-guidance-to-judges/5103196.article. The Judicial Equal Treatment Benchbook now requires this practice in all UK courtrooms. *Id.*

The legal system is the last bulwark against these trends, and fortunately there are jurisdictions that are taking this seriously. The Fifth Circuit recently denied the request of a male pedophile to use female pronouns after he began to "identify" as a woman. *U.S. v. Varner*, 948 F.3d 250 (5th Cir. 2020). The *Varner* court spoke bluntly against the practice of mandatory "preferred" pronouns, correctly finding that "no authority supports the proposition that we may require litigants, judges, court personnel, or anyone else to refer to gender-dysphoric litigants with pronouns matching their subjective gender identity." *Id.* at 254. It further noted that such compelled speech would "raise delicate questions about judicial impartiality" and "convey its tacit approval of the litigant's underlying legal position." *Id.* at 256. The court concluded by "declin[ing] to enlist the federal judiciary in this quixotic undertaking." *Id.* at 258.

III. GREEN IS A MAN, AND HIS ARGUMENT RELIES UPON A CONFLATION OF SEX AND GENDER NOT RECOGNIZED BY LAW.

A. Green is a man.

Appellant Green is a man. He admits this himself, *see* 2-ER-182 ("Ms. Green was *assigned* the gender of male at birth"). A man who has elective cosmetic surgery on his genitals is still a man. Women are not pronouns or hormone levels or outfits. A person's sex is not defined by a word on his or her driver's license, nor can it be biologically changed just because a government allows residents to put whatever sex they want on their driver's licenses, with no objective criteria or oversight. A woman is not a feeling inside a man's head. Men do not have the right to redefine what it means to be female in order to accommodate their own feelings and desires, and they certainly cannot compel women to redefine *themselves* for their comfort.

U.S. civil rights law recognizes the need to protect women from subjective beliefs of others that are founded on sex-stereotypes. *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (sex stereotyping is a form of sex discrimination). Women and girls are thus protected under the

law from subjective beliefs about whether and how women should work, vote, have children or not have children, and how they ought to look and behave.[8] Under the law, no longer are women (or men) governed by such regressive beliefs.

B. The conflation of gender and sex is not recognized in the law—the law protects women on the basis of biological sex alone.

The 21st century has introduced a new challenge in defending equality: expunging the female sex-class in language and in the law. Appellant seeks to redefine "female" to include members of both sexes and redefine "sex" to mean one's state of mind instead of one's reproductive class. However, discrimination on the basis of pregnancy, childbirth, or breastfeeding are all considered forms of sex discrimination, so it is clear - as a matter of law as well as science - that reproductive class is determinative of sex.

In 2020, the Supreme Court ruled that since Title VII of the Civil Rights Act prohibited discrimination on the basis of sex, that what it

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

called "transgender status" was also a form of discrimination on the basis of sex. *Bostock v. Clayton* County, 140 S. Ct. 1731 (2020). While this holding was narrow and applied only to Title VII, it has been claimed that *Bostock* applies to this case and is supportive of Appellant's argument. Dkt. 16 at 47. But the facts of this case are completely different from *Bostock* and support the opposite conclusion. The Supreme Court recognized that sex and "gender identity" were distinct concepts, whereas Appellant Green argues that they are the same. They are not. The Appellee is lawfully running a female-only event - i.e. sex discrimination in this circumstance is not prohibited. There is no remedy in *Bostock* for Appellant Green, who seeks an exemption from sex discrimination that he himself admits is lawful and appropriate because he views himself as female-sexed, despite objective reality.

C. Prohibiting the exclusion of some males from Appellee's pageant would prohibit the exclusion of any male.

A ruling in favor of Green would effectively mean that all women's pageants must also admit males, even if they identify as men. Oregon's ineffectual definition of gender identity would mean that, if this Court

rules for Appellant Green, then any man could bring a gender identity claim against a women's pageant for excluding him -- even if he does not identify as a woman. Or. Rev. Stat. §§ 166.155(3)(a) (defining "gender identity" as "an individual's gender-related identity, appearance, expression, or behavior, regardless of whether… [it] differs from that associated with the gender assigned to the individual at birth.") Thus, no man could be prohibited from entering the pageant. Taken to its logical conclusion, such a decision threatens any association or services intended for women, which are a historically marginalized group in need of services and associations specifically for them, to the exclusion of males.

The State of Oregon claims that exclusion based on protected characteristics "[prevents] the full participation of Oregonians... in economic and social life." Dkt. 23 at 2. To the contrary, the exclusion of men from women-only spaces and events is a necessary condition for women (including female Oregonians) to participate fully in economic and social life.

The Lambda brief also cited *Rotary*'s ruling that homogenous groups should not be able to "limit professional and networking benefits to

those that resemble themselves." Dkt. 23 at 11, citing *Bd. of Dir. of Rotary Intl. v. Rotary Club of Duarte*, 481 U.S. 537 (1987). It is, again, difficult to comprehend that the National Center for Lesbian Rights is arguing that there should be no female-only professional and networking opportunities. At any rate, both *Rotary* and *Roberts* were decided in such a manner as to ensure women did not have "barriers to economic advancement and political and social integration." *Id. See also Roberts v. United States Jaycees* (1984). But these decisions were never intended to require the "social integration" of certain types of men into all-female enterprises, where the all-female enterprise is otherwise legally permissible. Other groups of men (ethnic minorities, disabilities) may experience professional or social barriers to advancement, yet the court would not ask Appellee to subordinate the needs of the women they serve in order to advance the interests of those men.

D. The inclusion of a male contestant in a pageant for females would make it less safe for the contestants.

Nearly all murders, assaults, and rapes against women are committed by men. *See*, Satoshi Kanazawa & Mary C. Stil, *Why Men Commit Crimes (And Why They Desist)*, SOCIOLOGICAL THEORY, 434

(Nov., 2000). Since men are, on average, much stronger and larger than women, women lack the capacity to meaningfully defend themselves in close quarters when threatened. Gong Chen et al., *A Comparative Study on Strength between American College Male and Female Students in Caucasian and Asian Populations*, 21 SPORT SCIENCE REV. 153 (Aug. 2012) (finding that women have 37-64% of the upper body strength of men on average). In addition, sexual victimization can take additional forms beyond outright violence, such as exhibitionism and voyeurism. Appellee would either need to provide separate changing rooms for Green and any other male contestants (which may not be feasible) or else turn the communal change area into a mixed-sex space, to the detriment of the female contestants. This puts the female contestants at risk of sexual harassment and assault - even if Green were himself not a threat, other men statistically are. How are the female contestants to know which male contestants are going to harass, leer at, or potentially rape or photograph them in these sensitive spaces? Some women who might otherwise wish to join the pageant might no longer compete if they must share intimate facilities with a man. Thus, admitting male

contestants such as Green would reduce opportunities available to women to join the pageant.

Green's gender identity is irrelevant to concerns about privacy and safety, because there is nothing about "self-identifying" as a woman that exempts a man from being included in these statistics and generalities about men. According to a high-quality longitudinal study, even men who have identified as women for a long period of time and who have taken hormones and removed their genitals, maintain "male-pattern criminality," including violent crimes. Cecilia Dhejne et. al. *Long-Term Follow-Up of Transsexual Persons Undergoing Sex Reassignment Surgery: Cohort Study in Sweden,* PLoS One. 2011 Feb 22;6(2):e16885. doi: 10.1371/journal.pone.001688. Twenty percent of incarcerated trans-identified men in California are sex offenders, compared to only 15% of the incarcerated male population overall. Lori Sexton et. al., *Where The Margins Meet: A Demographic Assessment of Transgender Inmates in Men's Prisons*, 12, 38, University of California, Irvine, June 10, 2009.

The 21 trans-identified men currently being housed *with women* in California have committed, in addition to murder, arson, and

kidnapping, the following sex crimes: "Continuous Sex Abuse of Child Under 14 Years," "Adult Engage Oral Copulation/Penetration of a Child 10 years old or Younger," "Rape with Force/Violence/Fear of Bodily Injury," "Lewd and Lascivious Victim 14/15 Years Old and Age Difference of 10+ Years," Lewd and Lascivious Child Under 14 Years," Lewd and Lascivious Child Under 14 W/Force/Violence."[9]

Just this past summer, a trans-identified man exposed his genitals to four adult women and a little girl in a female-only section of a spa in Los Angeles. Andy Ngo, *Wi Spa Suspect Still at Large, With History of Indecent Exposure and Masturbation*, New York Post, September 17, 2021, found at https://nypost.com/2021/09/17/wi-spa-suspect-still-at-large-has-history-of-indecent-exposure-and-masturbation/. This man, who arguably had a legal right to be there under California's "gender identity" laws, has been on the sex offender registry since 2006. His "female" gender identity does not appear to have lessened his risk of perpetration.

[9] Public records response from the California Department of Corrections and Rehabilitation in a regarding convictions and sex offender status of male inmates housed in women's facilities, dated September 10, 2021.

Exhibitionism, voyeurism, and the myriad sex crimes commited by the trans-identified men incarcerated in California, are *vanishingly* rare among actual women. Zucker, K. (2013). DSM-5: call for commentaries on gender dysphoria, sexual dysfunctions, and paraphilic disorders. Archives of sexual behavior. Vol. 42, Iss. 5, pp. 669 – 674. Of course, Green himself is not a sex offender, and there is no evidence that he personally would behave inappropriately. However, we do not have female-only spaces because *all* men do these things - but rather because *some* men do.

CONCLUSION

If the words "woman" and "female" have no clear meaning, then one might rightly wonder on what basis the government has enacted statutory protections for them, and why the courts have consistently upheld the right of women and girls to self-separate from men and boys. The outcome of this case is a statement on whether this Circuit will honor the constitutional and statutory protections granted to women, fought for and earned over centuries of advocacy by feminists and civil rights activists. We urge the Court to stand resolute in defense of the civil protections that encourage and allow women to associate and

express themselves. The lower court's decision should be upheld for these reasons.

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), the undersigned certifies that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B). Exclusive of the sections exempted by Fed. R. App. P. 32(f), the brief contains 6,633 words, according to the word count feature of the software (Microsoft Word Version 2010) used to prepare the brief. The brief has been prepared in proportionately spaced typeface using Century Schoolbook 14 point.

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CERTIFICATE OF SERVICE

I hereby certify that on October 29, 2021, I electronically filed the foregoing Brief Of *Amicus Curiae* Women's Liberation Front In Support Of Defendant-Appellee with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the CM/ECF system, which will accomplish service on counsel for all parties through the Court's electronic filing system.

Dated: Oct. 29, 2021

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