

Nos. 24-539

In the Supreme Court of the United States

KALEY CHILES,

Petitioner,

v.

**PATTY SALAZAR, IN HER OFFICIAL CAPACITY AS
EXECUTIVE DIRECTOR OF THE COLORADO
DEPARTMENT OF REGULATORY AGENCIES, ET AL.,**

Respondents.

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

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

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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

Respondent contends that “trying to change [a] minor patients’ . . . gender identity” is “demonstrably harmful and ineffective.” Opp. at 1. This is a startling claim, as the gender ideology which supports the notion of transgenderism posits that children can “transition” and that gender identity can be fluid. In this brief, amici highlight that “gender identity,” under

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.

the ideology embraced by its proponents, is subjective, mutable, misleading, inherently self-contradictory, and thus not at all something which states may invoke as a justification for speech restrictions under the First Amendment.

ARGUMENT

Gender Identity Is Subjective, Mutable, Misleading, and Logically Contradictory and Thus Is Not a Suitable Justification for Speech Restrictions.

A major premise of the challenged Colorado law is that seeking to change “gender identity” is harmful. While it may indeed be harmful for a boy to try to “transition” to being a girl, or vice-versa, it is bizarre for Colorado to claim that gender identity “change” is harmful. Gender ideology – the belief that gender and biological sex are separate and that gender identity takes precedence over biological sex – touts “transitioning” as a *positive* thing. *E.g.*, Zawn Villines, “Social transitioning for trans people,” *Medical News Today* (Oct. 3, 2023). Moreover, gender ideology proclaims that gender identity itself can be fluid. *E.g.*, Sabra Katz-Wise, “Gender fluidity: What it means and why support matters,” *Harvard Health Publishing* (Dec. 3, 2020). Colorado therefore cannot rationally argue that gender identity change, as such, is harmful without contradicting itself. Rather, what Colorado must argue is that such change is only harmful when it is sought to align one’s sense of one’s gender with one’s biological sex. But *that* interest – the assertion that the only healthy gender identity is a transgender identity – fails in light of the incoherence of transgenderism and, specifically, of the concept of

gender identity.

Promoting “gender identity.” in the sense of driving or maintaining a wedge between one’s biological reality and one’s self-description, is *not* a legitimate or even a rational state interest. Rather, gender identity is a subjective, mutable, misleading, and logically contradictory label with little to no coherent content.

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, viz., disorders of sexual development [DSD]²). “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 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 “Structure of the Gametes,” *Developmental Biology* (6th

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

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

ed.) <https://www.ncbi.nlm.nih.gov/books/NBK10005/> (“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. Wize mann & M. L. Pardue, eds. 2001) (abstract).⁴ As such, it is not an exaggeration to state that, absent a DSD, literally every single cell in a human’s body reflects the unchanging biological sex of that person. *Id.* Even certain cellular functions significantly differ between males and females, 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 exist, they do not alter this inherent distinction.

“**Gender identity**,” by contrast, is taken to mean one’s self-described or self-experienced gender. *E.g.*, “APA Dictionary of Psychology,” *Amer. Psychol. Ass’n* (updated Nov. 15, 2023) (“gender identity”: “a person’s psychological sense of self in relation to their gender. Many people describe gender identity as a deeply felt, inherent sense of being a boy, a man, or male; a girl, a woman, or female; or a nonbinary gender (e.g., genderqueer, gender-neutral, agender, gender-fluid, transgender) that may or may not correspond to a person’s sex assigned at birth, presumed gender based

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

on sex assignment, or primary or secondary sex characteristics”); 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,” *AOL*, <https://www.aol.com/least-15-gender-identities-according-202700802.html> (hereafter “Becker”) (last visited June 11, 2025) (“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*. “Frequently Asked Questions about Transgender People,” *Advocates for Trans Equality* <https://transequality.org/issues/resources/frequently-asked-questions-about-transgender-people> (last visited June 11, 2025) (“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* p. 5 (“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. 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 or ingesting hormones does not – cannot – change one’s sex. Moreover, this objective truth does not change with 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 raised as female. 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->

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

11814300. Changing the body does not change the sex.

At least one gender identity medical practitioner acknowledged as much. Dr. Crystal Beal, who runs QueerDoc, stated, “changing your documentation or stopping your medication does not make you any less of a man or a woman, or any less trans. Who we are is not designated by what our documents say or what medications we take.” Emily Shugerman, “Americans Stockpile Abortion Pills and Hormones Ahead of ‘Reproductive Apocalypse’ Under Trump,” *Guardian UK* (Nov. 7, 2024).

Gender identity, by contrast, is *not fixed*. Rather, it can change over time. 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 the imposition of legal 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? As one Australian politician concluded, “anyone that identifies as a woman is a woman,” “Anyone that identifies as a woman is a woman” - Shannon Fentiman QLD Minister for Women,” YouTube, https://www.youtube.com/watch?v=B_chIcrf7DU. To answer the question “What does identifying as female (or male) mean?” entails either resort to such sheer circularity, or resort to physiology or cultural expectations (or both). Yet gender ideology denies the relevance of the physiology (since the body has no necessary connection to gender identity), and reliance upon culture 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 transgender legal claims 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* p. 6), 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, *supra* p. 5 (“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 a 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). One woman modified herself to look like a humanoid robot. Fran Lu, “China influencer in humanoid costume faces classic ‘boyfriend’ question in hometown,” *South China Morning Post* (Feb. 4, 2025).

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 a particular subset of subjective or psychological states 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/Portals/15/Documents/Recruit%20the%20Recruiter/Eligibility_Requirements.pdf?ver=2018-06-20-110345-967), or to look to such categories to determine who can purchase alcohol, vote, or go on certain amusement rides (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, or therapies (as here). 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 basis for legal restrictions. 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 “blib 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 meriting legal protection 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 legal 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” 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.

In short, embracing the promotion or protection of "gender identity" as a legitimate interest is incompatible with legal measures to stop invidious sex discrimination. For this additional reason, then, this Court should not accept the promotion or protection of "gender identity" as a legitimate government interest. Those persons who genuinely feel an inconsistency between their biology and their psyche are entitled to respect, compassion, and appropriate therapy. They are not entitled to a rewrite of constitutional law, especially to justify speech restrictions.

* * *

The concept of "gender identity" has no place in constitutional analysis. Colorado has no rational basis for restricting speech in service to gender ideology.

CONCLUSION

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

Respectfully submitted,

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June 13, 2024

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Frontline Policy Council

Michigan Family Forum