No. 20-35813

In the United States Court of Appeals
For the Ninth Circuit

LINDSAY HECOX; JANE DOE, with her next friends Jean Doe and John Doe,

Plaintiffs - Appellees,

v.

BRADLEY LITTLE, in his official capacity as Governor of the State of Idaho; SHERRI YBARRA, in her official capacity as the Superintendent of Public Instruction of the State of Idaho and as a member of the Idaho State Board of Education; INDIVIDUAL MEMBERS OF THE STATE BOARD OF EDUCATION, in their official capacities; BOISE STATE UNIVERSITY; MARLENE TROMP, in her official capacity as President of Boise State University; INDEPENDENT SCHOOL DISTRICT OF BOISE CITY, # 1; COBY DENNIS, in his official capacity as superintendent of the Independent School District of Boise City #1; INDIVIDUAL MEMBERS OF THE BOARD OF TRUSTEES OF THE INDEPENDENT SCHOOL DISTRICT OF BOISE CITY, # 1; in their official capacities; INDIVIDUAL MEMBERS OF THE IDAHO CODE COMMISSION, in their official capacities,

Defendants - Appellants,

and

MADISON KENYON; MARY MARSHALL,

Intervenors.

BRIEF OF *AMICUS CURIAE* WOMEN'S HUMAN RIGHTS CAMPAIGN – USA IN SUPPORT OF DEFENDANTS-APPELLANTS AND INTERVENORS

On Appeal from the United States District Court
U.S. District Court for the District of Idaho
The Honorable David C. Nye
Case No. 1:20-cv-00184-DCN

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Pursuant to Federal Rule of Appellate Procedure 29 and Ninth Circuit Local Rule 29-2, the U.S. chapter of the Women's Human Rights Campaign respectfully submits this brief *amicus curiae* in support of Defendants-Appellants and Intervenors. All parties have consented to this filing.

STATEMENT OF INTEREST

The Women's Human Rights Campaign (WHRC) is a group of volunteer women from across the globe dedicated to protecting women's sex-based rights.[1] WHRC includes academics, writers, organizers, activists, legal professionals, artists, and health practitioners, among others, and aims to represent the total breadth of the human female experience. The founders of the WHRC created the Declaration on Women's Sex-Based Rights (Declaration)[2] to lobby nations to maintain language protecting women and girls on the basis of sex rather than

[1] No counsel for any party to this litigation authored this brief in whole or in part. No party or party's counsel contributed money that was intended to fund preparing or submitting the brief. No person, other than *amicus*, its members, or its counsel, contributed money that was intended to fund preparing or submitting the brief.

[2] The Declaration relies heavily on the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), United Nations Convention on the Elimination of Discrimination Against Women, Sept. 3, 1981, 1249 U.N.T.S. 13. The United States has not *ratified* CEDAW. However, the United States has *signed* CEDAW. Under international law, this signature "creates an obligation to refrain, in good faith, from acts that would defeat the object and the purpose of the treaty." Vienna Convention on the Law of Treaties arts. 10, 18, January 27, 1980, 1155 U.N.T.S. 331.

"gender" or "gender identity." The Declaration has been signed by over 13 thousand people across the world, including over 1000 residents of the U.S., many of whom reside within the Ninth Circuit.

The WHRC-USA is the U.S. chapter of the WHRC. Our interest in this litigation stems from the fact that the ruling below, in addition to being incorrect as a matter of U.S. law, is incompatible with the provisions of the Declaration in several respects, as explained herein.[3]

SUMMARY OF ARGUMENT

It appears that the United States federal judiciary, including the court below, has become captured by the notion that so-called "gender identity" exists, and also that persons who claim to "be trans gender" deserve to be protected under U.S. constitutional and statutory law, on the basis of that self-declared status, under various provisions of U.S. law that are designed to protect people on the basis of the category of sex.[4] Notwithstanding the protestations of the Plaintiffs-Appellees,

[3] *Amicus* agrees with the legal arguments put forth in the Petitioners' briefing before this Court and submits this brief in order to offer an international policy perspective on the reasons why the ruling below should be reversed. *Amicus* understands that the Declaration is not binding on the Court, but rather offers its provisions to aid in the Court's analysis of the questions put forth on appeal.

[4] *See, e.g., Reed v. Reed*, 404 U.S. 71, 76-77 (1971) ("To give a mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment; and whatever may be said as to the positive values of avoiding intrafamily controversy, the choice in this context may not lawfully be

"gender identity" does not exist in any real, material sense, and the decision of the court below, enjoining the enforcement of Idaho's Fairness for Women in Sports Act, must be reversed.

First, language matters, and the fact is that so-called "gender identity" is not a coherent category of persons that ought to be protected as a discrete category in the law. The Introduction to the Declaration accurately explains that:

> The confusion between sex and 'gender' has contributed to the increasing acceptability of the idea of innate 'gender identities', and has led to the promotion of a right to the protection of such 'identities', ultimately leading to the erosion of the gains made by women over decades. Women's rights, which have been achieved on the basis of sex, are now being undermined by the incorporation into international documents of concepts such as 'gender identity' and 'Sexual Orientations and Gender Identities (SOGIES)'.
>
> Sexual orientation rights are necessary in eliminating discrimination against those who are sexually attracted to persons of the same sex. Rights relating to sexual orientation are compatible with women's sex-based rights, and are necessary to enable lesbians, whose sexual orientation is towards other women, to fully exercise their sex-based rights.
>
> However, the concept of 'gender identity' makes socially constructed stereotypes, which organize and maintain women's inequality, into essential and innate conditions, thereby undermining women's sex-based rights.

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mandated solely on the basis of sex."). *See also* Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 ("No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.") (Title IX).

Decl. on Women's Sex-Based Rts., *Introduction*.

It is simply not possible to *both* enshrine so-called "gender identity" in the law *and* protect the legal, privacy, and safety rights of women and girls. By granting the preliminary injunction, the Court below has done a grave disservice to women and girls, including lesbians, by essentially removing them as a coherent category worthy of civil rights protection, *as women and girls*, under Idaho law. Protecting women and girls *as women and girls* is entirely consistent with Title IX and the Constitution. The ruling below turns this conclusion on its head.

Second, Title IX was enacted in order to remedy the fact that women and girls, i.e., female human beings, were excluded from and discriminated against within the educational arena for centuries in the U.S, including in athletics.[5] As has been demonstrated, male athletes enjoy physiological and anatomical advantages over female athletes in sport. *See, e.g.,* Andrew Langford, *Sex Differences, Gender, and Competitive Sport*, Quillette (Apr. 5, 2019).

[5] Representative Mink (HI). "In Celebration of the 30th Anniversary of Title IX of the Education Amendments of 1972." *Congressional Record* 148:97 (July 17, 2002) p. H4861 ("Title IX has opened the doors of educational opportunity to millions of girls and women who otherwise would have been shunned or relegated to a secondary place. Title IX has helped to tear down barriers to admissions, increase opportunities for women in nontraditional fields of study, improve vocational educational opportunities for women, reduce discrimination against pregnant students and teen mothers, protect female students from sexual harassment in our schools, and increase athletic competition for girls and women.").

But, *even if that were not true*, women and girls ought to have the right to say no to men and boys in female-only spaces, including on playing fields and in track meets. The Declaration is firm on this point: "To ensure fairness and safety for women and girls, the entry of boys and men who claim to have female 'gender identities' into teams, competitions, facilities, or changing rooms, inter alia, set aside for women and girls should be prohibited as a form of sex discrimination." Decl. on Women's Sex-Based Rts. art. 7. In addition, a majority of Americans (66.96 percent of surveyed voters of all political parties) "state that men or boys who identify as transgender should not be permitted to compete in women and girls' athletics." Women's Liberation Front, *National Poll Reveals Majority of Voters Support Protecting Single-Sex Spaces* (Oct. 27, 2020).

Third, the court below does not appear to understand the extent to which the movement to enshrine so-called "gender identity" in U.S. law has been fueled by massive funding mechanisms that extend far beyond U.S. borders and that have as their goal the objective of medicalizing identity for profit.[6] "Gender identity" is one part of a much larger project, the aim of which is to divorce human beings from material reality. The very concept that a person can be "born in the wrong body" defies reason and rationality.

[6] *See, e.g.*, Jennifer Bilek, *Who Are the Rich, White Men Institutionalizing Transgender Ideology?*, The Federalist (Feb. 20, 2018).

This matter should be a straightforward one. In arguing in favor of the preservation of female-only spaces in general, attorney and scholar Christen Price states:

> [C]ertain of the transgender rights movement's legal and policy goals, especially as manifested in gender identity nondiscrimination laws, represent a new kind of "forced closeness," which elevates male identities, priorities, and desires, and undermines women's rights. I am a feminist attorney working against sex trafficking and other forms of sexual violence, and I am concerned about the implications of these trends for women's equality.

Christen Price, *Women's Spaces, Women's Rights: Feminism and the Transgender Rights Movement*, 103 Marq. L. Rev. 1509, 1511 (2020).[7]

The ruling below, granting the preliminary injunction, must be reversed.

ARGUMENT

1. "Gender Identity" is Not a Coherent Category and Should Not be a Separately Protected Legal Status.

Article 1 of the Declaration states:

> States should maintain the centrality of the category of sex, and not 'gender identity', in relation to women's and girls' right to be free from discrimination.
>
> For the purposes of this Declaration, the term "discrimination against women" shall mean "any distinction, exclusion or restriction made on the

[7] In her piece, Price quotes Sheila Jeffreys, *Gender Hurts: A Feminist Analysis of the Politics of Transgenderism* (2014), extensively. Jeffreys's work on the topic of gender is highly regarded and serves as an excellent resource on the topic of how gender works to erode the rights, privacy, and safety of women and girls.

> basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field". (CEDAW, Article 1).
>
> States should understand that the inclusion of men who claim to have a female 'gender identity' into the category of women in law, policies and practice constitutes discrimination against women by impairing the recognition of women's sex-based human rights. States should understand that the inclusion of men who claim to have a female 'gender identity' in the category of women results in their inclusion in the category of lesbian, which constitutes a form of discrimination against women by impairing the recognition of the sex-based human rights of lesbians.

Decl. on Women's Sex-Based Rts. art. 1 § (a), citing CEDAW.

The ruling below cites the Third Circuit for the proposition that "such seemingly familiar terms as 'sex' and 'gender' can be misleading." Mem. Decision and Order 4, citing *Doe ex rel. Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518, 522 (3d Cir. 2018), *cert. denied*. The court is correct that the Third Circuit did indeed make that somewhat vague and unverifiable observation in *dicta* in its *Boyertown* decision. The statement is, of course, not binding on this Court, and need not control the outcome of this case.[8]

[8] It is worth noting that during oral arguments before the Third Circuit's three-judge panel in *Boyertown*, one judge admonished the attorney for the petitioners not to use the phrase "opposite sex" during arguments because he found that the

There is no actual support for the proposition that the terms "sex" and "gender" are misleading or complicated. But, while proponents of so-called "gender identity" insist that sex and gender are different, they frequently conflate the two. *See, e.g.*, La Scapigliata, *How conflation of sex and gender became a tool of transgender ideology* (Mar. 27, 2018).

The ordinary term "sex" can be defined as: "either of the two major forms of individuals that occur in many species and that are distinguished respectively as female or male especially on the basis of their reproductive organs and structures," Merriam Webster Unabridged, "Sex," (a); "the sum of the structural, functional, and sometimes behavioral characteristics of organisms that distinguish males and females," Merriam Webster Unabridged, "Sex," (b); "the state of being male or female," Merriam Webster Unabridged, "Sex," (c) (citing for reference Title VII Civil Rights Act of 1964, which prohibits employment discrimination based on *sex* (emphasis in original)); or "males or females considered as a group," Merriam Webster Unabridged, "Sex," (d).

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phrase "complicates the discussion." Oral Argument at 4:22, *Boyertown* (No. 17-3113), https://www2.ca3.uscourts.gov/oralargument/audio/17-3113Doev.BoyertownAreaSchoolDist.mp3. This, despite the fact that the Supreme Court used the phrase "opposite sex" four times in its landmark decision in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), seemingly without any confusion or complication. *See, e.g., Obergefell*, 135 S. Ct. at 2593 ("The petitioners in these cases seek to find that liberty by marrying someone of the same sex and having their marriages deemed lawful on the same terms and conditions as marriages between persons of the opposite sex.").

Notably, the court below made no attempt whatsoever to define the word "gender." If it had, it might learn that "gender" is simply a set of stereotypes that are imposed on men and women *on the basis of sex*.[9] There is no such thing as "having a gender" or "being a gender." A person is either male or female – words that pertain to sex. Lindsay Hecox is male, regardless of identity. This is precisely what the court below is saying when it states that Lindsay is "[a] transgender woman," or "a person [whose] sex was determined to be male at birth." Mem. Decision and Order 5, citing *Boyertown* at 522.[10] In other words, Hecox is neither a woman, nor female.

This is not to say that sex-based stereotypes do not exist. They do, and they are pernicious. Although sex-based stereotypes harm everyone, they are particularly harmful to women. A good example of the ways in which sex-based stereotypes harm women is the experience of Ann Hopkins, the plaintiff whose case the Supreme Court ultimately decided in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

Hopkins had been nominated for a partnership at her place of employment, but her candidacy was put on hold, and the following year, she was not nominated.

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[9] *See, e.g.,* Sheila Jeffreys, *Gender Hurts: A Feminist Analysis of the Politics of Transgenderism* (2014).

[10] Notwithstanding the district court's insistence on using language like "lasting, persistent female gender identity," Mem. Decision and Order 5, female is not a "gender identity." It is one of two sexes.

Price Waterhouse at 231-232. She sued her employer under Title VII of the Civil Rights Act. In concluding that Price Waterhouse had engaged in unlawful sex-stereotyping, the Court noted that:

> There were clear signs, though, that some of the partners reacted negatively to Hopkins' personality because she was a woman. One partner described her as "macho"; another suggested that she "overcompensated for being a woman"; a third advised her to take "a course at charm school". Several partners criticized her use of profanity; in response, one partner suggested that those partners objected to her swearing only "because it's a lady using foul language." Another supporter explained that Hopkins "ha[d] matured from a tough-talking somewhat masculine hard-nosed mgr to an authoritative, formidable, but much more appealing lady ptr candidate." But it was the man who, as [the district court] found, bore responsibility for explaining to Hopkins the reasons for the Policy Board's decision to place her candidacy on hold who delivered the *coup de grace:* in order to improve her chances for partnership, [he] advised, Hopkins should "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry."

Id. at 235. These types of stereotypes – collectively, "gender" – pervade society, and *Price Waterhouse* provides a clear example of how they are harmful to women. Because the court below did not define gender, presumably it saw no reason to address this problem.

The court below did define "gender identity," however, again relying on *Boyertown*, as a person's "deep-core sense of self as being a particular gender." Mem. Decision and Order 5. But this is simply a conflation of the terms "sex" and

"gender." If the court had wanted to define "gender identity" as being a person's "deep-core sense of self as being the opposite sex," it could have. It did not.

As explained above, "female" is not "a gender;" it is one of two sexes. If "gender identity" means anything at all, it means identification with a set of sex-based stereotypes. However, because these stereotypes are harmful, interpreting the law in a manner that protects a person's "identification" with them serves to reinforce them. There is simply no legal justification for this Court to reinforce a set of sex-based stereotypes that harm women and girls.

So-called "gender identity" is nothing more than a regressive political movement, designed to enforce sex-based stereotypes that have no place in contemporary society, and which the Supreme Court has said have no legal or constitutional role to play in making employment decisions. All of so-called "gender identity" ideology rests on the notion that it is possible to have the brain of one sex inside a body of the opposite sex. But even that concept rests on the notion that there is such a thing as "sexed brains" – an idea that is "premised upon, and promote[s], harmful stereotypes concerning asserted biological differences in brain structure and development." ACLU, *ACLU Files Title IX Complaints Challenging*

Stereotype-Based Single-Sex Class Programs at Three Florida School Districts (Sept. 3, 2014).[11]

2. The Declaration on Women's Sex-Based Rights Demands that Women and Girls have their Own Athletics, in Accordance with Title IX and Its Implementing Regulations.

The Fairness in Women's Sports Act allows for women and girls to compete with and against each other in athletics, which is entirely consistent with the intent of Title IX and its implementing regulations, and with the Declaration.

The Declaration states:

> Article 10 (g) of the CEDAW provides that States Parties shall ensure ''[t]he same Opportunities to participate actively in sports and physical education'' for girls and women as for boys and men. This should include the provision of opportunities for girls and women to participate in sports and physical education on a single-sex basis. To ensure fairness and safety for women and girls, the entry of boys and men who claim to have female 'gender identities' into teams, competitions, facilities, or changing rooms, inter alia, set aside for women and girls should be prohibited as a form of sex discrimination.

Decl. on Women's Sex-Based Rts. art. 7.

On the topic of sex-segregated sports, the Declaration is perfectly consistent with Title IX and its implementing regulations:

> Notwithstanding the requirements of paragraph (a) of this section, a recipient may operate or sponsor separate teams for members of each

[11] The quote in the text above is taken from a press release, as the actual complaints appear to have been made unavailable. *See also* Cordelia Fine, *Delusions of Gender: How Our Minds, Society, and Neurosexism Create Difference* (W.W. Norton & Co. 2011).

> sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport. However, where a recipient operates or sponsors a team in a particular sport for members of one sex but operates or sponsors no such team for members of the other sex, and athletic opportunities for members of that sex have previously been limited, members of the excluded sex must be allowed to try-out for the team offered unless the sport involved is a contact sport. For the purposes of this part, contact sports include boxing, wrestling, rugby, ice hockey, football, basketball and other sports the purpose or major activity of which involves bodily contact.

34 C.F.R. § 106.41(b).

The U.S. Department of Education recently issued a decision on this topic, in connection with a complaint that had been filed by the organization Concerned Women for America against Franklin Pierce University. U.S. Dep't of Educ., Off. for Civ. Rts., Op. Letter, Compl. No. 01-20-2023 (Oct. 16, 2020) (Opinion Letter). The Department noted that "[w]here separating students based on sex is permissible—for example, with respect to sex-specific sports teams—such separation must be based on biological sex." Opinion Letter 4. The University thus agreed to rescind its policy of allowing male athletes to compete in women's sports, Opinion Letter 6, which resolved the dispute.

In its decision, the Department explained that the Supreme Court's recent decision in *Bostock v. Clayton Cnty., Georgia*, 140 S. Ct. 1731 (2020), did not affect the legal standard that applied to an administrative adjudication under Title IX, and noted further that "[d]uring oral argument before the U.S. Supreme Court, the employee's counsel conceded that the outcome of the case was not relevant,

one way or another, to the question of whether a recipient's willingness to allow a biological male … to compete against biological females constituted a violation under Title IX." Opinion Letter 2.

The Fairness in Women's Sports Act is also in line with a global trend to exclude men from competing in women's sports on the basis of their so-called "gender identity." For example, the World Rugby Federation recently promulgated a rule that bars men from competing in women's rugby at the international level. *See* World Rugby, *Transgender Guideline* (Sept. 10, 2020).[12]

Although the Court below obscured the matter by referring to men as "transgender women,"[13] the Court did accurately note that the NCAA has a policy

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[12] The new rule does, however, permit individual countries to establish their own rules on this topic. World Rugby, *World Rugby approves updated transgender participation guidelines* (Sept. 20, 2020), https://www.world.rugby/news/591776/world-rugby-approves-updated-transgender-participation-guidelines ("As a result, the new guidelines do not recommend that transwomen play women's contact rugby on safety grounds at the international level of the game where size, strength, power and speed are crucial for both risk and performance, but do not preclude national unions from flexibility in their application of the guidelines at the domestic/community level of the game."). The rule also, regrettably, allows men to compete in women's rugby if they were given puberty-blocking hormones before entering puberty. *Transgender Guideline*, 8. The WHRC-USA considers the medically-unnecessary administration of puberty-blocking hormones to be a form of child abuse. *See, e.g.*, Joy Pullman, *Transing Children is Child Abuse and Should Be Punished*, The Federalist (Oct. 23, 2019).

[13] As discussed *supra*, Argument § 1, the word "women" does not refer to "a gender." Instead, it refers to the class of people who are adult human females. Using words like "transgender women" is misleading, in that it suggests that men belong within the category "women," which is absurd on its face. Use of this kind

allowing men to compete in women's sports under certain circumstances. Mem. Decision and Order 2. However, that policy is currently under review, and members of the NCAA's Board of Governors are currently debating whether to keep that policy in place. *See* Brittany Cooper, *NCAA to consider transgender policies at October meeting* (Aug. 6, 2020) ("[T]he NCAA is working with national and international groups as it reviews its current transgender athlete policy.").[14]

There is hardly a global consensus that men who claim to "identify as trans gender" ought to be given permission to compete in women's sports. Australian Senator Claire Chandler has repeatedly addressed the Australian Parliament, on this topic, for example, reporting on research findings that had been posted on the

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of language is also what is known as a reversal – a deliberate strategy of confusing a particular matter in order to further a political agenda. *See, e.g.*, Agatha Trunchbull, *The Gender Cult is Winning the War of Language*, Uncommon Ground Media (Oct. 27, 2020) ("The gender cult's entire linguistic regime is made up of these politically-motivated misnomers, or what Mary Daly has called 'reversals.' She uses Orwell's *1984* as an example: 'the Ministry of Truth was where they made up lies, the Ministry of Love was where they tortured people.' So, too, with every term the gender cult coins or appropriates. Men are 'women.' Pushing lesbians out of LGB spaces is 'inclusivity.' Threatening women is 'feminism.' Mutilation is 'healthcare.' Anything that would prevent gay people from turning their internalized homophobia into a lifelong medical condition is 'trans conversion therapy.' None of these terms represent reality. In fact, they do exactly the opposite. They represent an attempt by the gender cult to *overwrite* reality, and to convince the public that everything is the opposite of what it is." (emphasis in original)).

[14] As of the date of writing, the NCAA had not reached a final decision.

World Rugby Federation's website from a "range of experts in biology, physiology, sports science, and sports medicine":

> One of the findings is that there is likely to be at least a twenty to thirty percent greater risk of injury when a female player is tackled by someone who has gone through male puberty…. Who needs scientific research to tell us that the average male has major advantages in speed, strength, and power, over the average female?

Clair Chandler, *Labor attempts to silence discussion on women's sport*, YouTube (Aug. 30, 2020).

Globally, there have been numerous instances of men dominating in women's sports, as this Court surely knows.

- In 2013, Fallon Fox – a man who was permitted to participate in Women's MMA (Mixed Martial Arts) on the basis that he claims to "identify as a woman" – broke open the skull of Tamikka Brents during a sparring match. He inflicted an orbital bone fracture, a concussion, and soft tissue injuries. *See* GallusMag, *Why Hormones Don't Make a Woman*, GenderTrending (Sept. 8, 2014).
- Rachel McKinnon, a man who sometimes uses the name Veronica Ivy, has won two world championships in women's cycling. *See* Rebecca Reza, *Transgender Cyclist Rachel McKinnon Wins Second-Straight World Masters Title*, Bicycling (Oct. 24, 2019).

- Selina Soule is a competitive runner and college freshman. In 2019, she made headlines for appearing as the first named plaintiff in a lawsuit against her school district and her state's athletic association over the association's policy of allowing boys to compete in girls' track. As this court knows, that matter is pending before the U.S. District Court for the District of Connecticut. *See Soule, et al. v. Connecticut Association of Schools, et al.*, No. 3:20-cv-00201-RNC, Compl. D. Conn. (Feb. 12, 2020).

And of course, though the Court below accurately noted that the International Olympic Committee has a policy of allowing men to compete in women's Olympic events under certain circumstances, Mem. Decision and Order 2, that policy is not without controversy. A 2019 survey of female British athletes found that the overwhelming majority felt that the "Committee's guidelines for transgender athletes are unfair on female athletes and should be suspended while more research is carried out." *See* Sean Ingle, *British Olympians call for IOC to shelve 'unfair' transgender guidelines*, The Guardian (June 12, 2019).

Further, even if this were simply a matter of sports competition, allowing men to compete as women is unsafe and unfair to women and girls, for all of the reasons stated herein, and in the Petitioners' filings. However, this matter is not limited to athletic competitions themselves. Girls depend on participation in

athletics to get recruited onto college teams. They depend on participation in athletics to be eligible for scholarships. The ability of girls to compete in athletics matters in very concrete, material ways. *Sports Benefit Girls in Many Concrete Ways*, Children's Medical Group (Jan. 31, 2019). But if boys are permitted to compete in girls' sports, there is a likelihood that top spots will go to boys. That is simply unfair and sexist, and constitutes sex discrimination against women and girls, in violation of Title IX.

The data is clear: men, including men who claim to be women, have an unfair advantage over girls and women in athletics. *See, e.g.*, Andrew Latham, *Physiological Differences Between Male and Female Athletes*, Chron (June 28, 2018) ("The physiological differences between men and women are so great that elite male and female athletes rarely compete with each other. These differences generally give men a competitive edge in sports that reward absolute strength, acceleration and speed."). But even if that were not true, women and girls ought to have the right to say no to men and boys, under any circumstances, for any reason, or for no reason whatsoever. The ruling below is out of touch with reality. It is also out of touch with the majority of U.S. voters across the political spectrum, who think that men and boys who "identify as transgender" should not be permitted to compete in women's and girls' sports. *See* Women's Liberation Front, *National Poll Reveals Majority of Voters Support Protecting Single-Sex Spaces* (Oct. 27,

2020). The ruling below is also incompatible with the Declaration and should be reversed.

3. The Ruling Below Furthers a Broader Movement to Medicalize Identity by Enshrining "Gender Identity" in the Law.

Contrary to popular belief, to Plaintiffs-Appellees' arguments, and to the ruling below, so-called "gender identity" is not a civil rights movement. It is a movement to further the medicalization of identity. In no other context does our society – or our system of law – allow for the use of life-altering hormones, permanent sterilization, or body-altering surgery to affirm a sense of identity. Or, in the words of researcher and blog author Jennifer Bilek, "[t]ransgenderism seems to be the only non-medical condition needing medical intervention, medical insurance and social validation as an identity. It is self-expression and it is a painful condition needing 'treatment,' simultaneously." Jennifer Bilek, *Custom Vaginoplasty "For Your Inner Well-Being,"* The 11th Hour Blog (Oct. 23, 2020). According to MarketWatch, "[s]ex reassignment surgeries are projected to witness exponential growth in the coming years owing to favorable government policies and rising number [sic] of cases where people are opting for sex change surgeries globally." Market Insight Reports, *Sex Reassignment Surgery Market Share | Global Industry Analysis, Segments, Top Key Players, Drivers and Trends to 2026* (Aug. 10, 2020).

The medicalization of identity does not stop with people, like Lindsay Hecox, who claim to be the opposite sex. It extends to people who claim to have a so-called "non-binary gender." According to Bilek, "[t]oday, what is euphemistically being promoted as surgery to 'affirm' your inner sense of well-being about your sexed body in its relation to socially constructed sex-role stereotypes, is being expanded for those identifying as 'non-binary.' Purportedly, those who identify as non-binary don't feel either male or female, though of course that non-binary identity is contingent on the opposite points of male-female existence, which trans activists consistently deny exist." *Bilek, supra*. Bilek goes on to detail the types of surgeries that are being provided to people who claim to be "non-binary." *Id.* The information that she provides is too graphic to be included in this brief; we will simply note here that it includes information about what is meant by the term "phalgina." *Id.*

This Court should refuse to participate in this unethical medicalization of identity by reversing the ruling below.

CONCLUSION

The movement to enshrine "gender identity" in the law has been moving at warp speed since at least 2006, when the Yogyakarta Principles were developed. *See* T. Sonia Onufer Corrêa and Vitit Muntarbhorn, *The Yogyakarta Principles: Principles on the Application of International Human Rights Law in Relation to*

Sexual Orientation and Gender Identity (Mar. 2007) and *The Yogyakarta Principles plus 10* (Nov. 10, 2017).[15] The Yogyakarta Principles purport to advance a system of law and legislation that protects human beings on the basis of sexual orientation, which WHRC-USA wholeheartedly supports. However, the Principles also boot-strap so-called "gender identity" into this legal framework. For all of the reasons discussed above, this enshrinement of "gender identity" into law is inappropriate, and the Yogyakarta Principles should be rejected on that basis.

Sexual orientation and "gender identity" are not the same thing. Sexual orientation relates to the attraction that a person has toward another, and any particular person might be heterosexual, homosexual, or bi-sexual. *See, e.g.*, Cambridge Unabridged, "Sexual Orientation" ("the fact of someone preferring to have sexual relationships either with men, or with women, or with both"). In order to protect individuals and couples on the basis of sexual orientation, the law must grant the reality of sex, as the Supreme Court did in *Obergefell*. In contrast, "gender identity" is either an individual's belief that he or she is the opposite sex, or it is an identification with a set of sex-based stereotypes. Either way, it is not a discrete category warranting legal protection.

[15] The original Yogyakarta Principles were developed in 2006. The 2017 version includes nine principles that were added in 2016. They do not have any force in law. *See* Sheila Jeffreys, *Enforcing Men's Sexual Rights in International Human Rights Law* 3, We Need to Talk (London, June 2018).

To the extent that Plaintiffs-Appellees are asking this Court to confirm that our nation's civil rights laws protect people from discrimination on the basis of sex-stereotyping, there is no need to do so, as the Supreme Court has already settled that matter, rightly, at least in the employment context, in *Price Waterhouse*. But the Fairness in Women's Sports Act does not, on its face or in any application, attempt to discriminate against anyone on the basis of sex-stereotyping. It is simply an acknowledgment that women and girls deserve protection on the basis of their sex, which advances the aims of Title IX and the Declaration.

This Court should acknowledge the same and reverse the ruling below accordingly.

Dated: November 19, 2020 Respectfully submitted,

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FORM 8. CERTIFICATE OF COMPLIANCE FOR BRIEFS

9th Cir. Case Number(s) 20-35813

I am the attorney or self-represented party.

This brief contains 5,573 words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

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