

No. 24-449

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In the  
**Supreme Court of the United States**

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WARREN PETERSEN, President  
of the Arizona Senate, et al.,  
*Petitioners,*

v.

JANE DOE, by next friends and parents,  
HELEN DOE and JAMES DOE, et al.,  
*Respondents.*

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

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**BRIEF OF *AMICI CURIAE* DR. BRENT ELLIS,  
PRESIDENT SPRING ARBOR UNIVERSITY  
AND THE WAGNER CENTER  
IN SUPPORT OF PETITIONERS**

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November 21, 2024

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**QUESTION PRESENTED**

1. Whether Arizona's Save Women's Sports Act ("SWSA"), which preserves the traditional practice of excluding biological males from girls' and women's sports teams and competitions, violates the Equal Protection Clause.

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**STATEMENT OF IDENTITY  
AND INTEREST OF *AMICI CURIAE***

Pursuant to Supreme Court Rule 37, *Amici Curiae*, *Spring Arbor University President Brent Ellis* (in his personal capacity), and the *Wagner Center* submit this brief.<sup>1</sup>

Dr. Brent Ellis serves as the 30th president of Spring Arbor University (SAU). At SAU, women compete in the following female sports programs: Basketball, Bowling, Cross Country, Golf, Soccer, Softball, Tennis, Track & Field, and Volleyball. SAU Men compete in the following male sports programs: Baseball, Basketball, Bowling, Cross Country, Golf, Soccer, Softball, Tennis, and Track & Field. Coed sports include Competitive Cheer and Esports.

SAU is a member of the National Association of Intercollegiate Athletics, the second largest governing body of collegiate sports. The Association includes 237 institutions in twenty-one conferences. President Ellis serves on the NAIA Council of Presidents. At the request of the Council, the NAIA formed a Task Force to review its existing policies governing sports

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<sup>1</sup> Pursuant to Rule 37(a), *Amici curiae* gave 10-days' notice of its intent to file this brief to all counsel. *Amici Curiae* further state that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity, other than *Amici curiae*, its members or its counsel, made a monetary contribution to the preparation or submission of this brief.

participation. President Ellis actively participated in this two-year process.

<https://www.naia.org/transgender/index> (last visited Nov. 6, 2024).

Housed on the campus of Spring Arbor University, the *Wagner Center* promotes and preserves the freedom to educate in both foundational and higher education. Most importantly for this case, the Wagner Center works to preserve the freedom of citizens to compassionately, peacefully, and persuasively hold truthful viewpoints on various topics, and is a leading voice in this area.

*Amici Curiae* hold a significant interest in the education of the next generation. *Amici Curiae* have special knowledge helpful to this Court in this case, about male athletes competing against female athletes in female sports. We present this special knowledge in a Brandeis-style *Amici Curiae* brief.

## SUMMARY OF THE ARGUMENT

This Court should grant the Petition for a Writ of Certiorari to resolve the significant Circuit splits outlined in the Petition. In doing so, this case provides an opportunity to restore predictability in the law, diminished by the jurisprudential conflict manifest in the Circuit splits. This Court should do so now because predictability in the law is necessary for good governance under the Rule of Law, especially during times of cultural discord.

Some athletes claim legal protection for new classifications flowing from fluid gender identity formulations, rather than objective biological science showing sex as immutable. When this contemporary cultural clash challenged the advancement of fairness for women in sports, the National Association of Intercollegiate Athletics (NAIA) sought a just resolution. An NAIA Task Force conducted a two-year study under the direction of the Council of Presidents, including *Amici* Spring Arbor University President Brent Ellis.

In this Brandeis-style *Amici Curiae* brief we present the conclusions reached by the Task Force to assist this Court in understanding the jurisprudential differences underlying the Circuit splits. Assiduously avoiding stereotyping and stereotypes, the study demonstrated the relevance of biological sex to "supporting the fair and safe competition opportunities for all student athletes." The Task Force study found that each NAIA male and female sport "includes some combination of strength, speed,



and stamina, providing competitive advantages for male student athletes." As to whether NAIA policy should, in female sports, permit men to compete against women, each of these elements rationally relate to, and are necessary for, creating a fair playing field, ensuring safety for competing athletes, and precluding male athletes from unfairly taking scholarship positions of female athletes. The NAIA, after unanimous approval by the Council of Presidents, "created separate categories for male and female participants." Transgender Participation Policy (April 8, 2024), [https://www.naia.org/transgender/files/TG\\_Policy\\_for\\_webpage\\_v2.pdf](https://www.naia.org/transgender/files/TG_Policy_for_webpage_v2.pdf) (last visited Nov. 6, 2024)

## ARGUMENT

### **I. THIS COURT SHOULD GRANT THE PETITION TO RESTORE PREDICTABILITY IN THE LAW DIMINISHED BY CIRCUIT SPLITS MANIFESTING SIGNIFICANT JURISPRUDENTIAL CONFLICT**

Deeply divided, the States of this nation now divide precisely in half as to whether male athletes ought to compete in female sports against female athletes. <https://highergroundtimes.com/higher-ground/2024/jul/22/chris-sununu-signs-new-hampshire-bans-on-biological/> (last visited Nov. 5, 2024). Reflecting this deep division, federal appellate courts, as outlined in the Petition, continue to split over how to decide these kinds of issues. This case provides an opportunity for this Court to resolve the

significant jurisprudential disagreement evident in these Circuit splits. It should do so now because predictability in the law is necessary for good governance under the Rule of Law, especially during times of cultural discord.

Consistent judicial decisions, grounded in honest interpretation, give government officials and others notice of what is prohibited. When it comes to judicial review of government action and constitutional provisions, consistent decisions provide predictability for officials seeking to act in accordance with constitutional standards. Inconsistent judicial precedents lead to unpredictability in the law, providing no beneficial guidance for government officials or others trying to act within the law. *Amici Curiae* are among those seeking to act within the law in the midst of a nation divided.

The Fourteenth Amendment to the United States Constitution provides, that "no State shall ... deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. 14. This guarantee of equal protection greatly advanced fairness in opportunities for women in sports. For example, Congress subsequently statutorily removed obstacles precluding women, based on their sex, from participating in educational opportunities. 20 U.S.C. §1681, *et seq.* Here, Title IX provides that:

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination

under any education program or activity  
receiving Federal financial assistance....  
20 U.S.C. §1681(a).

What does sex mean for the purpose of the Equal Protection Clause and Title IX? Challenges to the advancement of fairness for women in sports occurs when male athletes subjectively self-identify as female. Because they claim legal protection flowing from fluid gender identity formulations, their claims collide with objective biological science showing sex as immutable. Does a policy enabling male athletes to identify as female create an unfair playing field? Does it endanger competing female athletes? Does it unfairly displace scholarships intended for female athletes? Responding to these concerns, university athletic programs, conferences, and associations sought solutions. One of these athletic associations was the National Association of Intercollegiate Athletics (NAIA).

The second largest governing body of collegiate sports, the NAIA, includes 237 institutions in twenty-one conferences. *Amici* SAU President Ellis served on the NAIA Council of Presidents when, at the request of the Council, the Association formed a Task Force in April 2022. <https://www.naia.org/transgender/index> (last accessed Nov. 6, 2024).

Like the NCAA's policy prior to January 2022, NAIA's policy allowed male athletes to compete on women's teams if they asserted a gender identity as female and undertook a year of androgen suppression. *Id.*

The NCAA changed its policy in January 2022 so that the applicable Olympic national governing body (NGB) policy for each sport corresponded to the NCAA's policy for each sport *Id.*<sup>2</sup> *Amici* Ellis, and the rest of the Council of Presidents, subsequently assigned the NAIA's Task Force to review NAIA's existing policies governing sports participation. *Id.* The Council directed the Task Force to ascertain if a need existed to modify current policy. *Id.* If so, the Council further charged the Task Force with proposing recommended changes for the Council of Presidents to consider. *Id.*

Twenty-four months of diligent study ensued, ultimately producing a new policy governing participation and competition on female sports teams. *Id.* The Council of Presidents unanimously approved the policy on April 8, 2024, with an effective date of August 1, 2024. *Id.*

The Task Force and Council of Presidents assiduously avoided stereotyping and stereotypes. Instead, its two-year study demonstrated the relevance of biological sex to "supporting the fair and safe competition opportunities for all student athletes."

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<sup>2</sup> Under International Olympic Committee policy, the NGB for each sport determines whether men may compete against women in female events. For sports where no applicable NGB policy exists, the NCAA expects to use either United States Olympic & Paralympic Committee policy or International Federation Policy. *Id.*

Transgender Participation Policy (April 8, 2024), [https://www.naia.org/transgender/files/TG\\_Policy\\_for\\_webpage\\_v2.pdf](https://www.naia.org/transgender/files/TG_Policy_for_webpage_v2.pdf) (last visited Nov. 6, 2024) (hereafter NAIA Policy)

The underlying foundation for the new policy included: creating a fair playing field; ensuring safety for competing athletes; and precluding male athletes from unfairly taking scholarship positions of female athletes. *Id.*

The Task Force study found that each NAIA male and female sport "includes some combination of strength, speed, and stamina, providing competitive advantages for male student athletes." *Id.*; see also, D. Coleman, *Sex in Sport*, 80 L. AND CONTEMPORARY PROBLEMS 63, 74 (2017)). As to whether NAIA policy should, in female sports, permit men to compete against women, each of these facts rationally relate to, and are necessary for, creating a fair playing field, ensuring safety for competing athletes, and precluding male athletes from unfairly taking scholarship positions of female athletes. Understanding the significant impact of biology in sports competition, the NAIA, therefore, reasonably and necessarily "created separate categories for male and female participants." *NAIA Policy*; see also, *Adams ex rel. Kasper v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 801 (11th Cir. 2022) (applying objective biological understanding of sex as immutable in recognizing inherent difference between boys and girls); *United States v. Virginia*, 518 U.S. 515, 533 (recognizing that "[p]hysical differences between men and women ... are enduring ... [i]nherent differences between men and women, we have come to

appreciate, remain cause for celebration, but not for denigration of the members of either sex or for artificial constraints on an individual's opportunity.")

This Court ought to approach with caution cultural calls to cancel objective biological science in the context of the Equal Protection Clause, and statutes like Title IX. Medical experts in Europe now recognize that the "use of masculinizing / feminizing hormones ... present many unknowns..." INDEPENDENT REVIEW OF GENDER IDENTITY SERVICES FOR CHILDREN AND YOUNG PEOPLE, FINAL REPORT TO NHS ENGLAND, <https://cass.independent-review.uk/home/publications/final-report/> (last visited Nov. 6, 2024). Indeed, the "strengths and weaknesses of the evidence ... are often misrepresented and overstated, both in scientific publications and social debate." *Id.* While "a considerable amount of research has been published in this field, systematic evidence reviews demonstrated the poor quality of the published studies, meaning there is not a reliable evidence base upon which to make clinical decisions, or ... to make informed choices." *Id.*

Moreover, elevating self-identifying subjective gender fluidity over the objective biological truth that sex is immutable results in the unfair and unjust outcomes for female athletes articulated in the Petition. See, Women's Sports Policy Working Group, MALE VICTORIES IN FEMALE SPORTS, <https://womenssportspolicy.org/253-male-victories-in-female-sports/> (last visited Nov. 6, 2024). With this unfairness as a backdrop, it is important to understand that under the NAIA policy *no athlete is*

*prevented from NAIA competition.* To be sure, the policy provides clear lanes as to which category the athlete competes. Thus "[o]nly NAIA student-athletes whose biological sex is female may participate in NAIA-sponsored female sports." *NAIA Policy*. "All eligible NAIA student-athletes may participate in NAIA-sponsored male sports" including "[a] student who has begun masculinizing hormone therapy..." *Id.* In addition to providing every athlete with a fair opportunity to compete, the NAIA policy also recognizes the natural inherent dignity of human beings by ensuring "appropriate privacy protections" for athletes. *Id.*

## CONCLUSION

Male athletes continue to self-identify as female. Subjectively fluid gender identity formulations continue to collide with objective biological science showing sex as immutable. And federal courts continue to split over whether to choose truth or fiction in resolving these cases and controversies arising under the Constitution and laws of the United States. This case provides the opportunity for the Court to resolve the significant Circuit splits outlined in the Petition and restore some sanity to this nation's judicial institutions, just as *Amici* did in the Academy.

For the foregoing reasons, *Amici Curiae* urge this Court to grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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