No. 21-2875

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

DYLAN BRANDT, ET AL.,

Plaintiffs-Appellees,

v.

LESLIE RUTLEDGE, ET AL.,

Defendants-Appellants.

Appeal From: U.S. District Court
for the Eastern District of Arkansas - Central,
Case No. 4:21-cv-00450, Honorable James M. Moody, Jr.

BRIEF OF *AMICUS CURIAE* WOMEN'S LIBERATION FRONT IN SUPPORT OF APPELLANTS AND REVERSAL

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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.[2] WoLF has nearly 1,000 members who live, work, and attend school in the United States, including approximately 50 members who live in the 8th Circuit.

WoLF's interests and those of its members have been threatened by recent court decisions, laws, and policies that embrace the vague, quasi-spiritual concepts of "gender identity" and "transgender status." With stunning speed and almost no open debate, these concepts have

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[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] This brief 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.

entered the legal lexicon and been employed in a manner that conflicts with women's sex-based rights and interests and obscures material reality.

WoLF sees gender identity ideology as regressive and sexist, and rejects the notion that "gender identity" is innate. It supported the Save Adolescents From Experimentation (SAFE) Act, 2021 Ark. Act 626, because "gender transition" procedures for minors cause serious lifetime harm, despite a lack of evidence that they are medically necessary or effective at treating mental distress. Further, WoLF is concerned that women and girls are being disproportionately harmed by promises of "gender transition," and it seeks to ensure that the female-specific issues in this matter receive due attention. WoLF therefore submits this *amicus* brief in support of Appellants and reversal.

ARGUMENT

The district court ruling should be overturned for the reasons stated in Defendant-Appellants' brief. WoLF offers the following additional information to demonstrate why it is wrong to grant heightened scrutiny to Constitutional claims based on "gender identity" and "transgender status."

I. GENDER IDENTITY IDEOLOGY IS ROOTED IN IDIOSYNCRATIC AND QUASI-SPIRITUAL BELIEFS.

U.S. civil rights law recognizes the need to protect people from the subjective beliefs of others, including beliefs founded on sex stereotypes. Women and girls are protected from adverse employment and regulatory restrictions that are grounded in subjective beliefs about what fashion preferences, recreational interests, reproductive options, romantic partnerships, personality, behavior, educational opportunities, or employment status they should have based on their female sex.[3]

In contrast, the concept of "gender identity" depends on the continued existence of sex stereotypes. It presumes a society in which women and girls, men and boys have distinct and innate personalities, fashion preferences, thoughts, feelings, and interests. Under this ideology children are encouraged to believe that girls naturally

[3] 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); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (sex stereotyping is a form of sex discrimination); *Roe v. Wade,* 410 U.S. 113 (1973) (women have a right to terminate their pregnancy).

gravitate to "feminine" things—and if they don't conform to the social expectations associated with their sex, then perhaps they are not girls at all. *See* Nat. Ctr. for Trans. Equality, *Understanding Transgender People: The Basics*, https://transequality.org/sites/default/files/docs/resources/Understanding-Trans-Short-July-2016_0.pdf (defining "gender expression" as "how a person presents their gender on the outside, often through behavior, clothing, hairstyle, voice or body characteristics"). The district court appears to have adopted this belief system—including the idea that a person's "physical characteristics" should be made to "conform to their gender identity." Addendum of Defs-Appellants ("Add.") 2 at 8-9.

There is no legal justification for granting protected status to a belief system grounded in sex stereotypes; doing so takes women and civil rights law backward.

A. Sex Is Material And Immutable, And Sex Differences Matter In Some Circumstances.

The meaning of sex is both objective and longstanding. Like all mammals, in order for the species to survive our earliest human ancestors had to be able to distinguish between male and female even

before they developed the relevant language.[4] Since then, biologists have uncovered a more sophisticated understanding of sex, but the basic biological distinctions between male and female remain.[5] In contrast, the earliest appearance of the term "gender identity" in any law review article maintained by the Westlaw legal database appears to have been in 1985.[6]

Sex is observed and recorded – not "assigned" – at or before 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 (also known as "disorders of sexual development" or DSDs) are also either male or female; in vanishingly rare cases, individuals are born with a mix of

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[4] *See* Dawkins, R., THE ANCESTOR'S TALE, A PILGRIMAGE TO THE DAWN OF EVOLUTION 135 (2005) ("[T]he gene determining maleness (called *SRY*) has never been in a female body, at least since long before we and the gibbons diverged," approximately 17 million years ago).

[5] *X chromosome*, and *SRY gene - sex determining region Y*, NAT'L INST. FOR HEALTH GENETICS HOME REFERENCE (last updated May 20, 2020).

[6] *See* David M. Neff, *Denial of Title VII Protection to Transsexuals: Ulane v. Eastern Airlines, Inc.*, 34 DePaul L. Rev. 553 (1985).

male and female reproductive characteristics, but they do not constitute a third reproductive class.[7]

Although people's lives and personalities are not determined by their sex, their sex is always determined by their biology. Nowhere is the immutability of sex more apparent than in the medical context. Regardless of whether any particular woman *identifies with* her reproductive capacity, it remains true that only female humans are capable of carrying eggs and gestating infants, while only males are capable of producing sperm needed to fertilize eggs.[8] Although people of both sexes are vulnerable to rape, only women can be forcibly impregnated. While men may be indirectly affected, only women's bodies are directly, physically regulated by laws concerning abortion, *in vitro* fertilization, and miscarriage; only men suffer testicular cancer or experience erectile disfunction. Beyond these obvious differences, researchers in the fields of biology, genetics, and medicine are

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[7] Sax, Leonard, *"How Common Is Intersex? A Response to Anne Fausto-Sterling,"* THE JOURNAL OF SEX RESEARCH, v.39 no. 3 174-78 (2002), https://pubmed.ncbi.nlm.nih.gov/12476264/; reproduced in full at https://www.leonardsax.com/how-common-is-intersex-a-response-to-anne-fausto-sterling/.

[8] *See Gamete*, MERRIAM-WEBSTER.COM DICTIONARY, https://www.merriam-webster.com/dictionary/gamete.

constantly uncovering previously-unrealized sex differences outside of the immediate sexual reproductive system.[9]

Nothing from gender identity ideology further illuminates these well-established material facts.

B. "Gender Identity" Is A Quasi-Spiritual Concept.

A core tenet of gender identity ideology is that the sole criterion for whether somebody is transgender is that they say they are.[10] Any person, at any time, and for any reason may claim to possess a gender identity, so there is no inherent limit to the potential size of the transgender category, nor can gender identity or transgender status be described as stable or discrete characteristics.

The best attempts to define what it means to "be transgender" only manage to restate the defined term in a less concise manner. "A transgender person" means "someone who has a gender identity that

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[9] *See*, *e.g.* Soldin, *et al.*, *Sex differences in pharmacokinetics and pharmacodynamics*, CLINICAL PHARMACOKINETICS, vol. 48,3, 143-57 (2009). https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3644551/.

[10] *See* Br. of Amici Amer. Acad. of Pediat., et al., R. Doc. 30 at 6 (asserting that "transgender people have a gender identity that is not fully aligned with their sex assigned at birth [sic]," and gender identity is a person's own self-declared "deep internal sense of being female, male, a combination of both, somewhere in between, or neither.")

differs from the person's sex designated at birth." Dec. of Deanna Adkins, MD in support of Plaintiffs' Mot. for Prelim. Inj. ("Adkins Dec."), R. Doc. 11-11 ¶ 19. This definition is hopelessly circular, and therefore not a valid basis for delineating a protected category.

In truth, as demonstrated throughout the district court record, the only defining characteristics of persons claiming legal transgender status are (1) the demand to be legally recognized as one's subjective gender identity instead of one's natal sex, and (2) the claim of entitlement to special exceptions from ordinary and permissible laws based on that self-identification.

Because they lack grounding in material reality, claims based on gender identity must always ride on the coattails of other distinct classes of people whose status is determined by a material state of being. Sex, homosexuality or bisexuality, and "intersex" or DSD characteristics are all defined by a material and verifiable state of being that is objectively defined. *See* n. 2, 4, 5, 7, 8, above. Protecting people from discrimination on the basis of any of these characteristics requires a recognition that sex is real and verifiable, not subjective.

In contrast, protecting transgender status requires people to *deny* the basic fact that sex in humans is dictated by biology at the moment of conception, and remains immutable throughout life. It therefore becomes necessary for proponents to claim that sex is "assigned at birth" (*see* Add. 2 at 2, 7)—terminology the transgender movement has misappropriated from clinicians and patients dealing with DSDs. This term harkens back to a time when physicians pressured parents to "assign" a sex to infants born with ambiguous genitals, often by performing surgical alterations for purely cosmetic purposes and in some cases even lying to the child about their intersex characteristics.[11] This practice is now strongly disfavored, and intersex advocates call for patients themselves to be allowed to make decisions about surgeries that are not immediately life-saving, when they are mature enough to decide.[12] In the intersex context the phrase "sex assigned at birth" reflects biological and historical fact. But in the transgender context, "sex assigned at birth" reflects ideology, not biology.

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[11] Intersex Soc. of N. Amer., *What's wrong with the way intersex has traditionally been treated?*, https://isna.org/faq/concealment/.

[12] InterAct Advocates for Intersex Youth, W*hat should I know about surgery on my child's clitoris, vagina, urethra, or testicles?* https://interactadvocates.org/faq/#advice.

Notably, despite claiming expertise in the treatment of DSDs, one of Plaintiff-Appellees' medical consultants entirely fails to acknowledge the drastic differences between the *psychiatric* condition of gender dysphoria and the *medical, physiological* conditions classified as DSDs. Dr. Antommaria seems to understand the flaw in performing "feminizing" surgeries on patients whose genitals have verified physical disorders, yet he disregards the problem with "masculinizing" or "feminizing" surgeries on the genitals of youth whose only ailment is psychiatric, likely temporary, and treatable with noninvasive talk therapy. Expert Dec. of Armand H. Matheny Antommaria, MD, PhD, FAAP, HEC-C, R. Doc. 11-12 ¶¶ 10, 49.

The district court failed to recognize the important distinction between transgender identity and the psychiatric diagnosis of gender dysphoria. Gender dysphoria is itself a controversial diagnosis, encompassing a disparate collection of psychiatric conditions previously described in the medical literature as transsexualism, transvestic disorder, fetishistic transvestitism, and gender identity disorder.[13]

[13] *See* Nuttbrock, et al., *A Further Assessment of Blanchard's Typology of Homosexual Versus Non-Homosexual or Autogynephilic Gender*

Evidence in the record shows that these terms are not synonymous with transgender identity, and many people who identify as transgender do not have gender dysphoria.[14] Rather, gender dysphoria, which is marked by significant distress at the thought of one's sex, is also experienced by people who do not identify as transgender.[15] For example, "crossdressers, drag queens/kings or female/male impersonators, and gay and lesbian individuals" also commonly experience gender dysphoria. WPATH Standards at 7. Accordingly, doctors diagnose gender dysphoria using psychiatric clinical criteria, while a person's gender identity is a subjective experience that is self-identified and unverifiable.

Dysphoria, ARCHIVES OF SEXUAL BEHAVIOR 40(2), 247-57 (April 2011), https://www.researchgate.net/publication/40806058; *see also* Drescher, et al., *Expert Q & A: Gender Dysphoria*, https://www.psychiatry.org/patients-families/gender-dysphoria/expert-q-and-a; and *Diagnostic and Statistical Manual of Mental Disorders (DSM-5), Fifth ed.* AMERICAN PSYCHIATRIC ASSOCIATION (2013).

[14] *See* WPATH, *Standards of Care for the Health of Transsexual, Transgender, and Gender-Nonconforming People* at 5 (2012) ("WPATH Standards"), https://www.wpath.org/publications/soc.

[15] American Psychiatric Association, *Gender Dysphoria* (2013), http://bit.ly/2Re1MA5 (discussing the diagnostic criteria contained in the DSM-5).

Federal courts have recognized this distinction between transgender identity and gender dysphoria. *Blatt v, Cabela's Retail Inc.*, No. 5 :2014-cv-04822 at 3 (E.D. Pa. 2017) (stating that "gender dysphoria" "goes beyond merely identifying with a different gender and is characterized by clinically significant stress and other impairments that may be disabling"). *Doe v. Shanahan*, 917 F.3d 694, 696-97 (D.C. Cir. 2019).

This disconnect between the material and the metaphysical thus reveals the quasi-spiritual nature of the transgender belief system. "Gender identity" is akin to the religious concept of a soul: "the principle of life, feeling, thought, and action in humans, regarded as a distinct entity separate from the body, and commonly held to be separable in existence from the body; the spiritual part of humans as distinct from the physical part." *Soul*, Dictionary.com, based on RANDOM HOUSE UNABRIDGED DICTIONARY (2021), https://www.dictionary.com/browse/soul.

Spiritual beliefs provide many people with a sense of purpose and a way to understand the world. But these beliefs can neither be imposed on the public nor used to justify profound changes in the analysis of

civil rights claims by federal courts. "Transgender status" is determined in practice only by self-declaration of vague subjective feelings. It is not, therefore, an appropriate basis for applying heightened scrutiny.

C. "Gender Transition" Encourages Mind-Body Alienation For Ideological, Not Medical, Reasons.

While gender activists object to having their special identities pathologized, they simultaneously demand medical insurance coverage and legally-protected access to the cosmetic surgeries and hormones they use to pursue "gender transition." *See* Complaint, R. Doc. 1 ¶¶ 54 n.11, 156, 161. To downplay this contradiction and borrow legitimacy for their movement, proponents of gender identity ideology increasingly invoke the narrative of "the transgender child." The apparent goal of this narrative is to create the impression that transgender identity is rooted not in modern human culture and psychopathology, but in nature and biology.

According to this idea, children as young as toddlers may describe feeling like (or even "knowing") they are the opposite sex, which their parents, counselors, or physicians then attribute to an innate "gender

identity."[16] In children, historically this phenomenon was rare and temporary; not all children who asserted a cross-sex identity met the clinical criteria for a psychiatric diagnosis of "gender dysphoria," and the majority in all cases desisted after the child experienced a normal healthy puberty.[17]

However, under the newly predominant viewpoint, a child's self-identification as transgender *must* be affirmed by parents and everyone involved in the child's life. *See* Adkins Dec., R. Doc. 11-11 ¶25. So-called "treatment" options involve a variety of extreme surgical and hormonal interventions aimed at imitating the stereotypical appearance of the opposite sex. *See* Act 626, Sec. 2(8) (describing "serious known risks" that come with the use of cross-sex hormones; *id*. Sec. 2(10) (genital "gender reassignment surgery" involving removal of the penis, testicles,

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[16] *See* Dec. of Amanda and Shayne Dennis in Support of Pltfs' Mot. for Prelim. Inj., R. Doc. 11-6, ¶ 3 (asserting that one of the minor Plaintiffs, a 6 year-old male, "has always known who she is," stating that "[s]ince [the child] was 2 years old, she has gravitated towards traditionally feminine dress and activities. For example, [the child] has always loved to dress-up in girls' clothes.").

[17] *See* Cantor, *How Many Transgender Kids Grow Up To Stay Trans?* (Dec. 30, 2017), https://www.psypost.org/2017/12/many-transgender-kids-grow-stay-trans-50499 (discussing unanimous results from 12 studies showing a majority of pediatric patients desisted).

uterus, or vagina, among other things; *id*. Sec. 2(12) (other cosmetic surgeries that involve "alteration or removal of biologically normal and functional body parts.") Further, any co-occurring psychiatric disorders – which are common in children diagnosed with gender dysphoria (including depression, personality disorders, and autism) – must not be presumed to be the primary cause or source of the child's confusion and distress. Adkins Dec., R. Doc. 11-11 ¶24-25.

Nor may parents be trusted to assess whether their child's sudden-onset symptoms of gender dysphoria are influenced by external social influences. *See* Dec. of Jack Turban, MD, R. Doc. 51-1 ¶¶ 41-42. Rather, a child's gender identity is presumed to have arisen *sua sponte*, and any related distress is said to be the fault of outside forces such as "transphobia" and "stigma." *Id.* ¶36, 43. *See also* WPATH Standards at 4. Gender ideologues explicitly disparage any efforts parents or counselors may take to help children recover their mental health and remain physically whole while accepting the immutable reality of their natal sex. Talk therapy aimed at achieving those goals is misbranded as "conversion therapy" or "gender identity conversion efforts." *Id.* ¶¶ 45-46. These claims are patently biased.

Like Plaintiff-Appellees below, gender activists frequently invoke youthful threats of suicide and self-harm. *See* Complaint ¶¶ 6, 31, 50-52, 79, 115, 148, 153. However, subjective distress absent material harm is not a basis for adjudicating Constitutional or statutory civil rights protections. Moreover, this is misleading and manipulative. There are many groups of individuals who self-report high rates of attempted or completed suicide,[18] while, conversely, some groups that have historically been subject to sex- or race-based discrimination exhibit very low rates of suicide and self-harm. Indeed, if oppression were determined by 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.[19]

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[18] *See*, *e.g.*, Barker, *Why Do So Many Men Die by Suicide?*, Slate.com (June 28, 2018), https://amp.slate.com/human-interest/2018/06/are-we-socializing-men-to-die-by-suicide.html?; Ivanova, *Farmers in America are facing an economic and mental health crisis*, MONEY WATCH (June 29, 2018), https://www.cbsnews.com/news/american-farmers-rising-suicide-rates-plummeting-incomes/; Rand Corporation, *Invisible Wounds of War* (2008), https://www.rand.org/pubs/monographs/MG720.html.

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

Gender identity ideology pathologizes normal healthy puberty, not because it causes harm but because some children, their parents, and physicians simply *do not want* the child to proceed through the normal healthy process by which their body will become more perceptibly male or female. The district court ruling is based entirely on this pathologizing viewpoint, asserting that minor patients will be "forced" to stop taking puberty blocking hormones, which "will cause them to undergo endogenous puberty." Add. 2 at 8. Nothing in the record below supported the district court's approach of misidentifying normal healthy child development as injurious.

While feelings of distress and unhappiness during puberty are common given the sudden onslaught of physical and hormonal change, puberty is not an illness. Absent adverse social conditions (such as lack of support or cultural shaming practices) or medically-verified physiological conditions (such as precocious puberty or complications from intersex characteristics), there is no evidence that normal puberty itself causes physical or psychological harm, and Plaintiffs did not attempt to present such evidence in the district court. Thus, contrary to the court's misunderstanding, there is no "race against time" to stop

normal puberty, and nothing that would require "recovery" following puberty. *See* Transcript of Mot. Hrg., R Doc. 60 at 46:11-24.

The district court's findings regarding standing (Add. 2 at 2) and irreparable harm (*id.* at 8) are deeply flawed because they rest on an ideology that pathologizes normal healthy development and common feelings of distress associated with puberty, despite a complete absence of evidence that normal puberty or post-pubertal development cause material harm. That was clear error and this Court should therefore reverse the ruling below.

II. HARMFUL AND ABSURD RESULTS FOLLOW WHEN COURTS DENY MATERIAL SEX DIFFERENCES.

Innate and enduring physical differences between male and female physiology means that the sexes are "not similarly situated in certain circumstances." *Michael M. v. Superior Court*, 450 U.S. 464, 469 (1981); *United States v. Virginia*, 518 U.S. 515, 533 (1996). The biological distinction between men and women is the very criterion by which women have been discriminated against, excluded from public life, exploited, enslaved, sexually abused, and disenfranchised throughout history. Women are not asked how they identify or how they see themselves before they experience these things.

Remarkably, the district court assiduously avoided using the terms "male," "boy," "man," "female," "girl," or "woman" anywhere in its opinion aside from two case citations. That was not merely a stylistic choice, but instead reflects two pervasive factual and legal errors that mirror each other: 1) the court disregarded the state's inherent authority to recognize material sex differences, particularly in formulating restrictions on the medical treatment of minors, and 2) it embraced an alternative classification under which people are categorized as either "transgender" or "cisgender" based on their subjective beliefs.

When courts and other government decision makers adopt this sex-blind approach the results are not only absurd, but they tend to have disproportionate adverse effects on women and girls.

A. Sex-Blind Analysis Undermines Judicial Integrity And Credibility.

The integrity of our judicial system demands an unwavering commitment to employ facts, not rhetoric or ideology, as the basis for reviewing legislative actions and assessing claims of unconstitutional discrimination. That integrity is threatened when judges elevate subjective beliefs above plain facts and objective reasoning.

The ill effects of sex-blind analysis were put on full display in the preliminary injunction hearing, where the district court insisted repeatedly that medical treatments are the "exact same" regardless whether they are prescribed to boys or girls. According to the court:

> No, it's the same exact treatment or modality. I'm assuming for purposes of this argument that we're talking about a tablet of testosterone or a hundred tablets, it doesn't matter, it's the same treatment in purposes of my question to you. That they both want it. Boy wants it, girl wants it. Boy can have it, but girl cannot. Why is that not sex-based [discrimination]?

Transcript of Mot. Hrg., 33-34. Thus the court erroneously equated two drastically different treatments: the prescription of exogenous testosterone at abnormally-high levels for girls in pursuit of "gender transition" (prohibited by the SAFE Act), versus the prescription of testosterone to boys who require it to treat a medically verifiable disorder of sex development, another physical disorder or physical injury, or harm caused by prior "gender transition" procedures (allowed by the SAFE Act).

This erroneous thinking made it into the court's written ruling as well, wherein the court treats sex itself as a stereotype. Add. 2 at 10 (stating that the SAFE Act "allows the same treatments for cisgender

minors that are banned for transgender minors as long as the desired results conform with the stereotype of the minor's biological sex."). The court's use of "cisgender minors" to describe children with DSDs is especially absurd, given how it obscures two relevant characteristics: sex and medical status.

Similarly, the district court displayed an incurious attitude toward evidence in the legislative and litigation records showing serious adverse effects from the use of exogenous "cross-sex" hormones, commonly described as such because the normal natural levels of those hormones differ drastically depending on *sex*, regardless of a patient's subjective gender identity. *Compare* Act 626 Sec. 2(7)-(8) and Supp. Dec. of Paul W. Hruz, M.D., Ph.D., R. Doc. 55-3 ¶¶ 8-10, 20-24 *with* Transcript of Mot. Hrg., R. Doc. 60 at 27:10-25 (disregarding risks of exogenous cross-sex hormones), and 29:6-15 (disregarding risks of permanent infertility). It does not require a medical degree to recognize that material sex differences are real and they matter, such that the same testosterone which might resolve a boy's abnormal sexual development or treat a man's illness is likely to harm women and girls, in some cases irreversibly.

Any serious attempt to understand the SAFE Act demands a basic understanding of how sex-differences manifest in transgender identity. For example, puberty is a crucial developmental stage in the life of any individual, but the challenges of puberty affect girls and boys differently.[20] These differences stem partly from the stress that comes from experiencing new biological characteristics that are unique to girls (such as visible breast growth and menstruation), but also from the social pressures that fall uniquely upon girls, including the pressure to adopt sexualized fashions and behaviors. *See* Shrier, IRREVERSIBLE DAMAGE, THE TRANSGENDER CRAZE SEDUCING OUR DAUGHTERS at 22-23 (2020) (describing the influence of early exposure to pornography and social media). In fact, researchers have observed that the sex profile of patients seeking medical or surgical "gender transition" has shifted from overwhelmingly middle-aged males to predominantly adolescent females. *See* Genspect, *Females*, www.StatsForGender.org/females, citing, *inter alia*, Marchiano, *Outbreak: On Transgender Teens and*

[20] *See, e.g.*, Moore, et al., *Recollections Of Puberty And Disordered Eating In Young Women*, J. ADOLESC. 53:180-188 (Dec. 2016) (noting that "[p]uberty begins a period of vulnerability for disordered eating that is maintained and amplified through adolescence and early adulthood.").

Psychic Epidemics, PSYCHOLOGICAL PERSPECTIVES 60 (3): 345-366 (2017), https://www.tandfonline.com/doi/full/10.1080/00332925.2017.1350804. Differences in sexual orientation abound as well: "It has been established that the most likely outcome for prepubertal youth with gender dysphoria is to develop into lesbian, gay, bisexual (LGB) (non-transgender) adults (Ristori & Steensma, 2016; Singh et al., 2021 ; Wallien & Cohen-Kettenis, 2008; Zucker, 2018)."[21]

Researchers have continued to uncover significant sex differences among patients with a history of gender dysphoria who now have serious regrets about their own medical transitions. For example, in a scientific survey of 100 such individuals, "[p]rior to transitioning, natal females were more likely to report an exclusively homosexual sexual orientation and natal males were more likely to report an exclusively heterosexual sexual orientation." *Id.* Further, "nearly a quarter (23.0%) of the participants expressed the internalized homophobia and difficulty

[21] Littman, L., *Individuals Treated for Gender Dysphoria with Medical and/or Surgical Transition Who Subsequently Detransitioned: A Survey of 100 Detransitioners*, ARCH. OF SEX, BEHAV. at 21 (2021), https://doi.org/10.1007/s10508-021-02163-w.

accepting oneself as lesbian, gay, or bisexual narrative by spontaneously describing that these experiences were instrumental to their gender dysphoria, their desire to transition, and their detransition." *Id.* This research strongly indicates that lesbians (i.e. females) are disproportionately represented among the population that is protected by the SAFE Act, and are disproportionately harmed by the district court's injunction. The court's sex-blind analysis obscured this.

B. Vulnerable Populations Are At Risk When Courts Give Undue Deference To Medical Industry Associations.

Popular but harmful medical fads appear regularly throughout modern history. In the 1800s to early 1900s, physicians experimented with attempts to "treat" unwanted mental conditions or behaviors by interfering with their patients' fertility. "Labeling a young woman feeble minded was often an excuse to punish her sexual immorality. Many women were sent to institutions to be sterilized solely because they were promiscuous or had become pregnant out of wedlock." Roberts, *Killing the Black Body*, 2nd ed. at 69 (2017).

The 1927 Supreme Court case of *Buck v. Bell* remains a shameful stain on our country's history, with Justice Holmes declaring that the young woman Carrie Buck, having been involuntarily committed to the

Virginia State Colony for Epileptics and Feeble Minded and dubiously diagnosed as an "imbecile," "may be sexually sterilized without detriment to her general health and that *her welfare* and that of society *will be promoted by her sterilization*." 274 U.S. 200, 207 (1927) (emphasis added).

These were not fringe practices; they enjoyed support from medical associations and institutions generally regarded as progressive. *See* Cohen, *Imbeciles: The Supreme Court, American Eugenics, and the Sterilization of Carrie Buck* (2016); *see also Farber*, *U.S. Scientists' Role In The Eugenics Movement (1907-1939): A Contemporary Biologist's Perspective,* ZEBRAFISH, 5(4), 243–245 (2008), https://doi.org/10.1089/zeb.2008.0576. Given this history, it is imperative that legislatures and courts serve as a crucial check against harmful medical fads.

C. Women And Girls Lose Legal Protections When Courts Deny Material Sex Differences.

While many people are affected by transgender ideology, its demands consistently and disproportionately undermine the legal rights and interests of women and girls. The following examples provide only a cursory summary of those effects.

1. Loss of single-sex spaces

Gender activists demand that women's and girls' single-sex spaces be given over as "treatment" facilities for men and boys who claim to identify as transgender. *See* Adkins Dec., R. Doc. 11-11 ¶ 30. Consequently, women throughout the country have lost access to safe single-sex bathrooms, locker rooms, and changing rooms under policies dictating that access to such spaces be granted on the basis of gender identity rather than sex. *See, e.g. In re Township HS Sch. Dist. 211* (Nov. 2, 2015) https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/05141055-a.pdf (documenting how the U.S. Dept. of Ed. Office of Civil Rights pressures public schools to grant male students and teachers access to women's and girls' restrooms and locker rooms).

While Congress has not taken action to prohibit the establishment of single-sex emergency women's shelters, the U.S. Department of Housing and Urban Development has ordered federally-regulated shelters to determine eligibility based on "gender identity" rather than sex, forcing vulnerable women who flee domestic violence, drug addiction, and homelessness to share sleeping areas and showers with

men. HUD, *Equal Access in Accordance with an Individual's Gender Identity in Community Planning and Development Programs*, 81 Fed. Reg. 64763 (Sept. 21, 2016), codified at 24 C.F.R. Part 5.

Perhaps the most egregious example of such policies is California's SB 132, "The Transgender Respect, Agency, and Dignity Act," and similar individual court rulings under which incarcerated women have been forced to share prison and jail cells with men who claim special gender identities, including violent men who are convicted murderers, rapists, and child molesters. *See*, *e.g.*, Miller, *California Prisons Grapple With Hundreds Of Transgender Inmates Requesting New Housing*, LOS ANGELES TIMES (April 5, 2021); Shaw, *Male Convict Moved to Women's Jail*, WOMEN ARE HUMAN, https://www.womenarehuman.com/male-convict-moved-to-womens-jail-unit-plans-class-action-lawsuit-for-inmates-seeking-similar-move/.[22]

2. Loss of free speech and free association

For crucial political organizing, women depend heavily on their Constitutionally-protected rights of free speech and free association.

[22] WoLF recently filed suit challenging SB 132 on behalf of four incarcerated women. *Chandler, et al. v. Calif. Dept. of Corr. and Rehab.*, Case No. 1:21-cv-01657 (E.D. Cal., Nov. 17, 2021).

Gender activists who aim to restrain those rights have targeted women's organizations with harassment, violence, and bomb threats when they attempted to hold public meetings to discuss how the gender movement adversely affects women's lives.[23] Such threats have also extended into women's workplaces and other associational activities.[24] However, only a fraction of these threats have been thwarted by courts under the First Amendment, as in government employment cases. *See*, *e.g.*, *Meriwether v. Hartop*, 992 F.3d 492 (6th Cir. 2021).

3. Loss of fairness and opportunities in competitive athletics

As with single-sex spaces, gender activists demand that women's and girls' athletics be used as a form of "treatment" for men and boys who identify as transgender. *See*, *e.g. Hecox v. Little*, Appeal No. 20-35813 (9th Cir.) (suit filed by a male runner demanding eligibility for the Boise State Univ. women's cross country team based on his gender

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[23] *See* Hamm, *Women's Liberation Front Holds Sold-Out Event At Seattle Public Library Despite Bomb Threat, Interruptions, Arrests,* FeministCurrent.com (Feb. 3, 2020).

[24] Chart, *Trans Activists' Threats To Execute Women Sure Don't Look Like Social Justice*, THEFEDERALIST.COM (2018), https://thefederalist.com/2018/07/24/trans-activists-threats-execute-women-sure-dont-look-like-social-justice/.

identity). Under such policies, young women have been robbed of elite statewide championship titles and financial scholarship opportunities. *See Soule v. Connecticut Assoc. of Sch., Inc., et al.,* Appeal No. 21-1365 (2nd Cir. 2021).

By no means does this genuine "parade of horribles" end here. Only court-ordered word limitations prevent *Amicus* from supplying scores of additional pages and hundreds of citations demonstrating the extent to which gender identity ideology undermines women and girls' sex-based rights and interests. WoLF urges this court to exercise its inherent authority and responsibility to deny these demands.

III. *BOSTOCK* DOES NOT PROVIDE RELEVANT OR PERSUASIVE AUTHORITY IN THIS CASE.

In concluding that "heightened scrutiny applies to Plaintiffs' Equal Protection claims," the district court relied in part on *Bostock v. Clayton Cty., Georgia*, 140 S. Ct. 1731, 1741 (2020). Add. 2 at 4. In that case the Supreme Court ruled that "for an employer to discriminate against employees for being. . . transgender, the employer must intentionally discriminate against individual men and women in part

because of sex," which violates Title VII of the Civil Rights Act. *Id.* at 1743.[25]

Bostock applies only under Title VII where an employee claims they were fired because they identify as transgender. 140 S. Ct. at 1737, 1747. The Supreme Court expressly limited its ruling to the specific claims and facts there at issue, making it inapplicable to this case. In addition, the "transgender status" aspect of *Bostock* was poorly reasoned, and this Court should refuse to compound that error by extending it into this case or any other areas of law.

A. Although *Bostock* Is Inapplicable, The SAFE Act Is Consistent With Its Basic Logic.

The court in *Bostock* disclaimed that the holding applies to other state or federal laws, saying: "none of [them] are before us; we have not had the benefit of adversarial testing about the meaning of their terms, and we do not prejudge any such question today." 140 S. Ct. at 1753.

[25] WoLF supports the principle that workplace discrimination on the same-sex attraction violates Title VII because such discrimination reflects moralistic stereotypes applied on the basis of sex. Because the Complaint asserts no relevant claims, this brief does not address that aspect of the majority opinion in *Bostock*.

Therefore, the ruling does not constrain this Court's Equal Protection analysis.

When read in a generous light, the basic logic of the "transgender status" ruling in *Bostock* is this: The employee's sex in that case was generally irrelevant to employment decisions, so self-identification as the opposite sex was also irrelevant to employment decisions under Title VII. *Id.* at 1737. Assuming for the sake of argument *Bostock* is relevant to this case, the SAFE Act is entirely consistent with its logic, because a minor's self-declared "gender identity" or "transgender status" is irrelevant to the application of the Act. Instead, it is the patient's age and the purpose of the surgery or prescription that dictate whether it is prohibited or exempted. Br. of Appellants-Defendants at 30-33.

B. Because the *Bostock* Ruling on "Transgender Status" Was Defective, Its Reach Must Be Tightly Limited.

The Supreme Court majority in *Bostock* failed to define the central concepts of its ruling: "gender identity" and "transgender status." The court reasoned that merely self-identifying as the opposite sex is sufficient to provide protection from termination if a plaintiff alleges

that their identification as such was the basis for termination of employment. *Bostock* at 1741.

Understanding the defects of the majority opinion requires a brief examination of the underlying facts. William Stephens was a male who had been employed by a funeral home beginning in 2007. *EEOC v. RG & GR Harris Funeral Homes, Inc.*, 884 F.3d 560, 568 (6th Cir. 2018). For over five years Stephens complied with the employer's single-sex bathroom policy as well as the its sex-specific dress policy which required public-facing male employees to wear suits and ties, and public-facing female employees to wear skirts and business jackets. *Id.* at 593, 568. In 2013 Stephens sent a letter to the employer asserting a feminine "gender identity" and stating the intention to flout the male dress code by wearing skirts instead of slacks. *Id.* The employer made the decision to terminate based on his understanding that Stephens' stated intention to "live and work full-time as a woman" would involve Stephens representing himself as a woman to grieving funeral home clients and using the women's restrooms with female staff and guests. *Id.*

Significantly, the Supreme Court did not venture to rule that sex-specific dress codes or single-sex bathroom policies violate Title VII, insisting that such policies remain untouched by the ruling. *Id.* at 1753. Employers thus remain free to keep policies under which they may terminate female (but not male) employees if they refuse to wear skirts and heeled shoes, or to terminate male (but not female) employees who refuse to wear collars and ties.[26] Employers are also free to maintain separate restrooms or changing rooms designated for women and men—rightly so, to maintain safety, privacy, and dignity in intimate spaces.

At the same time, the court fashioned a brand new exemption from sex-based employment policies that can be invoked by any employee claiming to possess a "transgender status." Under this exemption, a man cannot be terminated for demanding access to the women's bathroom or changing room, or defying the dress policy, *if* he claims to have a feminine gender identity. The court's reasoning rests entirely on the fact that a claim of "transgender status" necessarily

[26] To be clear, WoLF would support an end to such dress codes, which are grounded in regressive sex stereotypes and cause unnecessary discomfort or potential injury. However, granting special treatment based on "gender identity" only reinforces the problem.

involves some reference to the claimant's sex. 140 S.Ct. at 1743. However, as exemplified by the *Bostock* ruling itself, the only relationship between "transgender status" and sex is that of *opposition* and *rejection*. One who claims a transgender status opposes the material, biological concept of sex, and rejects the material reality of his or her own unambiguous natal sex in favor of adopting some "gender identity," of which there exists an unlimited potential variety. "Transgender status" is thus founded on gender ideology, not material reality or the words of Title VII.

At no point did the court bother to examine the ideological underpinnings of "transgender status" or "gender identity," or determine whether they are consistent with Title VII. *See* 140 S. Ct. at 1739 (admitting that "nothing in [the majority's] approach to these cases turns on the question of whether "sex" in Title VII "refer[s] only to biological distinctions between male and female"). Nor did it consider how such exemptions affect other employees, the employer, or their clients.

The *Bostock* ruling therefore represents a poorly-reasoned and unjustified anomaly in the Supreme Court's Title VII jurisprudence,

and this Court should decline to extend its defects into this or any other matter outside of very particular Title VII claims.

CONCLUSION

Amicus WoLF agrees that Arkansas enjoys broad power to regulate the medical industry and protect children, and the legislature provided ample factual findings to support the prohibitions and exemptions in the SAFE Act. In applying heightened scrutiny and in finding likelihood of success on the merits, the district court employed an ideological theory in a manner that turns Constitutional principles of Equal Protection on their head, and undermines women's sex-based legal interests. WoLF therefore urges the Court to reverse the district court ruling in its entirety.

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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 6,475 words, according to the word count feature of the software used to prepare the brief. The brief has been prepared in proportionately spaced typeface using Century Schoolbook 14 point.

/s/ Jennifer C. Chavez
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CERTIFICATE OF SERVICE

I hereby certify that on November 19, 2021, I electronically filed the foregoing Brief Of *Amicus Curiae* Women's Liberation Front In Support Of Defendant-Appellant And Reversal with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit using the CM/ECF system, which will accomplish service on counsel for all parties through the Court's electronic filing system.

Dated: November 19, 2021 /s/ Jennifer C. Chavez
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