No. 18-13592

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

DREW ADAMS,

Plaintiff-Appellee,

v.

SCHOOL BOARD OF ST. JOHNS COUNTY, FLORIDA,

Defendant-Appellant.

Appeal from the United States District Court for the Middle District of Florida, Honorable Timothy J. Corrigan, Case No. 3:17-cv-00739-TJC-JBT

BRIEF OF *AMICUS CURIAE* WOMEN'S LIBERATION FRONT IN SUPPORT OF REVERSAL ON BEHALF OF DEFENDANT-APPELLANT SCHOOL BOARD OF ST. JOHNS COUNTY, FLORIDA

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Local Rules 26.1-1 through 26.1-3 and 28-1(b), the undersigned certifies that the name of each person, attorney, association of persons, firm, law firm, partnership, and corporation that has or may have an interest in the outcome of this action—including subsidiaries, conglomerates, affiliates, parent corporations, publicly-traded companies that own 10% or more of a party's stock, and all other identifiable legal entities related to any party in the case, in addition to those set forth in the Initial Brief of Appellant The School Board of St. Johns County, Florida, include:

1. Bertschi, Craig – counsel for *Amicus Curiae* Women's Liberation Front
2. McRae Bertschi & Cole LLC – counsel for *Amicus Curiae* Women's Liberation Front.
3. Women's Liberation Front – *Amicus Curiae*

The undersigned will enter this information in the Court's web-based CIP contemporaneously with filing this Certificate of Interested Persons and Corporate Disclosure Statement.

Women's Liberation Front is a private non-profit corporation that has no parent corporation and does not issue stock; thus there is no publicly held corporation that holds 10% or more of its stock.

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STATEMENT OF THE ISSUES

Whether the district court erred when it interpreted "sex" to mean "gender identity" under Title IX and the Equal Protection Clause?

INTEREST OF *AMICUS CURIAE*[1]

Amicus Women's Liberation Front ("WoLF"), is an all-volunteer radical feminist organization dedicated to the liberation of women by ending male violence, protecting reproductive sovereignty, preserving woman-only spaces, and abolishing sex discrimination. WoLF has nearly 500 members who live, work, and attend public schools, colleges, and Universities across the United States.

WoLF's interest in this case stems from its interest in protecting the safety and privacy of women and girls and preserving women's sex-based civil rights. When we say "sex" in this brief, we mean exactly what Congress meant in 1972 when it protected sex as a class in Title IX of the Civil Rights Act: The biological classification of human beings as either female ("women") or male ("men").

That legal protection against sex discrimination is being 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

[1] None of the parties to this case nor their counsel authored this brief in whole or in part. No person or entity other than WoLF made a monetary contribution intended for the preparation or submission of this brief. *Amicus curiae* files this brief with the written consent of all parties. All parties received timely notice of *amicus curiae*'s intention to file this brief.

are based explicitly on "sex." The lower court's decision in this case typifies this erosion of protection for women under the law.

WoLF previously challenged one such policy that purported to rewrite Title IX of the Civil Rights Act in a "Dear Colleague" letter issued by the U.S. Department of Justice and U.S. Department of Education on May 13, 2016. *Women's Liberation Front v. U.S. Department of Justice et al.*, No. 1:16-cv-00915 (D.N.M. August 11, 2016). WoLF also served as *amicus* addressing these same issues at the United States Supreme Court in *Doe v. Boyertown Area Sch. Dist.,* 897 F.3d 515 (3d Cir. 2018), *petition for cert. filed*, (Nov. 19, 2018) (No. 18-658) (supporting the pending petition for a writ of certiorari), and in *Gloucester County School Bd. v. G.G.*, 137 S. Ct. 1239 (2017) (mem.) (vacating and remanding *G.G. v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709 (4th Cir. 2016)), as well as in the respective appellate cases in *Boyertown* and *Gloucester County*.

Although the 2016 Dear Colleague Letter was withdrawn on February 22, 2017, threats to the rights of women and girls persist. The decision below did not recognize that women and girls—being of one sex—are understood under federal law as a discrete category worthy of civil rights protection. Instead, the lower court adopted "gender identity" ideology, according to which a girl who claims a so-called "male gender identity" does gain categorical protection for being "transgender." No coherent limiting principle confines the impact of this decision

to Appellant Adams, and the opposite-sex access granted to Adams ineluctably extends to the use of locker rooms and other communal intimate facilities by girls who claim to be male, or by boys who claim to be female.

The lower court erred by fundamentally shifting American law and policy to strip women of their Constitutional right to privacy, threatens their physical safety, and undercuts the means by which women can achieve educational equality. Ultimately and inevitably, "gender identity" ideology erases women and girls from the law. The principle embodied in the decision below not only extinguishes the very rights and protections that specifically secure *women's* access to education, but will extend those rights and protections to boys claiming to be girls.

WoLF empowers women and girls to advocate for their rights to privacy, safety, and association, seeking to educate government officials who might not otherwise consider the particular harms women and girls face if sex is redefined to mean "gender identity" under civil rights laws and the Constitution. WoLF urges the Court to reverse the decision below and confirm that schools and other institutions have the authority and duty to give effect to longstanding sex-based protections under the law.

SUMMARY OF THE ARGUMENT

The Court below has completely re-written the definition of "sex" for the purpose of interpreting Title IX and its implementing regulations. *Adams v. Sch.*

Bd. of St. Johns Cty., Fla., 318 F. Supp. 3d 1293, 1320 (M.D. Fla. 2018). But redefining such a key term to categorically eliminate "sex" as a protected characteristic under Title IX is a job for Congress, not a federal district court.[2] This Court should instead affirm the unambiguously-expressed intent of Congress to prohibit discrimination on the basis of sex under Title IX and the Constitution, in order to remedy centuries of sex-based discrimination against women and girls in the educational arena.

Sex and gender (or "gender identity") are distinctly different concepts. The word "sex" has objective meaning – specifically, the distinction between male and female.[3] Sex is recorded (not "assigned") at birth by qualified medical professionals, and it is an exceedingly accurate categorization: an infant's sex is easily identifiable based on external genitalia and other factors in 99.982% of all cases. The miniscule fraction of individuals who have "intersex" characteristics are also either male or female; in vanishingly rare cases individuals are born with such

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[2] WoLF categorically believes that Congress should not do this, as "gender identity" is a vague and meaningless concept that is not grounded in any material reality.

[3] *See* Sex, Black's Law Dictionary (10th ed. 2014); Male, Merriam-Webster.com (Dec. 3, 2018); Female, Merriam-Webster.com (Dec. 3, 2018); Nat'l Inst. For Health, *Genetics Home Reference: X chromosome* (Jan. 2012), https://ghr.nlm.nih.gov/chromosome/X (last visited Dec. 3, 2018); Daphna Joel, *Genetic-gonadal-genitals sex (3G-sex) and the misconception of brain and gender, or why 3-G males and 3-G females have intersex brain and intersex gender*, 27 Biology of Sex Differences, no. 3, Dec. 2012, at 1.

a mix of characteristics that it is difficult to characterize—but they still do not constitute a third reproductive class.[4]

In stark contrast to sex, "gender" and "gender identity" refer to stereotypical roles, personalities, behavioral traits, and clothing fashions that are socially imposed on men and women.[5] There is no credible support for the argument that "gender identity" is innate, has a supposed "biological basis," or that every human being has a "gender identity." The Court below acknowledges as much when it states that "'[g]ender identity' refers to a person's internal sense of being male, female, or another gender." *Adams*, 318 F. Supp. 3d at 1299. That is a wholly circular definition. "Gender identity" is in essence only a belief system that has been invented and adhered to by a small subset of society.[6]

Legally redefining one sex, such as female, as anyone (male or female) who claims to be female results in the erasure of female people as a class.[7] If, as a

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[4] Leonard Sax, *How Common Is Intersex? A Response to Anne Fausto-Sterling*, The Journal of Sex Research, 39, no. 3 (2002) at 174-78, http://www.jstor.org/stable/3813612; R. Dawkins, *The Ancestor's Tale, A Pilgrimage to the Dawn of Evolution*, 135 (Mariner Books ed. 2005); Nat'l Institutes for Health, *Genetics Home Reference: SRY gene* (March 2015) https://ghr.nlm.nih.gov/gene/SRY.pdf . Nor are chromosomal anomalies at issue in this case.

[5] *Whitaker by Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. Of Educ.*, 858 F.3d 1034, 1048 (7th Cir. 2017) ("By definition, a transgender individual does not conform to the sex-based stereotypes of the sex that he or she was assigned at birth.")

[6] *See* Rebecca Reilly-Cooper, *Gender is Not a Spectrum,* Aeon (June 28, 2016); Cordelia Fine, *Testosterone Rex* (2017).

[7] *See generally,* Ruth Barrett, ed., *Female Erasure* (2016).

matter of law, *anyone* can be a woman, then *no one* is a woman, and Title IX has no meaning whatsoever. The ruling below effectively erases the category of sex from Title IX.

The entire concept of "gender identity" is rooted in the notion that males and females have particular sex-specific ways of feeling and thinking, but scientists have demonstrated time and again that there is simply no such thing as a "female brain" or a "male brain."[8] This science demonstrates that gender is not innate. It is a collection of sex-based stereotypes that society imposes on people on the basis of sex, where women are understood to like particular clothing and hair styles and to have nurturing, unassuming personalities, whereas men are said to like a different set of styles and to have ambitious, outgoing personalities.[9]

In application, "gender identity" is simply adopting the sex-based

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[8] *See, e.g.,* Daphna Joel, et al., *Can We Finally Stop Talking About 'Male' and 'Female' Brains?* The New York Times (Dec. 3, 2018) ; Karen Kaplan, *There's No Such Thing as a 'Male Brain' or a 'Female Brain' and Scientists Have the Scans to Prove It*, L.A. Times (Nov. 30, 2015), http://www.latimes.com/science/sciencenow/la-sci-sn-no-male-female-brain-20151130-story.htmo; Lila MacLellan, *The biggest myth about our brains is that they are "male" or "female,"* Quartz (August 27, 2017), https://qz.com/1057494/the-biggest-myth-about-our-brains-is-that-theyre-male-or-female/.

[9] *See, e.g., Am.* Br. of the National PTA, *et al.* in Support of Appellees at 22, *Doe v. Boyertown Area Sch. Dist.,* No. 17-3113 (Jan. 23, 2018) (quoting a self-described "trans[gender] girl" as stating, "When I was little I loved to play with dolls and play dress up. I loved painting my nails too. Wearing my mom's high heels was my favorite!") These stories peddle the offensive stereotype that a child who is a girl must like playing with dolls, dressing up, painting nails, and wearing heels.

stereotypes that society imposes on the opposite sex. This is old-fashioned sexism run rampant: schools and courts should suppress the use of sexist stereotypes, not force entire student populations to affirm a particular individual's expression of adopted stereotypical behavior.

ARGUMENT

Sex and "gender" are distinct concepts that cannot be conflated. While some individuals may claim to feel or possess an "identity" that differs from their sex, such feelings have no bearing whatsoever on the person's vital characteristics, and should have no bearing on the Courts' application of civil rights law.

A. If "gender identity" is used to mean sex for purposes of interpreting the Constitutional right to privacy and Title IX, women and girls will lose their privacy and be put at even greater risk of sexual violence.

Redefining "sex" to mean "gender identity" means that the thousands of colleges, universities, and schools that have women-only facilities, including dormitories, must now allow any male who "identifies as" female or "transgender" to live in them. Thus, women and girls who believed that they would have personal privacy of living only with other females will be surprised to discover that males will be their roommates and will be joining them in the showers. And those girls and their parents will only discover this *after* they move in because colleges and universities across the country have adopted policies that prohibit administrators from notifying them in advance, on the theory that self-described transgender

students have a right to conceal their vital characteristics and to compel schools to instead recognize their subjective "gender identity." It is truly mind-boggling that informing women that men might have the "right" to share a bedroom with them is an "invasion of privacy," but it is *not* an invasion of privacy to invite those men into women's bedrooms in the first place.

Schools have long provided women-only dormitories and related facilities for female students. For example, Cornell College in Mount Vernon, Iowa, has a proud history of serving women, having been the first college west of the Mississippi to grant women the same rights and privileges as men, and the first, in 1858, to award a degree to a woman. At Cornell College, Bowman-Carter Hall has traditionally been a residence hall for women only.[10] But if sex is redefined to mean "gender identity" under Title IX, then any male person will be legally entitled to live in Bowman-Carter Hall once he claims to identify as a woman.

The same is true at Cornell University, where Balch Hall has long been a women-only residence.[11] But that will end if "sex" is redefined to mean "gender identity," and the women of Balch Hall will be joined by any man – or group of men – who utters the magic words "I identify as a woman."

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[10] *See Bowman-Carter Hall (1885)*, Cornell College, www.cornellcollege.edu/residence-life/housing/halls/bowman-carter/index.shtml (last visited Dec. 3, 2018).
[11] *See* Living at Cornell*, Balch Hall*, Cornell College, https://living.cornell.edu/live/wheretolive/residencehalls/Balch-Hall.cfm (last visited Dec. 3, 2018).

Privacy is one thing; violence is another. The violence that Appellee Adams seeks to do to the definition of "sex" under civil rights laws is reflected in the violence that will result from this action. Without a second thought, schools and universities are mandating that men must be permitted to invade women's spaces, which inherently threatens women's physical safety in the places previously preserved exclusively for women and girls. That *any* male can justify his presence in *any* female-only space by saying "I identify as female" will not escape the notice of those who already harass, assault, and rape tens of thousands of women and girls every day. Data shows 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 during that time.[12] Moreover, a majority of those assaults were committed by "students, professors, or other employees of the school."[13]

Allowing any male to claim that he has a right guaranteed by federal law to be in women's most intimate and vulnerable spaces 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

[12] U.S. Dep't 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).
[13] *Id.* at 104.

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). If any male can assert that he has a legal right to be in a women's locker room because he identifies as female, it will be impossible to see how either this or similar laws in 26 other states could ever be enforced.

Redefining sex to mean "gender identity" under civil rights laws would also render similar statutes in other states inapplicable to these types of crimes. In many states, the relevant statute criminalizes only covert or "surreptitious" observation. For example, District of Columbia law provides that it is "unlawful for any person to occupy a hidden observation post or to install or maintain a peephole, mirror, or any electronic device for the purpose of secretly or surreptitiously observing" in a bathroom, locker room, etc. D.C. Code Ann. § 22-3531(b). Similarly, 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).[14]

[14] This same condition of the secret or hidden observer applies to voyeurism statutes in at least 15 other states. See Del. Code Ann. tit. 11, § 820 ("peer or peep into a window or door"); Fla. Stat. Ann. § 810.14 ("secretly observes"); Ga. Code

But if sex can be self-declared, then it is *not* illegal for a man to walk into a women's locker room in the District of Columbia or 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," as the Court below has done, *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 female."

B. If "gender identity" is used to mean sex for purposes of interpreting Title IX, women and girls will lose preferences addressing historical and systemic discrimination.

After centuries of second-class treatment in all matters educational, the very preferences used to remedy that history and encourage women's education – most importantly perhaps, scholarships for women – will, if the word "sex" is redefined to mean "gender identity," be reduced by the demands of any males who "identify as female." For example, will Alpha Epsilon Phi, a women's legal sorority that sponsors the Ruth Bader Ginsburg Scholarship for female law students, now be forced to open its scholarships to males purely on the basis of "gender identity?"

Ann. § 16-11- 61 ("peeping Tom"); Haw. Rev. Stat. Ann. § 711-1111 ("peers or peeps"); Mich. Comp. Laws Serv. § 750.167 ("window peeper"); Miss. Code Ann. § 97-29-61 ("pries or peeps through a window"); Mont. Code Ann. §45-5-223 ("surreptitious"); Nev. Rev. Stat. Ann. § 200.603 ("surreptitiously conceal . . . and peer, peep or spy"); N.C. Gen. Stat. § 14-202 ("peep secretly"); N.D. Cent. Code § 12.1-20-12.2 ("surreptitiously"); Ohio Rev. Code Ann. § 2907.08 ("surreptitiously"); R.I. Gen. Laws § 11-45-1 ("window, or any other opening"); S.D. Codified Laws § 22-21-1 ("peek"); Wyo. Stat. § 6-4-304 ("looking in a clandestine, surreptitious, prying or secretive nature").

Virtually all schools have endowed scholarships. Princeton, for example, has the Peter A. Cahn Memorial Scholarship, the first scholarship for female students at Princeton, and the Gary T. Capen Family Scholarship for International Women. For graduate students, Cornell University's School of Veterinary Medicine has at least four scholarships intended to benefit female students.[15]

Given the struggles that 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. *See*, e.g. the Joan Keyes Scott Memorial Scholarship, the Lillian Goldman Perpetual Scholarship Fund and the Elizabeth Warke Brenm Memorial Fund at Yale Law School.[16]

Nor are such scholarships supporting women confined to private institutions. For example, at the University of Iowa, undergraduate women are supported by the Madeline P. Peterson Scholarship[17] and Ohio University has the Mary Ann Healy Memorial Scholarship.[18] This list goes on and on.

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[15] *See* College of Veterinary Medicine, *Scholarship List*, Cornell University, http://bit.ly/2BAJKhO (last visited Dec. 3, 2018).
[16] *See Alumni and Endowment Funds*, Yale Law School, http://bit.ly/2RjTbfg (last visited Dec. 34, 2018).
[17] *See* Awards and Scholarships, *Madeline P. Peterson Scholarship for American Indian Women*, University of Iowa, http://bit.ly/2AcqCqG (last visited Dec. 3, 2018).
[18] *See* Scholarship Library, *Mary Ann Healy Memorial Scholarship*, Ohio University, http://bit.ly/2PZjanw (last visited Dec. 3, 2018).

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 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 no 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 based on the notion that there is no objective way to identify a female body. After all, according to the lower court and to Adams, whether one is male or female is defined solely by self-identification.

The ruling below effectively denies that sex is a meaningful legal category. This would be a surprise to the drafters of the Nineteenth Amendment, which reads

"[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex."[19] Surely, everyone knew what a woman was when the law prohibited women from voting; at no point were those disenfranchised women asked whether they identified with the sex-stereotypes or social limitations imposed on women at the time.

C. If "gender identity" is used to mean sex for purposes of interpreting Title IX, women and girls will lose preferences under other remedial statutes.

If "sex" becomes ambiguous in Title IX, then there is no logical reason why "sex" or "female" or "woman" or "girl" would be 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 creating the National Women's Business Council, of which at least four members would be women. *Id*., § 403(b)(2)(A)(ii).

Similarly 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 (Pub. L. 102-530, § 1(a); codified at 29 U.S.C. § 2501(a)), in

[19] U.S. Const. Amend. 19.

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 these programs will 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 *amicus* is concerned that men "identifying as women" reduces the availability of benefits Congress intended to aid actual women, judicially redefining sex to mean "gender identity" in Title IX would also affect all other federal statutes that 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)), mental health and substance abuse (42 U.S.C. § 300x-57(a)), maternal and child health (42 U.S.C. § 708(a)), and a myriad of other federal programs.

Finally, *amicus* also note that men might take advantage of the confusion between sex and "gender identity" 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). Should America again find itself relying on the draft to defend itself, draft boards may well be astonished by a sudden surge in the female population.

D. Civil rights protections should not be based on subjective feelings or on a propensity to threaten or engage in self-harm.

The ruling below rests on the extraordinary principle that a male person who claims to "feel like" a female person must automatically be given access to a host of rights and spaces that were hard-won by women and girls. While the ruling below asserts that "[M]any transgender individuals are diagnosed with gender dysphoria," *Adams* 318 F. Supp. 3d at 1299 (citation omitted), it only defines

gender identity and transgender according to ineffable, unverifiable, subjective beliefs, making all the medical evidence cited by the lower court irrelevant.

Even if the definition of "transgender" in the ruling below required a formal diagnosis of "gender dysphoria,"[20] subjective distress about one's sex has never previously served to define a class of persons protected under civil rights laws. Yet the ruling below erases single-sex protections based in part on the largely self-reported propensity of an ill-defined class of individuals to threaten or engage in self-harm. *Adams*, 318 F. Supp. 3d at 1299 n. 15. No law justifies or requires this result.

Moreover, this is misleading and manipulative. There are many groups of individuals with high-levels of self-reported attempted or completed suicide, while conversely, some groups that have historically been subject to sex-based and race-based discrimination exhibit very low rates of suicide and self-harm.[21] Indeed, if

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[20] "Gender dysphoria" is a psychiatric condition marked by significant distress at the thought of one's sex, and "a strong conviction that one has feelings and reactions typical" of the opposite sex. American Psychiatric Association, *Gender Dysphoria* (discussing the diagnostic criteria contained in the APA's *Diagnostic and Statistical Manual of Mental Disorders (DSM-5)*), available at http://bit.ly/2Re1MA5 (last visited Nov. 10, 2018).

[21] *See*, *e.g.*, Gary Barker, *Why Do So Many Men Die by Suicide?*, Slate (June 28, 2018), http://bit.ly/2EHSe9V?; Jennifer Wright, *Why a Pro-Life World Has a Lot of Dead Women in it*, Harper's Bazaar (June 28, 2018), http://bit.ly/2RhBFbC; Irina Ivanova, *Farmers in America are facing an economic and mental health crisis*, Money Watch (June 29, 2018), https://cbsn.ws/2GABxzX; Rand Corporation, *Invisible Wounds of War* (2008), http://bit.ly/2EEUdMa.

civil rights laws were to be interpreted according to suicide rates, white men would be roughly three times as oppressed as Black, Hispanic, or Asian Pacific Islander individuals in the U.S., even more so for white men living in Montana.[22] Certainly, any student expressing suicidal intent merits compassion and support—but it is neither compassionate nor supportive of women and girls to eliminate sex discrimination protections by judicially adopting gender identity ideology.

E. Replacing sex with "gender identity" under civil rights law will distort vital statistics.

Numerous consequences follow from the conflation of sex to mean "gender" or "gender identity." For example, sex is a vital statistic; "gender" and "identity" are not. Society has many legitimate interests in recording and maintaining accurate information about its residents' sex, for purposes of identification, tracking crimes, determining eligibility for sex-specific programs or benefits, ensuring proper medical treatment where the effectiveness of therapies is directly impacted by the patient's sex, and determining admission to sex-specific spaces, to name just a few examples. In contrast, there is no legitimate governmental interest in recording a person's subjective "identity" or giving that identity legal significance *in lieu of* sex.

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[22] Suicide Prevention Resource Center, *Racial and Ethnic Disparities*, https://www.sprc.org/racial-ethnic-disparities (last visited Dec. 3, 2018); American Found. for Suicide Prevention, *State Fact Sheet for Montana*, https://afsp.org/about-suicide/state-fact-sheets/#Montana (last visited Dec. 3, 2018).

Additionally, as demonstrated consistently by the FBI's Uniform Crime Reporting system and similar state systems, women face a dramatically disproportionate statistical risk of violence, rape, assault, or voyeurism, and in the vast majority of cases women suffer these harms at the hands of men. For crimes reported by law enforcement to the FBI in 2015, men committed over 88% of all murders, 97% of rapes, 77% of aggravated assaults, and 92% of sex offenses other than rape or prostitution.[23] Redefining sex to mean "gender identity" would skew basic crime statistics traditionally recorded and analyzed according to sex because police departments traditionally use the sex designation on a driver's licenses to record the sex of an arrestee. Males who commit violent crimes against women should not be permitted to obscure their sex by simply "identifying as women."

CONCLUSION

If the word sex is redefined in a circular manner; if the words "women" and "girls" have no clear meaning; if women and girls have not been discriminated against, harassed, assaulted, and murdered because of their sex; if women are not a discrete legally-protectable category, then one might rightly wonder what women have been fighting for all this time. Women and girls deserve more consideration than the ruling below gives them. WoLF implores the Court to reverse the lower

[23]2015 Crime in the United States, Table 33, *Ten-Year Arrest Trends by Sex, 2006–2015*, https://ucr.fbi.gov/crime-in-the-u.s/2015/crime-in-the-u.s.-2015/tables/table-33, U.S. Dep't of Justice Fed. Bureau of Investigation (last visited Dec. 3, 2018).

court's holding and honor the plain text and original intent of Title IX, which is to prohibit discrimination on the basis of *sex*.

Respectfully submitted,

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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 4,893 words, according to the word count feature of the software (Microsoft Word 2013) used to prepare the brief. The brief has been prepared in proportionately spaced typeface using Times New Roman 14 point.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was filed electronically with the Court's CM-ECF system on this 27th day of December, 2018. Service will be effectuated by the Court's electronic notification system upon all parties and counsel of record.

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