

No. 23-8065

In the United States Court of Appeals for the Tenth Circuit

JAYLYN WESTENBROEK; HANNAH HOLTMEIER; ALLISON COGHAN;
GRACE CHOATE; MADELINE RAMAR; AND MEGAN KOSAR, ON
BEHALF OF THEMSELVES AND DERIVATIVELY ON BEHALF OF KAPPA
KAPPA GAMMA FRATERNITY,

Plaintiffs – Appellants

v.

KAPPA KAPPA GAMMA FRATERNITY, AN OHIO NON-PROFIT
CORPORATION AS NOMINAL DEFENDANT AND AS A DIRECT
DEFENDANT; MARY PAT ROONEY, PRESIDENT OF THE FRATERNITY
COUNCIL OF KAPPA KAPPA GAMMA FRATERNITY, IN HER OFFICIAL
CAPACITY; AND KAPPA KAPPA GAMMA BUILDING CO., A WYOMING
NON-PROFIT CORPORATION,

Defendants – Appellees

ARTEMIS LANGFORD

Defendant

On Appeal from the United States District Court for the District of Wyoming No.
2:23-CV-00051-ABJ, Hon. Alan B. Johnson

***AMICUS CURIAE* BRIEF OF WOMEN'S DECLARATION
INTERNATIONAL USA IN SUPPORT OF APPELLANTS AND REVERSAL**

Kara Dansky
WOMEN'S DECLARATION INTERNATIONAL USA
P.O. Box 21160
Washington, D.C., 20009
800-939-6636
president@womensdeclarationusa.com
Counsel for Amicus Curiae
Women's Declaration International USA

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INTEREST OF AMICUS CURIAE

Women’s Declaration International (WDI, of which WDI USA is one chapter) is made up of women from every walk of life – from law and government, to the hard sciences, the culture-shaping professions, and the nation-building trades. We are lesbians, straight women, and bisexual women. We are mothers and child-free women. We are women of all races, ethnicities, and religions. We are more than 37,000 individual women and 517 organizations from 160 nations.

But in our diversity we have a single message: Never again will we return to a world where women are defined by the patronizing, regressive, and oppressive stereotypes of gender, of which “gender identity” is one form. “Gender identity” ideology supplants the objectively definable category of sex with an ambiguous “identity” category such as the one at issue in this case. It deprives us all of the definition of women woven into thousands of sex discrimination cases that acknowledge sex as binary, objective, and immutable. This appeal presents the questions, critical to the continued progress of women and girls, as to what the words sex and gender mean, and what it means to “identify as a woman” if one is in fact not a woman. It exemplifies how the nebulous concept of “gender identity” is being weaponized to deprive women and girls of their right to single-sex spaces, including sororities.

WDI's founders authored the Declaration on Women's Sex-Based Rights (the Declaration), which affirms the sex-based rights of women and girls and challenges the discrimination they experience when the category of "sex" is replaced by the category of "gender identity."¹ Such discrimination includes the use of phrases like "women and individuals who identify as women" to define membership in a women-only organization such as a sorority. The Declaration is rooted in the idea that the right of women and girls to live free from discrimination, recognized under international human rights law, derives from being of the female sex not from "identifying as" women and girls. Relevant in this case involving the right of women to associate exclusively with other women, the Declaration provides 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."²

WDI USA is interested in this appeal first because although we agree that organizations (including feminist organizations) have a First Amendment right of association (as well as speech) to define their own organizing documents, that right

¹ Decl. Women's Sex-Based Rts. (January 2019), <https://www.womensdeclaration.com/en/>.

² *Id.*, Art. I.

has some limitations that the District Court erroneously found inapplicable. Second, as an organization, we can hardly protect the rights of women and girls, such as appellants in this matter, to associate exclusively with other women and girls, if membership in a women-only organization is open to “individuals who identify as women,” i.e., men. Relatedly, the linguistic destabilization caused by the uncritical use of words like “transgender” is producing massive confusion throughout society as well as in law, and ought to be avoided at all costs. Third, if the word women includes men who claim to “identify as women,” the word lesbian ceases to have any coherent meaning, to the detriment of lesbians as a class. All over the world, lesbians (including members of the WDI USA Lesbian Caucus) are being compelled by governmental and social entities to include men in meetings, dating pools, and organizations if said men claim to be women, i.e., if they “identify as women.” In view of its work on these issues, WDI USA has a meaningful perspective to offer the Court.

No counsel for a party authored this brief in whole or in part. No party or counsel for a party contributed money that was intended to fund preparing or submitting this brief. No person—other than WDI USA, its members, or its counsel—contributed money that was intended to fund preparing or submitting this

brief. WDI USA is authorized to file this *amicus* brief because Appellants and Appellees have consented to its timely filing.

SUMMARY OF ARGUMENT

Organizations indisputably have a First Amendment associational right to engage in protected speech and expression. *Amicus* stands firmly behind that right, which is consistent with Article V of the Declaration, reaffirming women’s right to freedom of peaceful assembly and association.³ Nonetheless, the court below misconstrued the facts and misapplied the applicable law in ruling in favor of Kappa Kappa Gamma (KKG). Contrary to what the District Court found, KKG has not interpreted, defined, augmented, or broadened the word “woman”; it has appended to it. The District Court’s dismissal of Plaintiffs’ Count I hinged on these erroneous factual findings. Therefore, at least with respect to Count I, Plaintiffs stated a claim upon which relief could be granted in its derivative claim against KKG for admitting Artemis Langford, a man who claims to “identify as a woman.”⁴

Furthermore, the District Court used the word “transgender” uncritically, revealing a gap in its understanding of the differences between the material reality of sex and the elusive nature of “gender identity.” Our society tends to use the words sex and gender interchangeably, warping our understanding of the harms that

³ See *supra*, n.1, Art. V.

⁴ *Amicus* does not concede that a man who claims to “identify as a woman” is a woman or that there is any manner of “identifying as a woman” other than by simply being one.

“gender identity” poses to women and girls as a sex class.⁵ This Court has an opportunity to correct that by clarifying that “sex” denotes biological material reality, whereas “gender” (and linguistic derivatives like it such as “transgender” and “gender identity”) is simply a matter of sex role stereotypes.

Because the District Court already found futility under applicable Ohio law and because its analysis of KKG’s associational rights was factually and legally flawed and ignored important considerations related to the language used to discuss sex and gender, *amicus* urges this court to reverse and remand the District Court’s ruling with regard to Plaintiffs’ Count I derivative claim for further proceedings.⁶

⁵ See, e.g., Kara Dansky, *Democrats Should Defend Sex-Based Rights for Women and Girls*, THE LIBERAL PATRIOT (Nov. 12, 2023), <https://www.liberalpatriot.com/p/democrats-should-defend-sex-based> (“What’s more, two thirds of voters surveyed said they define ‘gender’ and ‘sex’ as synonyms describing whether one is female or male. When writing law and policy, adjudicating disputes, or gauging public support for measures based on ‘gender,’ elected officials and the courts must be aware that most Americans understand that word to mean ‘sex,’ not ‘gender identity.’”).

⁶ *Amicus* does not take a position on the District Court’s rulings with respect to Plaintiffs’ other claims.

ARGUMENT

I. The District Court is correct that organizations have an associational right to engage in protected speech but misconstrued the facts and misapplied the law in this case by ruling in favor of KKG.

The District Court declined to define the word “woman” for purposes of this litigation.⁷ Fair enough. But the court need not have defined the word woman in order to rule that Plaintiffs stated a claim upon which relief could be granted with regard to Count I. In fact, no one needs to define the word woman because it already has a clear definition: adult human female. KKG does not appear ever to have claimed otherwise.

A. The District Court erroneously characterized KKG’s actions as “defining,” “interpreting,” “broadening,” and/or “augmenting” the word “woman,” and KKG’s own language—“women and individuals who identify as women”—makes it clear as a factual matter that “individuals who identify as women” are not women.

The court below noted that although KKG’s bylaws unambiguously require that “[a] new member shall be a woman,” they do not define the word “woman.”⁸ It also explained that in 2018, KKG issued guidance stating: “Kappa Kappa Gamma is a single-gender organization comprised of women and individuals who identify as

⁷ *Westenbroek, et al. v. Kappa Kappa Gamma et al.*, 2:23-CV-00051 (D.WY. Sept. 26, 2023), at 3.

⁸ *Id.* at 3, 4.

women whose governing documents do not discriminate in membership selection except by requiring good scholarship and ethical character.”⁹ It was presumably based on this guidance that Langford, a man who claims to “identify as a woman” was eligible for membership. No one in this litigation appears to claim that Langford belongs in the category “women.” If Langford belonged in the category “women,” KKG would presumably not have felt the need to append the phrase “individuals who identify as women” to the word “women” in its 2018 guidance.

The court below went to great pains to characterize the 2018 guidance as “defining,” “interpreting,” “broadening,” and “augmenting” the word “woman.” *See, e.g.,* the following:

“The delegate of a private, voluntary organization interpreted ‘woman,’ otherwise undefined in the non-profit’s bylaws, expansively;”¹⁰

“Defining ‘woman’ is Kappa Kappa Gamma’s bedrock right as a private, voluntary organization”¹¹

⁹ *Id.* at 4.

¹⁰ *Id.* at 3.

¹¹ *Id.* at 26.

“Whereas Plaintiffs circumscribe ‘woman,’ their delegate augmented the same.”¹²

“In summary, the delegate of a private, voluntary organization, in pursuit of ‘inclusiv[ity],’ broadened its interpretation of ‘woman.’”¹³

None of this is factually accurate.

What KKG did in 2018 was to *append* the phrase “and individuals who identify as women” to the word “women” in its description of the organization's members. This is not in dispute. The sole question before the District Court with respect to Count I of Plaintiffs’ complaint was whether KKG “violated their duties of loyalty, care, and obedience/compliance” by admitting a man into the sorority on the basis that he is an “individual who identifies as a woman.” Although the District Court went to great pains to make this case a case about the definition of the word “woman,” at no point did KKG in fact redefine, interpret, augment, or broaden its definition of “woman.” KKG *added* a category to its description of the organization's members to include two distinct groups: “women” and “individuals who identify as women.” The District Court simply got this wrong factually. Why that matters legally is explained in Section IB below.

¹² *Id.* at 31.

¹³ *Id.* at 33.

Before moving on to the legal ramifications of the District Court's insistence that this case is about the definition of the word "woman" and that KKG's 2018 guidance constituted an "interpretation" of said definition in its bylaws, it's worth pointing out that KKG's *own* language demonstrates clearly that the phrase "individuals who identify as women" does not describe a category of people who are, in fact, women. Again, KKG's 2018 guidance states that it is "comprised of women and individuals who identify as women." The word "and" is a conjunction that is most commonly used to connect words of the same part of speech. Take, for example, the phrase "cats and dogs." The function of the word "and" in this phrase is to connect the nouns "cats" and "dogs," but that does not magically turn cats into dogs, or vice versa. Dogs are not cats, as everyone knows. Similarly, "individuals who identify as women," like Langford, are not women. Appending the phrase "individuals who identify as women" to the word women does not magically transform "individuals who identify as women" into women. If "individuals who identify as women" (whatever that means) were actually women, KKG would not have needed to issue the 2018 guidance, Langford would simply be eligible for membership under the clear terms of the bylaws, and this controversy would not exist.

B. The District Court’s ruling on associational rights hinged on KKG’s “bedrock right as a private, voluntary organization” to define the word “woman,” even though KKG has not done that.

In its ruling, the District Court relied heavily on the Supreme Court’s decision in *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000), where the “Court held that the application of New Jersey’s nondiscrimination law, requiring the Boy Scouts to appoint James Dale, an openly gay man as scoutmaster, ran ‘afoul of the Scouts’ freedom of expressive association.”¹⁴ It clarified further that “[f]reedom of expressive association is the ‘right to associate with others in pursuit of a wide variety political, social, economic, educational, religious, and cultural ends.’”¹⁵

Amicus takes no issue with the concept of freedom of expressive association generally and agrees that KKG has just as much right to it as the Boy Scouts or any other organization. *Amicus* agrees that it’s important for organizations to be able to associate with others in pursuit of a wide variety political, social, economic, educational, religious, and cultural ends. This notion lies at the heart of Article V of the Declaration, which reaffirms women’s right to freedom of peaceful assembly and association and states that the right should “include the right of women and girls to

¹⁴ *Id.* at 28, quoting *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 647 (2000).

¹⁵ *Id.* at 28 n.49, quoting *Dale*, 530 U.S. at 647.

assemble and associate as women or girls based upon their sex, and the rights of lesbians to assemble and associate on the basis of their common sexual orientation, without including men who claim to have female ‘gender identities.’”¹⁶

However, an organization’s right to freedom of expressive association is not unlimited. As the District Court noted, pertinent Ohio caselaw provides that “unless there has been some palpable violation of the constitution or laws of the corporation whereby [a member] has been deprived of valuable rights, the civil courts will not interfere.”¹⁷ But that is exactly what has happened here. The District Court concluded that “Plaintiffs make no such showing,” and stated that the Plaintiffs simply ask the Court to “overrule one interpretation and inject another.”¹⁸ But again, KKG’s 2018 guidance that its membership is “comprised of women and individuals who identify as women” did not interpret the word women—it *appended to* it while leaving the word itself intact. Langford may very well be an “individual who identifies as a woman” (whatever that may mean), but he is not, according to KKG’s own language, a woman. Accordingly, his admission was in blatant violation of the

¹⁶ *Supra*, n.1, Art. V. *Amicus* will elaborate on the implications for lesbians of defining women to include men in Section IIB, *infra*.

¹⁷ *Westenbroek*, *supra* n.7 at 7, quoting *Powell v. Ashtabula Yacht Club*, No. 953, 1978 WL 216074 at 4 (11th Dist. Dec. 4, 1978).

¹⁸ *Id.* at 32.

organization’s bylaws which, as everyone agrees, state that a new member “shall be a woman.” This is precisely the type of rights deprivation the *Powell* court presumably had in mind—a “palpable violation of the ... laws of the corporation”—when it carved out this limitation on the right to freedom of expressive association.

The Ninth Circuit’s decision in *Green v. Miss United States of Am., LLC*, 52 F.4th 773 (9th Cir. 2022), although not factually identical, is instructive. In *Green*, a man who claims to “identify as a woman” applied to be a contestant in Oregon’s Miss USA pageant and was denied because the pageant has a “natural born female” eligibility requirement and Green is not female. Green argued that the pageant’s denial of his participation violated the state’s nondiscrimination law, but the District Court for the District of Oregon ruled that the First Amendment protects the pageant’s expressive association rights.¹⁹ The Ninth Circuit eventually ruled that the District Court was correct to rule in favor of the pageant, but that the proper protection was under the First Amendment’s protection against compelled speech rather than the First Amendment’s protection of association.²⁰ Either way, the pageant had a First Amendment right to exclude men, including men who “identify

¹⁹ *Green*, 52 F.4th at 777.

²⁰ *Id.*

as women” and Green did not petition the Supreme Court for *certiorari*. KKG’s bylaws are clear—a new member “shall be a woman,” not someone “who identifies as a woman,” and contrary to what the District Court found, nothing KKG has said since enacting its bylaws has defined, interpreted, augmented, expanded, or broadened the word “woman.” Because the District Court’s ruling on associational rights hinged on its misconstruing of the facts, its ruling dismissing Count I of Plaintiffs’ complaint must be reversed.

II. Sex is grounded in material reality, whereas “gender” (including linguistic derivatives like “gender identity,” “transgender” and “cisgender”) is grounded in regressive sexist stereotypes, and the idea that a man who “identifies as a woman” is in fact a woman is patently harmful to women and girls, including lesbians, as a sex class.

Despite the frequent use of “gender” as a euphemism for “sex” in polite conversation, “sex” and “gender” are not synonyms. The term sex refers to the observable fact of the distinction between female and male—based on genetic characteristics and reproductive biology—not a mutable status that everyone, as if by accident, is “assigned at birth.”²¹ Women and girls are the female sex.²² Sex is

²¹ See Kathleen Stock, *Changing the concept of “woman” will cause unintended harms*, THE ECONOMIST (Jul. 6, 2018), <https://www.economist.com/open-future/2018/07/06/changing-the-concept-of-woman-will-cause-unintended-harms>

²² See Andrea Orwoll, *Pregnant “Persons”*: The Linguistic Defanging of Women’s Issues and the Legal Danger of “Brain-Sex” Language, 17 NEV. L.J. 670,

established at conception, when an X sperm or a Y sperm fertilizes an egg.²³ It is easily identifiable and recorded with nearly 100% accuracy.²⁴

In contrast to sex, “gender” refers to a set of stereotypes imposed on women (and girls) and men (and boys) on the basis of sex.²⁵ It is, in the words of feminist scholar Sheila Jeffreys, the “foundation of the political system of male domination.”²⁶ For feminists, gender is purely a social construction loaded with various patriarchal roles, values, and expectations. For example, women in our

693 (2017) (“There are undeniable legal consequences of living in a female body. . . . Thus, woman specific language must be used in legal discussions of sex-based discrimination. . . .”).

²³ See Risa Aria Schnebly, *Sex Determination in Humans*, THE EMBRYO PROJECT ENCYCLOPEDIA (Jul. 16, 2021), <https://embryo.asu.edu/pages/sex-determination-humans>.

²⁴ See Colin Wright, *A Biologist Explains Why Sex Is Binary*, THE WALL STREET JOURNAL (Apr. 9, 2023) (refuting arguments that the existence of intersex people renders “sex” indeterminate).

²⁵ See, e.g., *Amicus Curiae* brief of Women’s Liberation Front in support of Plaintiff-Appellant at 7-9, *Meriwether v. Hartop*, 992 F.3d 492 (6th Cir. 2021) (No. 20-3289).

²⁶ Sheila Jeffreys, *GENDER HURTS: A FEMINIST ANALYSIS OF THE POLITICS OF TRANSGENDERISM* (Routledge 2014), 1; see also Sandra Lee Bartky, *Shame and Gender*, in *FEMININITY AND DOMINATION* (Routledge 1990), 84 (“What patterns of mood or feeling, then, tend to characterize women more than men? Here are some candidates: shame; guilt; the peculiar dialectic of shame and pride in embodiment consequent upon a narcissistic assumption of the body as spectacle; the blissful loss of self in the sense of merger with another; the pervasive apprehension consequent upon physical vulnerability, especially the fear of rape and assault.”).

society are expected to wear high heels in order to comply with the rules of womanhood and to attract the attention of men, even though it has been shown time and again that wearing high heels impairs mobility and causes lower back pain, sore calves, foot pain, angle sprains, constricted blood vessels, crooked feet, and weakened ligaments. Women are also expected to be sweet, docile, and subservient to men.²⁷ This is all still true, notwithstanding the gains that feminists have made over the years. Feminists call for the abolition of gender because gender is a prison that keeps women in a position of subservience to men. For feminists, in other words, gender is the problem, not the solution.²⁸

The concept of “gender identity” manipulates offensive, regressive, sexist stereotypes for a particularly harmful purpose—to deny women the coherent, objective legal taxonomy that anchors the jurisprudence of women’s rights. On its face, “gender identity” refers to a person’s subjective *identity*, not to his or her *sex*, and appears to be defined by whatever feeling the person has of what it means to “be of the gender with which he or she identifies” and whatever expression the person

²⁷ The Supreme Court has rightly ruled that discrimination on the basis of nonconformity with such stereotypes in the employment context constitutes unlawful sex discrimination. *See Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

²⁸ *See, e.g.*, Kara Dansky, *THE ABOLITION OF SEX: HOW THE ‘TRANSGENDER’ AGENDA HARMS WOMEN AND GIRLS* (Bombardier Books 2021).

gives that feeling. When men and boys claim to “identify as” women or girls, “gender identity” reduces women to regressive stereotypes about what it means to be female, deprives women of agency to define their role in the world for themselves, and subjects women to sex-based discrimination. As Jeffrey notes:

Transgenderism depends for its very existence on the idea that there is an ‘essence’ of gender, a psychology and pattern of behavior, which is suited to persons with particular bodies and identities. This is the opposite of the feminist view, which is that the idea of gender is the foundation of the political system of male domination.”²⁹

How can a man or boy “feel” or “sense” that he is a woman and express that feeling by wearing dresses, earrings, and makeup, except by having lived in a society where that is demanded and expected of women?

A. The word “transgender” is a linguistic sleight of hand that should not be enshrined in law because it is incapable of being defined coherently.

The District Court used the word “transgender” uncritically and defined it to mean “a broad, umbrella term that is often used for individuals whose brain sex, gender identity, or gender expression either does not or is perceived not to match the

²⁹ Jeffrey, *supra* n.26 at 1.

physical sex they were assigned at birth.”³⁰ There is so much wrong with this definition.

First, the concept of “brain sex” has been entirely debunked.³¹ There is simply no credible support for the proposition that male and female brains are wired differently. Second, the expression “assigned at birth” was developed to indicate that medical professionals had “assigned” a sex to members of a tiny class of babies whose sex could not easily be determined because they had both male and female reproductive characteristics, but who were all nonetheless genetically either female or male (these are known as people with differences of sexual development, or DSDs).³² That objectively diagnosed condition is not related to the subjective feelings at the root of “gender identity” ideology, but “gender identity” advocates intentionally repurpose the phrase to imply that sex is not binary, but rather a continuum. Their use of the term is not aimed at scientific accuracy, but rather ideological advocacy. Third, the idea of having a “gender expression that does not

³⁰ *Westenbroek, supra* n.7 at 6, citing Stevie V. Tran & Elizabeth M. Glazer, *Transgenderless*, 35 HARV. J.L. & GENDER, 399 n.1 (2012).

³¹ *See, e.g.*, Cordelia Fine, *DELUSIONS OF GENDER: HOW OUR MINDS, SOCIETY, AND NEUROSEXISM CREATE DIFFERENCE* (W.W. Norton & Co. 2010).

³² *See* Jessica A. Clarke, *Sex Assigned at Birth*, 122 COLUM. L. REV. 1821, 1834-36 (2022).

or is perceived not to match physical sex” is simply a long-winded way of saying “non-conformity with sex stereotypes.” One hundred percent of human beings—all eight billion of us—are either female or male and most of us do not 100 percent conform to the stereotypes imposed on us on the basis of sex. But regardless, the point must be made that all of society (including, often, the federal judiciary) has been persuaded that there is some coherent category of human beings called “transgender.” There isn’t.

The Human Rights Campaign (HRC) defines the word “transgender” to mean an “umbrella term for people whose gender identity and/or expression is different from cultural expectations based on the sex they were assigned at birth.”³³ It continues to state that “[b]eing transgender does not imply any specific sexual orientation. Therefore, transgender people may identify as straight, gay, lesbian, bisexual, etc.”³⁴ In a similar vein, the U.K. organization Stonewall defines the word “trans” to mean an “umbrella term to describe people whose gender is not the same as, or does not sit comfortably with, the sex they were assigned at birth.”³⁵

³³ Human Rights Campaign, *Glossary of Terms* (last updated May 31, 2023), <https://www.hrc.org/resources/glossary-of-terms>.

³⁴ *Id.*

³⁵ Stonewall, *List of List of LGBTQ+ terms*, <https://www.stonewall.org.uk/list-lgbtq-terms>.

Stonewall’s definition continues: “Trans people may describe themselves using one or more of a wide variety of terms, including (but not limited to) transgender, transsexual, gender-queer (GQ), gender-fluid, non-binary, gender-variant, crossdresser, genderless, agender, nongender, third gender, bi-gender, trans man, trans woman, trans masculine, trans feminine and neutrois.”³⁶

But if the word “transgender” is an “umbrella term” that encompasses all of these various categories of people (and it is, according to both the Human Rights Campaign and Stonewall, two of the most vocal organizations in the world championing the “rights of transgender people”), it cannot possibly denote a coherent singular category of people.³⁷ This Court should correct the District Court’s completely uncritical acceptance of the idea that “transgender” has some kind of coherent meaning and simply use the words “sex” and “gender” accurately.

In *Adams v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791 (11th Cir. 2022), the Eleventh Circuit Court of Appeals was asked, among other things, to determine whether the word “sex” was ambiguous at the time of the enactment of Title IX of the Civil Rights Act. It had no trouble determining that it was not:

³⁶ *Id.*

³⁷ *Accord L.W. v. Skrmetti*, 23-5600 (6th Cir. Sept. 28, 2023) at 33-37 (holding “transgender individuals” not a suspect class for equal protection purposes in part because “transgender individuals” are “not an immutable group”).

Reputable dictionary definitions of “sex” from the time of Title IX’s enactment show that when Congress prohibited discrimination on the basis of “sex” in education, it meant biological sex, i.e., discrimination between males and females. *See, e.g., Sex, American Heritage Dictionary of the English Language* (1976) (“The property or quality by which organisms are classified according to their reproductive functions.”); *Sex, American Heritage Dictionary of the English Language* (1979) (same); *Sex, Female, Male, Oxford English Dictionary* (re-issued ed. 1978) (defining “sex” as “[e]ither of two divisions of organic beings distinguished as male and female respectively, “female” as “[b]elonging to the sex which bears offspring,” and “male” as “[o]f or belonging to the sex which begets offspring, or performs the fecundating function of generation”); *Sex, Webster’s New World Dictionary* (1972) (“[E]ither of the two divisions, male or female, into which persons, animals, or plants are divided, with reference to their reproductive functions.”); *Sex, Female, Male, Webster’s Seventh New Collegiate Dictionary* (1969) (defining “sex” as “either of two divisions of organisms distinguished respectively as male or female,” “female” as “an individual that bears young or produces eggs as distinguished from one that begets young,” and “male” as “of, relating to, or being the sex that begets young by performing the fertilizing function”); *Sex, Random House College Dictionary* (rev. ed. 1980) (“[E]ither the male or female division of a species, esp. as differentiated with reference to the reproductive functions”).³⁸

None of that has changed in the fifty-one years since Title IX was enacted. The present case is not about Title IX, but about whether women ought to have the right to associate outside the presence of men after joining an organization whose bylaws expressly limit membership to women, even if the organization later appended the phrase “individuals who identify as women” to the word “women” in policy

³⁸ *Adams*, 57 F.4th at 812.

guidance. The word “sex” is not ambiguous, and neither is the word “woman.” This court has an opportunity to follow the Eleventh Circuit’s lead in saying so explicitly.

B. If the word “women” includes men who “identify as women,” the word lesbian ceases to have any coherent meaning, to the detriment of lesbians as a class.

Including men who claim to “identify as women” in the category “women” has a material impact on all women and girls. Women and girls are being erased as a sex class and trampled on by men and boys as a sex class and, as set forth in the Plaintiffs’ complaint, we live in a society where men are permitted to abuse women if they claim to “identify as women.” Men are allowed to be housed in women’s prisons, enter women’s bathrooms and locker rooms, and dominate women’s sports if they say they are “transgender,” i.e., that they “identify as women.”³⁹ One category of women and girls who are uniquely impacted by all this are lesbians.

By definition, a lesbian is a woman who is exclusively attracted to other women.⁴⁰ Lesbians are not interested in having romantic or sexual relationships with men, including men who claim to “identify as women.” There are several examples of how lesbians are uniquely affected by the existence of laws, policies,

³⁹ See Kara Dansky, *THE RECKONING: HOW THE DEMOCRATS AND THE LEFT BETRAYED WOMEN AND GIRLS*, Ch. 2 *generally* (Bombardier Books 2023).

⁴⁰ See, e.g., Merriam-Webster, “Lesbian” (“a woman who is sexually or romantically attracted to other women; a gay woman”), <https://www.merriam-webster.com/dictionary/lesbian>.

and practices, such as KKG's policy of admitting men who claim to "identify as women." Lesbians have been told that they are not permitted to meet in public without the presence of men who claim to "identify as women," effectively putting them back in the proverbial closet. Lesbian university students have been forced to share dormitory rooms with men who claim to "identify as women." Incarcerated lesbians have been forced to share living space with violent male predators who claim to "identify as women." Lesbian bars no longer exist because they have been overrun with men who claim to "identify as women." Lesbians are harassed openly and with impunity for rejecting the notion that men can be women if they claim to "identify as women." Lesbians, along with other women who reject "gender identity," are physically attacked when they try to speak out about their rights in public places. Lesbian girls and other nonconforming girls are being told they are probably boys and are having their bodies mutilated with irreversible hormones and surgeries that will not only sterilize them and harm their hearts and bones, but will also likely preclude sexual gratification, forever.⁴¹

This is happening all over the world and none of it is theoretical. Lesbian Bill of Rights International (LBOR International) is an international network of lesbian organizations that have adopted the Lesbian Bill of Rights, written by the

⁴¹ See, e.g., Dansky, *supra* n.39, Ch. 2 and 3, *generally*.

WDI USA Lesbian Caucus.⁴² It defines relevant terms such as woman, man, and lesbian. Lesbian Action Group (LAG) is an Australian lesbian organization that has joined LBOR International. Earlier this year, it applied to the Australian Human Rights Commission (AHRC) for an exemption from Australia’s Sex Discrimination Act of 1984. That exemption would have allowed LAG to hold female-only events. But the AHRC denied its application, stating that the Sex Discrimination Act “protects individuals from discrimination on the basis of both sexual orientation and gender identity.”⁴³ It continued: “Transgender women, as a group, also face significant structural and entrenched discrimination. One way in which gender identity discrimination can manifest is by treating a person less favourably, and contrary to their gender identity, because of their transgender experience.”⁴⁴ In other words, the AHRC ruled that as a matter of Australian law, lesbians are not permitted to hold female-only events because doing so excludes men who claim to

⁴² See Women’s Declaration International USA, *Statement submitted in support of Lesbian Action Group (Australia)* (October 4, 2023), <https://womensdeclarationusa.com/statements-submitted-in-support-of-lesbian-action-group-australia/>.

⁴³ Australian Human Rights Commission, *Exemption applications under the Sex Discrimination Act 1984 (Cth)* (October 12, 2023) <https://humanrights.gov.au/our-work/legal/exemption-applications-under-sex-discrimination-act-1984-cth>.

⁴⁴ *Id.*

“identify as women.” Sororities are not immune. Researchers estimate that between three and four percent of sorority sisters are either lesbian or bisexual.⁴⁵ *Amicus* has no way of knowing whether any of the Plaintiffs or KKG sisters more generally are lesbians, but if any are, they are uniquely impacted by KKG’s decision to admit a man on the basis that he “identifies as a woman.”

Today, individuals, organizations, and governments frequently refer to the “LGBTQ+” community (occasionally adding an I for intersex, and A for asexual, or other letters purporting to refer to various “gender identities”). But this is an example of forced teaming⁴⁶ and the bottom line is that forced teaming lesbians, by

⁴⁵ See Daniel C. Newmann, Mark A. Kretovics, and Elisabeth C. Roccoforte, *Attitudes and Beliefs of Heterosexual Sorority Women Toward Lesbian and Bisexual Chapter Members*, 8 WM. & MARY J. OF SORORITY & FRATERNITY LIFE RSCH. & PRAC. 1 Art. 3, 2 (March 2013), [chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://scholarworks.wm.edu/cgi/viewcontent.cgi?article=1092&context=oracle#:~:text=Based%20on%20their%20findings%2C%20the,identified%20as%20lesbian%20or%20bisexual](https://scholarworks.wm.edu/cgi/viewcontent.cgi?article=1092&context=oracle#:~:text=Based%20on%20their%20findings%2C%20the,identified%20as%20lesbian%20or%20bisexual).

⁴⁶ Gavin De Becker coined this term to describe a situation in which an individual or group tries to make a victim feel as though she’s on the “same team” or “in the same boat” as an abuser or other perpetrator of crime. “The detectable signal of forced teaming is the projection of a shared purpose or experience where none exists: *both of us; we’re some team; now we’ve done it; how are we going to handle this?*” (emphasis in original). Gavin De Becker, *THE GIFT OF FEAR: AND OTHER SURVIVAL SIGNALS THAT PROTECT US FROM VIOLENCE*, p.55 (North Books 1998).

law or otherwise, with the TQ+—men who claim to “identify as women”—has been devastating to lesbians.⁴⁷

This tension between lesbians and men who claim to “identify as women” is not new.⁴⁸ In 1991, a man who “identified as a woman” named Nancy Burkholder was expelled from the Michigan Women’s Music Festival⁴⁹ (a long-standing female-only festival that was open to all women but was attended mainly by lesbians) because he was male.⁵⁰ Over the course of the next few years, various men who claim to “identify as women” attempted to infiltrate the festival and were continually expelled because the festival maintained its female-only policy. In 1993, a group of men who claimed to “identify as women” set up a camp across the road from the festival. That eventually came to be known as “Camp Trans” and

⁴⁷ See, e.g., Women’s Declaration International USA Lesbian Caucus, “Lesbians in the Crosshairs: How the Forced Teaming of LGB with TQ+ Has Harmed Lesbians” (Nov. 27, 2023), <https://womensdeclarationusa.com/lesbians-in-the-crosshairs-how-the-forced-teaming-of-lgb-with-tq-has-harmed-lesbians/>.

⁴⁸ See, e.g., Julie Compton, ‘Pro-lesbian’ or ‘trans-exclusionary’? Old animosities boil into public view, NBC NEWS (Jan. 14, 2019), <https://www.nbcnews.com/feature/nbc-out/pro-lesbian-or-trans-exclusionary-old-animosities-boil-public-view-n958456>.

⁴⁹ “Michfest: Michigan Womyn’s Music Festival” (2020), <https://www.michfest.com/>.

⁵⁰ See, e.g., News Release, *The Committee to Free Nancy Now! And The Transsexual Menace: U.N.I.T.Y.! A fundraiser in support of CAMP TRANS* (May 2, 1994), <http://www.qrd.org/qrd/events/1994/camp.trans.music.festival-05.04.94>.

its explicit mission was to force the female festival organizers to admit men who claim to “identify as women.” It did this every year, for decades. The festival’s last official event was in 2015.

Amicus understands that this analysis of how “gender identity,” or the phenomenon of men like Langford claiming to “identify as women,” is not directly relevant to the question of whether the District Court’s decision was correct as a matter of law. But we do think that it’s important for members of the federal judiciary to understand the very real and serious havoc that allowing phrases like “women and individuals who identify as women” is wreaking throughout society. Phrases like “women and individuals who identify as women” are not benign. They are specifically intended to allow men who claim to be women, like Langford, access to female-only spaces. As the complaint in this matter shows, nothing good comes from that.

CONCLUSION

For the reasons set forth in the Appellants' brief and those set forth herein, *amicus* urges this court to reverse the District Court's ruling as to Plaintiffs' derivative claim presented in Count I and to remand for additional proceedings in an opinion that uses language accurately and precisely.

Dated: December 11, 2023

Respectfully Submitted,

/s/ Kara Dansky

Kara Dansky

WOMEN'S DECLARATION INTERNATIONAL USA

P.O. Box 21160

Washington, D.C. 20009

(800) 939-6636

president@womensdeclarationusa.com

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), the undersigned hereby certifies that:

1. This brief complies with the type-volume limitation, as provided in Circuit Rule 32.2 and Fed. R. App. P. 29(a)(5), because, exclusive of the exempted portions of the brief as provided by Fed. R. App. P. 32(f), the brief contains 6,447 words.
2. This brief complies with the type-face and type-style requirements, as provided in Fed. R. App. P. 32(a) and Circuit Rule 32 because the brief has been prepared in proportionally spaced typeface using Microsoft Word for Office 365 in 14-point Times New Roman font.
3. As permitted by Fed. R. App. P. 32(g)(1), the undersigned has relied upon the word count feature of this word processing system in preparing this certificate.

Dated: December 11, 2023

/s/ Kara Dansky

Kara Dansky

CERTIFICATE OF SERVICE

I hereby certify that on December 11, 2023, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

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