Nos. 24-38, 24-43

IN THE

Supreme Court of the United States

BRADLEY LITTLE, GOVERNOR OF IDAHO, *et al.*,
Petitioners,
v.
LINDSAY HECOX, *et al.*,
Respondents.

WEST VIRGINIA, *et al.*,
Petitioners,
v.
B.P.J., BY HER NEXT FRIEND AND MOTHER, HEATHER JACKSON,
Respondents.

On Writs of Certiorari to the United States Courts of Appeals for the Ninth and Fourth Circuits

BRIEF OF THE INDEPENDENT COUNCIL ON WOMEN'S SPORTS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER AND ADDRESSING WHY SEX-SEPARATION IS REQUIRED IN WOMEN'S SPORTS

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INTEREST OF AMICUS CURIAE[1]

Amicus is the Independent Council on Women's Sports (ICONS) a 501(c)(3) organization and advocacy group that supports a network of current and former collegiate and professional women athletes and their supporters who agree with former Justice Ginsberg that "physical differences between men and women . . . are enduring . . . the two sexes are not fungible . . . inherent differences between men and women . . . remain cause for celebration." *United States v. Virginia*, 518 U.S. 515, 533, 116 S. Ct. 2264, 2276, 135 L. Ed. 2d 735 (1996) (cleaned up; citations omitted).

[1] Rule 37 statement: No party's counsel authored any of this brief; *amicus* alone funded its preparation and submission. *See* Sup. Ct. R. 37.6.

SUMMARY OF ARGUMENT

"Given how biological differences affect typical outcomes in sports, ensuring equal opportunities for biological girls in sports *requires* that they not have to compete against biological boys." *B.P.J. by Jackson v. W. Virginia State Bd. of Educ.*, 98 F.4th 542, 571 (4th Cir. 2024) (Agee, J., concurring and dissenting in part) (emphasis added).

Judge Agee is right. Due to enormous, documented performance advantages of males[2] in sport, Title IX's equal opportunity mandate is correctly interpreted to bar males from competing on sex-separated women's sports teams at federally funded schools. However, to date, regardless of whether the interpretation of Title IX has been rendered by school administrators or judges, this has frequently not been the result.

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[2] "Man" "woman" "women" "men" "male" "female" "she" "he" "him" "her" and "sex" are used herein in their strict biological sense as used in Title IX's sport-specific regulation adopted in chronological proximity to Title IX's passage, without regard for "gender identity." *See Adams by & through Kasper v. Sch. Bd. of St. Johns Cnty.,* 57 F.4th 791, 812 (11th Cir. 2022) (Title IX defines "sex" "based on biology and reproductive function."); *Black's Law Dictionary* (5th ed. 1979) **("Sex.** The sum of the peculiarities of structure and function that distinguish a male from a female organism[.]"); *see also Bostock v. Clayton Cnty., Ga.,* 590 U.S. 644, 655 (2020) ("sex" in the Civil Rights Act of 1964 "refer[s] only to biological distinctions between male and female").

Stemming from the failure of institutions, educational and judicial, to accurately apply Title IX, reportedly 27 states have enacted legislation prohibiting males from participating on women's sports teams. *See* https://williamsinstitute.law.ucla.edu/publications/impact-trans-sports-ban-eo/. The evident reason these laws have become necessary is misinterpretation of Title IX to permit boys and men who self-identify as transgender to compete in women's sports. Instead of protecting women's equal opportunities, Title IX has been misunderstood or misconstrued to permit males to compete against females and use women's showers and locker rooms, diminishing women's equal opportunities in scholastic sports.

With the Country practically cleaved down the middle between states that have enacted laws to protect women's equal opportunities in scholastic sports and those that have not, and with the number of boys and men seeking to compete in women's sports clearly on the rise, many girls remain unprotected against loss of their equal opportunities. This threatens irreparable loss of the significant benefits resulting from early participation in women's athletics.

Title IX and its athletics regulation are grounded in the obvious facts that men and women are physically different and that in sport these differences matter. The athletics regulation was meant to ensure that women have access to the same experience on the athletic field and in the locker room as men in a context that's fair and respects women's dignity and privacy. The premise of the regulation is that sex-

separated teams are essential for equal opportunity in sport, and that women's opportunities and amenities must be equal to the men's.

Every case decided by this Court applying Title IX has either expressly stated or presumed that schools violate Title IX when they fail to provide equal opportunities or are deliberately indifferent to circumstances that interfere with unfettered enjoyment of those opportunities. Given that scholastic sports are organized around a paradigm of equal opportunities on separate teams, every time a man joins a women's team he takes a women's spot on that team. Deliberately allowing trans-identifying men to take women's opportunities and invade their private spaces is fundamentally inconsistent with the athletics regulation and this Court's Title IX precedents.

If left unchecked, ongoing misinterpretation of Title IX will drive many girls out of scholastic sports, and that exodus has sadly already started. The increasing numbers of males joining women's teams threatens the gains for women that Title IX made possible in the first place.

The solution? Interpret Title IX and its accompanying athletics regulation as written and originally understood to require sex-separation in women's sports and locker rooms where necessary to protect equal opportunities for women and prevent males from competing in women's sport when a school has decided to field women's teams. Faithful construction of Title IX's athletics regulation is the answer.

ARGUMENT

I. Sports Participation Improves Girls' Educational Achievement and Lifelong Health

The passage of Title IX in 1972 changed the landscape of women's sports in America. It led to women's participation increasing in high school sports by over 1,000% and in college sports by over 600%. In 1972, just 7% of high-school athletes were girls, but by 2018 that number had risen to almost 43%. *See* Rogers, Elle, *The Two Sexes are Not Fungible: The Constitutional Case Against Transgender-Inclusive Sports*, 28 TEX. R. OF LAW & POLITICS 243, 246 (2024) (citing sources).

Courts have recognized both the importance of scholastic sports and Title IX's key role in helping secure for America's youth the salutary benefits of scholastic sport. From *Brenden v. Indep. Sch. Dist. 742*, 477 F.2d 1292, 1298 (8th Cir. 1973), the first case to refer to Title IX, "courts have repeatedly found that athletics is a vital and important part of the educational experience for high school and college students." Anderson, Paul M., *Title IX at Forty: An Introduction and Historical Review of Forty Legal Developments That Shaped Gender Equity Law*, 22 MARQ. SPORTS L. REV. 325, 327 (2012).

Girls derive dramatic education benefits from sports participation. Girls who play high school sports are 20% more likely to graduate from high school and 20% more likely to attend college. Sports participation itself yields these academic benefits; it is not just that

girls who were always going to do well academically choose to play sports. Lumpkin, A., & Favor, J., *Comparing the academic performance of high school athletes and non-athletes in Kansas*, 4(1) JOURNAL OF SPORT ADMINISTRATION & SUPERVISION 41–62 (2012), https://www.jsasonline.org/index.php/jo. There is a positive link between sport participation and academic performance for high school girls. *Id*.

Female collegiate athletes too have higher grades and graduation rates than their non-athletic peers. Of the female student-athletes entering NCAA Division I programs on scholarship between 2018 and 2022, 94% graduated within six years of enrollment. This graduation rate is 23 percentage points higher than for female non-athlete students (71%) and higher than the rate for all students. *NCAA Division I graduation rates report*, (2023), https://www.ncaa.org/sports/2021/11/16/graduation-success-rate.aspx.

Indeed, female athletes consistently post the highest graduation rates of all students. Both white female scholarship athletes (71%) and female scholarship athletes of color (58%) graduated at higher rates than their counterparts in the general student population (56% and 44%, respectively). Tompsett, J., *Collegiate sports participation, academic achievement, and bachelor's degree completion*, 38(4) SOCIOLOGICAL FORUM 987–1008 (2023), https://onlinelibrary.wiley.com/doi/10.1111/socf.12945. The same impact on graduation rates is observable in high schools where female student-athletes graduate at rates higher than their non-athlete counterparts in the student-body. Marsh, H. W., & Kleitman, S.,

School athletic participation: Mostly gain with little pain, 25(2) JOURNAL OF SPORT & EXERCISE PSYCHOLOGY 205–228 (2003), https://journals.humankinetics.com/view/journals/jsep/25/2/article-p205.xml.

The educational, maturational, and developmental benefits to women of sport participation also translates into post-graduation economic success. Data shows a link between sport participation and economic attainment later in life. Increased sports participation by women after the passage of Title IX is said to explain about 20% of the increase in women's educational attainment and about 40% of the rise in employment for 25-to-34-year-old women, including a 12% spike in the number of women working in traditionally male-dominated occupations such as law, accounting, and veterinary medicine. Stevenson, B., *Beyond the classroom: Using Title IX to measure the return to high school sports*, 92(2) REV. OF ECONOMICS AND STATISTICS 284–301 (2010), https://www.mitpressjournals.org/doi/abs/10.1162/rest.2010.12333.

Increases in female sports participation spurred by Title IX are also good for the American economy. A study found that more than four out of five executive businesswomen (81%) played sports growing up – and the vast majority of these women reported that the lessons they learned on the playing field contributed to their business success. *Oppenheimer Funds survey on women in business and sports participation*, (2002), https://www.ey.com/en_us. Not surprisingly, a background in competitive sport is a common gateway to future employment in the sports industry itself. The

business of sports, including athletic administration, coaching, sports management, sports medicine, marketing, and manufacturing, is a nearly $260 billion per-year industry. Sports & Fitness Industry Association, *Economic impact of the sports industry in the United States* (2024), https://www.sfia.org/reports/2024-economic-impact.

Lifelong health benefits are also correlated to participation in scholastic sports. High school sports participation leads to more physical activity throughout a woman's lifetime. Women who participate in regular physical exercise reduce their risk of breast cancer between 20 and 40%. American Cancer Society, *Physical activity and cancer risk*, (2023), https://www.cancer.org/cancer/risk-prevention/diet-physical-activity/physical-activity-and-cancer.html. Osteoporosis afflicts 10 million Americans, 80% of whom are women. But regular physical activity and sports participation in the school-age years increases life-time bone density. National Osteoporosis Foundation, *Osteoporosis statistics and prevention* (2024), https://www.bonehealthandosteoporosis.org/patients/osteoporosis/. Alzheimer's disease disproportionately afflicts older women, but rates can be lowered with physical activity earlier in life. Alzheimer's Association, *Physical activity and Alzheimer's risk* (2025), https://www.alz.org/help-support/brain_health/physical_activity.

High school sports participation also helps prevent adult obesity. A 20% increase in girls' sport participation in high school was associated with a 24% increase in the probability of engaging in "much"

physical activity during recreational activities, a 4% decline in body mass index, and a lessened probability of being overweight or obese. Kaestner, R., & Xu, X, *Effects of Title IX and sports participation on girls' physical activity and weight*, 17 ADVANCES IN HEALTH ECONOMICS AND HEALTH SERVICES RESEARCH 79–111 (2006), https://www.emerald.com/insight/content/doi/10.1016/S0731-2199(06)17004-1. When physically active in high school, girls are more likely to maintain a normal weight into their twenties, which increases their life expectancy by as much as eight years. National Institutes of Health, *Obesity and mortality: Longitudinal studies*, (2023), https://www.nih.gov/news-events/nih-research-matters/obesity-mortality.

High school sports participation also changes lifestyle choices affecting health. For example, female athletes are less likely to smoke or use illicit drugs than non-athletes. They are less likely to become pregnant as teenagers and more likely to report never having had sexual intercourse. They are also more likely to experience their first sexual intercourse later in adolescence than female non-athletes. Pate, R. R., et al., Sports participation and health-related behaviors among US youth, 154(9) ARCHIVES OF PEDIATRICS & ADOLESCENT MEDICINE 904–911 (2000), https://jamanetwork.com/journals/jamapediatrics/fullarticle/351093.

Athletic participation also has mental health benefits. Female high school athletes suffer lower rates of depression and show markedly lower incidences of considering or attempting suicide.

Jewett, R., et al., *School sport participation during adolescence and mental health in early adulthood*, 55(5) J. OF ADOLESCENT HEALTH 640–644 (2014), https://www.jahonline.org/article/S1054-139X(14)00229-9/fulltext.

There can be little question that securing equal opportunities for women in scholastic sport is vital to the Nation and is a key goal of Title IX.

II. Males Competing in Women's Sports Deprive Women of Equal Opportunities and Can Push Them Out of Sport

Given the enormous size, strength, power and other sport performance advantages enjoyed by males over women described in Petitioners' Briefs, it follows that continuing participation of males in women's scholastic sports will cause a decrease in girls' sports participation in high school and college.

First, the performance advantages of being male will cause women to lose roster spots and playing time, resulting in these girls losing some of the intrinsic joys of sport and life lessons that can be learned through sport.

Second, as described below, participation by males in women's contact sports increases the likelihood of physical injuries to women. Further, many women experience depression and a profound sense of unfairness when deprived of sports opportunities by men who, because of extreme physical superiority, have competitive advantages women are unable to overcome through dedication and

hard work.

Unfair and unsafe competition naturally leads to suppressed participation in sport. This is one of the lessons learned from organized doping in sports like cycling and track and field, where many athletes report that doping within the elite levels of their sport diminishes their motivation to continue and ultimately drives them out of top-level competitions. *See*, *e.g.*, *Enhanced Games could 'turn away future athletes*,' BBC (Sept. 16, 2025), https://www.bbc.com/sport/articles/cp3qn6xd91ro; Scott Mercier, *The Cyclist Who Refused To Dope, Now Champions Clean Racing*, COLORADO PUBLIC RADIO, Apr. 26, 2017, https://www.cpr.org/show-segment/scott-mercier-the-cyclist-who-refused-to-dope-now-champions-clean-racing/; *Athlete's 'Nope To Dope' Became 'No To Sports,'* NPR, Aug. 30, 2010, https://www.npr.org/2010/08/30/129533093/athletes-nope-to-dope-became-no-to-sports#:~:text=Katherine%20Hamilton%20during%20a%201981,to%20lying%20about%20drug%20use.

Like doping, men's participation in women's sports raises both fairness and safety concerns that are driving women out of sport.

Female attrition due to men participating on women's sports teams is regrettably on the rise. For example, former high school volleyball player Payton McNabb never played another volleyball game after she suffered a debilitating brain injury when struck in the head by a spike from a trans-identifying male athlete in a women's high school volleyball match. *See Volleyball player 'fights for truth' after being severely*

injured by trans opponent: 'If only my rights had been more important than a man's feelings,' NEW YORK POST, Dec. 17, 2024, https://nypost.com/2024/12/17/us-news/female-athlete-permanently-hurt-by-trans-athlete-speaks-out/.

Seven times last season entire college women's volleyball teams in the Mountain West Conference (MWC) protested a male volleyball player on the San Jose State University Women's Volleyball Team and the girls on these teams lost the opportunity to compete. Adding insult to injury, their teams were assigned forfeits by the MWC for protesting.

The Boise State University Women's Volleyball Team, in fact, forfeited three games to the San Jose State team for this very reason, including forfeiting the semifinal round of the Mountain West Conference Championship, rather than play against a male player who had spiked numerous girls in the face throughout the season, creating fear of injury for the women. *See* San Jose State's Opponent Boycotts Game Over Transgender Player. Again., *New York Times*, (Nov. 28, 2024), https://www.nytimes.com/2024/11/28/us/transgender-san-jose-boise-volleyball.html.

This year, three girls on the Santa Rosa Junior College Women's Volleyball Team are losing an entire year of college eligibility due to a trans-identifying male on their team who has already concussed one teammate during practice this year. *See Santa Rosa women's volleyball players open up on trans teammate's alleged spikes to the head*, FOX NEWS, Sept. 9, 2025, https://www.foxnews.com/sports/santa-rosa-

womens-volleyball-players-open-up-trans-teammates-alleged-spikes-head.

The above examples only scratch the surface of what is happening to women in scholastic sports across the country as other *amicus* briefs filed in this case attest, space prevents a full accounting. This same story of women losing opportunities to men in women's scholastic sports is playing out repeatedly from coast to coast, all to the detriment of girls who should be protected by Title IX but instead are losing irreplaceable competitive opportunities to men.

III. The Title IX Athletics Regulation Presumes Sex-Separation in Sports to Protect Women and Afford Them Equal Opportunities to Men

A. Adoption of Javits Amendment

On August 21, 1974, Congress passed the Javits Amendment, requiring the Department of Health, Education, and Welfare (the "Department") (the predecessor federal enforcer of Title IX) to "prepare and publish . . . proposed regulations implementing the provisions of [T]itle IX of the Education Amendments of 1972 relating to the prohibition of sex discrimination in federally assisted education programs which shall include with respect to intercollegiate athletic activities reasonable provisions considering the nature of particular sports." Pub. L. No. 93-380, Title VII, Part D, § 844, 88 Stat. 612 (1974).

B. Title IX Athletics Regulation

The regulations regarding "intercollegiate athletic activities" requested by Congress (the "athletics regulation") were published in 1975. The first part of the athletics regulation prohibits discrimination in athletics using language that tracks Title IX:

> General. No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient, and no recipient shall provide any such athletics separately on such basis.

34 C.F.R. § 106.41(a).

The athletics regulation next addresses separate athletics teams for each sex, making clear that sex-separated but comparable sports teams remained the presumptive method of choice under Title IX to create the conditions for women's equal opportunities in sport.

> Separate teams. Notwithstanding the requirements of paragraph (a) of this section, a recipient may operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the

> activity involved is a contact sport. However, where a recipient operates or sponsors a team in a particular sport for members of one sex but operates or sponsors no such team for members of the other sex, and athletic opportunities for members of that sex have previously been limited, members of the excluded sex must be allowed to try-out for the team offered unless the sport involved is a contact sport. . . .

34 C.F.R. § 106.41(b).

Thus, Title IX did not do away with or discourage sex-separated women's sports teams. To the contrary, the athletics regulation embraces sex-separated women's teams (and the effort to increase the numbers of women playing on those teams and the resources available to these women) as the favored method for advancing women's equal opportunities in scholastic sports.

Thirdly, the athletics regulation sets forth a list of ten factors to consider when evaluating whether a recipient of federal funding is providing "equal athletic opportunity for members of both sexes":

> Equal opportunity. A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics shall provide *equal athletic opportunity for members of both sexes*. In determining whether equal opportunities are available the Director will consider,

among other factors:

> (1) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes;
>
> (2) The provision of equipment and supplies;
>
> (3) Scheduling of games and practice time;
>
> (4) Travel and per diem allowance;
>
> (5) Opportunity to receive coaching and academic tutoring;
>
> (6) Assignment and compensation of coaches and tutors;
>
> (7) Provision of locker rooms, practice and competitive facilities;
>
> (8) Provision of medical and training facilities and services;
>
> (9) Provision of housing and dining facilities and services;
>
> (10) Publicity.

34 C.F.R. § 106.41(c) (emphasis added).

Each of the above equal opportunity factors is not only fully compatible with sex-separated women's

teams, it presumes sex-separation. By mandating comparisons between what the school's women's team receives with what the comparable men's team receives, the regulation presumes that men's and women's teams are separated. Such comparisons of the opportunities made available by an institution for its' women's teams vis-à-vis the opportunities it provides for its men's teams is the starting point for assessing the institution's compliance with Title IX.

IV. Women on a Women's Team May Sue Under Title IX When Deprived of Equal Opportunities or Resources by a Male Competitor or Teammate

Title IX "prohibits sex discrimination by recipients of federal education funding," *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 173 (2005), and equalizes opportunities for women by extending its protections based on "sex." 20 U.S.C. § 1681(a).

"Sex" in Title IX "refer[s] only to biological distinctions between male and female." *Bostock,* 590 U.S. at 655; *accord Soule v. Conn. Assoc. of Schools,* 755 F. Supp. 3d 172, 194 n.17 (D. Conn. 2024) ("I agree that" interpreting "sex" in Title IX to mean "biological sex" "best reflects the term's ordinary public meaning in 1972"). Title IX protects biological women from being treated worse than biological men. As explained above, the way that this is typically assessed is by comparing the benefits and opportunities given to (or taken from) women's teams against the benefits and opportunities given to (or taken from) men's teams.

"Sex" in Title IX does not mean "gender

identity." *Adams,* 57 F.4th at 813-14 ("There simply is no alternative definition of 'sex' for transgender persons as compared to nontransgender persons under Title IX."). "Title IX was enacted in 1972, and its implementing regulations were promulgated shortly thereafter. And during that period of time, virtually every dictionary definition of "sex" referred to the *physiological* distinctions between males and females-particularly with respect to their reproductive functions." *Grimm v. Gloucester Cnty. Sch. Bd.,* 972 F.3d 586, 632-33 (4th Cir. 2020), *as amended* (Aug. 28, 2020) (Niemeyer, J., dissenting). Title IX is "gender identity" blind-it does not consider the identity of a person or presume that sex could ever be mutable. However a person may identify, Title IX is focused solely on biology.

As explained below, given that sex-separated women's sports teams are the chosen method of equalizing women's opportunities in sports, it follows that women must be able to challenge the intrusion of males on women's teams when that intrusion is the result of a deliberate or intentional policy by an institution that deprives or threatens to deprive women of equal opportunities.

A. Supreme Court Decisions and Legislative Developments Relevant to Women's Title IX Rights

For more than forty-five years, this Court and Congress have consistently interpreted Title IX or amended it to expand the rights of individuals to seek remedies against institutions that participate in depriving women of their right to equal opportunities

or resources in comparison to men in programs and activities covered by Title IX.

1. *Cannon v. University of Chicago* (1979)

In 1979 the Court recognized a private right of action under Title IX, allowing a female student denied admission to medical school to sue the University of Chicago over alleged sex discrimination in the admissions process. *Cannon v. Univ. of Chicago*, 441 U.S. 677, 717 (1979).

2. *North Haven Board of Education v. Bell* (1982)

Three years later, in a case involving a tenured public school teacher, the Court found that employment discrimination is prohibited under Title IX. *N. Haven Bd. of Ed. v. Bell*, 456 U.S. 512, 530-31 (1982). Therein, the Court also discussed that the Title IX regulations were considered by Congress, noting Congress had conducted committee hearings to consider the regulations, recalling its statement in *Cannon* that "[a]lthough postenactment developments cannot be accorded 'the weight of contemporary legislative history, we would be remiss if we ignored these authoritative expressions concerning the scope and purpose of Title IX.'" *Id.* at 535 (quoting *Cannon*, 441 U.S. at 687 n.7). The Court has ever since regarded the Title IX implementing regulations, including the athletics regulation, as authoritative expressions concerning the scope and purpose of Title IX.

3. *Grove City College v. Bell* (1984)

Next, the Court considered the scope of Title IX's coverage over federally funded institutions. In *Grove City* the Court agreed that the Department of Education could terminate Basic Educational Opportunity Grants (BEOGs) to Grove City because the College had refused to sign the Department's assurance that the College was in compliance with Title IX. *Grove City Coll. v. Bell*, 465 U.S. 555, 563 (1984). The Court then analyzed which "education program or activity" at the College received federal assistance through the BEOGs and concluded it was the financial aid program which received federal aid, therefore, *institution-wide coverage* of the College was not triggered by the financial aid program's acceptance of BEOGs. *Id.* at 573-74.

4. Civil Rights Restoration Act (1987)

Grove City was viewed by some in Congress as retracting the intended reach of Title IX, eventually prompting Congress to adopt the Civil Rights Restoration Act (CRRA) in 1987 to "restore the broad scope of coverage and to clarify the application of title IX." Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (1987). The CRRA makes clear Title IX coverage is institution-wide and covers every part, program, and activity of an entity receiving federal assistance.

5. *Franklin v. Gwinnett County Public Schools* (1992)

In *Franklin* the Court concluded that the private right of action to enforce Title IX permitted a student to sue her high school for failing to stop known sexual harassment of her by a teacher, and that because Congress had not limited the remedies available under Title IX "a damages remedy is available for an action brought to enforce Title IX." *Franklin v. Gwinnett Cnty. Pub. Sch.*, 503 U.S. 60, 76 (1992).

6. Equity in Athletics Disclosure Act (EADA) (1994)

In 1994 Congress passed the Equity in Athletics Disclosure Act (EADA) which was focused on prospective students and student-athletes who "should be aware of the commitments of an institution to providing equitable athletic opportunities for its men and women students," and provided information to help students "make informed judgments about the commitments of a given institution of higher education to providing equitable athletic benefits to its men and women students." 20 U.S.C. § 1092 n.(b)(7)-(8).

The EADA requires institutions to prepare annual reports identifying undergraduate attendance, information about varsity sports teams, money spent on athletically related student aid, recruiting expenses, revenues, salaries, and overall expenses. The information submitted by covered schools can be accessed online on the Department of Education's Equity in Athletics Analysis Cutting Tool. *See*

https://data.ed.gov/data_explorer/equity-athletics.

The EADA underscores Title IX's reliance on sex-separated teams to assess Title IX compliance. It requires reporting absolute numbers of members of each sex-separated team in comparison to absolute numbers of males and females in the student population. The obvious reason for mandating reporting of EADA data is to *compare* an institution's sex-separated sports programs, *i.e.,* to compare the resources and opportunities directed to men's teams versus women's teams.

7. *Gebser v. Lago Vista Independent School District* (1998)

In 1998 the Court considered a sexual harassment case against a school district arising from a sexual relationship between a student and teacher. The Court concluded the student could recover damages if "an official of the school district who at a minimum has authority to institute corrective measures on the district's behalf has actual notice of, and is deliberately indifferent to, the teacher's misconduct." *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 284 (1998). Because the defendant school in *Gebser* did not have actual notice of the teacher's sexual misconduct and was not deliberately indifferent the student was unable to recover damages. *Id.* at 292-93.

8. *NCAA v. Smith* (1999) (Smith I)

In 1999 the Court reviewed its first and only

Title IX case involving the National Collegiate Athletic Association (NCAA) in *NCAA v. Smith*, 525 U.S. 459 (1999), sometimes referred to as *Smith I* to distinguish it from a later Title IX case brought against the NCAA in the lower courts that is referred to as *Smith II*.

In *Smith I* the Plaintiff Renee Smith had been a student-athlete at St. Bonaventure University where she played on the women's volleyball team. Smith left the school after graduating and still had a year of collegiate athletics eligibility remaining when she enrolled at a different graduate school and sought a waiver from the NCAA of its postbaccalaureate rule that forbade a student to participate in intercollegiate athletics after graduation except at the undergraduate school the student attended. Smith challenged this NCAA rule as discriminatory based on sex because the NCAA granted more waivers of it to men than to women.

The only issue ultimately considered by the Court, however, was the basis of Smith's contention that the NCAA was covered by Title IX. The Court said, "if any part of the NCAA received federal financial assistance, all NCAA operations would be subject to Title IX." *Smith I*, 525 U.S. at 469.

However, the only theory of Title IX coverage advanced by *Smith* had been that the NCAA received "dues" from federally funded members. Thus, the only question before the Court was whether payments of any sort by a federally financed school to a third party could subject that third party to Title IX coverage. The Court held the mere receipt of "dues" by the NCAA was insufficient because the student-athlete had not

alleged that "NCAA members paid their dues with federal funds earmarked for that purpose," therefore proof of the NCAA's "receipt of dues" merely "demonstrates that it indirectly benefits from the federal assistance afforded its members." *Id.* at 468. "[T]his showing, without more, [was] insufficient to trigger Title IX coverage." *Id.*

Before the Supreme Court, Smith sought to raise other bases for Title IX coverage over the NCAA. The *Smith I* Court appeared to signal that these alternative theories for NCAA coverage under Title IX might be viable. However, because these alternative coverage theories had not been raised below, the Court was unable to consider them.

One theory of coverage the Court did not address in *Smith I,* because it had not been advanced below, is the theory that "when a recipient cedes controlling authority over a federally funded program to another entity, the controlling entity is covered by Title IX regardless of whether it is itself a recipient." *Smith I,* 525 U.S. at 469-70. A second Title IX coverage ground raised but not decided in *Smith I* was that the NCAA indirectly "receive[d] federal financial assistance through the National Youth Sports Program" administered by the NCAA. *Id.*

The Court acknowledged in *Smith I* that the NCAA is "'created by and comprised of schools that receive federal funds, and ... governs its members 'with respect to athletic rules.'" *Id.* at 469 (cleaned up). Perhaps significantly, the Court noted this arrangement was a potential basis to distinguish the NCAA from an entity addressed in *United States DOT*

v. Paralyzed Veterans of America, 477 U.S. 597 (1986), which held that merely benefiting from a federal funding recipient does not trigger Title IX coverage. Thus, this comment by the Court appears to suggest that the Court considered that the NCAA's "govern[ing]" authority over the "athletic rules" of NCAA members would weigh in favor of Title IX coverage over the NCAA had that argument been raised below.

However, the *Smith I* Court ultimately said that, "[e]vident as these distinctions may be, they do not bear on the narrow question we decide today-whether an entity that receives dues from recipients of federal funds is for that reason a recipient itself." *Id.*

9. *Davis v. Monroe County Board of Education* (1999)

Also in 1999, the Court considered the claims of a fifth-grade student who sued their school board under Title IX for failure to remedy a classmate's sexual harassment. The Court held that a school board could be "liable for its own decision to remain idle in the face of known student-on-student harassment in its schools." *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 641 (1999). Where the funding recipient acted with deliberate indifference, the harassment must be sufficiently severe that it effectively bars the victim's access to an educational opportunity or benefit and the recipient must have exercised substantial control over the harasser and the context in which the known harassment occurred. *Id.* at 641-47. Where harassment occurs on the school grounds, "the recipient retains substantial control over the

context in which the harassment occurs." *Id*. at 646.

The *Davis* Court also emphasized that the gravamen of a deliberate indifference claim is not sexual harassment itself, but the "deprivation of access to school resources" or "deni[al of] equal access to an institution's resources and opportunities." *Id*. at 650-51. The Court explained its *focus on the denial of equal access to an institution's resources and opportunities* by posing the following non-sexual harassment hypothetical that the Court made clear would result in liability under Title IX:

> Consider, for example, a case in which male students physically threaten their female peers every day, successfully preventing the female students from using a particular school resource—*an athletic field* or a computer lab, *for instance*. District administrators are well aware of the daily ritual, yet they deliberately ignore requests for aid from the female students wishing to use the resource. The district's knowing refusal to take any action in response to such behavior would fly in the face of Title IX's core principles, and such deliberate indifference may appropriately be subject to claims for monetary damages. It is not necessary, however, to show physical exclusion to demonstrate that students have been deprived by the actions of another student or students of an educational opportunity on the basis of sex. Rather, a plaintiff must establish

> sexual harassment of students that is so severe, pervasive, and objectively offensive, and *that so undermines and detracts from the victims' educational experience, that the victim-students are effectively denied equal access to an institution's resources and opportunities*.

Id. at 650–51 (emphasis added).

Thus, the *Davis* Court made clear that the essence of a Title IX deliberate indifference claim is the denial of "equal access to an institution's resources and opportunities." But this is exactly what happens when scholastic sports officials (whether at a school, the NCAA, or a college athletic conference) ignore the deprivation of equal opportunities in women's sport and loss of equal access to school resources in women's locker rooms and showers that occurs when males are authorized to take women's places on sports teams and enter their private spaces. This language from *Davis* appears to reflect the Court would recognize a claim against an institution whose official(s) knowingly allowed males (or a male) to deprive females (or a female) of resources and private spaces dedicated to women or implemented a policy permitting such deprivations.

10. *Jackson v. Birmingham Board of Education* (2005)

The Plaintiff in *Jackson v. Birmingham Board of Education*, 544 U.S. 167 (2005), was a high school teacher and girls' basketball coach who claimed his team was not given equal access to athletic equipment

or facilities. *Id.* at 171. The school board and administration ignored the coach's complaints and gave the coach negative performance reviews, eventually removing him from his coaching job. *Id.* at 171-72. Jackson sued claiming he had been retaliated against for his Title IX complaints about unequal treatment of the women's basketball team. The Court held that retaliation is another version of intentional discrimination that violates Title IX, saying said:

> [R]etaliation is, by definition, an intentional act. It is a form of "discrimination" because the complainant is being subjected to differential treatment . . . . Moreover, retaliation is discrimination "on the basis of sex" because it is an intentional response to the nature of the complaint: an allegation of sex discrimination. We conclude that when a funding recipient retaliates against a person because he complains of sex discrimination, this constitutes intentional "discrimination" "on the basis of sex," in violation of Title IX.

Id. at 173-74.

11. ***Fitzgerald v. Barnstable School Committee* (2009)**

Fitzgerald involved parents' complaints over how a school handled peer-on-peer sexual harassment on a school bus. The parents had complained and were dissatisfied with the school's handling of the

harassment.

The issue before the Court, however, was a narrow one regarding whether Title IX precluded counterpart actions against state actors under section 1983 for alleged violations of the Equal Protection Clause or other constitutional rights. The Court concluded that "Title IX was not meant to be an exclusive mechanism for addressing gender discrimination in schools, or a substitute for § 1983 suits as a means of enforcing constitutional rights," *Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 258 (2009), therefore, "suits based on the Equal Protection Clause remain available to plaintiffs alleging unconstitutional gender discrimination in schools." *Id.*

B. The Athletics Regulation Requires Scholastic Sports Be Sex-Separated Where Necessary to Protect Equal Opportunities for Women

Amicus posits that the athletics regulation not only *permits* sex-based distinctions but *requires* them where necessary to ensure equal opportunity. Thus, where sex-separation in scholastic sports exists to protect women's opportunities and access to resources, Title IX prohibits covered entities from giving those opportunities and resources to men.

This Court's precedents clearly signal that female athletes can sue institutions that deprive them of sex-separated sports opportunities. As explained above, Title IX protects women "from being 'excluded from participation in' or 'denied the benefits of' any

'education program or activity.'" *Davis*, 526 U.S. at 650 (quoting 20 U.S.C. § 1681(a)). A sex-separated scholastic sports team and sex-separated showers and locker rooms used by the members of that team certainly constitute the benefits of an education program or activity.

For women to have "equal opportunity" in athletic competition, "relevant differences cannot be ignored." *Yellow Springs Exempted Vill. Sch. Dist. Bd. of Educ. v. Ohio High Sch. Athletic Ass'n*, 647 F.2d 651, 657 (6th Cir. 1981); *see also* 117 Cong. Rec. 30, 407 (1971) (statement of Sen. Bayh) (noting Title IX would not require co-ed sports teams or locker rooms).

One of this Court's staunchest advocates for women recognized that "[p]hysical differences" between the sexes are "enduring." *Virginia*, 518 U.S. at 533. Addressing such physical differences and ensuring that they do not impeded women's equal opportunities and benefits is the whole reason for the accepted norm of sex-separated women's athletic teams and facilities furthered by the athletics regulation.

"[T]he mere opportunity for girls to try out" for a team is not enough if they cannot realistically make the roster because of competition from men. *Williams v. Sch. Dist. of Bethlehem, Pa.*, 998 F.2d 168, 175 (3d Cir. 1993). Nor is being on a team enough if women cannot win scholarships or "enjoy the thrill of victory" in historically male-dominated sports. *See Neal v. Bd. of Trs. of Cal. State Univs.*, 198 F.3d 763, 773 (9th Cir. 1999); *accord Adams*, 57 F.4th at 820 (Lagoa, J., specially concurring). Similarly, access to a shower,

restroom, or locker rooms is not sufficient when a woman is denied enjoyment of that resource because her privacy has been violated.

Biology matters. Males enjoy significant athletic performance advantages rooted in male biology. Therefore, when administrators decide to separate teams by sex due to enduring physical differences (*i.e.*, male advantages in size, strength, speed and performance) that separation must be maintained, at least until some other paradigm for protecting women's equal opportunities has been implemented. Covered programs cannot selectively revert to co-ed teams on a case-by-case basis because that will necessarily deprive women of equal opportunities because they cannot easily move to a men's team.

Likewise, biology matters in terms of females' ability to use and enjoy physical spaces which cannot be fully or comfortably used without sex-separation. Because biology matters in areas where women must have privacy to fully prepare for or recover from athletic activity that privacy must be maintained on a sex-separated basis. In other words, enduring physical differences also raise privacy concerns. As Justice Ginsburg explained, integrating *VMI* "would undoubtedly require alterations necessary to afford members of each sex privacy from the other sex in living arrangements." *Virginia*, 518 U.S. at 550 n.19. Accordingly, Title IX mandates women have "separate" and "comparable" locker rooms. 34 C.F.R. § 106.33 and protects bodily privacy as failing to do so "would deny many persons in the educational context the dignity and freedom of bodily privacy" within

"intimate spaces within the educational environment." *Texas v. Cardona*, 743 F. Supp. 3d 824, 876–77 (N.D. Tex. 2024).

Furthermore, subjecting women to a man's presence in a women's locker room without consent should be considered "encompass[ed within the] diverse forms of intentional sex discrimination" recognized by the Supreme Court. *Jackson*, 544 U.S. at 183. A man's presence in a women's locker room should not have to rise to the level of traditional harassment to constitute a Title IX violation where his presence was not consented to by females and his access to the women's locker room was intentionally conferred by a covered entity without regard for surprise, shame and humiliation to women, particularly where men and women may be undressing in the same room. A man's presence in a locker room, shower, or restroom violates Title IX because it deprives women of equal and full enjoyment of the resource.

V. A Policy that Permits Men to Participate on a Women's Team Contrary to the Sex-Separation Model Constitutes Programmatic Discrimination

Since 1972 colleges and universities have operationalized Title IX's plain and unambiguous equal opportunity mandate by creating sex-separated teams in virtually all intercollegiate sports. Publicly available EADA data compiled by the U.S. Department of Education confirms this. Having separated women's sports by sex to comply with Title IX, and having announced that sex-separation to the

world through EADA data as Congress requires, a federally funded school must maintain that sex-separation so long as sex-separation continues to be the method the school employs to equalize resources and opportunities in sports.

Based on early HEW guidance documents some courts have said that a Title IX claim can be established through proof of programmatic discrimination throughout a school's athletic program. *See*, *e.g.*, *Cohen v. Brown University,* 101 F.3d 155, 161-64 (1st Cir. 1996); *Cohen v. Brown Univ.*, 809 F. Supp. 978, 991-92 (D.R.I. 1992), *aff'd*, 991 F.2d 888 (1st Cir. 1993). While this is one way to prove a Title IX violation, as this Court's precedents make clear, it is not the only way to do so.

As this Court held in *Cannon, Franklin, and Davis,* purposeful deprivation of a woman's access to educational opportunities or resources about which the covered entity is aware and could prevent is actionable discrimination under Title IX. Thus, an entity's policy of putting a man on the women's team or in the women's locker room thereby depriving women of opportunities and resources states an actionable Title IX claim.

When a covered entity fields sex-separated teams but then grants exceptions for individuals to join a team of the opposite sex and a man deprives women of resources by joining a women's team no sort of program-wide assessment or analysis of the extent of the harm should be necessary. A woman who alleges she has been harmed through lost opportunities or access to resources should be allowed to proceed with

her individual claim without alleging programmatic harm. Nevertheless, even if for some reason women are required to prove that the loss of access they suffer under a transgender eligibility policy that opens women's sports teams to men constitutes a pervasive or programmatic loss of opportunities for women, it is apparent that they can do so under Circuit court precedents.

For instance, the Second Circuit has held, a significant disparity in a single program component in an athletics department "can alone constitute a Title IX violation if it is substantial enough in and of itself to deny equality of athletic opportunity to students of one sex at a school." *McCormick ex rel. McCormick v. Sch. Dist. of Mamaroneck*, 370 F.3d 275, 293 (2d Cir. 2004). A denial of equal athletic opportunity can "result from a significant disparity in a single sport." *Id.* at 296 (finding Title IX violation based on a scheduling disparity solely in girls' soccer); *see* 44 Fed. Reg. 71413, 71414-17 (finding of ineffective accommodation need not be made on a program-wide basis but can be limited to *"disparities in* benefits, *treatment,* services, *or opportunities in individual segments of the program*[.]").

If programmatic review is necessary then, as *McCormick* indicates, programmatic harm occurs when women are denied access to resources or competitions, or lose, for example placements, or a starting role or other similar opportunity in women's sports due to an institutional policy or decision. *McCormick* suggests that discriminatory *policies* constitute programmatic harm *per se*. It is impermissible to subject girls to a glass ceiling on

potential athletic attainment when "boys are subject to no such ceiling." *McCormick,* 370 F.3d at 295. It is unlawful to "send[] a message to ... girls ... that they are not expected to succeed and that the school does not value their athletic abilities as much as it values the abilities of the boys." *Id.* But allowing men in women's sports does just that. Title IX violations occur when a male athlete is put in a position where officials know he will take resources or opportunities from women.

VI. The Title IX Athletics Regulation Presumes That Biology Matters, and Title VII Does Not

The unique way in which sports opportunities and resources are allocated and equalized under the athletics regulation, *i.e.,* through sex-separation, is also why the Court's reasoning in *Bostock v. Clayton County* for resolving discrimination in employment is fundamentally incompatible with the scholastic sports context. *Bostock* adopted the "change one thing at a time and see if the outcome changes" approach to determining whether a person's sex was a "but-for cause" of an employment action. *Bostock*, 590 U.S. at 656. This approach presumes that biology (*i.e.,* male vs. female differences) is largely irrelevant in most employment contexts. But biology is highly relevant in sports. "Congress itself recognized that addressing discrimination in athletics presented a unique set of problems not raised in areas such as employment and academics. *See, e.g.,* Sex Discrim. Regs., Subcomm. Hrg. on Post Secondary Educ. of the Comm. on Educ. and Labor, 94th Cong. 1st Sess. at 46, 54, 125, 129, 152, 177, 299-300 (1975); 118 Cong.Rec. 5,807 (1972)

(Sen. Bayh); 117 Cong.Rec. 30,407 (1971) (same)." *Kelley v. Bd. of Trs.,* 35 F.3d 265, 270 (7th Cir. 1994).

The Title IX athletics regulation makes clear that equal opportunity for women is typically achieved by excluding men from women's sports. "In fact, the Title IX framework effectively requires a recipient to maintain separate sports teams." *Soule v. Connecticut Ass'n of Sch., Inc.*, 90 F.4th 34, 63 (2d Cir. 2023) (Menashi, J. and Park, J., concurring). In many cases equal opportunity for women vis-à-vis men may not be achievable in any other way. *Neal*, 198 F.3d at 769 ("Title IX permits a university to diminish athletic opportunities available to men so as to bring them into line with the lower athletic opportunities available to women."); *Williams*, 998 F.2d at 175 (Title IX requires "equalizing the numbers of sports teams offered for boys and girls."); *Clark, By & Through Clark v. Arizona Interscholastic Ass'n,* 695 F.2d 1126, 1131 (9th Cir. 1982) (approving exclusion of males from Arizona high school volleyball).

Regrettably, some courts have misapplied *Bostock*'s approach to competitive sports to require the very thing Title IX prohibits: men taking women's opportunities and invading their private spaces. Applying *Bostock* in competitive sports and/or locker room cases makes no sense because the Title IX athletics regulation itself presumes transcendent biological differences. *Bostock*'s Title VII approach to the employment world, where sex differences *should not matter*, simply does not account for the unique way in which Title IX sex-separation achieves equal opportunity for women on the athletic field and in the

locker room and showers where sex differences *do matter*.

Title IX and its athletics regulation forbid a man from depriving women of, or diverting to a man, equal opportunity in sport, including placements, awards, publicity, locker room access and privacy. They require covered entities to "level the proverbial playing field" between men and women through sex-separation, *Neal*, 198 F.3d at 769, and having done so, they may not purposefully unlevel it to favor a man.

CONCLUSION

The challenged state laws in Idaho and West Virginia should be upheld to protect women's Title IX rights which have been undermined by the rules of high school and college athletic associations. The judgments of the Court of Appeals should be reversed.

Respectfully submitted,

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