

No. 24-38

In the
Supreme Court of the United States

BRADLEY LITTLE, GOVERNOR OF IDAHO, ET AL.,
Petitioners,

v.

LINDSAY HECOX, ET AL.,
Respondents.

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

**BRIEF AMICI CURIAE OF
REP. BARBARA EHARDT OF IDAHO,
206 OTHER FEMALE STATE LEGISLATORS,
AND 38 FAMILY POLICY ORGANIZATIONS
IN SUPPORT OF PETITIONERS**

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IDENTITY AND INTEREST OF *AMICI CURIAE*¹

Amici curiae are 206 female state legislators and 38 family policy organizations, all of which have authored, sponsored, introduced, supported, or advocated legislation defining eligibility for women's sports based on biological criteria.

Amica Rep. Barbara Ehardt of Idaho was the author and principal sponsor in the Idaho House of Representatives of the statute that the Ninth Circuit held was likely unconstitutional in this case. Rep. Ehardt is also a former Division I NCAA basketball player and coach, and currently coaches clinics and travel teams for high-level high-school basketball prospects.

Additional *amicae* state legislators are: Rep. Susan DuBose (Alabama), Rep. Leigh Hulsey (Alabama), Sen. April Weaver (Alabama), Rep. Julie Coulombe (Alaska), Rep. Elexie Moore (Alaska), Rep. Cathy Tilton (Alaska), Rep. Jubilee Underwood (Alaska), Rep. Sarah Vance (Alaska), Sen. Shelly Hughes (Alaska), Rep. Mary Bentley (Arkansas), Rep. Robin Lundstrum (Arkansas), Rep. Selina Bliss (Arizona), Rep. Pamela Carter (Arizona), Rep. Lisa Fink (Arizona), Rep. Gail Griffin (Arizona), Rep. Kim Ransom (Colorado), Rep. Anne Dauphinais (Connecticut), Rep. Tracy Marra (Connecticut), Rep. Karen Reddington-

¹ No counsel for any party to this case authored this brief in whole or in part. No party to this case and no counsel for any party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amici*, their members, and their counsel made such a monetary contribution.

Hughes (Connecticut), Rep. Cara Pavalock-Damato (Connecticut), Rep. Nicole Klarides-Ditria (Connecticut), Rep. Kathy Kennedy (Connecticut), Rep. Gale Mastrofrancesco (Connecticut), Rep. Lezlye Zupkus (Connecticut), Rep. Jessica Baker (Florida), Rep. Noelle Kahaian (Georgia), Rep. Charlice Byrd (Georgia), Rep. Brooke Boden (Iowa), Rep. Cindy Golding (Iowa), Rep. Megan Jones (Iowa), Rep. Shannon Latham (Iowa), Rep. Shannon Lundgren (Iowa), Rep. Ann Meyer (Iowa), Sen. Dawn Driscoll (Iowa), Sen. President Amy Sinclair (Iowa), Sen. Sandy Salmon (Iowa), Sen. Annette Sweeney (Iowa), Sen. Christy Zito (Idaho), Sen. Glenneda Zuiderveld (Idaho), Rep. Michelle Davis (Indiana), Rep. Joanna King (Indiana), Rep. Julie McGuire (Indiana), Rep. Lorissa Sweet (Indiana), Sen. Liz Brown (Indiana), Rep. Carrie Barth (Kansas), Rep. Sherri Brantley (Kansas), Rep. Robyn Essex (Kansas), Rep. Susan Estes (Kansas), Rep. Leah Howell (Kansas), Rep. Lisa Moser (Kansas), Rep. Rebecca Schmoe (Kansas), Rep. Megan Steele (Kansas), Rep. Barb Wasinger (Kansas), Rep. Kristy Williams (Kansas), Rep. Dawn Wolf (Kansas), Rep. Angela Stiens (Kansas), Sen. Renee Erickson (Kansas), Sen. Beverly Gossage (Kansas), Sen. Kellie Warren (Kansas), Rep. Emily Callaway (Kentucky), Rep. Jennifer Decker (Kentucky), Rep. Kim Holloway (Kentucky), Rep. Mary Beth Imes (Kentucky), Rep. Savannah Maddox (Kentucky), Rep. Candy Massaroni (Kentucky), Rep. Kimberly Poore Moser (Kentucky), Rep. Marianne Proctor (Kentucky), Rep. Felicia Rabourn (Kentucky), Rep. Nancy Tate (Kentucky), Sen. Amanda Mays Bledsoe (Kentucky), Sen. Shelley Funke Frommeyer (Kentucky), Sen. Lindsey Tichenor (Kentucky), Rep. Beryl Amadee (Louisiana), Rep.

Rhonda Butler (Louisiana), Rep. Emily Chenevert (Louisiana), Rep. Kathy Edmonston (Louisiana), Rep. Dodie Horton (Louisiana), Rep. Laurie Schlegel (Louisiana), Sen. Heather Cloud (Louisiana), Sen. Beth Mizell (Louisiana), Rep. Elizabeth Caruso (Maine), Rep. Katrina Smith (Maine), Rep. Tracy Quint (Maine), Rep. Laurel Libby (Maine), Delegate Lauren Arian (Maryland), Delegate LaToya Nkongolo (Maryland), Delegate Kathy Szeliga (Maryland), Rep. Jaimie Greene (Michigan), Speaker Lisa Demuth (Minnesota), Rep. Pam Altendorf (Minnesota), Rep. Patti Anderson (Minnesota), Rep. Peggy Bennett (Minnesota), Rep. Marj Fogelman (Minnesota), Rep. Mary Franson (Minnesota), Rep. Dawn Gillman (Minnesota), Rep. Bobbie Harder (Minnesota), Rep. Krista Knudsen (Minnesota), Rep. Patricia Mueller (Minnesota), Rep. Bernie Perryman (Minnesota), Rep. Marion Rarick (Minnesota), Rep. Kristin Robbins (Minnesota), Rep. Peggy Scott (Minnesota), Rep. Erica Schwartz (Minnesota), Rep. Natalie Zeleznikar (Minnesota), Sen. Julia Coleman (Minnesota), Sen. Keri Heintzeman (Minnesota), Sen. Karin Housley (Minnesota), Sen. Carla Nelson (Minnesota), Sen. Angela Hill (Mississippi), Rep. Mazzie Christensen (Missouri), Rep. Wendy Hausman (Missouri), Rep. Cathy Jo Loy (Missouri), Rep. Holly Jones (Missouri), Rep. Ann Kelley (Missouri), Rep. Becky Laubinger (Missouri), Rep. Tara Peters (Missouri), Rep. Peggy McGaugh (Missouri), Rep. Melissa Schmidt (Missouri), Rep. Brenda Shields (Missouri), Sen. Jill Carter (Missouri), Sen. Mary Elizabeth Coleman (Missouri), Sen. Cindy O'Laughlin (Missouri), Rep. Lyn Bennett (Montana), Rep. Kerri Seekins-Crowe (Montana), Rep. Jodee Etchart (Montana), Rep. Kathy Love (Montana), Rep. Nelly Nicol

(Montana), Rep. Melissa Nikolakakos (Montana), Rep. Valerie Moore (Montana), Rep. Amy Regier (Montana), Rep. Courtenay Sprunger (Montana), Sen. Theresa Manzella (Montana), Sen. Sue Vinton (Montana), Sen. Jana Hughes (Nebraska), Sen. Kathleen Kauth (Nebraska), Sen. Tanya Storer (Nebraska), Assemblywoman Victoria A. Flynn (New Jersey), Assemblywoman Dawn Fantasia (New Jersey), Rep. Jennifer Balkcom (North Carolina), Rep. Karen Anderson (North Dakota), Rep. Kathy Frelich (North Dakota), Rep. Donna Henderson (North Dakota), Rep. Desiree Morton (North Dakota), Rep. SuAnn Olson (North Dakota), Sen. Janne Myrdal (North Dakota), Sen. Desiree van Oosting (North Dakota), Rep. Jennifer Jones (New Mexico), Former Rep. Jena Powell (Ohio), Rep. Stacy Jo Adams (Oklahoma), Rep. Emily Gise (Oklahoma), Rep. Denise Crosswhite-Hader (Oklahoma), Rep. Toni Hasebeck (Oklahoma), Rep. Marilyn Stark (Oklahoma), Sen. Kendal Sacchieri (Oklahoma), Sen. Julie Daniels (Oklahoma), Rep. Stephanie Borowicz (Pennsylvania), Rep. Marla Brown (Pennsylvania), Rep. Jill Cooper (Pennsylvania), Rep. Mindy Fee (Pennsylvania), Rep. Windy Fink (Pennsylvania), Rep. Valerie Gaydos (Pennsylvania), Rep. Barbara Gleim (Pennsylvania), Rep. Milou Mackenzie (Pennsylvania), Rep. Leslie Rossi (Pennsylvania), Sen. Dawn Keefer (Pennsylvania), Sen. Judy Ward (Pennsylvania), Rep. Heather Ammons Crawford (South Carolina), Rep. April Cromer (South Carolina), Rep. Sarita Edgerton (South Carolina), Rep. Shannon Erickson (South Carolina), Rep. Melissa Oremus (South Carolina), Rep. Ashley Trantham (South Carolina), Rep. Brandei Schaeffbauer (South Dakota), Rep. Bethany Soye (South Dakota), Sen. Tamara Grove (South

Dakota), Sen. Sue Peterson (South Dakota), Former Sen. Maggie Sutton (South Dakota), Rep. Elaine Davis (Tennessee), Rep. Michele Reneau (Tennessee), Sen. Janice Bowling (Tennessee), Sen. Becky Duncan Massey (Tennessee), Sen. Dawn White (Tennessee), Rep. Hillary Hickland (Texas), Rep. Caroline Harris-Davilla (Texas), Rep. Carrie Isaac (Texas), Rep. Candy Noble (Texas), Rep. Katrina Pierson (Texas), Rep. Valoree Swanson (Texas), Rep. Ellen Troxclair (Texas), Rep. Terri Leo Wilson (Texas), Sen. Lois Kolkhorst (Texas), Sen. Angela Paxton (Texas), Former Rep. Kera Birke-land (Utah), Rep. Lindee Brill (Wisconsin), Rep. Joy Goeben (Wisconsin), Rep. Amanda Nedweski (Wisconsin), Rep. Barbara Dittrich (Wisconsin), Rep. Evie Brennan (Wyoming), Rep. Lynn Hutchings (Wyoming), Rep. Martha Lawley (Wyoming), Rep. Jayme Lien (Wyoming), Rep. Ann Lucas (Wyoming), Rep. Rachel Rodriguez-Williams (Wyoming), Rep. Pepper Ottman (Wyoming), Rep. Cheri Steinmetz (Wyoming), and Sen. Patricia Rucker (West Virginia).

Details about some of the individual *amicae* are provided in Section II, *infra*.

Amici family policy organizations are: Alabama Policy Institute, Alaska Family Council, Center for Arizona Policy, Family Council Arkansas, California Family Council, Family Institute of Connecticut Action, Delaware Family Policy Council, Family Policy Alliance, Florida Family Voice, Frontline Policy Council, Hawaii Family Forum, Idaho Family Policy Center, Indiana Family Institute, The Family Leader Iowa, Kansas Family Voice, The Family Foundation Kentucky, Louisiana Family Foundation, Christian Civic League of Maine, Maryland Family Institute,

Massachusetts Family Institute, Minnesota Family Council, Montana Family Foundation, Nebraska Family Alliance, Cornerstone New Hampshire, New Mexico Family Alliance, New Jersey Family Policy Center, North Carolina Family Policy Council, North Dakota Family Alliance, Oklahoma Council of Public Affairs, Pennsylvania Family Council, Rhode Island Family Institute, Palmetto Family Council, South Dakota Family Voice, Texas Values, The Family Foundation Virginia, Family Policy Institute of Washington, Wisconsin Family Action, and Wyoming Family Alliance.

SUMMARY OF ARGUMENT

One of our society's greatest recent triumphs is the cultural and legal consensus in favor of women's sports. For the most part, the long struggle for women's rights has been one for equality under the law: to ensure that all Americans can participate in all areas of public life, without regard to their sex. Women's sports have been a special case. In this limited area, our nationwide consensus has been that equal opportunity for women requires providing separate facilities and programs for them.

This has been a resounding success, opening countless life-changing opportunities to women who would never have experienced them otherwise. Many of the state legislators who are *amicae* here experienced this firsthand. They have been able to play in, coach, promote, and offer to their daughters sporting opportunities that had never existed for previous generations of women.

But this legal and cultural consensus in favor of women's sports has reached what is likely the most

significant crossroads of its existence. Since its inception, that consensus has been predicated on biology. The need for women's sports arises from biological differences between women and men—and, consequently, who may participate in women's sports has always been determined by the biological characteristics that make a person female. But that axiom of women's sports is now being challenged.

In recent decades, there has been growing public awareness of a separate concept of “gender identity:” a person's interior sense of being a woman or man (or neither), which may or may not correspond with the person's biological sex characteristics. This has had major implications for the few areas, such as athletics, where separate women's programs are still recognized as necessary and desirable. Increasingly, the argument is being made that eligibility for such events should be determined *not* by the biological characteristics that make a person female—as has been the case until now—but instead by a person's interior sense of being a woman.

There are powerful justifications for retaining the longstanding biological criteria. The near-universal recognition of the importance of women's sports is predicated on the just-as-widespread recognition that, in almost every sport and at almost every level of competition, there are major differences between the average speed and strength of female and male athletes. Those are *biological* differences—they are physical characteristics that are strongly correlated with the biological features that make a person female or male. By contrast, the very premise of “gender identity” is that one's internal sense of being a woman or man *does*

not have any necessary correspondence to one's biological characteristics. Therefore, since the existence of separate women's sports programs is justified by biological differences between women and men, there are exceedingly persuasive reasons to determine eligibility for such programs using biological criteria rather than a person's sense of gender.

Based on this or very similar reasoning, most States have enacted statutes affirming that participation in women's sports depends on biology. The *amici* here are legislators and policy organizations that have championed these laws. Some courts—including the Ninth Circuit here—have held that the federal Constitution or federal statutes prohibit this, and instead mandate a gender-identity criterion for participation in women's sports. If this fundamental change is allowed to occur, it is likely to have effects on women's sports—and on the nationwide consensus in favor of them—that are at best deeply uncertain, and at worst will fundamentally alter women's sports until they are unrecognizable. The Court should reverse the judgment below.

ARGUMENT

I. **Women’s Sports Enjoy Widespread And Enduring Support.**

Women’s sports are a remarkable American success story.

For more than a century and a half, the nationwide struggle for women’s rights has mostly focused on achieving equal treatment under the law, without regard for a person’s sex. Since our country’s founding, women have overcome and removed legal barriers to their voting or holding public office on the same terms as men, *see Frontiero v. Richardson*, 411 U.S. 677, 685 (1973); to their owning or managing their own property on the same terms as men, *ibid.*; to their accepting paying work or entering a profession on the same terms as men, *see Nevada Dep’t of Hum. Res. v. Hibbs*, 538 U.S. 721, 729 (2003); and to their engaging in many other important activities in the same way that men can. They have overcome countless additional social and cultural barriers to their equal participation in public life. Although room for improvement certainly remains, our nation has made great progress toward offering all Americans “equal opportunity to aspire, achieve, participate in and contribute to society based on their individual talents and capacities,” without regard to their sex. *See United States v. Virginia*, 518 U.S. 515, 532 (1996).

Concurrently with this progress toward equal treatment regardless of sex, a cultural consensus also has emerged that, in a few areas, equality requires separate spaces or programs that are reserved for women alone. These fall primarily into two categories: private spaces such as restrooms and dormitories, and

athletic competitions. In these particular contexts, society widely recognizes that equal access for women can best be maintained through reserving separate facilities or events for women. When Congress mandated equal treatment for women and men in education through Title IX, for instance, it was careful to specify that schools still may “maintain[] separate living facilities for the different sexes.” 20 U.S.C. 1686. And when the Department of Education promulgated regulations to implement that nondiscrimination mandate, it specified that schools generally “may operate or sponsor separate [athletic] teams for members of each sex.” 34 C.F.R. 106.41(b).

Indeed, sporting events often implicate multiple justifications for reserving spaces and programs for women. In addition to involving athletic competition, they often require athletes to change clothes or shower in shared locker rooms, or to share overnight accommodations when traveling. All of these reasons justify reserving separate sports programs for women.

In that light, the past 50 years have seen the growth of a near-universal approval of women’s sports. In a nation that is bitterly divided in many respects—including over some issues of sex equality—vast numbers of Americans are united in their passion for sports. And increasingly that includes women’s sports. Excellence in women’s athletics is avidly supported by Americans from every State, religion, political party, and ideology. At the local level, that is reflected in the groundswell of support for and participation in girls’ sports leagues of all kinds—with girls’ sports participation having consistently climbed for nearly a decade, and approaching the same level as

boys'.² At the high-school level, it is reflected in the nearly thirty-fold increase in girls' athletics participation since the early 1970s.³ At the highest levels of sporting competition, our growing nationwide love for women's sports is reflected in every region and social stratum: from the recent surge of interest in college and professional women's basketball, to record-setting crowds attending college women's volleyball matches,⁴ to the striking successes of women's athletics at religious universities,⁵ to the many millions of Americans who cheer on our women's teams' extraordinary successes in the Olympics and in other international competitions. At any level, one would be hard-pressed to find any significant group of Americans who oppose the idea of women's sports.

² Project Play, Aspen Institute, *State of Play 2023: Participation Trends* at § 2, <https://projectplay.org/state-of-play-2023/participation>.

³ Nat'l Fed. Of State High School Ass'ns, *High School Athletics Participation Survey* at 56, Athletics Participation Survey Totals, https://www.nfhs.org/media/7212351/2022-23_participation_survey.pdf.

⁴ Olson, Associated Press, *Nebraska volleyball stadium event draws 92,003 to set women's world attendance record* (August 30, 2023), <https://apnews.com/article/nebraska-volleyball-attendance-record-38f103fe2100a368cddb19b75e1adb8d>.

⁵ E.g., Payne, Universe Sports, *Was this the greatest year in the history of BYU women's athletics?* (June 24, 2022), <https://universe.byu.edu/2022/06/24/column-was-this-the-greatest-year-in-the-history-of-byu-womens-athletics/>; Liberty University Athletics, *Lady Flames Soccer wins Conference USA title with 2-1 victory over New Mexico State* (Nov. 5, 2023), <https://www.liberty.edu/news/2023/11/05/liberty-wins-conference-usa-womens-soccer-title-with-a-2-1-victory-over-new-mexico-state/>.

II. Sports Offer Exceptional Opportunities To Millions Of Women, Including *Amicae*.

The emergence of this social and legal consensus for women's sports in the past 50 years has done tremendous good for millions of American girls and women—including many *amicae* here.

Amica Rep. Barbara Ehardt of Idaho has always been passionate about playing sports. She recalls being asked, as a young girl, what she wanted to do when she grew up—and responding unequivocally that she wanted to play sports. But she also recalls being constantly told that “girls don’t do that.” She was eight years old in 1972, when Congress enacted Title IX. As she often testifies, this changed her life. As women’s athletic opportunities became increasingly available in the 1970s because of Title IX, young Ms. Ehardt thrived playing competitive basketball—first in junior high school, then in high school, next at North Idaho Junior College, and finally achieving her goal of playing Division I women’s basketball on a scholarship at Idaho State University. After she graduated, she became Coach Ehardt—embarking on a 15-year Division I women’s college basketball coaching career at UC Santa Barbara, Brigham Young University, Washington State University, and then as the head coach at Cal State-Fullerton. As Rep. Ehardt, she continues to coach basketball, teaching leadership and life lessons through her “Camps & Clinics” and “travel hoops” opportunities. Rep. Ehardt knows that playing sports can change lives. It changed hers.

Amica Rep. Peggy Bennett of Minnesota likewise sponsored women’s-sports legislation as a direct result of her personal experience. Title IX passed when Rep.

Bennett was in high school. During her senior year, her high school finally offered girls-only sports teams. She played basketball that year—and it transformed her life. Young Ms. Bennett went from being a shy and reserved girl to an athlete with a new sense of self and confidence, who went on to play college basketball as well. Rep. Bennett is certain that she and many of her teammates would never have played high school basketball if males had been on the team, and she does not want the experience she had to be denied to future generations of girls and women.

Amica Sen. Renee Erickson of Kansas has a similar story. When she was a girl, no one in her family had ever gone to college. That changed when Ms. Erickson, a high-school basketball star, was offered scholarships to play for several different colleges and universities. She chose to attend Oklahoma Christian University where she became a prominent guard on the women's basketball team. This has led to a lifelong passion for sports that now-Senator Erickson is currently passing on to her three granddaughters.

Amica Rep. Peggy Scott of Minnesota, chief author of the Preserve Girls' Sports Act, attended high school in rural Iowa shortly after the passage of Title IX. Unlike some others, she did not aspire to become a professional athlete. The availability of junior-high and high-school girls' sports gave her the opportunity to play. Rep. Scott firmly believes that these experiences developed lifelong character traits such as leadership, fortitude, and self-confidence, that have carried her through both personal and professional challenges throughout her life.

Not every *amica* had these opportunities. Rep. Barb Wasinger of Kansas grew up just a few years before Rep. Ehardt, but her experience was very different. In her high-school years, Ms. Wasinger was passionate about swimming—but as a young woman at that time, her only opportunities for school sports were field hockey, pompom squad, and cheerleading. She could swim only in a “play league” during summer vacations. Although she yearned for more opportunities to advance in the sport she loved, those opportunities did not become available for women until it was a few years too late for her.

These are only representative illustrations. *Amicae* could share countless stories and experiences that led to them to be advocates in their respective States for women’s sports. They share a firm belief that it is their responsibility and duty as legislators to protect and carry forward the hard-fought gains for girls’ and women’s opportunities in sports. *Amicae* know firsthand that this includes both lifelong memories made on the field, and leadership qualities that have brought many *amicae* to where they are today. They desire the same opportunities for future generations of female leaders.

III. The Consensus In Favor Of Women’s Sports Has Always Been Premised On Biology—But That Is Now In Question.

Until recently, the consensus in favor of women’s sports has been premised on the biological distinction between women and men. Even as this Court developed stronger protections for women’s rights, a cornerstone of its jurisprudence has remained the

recognition that “[p]hysical differences between men and women ... are enduring”. *United States v. Virginia*, 518 U.S. 515, 533 (1996). This basic reality is reflected in our national understanding that, with respect to private spaces and athletic competitions, equal opportunity for women means separate opportunities *reserved* for women. This, it has been understood, is necessary to account for the relevant physical differences between women and men.

Thus, eligibility for participating in women’s sports has historically been determined by the physical characteristics that make a person female. As the Ninth Circuit put it below, “[a] person’s ‘sex’” typically is determined “based on ... external genitalia” present at birth, along with other characteristics such as “internal reproductive organs” and “chromosomes.” (Pet.App. 13a (citation omitted).) This biological distinction between women and men has historically been the premise of women’s sports.

In the last decade or two, however, some have voiced strong objections to this basic understanding. There has been an increasing awareness of the concept of “gender identity,” which—as the Ninth Circuit explained—“is the term used to describe a person’s sense of being male, female, neither, or some combination of both.” (*Ibid.* (citation omitted).) The concept has gained currency due to an increasing awareness that a given “individual’s gender identity” may or may not “correspond to their sex,” with the result that the person is “transgender,” or “experience[s] ‘gender dysphoria,’” or both. (*Id.* at 13a-14a.)

In many areas of public life, sex and gender identity are both properly regarded as immaterial to a

person's rights to equal treatment. In these areas, there is no direct conflict between protecting the rights of women (defined by biology) and protecting the rights of transgender people (defined by gender identity). For instance, a transgender person's right to vote on the same terms as any other citizen—or to own property, or to make contracts, or to exercise various other rights—normally presents no direct conflict with any biological woman's right to do the same.

A conflict arises only in the few important areas where society still recognizes the need to reserve separate spaces and programs for women. In these areas, those advocating for transgender rights have increasingly argued that gender identity should *replace* biological sex as the eligibility criterion. Women's restrooms, or dormitories, or sports teams, it is said, should be open to anyone who has (in the Ninth Circuit's terms) a "sense of being ... female" (Pet.App. 13a), even if the person's biological characteristics are mostly or wholly male. In other words, the argument goes, those spaces and programs are *not* to be reserved for biological females anymore. They must also be open to people with biologically male characteristics who identify as female.

This presents what is likely the most significant inflection point that our national consensus in favor of women's sports has ever faced. It raises a host of important and hotly-debated questions. Having established an extensive and successful sporting infrastructure reserved for women, can we fairly, prudently, and feasibly abandon the physical criteria by which we have defined who is eligible to participate? If we can, what replacement criteria could or should

we use? And if we do, how might it affect the revolutionary success of women's sports over the past half century? It is no exaggeration to say that the future of women's sports may hinge on the answers.

IV. There Are Extraordinarily Powerful Reasons To Continue Determining Eligibility For Women's Sports Based On Physical, Biological Criteria.

Faced with those questions, most States have enacted statutes that retain or establish physical, biological criteria for determining who may participate in women's sports.⁶ *Amica* Rep. Ehardt authored and sponsored the first enacted statute of this kind—Idaho's Fairness in Women's Sports Act, which is at issue in this case. The other *amici* here authored, sponsored, introduced, or supported similar statutes or bills in other States. There are exceedingly strong reasons for this approach.

In this regard, it bears stating in more detail just why there has been such a strong social consensus in favor of separate women's sports, even as our nation has otherwise become increasingly committed to equal

⁶ In addition to the Idaho statute at issue here, *see* Ala. Code 16-1-52; Ariz. Code 15-120.02; Ark. Code 6-1-107; Fla. Stat. 1006.205; Ga. Code Title 20, Ch. 3, Art. 1, Pt. 3; Ind. Code 20-33-13-4, Iowa Code Ch. 261I; Kan. Stat. 60-5601–5606; Ky. Stat. 164.2813; La. Stat. 4:444; Miss. Code 37-97-1, Mo. Stat. 163.048; Mont. Code 20-7-1306–1307; Neb. Code § 79-3804; N.C. Gen. Stat. 116-400–403; N.D. Cent. Code Ch. 15.1-41-01; Ohio Code 3313.5320; 70 Okla. Stat. 27-106, S.C. Code 59-1-500; S.D. Code 13-67-1; Tenn. Code 49-7-180; Tex. Educ. Code 51.980; Utah Code 53G-6-901–904; W. Va. Code 18-2-25d; Wyo. Stat. 21-25-101–102.

treatment and participation without regard to sex. As noted, our national community understands that in limited areas such as sports, women and men are physically different from each other in ways that recommend separate opportunities.

With respect to athletic events, it is important to be specific about what these physical differences are. Boys and men tend to be significantly stronger and faster, physically, than girls and women. Biological men tend to be taller and heavier than biological women; their muscles and bones tend to be bigger and stronger; their lungs tend to take in more oxygen, and their hearts to pump more blood.⁷ For that reason, if women were forced to compete against men, their opportunities to excel and win would be sharply curtailed, and in many cases eliminated. As Justice Stevens put it, “[w]ithout a gender-based classification in competitive contact sports, there would be a substantial risk that boys would dominate the girls’ programs and deny them an equal opportunity to compete in interscholastic events.” *O’Connor v. Bd. of Ed. of Sch. Dist. 23*, 449 U.S. 1301, 1307 (1980) (Stevens, J., in chambers). Or, as the Ninth Circuit put it in the precedent that governed until this case, “due to

⁷ *E.g.*, Univ. of Utah, *Why males pack a powerful punch*, ScienceDaily (Feb. 5, 2020), <https://www.sciencedaily.com/releases/2020/02/202005132404.htm> (male upper bodies average 75% greater muscle mass and 90% greater strength than female). Even suppressing a male’s testosterone levels may have little effect on this muscular advantage. See Hilton & Lundberg, *Transgender Women in the Female Category of Sport: Perspectives on Testosterone Suppression and Performance Advantage*, 2021 Sports Med. 51(2) at 199, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7846503/>

average physiological differences, males would displace females to a substantial extent if they were allowed to compete” against each other, and “[t]hus, athletic opportunities for women would be diminished.” *Clark ex rel. Clark v. Arizona Interscholastic Ass’n*, 695 F.2d 1126, 1131 (9th Cir. 1982).

To be sure, this distinction is based on averages. No one thinks that every man or boy is stronger or faster than every woman or girl. And with respect to certain other athletic characteristics—such as eye-hand coordination or flexibility—men likely do not have an overall advantage. But the average differences in speed and strength are large enough and important enough that, in almost every sport, equal competitive opportunities for women can be meaningfully achieved only through separate women’s events. We will not belabor this point with a multitude of examples—although it could be done—but track-and-field records provide a vivid illustration. The holders of women’s world records in track and field are superb athletes and exemplars of human excellence. Society’s ability to celebrate these athletes—as it should—depends on the existence of separate women’s competitions. If those world-record-holders were forced to compete against men, the record books show that the top U.S. high-school boys would regularly exceed them in every event. See Coleman & Shreve, *Comparing Athletic Performances: The Best Elite Women to Boys and Men*, <https://law.duke.edu/sites/default/files/centers/sportslaw/comparingathleticperformances.pdf>. Something similar is true in virtually every sport, at virtually every level of competition: proper recognition of women’s athleticism and athletic achievements is made possible only by separate women’s events.

Crucially, this distinction between women and men is also based on *biology*. Sports are inherently physical. There is no serious debate that excellence in sports depends heavily on the physical characteristics of one's body. Although training and mental preparation play major roles, raw physical ability also remains an indispensable ingredient in athletic success. Simply put, a person's athletic prowess depends, in significant part, on his or her native size, strength, speed, stamina, and numerous other factors. And in these respects, the differences between women and men are matters of biology. They derive from the significant average physical differences between women's and men's muscles, bones, lungs, hearts, and other body parts. And as the discussion above shows, although these characteristics are not *perfectly* correlated with biological sex (as determined by reproductive organs and chromosomes), the correlation is so close and so strong that no other non-sex-based classification criteria have ever been developed that can adequately ensure both fair competition and equal opportunity for women.

It was in this context that *amici*, and other policy-makers like them, were confronted with the question of whether to set aside the traditional biological eligibility criteria for women's sports in favor of "a person's sense of being ... female." (See Pet.App. 13a.) The result of that change would be to allow some unknown number of people with male biological characteristics to participate in women's sports. And since gender identity by definition bears no necessary relationship to a person's physical characteristics, there was no reason to expect these potential new participants in

women's sports to be physically comparable to biological women.

In short, the separate existence of women's sports is justified by the distinct biological characteristics of women. The question faced by *amici* was whether, correspondingly, to continue defining *eligibility* for women's sports with reference to the distinct biological characteristics of women. Some have argued for the use of non-biological criteria, in whole or in part—thus creating a mismatch between the justifications for reserving sports for women and the criteria for determining who may participate. In that context, Rep. Ehardt and the other *amici* firmly believed that the only correct course was to continue reserving women's sports for biological women.

Of course, the decision for the courts is not whether their choice was correct as a matter of policy—it is merely whether this choice is *permitted* by the Constitution. On that score, there can be little doubt indeed. “[T]his Court has consistently upheld statutes where the gender classification is not invidious, but rather realistically reflects the fact that the sexes are not similarly situated in certain circumstances.” *Michael M. v. Superior Ct. of Sonoma Cnty.*, 450 U.S. 464, 469 (1981). There is no serious dispute that, with respect to athletic competitions, women and men “are not similarly situated”—and that the relevant difference turns on biology, not on an individual's interior sense of gender. Therefore, there can be nothing invidious or untoward about defining eligibility for women's sports based on the former rather than the latter.

V. In A Future Case, The Court Should Consider Whether And When Federal Law Requires Biological-Sex Eligibility Criteria.

As just noted, the question in this case is whether the Constitution permits state governments to choose eligibility criteria for women’s and girls’ sports events that are based on biological sex, rather than interior gender identity. It plainly does, and the Court should so hold. There is a related question, however, that is percolating in the lower courts⁸ and that this Court should take up in a future case. That question is whether, and to what extent, federal antidiscrimination law has already chosen biological-sex eligibility criteria for the nation as a whole.

As this brief has explained, in most areas of public life, all Americans can participate—and should be able to participate—without any regard either for their biological sex or their gender identity. Exceptions arise in a few areas, including where our culture and laws

⁸ *Female Athletes United v. Ellison, et al.*, No. 0:25-cv-02151 (D. Minn. 2025) ; *U.S. v. California*, No. 8:25-cv-1485 (C.D. Cal. filed July 9, 2025); cf. *Minn. v. Trump*, No. 0:25-cv-01608 (D. Minn. filed Apr. 22, 2025); see also Letter from Pam Bondi, U.S. Att’y Gen., to Keith Ellison, Minn. Att’y Gen., and Erich Martens, Exec. Dir., Office of the Att’y Gen. (Feb. 25, 2025), <https://www.justice.gov/ag/media/1390801/dl>; Letter from Pam Bondi, U.S. Att’y Gen., to Ron Nocetti, Exec. Dir., Office of the Att’y Gen. (Feb. 25, 2025), <https://www.justice.gov/ag/media/1390791/dl>; Letter from Pam Bondi, U.S. Att’y Gen., to Janet Mills, Gov., Office of the Att’y Gen. (Feb. 25, 2025), <https://www.justice.gov/ag/media/1390796/dl>; *Cal. v. McMahon*, No. 1:25-cv-00329 (D.R.I. filed July 14, 2025).

find it appropriate to reserve separate spaces or opportunities for women. In those select areas, biological-sex criteria and gender-identity criteria are mutually exclusive. Since the whole point of the concept of gender identity is that it bears no necessary relationship to biological sex, women's spaces and opportunities must necessarily be reserved *either* for those who are female based on biology, *or* for those who identify as women.

The inevitable nature of this choice informs the requirement, under federal law, that women be given educational opportunities equal to men. *See* 20 U.S.C. 1681 *et seq.* If that legal requirement turns on biological sex—as it likely does—then education programs and activities receiving federal funding likely are required to adopt biological-sex eligibility requirements for women's events, at least in many contexts.

This case does not present those questions, but the answers to them will have a profound impact on our continuing national debate over women's sports and spaces. In an appropriate future case, the Court should consider resolving them.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted,

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