IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

A.M., by her mother and next friend, E.M., *Plaintiff,* v. INDIANAPOLIS PUBLIC SCHOOLS and SUPERINTENDENT, INDIANAPOLIS PUBLIC SCHOOLS, in her official capacity, *Defendants,* and STATE of INDIANA, *Defendant-Intervenor.*	No. 1:22-cv-1075-JMS-DLP

BRIEF OF AMICI CURIAE FROM FIVE FEMALE ATHLETES IN SUPPORT OF DEFENDANT-INTERVENOR STATE OF INDIANA

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INTRODUCTION

Earlier this year in an Atlanta swimming pool, swimmer Lia Thomas won the NCAA Division I Championships in the 500-yard freestyle—beating two former Olympians in the same race. This event should have exemplified the value of giving women equal opportunities to compete and succeed in athletics. But it didn't. Because Thomas is a male, numerous women lost the opportunity to compete and win that day. Their efforts and accomplishments were erased.

This event illustrates the debate surging across our country about women's sports. Some believe that women deserve an equal opportunity to compete like their male counterparts. Others believe that biological males who identify as female should be allowed to compete in women's sports. Policymakers have also taken different positions. As a result, biological males in many states have begun to compete in and dominate women's sports, taking women's spots in athletic competitions, their place on the podium and in the history books, and their chance to gain scholarships. Faced with this problem, Indiana passed Indiana Code § 20-33-13-4 (the Sports Act) that drew a biological line in defining women's sports, protecting women's ability to compete on a level playing field. This is a valid way to achieve a valid goal. Ultimately, "physical differences between men and women … are enduring: the two sexes are not fungible." *United States v. Virginia*, 518 U.S. 515, 533 (1996) (cleaned up). And this distinction is an "immutable" one, "determined solely by the accident of birth." *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973).

Amici are female athletes from across the country who wish to support Indiana's efforts to protect women's sports. These women have each competed against and lost to men in athletic competitions. They have personally suffered the deflating experience of having opportunities stripped away in the name of so-called progress. Indiana University basketball player Debbie Millbern Powers experienced

the harm and stigma of playing sports before Title IX existed. She then saw some opportunities restored after Title IX passed while she coached girls' volleyball. Runners Selina Soule, Chelsea Mitchell, and Madison Kenyon lost to biological males a combined twenty-seven times. Cynthia Monteleone personally competed against a male athlete and watched her daughter lose first place in a race against a male. Their experiences underscore the need for Indiana's Sports Act and the validity for separating sports based on biology.

Plaintiff A.M. though is a biological male who wants to challenge this distinction and facially enjoin Indiana's law on the theory that biological differences between men and women are mere stereotypes.[1] Not so. A.M. does not contest that Indiana can exclude males who identify as males from women's sports even when those males have less athletic ability than women. This concession proves that biological differences *generally* matter in sports, these differences are not mere stereotypes, and Indiana can validly apply its biological rule even to those few males who may or may not have similar physical abilities to some women. Amici therefore urge the Court to acknowledge that biological differences matter in sports and to deny A.M.'s requested injunction.

ARGUMENT

I. A "drastic" preliminary injunction would be premature at best given the complex factual background before this Court.

A preliminary injunction is an "extraordinary and drastic remedy, one that should not be granted unless the movant, *by a clear showing*, carries the burden of persuasion." *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (emphasis in original);

[1] A.M. seeks to both "enjoin HEA 1041 *and* allow[ ] plaintiff to participate in school sponsored girls' sports teams." Compl. ¶ 73 (emphasis added). So A.M.'s requested relief and legal theory do not turn on the A.M.'s or anyone else's particular physiological characteristics or the medical treatments they receive. A.M.'s legal theory demands that *any male* who identifies as female and who is otherwise qualified must be allowed to compete on women's sports teams.

accord Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 20 (2008). Such an extraordinary measure would be inappropriate here because the factual landscape is rapidly evolving, and the legislature has exercised its reasonable judgment. The Seventh Circuit has recognized that "[o]n an application for preliminary injunction the court is not bound to decide doubtful and difficult questions of law or disputed questions of fact." *Gen. Elec. Co. v. Am. Wholesale Co.*, 235 F.2d 606, 609 (7th Cir. 1956). At the preliminary stage in this case, the parties are doing only limited discovery that cannot fully delve into the latest science or real-world impact on women and so cannot justify the "drastic" act of a preliminary injunction here. *Mazurek*, 520 U.S. at 972. This is especially true because A.M. has little likelihood of success on the merits, as discussed later.

Against a backdrop of women losing to men, sports policies changing, and researchers confirming males' advantages in sports, the Indiana legislature acted. The Sports Act remedies real harms faced by real women and girls, including amici. And the Act promotes fairness and safety for women and girls in sports. There's no need to raise "sheer conjecture and abstraction" about the harm the Act remedies. *Whitaker ex rel. Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1052 (7th Cir. 2017). Fifty years after Title IX's passage, girls are once again becoming an afterthought. The Sports Act seeks to change that. As a legislative judgment about this topic, the Act is an important measure of the public's interest. *See S. Glazer's Distributors of Ohio, LLC v. Great Lakes Brewing Co.*, 860 F.3d 844, 854 (6th Cir. 2017) (public interest would be served by enforcing statute); *Golden Gate Rest. Ass'n v. City & Cnty. of San Francisco*, 512 F.3d 1112, 1127 (9th Cir. 2008) (staying district court's preliminary injunction of city ordinance in part because ordinance was enacted in the public's interest).

Title IX created a space for female athletes when it passed almost 50 years ago to stop discrimination against women in education, and it has come to be

synonymous with women's sports. Debbie Powers experienced the sports world without Title IX and saw its benefits to women once it was enacted.[2] She grew up in the basketball-crazed State of Indiana in the 1950s and mastered her basketball skills on driveways against neighborhood boys. But she was continuously told that sports were for "boys only." When she played basketball at Indiana University, women were not allowed to play in the same arena as men, there were no female scholarships, and at away games, women slept in sleeping bags while men slept in hotels. She watched as Title IX opened a world of new opportunities for women and girls in sports. In 1972, there were just 300,000 women and girls in high school and college sports in the United States. But by 2012, that number had risen ten-fold to more than three million women. Debbie watched this increase in women's sports throughout her life.

But as a volleyball coach in 1975, she watched as her volleyball team was forced to compete against boys because of a frail interpretation of Title IX. Boys that were 6'3", strong, and skilled were allowed to fiercely pound the volleyball high above the girls' net. Debbie saw the impact it had on her girls and as they had to fight to stay in the game.[3] Even 50 years ago, the tenants of Title IX were necessary to protect equal competition in women's sports.

But Debbie's efforts to create equal opportunities in sports is eroding as males are increasingly displacing female athletes across the country. For example, starting in 2017, two male athletes in Connecticut secured 15 women's state championships in track and field. Selina Soule faced these two males in her preliminary race at state championships. Those males bumped Selina from

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[2] *See generally* Debbie Millbern Powers, MEETING HER MATCH: THE STORY OF A FEMALE ATHLETE-COACH, BEFORE AND AFTER TITLE IX (2014).

[3] Debbie's experiences motivated her to submit written testimony to the Indiana Legislature on HEA 1041, sharing her experiences.

advancing to the finals in her event—and she didn't advance to the New England Championships—by two spots. Those spots were taken by males. Chelsea Mitchell lost to these two males on more than twenty different occasions. Selina described the experience as frustrating and demoralizing. Chelsea said it caused her anxiety and stress, which manifested into a negative impact on her athletic performance. When Chelsea's mother complained, she was told that the girls have a right to participate, but not to win.[4]

In Hawaii, Cynthia Monteleone, track coach, track athlete, and mom watched her daughter line up for her first high-school track meet next to a male athlete.[5] This athlete proceeded to run the first 100 meters of the 400-meter race in a time that would have set a women's state record. Cynthia watched as her daughter lost the race, putting her daughter in second place. Not only did this male athlete beat Cynthia's daughter, but Cynthia had to watch this athlete compete against the track team she coached, where one senior cried because she knew there was nothing she could do to win the conference championship. Cynthia had personally experienced this sense of defeat a year and a half earlier when she raced against a male athlete in the World Masters Athletics Championships in Malaga, Spain. Cynthia will not be silent in the face of this psychological and emotional heartbreak of women.

Male athletes have similarly displaced females at the collegiate level. In 2018, CeCe Telfer competed on the Franklin Pierce University's track team after

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[4] *See generally Soule ex rel. Stanescu v. Conn. Ass'n of Schools, Inc.*, Case No. 3:20-cv-00201 (RNC), 2021 WL 1617206 (D. Conn. April 25, 2021), *appeal docketed*, No. 21-1365 (2d Cir. May 26, 2021); Kelsey Bolar, *Connecticut Lawsuit To Protect Girls And Women's Sports Hits Roadblock*, INDEPENDENT WOMEN'S FORUM (Apr. 26, 2021), https://perma.cc/T6K3-V8EJ.

[5] Cynthia Monteleone, *I'm a Team USA World Masters track athlete, mom and coach calling for the protection of women's sports*, FOX NEWS (Feb. 18, 2022, 2:00 AM), https://perma.cc/RZ6Q-L39W.

previously competing on the men's team. That season, Telfer won an NCAA championship after placing first in the women's 400-meter hurdles. Telfer also placed fifth in the women's 100-meter hurdles. Telfer never previously made it to a championship event while competing for the men's team. While Telfer's testosterone levels were too high to compete as a woman at the 2021 U.S. Olympic Trials, Telfer is aiming to compete at upcoming World Championships and the 2024 Olympic Summer Games.[6]

In Montana, June Eastwood competed on the men's cross country and track teams for three years before identifying as a woman and competing on the woman's team. Female athlete Madison Kenyon was surprised during her first collegiate race when she stood at the starting line with a biological male. She described feeling discouraged, frustrated, and defeated. Madison watched as Eastwood bumped her teammate down from the podium after coming in third place. Instead, her teammate placed fourth as Eastwood took first place.[7]

As noted above, Lia Thomas is a male swimmer who recently swam on the University of Pennsylvania's women's swim team. Thomas set two Ivy League records and became an NCAA champion in the 500-yard freestyle, beating two Olympians.[8] Riley Gaines, a female swimmer from the University of Kentucky, tied

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[6] Jill Martin, *Transgender runner CeCe Telfer is ruled ineligible to compete in US Olympic trials*, CNN (June 25, 2021, 1:08 PM), https://perma.cc/PJY8-7RRN; Dawn Ennis, *Trans All-American CeCe Telfer Featured in Women's Sports Equality Campaign*, FORBES (Sept. 14, 2021), https://www.forbes.com/sites/dawnstaceyennis/2021/09/14/trans-all-american-cec-telfer-featured-in-womens-sports-equality-campaign/?sh=64e6e2d04c3c.

[7] Madison Guernsey, *Two ISU athletes file motion in support of Idaho's transgender sports ban*, IDAHO STATE J. (May 27, 2020), https://perma.cc/MF3S-NEBA.

[8] Both Emma Weyant and Erica Sullivan won individual medals in the Tokyo 2020 Olympic Games. *See* International Olympic Committee, *Tokyo 2020 Swimming Women's 400M Individual Medley Results*, https://perma.cc/NR4K-7TY2 (last visited June 16, 2022); *Tokyo 2020 Swimming Women's 1500M Freestyle Results*, https://perma.cc/U9TB-EFHL (last visited June 16, 2022).

for fifth place with Thomas in the 200-yard freestyle.[9] The single fifth-place trophy was given to Thomas rather than Riley, and Riley was told she could pose with the sixth-place trophy instead.[10] "[I]t's so blatant that it's unfair," Riley said.[11] The NCAA also allows females who identify as male to "participate on a men's or women's team" so long as they are "not taking testosterone related to gender transition."[12] This allowed Iszac Henig, a female who identifies as male, to compete at the same NCAA championships as Lia Thomas.[13] There have been similar stories of males displacing females across the country and even the entire world.[14]

Professional organizations and sports leagues have taken varied approaches. The International Olympic Committee ("IOC") and the NCAA allow some but not all males who identify as female to compete on women's teams.[15] World Rugby recently issued guidelines excluding nearly all biological males from women's rugby because

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[9] Editorial Staff, *Riley Gaines: "I Left There With No Trophy" After Tie With Lia Thomas*, SWIMMING WORLD, (Mar. 24, 2022, 4:30 PM), https://perma.cc/LKK2-FVY6.

[10] *Id.*

[11] Valerie Richardson, *Kentucky's Riley Gaines makes splash by blasting 'unfair' rules after swimming against Lia Thomas*, WASH. TIMES (Apr. 14, 2022), https://perma.cc/8XKL-KDTP.

[12] 2010 NCAA Policy on Transgender Student-Athlete Participation, https://perma.cc/J5WY-7A67.

[13] *See* Tigerlily Hopson & Toia Conde Rodrigues da Cunha, *Swimming & Diving: 'It Feels Like Flying:' Iszac Henig '23 soars on women's swim team*, YALE NEWS (Feb. 3, 2022), https://perma.cc/P56V-P6B2.

[14] Chuck Culpepper, *New Zealand weightlifter Laurel Hubbard makes Olympic history as a transgender athlete*, WASH. POST (Aug. 2, 2021), https://perma.cc/TN82-B2LX; *Transgender Track Star Stirs Controversy Competing In Alaska's Girls' State Meet Championships*, CBSNEWS.COM (June 8, 2016), https://perma.cc/M8KR-EHBG.

[15] Even with the NCAA's prescribed regimen of testosterone suppression, Lia Thomas still managed to beat two Olympic champions in a single race. The NCAA and the IOC organizations abandoned their previous policies for a "sport-by-sport approach" that will become effective later this year. NCAA Transgender Student-Athlete Participation Policy, https://perma.cc/AV9C-EE4X (last visited April 21, 2022).

of the injury risk to females.[16] And just last month, in May 2022, the World Swimming Coaches Association (WSCA) released a position statement advocating to separate swimming divisions based on "birth sex" and potentially to create a new "Trans Division."[17] As the WSCA stated, "[c]ompetitive fairness cannot be reconciled with self-identification into the female category in a gender-affected sport such as swimming."[18]

Meanwhile, the science about men playing in women's sports is rapidly evolving. As men have begun dominating women's sports, the science has increasingly shown males' advantage in sports and in so doing undermined A.M.'s claims. But A.M. asserts that "[t[here is a medical consensus" that the largest factor of athletic differences between males and females is "the elevated levels of testosterone" that occur during puberty. Compl. for Declaratory and Injunctive Relief (Compl.) ¶ 34, ECF No. 1. A.M. also claims that once on puberty blockers, A.M. will "not experience the increase in muscle mass and other muscle development" that comes with puberty (*id.* ¶ 29–30) and A.M. will therefore have "no competitive athletic advantage as compared to other girls." Mem. in Supp. of Mot. for Prelim. Inj. (Br.) 11, ECF No. 24. That is not true.

While the male advantage widens during puberty, it exists in most athletic tests before puberty and is particularly pronounced in upper body strength. A.M. plays on the softball team and therefore benefits from the male advantage of throwing, which "represents the widest sex difference in motor performance from an

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[16] World Rugby, *Transgender Women Guidelines*, https://perma.cc/HP6H-6NCV.

[17] World Swimming Coaches Association, *Position Statement on Transgender Swimming*, https://perma.cc/D9VS-5ZH8 (last visited June 16, 2022).

[18] *Id.*

early age."[19] This upper-body advantage derives from physiological advantages in body composition, muscle mass, muscle strength, bone structure, tendon properties, aerobic output, respiratory function, and cardiovascular function.

The emerging evidence also shows that medical interventions, such as testosterone suppression, do not eliminate the male performance advantage. As Hilton and Lundberg (2021) detail, the data shows that following testosterone suppression, "strength, lean body mass, muscle size and bone density are only trivially affected."[20] Joanna Harper, a male athlete who identifies as female, recently published a literature review on the effects of testosterone suppression and found that "the small decrease in strength in transwomen after 12–36 months of [testosterone suppression] suggests that transwomen likely retain a strength advantage over cisgender women."[21] The science may be evolving, but the initial results are in. These studies repudiate or at the very least urge caution to those who would separate sports based on gender identity rather than biological sex. At minimum, the emerging literature indicates that this Court should not act drastically without full discovery; A.M. cannot carry "*by a clear showing*" the burden of persuasion without refuting the most recent scientific studies. *Mazurek*, 520 U.S. at 972.

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[19] Hilton, E.N. & Lundberg, T.R., *Transgender Women in the Female Category of Sport: Perspectives on Testosterone Suppression and Performance Advantage*, 51 SPORTS MED. 199, 203 (2021), doi: 10.1007/s40279-020-01389-3. Indeed, boys exceed girls in throwing velocity by 1.5 standard deviations as early as 4 years old, and that advantage expands to 3 standard deviations by 9 years old.

[20] *Id.*

[21] Harper, J., et al., *How does Hormone Transition in Transgender Women Change Body Composition, Muscle Strength and Haemoglobin? Systematic Review with a Focus on Implications for Sport Participation*, BR. J. SPORTS MED. (Mar. 1, 2021), doi: 10.1136/bjsports-2020-103106 (published online ahead of print).

II. The Act complies with the Equal Protection Clause.

Equal protection "protects individuals against intentional, arbitrary discrimination by government officials." *Hayden ex rel. A.H. v. Greensburg Cmty. Sch. Corp.*, 743 F.3d 569, 577 (7th Cir. 2014). To prove a claim, A.M. must show that A.M. was "a member of a protected class," that A.M. "was treated differently from a similarly situated member of an unprotected class," and that the differential treatment was "motivated by a discriminatory purpose." *Alston v. City of Madison*, 853 F.3d 901, 906 (7th Cir. 2017). Courts apply some form of heightened scrutiny "if the state-crafted classification disadvantages a suspect" or quasi-suspect class. *St. Joan Antida High Sch. Inc. v. Milwaukee Pub. Sch. Dist.*, 919 F.3d 1003, 1008 (7th Cir. 2019).[22]

The Act does not violate equal protection: (A) the Act does not invidiously discriminate based on gender identity, and (B) it draws lawful distinctions based on sex because sex matters in sports while (C) gender identity does not. So the Act legitimately protects biological females from competition against males because (D) the Act validly applies to A.M., regardless of A.M.'s physiology or gender identity and (E) gender identity is not a suspect class.

A. The Act does not discriminate based on gender identity, but draws a line based on biology.

A.M. asks the Court to "enjoin[ ] [the Sports Act]" because it makes "an explicit distinction … based on transgender status," because "[a]ll girls can play" on the girls' team but males who identify as girls can't. Compl ¶ 73; Br. at 15. Not so.

[22] A.M.'s claims arguably attack the Sports Act only for discriminating on the basis of transgender status. Because the Act makes no such distinction and transgender status is not a protected classification under the Equal Protection Clause (§§ II.A, E), A.M.'s raised objections should be subject only to rational-basis review. But to the extent A.M. challenges the Act for making invalid biological distinctions or for applying to A.M. because of biological-sex distinctions, this Court should still uphold the Act under intermediate scrutiny, as amici explain in Section II.

First, the Act doesn't say anything about gender identity so it does not explicitly distinguish based on transgender status. "[T]he statute in fact is facially neutral and applies to everyone who seeks to" participate in sports, regardless of their identity. *Snyder v. O'Bannon*, No. 99-1098, 1999 WL 569013, at *1 (7th Cir. Aug. 2, 1999).

"The fact that this statute affects a [certain] group … does not necessarily mean that the statute classifies on the basis of [that groups characteristics]." *St. John's United Church of Christ v. City of Chicago*, 502 F.3d 616, 639 (7th Cir. 2007). A law that demands a social security number to register a car doesn't classify based on religion, even though some people think "that the Social Security Number is the mark of the beast." *Snyder*, No. 99-1098, 1999 WL 569013, at *1. And a law that demands veterans be considered before qualifying non-veterans does not discriminate against women even if the majority of veterans are men. *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 274-75 (1979).

When a statute is facially neutral, courts conduct a "twofold inquiry." *Id.* at 274. "The first question is whether the statutory classification is indeed neutral in the sense that" it is not "overtly or covertly designed to prefer" a certain class. *Id.* at 273–74. "[T]he second question is whether the adverse effect reflects invidious … discrimination." *Id.* at 274.

The Act is not a "covert" attempt to disfavor athletes who identify as transgender. A law that favors veterans doesn't covertly favor men, even if veterans are 98% male. *Id.* at 270, 274. And a law that disfavors abortion doesn't covertly discriminate against women, even though only women can procure an abortion. *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 271 (1993) (quoting *Geduldig v. Aiello*, 417 U.S. 484, 496 n.20 (1974)). Here, the Act limits half the population: biological males. So there's a stark "lack of identity" between the Act's sex-based classification and transgender persons. *Geduldig*, 417 U.S. at 496 n.20.

"Too many men are affected … to permit the inference that the statute is but a pretext" for disfavoring transgender persons. *Feeney*, 442 U.S. at 275; *see also Geduldig*, 417 U.S. at 496 n.20 (pregnancy distinction did not distinguish based on sex because "nonpregnant" category "includes members of both sexes").

So a "disparate impact does not violate the equal protection clause." *Bond v. Atkinson*, 728 F.3d 690, 692-93 (7th Cir. 2013). "Most laws classify, and many affect certain groups unevenly, even though the law itself treats them no differently from all other members of the class described by the law." *Feeney*, 442 U.S. at 271–72. These types of "uneven effects upon particular groups within a class are ordinarily of no constitutional concern" unless there is a "reason to infer antipathy." *Id.* at 272; *see also Bray*, 506 U.S. at 272–73 (regulations "disfavoring… abortion" are "not *ipso facto* sex discrimination").

So A.M.'s attempts to invalidate the Act because A.M. will suffer "negative emotional consequences" and interrupt A.M.'s social transition are not persuasive. Br. at 10, 29. On this theory, any person who is negatively impacted by legislation would be able to invalidate it on equal-protection grounds even if the law facially treated everyone the same. What's more, A.M. states that while A.M. is looking forward to playing softball again in the fall, A.M. would "like to continue to play girls' team sports" throughout school. Decl. of E.M. ¶ 27, ECF No. 8-2. This claim sets A.M. up for multiple opportunities to claim injury for multiple sports while making all girls' sports a target for these types of claims. Equal- protection cases are not decided on these individualized injuries.

Plus, any disparate impact is "plausibly explained on a neutral ground." *Feeney*, 442 U.S. at 275. Sex-based distinctions necessarily overlap a person's gender identity or contradict it. So excluding males who identify as female from women's sports "is essentially an unavoidable consequence of a legislative policy that has in itself always been deemed to be legitimate." *Id.* at 279 n.25. That

resolves this question because the Act treats A.M. no different than other males, even if (according to A.M.) it affects A.M. more than many males.

Nor should this Court assume that everyone with gender dysphoria desires to play on the sports team that accords with their gender identity. "[T]he transgender community is not a monolith." *Doe 2 v. Shanahan*, 917 F.3d 694, 722 (D.C. Cir. 2019) (Williams, J., concurring); *see also id.* at 701 (Wilkins, J., concurring) (same). As previously mentioned, athletes like Iszac Henig, a female swimmer, compete at the highest levels of collegiate women sports, even though Henig identifies as male.[23]

So "[t]o obtain relief, [A.M.] must show intentional discrimination." *Bond*, 728 F.3d at 693. But there is no evidence of that here. A.M.'s only argument is that any law in any context with a biology-based classification invidiously discriminates because it necessarily places persons who identify as transgender in the "wrong" category. But the Supreme Court has said just the opposite and "consistently upheld statutes where the gender classification … 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) (plurality opinion)

B. The Act makes valid distinctions based on biological sex because sex matters in sports.

"The core concern of the Equal Protection Clause [is] as a shield against arbitrary classifications." *Engquist v. Or. Dep't of Agric.*, 553 U.S. 591, 598 (2008). "Quite naturally, those who seek benefits denied them by statute will frame the constitutional issue in a manner most favorable to their claim," but "[t]he proper classification for purposes of equal protection analysis … must begin with the statutory classification itself." *Califano v. Boles*, 443 U.S. 282, 293–94 (1979).

[23] Hopson, *supra* note 13.

Here, the Act draws a sex-based distinction by requiring that schools separate teams "based on a student's biological sex." Indiana Code § 20-33-13-4(b). Males "may not participate on an athletic team or sport designated … as being a female, women's, or girls' athletic team or sport." *Id.* But teams for males may be open to anyone.

So this case is about biological sex, and the Equal Protection Clause does not make sex "a proscribed classification." *United States v. Virginia*, 518 U.S. 515, 533 (1996). "A community made up exclusively of one sex is different from a community composed of both." *Id.* (cleaned up). So Indiana need only show "that the [sex-based] classification serves important governmental objectives" and that the "means employed are substantially related to the achievement of those objectives" to show that the classification is valid. *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982) (internal quotation marks omitted).

The Supreme 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.*, 450 U.S. at 469 (1981). For example, laws may penalize just males for having sex with underage females because of the risks of pregnancy. *Id.* at 471–73. And laws can impose "a different set of rules" to prove biological parenthood "with respect to fathers and mothers," because of "the unique relationship of the mother to the event of birth." *Tuan Anh Nguyen v. I.N.S.*, 533 U.S. 53, 63–64 (2001).

In the context of sports too, "[t]he difference between men and women … is a real one." *Id.* at 73. There is "an undeniable difference" in physiology between men and women. *Id.* at 68. And "due to average physiological differences, males would displace females to a substantial extent if they were allowed to compete" for the same teams. *Clark v. Ariz. Interscholastic Ass'n* (*Clark I*), 695 F.2d 1126, 1131 (9th Cir. 1982). Indeed, "the great bulk of the females would quickly be eliminated from

participation and denied any meaningful opportunity for athletic involvement," without distinct teams. *Cape v. Tenn. Secondary Sch. Athletic Ass'n*, 563 F.2d 793, 795 (6th Cir. 1977).

These differences also matter for safety. That's why World Rugby recently issued guidelines excluding biological males because it "concluded that safety and fairness cannot presently be assured for women competing against transwomen in contact rugby.".[24] It said that the women's category was created "to ensure protection, safety and equality" for those who do not benefit from biological advantages. World Rugby, *supra* note 16; *see also Kleczek v. R.I. Interscholastic League, Inc.*, 612 A.2d 734, 739 (R.I. 1992) (sex "classifications … will help promote safety).

A.M. doesn't seem to dispute that it's acceptable for boys and girls to compete separately, or that Indiana can validly exclude 99% of males from women's teams. *See* Br. at 5 (stating less than 1% of Indiana's population identifies as transgender). In fact, some form of sex-separated teams is necessary for A.M. to state a claim given that A.M. wants to participate on the girls' softball team. Br. at 13. This "poses the question: Where's the sex discrimination?" *Bond*, 728 F.3d at 692.

Instead of arguing that the Act discriminates against males or females as a class, A.M. argues that the Act draws sex stereotypes. But A.M.'s concessions disprove this. Even A.M. agrees that sex-separated teams are constitutional in most applications. This concession necessarily dooms A.M.'s request to facially enjoin the Sports Act. No one here does or can plausibly think that the Act is unconstitutional in every application. *See Ezell v. City of Chicago*, 651 F.3d 684, 698 (7th Cir. 2011) ("[A] law is not facially unconstitutional unless it 'is unconstitutional in all of its applications.'" (citing *United States v. Salerno*, 481 U.S. 739, 745 (1987))).

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[24] World Rugby, *World Rugby approves updated transgender participation guidelines* (Oct. 9, 2020), https://perma.cc/GHG6-LGN5.

But A.M.'s concession also means that sex-separated teams can't discriminate based on sex stereotypes or "a failure to conform to stereotypical gender norms." *Whitaker*, 858 F.3d at 1049. If Indiana can use a biological distinction to exclude some males and that distinction is not a sex stereotype there, the same distinction is not a sex stereotype when applied to A.M.

Whitaker ex rel. v. Kenosha Unified School District No. 1 Bd. of Education does not help A.M. either. *Contra* Br. at 17–18. *Whitaker* merely upheld a preliminary injunction against a school's continually changing practice of singling out and excluding a female from boy's restrooms because that student was transgender. 858 F.3d at 1054. But Indiana's Act creates a uniform biological rule that applies regardless of anyone's transgender status.

To be sure, *Whitaker* held that "transgender students" could bring "sex-discrimination claims based on a theory of sex-stereotyping" like any other party. 858 F.3d at 1047. But *Whitaker* did not question the validity of all biological distinctions, much less the use of biological distinctions in sports where they matter most. *Whitaker* simply does not speak to this situation, nor undermine the State's ability to draw biological distinctions.

If anything, *Whitaker* supports Indiana because *Whitaker* assumes that the concept of biological sex is valid and not a sex stereotype. One version of the changing policy in *Whitaker* required students to use the bathroom aligning with the "sex listed on the student's birth certificate." *Id.* at 1051.[25] But the Court questioned whether a birth certificate can be used as a "proxy for an individual's biological sex" as it can be changed and could reflect a different sex than the "individual's chromosomal makeup," which is "a key component of one's biological

[25] The Court said it would refer to the school district's bathroom policy as a "policy" even though it is "unwritten and its exact boundaries are unclear." *Whitaker*, 858 F.3d at 1039, n.2.

sex." *Id.* at 1053.[26] So *Whitaker* faulted the school for not drawing a *consistent* biological distinction. But the Sports Act draws a biological distinction consistently and does not draw a distinction based on mere paperwork or stereotypes.

Indeed, sex-separated teams are "based on the innate physical differences between the sexes, rather than on generalizations that are 'archaic' or attitudes of romantic paternalism." *Clark I*, 695 F.2d at 1130 (cleaned up) (quoting *Petrie v. Ill. High Sch. Ass'n*, 394 N.E.2d 855, 862 (1979)). And far from being the exception, Indiana's law is part of a "long-standing tradition in sports of setting up classifications whereby persons having objectively measured characteristics likely to make them more proficient are eliminated from certain classes of competition." *Petrie*, 394 N.E.2d at 861. Heavyweight boxers and wrestlers can't compete in lighter weight classes, and high school seniors can't compete on teams reserved for freshman. *See id.* "There is no stigma attached to a person eliminated by this system from competing in a class in which that person might have undue advantage." *Id.* at 861–62.

But on A.M.'s legal theory, states could never establish a biological classification to help biological women because every biological distinction is a sex stereotype. That cannot be correct. It would upend at least 50 years of equal-protection jurisprudence and silently reverse Supreme Court decisions upholding laws that favored "female wage earners to compensate for past employment discrimination," *Califano v. Webster*, 430 U.S. 313, 318 (1977), or validating the government's ability to require "every male citizen" between 18 and 26 to register for the draft, *Rostker v. Goldberg*, 453 U.S. 57, 59 (1981). It would mean the State

[26] A.M. "did not raise this issue" and challenge the majority of the applications of sex-separated sports and thus concedes this point. *Washington v. Indiana High Sch. Athletic Ass'n, Inc.*, 181 F.3d 840, 844 (7th Cir. 1999).

could never separate men's and women's sports, even when a biological male who identifies as a man wants to compete against women.

A.M.'s theory would produce seismic consequences elsewhere too. Consider homeless shelters for women who "have escaped from sex trafficking or been abused or battered, primarily at the hands of men." *Downtown Soup Kitchen v. Mun. of Anchorage*, 406 F. Supp. 3d 776, 781 (D. Alaska 2019) (granting injunction against local law forcing women's homeless shelter to accept biological males). Or what about nudity ordinances that differentiate between men and women to protect "traditional moral norms and public order." *Tagami v. City of Chicago*, 875 F.3d 375, 379 (7th Cir. 2017). Or what about sex separation that makes immanent sense in prisons or jails, where "female and male inmates are not housed together" because of the "serious and real" risk of harassment, assault, rape, and even murder. *De Veloz v. Miami-Dade Cnty.*, 756 F. App'x 869, 877 (11th Cir. 2018). Sex matters for safety in sports too, which is why World Rugby recently issued its updated guidelines, as discussed above.

A.M.'s theory would also invalidate laws like Title IX that allow sex classifications in military schools, 34 C.F.R. § 106.13, dormitories, *id.* § 106.32, sororities and fraternities, *id.* § 106.14, and, of course, school athletics, *id.* § 106.41. These laws cannot be squared with A.M.'s equal-protection claim.

C. The Act validly protects only biological females because sex matters in sports while gender identity does not.

Though the analysis above settles this case, it's worth explaining where A.M.'s analysis goes wrong. It starts with A.M.'s claim that males who take puberty blockers and identify as female are similarly situated to biological females. Br. at 20, 23. Based on this premise, A.M. believes that Indiana must treat A.M. like a girl in sports. That is not correct.

To be "similarly situated" under equal protection, comparators must be alike in "all relevant respects." *Nordlinger v. Hahn*, 505 U.S. 1, 8, 10 (1992); *see also Reed v. Freedom Mortg. Corp.*, 869 F.3d 543, 549 (7th Cir. 2017) ("'Similarly situated' means directly comparable in all material respects."). "[W]hat is 'different' and what is 'the same'" depends on "the nature of the problem" that is being solved. *Plyler v. Doe*, 457 U.S. 202, 216 (1982).

Here, the State validly seeks to promote athletic opportunities for female athletes by excluding male competitors from the women's division. "There is no question" that promoting equal athletic opportunities for female athletes "is a legitimate and important governmental interest." *Clark I*, 695 F.2d at 1131.

So the question here is straightforward: is A.M. (a biological male who identifies as a girl) similarly situated to female athletes when it comes to promoting athletic opportunities *for biological females*? To ask the question is to answer it. A.M. can't be similarly situated to the female athletes that the State seeks to protect when the relevant characteristic of the protected class is their biological sex. If a male athlete were allowed to displace even "one [female] player … the goal of equal participation by females in interscholastic athletics is set back, not advanced." *Clark v. Ariz. Interscholastic Ass'n* (*Clark II*), 886 F.2d 1191, 1193 (9th Cir. 1989).

A.M. simply "misconceives the nature of … the governmental interest at issue." *Nguyen*, 533 U.S. at 69. Instead of protecting fair competition for women according to biology, A.M. demands that the State promote fair competition according to gender identity.

But sex can only "be used as a proxy" for athletic ability and performance "if it is an accurate proxy" for the "average real differences between the sexes." *Clark I*, 695 F.2d at 1131 (emphasis added); *see Craig v. Boren*, 429 U.S. 190, 204 (1976) (sex classification valid if "sex represents a legitimate, accurate proxy" for permissible objective). So "[t]here is nothing irrational or improper in the recognition" of the

biological differences between the sexes. *Nguyen*, 533 U.S. at 68. After all, sex "is an immutable characteristic determined solely by the accident of birth." *Frontiero*, 411 U.S. at 686. And there is "an undeniable difference" in physiology between men and women when it comes to sports. *Nguyen*, 533 U.S. at 66.

In contrast, distinguishing athletes according to gender identity makes little sense. Gender identity is, according to A.M., "one's sense of oneself." Decl. of James D. Fortenberry (Fortenberry Decl.) ¶ 11, ECF No. 8-1. Some persons who identify as transgender may undergo "social transition, hormone therapy, and surgical interventions." *Shanahan*, 917 F.3d at 708 (Williams, J., concurring). But "not all transgender persons opt to complete a surgical transition" because of "the significant risks and costs that accompany such procedures." *Whitaker*, 858 F.3d at 1041. And "not … every person wants to take steps necessary to live in accord with his or her preferred gender (rather than his or her biological sex)." *Shanahan*, 917 F.3d at 722 (Williams, J. concurring). The upshot is that classifying sports teams according to gender-identity doesn't promote fairness or safety for anyone.

Besides, even if "specific athletic opportunities could be equalized more fully in a number of ways," that doesn't invalidate Indiana's chosen method here. *Clark I*, 695 F.2d at 1131. Perhaps "participation could be limited on the basis of specific physical characteristics other than sex." *Id.* Perhaps participation by males "could be allowed but only in limited numbers," *id.*, or they could give "boys an opportunity to play [women's sports] through a quota system," *Petrie*, 394 N.E.2d at 863. "Instead, [Indiana] enacted an easily administered scheme to promote the different but still substantial interest of ensuring" men could not displace women in competitive or contact sports. *Nguyen*, 533 U.S. at 69. And it's acceptable that "the alternative chosen may not maximize equality, and may represent trade-offs between equality and practicality." *Clark I*, 695 F.2d at 1131–32; *Nguyen*, 533 U.S.

at 69 (same); *see also Petrie*, 394 N.E.2d at 862 (classification based on physical parity "would be too difficult to devise").

D. Indiana can apply its law to A.M. no matter A.M.'s gender identity or physiology.

On top of trying to redefine the state's interest, A.M. incorrectly asserts that A.M. use of puberty blockers—which allegedly eliminate an athletic advantage over females—weakens the state's interest in enforcing the Act against A.M. But focusing on A.M.'s particular characteristics "misconceives … the manner in which we examine statutes alleged to violate equal protection." *Nguyen*, 533 U.S. at 69.

"In assessing an equal protection challenge, a court is called upon only to measure the basic validity of the legislative classification." *Feeney*, 442 U.S. at 272. And "the validity of the [law] depends on the relation it bears to the overall problem the government seeks to correct, not on the extent to which it furthers the government's interests in an individual case." *Ward v. Rock Against Racism*, 491 U.S. 781, 801 (1989) (discussing narrow tailoring).

Remember, the government need only show that the "means employed are *substantially* related to the achievement of [its] objectives." *Hogan*, 458 U.S. at 724 (emphasis added) (cleaned up). And "this question cannot be answered by limiting the inquiry to whether the governmental interest is directly advanced as applied to a single person or entity." *United States v. Edge Broad. Co.*, 509 U.S. 418, 427 (1993). Instead, Indiana can "protect its interest by applying a prophylactic rule," and it need not "go further and to prove that the state interests … were advanced by applying the rule in [A.M.'s] particular case." *Id.* at 431.

The Seventh Circuit applied this principle in a similar case where a female middle schooler (named Karen) sued to play on a boys' basketball team. *O'Connor v. Bd. of Educ. of Sch. Dist. No. 23*, 645 F.2d 578, 581 (7th Cir. 1981). The equal-protection analysis there did not turn on her individual circumstances or "the

advantages she would gain from the higher level of competition in the boys' program." *Id.* (quoting *O'Connor v. Bd. of Ed. of Sch. Dist. 23*, 449 U.S. 1301, 1306 n.4 (1980) (Stevens, J., in chambers)). Instead, it turned on "whether it [was] permissible for the defendants to structure their athletic programs by using sex as one criterion for eligibility." *Id.* The "general rule" cannot "be unconstitutional simply because it appears arbitrary in an individual case." *Id.*

O'Connor controls this case. Like A.M., Karen sued to participate on the team for the opposite sex because she felt it was the only team that was appropriate for her. *Id.* at 579 (explaining that the plaintiff was "a good athlete … equal to that of a male eighth-grade player."). Like A.M., she "refus[ed] to try out" for the boys' team. *Id.* at 583. And like the Sports Act, "the separation of boys' and girls' programs" in *O'Connor* existed "to prevent male domination of the sports program." *Id.* at 580. The defendants in *O'Conner* even "concede[d] that their policy [was] arbitrary as applied to Karen." *O'Connor v. Bd. of Educ. of Sch. Dist. 23*, 545 F. Supp. 376, 379 (N.D. Ill. 1982). But the Court still upheld the application against Karen anyway because the Court looked at the regulations effect on the class as a whole, not the individual. *O'Connor*, 645 F.2d at 581.

This Court should apply the same analysis. The question here is whether Indiana can distinguish between females as a class and males as a class, not whether the State can distinguish between females as a class and males *like A.M.* *Contra* Br. at 22–23. A.M. seems to agree with the principle; A.M. just prefers a different classification. A.M. wants everyone to participate on the team that matches their gender identity because biology-based laws are (according to A.M.) discriminatory. But A.M. cannot force the State to make this judgment as a matter of constitutional requirement.

Nor can A.M. avoid these principles by labeling this lawsuit an as-applied challenge to allow A.M. to participate on "girls' sports teams." Compl. ¶ 73.

"[C]lassifying a lawsuit as facial or as-applied … does not speak at all to the substantive rule of law necessary to establish a constitutional violation." *Bucklew v. Precythe*, 139 S. Ct. 1112, 1127 (2019). Under intermediate scrutiny, Indiana need not show that the Act is "capable of achieving its ultimate objective in every instance." *Nguyen*, 533 U.S. at 70. Indeed, if the law must be perfectly tailored to A.M.'s circumstances, then this Court would be applying strict scrutiny, not intermediate scrutiny, and this Court would need to invalidate all sex-separated sports because girls' and boys' teams will never achieve perfect fairness or parity in competition.

So even though A.M. makes much of A.M.'s personal circumstances, they are irrelevant to the constitutional analysis. *Ezell*, 651 F.3d at 697 (cleaned up) ("In a facial constitutional challenge, individual application facts do not matter …. the plaintiff's personal situation becomes irrelevant"). "[I]ntermediate scrutiny requires … a fit that is not necessarily perfect, but reasonable." *Id.* at 708 (quoting *Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989)). One "that employs not necessarily the least restrictive means but … a means narrowly tailored to achieve the desired objective." *Fox*, 492 U.S. at 480.

A.M.'s concession that sex-separated sports are generally valid proves the point and resolves this case. "Like all systems of classifications for competition," sex separation "is overbroad and underbroad in that it includes females who are athletically superior to many males and excludes males who are less well-endowed athletically than most females" too. *Petrie*, 394 N.E.2d at 862. That doesn't invalidate biology-based classifications though. And if any classification system is arbitrary, it's separating athletes according to gender identity alone, because that is not even rationally related to promoting fairness and safety. *See supra* at II.A.

Think about it: if the State can exclude males from girls' sports when those males identify as male and have similar athletic abilities as girls (group A), it must

be permissible to exclude males who identify as female and have similar athletic abilities as girls too (group B). After all, both groups are similar to girls as to athletic ability. But letting group B participate in girls' sports while excluding group A would discriminate based solely on gender identity—the very thing A.M. complains of. In this respect, A.M.'s argument could be used by any male to challenge sex-based sports distinctions.

E. Gender identity is not a suspect class.

Even though the Sports Act draws a line based on biology, not gender identity, A.M.'s arguments fail for another independent reason. The Supreme Court and the Seventh Circuit have never found gender identity to be a suspect or quasi-suspect class under equal protection. This Court shouldn't either for four reasons.

First, A.M.'s cites *Whitaker* to say that transgender persons should be subject to "heightened scrutiny" (Br. at 22), but *Whitaker* did not reach that question. The Court in *Whitaker* said, "this case does not require us to reach the question of whether transgender status is per se entitled to heightened scrutiny." *Whitaker*, 858 F.3d at 1051.

Second, transgender persons aren't a "discrete and insular" group objectively defined by immutable characteristics. *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 313 (1976). Unlike race, sex, and national origin, which are fixed and "determined solely by the accident of birth," *Frontiero*, 411 U.S. at 686, the term transgender is more like a catchall, describing anyone whose gender identities are "not congruent with their sex as assigned at birth." Compl. ¶ 18. Gender dysphoria may arise in childhood, but also may arise when a "transgender person experiences a constant sense of distress" because of their gender identity. Compl. ¶ 20. Some may choose to socially transition or undergo hormone therapy. Compl. ¶¶ 26, 27. Others will not.

Some may experience "both a male and female gender identity."[27] Others may "renounce any gender identity" altogether. *Id.* And some may even experience "a continuous and rapid involuntary alternation" between genders. *Id.* The transgender community is not all the same, where "every person wants to take steps necessary to live in accord with his or her preferred gender (rather than his or her biological sex)." *Shanahan*, 917 F.3d at 722 (Williams, J, concurring in the result) *see id.* at 701 (Wilkins, J., concurring) (same). Yet A.M. alleges that these choices are all relevant. Compl. ¶ 46–51. "How this large and diversified group is to be treated under the law is a difficult … matter," and should not be decided by "the perhaps ill-informed opinions of the judiciary." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 442–43 (1985).

There has also been a significant rise in the number of transgender individuals desisting from their transgender identity in recent years. In 2014, it was challenging for a desister to find another person who had "similarly detransitioned."[28] But now these communities are growing. *Littman*, *supra* note 28. In 2021, Lisa Littman of Brown University conducted a study of 100 teenage and young adults who had transitioned and eventually detransitioned. Sixty percent reported they desisted because they were more comfortable living in their biological sex. *Id.* With such a large insurgence of individuals reverting back to their biological sex, it is hard to classify the transgender status as an "immutable characteristic." *Frontiero*, 411 U.S. at 686.

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[27] Hembree, W.C., et al., *Endocrine Treatment of Gender-Dysphoric/Gender Incongruent Persons: An Endocrine Society* Clinical Practice Guideline*, 102 J. CLIN. ENDOCROL. METAB. 3869 (2017), doi: 10.1210/jc.2017-01658.
[28] Littman, L., *Individuals Treated for Gender Dysphoria with Medical and/or Surgical Transition Who Subsequently Detransitioned: A Survey of 100 Detransitioners*, 50 ARCH. SEX. BEHAV. 3353 (Oct. 2019), doi: 10.1007/s10508-021-02163-w.

Third, "the distinctive legislative response, both national and state," to societal difficulties faced by transgender persons "belies a continuing antipathy or prejudice and a corresponding need for more intrusive oversight by the judiciary." *Cleburne*, 473 U.S. at 443. Congress has considered a bill now that would make gender identity a protected status under federal laws. Equality Act, H.R. 5, 117th Cong. § 2 (2021). And 21 states and around 330 municipalities make gender-identity discrimination illegal.[29]

Fourth, this "legislative response … negates any claim that [transgender persons] are politically powerless." *Cleburne*, 473 U.S. at 445. A class that can "attract the attention of the lawmakers," *id.*, doesn't need "extraordinary protection from the majoritarian political process." *Murgia*, 427 U.S. at 313.

Courts should be "very reluctant" to create new suspect categories. *Cleburne*, 473 U.S. at 441. The way a law impacts society is a "legislative" choice, "not a judicial responsibility." *Feeney*, 442 U.S. at 272.

III. The Act complies with Title IX.

To succeed on a Title IX claim, A.M. must show that the Act discriminates against A.M. "on the basis of sex." *O'Connor*, 645 F.2d at 582. The Act does no such thing: (A) Title IX deals with sex, not gender identity, (B) the Act can exclude A.M. from girls' sports because A.M. is not similarly situated to girls in this context; and (C) Title IX sometimes requires sex-separated teams in sports.

A. Title IX deals with sex, not gender identity.

A.M. does not challenge sex-separated athletics under Title IX. Instead, A.M. asserts that Title IX requires schools to permit athletes to compete on the team that matches their gender identity. Not true.

[29] Movement Advancement Project, *Local Nondiscrimination Ordinances*, https://bit.ly/2Xozqbo (last visited June 15, 2022).

A.M.'s argument depends on reading 'gender identity' into the word 'sex' under Title IX. But gender identity and "transgender status are distinct concepts from sex." *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1746–47 (2020); *see also Whitaker*, 858 F.3d at 1053. Since the word 'sex' can't fully encompass all of these terms at once, the question is *which* term Title IX uses when it prohibits discrimination "on the basis of sex." 20 U.S.C. § 1681(a). Because "sex" is not defined in the statute, it should "be interpreted as taking [its] ordinary, contemporary, common meaning." *Sandifer v. U.S. Steel Corp.*, 571 U.S. 220, 227 (2014) (citation omitted). In 1972, the ordinary meaning of "sex" was "one of the two divisions of organic esp. human beings respectively designated male or female." *Sex*, WEBSTER'S NEW INTERNATIONAL DICTIONARY (3d ed. 1968). And until it is changed by Congress "Title IX's ordinary public meaning remains intact." *Neese v. Becerra*, 2:21-CV-163-Z, 2022 WL 1265925, at *12 (N.D. Tex. Apr. 26, 2022) (interpreting Title IX to protect biological sex, not gender identity). The Supreme Court has similarly described "sex" as "an immutable characteristic determined solely by the accident of birth." *Frontiero*, 411 U.S. at 686.

Title IX reinforces this biological sense. Throughout the statute, the term is used as a binary concept, encapsulating only male and female. For example, Title IX allows schools in some cases to change "from being an institution which admits only students of *one sex* to being an institution which admits students of *both sexes*." 20 U.S.C. § 1681(a)(2) (emphases added). Title IX also exempts "father-son or mother-daughter activities … but if such activities are provided for students of *one sex*, opportunities for reasonably comparable activities shall be provided for students of *the other sex*." § 1681(a)(8) (emphases added).

If sex included concepts like a person's gender identity, many Title IX exemptions would not make sense. For example, Title IX exempts institutions "traditionally" limiting their admissions to "only students of one sex,". § 1681(a)(5);

sororities and fraternities "traditionally … limited to persons of one sex," § 1681(a)(6)(B); "living facilities for the different sexes," § 1686; "separation of students by sex within physical education classes" for sports whose major activity involves bodily contact, 34 C.F.R. § 106.34(a)(1); and human sexuality classes and choirs separated by "sex," § 106.34. If sex includes gender identity, these provisions would permit discrimination based on stereotypes of how men and women should behave and appear. *See supra* § II.D. (outlining this argument). That makes little sense. These exemptions work only if sex throughout Title IX means biological sex alone.

So too in athletics. Title IX regulations correctly allow for sex-separated teams "where selection for such teams is based upon competitive skill or the activity involved is a contact sport." 34 C.F.R. § 106.41(b)–(c). This carve out shows that sex-separated teams are about fairness and safety—justifications based on biology, not gender identity. *See supra* § I.A–B; *see also* Doriane Lambelet Coleman et al., *Re-Affirming the Value of the Sports Exception to Title IX's General Non-Discrimination Rule*, 27 DUKE J. GENDER L. & POL'Y 69, 81–82 (2020) (making this point).

Nor does *Bostock v. Clayton County* change this textual analysis or lead to different conclusions about Title IX. *Contra* Br. at 16–19. For one thing, *Bostock* did not conflate gender identity and biological sex but evaluated them as distinct concepts. 140 S. Ct. at 1739. That supports Indiana and underscores that these concepts are in fact textually and conceptually distinct. *Bostock* merely said that gender-identity discrimination considered sex; but *Bostock* did not consider the inverse question presented here: whether considering biological sex *always* constitutes gender-identity discrimination. 140 S. Ct. at 1747–48. Because the Sports Act only considers biological sex, not gender identity, *Bostock* simply has no application here.

But even worse for A.M.'s argument, *Bostock* does not apply to Title IX at all. *Bostock* applied to hiring under Title VII and explicitly disclaimed any application outside that context. 140 S. Ct. at 1753. That makes sense too. Whereas sex "is not relevant to the selection, evaluation, or compensation of employees," *id.* at 1741 (cleaned up), it is relevant in sports and permissibly considered under Title IX and Title IX regulations, as amici explained above. That's exactly why courts do not import Title VII logic into the Title IX sports context. *Meriwether v. Hartop*, 992 F.3d 492, 510 n.4 (6th Cir. 2021) ("Thus, it does not follow that principles announced in the Title VII context automatically apply in the Title IX context."); *Neal v. Bd. of Trs. of Cal. State Univs.*, 198 F.3d 763, 773 (9th Cir. 1999) ("Those [Title VII] precedents are not relevant in the context of collegiate athletics. Unlike most employment settings, athletic teams are gender segregated … ."); *Cohen v. Brown Univ.*, 101 F.3d 155, 176 (1st Cir. 1996) (same).

This point underscores why A.M.'s arguments must be wrong and why *Bostock* cannot apply to Title IX. If *Bostock* did apply to Title IX as A.M. argues, then Title IX *would make every sex-separation in sports illegal*—even when the state excludes a man who identifies as a man from women's sports. Under A.M.'s theory, even that distinction notices someone's sex and therefore violates *Bostock*. But no one thinks that Title IX forbids all sex-separated sports in every situation. That is just the necessary implication of A.M.'s argument and highlights why this argument should be rejected.

B. The Act can exclude A.M. from girls' sports, because A.M. is not similarly situated to females in the context of sports.

A.M. may argue that the Act discriminates against A.M. "on the basis of sex" because A.M.'s "sex remains a but-for-cause of her exclusion." Br. at 21. But the first point doesn't follow from the second.

A.M. is not being excluded from school teams because of A.M.'s sex or gender identity. A.M. may still compete on the boys' team like every other male. The Act only prevents A.M. from participating on certain women's teams, like it does for every other male. Even if A.M. did not wish to pursue this option, A.M. "was given the opportunity to play" on the boys' team, and A.M. "voluntar[ily] refus[ed] to try out for that team." *O'Connor*, 645 F.2d at 583. And A.M. may not compete on the women's team because the Act is based on the individual's biological sex. *See supra* § II.D.

Sroga v. City of Chicago illustrates this point in a similar context. There, a male applicant was not chosen to be a probational police officer and alleged that the standards for the agility test were "much easier for women, thereby resulting in disparate treatment of male candidates." *Sroga v. City of Chicago*, No. 18 C 1749, 2020 WL 2112373, at *2 (N.D. Ill. May 4, 2020). The city countered that differing passing requirements for the sexes are "not discriminatory" when men and women are held to "equal standards of compliance and measure the minimum qualifications necessary for successful performance of the job." *Id.* at *7 (citing *Bauer v. Lynch*, 812 F.3d 340, 351 (4th Cir. 2016) ("[A]n employer does not contravene Title VII when it utilizes physical fitness standards that distinguish between the sexes on the basis of their physiological differences … .").

The same logic applies in athletics. Though A.M. identifies as a girl, A.M. is not similarly situated to girls because of the average physiological differences between the sexes. *See supra* § II.B. So like all biological males, the Act lets A.M. participate on male teams. Like all biological males under the Act, A.M. may not participate on female teams. That way, females have an equal opportunity to compete. That is what Title IX is all about.

C. Title IX sometimes requires sex-separated teams to accommodate the physiological differences between men and women.

Title IX's purpose is to provide women and girls with equal educational opportunities that have historically been denied to them. *See McCormick ex rel. McCormick v. Sch. Dist. of Mamaroneck*, 370 F.3d 275, 286 (2d Cir. 2004). In the context of athletics, "[m]ale athletes had been given an enormous head start." *Neal v. Bd. of Trs. of Cal. State Univs.*, 198 F.3d 763, 767 (9th Cir. 1999). So Title IX's implementing regulations aimed "to level the proverbial playing field," *id.*, and requires that schools "shall provide equal athletic opportunity for members of both sexes." 34 C.F.R. § 106.41(c).

This sometimes requires schools to establish women-only sports to give women a fair opportunity to compete because Title IX requires sex-equality, not sex-blindness. Or as Title IX's principal sponsor put it, sometimes sex segregation is "absolutely necessary to the success of the program - such as in classes for pregnant girls or emotionally disturbed students, in sports facilities or other instances where personal privacy must be preserved." 118 Cong. Rec. 5807 (1972). No one seriously disputes that males would displace females if both sexes were forced to compete against one another in certain sports. *E.g., Clark I*, 695 F.2d at 1131; *Petrie*, 394 N.E.2d at 862. And schools need to accommodate women's interests "in both the selection of the sports and the levels of competition, to the extent necessary to provide equal athletic opportunity." *Horner v. Ky. High Sch. Athletic Ass'n*, 43 F.3d 265, 273 (6th Cir. 1994) (quoting Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,413 (Dec. 11, 1979) (codified at 45 C.F.R. pt. 86)).[30] Indiana's Sports Act accounts for these true physiological differences between the sexes by preventing males from

[30] Many circuits have deferred to these policy documents in determining what violates Title IX. *See Miami Univ. Wrestling Club v. Miami Univ.*, 302 F.3d 608, 615 (6th Cir. 2002) (citing cases).

dominating women's sports and giving women the chance the compete fairly. So when this Act consistently distinguishes sports teams based on biological sex in this way, that cannot possibly violate Title IX.

"Athletic opportunities means real opportunities, not illusory ones." *Williams v. Sch. Dist. of Bethlehem*, 998 F.2d 168, 175 (3d Cir. 1993) (cleaned up). In other words, "the mere opportunity for girls to try out" for a team is not enough if they don't stand a realistic chance of making the roster because of competition from men. *Id.*[31] And the mere opportunity to participate also isn't enough if they don't have a realistic chance to win scholarships or "enjoy the thrill of victory" because the sport is dominated by men. *See Mansourian v. Regents of Univ. of Cal.*, 602 F.3d 957, 973 (9th Cir. 2010). Equality of opportunity can't exist in sports like softball if women must compete against men. In this respect, A.M.'s Title IX claim does not merely fail on the merits; A.M.'s requested relief would affirmatively violate Title IX's promise of equal athletic opportunity for women.

CONCLUSION

A.M.'s claim is that biological sex is an inherently discriminatory concept and that the State can never consider biology to distinguish men and women. Yet the Supreme Court has said just the opposite and consistently upheld laws that accommodate the real physiological differences between the sexes. After all, that is why we have sex-separated sports.

A.M. in contrast wants schools to separate sports based solely on gender identity and seeks to invalidate Indiana's Sports Act both facially and as applied for failing to do so. But gender identity doesn't say anything about athletic ability. So

[31] "Whether the opportunity for girls to try out for a boys' team is a realistic athletic opportunity with respect to that particular sport may turn on whether there are real and significant physical differences between boys and girls in high school." *Williams*, 998 F.2d at 175.

separating sports based on gender identity doesn't promote fairness or safety. Instead, this proposal would undermine our country's 50-year effort to level the playing field for biological women in sports. And this would allow male athletes to keep displacing females like amici, removing them from the podium and sometimes even from entire playing fields. These women and their hard work should not be sacrificed or erased in the name of a different vision of what progress looks like.

Respectfully submitted this 17th day of June, 2022.

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**Pro Hac Vice Motions forthcoming*
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