No. 18-658

In The
Supreme Court of the United States

JOEL DOE, et al.,

Petitioners,

v.

BOYERTOWN AREA SCHOOL DISTRICT, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

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

L. THEODORE HOPPE, JR.
Counsel of Record
2 S. Orange St., Ste. 215
Media, PA 19063
610-497-3579
thoppe@thoppelaw.com

Counsel for Amicus Curiae

December 18, 2018

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

INTEREST OF *AMICUS CURIAE*[1]

Amicus is the Women's Liberation Front ("WoLF"), an all-volunteer organization of radical feminists 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.[2] Those rights have been 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." 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

---

[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 specifically 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.

[2] *Amicus* uses "sex" throughout to mean exactly what Congress meant in 1972 when it incorporated the longstanding meaning of that term into Title IX of the Civil Rights Act: The biological classification of human beings as either female ("women") or male ("men").

Education on May 13, 2016 ("2016 Guidance").[3] *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 submitted *amicus* briefs addressing the same question in this Court and in the U.S. Court of Appeals for the Fourth Circuit in the case of *Gloucester County School Bd. v. G.G.*, 137 S. Ct. 1239 (2017) (mem.) (vacating *G.G. v. Gloucester Cty. Sch. Bd*., 822 F.3d 709 (4th Cir. 2016), and remanding).

Although the 2016 Guidance was withdrawn on February 22, 2017, the threat to women's civil rights persists. The decision below proclaims that women and girls are no longer recognized under federal law as a discrete category worthy of civil rights protection, but men and boys who claim to have a female "gender identity" are. If allowed to stand, it will mark a truly fundamental shift in American law and policy that strips women of their Constitutional right to privacy, threatens their physical safety, undercuts the means by which women can achieve educational equality, and ultimately works to erase women and girls under the law. It not only revokes the very rights and protections that specifically secure *women's* access to education, but does so in order to extend those rights and protections to men *claiming* to be women.

WoLF seeks to empower women and girls to advocate for their rights to privacy, safety, and association before government officials who might not otherwise consider the particular harms women and girls face if

[3] *See* Petition for *Certiorari* at 2.

sex is redefined to mean "gender identity" under civil rights laws and the Constitution. WoLF urges the Court to grant certiorari in order to confirm that schools and other institutions have the authority and duty to give effect to longstanding sex-based protections under the law.

SUMMARY OF ARGUMENT

There are at least three reasons for granting the Petition for *Certiorari*.

A. The Court Should Grant Certiorari In Order To Resolve A Circuit Split As To Whether Title IX Employers And Schools May Limit Access To Restrooms And Other Intimate Spaces On The Basis Of Sex.

The Third Circuit held that under Title IX and the Constitution, schools may not limit student access to restrooms on the basis of sex. This holding applies equally to school teachers, administrators, or other employees, because DOE's regulations expressly extend Title IX's protections to employees of covered institutions: "No person shall, on the basis of sex, . . . be subjected to discrimination in employment, or recruitment, consideration, or selection therefor . . . under any education program or activity operated by a recipient which receives Federal financial assistance."

34 C.F.R. § 106.51(a).[4] In short, the decision below *requires* schools to allow male teachers, administrators, and other employees the same unfettered access to women's restrooms as extended to students on the basis of a self-declared female "gender identity."

By forbidding schools from keeping male teachers, administrators and other employees out of women's bathrooms, the decision below conflicts with the Tenth Circuit's decision in *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215 (10th Cir. 2007). 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."[5] *Etsitty*, 502

---

[4] DOE's authority to promulgate the Title IX employment regulations was upheld in *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512 (1982), and the regulation at issue here ("A recipient may provide separate toilet, locker room, and shower facilities on the basis of sex . . . ;" 34 C.F.R. § 106.33) has a similar counterpart in DOE's employment regulations: "[N]othing contained in this section shall prevent a recipient from considering an employee's sex in relation to employment in a locker room or toilet facility used only by members of one sex." 34 C.F.R. § 106.61.

[5] *Price Waterhouse* "sex stereotyping" (now "gender nonconformity") claims have become the prevailing remedy for trans-related employment discrimination because most courts have held that discrimination based on "transgendered" status, in and of itself, is not sex discrimination under Title VII precisely because "sex" means

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 to this doctrine (*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.

Ever since this Court's decision in *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 75 (1992), which expressly relied on its Title VII decision in *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986), to hold that Title IX supported actions for damages, courts have read Title IX in light of Title VII. "This Court has also looked to its Title VII interpretations of discrimination in illuminating Title IX[.]" *Olmstead v. L. C. by Zimring*, 527 U.S. 581, 616 n.1 (1999) (Thomas, J., dissenting). Nowhere is this truer than in the area covered by both statutes, *i.e.*, sex discrimination in educational employment. "The identical standards apply to employment discrimination claims brought under Title VII [and] Title IX[.]" *Weinstock v. Columbia Univ.*, 224 F.3d 33, 42 n.1 (2d Cir. 2000); *Preston v. Commonwealth of Virginia ex rel. New River Cmty. Coll.*, 31 F.3d 203, 206 (4th Cir. 1994).

"male" or "female" but not "transgender." *Etsitty*, 502 F.3d at 1221; *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1084 (7th Cir. 1984); *Sommers v. Budget Mktg., Inc.*, 667 F.2d 749, 750 (8th Cir. 1982).

Thus the Circuit split: The Tenth Circuit held that Title VII allows employers to require employees to use restrooms consistent with their sex, but the Third Circuit says that employers may not do so under Title IX. And while courts disagree as to whether Title IX provides a private right of action for employment discrimination by covered institutions, or whether such claims must be brought under Title VII, the United States may enforce either Title VII or Title IX against an educational institution discriminating in employment on the basis of sex. The decision below thus presents a Circuit split on a pure question of law that needs no further factual development before review in this Court.

B. The Ruling Below Redefines "Sex" In A Manner That Undermines Title IX.

The Court below has completely re-written the definition of the word sex for the purpose of interpreting Title IX and its implementing regulations.[6] This case presents an opportunity for the Court to 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 distinct concepts. The word "sex" has meaning – specifically,

---

[6] *See* Petition for *Certiorari* at 4-5.

the distinction between male and female.[7] 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 a mix of characteristics that it is difficult to characterize – but they still do not constitute a third reproductive class.[8]

In stark contrast to sex, "gender" and "gender identity" refer stereotypical roles, personalities, behavioral traits, and clothing fashions that are socially imposed on men and women.[9] There is no credible

---

[7] *See* Black's Law Dictionary, *Sex* (10th ed. 2014); Merriam-Webster.com, Male (Dec. 3, 2018); Merriam-Webster.com, Female (Dec. 3, 2018); Nat'l Institutes for Health, *Genetics Home Reference: X Chromosome* (Jan. 2012), available at https://ghr.nlm.nih.gov/chromosome/X (last visited Dec. 3, 2018); Joel, Daphna, *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.

[8] Sax, Leonard, "*How Common Is Intersex? A Response to Anne Fausto-Sterling*," The Journal of Sex Research 39, No. 3 (2002): 174-78, available at http://www.jstor.org/stable/3813612; Dawkins, R., *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* (Mar. 2015), available at https://ghr.nlm.nih.gov/gene/SRY.pdf.

[9] *See Doe v. Boyertown Area Sch. Dist.*, No. 17-3113, 29 (3d Cir. 2018), quoting *Whitaker by Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1048 (7th Cir. 2017) ("By

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 "[a] person's gender identity is their subjective, deep-core sense of self as being a particular gender" – a wholly circular definition.[10] "Gender identity" is simply a belief system that has been invented and adhered to by a small subset of society.[11]

Legally redefining "female" as anyone who claims to be female results in the erasure of female people as a class.[12] If, as a 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 Title IX.

Gender is simply a set of sex-based stereotypes that operate to oppress female people. Further, to assert that women and girls have a "deeply felt identification" with the sex-based stereotypes that are imposed on them is insulting to women and girls who reject the prison of femininity.

---

definition, a transgender individual does not conform to the sex-based stereotypes of the sex that he or she was assigned at birth.").

[10] *See id.* at 7.

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

[12] *See* Barrett, Ruth, ed., *Female Erasure* (Tidal Time Publishing, L.L.C. 2016).

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."[13] 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.[14] This is simply old-fashioned sexism.

---

[13] *See, e.g.*, Joel, Daphna, *et al.*, *Can We Finally Stop Talking About 'Male' and 'Female' Brains?* The New York Times (Dec. 3, 2018); Kaplan, Karen, *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), available at http://www.latimes.com/science/sciencenow/la-sci-sn-no-male-female-brain-20151130-story.html; MacLellan, Lila, *The biggest myth about our brains is that they are "male" or "female,"* Quartz (Aug. 27, 2017), available at https://qz.com/1057494/the-biggest-myth-about-our-brains-is-that-theyre-male-or-female/.

[14] *See, e.g., Amicus* Brief of the National PTA, *et al.* in Support of Appellees at 22, *Doe v. Boyertown Area Sch. Dist.*, No. 17-3113 (3d Cir. 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.

C. The Third Circuit Has Completely Re-Written The Strict Scrutiny Test For Evaluating Constitutional Claims Without Input From This Court.

In its decision, the Third Circuit has completely re-written the strict scrutiny test for evaluating a claim that the government has intruded on the fundamental Constitutional right to privacy.[15] This case presents an opportunity for the Court to clarify that when evaluating such a claim, the Court must hold the government to its burden of demonstrating that the action or policy being complained about serves a compelling government interest and that the action or policy is narrowly tailored to accomplish that interest.

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.

[15] *See* Petition for *Ceriorari* at 3-4.

A. If "Gender Identity" Is Used To Interpret 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 – like Alexis Lightcap and her fellow students – 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 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.[16] 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.[17] 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."

Privacy is one thing; violence is another. The violence that the Respondents seek 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 and threaten their physical safety in the places heretofore reserved 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

---

[16] *See Bowman-Carter Hall* (1885), available at http://www.cornellcollege.edu/residence-life/housing/halls/bowman-carter/index.shtml (last visited Dec. 3, 2018).

[17] *See Living at Cornell, Balch Hall*, available at https://living.cornell.edu/live/wheretolive/residencehalls/Balch-Hall.cfm (last visited Dec. 3, 2018).

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.[18] Moreover, a majority of those assaults were committed by "students, professors, or other employees of the school."[19]

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 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.

---

[18] 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.

[19] *Id.* at 104.

Redefining sex to mean "gender identity" under civil rights laws would also render similar statutes in other states simply 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).[20]

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

[20] 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 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").

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 Interpret 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?"

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.[21]

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.[22]

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[23] and Ohio University has the Mary Ann Healy Memorial Scholarship. [24] This list goes on and on.

---

[21] *See* Cornell University College of Veterinary Medicine Scholarship List, available at https://www2.vet.cornell.edu/education/doctor-veterinary-medicine/financing-your-veterinary-education/policies-funding-sources/college-scholarships/scholarship-list (last visited Dec. 3, 2018).

[22] *See* Yale Law School Alumni and Endowment Funds, available at http://bulletin.printer.yale.edu/htmlfiles/law/alumni-and-endowment-funds.html (last visited Dec. 3, 2018).

[23] *See Madeline P. Peterson Scholarship for American Indian Women*, available at https://diversity.uiowa.edu/awards/madeline-p-peterson-scholarship-american-indian-women (last visited Dec. 3, 2018).

[24] *See* Scholarship Library, Mary Ann Healy Memorial Scholarship, available at http://www.scholarshiplibrary.com/wiki/Mary_Ann_Healy_Memorial_Scholarship_ (Ohio_University_Main_Campus) (last visited Dec. 3, 2018).

Twenty years ago, this 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 court below and the Respondents, women are defined solely by self-identification.

The ruling below effectively denies that sex is a meaningful legal category. Yet the text of the Nineteenth Amendment 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."[25] 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. Women And Girls Will Lose Preferences Under 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,

---

[25] U.S. Const. Amend. 19. In addition, surely the founders of the ACLU Women's Rights Project understood the category of people whose rights they were seeking to protect.

insofar as possible, the discriminatory barriers that are encountered by women in accessing capital and other factors of production." (Pub. L. No. 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). 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 (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 (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 (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 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 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). In the event of war, no doubt demographers will be astonished by the 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 claim 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 "transgender individuals may experience 'gender dysphoria,'"[26] it only defines "transgender" according to ineffable, unverifiable, subjective beliefs, making all the medical evidence cited by the Panel irrelevant. In other words, this is not a case about discrimination against people who have received a mental health diagnosis of "gender dysphoria";[27] it is a case about people who – for any reason or no reason at all – claim to identity as the opposite sex.

Even if the definition of "transgender" in the ruling below required a formal diagnosis of "gender dysphoria," subjective distress about one's sex has never previously been recognized as a basis for defining a class of persons protected under civil rights laws. Yet

---

[26] *See Doe v. Boyertown Area Sch. Dist.*, No. 17-3113, 5 (3d Cir. 2018).

[27] "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)*) (5th ed. 2013), available at https://www.psychiatry.org/File%20Library/Psychiatrists/Practice/DSM/APA_DSM-5-Gender-Dysphoria.pdf (last visited Nov. 10, 2018).

the ruling erases single-sex protections based on the self-reported propensity of an ill-defined class of individuals to threaten or engage in self-harm.[28] 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 attempts or completed suicide,[29] 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. Indeed, if 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.[30] The Court below further recognizes in its ruling the need to be concerned about the mental

---

[28] *See Doe v. Boyertown Area Sch. Dist.*, No. 17-3113 at 5-6, 15 (3d Cir. 2018).

[29] *See*, *e.g.*, Barker, Gary, *Why Do So Many Men Die by Suicide?*, Slate (June 28, 2018), available at https://amp.slate.com/human-interest/2018/06/are-we-socializing-men-to-die-by-suicide.html?; Wright, Jennifer, *Why a Pro-Life World Has a Lot of Dead Women in it*, Harper's Bazaar (June 28, 2018), available at https://www.harpersbazaar.com/culture/features/amp10033320/pro-life-abortion/; Ivanova, Irina, *Farmers in America are facing an economic and mental health crisis*, Money Watch (June 29, 2018), available at https://www.cbsnews.com/news/american-farmers-rising-suicide-rates-plummeting-incomes/; Rand Corporation, *Invisible Wounds of War* (2008), available at https://www.rand.org/pubs/monographs/MG720.html.

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

health and wellness not only of students identifying as transgender, but of lesbian, gay, and bisexual individuals.[31] If the law cannot recognize sex, then it cannot recognize anyone's sexual orientation.

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, 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.

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

---

[31] *See Doe v. Boyertown Area Sch. Dist.*, No. 17-3113, 6 n.17 (3d Cir. 2018). Despite the Court's suggestion during oral argument in the proceedings below that the words "sex" and "opposite sex" are confusing, this Court knows perfectly well what the word "sex" means, as this Court used the phrase "same-sex" a total of 165 times throughout the Syllabus and the various Opinions in its landmark decision *Obergefell v. Hodges,* 135 S. Ct. 2584 (2015).

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.[32] 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 license 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 grant the Petitioners' Petition for a Writ of *Certiorari* in order to honor the plain text and original intent of

[32] Dept. of Justice Fed'l Bureau of Investigation, 2015 Crime in the United States, Table 33, *Ten-Year Arrest Trends by Sex, 2006–2015*, available at https://ucr.fbi.gov/crime-in-the-u.s/2015/crime-in-the-u.s.-2015/tables/table-33/ (last visited Dec. 3, 2018).

Title IX, which is to prohibit discrimination on the basis of *sex*.

Respectfully submitted,

L. THEODORE HOPPE, JR.
Counsel of Record
2 S. Orange St., Ste. 215
Media, PA 19063
610-497-3579
thoppe@thoppelaw.com

Counsel for Amicus Curiae