

Nos. 23-477

In the Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

**JONATHAN THOMAS SKRMETTI, ATTORNEY
GENERAL AND REPORTER FOR TENNESSEE, ET AL.,**
Respondents.

and

**L.W., BY AND THROUGH L.W.'S PARENT
AND NEXT FRIEND, ET AL.,**
Respondents in support of Petitioner.

On Writ of Certiorari to the United States Court of
Appeals for the Sixth Circuit

**AMICUS BRIEF OF FRONTLINE POLICY
COUNCIL ET AL. IN SUPPORT OF
RESPONDENTS**

CHELSEA THOMPSON	KRISTINE L. BROWN
GENERAL COUNSEL	<i>Counsel of Record</i>
FRONTLINE POLICY	Suite 370953
COUNCIL	8700 E. Jefferson Ave.
5 Perry St., Suite 373	Denver, CO 80237
Newnan, GA 30263	(720) 285-9552
	kristi@kristiburtonbrown.com

Counsel for Amici

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF AMICI.....	1
SUMMARY OF ARGUMENT	1
ARGUMENT	2
Gender Identity Is Subjective, Mutable, Misleading, and Logically Contradictory and Thus Is Not a Suitable Category for Equal Protection Analysis	2
1. Sex is objective; gender identity is subjective .	5
2. Sex is immutable; gender identity can be fluid	6
3. Gender identity is a misleading concept that piggybacks on objective terms.....	8
4. Gender identity is unlimited.....	11
5. Gender identity is a logically contradictory concept	12
6. Treating gender identity as a protected class is fundamentally inconsistent with treating sex as a protected class	12
CONCLUSION.....	15
ADDENDUM: List of Amici.....	1a

TABLE OF AUTHORITIES

Cases	Page
<i>Craig v. Boren</i> , 429 U.S. 190 (1976)	13
<i>Frontiero v. Richardson</i> , 411 U.S. 677 (1973)	6
<i>Nguyen v. INS</i> , 533 U.S. 53 (2001)	13
<i>Reed v. Reed</i> , 404 U.S. 71 (1971)	13
<i>Trinity Lutheran Church v. Comer</i> , 582 U.S. 449 (2017)	6
<i>United States v. Virginia</i> , 518 U.S. 515 (1996)	6, 12
Other Authorities	
Amer. Psychol. Ass’n, “Understanding transgender people, gender identity and gender expression” (Mar. 9, 2023; updated July 8, 2024).	4
Amer. Psychol. Ass’n, “Sexual orientation and gender diversity,” https://www.apa.org/ topics/lgbtq (last visited Oct. 11, 2024).	5
Gwen Aviles, “Model admits to falsely coming out as transgender to avoid backlash,” <i>NBC News</i> (July 31, 2019)	5

Emily Becker, Addison Aloian, Heath Fogg Davis, Sabrina Talbert, “Your Gender Identity Can Change Over Time, And Yes, That’s Totally Normal,” MSN, <https://www.msn.com/en-ca/health/wellness/your-gender-identity-can-change-over-time-and-yes-that-s-totally-normal/ar-AAZhE6B> (last visited Sept. 24, 2024) 4, 9

Lewis Carroll, *Through the Looking Glass* 8

Chloe Cole, “Detransitioner Chloe Cole’s full testimony to Congress is a ‘final warning’ to stop gender surgery,” *New York Post* (July 28, 2023) 7

Andrew Court, “I’m an ex-banker ‘genderless dragon’ — now my son won’t talk to me,” *New York Post* (Jan. 31, 2023) 10

Hayden Cunningham, “A woman is a person who says she is’: Progressive activist Maya Wiley justifies trans ideology because people called her a boy when she was a child,” *Post Millennial* (June 28, 2024) <https://thepostmillennial.com/a-woman-is-a-person-who-says-she-is-progressive-activist-maya-wiley-justifies-trans-ideology-because-people-called-her-a-boy-when-she-was-a-child> 12

“Disney Theme Parks & Water Parks – Frequently Asked Questions,” Walt Disney World, <https://disneyworld.disney.go.com/faq/parks/height-requirements/> 11

“Disorders of Sexual Development,” Cleveland Clinic, https://my.clevelandclinic.org/health/diseases/disorders-of-sexual-development	2
DOL Policies on Gender Identity: Rights and Responsibilities, U.S. Dep’t of Labor	4
Eleanor Dye, “Rise of the Therians: People who identify as animals claim they ‘shift’ into feral impulses, prefer to walk on all fours and show off their lives on TikTok wearing masks and tails,” <i>Daily Mail</i> (Feb. 21, 2024) .	10
“Eligibility Requirements,” U.S. Army Recruiting Command, https://recruiting.army.mil/recruiter/eligibility_requirements/	11
<i>Exploring the Biological Contributions to Human Health: Does Sex Matter</i> (T. M. Wize mann & M. L. Pardue, eds. 2001)	3
Sian Ferguson, “What Does It Mean To Be Gender Fluid?” <i>healthline</i> (June 11, 2020)	7
Mike Fleeman, “Angelina Jolie Has Preventative Double Mastectomy,” <i>People</i> (May 14, 2023) . .	7
“Frequently Asked Questions about Transgender People,” <i>Advocates for Trans Equality</i> https://transequality.org/issues/resources/frequently-asked-questions-about-transgender-people (last visited Oct. 11, 2024)	5
Claire Gillespie, “What Does It Mean To Be Gender Fluid?” <i>health</i> (Jan. 31, 2024)	7

Chris Glorioso & Kristina Sola, “Man posing as transgender woman raped female prisoner at Rikers, lawsuit says,” <i>4NBC New York</i> (Jan. 24, 2024)	5
Xennia Hamilton, “The Women Who Became Human Barbies — And a Plastic Surgeon Who Wants to Make More of Them,” <i>The Hollywood Reporter</i> (Aug. 16, 2023)	10
“Health Check: The boy who was raised a girl,” <i>BBC</i> (Nov. 23, 2010), https://www.bbc.com/news/health-11814300	7
Jack Hobbs, “I chopped off my finger — now I’m removing skin to look like an alien” <i>New York Post</i> (July 6, 2023)	10
Ian Horswill, “Stalking Cat Dennis Avner whose body was transformed by Steve Haworth into a tiger found dead,” <i>NewsComAu</i> (Nov. 14, 2012)	10
“How Many Genders Are There? 2024 Gender Identity List,” <i>SexualDiversity.org</i> (updated Apr. 10, 2024)	11
Scitable, “gamete,” <i>Nature Education</i> , https://www.nature.com/scitable/definition/gamete-gametes-311/	3
https://www.ncbi.nlm.nih.gov/books/NBK10005/ . . .	3
NIH Office of Research on Women’s Health, “What are Sex & Gender?” https://orwh.od.nih.gov/sex-gender	7

Ryan O’Hanlon, “My Life as a Therian,” *Pacific Standard* (Sept. 5, 2013) 10

“Prison bosses defend sending rapist Isla Bryson to women's jail,” *BBC* (Feb. 22, 2023) 9

Jonathan D. Raskin, “Understanding Gender, Sex, and Gender Identity,” *Psychology Today* (Feb. 27, 2021) 4

“Sexual Orientation vs. Gender Identity: What Is the Difference?” *GenderGP* (Aug. 14, 2024) . 5, 6

Christine Younan, “Black alien' body modification addict shows what he looked like two years ago,” *Mirror* (June 25, 2024) . . 10

INTEREST OF AMICI¹

The Frontline Policy and Family Policy Alliance organizations are nonprofit state and national policy organizations dedicated to educating, promoting, and defending policies that strengthen families, uphold religious freedom, and ensure families thrive across Georgia, nationally, and other respective states. Each of these organizations have played a key role in amplifying policies that protect children from the permanent harms of puberty blockers, sex transition surgeries, and related procedures and initiatives. Each of these organizations has played a key role in amplifying policies that promote the family unit and that protect children's opportunity to thrive. We believe that our society cannot thrive without essential protections for its most vulnerable members. A full list of the organizations joining this amicus brief appears in the Addendum.

SUMMARY OF ARGUMENT

Petitioner United States and the supporting private parties argue that “transgender status” warrants “heightened scrutiny” under the Equal Protection Clause. But “transgender status” hinges upon one’s asserted “gender identity.” “Gender identity,” however, is subjective, mutable, misleading, inherently self-contradictory, and thus unsuitable as

¹ No counsel for any party authored this brief in whole or in part. No such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity aside from amici, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

a category for Equal Protection analysis.

ARGUMENT

Gender Identity Is Subjective, Mutable, Misleading, and Logically Contradictory and Thus Is Not a Suitable Category for Equal Protection Analysis.

The premise of the challenge to the Tennessee law is that “gender identity” is a coherent and useful concept for purposes of constitutional analysis, either because it is inextricable from “sex” or because “transgender status” is itself a protected category. *See, e.g.*, US Br. at 15; Br. of Respondents L.W. *et al.* at 17-19. “Gender identity,” however, is not a category suitable for legal classification or analysis. Rather, it is a subjective, mutable, misleading, and logically contradictory label.

It is important to start with some terminology. “Sex” refers to one’s physiological/biological organization as either male or female, recognizing that there are exceptional conditions (disorders of sexual development²). “Gender identity” refers to one’s internal sense of one’s *gender*, irrespective of whether that internal sense corresponds with a person’s *sex*. Some elaboration on this distinction will highlight aspects of these two distinct concepts that are relevant to the analysis of this case.

Again, “**sex**” is taken to mean one’s biological maleness or femaleness as reflected in the physiological organization of the body. In biological or

²*See, e.g.*, “Disorders of Sexual Development,” Cleveland Clinic, <https://my.clevelandclinic.org/health/diseases/disorders-of-sexual-development> (last visited Oct. 11 2024).

physiological terms, males have bodies that are organized to produce sperm and impregnate, and females have bodies that are organized to produce eggs and to gestate. There are *only two* kinds of human gametes, or sex cells. “Female gametes are called ova or egg cell, and male gametes are called sperm.” Scitable, “gamete,” *Nature Education*.³ See also <https://www.ncbi.nlm.nih.gov/books/NBK10005/> (referencing *Developmental Biology*, 6th ed.) (“sperm and egg—the two cell types specialized for fertilization.”). Moreover, humans reflect a “defining genotypic difference between male and female mammals, namely, an XY (male) sex chromosome constitution versus an XX (female) sex chromosome constitution,” *Exploring the Biological Contributions to Human Health: Does Sex Matter* (T. M. Witzmann & M. L. Pardue, eds. 2001) (abstract).⁴ As such, it is not an exaggeration to state that literally every single cell in a human’s body reflects the unchanging biological sex of that person. *Id.* Even certain cellular functions differ between males and females significantly, for a variety of sex related reasons – for instance, female cells must have cellular mechanisms for inactivating one of the two X chromosomes in each cell, while males need no such cellular mechanisms. *Id.* Sex is fundamentally binary, consisting of only two categories. While disorders of sexual development may exist, they do not alter this inherent distinction.

“**Gender identity**,” by contrast, is taken to mean

³<https://www.nature.com/scitable/definition/gamete-gametes-311/>.

⁴<https://www.ncbi.nlm.nih.gov/books/NBK222291/#:~:text=The%20phenotypic%20differences%20between%20males,disease%20susceptibility%2C%20at%20many%20levels.>

one’s self-described or self-experienced gender. *E.g.*, DOL Policies on Gender Identity: Rights and Responsibilities, U.S. Dep’t of Labor (hereafter DOL Policies) (last visited Sept. 24, 2024) (under Gender Identity: Key Terminology: “Gender identity: A person’s internal sense of being male, female, or something else Since gender identity is internal, one’s gender identity is not necessarily visible to others.”); Jonathan D. Raskin, “Understanding Gender, Sex, and Gender Identity,” *Psychology Today* (Feb. 27, 2021) (Raskin) (“how one understands and experiences one’s own gender. . . . a person’s psychological sense of being male, female, or neither”). Gender identity may be male, female, nonbinary, or anything on a long and potentially infinite spectrum of alternatives, Raskin, *supra* (“there are as many possible gender identities as there are people psychologically forming identities”). As Dr. Raskin put it, “the first thing we need to do is stop mixing up biological sex and gender identity. The former may be constrained by biology, but the latter is only constrained by our imaginations.” *Id.* See also Amer. Psychol. Ass’n, “Understanding transgender people, gender identity and gender expression” (Mar. 9, 2023; updated July 8, 2024) (“Gender identity refers to a person’s internal sense of being male, female or something else Sex refers to one’s biological status as either male or female”). Gender identity thus is not binary. Quite the contrary: it presents an infinite list of options. Emily Becker, Addison Aloian, Heath Fogg Davis, Sabrina Talbert, “Your Gender Identity Can Change Over Time, And Yes, That’s Totally Normal,” *MSN*, <https://www.msn.com/en-ca/health/wellness/your-gender-identity-can-change-over-time-and-yes-that-s-totally-normal/ar-AAZhE6B> (hereafter “Becker”) (last visited Sept. 24, 2024)

(“There are actually countless ways to describe your gender”); “Sexual Orientation Vs. Gender Identity: What Is the Difference?” *GenderGP* (Aug. 14, 2024) (“Sexual Orientation Vs. Gender Identity”) (“There’s no single way to define gender identity. There are many gender identities, and each person brings their own flavour within the umbrella of that identity.”).

Once these two categories are understood, several propositions follow.

1. Sex is objective; gender identity is subjective.

By definition, biological sex can be objectively assessed. Gender identity, by contrast, is a subjective self-description that it is difficult, if not impossible, to verify. The prospect of false assertions of gender identity is plain. *See, e.g.*, Chris Glorioso & Kristina Sola, “Man posing as transgender woman raped female prisoner at Rikers, lawsuit says,” *4NBC New York* (Jan. 24, 2024); Gwen Aviles, “Model admits to falsely coming out as transgender to avoid backlash,” *NBC News* (July 31, 2019). Importantly, *gender identity and sexual orientation are independent concepts*. Amer. Psychol. Ass’n, “Sexual orientation and gender diversity,” <https://www.apa.org/topics/lgbtq> (last visited Oct. 11, 2024) (“Sexual orientation and gender identity are not the same thing—they are distinct aspects of being a person.”); “Frequently Asked Questions about Transgender People,” *Advocates for Trans Equality* <https://transequality.org/issues/resources/frequently-asked-questions-about-transgender-people> (last visited Oct. 11, 2024) (“Gender identity and sexual orientation are two different things. . . . For example, a transgender man (someone who lives as a man today) may be primarily attracted to other men (and identify as a gay man), may be primarily attracted to women (and identify as a straight man), or

have any other sexual orientation.”); “Sexual Orientation Vs. Gender Identity,” *supra* (“In short, sexual orientation is about who you want to go to bed with, whereas gender identity is about who you want to go to bed as.”). Thus, an anatomically intact biological male who is sexually attracted to females can nonetheless assert a female gender identity and demand the privileges that go with being female, such as access to female changing rooms, sports teams, prisons, etc.

2. Sex is immutable; gender identity can be fluid. This Court has sometimes looked to immutability of a characteristic as a factor in Equal Protection analysis. *See, e.g., Frontiero v. Richardson*, 411 U.S. 677, 686 (1973). Sex is immutable, as this Court has already recognized, *United States v. Virginia*, 518 U.S. 515, 533 (1996) (“Physical differences between men and women . . . are enduring”); gender identity is not.⁵

One cannot surgically or chemically change one’s sex. The removal of various body parts from a woman, for example – say, removing a cancerous uterus or ovaries – does not make her anything other than the woman she was. Indeed, it would be downright heartless (and biologically ignorant) to assert that a post-hysterectomy woman is not a woman. Every single cell remaining in her body retains its original reflection of sexual dimorphism. Cutting and pasting body parts does not – cannot – change one’s sex. Moreover, this objective truth does not change with

⁵Religious discrimination, while not based on an immutable characteristic, nevertheless receives greater protection because of the Free Exercise Clause. *Trinity Lutheran Church v. Comer*, 582 U.S. 449, 458 (2017).

subjective intent. In other words, it does not matter if the physical alterations are made with the goal of changing one's sex. Both Angelina Jolie, *see* Mike Fleeman, "Angelina Jolie Has Preventative Double Mastectomy," *People* (May 14, 2023), and Chloe Cole, *see* Chloe Cole, "Detransitioner Chloe Cole's full testimony to Congress is a 'final warning' to stop gender surgery," *New York Post* (July 28, 2023), remained women after their respective double mastectomies. Likewise, Bruce Reimer, the little boy in the Money experiment, was still male even though he had been castrated as a baby and given female hormones. In that horrific experiment, one of two twin boys (Bruce) was "transitioned" and raised as a girl, "Health Check: The boy who was raised a girl," *BBC* (Nov. 23, 2010), <https://www.bbc.com/news/health-11814300>. Changing the body does not change the sex.

Gender identity, by contrast, is *not fixed*. Rather, it can change over time. NIH Office of Research on Women's Health, "What are Sex & Gender?" <https://orwh.od.nih.gov/sex-gender> ("A person's gender identity (e.g., *woman*, *man*, *trans man*, *gender-diverse*, *nonbinary*) is *self-identified*, may change throughout their life") (last visited Sept. 24, 2024) (emphasis in original); DOL Policies, *supra* p. 4 ("Genderfluid individuals have different gender identities at different times. A genderfluid individual's gender identity could be multiple genders at once, and then switch to none at all, or move between single gender identities. For some genderfluid people, these changes happen as often as several times a day, and for others, monthly, or less often."); Claire Gillespie, "What Does It Mean To Be Gender Fluid?" *health* (Jan. 31, 2024) <https://www.health.com/mind-body/gender-fluid> ("Your gender identity may change over time. Gender can

shift over the course of a day, several weeks, months, or years.”); Becker, *supra*; Sian Ferguson, “What Does It Mean To Be Gender Fluid?” *healthline* (June 11, 2020) <https://www.healthline.com/health/gender-fluid> (“Their gender might change quickly — in a matter of hours — or slowly, over months or even years.”).

3. Gender identity is a misleading concept that piggybacks on objective terms. “Gender identity” is a fundamentally misleading concept. The law cannot employ one’s “blib identity” as a basis for categorization or consequences if the term “blib” means whatever the speaker wants it to mean. That would be Humpty Dumpty law. “When I use a word,’ Humpty Dumpty said in rather a scornful tone, ‘it means just what I choose it to mean — neither more nor less.” Lewis Carroll, *Through the Looking Glass* (quoted in goodreads). And while “blib” is not a real word, using a more familiar term like “gender” makes the enterprise even worse, as it becomes deeply misleading. The phrase *borrow*s the terminology of sex (identifies as male, identifies as female) but is entirely *disconnected* from sex. Under gender identity theory, a biological male (sex) can have a female gender identity, a male gender identity, or neither/something else; likewise, a biological female can have a male gender identity, a female gender identity, or neither/something else. But if that is so, several questions immediately arise.

First and fundamentally, what does it even *mean* to *identify* as male or female, if that signification has no connection to physiology, genetics, or biology? What is a “male” or “female” or “nonbinary” identity other than a label one applies to oneself? To answer the question, “What does identifying as female (or male) mean?” requires resort either to physiology or to

cultural expectations (or both). Yet gender ideology denies the relevance of the former (since the body has no necessary connection to gender identity), and reliance upon the latter incorporates what in any other context would be called “stereotypes” (“I want to behave/dress/speak the way a male or female behaves/dresses/speaks,” i.e., as set by cultural expectations). In short, by using terms with *biological* reference, while disavowing a biological foundation, gender ideology *misleads*. The concept invokes familiar objective concepts for a completely subjective and indeterminate “identity”.

Notably, this conflation of objective and subjective meanings for “male” or “female” is a key rhetorical ploy used to make a transgender discrimination argument facially plausible. If a convicted rapist were to say, “I want to be housed in a female prison because I identify as blib” (*see supra*), the claim would be dismissed out of hand. But if the convicted rapist says, “I want to be housed in a female prison because I identify as female,” *e.g.*, “Prison bosses defend sending rapist Isla Bryson to women's jail,” *BBC* (Feb. 22, 2023), the terminology suggests there is something unfair in not placing this “female” with the other females.

Second, if gender identity is wholly independent of physiology, Becker (“someone’s genitals have no bearing on whether they identify as a man, a woman, non-binary, or anything else”), then why is there any need to alter the physiology? The impulse to conform one’s body to one’s mental self-picture either asserts or assumes the importance of a connection between biological sex and gender identity – the very connection gender identity theory itself denies.

Of course, it could be that “gender identity” is just the stalking horse for the assertion of an unfettered right to alter one’s body however one pleases, not just

to mimic the opposite sex but also to mimic beings in other categories. For example, there are people -- “therians” -- who claim to identify as animals, *e.g.*, Ryan O’Hanlon, “My Life as a Therian,” *Pacific Standard* (Sept. 5, 2013) (“For me, I would explain it as being a wolf in a human body. Everything else—my mind, my soul—is wolf.”); Eleanor Dye, “Rise of the Therians: People who identify as animals claim they ‘shift’ into feral impulses, prefer to walk on all fours and show off their lives on TikTok wearing masks and tails,” *Daily Mail* (Feb. 21, 2024) (“The term therian refers to people who identify as non-human animals on a deep level and engage in behaviours associated with their animal identity. They differ from furies, who see their animal persona as a character, while therians innately feel animal characteristics.”). Some people actually do modify their bodies to resemble animals, *e.g.*, Ian Horswill, “Stalking Cat Dennis Avner whose body was transformed by Steve Haworth into a tiger found dead,” *NewsComAu* (Nov. 14, 2012), or mythological creatures, *e.g.*, Andrew Court, “I’m an ex-banker ‘genderless dragon’ — now my son won’t talk to me,” *New York Post* (Jan. 31, 2023). Others seek to conform their bodies to an alien identity, *e.g.*, Christine Younan, “‘Black alien’ body modification addict shows what he looked like two years ago,” *Mirror* (June 25, 2024); Jack Hobbs, “I chopped off my finger — now I’m removing skin to look like an alien” *New York Post* (July 6, 2023). Some people even modify themselves to resemble toys, Xennia Hamilton, “The Women Who Became Human Barbies — And a Plastic Surgeon Who Wants to Make More of Them,” *The Hollywood Reporter* (Aug. 16, 2023).

If the pursuit of pseudo-sex change procedures (whether chemical or surgical) is just one instance of a broader desire to modify one’s body for whatever

reason, then the concept of “gender identity” is no more useful legally than “species identity,” “extraterrestrial identity,” or “toy identity” – i.e., at most a description of one’s subjective or psychological state or desires.

4. Gender identity is unlimited. As noted above, the only limit on the universe of “gender identities” is the human imagination. Being an entirely subjective concept, the idea cannot be constrained by objective classification. It may make sense in many contexts to reference, for legal purposes, such objective categories as age, height, citizenship, and educational level (e.g., “Eligibility Requirements,” U.S. Army Recruiting Command, https://recruiting.army.mil/recruiter/eligibility_requirements/), or to look to such categories to determine who can purchase alcohol, vote, or go on a certain amusement ride (e.g., “Disney Theme Parks & Water Parks – Frequently Asked Questions,” Walt Disney World, <https://disneyworld.disney.go.com/faq/parks/height-requirements/>). But it would be irrational and arbitrary to restrict (or grant) access to bathrooms, sports teams, etc. based upon how much of a Chiefs fan one is, or whether one considered oneself a strong progressive or just a moderate progressive, or any other subjective, points-on-a-spectrum, eminently debatable characterization. Gender identity is just such an arbitrary feature and therefore unsuitable as a legal classification. Identifying as “endosex,” “bissu,” “gendervague,” or “xenogender,” see “How Many Genders Are There? 2024 Gender Identity List,” *SexualDiversity.org* (updated Apr. 10, 2024), may make for interesting conversation, but it is *not* a detail that provides a firm foundation for legal analysis.

As noted above, the recognizable terms for one’s sex carry with them a grounded meaning which is *not* what the new usage represents. *Adherents of gender*

ideology expressly admit that, in their usage, a woman is anyone who says “I’m a woman.” Hayden Cunningham, “A woman is a person who says she is: Progressive activist Maya Wiley justifies trans ideology because people called her a boy when she was a child,” *Post Millennial* (June 28, 2024) <https://thepostmillennial.com/a-woman-is-a-person-who-says-she-is-progressive-activist-maya-wiley-justifies-trans-ideology-because-people-called-her-a-boy-when-she-was-a-child>. That admission, in turn, illustrates that the terms male and female, in gender identity usage, have no fixed meaning at all and thus are as useless as legal terms or referents as “bilib identity.”

5. Gender identity is a logically contradictory concept. As demonstrated above, “gender identity” is ultimately no more than a label attached to one’s own subjective feelings or desires. But worse, it is internally contradictory: it invokes biological terms while disavowing a biological link; it demands physiological alteration while denying the need for physiological correlatives; it wraps itself in a binary realm (e.g., a woman trapped in a man’s body) while casting off any limit to the number of possible gender identities; it insists upon the preeminence of one’s own feelings and perceptions while ruling out-of-bounds the feelings and perceptions of those who disagree.

6. Treating gender identity as a protected class is fundamentally inconsistent with treating sex as a protected class. This Court has repeatedly engaged in Equal Protection analyses of sex-based claims by asking whether a law creates different rules for “males” vs. “females” or “men” vs. “women.” See *United States v. Virginia*, 518 U.S. 515, 531 (1996)

(“withhold from women opportunities accorded to men”); *Craig v. Boren*, 429 U.S. 190, 192 (1976) (different legal drinking ages for “males” and “females”); *Reed v. Reed*, 404 U.S. 71, 73 (1971) (“male[] was to be preferred to the female”). Such cases presuppose a real “biological difference,” *Nguyen v. INS*, 533 U.S. 53, 64 (2001), between males and females. But if the terms “men,” “male,” “women,” and “female” are not rooted in biological, genetic, physiological attributes, then this Court’s prior analyses are rendered meaningless and defeasible at will. After all, since, as noted above, gender identity is internal, subjective, changeable, invisible, and controlled by a person’s mere say-so, there is no solid basis for saying that any discrimination against *women*, in the gender identity sense, is actually occurring. The alleged discriminator, alike with the judge or juror assigned to evaluate the case, can justly protest, “I did not know/could not tell that person (or group of persons) in question *identified* as female and thus ‘was’ female.”

Meanwhile, if one’s internal “gender identity” is included within the definition of “sex” for Equal Protection purposes, then a biological male could nevertheless constitute a “woman” and claim entitlement to any and all protections given to women under the Constitution, Title IX, or any other law – based solely on that person’s state of mind.

And that same person could at any time (as noted earlier) change “gender identity” and thus cease to be a “woman” (again, based on their professed state of mind), rendering the whole analytical exercise no more than a house built on sand.

If “sex” for purposes of Equal Protection entails a person’s state of mind (which is what happens if “gender identity” is taken as “sex”), then any and all

human beings, regardless of biology, could be male, female, both, neither, or something else, and could exit or enter a protected class at any time. The entire line of jurisprudence related to sex-based classifications thereby becomes quixotic.

This Court's Equal Protection jurisprudence rests upon the biologically, physiologically, and genetically real, immutable, and objectively identifiable differences between males and females. These differences are present at a person's conception, birth, and throughout his or her life. No meaningful sex-based Equal Protection Clause analysis can occur absent this foundational assumption. This Court should expressly reaffirm as much. Unless and until this Court clearly and unambiguously embraces these basic truths (which until very recent times, were considered self-evident), litigation seeking to inject a new and inconsistent meaning for "male" and "female" will continue.

Amici urge this Court, for the sake of doctrinal clarity and stemming rampant and growing jurisprudential confusion, firmly to exclude gender identity from the concept of "sex" for purposes of Equal Protection analysis. Those persons who genuinely feel an inconsistency between their biology and their psyche are entitled to respect and compassion. They are not entitled to a rewrite of Equal Protection law.

* * *

The concept of "gender identity" has no place in constitutional analysis. This Court should *not* incorporate such a category into Equal Protection review.

CONCLUSION

This Court should affirm the judgment of the court of appeals.

Respectfully submitted,

CHELSEA THOMPSON	KRISTINE L. BROWN
GENERAL COUNSEL	<i>Counsel of Record</i>
FRONTLINE POLICY	Suite 370953
COUNCIL	8700 E. Jefferson Ave.
5 Perry St., Suite 373	Denver, CO 80237
Newnan, GA 30263	(720) 285-9552
	kristi@kristiburtonbrown.com

Counsel for Amici

Oct. 15, 2024

ADDENDUM

1a

ADDENDUM TABLE OF CONTENTS

Addendum: List of Amici

ADDENDUM: List of Amici

Frontline Policy Council

Louisiana Family Forum

Family Policy Institute of Washington

Alaska Family Council

California Family Council

Rhode Island Family Institute

Michigan Family Forum