IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
KNOXVILLE DIVISION

THE STATE OF TENNESSEE; THE STATE OF ALABAMA; THE STATE OF ALASKA; THE STATE OF ARIZONA; THE STATE OF ARKANSAS; THE STATE OF GEORGIA; THE STATE OF IDAHO; THE STATE OF INDIANA; THE STATE OF KANSAS; THE COMMONWEALTH OF KENTUCKY; THE STATE OF LOUISIANA; THE STATE OF MISSISSIPPI; THE STATE OF MISSOURI; THE STATE OF MONTANA; THE STATE OF NEBRASKA; THE STATE OF OHIO; THE STATE OF OKLAHOMA; THE STATE OF SOUTH CAROLINA; THE STATE OF SOUTH DAKOTA; THE STATE OF WEST VIRGINIA,

Plaintiffs,

—and—

ASSOCIATION OF CHRISTIAN SCHOOLS INTERNATIONAL; A.S., a minor, by Brandi Scarborough, her mother; **C.F.,** a minor, by Sara Ford, her mother; **A.F.,** a minor, by Sara Ford, her mother,

Intervenor-Plaintiffs,

v.

UNITED STATES DEPARTMENT OF EDUCATION; MIGUEL CARDONA, in his official capacity as Secretary of Education; **EQUAL EMPLOYMENT OPPORTUNITY COMMISSION; CHARLOTTE A. BURROWS**, in her official capacity as Chair of the Equal Employment Opportunity Commission;

Case No. 3:21-CV-00308-CEA-DCP

INTERVENOR-PLAINTIFFS' MOTION TO INTERVENE

UNITED STATES DEPARTMENT OF JUSTICE; MERRICK B. GARLAND, in his official capacity as Attorney General of the United States; **KRISTEN CLARKE**, in her official capacity as Assistant Attorney General for Civil Rights at the United States Department of Justice,

Defendants.

Proposed Intervenor-Plaintiffs Association of Christian Schools International, A.S., C.F., and A.F. (collectively, Intervenors), move to intervene in this case. Among other claims, Intervenors challenge the following final agency actions:

- The U.S. Department of Education's interpretation of Title IX published in the Federal Register on June 22, 2021. Enforcement of Title IX of the Education Amendments of 1972 With Respect to Discrimination Based on Sexual Orientation and Gender Identity in Light of Bostock v. Clayton County, 86 Fed. Reg. 32,637 (June 22, 2021) ("Interpretation").

- The "Dear Educator" letter and accompanying fact sheet issued by the U.S. Department of Education and Department of Justice's Civil Rights Division on June 23, 2021. U.S. Dep't of Educ., Letter to Educators on Title IX's 49th Anniversary (June 23, 2021), https://bit.ly/3ksLLDj; U.S. Dep't of Justice & U.S. Dep't of Educ., Confronting Anti-LGBTQI+ Harassment in Schools, https://bit.ly/3sQjZnM (together with the Dear Educator Letter, "Fact Sheet").

Intervenors challenge the Interpretation and the Fact Sheet on the basis that they violate the Constitution, Title IX (20 U.S. Code § 1681), the Administrative Procedure Act, and other statutes. The reasons for granting this motion are set forth in Intervenors' accompanying memorandum of law, which is incorporated by reference, along with its attached exhibits. *See* Fed. R. Civ. P. 24. Intervenors' counsel conferred with Plaintiffs' counsel and Defendants' counsel. Plaintiffs do not oppose this intervention. Defendants oppose Intervenors' intervention under Federal Rule of Civil Procedure 24(a) and reserve their position as to Intervenors'

intervention under Federal Rule of Civil Procedure 24(b). Intervenors request oral argument on this motion.

Respectfully submitted this 4th day of October, 2021.

s/ W. Andrew Fox

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**Pro hac vice* applications forthcoming

Attorneys for Intervenor-Plaintiffs

Certificate of Service

I hereby certify that on the 4th day of October, 2021, I electronically filed the foregoing document with the Clerk of Court and that the foregoing document will be served via the CM/ECF system on all counsel of record.

s/ W. Andrew Fox
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Attorney for Intervenor-Plaintiffs

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THE STATE OF TENNESSEE; THE STATE OF ALABAMA; THE STATE OF ALASKA; THE STATE OF ARIZONA; THE STATE OF ARKANSAS; THE STATE OF GEORGIA; THE STATE OF IDAHO; THE STATE OF INDIANA; THE STATE OF KANSAS; THE COMMONWEALTH OF KENTUCKY; THE STATE OF LOUISIANA; THE STATE OF MISSISSIPPI; THE STATE OF MISSOURI; THE STATE OF MONTANA; THE STATE OF NEBRASKA; THE STATE OF OHIO; THE STATE OF OKLAHOMA; THE STATE OF SOUTH CAROLINA; THE STATE OF SOUTH DAKOTA; THE STATE OF WEST VIRGINIA,

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Case No. 3:21-CV-00308-CEA-DCP

INTERVENOR-PLAINTIFFS' MEMORANDUM IN SUPPORT OF THEIR MOTION TO INTERVENE

UNITED STATES DEPARTMENT OF JUSTICE; MERRICK B. GARLAND, in his official capacity as Attorney General of the United States; **KRISTEN CLARKE**, in her official capacity as Assistant Attorney General for Civil Rights at the United States Department of Justice,

Defendants.

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Introduction

Female athletes deserve the chance to compete on a safe, equal playing field. A.S., C.F., and A.F. are female athletes in Arkansas who have dedicated most of their young lives to excellence in their respective team sports. Like millions of other girls, they deserve the opportunity to compete on a safe and fair playing field against other female athletes. And schools around the country, like those that belong to the Association of Christian Schools International (ACSI), also want to protect their female student athletes and give them a fair chance to be champions. But the federal government recently issued new Title IX rules by executive fiat that erase women's sports and eliminate the opportunities for women that Title IX was intended to protect. A.S., C.F., A.F., and ACSI ("Intervenors") ask this Court to allow them to intervene as-of-right or by permission under Federal Rule of Civil Procedure 24. Plaintiffs consent to Intervenors' motion to intervene. Intervenors' request should be granted for three reasons.

First, Intervenors' request is timely because the case is only five weeks old. Second, Intervenors have a significant interest in preserving equal athletic opportunities for themselves, ACSI member schools, and the thousands of female athletes attending ACSI member schools. A.S., C.F., A.F., and ACSI member schools' female athletes currently compete in public school team and individual athletics in states—like Arkansas—that ensure women can compete in athletics on a safe and fair playing field. ACSI's member schools have an interest in protecting its female athletic teams, and the educational and reputational benefits they derive from those teams. And ACSI has interests as an organization. The federal government's redefinition of "sex" harms all of these interests by forcing female athletes to compete against and lose opportunities to biological males.

Third, Plaintiffs cannot adequately represent Intervenors' interests because Intervenors bring unique perspectives, raise different arguments, and have different litigation goals as female athletes, schools, and an organization. Adding the female athletes and ACSI guarantees a thorough presentation of the arguments against the unlawful changes to Title IX. This Court needs to hear from the very persons most directly injured by this unlawful recasting of Title IX.

Statement of Facts

In January 2021, President Biden released an Executive Order stating that laws that prohibit sex discrimination, including Title IX, now prohibit discrimination based on sexual orientation and gender identity. Exec. Order No. 13,988, 86 Fed. Reg. 7023–25 (Jan. 20, 2021). The Department of Education (Department) published a notice of interpretation, called "Enforcement of Title IX of the Education Amendments of 1972 With Respect to Discrimination Based on Sexual Orientation and Gender Identity in Light of Bostock v. Clayton County." 86 Fed. Reg. 32,637 (June 22, 2021) ("Interpretation"). In this notice, the Department stated its current view that "Title IX Prohibits Discrimination Based on Sexual Orientation and Gender Identity." *Id*. The next day, the Civil Rights Division of the Department of Justice (DOJ) and the Office of Civil Rights (OCR) issued a "Dear Educator" letter notifying Title IX recipients of the Department's new Interpretation and reiterating that the Department "will fully enforce Title IX to prohibit discrimination based on sexual orientation and gender identity." Letter to Educators on Title IX's 49th Anniversary (June 23, 2021). The Dear Educator letter was accompanied by a "fact sheet" issued by the DOJ and the Office for Civil Rights at the Department. U.S. Dep't of Justice & U.S. Dep't of Educ., Confronting Anti-LGBTQI+ Harassment in Schools (together with the Dear Educator Letter, "Fact Sheet"). The Fact Sheet defined discrimination under the Department's new interpretation of Title IX. These

actions threaten Title IX's original purpose: to prohibit discrimination against women.

I. Association of Christian Schools International is an organization that serves member individuals and schools ranging from early education to colleges and universities.

ACSI promotes excellence in Christian education and equips member schools to do the same. Decl. of David Balik in Supp. of Mot. to Intervene (Balik Decl.) ¶¶ 3–20, attached as Exhibit D. ACSI serves schools at every level of education—from early educational institutes to high schools to colleges and universities. *Id.* at ¶¶ 5–7. All told, ACSI represents thousands of schools with about five hundred thousand students. *Id.*

ACSI offers many services, benefits, and resources to its member schools, including teacher certifications, school accreditations, curriculum development, and other resources to ensure member schools strive for excellence and create communities marked by healthy and productive spiritual, emotional, and cultural characteristics. *Id.* at ¶¶ 8–20. ACSI also advocates for its member schools with government officials and policymakers on issues that impact education, religious freedom, and other areas of concern for its schools. *Id.* at ¶¶ 15–20

ACSI and its member schools value athletics as part of the educational experience. *Id.* at ¶¶ 19–20, 33. For that reason, ACSI provides services related to member schools' athletic programs. *Id.* at ¶¶ 19–20. Likewise, member schools offer athletics to its male and female students and promote its sports. *Id.* at ¶¶ 33–37. Athletics benefit member schools. *Id.* at ¶¶ 38–56 Among other benefits, athletic programs contribute to the schools' brand and reputation, help attract students, and provide social events for its students, alums, and the broader community. *Id.* Teams from member schools frequently compete against public high schools, colleges, and universities, for titles, records, and individual championships. *Id.* at ¶¶ 58–66.

For ACSI member schools and its female athletes, the Interpretation and the Fact Sheet eliminate these athletic benefits. ACSI member schools and its female athletes compete against schools bound by Title IX. *Id.* at ¶¶ 58–66. But while ACSI member schools only permit females to compete on its female sports teams, the Interpretation and the Fact Sheet require public schools to allow males to compete in female sports. *Id.* at ¶¶ 68–69. So the Interpretation and Fact Sheet put ACSI's member schools and its female athletes at a competitive disadvantage. *Id.* at ¶¶ 68–89. ACSI member schools cannot fairly, or safely, compete against other public schools in female athletics. *Id.* And the female athletes at ACSI member schools lose the chance to compete on an even playing field. *Id.* at ¶¶ 68–91.

The Interpretation and the Fact Sheet harm ACSI too. The Interpretation and the Fact Sheet undermine ACSI's purpose by promoting an opposite view about biology than the view ACSI and its member schools espouse. *Id.* at ¶ 32. And ACSI tried to submit public comments on proposed Title IX regulations to ensure that any changes protected religious schools. *Id.* at ¶¶ 25–28. But without a notice and comment period, ACSI's pleas fell on deaf ears.

II. A.S., C.F., and A.F. are talented middle and high school female athletes.

A.S., C.F., and A.F. are athletes at public schools in Arkansas. Declaration of A.S. ¶ 2, attached as Exhibit A; Declaration of C.F. ¶ 2, attached as Exhibit B; Declaration of A.F. ¶ 2, attached as Exhibit C. Sports are a large part of their lives and they have committed themselves to excellence on their respective teams. A.S. Decl. ¶ 5; C.F. Decl. ¶ 4; A.F. Decl. ¶¶ 4–5. Since early childhood each has pursued the delight of athletic training and competition. *Id.* Each athlete's parents were involved in sports growing up and their siblings are also competitive athletes. A.S. Decl. ¶ 3; C.F. Decl. ¶ 3; A.F. Decl. ¶ 3. Sports are a family activity. C.F. and A.F.

had a ball in their hands almost as soon as they could sit up. C.F. Decl. ¶ 4; A.F. Decl. ¶ 4.

A.S. plays soccer at Brookland High School. A.S. first kicked a ball in first grade; she has not stopped since. A.S. Decl. ¶¶ 4–5. C.F. competes in basketball, tennis, and track and field at Brookland High School. But her first love is basketball. C.F. Decl. ¶¶ 2, 19. A.F. plays volleyball, basketball, and intends to compete in track and field at Brookland Middle School. A.F. Decl. ¶ 2. But even at a young age, her favorite sport was basketball. A.F. Decl. ¶ 4.

These young women have worked incredibly hard and sacrificed much to play their respective sports. A.S. Decl. ¶ 16; C.F. Decl. ¶ 26; A.F. Decl. ¶ 20. But they do so because they are committed athletes who want to be the best that they can be—and they want to win. A.S. Decl. ¶ 17; C.F. Decl. ¶ 27; A.F. Decl. ¶ 13. The benefits that they reap from sports stretch far beyond the court or track—these female athletes are learning life skills and accessing opportunities that shape their future. A.S. Decl. ¶ 18; C.F. Decl. ¶ 24; A.F. Decl. ¶ 21. They also would love to play sports in college and earning an athletic scholarship would play a key role in their decision on where to attend college. A.S. Decl. ¶ 19; C.F. Decl. ¶ 43; A.F. Decl. ¶¶ 14, 22.

These young women are committed to the integrity of female athletic competition, support Arkansas's Fairness in Women's Sports Act, and are distressed that the Department and the DOJ re-wrote Title IX. A.S. Decl. ¶¶ 31-34; C.F. Decl. ¶¶ 44-45; A.F. Decl. ¶¶ 29-30. They wish to have their personal concerns fully set forth and represented in this case in which the Department and the DOJ want to change the definition of "sex" that would leave them, and other female athletes, defenseless against male participation in their sports.

A.S., C.F., and A.F. were upset and shocked to hear about males competing in girls' sports. A.S. Decl. ¶ 20; C.F. Decl. ¶ 28; A.F. Decl. ¶ 23. Males have clear athletic advantages, like greater strength, height, and endurance. A.S. Decl. ¶ 28; C.F. Decl.

¶ 28; A.F. Decl. ¶ 24. These female athletes have each experienced and observed males' athletic domination even at their young ages. A.S. Decl. ¶¶ 26-27; C.F. Decl. ¶ 30; A.F. Decl. ¶ 26. They are afraid of competing against males in rough contact sports, like basketball and soccer, and getting injured by males. A.S. Decl. ¶ 29; C.F. Decl. ¶¶ 32-34; A.F. Decl. ¶ 27.

But even beyond safety, they believe it is not fair to force them to compete against males. A.S. Decl. ¶ 29; C.F. Decl. ¶ 40; A.F. Decl. ¶ 31. They are worried that females like them will be displaced in their sports by bigger, faster, and stronger males. *Id*. They are moving to intervene to ensure other female athletes have a chance to enjoy the same athletic opportunities. A.S. Decl. ¶ 36; C.F. Decl. ¶ 44; A.F. Decl. ¶ 32.

Argument

Federal Rule of Civil Procedure 24 authorizes both intervention as of right and permissive intervention. The Sixth Circuit favors intervention, and Rule 24 should be "broadly construed in favor of potential intervenors." *Purnell v. Akron*, 925 F.2d 941, 950 (6th Cir. 1991). The female athletes and ACSI should be granted (I) intervention as of right because their motion is timely, they have protectable interests directly affected by this litigation, and their arguments are unique from those of the Plaintiffs involved in this case. They also satisfy the requirements for (II) permissive intervention because their legal interests share common questions of law and facts with this case.

I. The female athletes and ACSI satisfy the requirements for intervention as of right because their request is timely, their interests are affected by this litigation, and their arguments differ from the Plaintiffs' arguments.

The Sixth Circuit uses four factors to evaluate a request to intervene as of right: (1) timeliness of the motion to intervene; (2) the intervenors' "substantial legal

interest" in the case; (3) whether the intervenors' "ability to protect that interest may be impaired in the absence of intervention"; and (4) whether "the parties already before the court may not adequately represent their interest." *Grutter v. Bollinger*, 188 F.3d 394, 397–98 (6th Cir. 1999). Judicial economy favors the disposition of similar claims and issues in a single suit. *Jansen v. City of Cincinnati*, 904 F.2d 336, 339 (6th Cir. 1990). The female athletes and ACSI satisfy each requirement.

A. The motion to intervene is timely.

The Intervenors' motion is timely because this lawsuit is in its infancy. The Sixth Circuit measures timeliness by considering five factors: "1) the point to which the suit has progressed; 2) the purpose for which intervention is sought; 3) the length of time preceding the application during which the proposed intervenors knew or should have known of their interest in the case; 4) the prejudice to the original parties due to the proposed intervenors' failure to promptly intervene after they knew or reasonably should have known of their interest in the case; and 5) the existence of unusual circumstances militating against or in favor of intervention." *Blount-Hill v. Zelman*, 636 F.3d 278, 284 (6th Cir. 2011). No one factor is determinative, and the factors should be weighed in relation to all relevant circumstances. *Id.*

First, the Court looks to the point to which the suit has progressed. *Id.* Here, the case is in its infancy as it is only a few weeks old. Courts regularly grant requests in similar time frames or even much later than this intervention. In *Gratz v. Bollinger*, the Court found that the intervention was timely as it was filed approximately four months after the initial complaint and the case was still in its initial stages. 183 F.R.D. 209, 212 (E.D. Mich. 1998), *rev'd on other grounds sub nom. Grutter v. Bollinger*, 188 F.3d 394 (6th Cir. 1999). On appeal in *Grutter*, the Court affirmed that the intervention was timely. 188 F.3d at 398. *See Jansen*, 904 F.2d at

340–41 (timely intervention where intervenors moved to intervene halfway through the discovery process because the intervenors only found out their interests were not adequately represented two weeks prior); *Chill v. Farmers Ins. Co.*, No. 3:20-CV-00191, 2021 WL 638124, at *6 (M.D. Tenn. Feb. 18, 2021) (timely intervention where intervenor moved to intervene within two months of the initial complaint and before the initial case management conference); *Morelli v. Morelli*, No. 2:00-CV-988, 2001 WL 99859, at *2 (S.D. Ohio Feb. 1, 2001) (timely intervention where motion to intervene filed seven weeks after the complaint was filed, discovery had not been initiated, and pretrial conference had not been held).

The female athletes and ACSI easily clear this hurdle because this lawsuit was filed five weeks ago. The Defendants moved to dismiss the complaint, but that motion has not been fully briefed or decided by this Court.[1] The parties have not engaged in discovery, and this Court has yet to issue a scheduling order. Intervention at this early stage in the proceedings easily meets this factor.

Second, courts have looked at whether the intervenor asserted a legitimate purpose for the intervention and at other times looked at whether the intervention was timely. *Kirsch v. Dean*, 733 F. App'x 268, 275–76 (6th Cir. 2018). Here, the Intervenors have an interest in safeguarding women's opportunities in sports. They found out about the case only a few weeks ago and moved quickly to intervene.

Third, the Court considers the length of time the proposed intervenors knew their interests would be affected by the litigation. *Stotts v. Memphis Fire Dep't*, 679 F.2d 579, 582–83 (6th Cir. 1982). The case is only five weeks old. The female athletes and ACSI quickly noticed their interests would be impacted by the litigation and intervened. Choosing to intervene in a case of this magnitude is a substantial

[1] The Defendants filed their motion to dismiss on September 23, 2021. The Plaintiff States' response is due on October 8, 2021.

decision. It would not be reasonable to require intervenors to act more quickly than the Intervenors here.

Fourth, the other parties will not be prejudiced by adding the female athletes and ACSI. Courts consider the prejudice caused by the delay and not the prejudice caused by the intervention itself. *U.S. v. City of Detroit*, 712 F.3d 925, 933 (6th Cir. 2013). There is no delay here. The litigation just started. And the Intervenors will not slow anything down because the Intervenors request to join and adopt the State's motion for preliminary injunction.[2] And finally, there are no unusual factors here that would mitigate for or against intervention. *Jansen*, 904 F.2d at 340–41.

Because the female athletes and ACSI did not delay, there is no prejudice to any party for their intervention request. They filed their complaint in this lawsuit concurrently with this motion. *See* Intervenor-Plaintiffs' Proposed Verified Compl. (Proposed Compl.), attached as Exhibit E. Their motion is therefore timely.

B. The female athletes and ACSI have a substantial and legally protectable interest in fair, safe competition.

Along with timeliness, the female athletes and ACSI "have a substantial interest in the subject matter of this litigation. *Grutter*, 188 F.3d at 398. The Sixth Circuit takes a "rather expansive notion of the interest sufficient to invoke intervention of right," *Michigan State AFL-CIO v. Miller*, 103 F.3d 1240, 1245 (6th Cir. 1997), and approves "decisions of other courts 'reject[ing] the notion that Rule 24(a)(2) requires a specific legal or equitable interest.'" *Grutter*, 188 F.3d at 398 (quoting *Miller*, 103 F.3d at 1245).

Other courts across the country have already found "there is no question" that a woman's right to an equal athletic opportunity is a "legitimate and important"

[2] While Intervenors will be making different arguments throughout the litigation based on their unique interests, they will not make any different arguments for the preliminary injunction motion to ensure that their intervention will not delay resolution of that motion.

interest." *Clark v. Ariz. Interscholastic Ass'n*, 695 F.2d 1126, 1131 (9th Cir. 1982); *Kelley v. Bd. of Trs.*, 35 F.3d 265, 270 (7th Cir. 1994) ("Congress … recognized that addressing discrimination in athletics presented a unique set of problems."). Under Title IX, "an institution must effectively accommodate the interests of both sexes 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); *see Miami Univ. Wrestling Club v. Miami Univ.*, 302 F.3d 608, 615 (6th Cir. 2002) ("Title IX prohibits gender inequity in connection with, among other things, the opportunity to participate in athletics.").

Given this imperative interest, courts have allowed athletes to intervene in other similar cases—i.e., cases where males seek access to female sports. *See, e.g.*, *Hecox v. Little*, 479 F. Supp. 3d 930, 952, 955, 958 (D. Idaho 2020) (allowing female athletes to intervene to defend Idaho's law guaranteeing equal opportunities for female athletes). And courts have also allowed male athletes to intervene to defend a district policy forcing female athletes to compete against male athletes. Order Granting Mot. to Intervene, *Soule v. Conn. Ass'n of Schs., Inc.*, No. 3:20-cv-00201 (RNC), 2021 WL 1617206 (D. Conn. April 25, 2021), ECF No. 93. If male athletes can intervene to defend laws enabling them to compete on a female athletic team, then female athletes can intervene against a law that could strip away their equal opportunity in athletics. That's only fair.

The Sixth Circuit also finds groups of people (like female athletes) have an interest in challenges to a law that affects that group. For example, minority students who benefitted from an affirmative action program had the right to intervene in a lawsuit challenging that program. *See Grutter*, 188 F.3d at 396–98 (finding "substantial legal interest" in preventing minority enrollment).

So too here. The female athletes currently benefit from Arkansas's law protecting them from competing against boys. Ark. Code § 6-1-107. They also benefit

from a correct interpretation of Title IX that protects female athletes. The Interpretation and the Fact Sheet would deprive them of those protections. The female athletes are competitive high school and middle school athletes directly impacted by Title IX. A.S. Decl. ¶ 2; C.F. Decl. ¶ 2; A.F. Decl. ¶ 2. They will be harmed—by being put at a competitive disadvantage and being deprived a fair chance to win—if male athletes are permitted to compete against them. *See, e.g.*, 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, 87–99 (2020) (explaining males win against comparably trained females). They want to engage in female-only competitions and maintain a competitive environment protected from physiologically-advantaged male participants. They also have an interest in their safety if they are forced to compete against males in contact sports like basketball and soccer. A.S. Decl. ¶ 23; C.F. Decl. ¶¶ 32-33; A.F. Decl. ¶ 27. Concussions, knee injuries, and ankle injuries are already potential risks in these sports. A.S. Decl. ¶ 24; C.F. Decl. ¶ 33; A.F. Decl. ¶ 27. The female athletes have an interest in minimizing these risks by ensuring they compete only against other girls. So these female athletes have a "substantial legal interest" in athletic opportunities and preventing the decline of female athletes in women's sports.

ACSI adds additional "substantial interest[s]" to this case. For starters, ACSI has an interest in overturning the Interpretation and the Fact Sheet because they were passed without following the Administration Procedure Act—so ACSI lost the chance to "influence the rule making process in a meaningful way." *U.S. Steel Corp. v. U.S. E.P.A.*, 595 F.2d 207, 214 (5th Cir. 1979); Balik Decl. ¶¶ 25–30. And ACSI lost time drafting a written comment which was ignored. Balik Decl. ¶¶ 25–30. *Cf. Miami Valley Fair Hous. Ctr., Inc. v. Connor Grp.*, 725 F.3d 571, 576–77 (6th Cir. 2013) (organizational injury from action that drained resources). So ACSI has an interest here.

Next, ACSI has an interest on behalf of its member schools. ACSI's member schools benefit from fairness in female sports. Balik Decl. ¶¶ 38–56. But the Interpretation and the Fact Sheet put ACSI's member schools at a competitive disadvantage compared to other public schools, which causes them injury. *Id.* at ¶¶ 68–89. The federal government opens each sports league to new competitors and changes the rules of play to include serious safety risks, and thus creates competitor standing for competitor female athletes, as well as competitor schools, to vindicate their educational, athletic, aesthetic, and recreational interests, protected by statute, in competing fairly in only women's-only sports. *Id. See, e.g.*, *XY Plan. Network, LLC v. United States Sec. & Exch. Comm'n*, 963 F.3d 244, 251 (2d Cir. 2020) (summarizing competitor standing doctrine); *Sherley v. Sebelius*, 610 F.3d 69, 72 (D.C. Cir. 2010) (same). For example, the Interpretation and the Fact Sheet make it harder for ACSI's member schools to win athletic championships, games, and events, make it more difficult for ACSI member colleges and universities to recruit top-flight student athletes, and force ACSI member high schools to decide whether to participate or leave state-wide athletic associations. Balik Decl. ¶¶ 68–89. Because the Interpretation and the Fact Sheet harm ACSI's member schools and this challenge is germane to ACSI's purpose of providing services to its member schools (including athletic advice), ACSI has an associational interest in this case. *See, e.g.*, *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 341–43 (1977) (explaining this interest).

Finally, ACSI has an interest because of the damage the Interpretation and the Fact Sheet inflict on ACSI's member schools' female athletes. Balik Decl. ¶¶ 90–91. There's no doubt that the member schools have an interest in protecting their female athletes. *See Runyon v. McCrary*, 427 U.S. 160, 175 n. 13 (1976) ("It is clear that the schools have standing to assert these arguments [involving student's right to privacy and free association and the parent's right to direct the child's education]

on behalf of their patrons."); *Ohio Ass'n of Indep. Sch. v. Goff*, 92 F.3d 419, 422 (6th Cir. 1996) ("[S]chools also have standing to assert the constitutional right of parents …."); *id.* (collecting cases). And because ACSI is "an organization dedicated exclusively to advancing the interests of the member schools," ACSI has a substantial interest in protecting the member schools' female athletes. *Id.*[3]

From individual athletes to high schools and colleges, the Intervenors represent a wide swath of substantial interests affected by the Interpretation and the Fact Sheet. They should be permitted to intervene.

C. The female athletes' and ACSI's interests could be impaired by this litigation which threatens to undermine equal opportunities for women.

Third, to determine whether a proposed intervenor's interests will be impaired, "a would-be intervenor must show only that impairment of its substantial legal interest is possible if intervention is denied." *Grutter*, 188 F.3d at 399. But "it is not necessary that the would be intervenor demonstrate that the impairment is probable; they need only demonstrate that such is possible." *Blount-Hill v. Ohio*, 244 F.R.D. 399, 403 (S.D. Ohio 2005), *aff'd sub nom. Blount-Hill v. Bd. of Educ. of Ohio*, 195 F. App'x 482 (6th Cir. 2006). The burden to meet this element is minimal. *Miller*, 103 F.3d at 1247 ("[T]his court has already acknowledged that potential stare decisis effects can be a sufficient basis for finding an impairment of interest.").

If the federal government is not restrained by the courts, the protection of women's equality in athletics will be eliminated. As a result, female athletes, including A.S., C.F., A.F., and female athletes at ACSI schools, will lose

[3] *Cf. Pennsylvania Psychiatric Soc'y v. Green Spring Health Servs., Inc.*, 280 F.3d 278, 281 (3d Cir. 2002) (nonprofit corporation representing psychiatrists had standing to sue on behalf of psychiatrists' patients); *Public Citizen v FTC*, 869 F.2d 1541, 1550 (D.C. Cir. 1989) (allowing public action group to sue on behalf of its members' children to require a federal agency to prohibit the sale of items advertising smokeless tobacco without a health warning).

opportunities to attract attention from college scouts, lose opportunities to win titles, and miss out on becoming champions in their own sports. Balik Decl. ¶¶ 68–89. Because the market for college athletic scholarships is nationwide (and because schools only have limited athletic scholarships), allowing males to compete in women's sports takes away female roster spots and reduces their limited chances of receiving college scholarships. *See* A.S. Decl. ¶ 19; C.F. Decl. ¶ 43; A.F. Decl. ¶ 14, 22; *Full Ride Scholarships and How to Get Them*, Next College Student Athlete, https://bit.ly/3FanCLb (last accessed Oct. 1, 2021). *Hardin v. Ky. Utils. Co.*, 88 S. Ct. 651, 654 (1968) ("[W]hen the particular statutory provision invoked does reflect a legislative purpose to protect a competitive interest, the injured competitor has standing to require compliance with that provision.").

ACSI's schools meanwhile will miss the chance to attain athletic prominence and attract other talented students, will lose a fair playing field against other public schools, and could be forced to leave certain divisions and conferences altogether. Balik Decl. ¶¶ 68–89.

The Intervenors only have to overcome a minimal burden to prove their interest will be impaired if they do not prevail in this suit. *Miller*, 103 F.3d at 1247; *see also Blount-Hill*, 244 F.R.D. at 403 (granting intervention even though "there is nothing to indicate that the impairment [proposed intervenor] is likely to result from a ruling in favor of the Plaintiffs, it is one of the possible consequences of such a ruling. As the Sixth Circuit has stated, the burden for satisfying this element is minimal....").

If the Interpretation and the Fact Sheet stand, the female athletes and ACSI will be affected by this litigation. A.S., C.F., A.F., and ACSI member schools' female athletes will be at a competitive disadvantage by being forced to compete against males in athletics. Balik Decl. ¶¶ 90–91. ACSI member schools will lose opportunities for their female sports teams to compete on a fair playing field. Balik

Decl. ¶¶ 68–89. They therefore have a significant interest which this case could impair.

D. The Plaintiffs do not adequately represent the female athletes' and ACSI's interests because they will raise arguments and pursue strategies Plaintiffs will not.

As for the fourth requirement for intervention as of right, the Plaintiffs do not adequately represent Intervenors' unique interests. Intervenors offer different arguments and distinct perspectives that Plaintiffs do not and cannot.

Proposed intervenors need only show that representation of their interests "'may be' inadequate; and the burden of making that showing should be treated as minimal." *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972); *see also Grutter*, 188 F.3d at 400 ("proposed intervenors are not required to show that the representation will in fact be inadequate" (cleaned up)). A proposed intervenor "should be treated as the best judge of whether the existing parties adequately represent his or her interests, and ... any doubt regarding adequacy of representation should be resolved in [movant's] favor." James William Moore, et al, 6 Moore's Federal Practice § 24.03[4][a] (3d ed. 1997).

Plaintiffs are twenty States with an interest in upholding their own laws and preventing federal agencies from usurping congressional authority. These are important goals, but they differ from the Intervenors'. The female athletes and ACSI seek to provide equal opportunities for women in athletics—ACSI for its member schools and their female athletes—by maintaining sex-separated sports teams as guaranteed by Title IX. *See supra* § I.B (detailing Intervenors' interests).

As such, the Plaintiffs cannot adequately represent Intervenors' interests. Intervenors only have to show that "there is a *potential* for inadequate representation." *Grutter*, 188 F.3d at 400. And their burden to show that is minimal. *Id*. They clear that hurdle.

What's more, Intervenors will offer different arguments and strategies in this litigation, and that is enough to justify intervention. *Grutter*, 188 F.3d at 400. First, the Plaintiffs argue that the Interpretation and Fact Sheet violate the Administrative Procedure Act because they are contrary to Title IX. But they do not explicitly argue that Title IX affirmatively requires sex-separated athletic teams. Pls. Mot. for Prelim. Inj. 13–18, ECF No. 11. In contrast, Intervenors will highlight that Title IX not only permits, but *requires* separate sports teams for girls and boys in contests of speed, strength, or physical contact so that girls are receive an "equal athletic opportunity." 34 C.F.R. § 106.41(c); *See* Proposed Compl., ¶¶ 314–30; Proposed. Compl. Prayer for Relief ¶¶ 4, 6.

They will argue that this "equal athletic opportunity" requires both equal treatment and effective accommodation.[4] Proposed Compl., ¶¶ 314–30. For equal treatment, the Department considers whether "program components reveal that treatment, benefits, or opportunities are not equivalent in kind, quality or availability" between the sexes. 44 Fed. Reg. 71,415 (Dec. 11, 1979). That means girls must be guaranteed equal opportunities to engage in post-season competition and equal quality of competition. *Id.* at 71,416; 1996 Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test.[5] They also deserve equal access to publicity and scholarships. 34 C.F.R. § 106.41(c); 44 Fed. Reg. 71,415.

But none of this is possible when males dominate women's sports. That's why sex-separated sports have always been the means to provide an "equal opportunity" for women. And from the beginning of Title IX, schools were advised

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[4] Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics. 44 Fed. Reg. 71,413. Many circuits, including this one, have deferred to these documents in determining what violates Title IX. *See Miami Univ. Wrestling Club*, 302 F.3d at 615 (citing cases); *Horner*, 43 F.3d at 273.

[5] The 1996 Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test is viewable at: https://www2.ed.gov/about/offices/list/ocr/docs/clarific.html.

to "determine the relative abilities of members of each sex for each . . . sport offered, in order to decide whether to have single sex teams or teams composed of both sexes." 40 Fed. Reg. 52,656 (Sept. 6, 2006).

And for effective accommodation, Intervenors will argue that OCR's policies elaborate that schools must provide "equal opportunity in … levels of competition," and competitive opportunities "which equally reflect [girls'] abilities." 44 Fed. Reg. 71,417–418 (emphasis added). Proposed Compl., ¶¶ 314–30. Compliance with this mandate turns on "whether the policies … are discriminatory in … effect," or whether there exists "disparities" with respect to benefits, treatment, or opportunities that deny equal opportunity. *Id.* at 71,417.

Intervenors will argue that "[t]reating girls differently regarding a matter so fundamental to the experience of sports—the chance to be champions—is inconsistent with Title IX's mandate of equal opportunity for both sexes." *McCormick ex rel. McCormick v. Sch. Dist. of Mamaroneck*, 370 F.3d 275, 295 (2d Cir. 2004). *See* Proposed Compl., ¶¶ 314–30. Plus, in many sports, Title IX's mandate of non-discrimination could not be achieved with sex-blind programs. Failing to provide females with separate sports teams with equal competition violates Title IX. See 44 Fed. Reg. at 71,417–418; *see also Roberts v. Colo. State Bd. of Agric.*, 998 F.2d 824, 829 (10th Cir. 1993).

Second, Plaintiffs do not explicitly argue. that "sex" discrimination under Title IX does not include "gender identity" discrimination. Title IX does not define "sex." But in 1972 when Title IX was passed, "sex" was defined as "one of the two divisions of organic esp. human beings respectively designated male or female." Webster's New International Dictionary 2081 (3d ed. 1968). That meaning controls Title IX. *See Sandifer v. U.S. Steel Corp.*, 571 U.S. 220, 227 (2014) (when term not defined it should be given its "ordinary, contemporary, common meaning.").

Intervenors will argue that throughout Title IX, "sex" is used as a binary concept, containing only male and female. *See* Proposed Compl., ¶¶ 49, 132, 362. For example, Title IX allows schools in certain circumstances 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." 20 U.S.C. § 1681(a)(8) (emphases added). Not only does this provision say "the" other sex rather than "another" sex, but it uses terms directly tied to biology like "father-son" and "mother-daughter." At the time, mother was defined as "a female parent," Webster's New International Dictionary 1474 (3d ed. 1968); "father" as "a male parent," *id.* at 828; "son" as a "male offspring," *id.* at 2172; and "daughter" as "a human female," *id.* at 577. None of this would make sense if "sex" included the non-binary concept of gender identity.

Intervenors will also argue that if sex included gender identity, then many Title IX exemptions would be illogical and even discriminatory. *See, e.g.*, Proposed Compl., ¶¶ 132, 361–62. For example, Title IX exempts institutions "traditionally" limiting their admissions to "only students of one sex," 20 U.S.C. § 1681(5); sororities and fraternities "traditionally . . . limited to persons of one sex," § 1681(6); "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," 34 C.F.R. § 106.34(a)(3)–(4). But if sex includes gender identity, these provisions would affirmatively bless schools' ability to create female-only choirs or transgender-only fraternities. That makes little sense. Intervenors will argue that these exemptions only work if sex throughout Title IX means biological sex alone.

Intervenors will also argue that Title IX's purpose confirms its text and structure. *See* Proposed Compl., ¶¶ 31–45, 361. After all, Title IX was "enacted in response to evidence of pervasive discrimination against women with respect to educational opportunities, which was documented in hearings held in 1970 by the House Special Subcommittee on Education." *McCormick*, 370 F.3d at 286; *see also N. Haven Bd. of Educ.. v. Bell*, 456 U.S. 512, 523 n.13 (1982). Title IX's statutory context and purpose simply focus on biology.

Third, Plaintiffs fail to raise the implications of redefining sex in Title IX to include gender identity. Intervenors will argue that the Interpretation would undermine sex-based classifications everywhere. *See, e.g.*, Proposed Compl., ¶¶ 132, 361–62. This Court has already recognized "a fundamental constitutional right to be free from forced exposure of one's person to strangers of the opposite sex" in prisons and schools. *Kent v. Johnson*, 821 F.2d 1220, 1226 (6th Cir. 1987) (in prisons); *Brannum v. Overton Cnty. Sch. Bd.*, 516 F.3d 489, 498 (6th Cir. 2008) (in schools). But that right would be virtually non-existent if sex were redefined.

For example, homeless shelters for women who have "been physically or sexually abused" would be required to admit males, thus adding to the trauma for women. *See The Downtown Soup Kitchen v. Municipality of Anchorage*, No. 3:21-cv-155 (D. Alaska 2019) (challenging local law forcing women's homeless shelter to accept biological males).

Likewise, separation based on biological sex makes imminent 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). Safety matters in sports

too. World Rugby recently issued guidelines excluding biological males from women's rugby because of the injury risk to females.[6]

Or what about sex-based classifications like the Military Selective Service Act, which requires "every male citizen" between 18 and 26 to register for the draft? 50 U.S.C. § 3802(a). Or prior social security laws that favored biological females to "redress[ ] our society's longstanding disparate treatment of women"? *Califano v. Webster*, 430 U.S. 313, 317 (1977). The Supreme Court upheld these laws, but the logic of the Interpretation and Fact Sheet would effectively overturn these rulings. *Rostker v. Goldberg*, 453 U.S. 57 (1981) (selective service); *Califano*, 430 U.S. at 317–18 (social security).

Intervenors will argue that the Interpretation and Fact Sheet would also explicitly 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 the logic of the redefinition of sex. And if "[o]ver 100 federal statutes prohibit discrimination because of sex," invalidating Title IX's sex-based classification is "virtually certain to have far-reaching consequences." *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1778 (2020) (Alito, J., dissenting). "Before issuing [a] radical decision," the Department and the DOJ should "give[ ] some thought to where its decision [might] lead." *Id.*

By highlighting these dangers, Intervenors will provide a unique perspective on these issues. The female athletes will show how allowing physiologically bigger, stronger, and faster biological males to compete in women's sports personally harms their chance at fair competition and eliminates their "chance to be champions." *McCormick*, 370 F.3d at 295. *See supra* § I.B; *See, e.g.*, Proposed Compl., ¶¶ 56–106.

[6] *Transgender Women Guidelines*, World Rugby, https://bit.ly/2Z8kFKA.

And ACSI will demonstrate how being forced to compete against other schools that redefine sex directly harms their reputation by creating an unfair competitive market. *See supra* § I.B.

Finally, *Hecox* and *Soule*, the two cases in the country most similar to this one, granted intervention as of right and by permissive. *Hecox*, 479 F. Supp. 3d 930 at 955; *Soule v. Conn. Ass'n of Schs., Inc.*, No. 3:20-cv-00201 (RNC), 2021 WL 1617206 (D. Conn. Apr. 25, 2021). Just as the government officials in those cases did not adequately represent the intervenors' interests, Plaintiffs do not adequately represent Intervenors' interests here.

II. Alternatively, the Court should grant the female athletes' and ACSI's permissive intervention.

Along with satisfying the requirements for intervention as of right, Intervenors also qualify for permissive intervention. Federal Rule of Civil Procedure 24(b)(1) provides that "[o]n timely motion, the court may permit anyone to intervene who … has a claim or defense that shares with the main action a common question of law or fact." "Strong interest in judicial economy and desire to avoid multiplicity of litigation wherever and whenever possible … supports permissive intervention." *Buck v. Gordon*, 959 F.3d 219, 225 (6th Cir. 2020). In making this decision, a court should also consider "whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3). Intervenors satisfy these requirements for three reasons.

First, as discussed above, Intervenors timely filed this motion with no prejudice or delay to the original parties. They have filed a responsive pleading and their participation will provide no obstruction to effective litigation by the parties. See supra § I.A.

Second, Intervenors' involvement provides a more complete airing of the issues in dispute in this lawsuit. Their legal issue "shares with the main action a

common question of law or fact," Fed. R. Civ. P. 24(b)(1), as their interests situate and compel them to challenge the Interpretation and Fact Sheet.

Finally, Intervenors, unlike Plaintiffs, have a personal connection to this issue and unique experiences to share. They can provide unheard perspectives and arguments, thereby aiding in the disposition of the case. Their application satisfies the conditions for permissive intervention.

Conclusion

This case raises important legal issues for women and specifically for female athletes that will be impacted by this Court's decision about the Interpretation and the Fact Sheet. This Court should hear from those who Title IX was meant to protect and who lose by the federal governments' actions. For these reasons, A.S., C.F., A.F., and ACSI should be permitted to intervene, as of right or permissively.

Respectfully submitted this 4th day of October, 2021.

s/ W. Andrew Fox

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**Pro hac vice* applications forthcoming

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Certificate of Service

I hereby certify that on the 4th day of October, 2021, I electronically filed the foregoing document with the Clerk of Court and that the foregoing document will be served via the CM/ECF system on all counsel of record.

s/ W. Andrew Fox
W. Andrew Fox
Attorney for Intervenor-Plaintiffs

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
KNOXVILLE DIVISION

THE STATE OF TENNESSEE; THE STATE OF ALABAMA; THE STATE OF ALASKA; THE STATE OF ARIZONA; THE STATE OF ARKANSAS; THE STATE OF GEORGIA; THE STATE OF IDAHO; THE STATE OF INDIANA; THE STATE OF KANSAS; THE COMMONWEALTH OF KENTUCKY; THE STATE OF LOUISIANA; THE STATE OF MISSISSIPPI; THE STATE OF MISSOURI; THE STATE OF MONTANA; THE STATE OF NEBRASKA; THE STATE OF OHIO; THE STATE OF OKLAHOMA; THE STATE OF SOUTH CAROLINA; THE STATE OF SOUTH DAKOTA; THE STATE OF WEST VIRGINIA,

Plaintiffs,

—and—

ASSOCIATION OF CHRISTIAN SCHOOLS INTERNATIONAL; A. S., a minor, by Brandi Scarborough, her mother; **C.F.,** a minor, by Sara Ford, her mother; **A.F.,** a minor, by Sara Ford, her mother,

Intervenor-Plaintiffs,

v.

UNITED STATES DEPARTMENT OF EDUCATION; MIGUEL CARDONA, in his official capacity as Secretary of Education; **EQUAL EMPLOYMENT OPPORTUNITY COMMISSION; CHARLOTTE A. BURROWS**, in her official capacity as Chair of the Equal Employment Opportunity Commission; **UNITED STATES DEPARTMENT OF JUSTICE; MERRICK B. GARLAND,** in his official capacity as Attorney General of

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the United States; **KRISTEN CLARKE**, in her official capacity as Assistant Attorney General for Civil Rights at the United States Department of Justice,

Defendants.

DECLARATION OF A.S.
IN SUPPORT OF MOTION TO INTERVENE

I, A.S., under penalty of perjury, declare as follows:

1. I am a seventeen-year-old resident of Paragould, Arkansas, in Greene County, and have personal knowledge of the information below.

2. I am a senior and female athlete at Brookland High School in Brookland, Arkansas, where I compete on the women's soccer team.

Athletics Background

3. Sports is an important part of my family life. Both of my parents were athletes. My mom played basketball, and my dad played football. My brother is also an athlete.

4. But rather than shoot hoops or score touchdowns, I score goals.

5. Soccer has been a life-defining pursuit. I first kicked a soccer ball in first grade, after joining a free community youth team called City Stars Recreational Soccer. Later, I competed on a local recreational team through Greene County Soccer Association. Though these early teams were sometimes co-ed up through sixth grade, by seventh and eighth grade, the recreational leagues had shifted to girls-only and boys-only teams.

Competing in High School Sports

6. In Brookland Public Schools, the girls' high school soccer team is comprised of girls from grades nine through twelve.

7. Soccer team positions are limited based on an individual's athletic ability as demonstrated during tryouts.

8. There are 11 players per team (22 players total) on the soccer field at any given time, though the team may have many more players watching from the sidelines. Those 11 starting positions on the soccer field are highly coveted and competitive. I have had the privilege of being a starter beginning in my freshman year.

9. Soccer players are grouped into four positions:

a. the front, or attacking positions, which are called strikers;

b. the midfielder positions;

c. the defender positions; and

d. the goalie.

10. I typically start as a right wing defender position, which is also called a right fullback. As the game progresses and players get tired, we move around as needed. Sometimes I play other midfielder and defender positions. In the past, I've even played some offense.

11. Our girls' soccer team typically has both a junior (eleventh grade) captain and a senior (twelfth grade) captain. Last year during the 2020-21 school year, I had the privilege of being elected as the junior captain of my soccer team. This is a leadership position that has responsibilities which include leading warmups before practices and games, talking to referees, and serving as liaison between players and coaches.

12. The soccer season generally runs from the end of February through May and culminates in a state tournament. Because of my team's dedication and hard work, I am proud that my high school soccer team has made it to the state tournament every year of my high school career thus far except for one (2020),

which was cancelled due to the COVID-19 pandemic.

13. I have also been honored to win individual awards for my soccer performances. For example, my freshman year, I won the Workout Award for demonstrating a good attitude in the weight room and trying hard. My junior year, I won an All-Conference Award (an award voted on by coaches in our conference based on the athlete's performance in conference), a team Defender of the Year award (from my school), and a 4A All-State Tournament award (from my coach).

14. I love playing soccer. Not only is it a demanding, active sport that pushes me to give my all, but I also appreciate the teamwork that it requires to achieve a win. Every girl has to play her part.

15. We generally train an average of two-and-a-half to three hours per day, five days a week in season (with the exception of game days). We run long distances, short sprints, scrimmage, practice ball handling, and lift weights in training.

16. Being a female athlete is not easy. It requires significant sacrifice—both personally, and for my family—for me to compete at the high school level. I have sacrificed personal time with friends and family. I have sacrificed sleep, as I stay up late after a game to finish homework. And my family has made significant time and financial sacrifices so that I can compete.

17. But I make these sacrifices because I want to be the best that I can be at my sport, and help my teammates win.

18. Competing in soccer has shaped me significantly as a person. It has taught me responsibility and time management, as I juggle a high school study schedule with practice and games. It has provided opportunities to learn teamwork and leadership, how to identify our goal and work with others to achieve that goal. It has taught me perseverance through fatigue and even tough conditions (like

inclement weather). It has helped me grow in self-confidence and communication skills. It helped me forge strong relationships with my teammates as we process life together. It has taught me how to lose gracefully and come back stronger, as well as how to win with humility.

19. As a senior, I am currently being recruited by college soccer coaches, including those in other states. I have not yet decided where I will attend college, but I am currently looking to attend a state school. Athletic scholarship offers would certainly play a key role in my decision of where to attend college. But I know that girls' athletic scholarships are limited and competitive.

Males Competing in Girls' Sports: Fairness & Safety

20. Early this year, I began to hear about males competing in girls' sports. I later learned about female track athletes in Connecticut and elsewhere who lost to males competing in their races. It was shocking to me that this could happen.

21. The whole idea of facing male competition in my sport is incredibly discouraging.

22. I work very hard to be competitive in soccer. And I am honored to have achieved a starting position on the field, earned a leadership position on my team, and competed in several state tournament competitions. But the idea of facing a person with inherent physical advantages over me takes both the fun and the fairness out of it.

23. Soccer is a rough contact sport—even in high school—and injuries are common among female athletes.

24. Most commonly, I have observed my fellow athletes sprain ankles, injure knees, break wrists, and receive concussions while playing soccer. I have personally had my share of ankle and wrist injuries from playing my sport.

25. Playing a rough contact sport against other girls is one thing. But

playing a rough contact sport against a male is an entirely different matter.

26. Brookland High School has a boys' soccer team that my girls' team regularly scrimmages against for practice. Even though the boys' team holds back a little in those scrimmages, they still dominate us girls.

27. Even in my experience playing three-on-three recreational soccer through Kick It 3v3, my all-girls team was crushed by an all-boys team. We didn't stand a chance.

28. And this makes sense. Males generally have advantages of size, speed, strength, and stamina in soccer. I have also noticed that they tend to have better ball control. They possess the ball less because they kick the ball harder and further. Their bigger frames are more effective and aggressive in blocking. They run faster. And they commonly play more physically.

29. I feel intimidated at the idea of playing soccer against males. I don't want to be hurt. And that would take the fun out of my sport.

30. But even beyond safety, it simply is not fair to force us girls to play against a male who has inherent physical advantages over us. It takes the fairness out of our sport.

Protecting Girls' Sports

31. That's why I was thankful to hear that Arkansas had passed a law to protect women's sports.

32. I have always understood that Title IX was designed to protect female athletes by keeping the fairness and the fun in our sport.

33. I fear that, without Title IX or Arkansas's sports law, girls will be replaced on girls' sports teams by individuals who have spots of their own on a co-ed or boys' team—and we girls would once again be left behind.

34. No male individual should be allowed to take opportunities away from

female athletes, whether that is a position on the field, a leadership position, a championship opportunity, or a scholarship opportunity.

35. Getting involved in this lawsuit was a weighty decision that I took very seriously. But I want to ensure that I am not faced with the tough decision of competing on an unfair playing field with heightened safety risks, or not competing at all.

36. And I took this step not only for me, but for other female athletes as well. I want to ensure that other female athletes have the opportunity to enjoy the same athletic experiences that have shaped me into the person I am today.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
KNOXVILLE DIVISION

THE STATE OF TENNESSEE; THE STATE OF ALABAMA; THE STATE OF ALASKA; THE STATE OF ARIZONA; THE STATE OF ARKANSAS; THE STATE OF GEORGIA; THE STATE OF IDAHO; THE STATE OF INDIANA; THE STATE OF KANSAS; THE COMMONWEALTH OF KENTUCKY; THE STATE OF LOUISIANA; THE STATE OF MISSISSIPPI; THE STATE OF MISSOURI; THE STATE OF MONTANA; THE STATE OF NEBRASKA; THE STATE OF OHIO; THE STATE OF OKLAHOMA; THE STATE OF SOUTH CAROLINA; THE STATE OF SOUTH DAKOTA; THE STATE OF WEST VIRGINIA,

Plaintiffs,

—and—

ASSOCIATION OF CHRISTIAN SCHOOLS INTERNATIONAL; A.S., a minor, by Brandi Scarborough, her mother; **C.F.,** a minor, by Sara Ford, her mother; **A.F.,** a minor, by Sara Ford, her mother,

Intervenor-Plaintiffs,

v.

UNITED STATES DEPARTMENT OF EDUCATION; MIGUEL CARDONA, in his official capacity as Secretary of

Case No. 3:21-CV-00308-CEA-DCP

Education; **EQUAL EMPLOYMENT OPPORTUNITY COMMISSION; CHARLOTTE A. BURROWS**, in her official capacity as Chair of the Equal Employment Opportunity Commission; **UNITED STATES DEPARTMENT OF JUSTICE; MERRICK B. GARLAND,** in his official capacity as Attorney General of the United States; **KRISTEN CLARKE**, in her official capacity as Assistant Attorney General for Civil Rights at the United States Department of Justice,

Defendants.

DECLARATION OF C.F.
IN SUPPORT OF MOTION TO INTERVENE

I, C.F., under penalty of perjury, declare as follows:

1. I am a seventeen-year-old resident of Jonesboro, Arkansas, in Craighead County, and have personal knowledge of the information below.

2. I am a senior and multi-sport female athlete at Brookland High School in Brookland, Arkansas, where I compete on the women's basketball, tennis, and track teams. Sports has been a life-defining pursuit.

Athletics Background

3. Sports was like the air I breathed growing up. Both of my parents were multi-sport athletes: my mom played tennis and volleyball, and my dad played baseball and golf. My brother and sister are also competitive athletes.

4. For as long as I can remember, balls and competition have been a part of my life. From a very young age—almost as soon as I could sit up—my dad stuck a ball in my hands. And as a small child, I loved playing with our Little Tykes basketball and goal.

Competing in Basketball, Tennis, and Track

5. In third grade, I joined my first public school basketball team at Brookland Elementary School, which was co-ed.

6. In fourth through sixth grade, I played basketball for our public middle school on an all-girls team.

7. In seventh grade, I doubled-up: I not only played for our seventh-grade girls' team, but simultaneously played on the junior high girls' team that year. It was quite an honor to be invited to play for a basketball team of older (eighth and ninth grade) girls. During seventh grade, I was also voted Miss Lady Bearcat by the team, in recognition of my leadership for the team.

8. In seventh, eighth, and ninth grades, my Brookland public school team became three-peat conference champions.

9. And just last year, my junior year of high school, my Lady Bearcats team were conference champions, district champions, and made it into the quarterfinals for the state tournament. It was thrilling to see our hard work pay off.

10. From ninth grade through the end of eleventh grade, I also played club basketball.

11. I love basketball. It's something I look forward to throughout the school day, because I can let go of everything else going on in life and just focus on competition. It's a very active sport and keeps me in shape with the constant running. Basketball has given me some of my best friends. We learn how to communicate well, and how to work together.

12. But basketball is a tough sport. There is no downtime, no off-season. And, especially compared with other sports, it is a sport that not many girls play. In fact, I remember being at sixth grade recess and being the only girl shooting hoops with the boys.

13. In basketball, there are five girls per team (ten total) on the court at any given time.

14. And those five girls play one of these three positions:

a. a point guard, who leads the offensive, calls the plays, starts the plays, runs the balls, and carries the ball;

b. two shooting guards on the wings; and

c. two post players, who used to be known as centers.

15. I play point guard.

16. Positions on the girls' basketball team are limited by a girl's capabilities demonstrated during tryouts. There are typically more than five girls on a given basketball team.

17. The five starting positions on the court are highly coveted and competitive. I will be a starter for my team this year.

18. Basketball season generally runs November through March and culminates with a state tournament.

19. Basketball is my first love. But I also took up tennis and track in high school.

20. Just recently, during my senior year of high school, I took up tennis. Our season runs from August to October, and we are nearing the end of this season. I play on a girls' doubles team.

21. Though there generally is not a limit to the number of people at my school who can play girls' tennis, our coach can only take two doubles teams and two singles teams to districts competitions. This means that only the top performing teams have the opportunity to advance to the next level of competition.

22. I have also competed in outdoor track as a mid-distance runner off-and-on due to the COVID-19 pandemic and personal injuries.

23. Our school only offers outdoor track. I generally compete in the 800-meter the relay 4x800-meter relay. During my freshman year, I competed in the 800-meter race at conference and helped my school become conference champions. I plan to compete in outdoor track this upcoming spring.

24. Sports have shaped me as a person. I've learned leadership skills and how to work with others to achieve a goal. I've learned that it is okay to make mistakes. I've learned how to overcome my own anxiety and become much more comfortable being in front of people and communicating with strangers. When I'm having a bad day, sports help me take my mind off of my circumstances.

25. But it isn't easy. Practice runs five days a week for approximately two hours and lasts year 'round for basketball. We run drills, workout with the team, and shoot hoops.

26. And it takes sacrifice. I sacrifice time for sports that could be used for homework, or earning an income, or spending time with friends and family. We can't take family vacations when we'd prefer to, as we work around tournament schedules. I miss out on time to relax or enjoy typical teen experiences through high school.

27. But the sacrifice is worth it because I love my sport. I love the challenge, the adrenaline, and the rush of satisfaction when we achieve a win.

Males Competing in Women's Sports: Fairness & Safety

28. When I first heard about males competing in girls' sports, I thought it was so obviously unfair. Males have clear athletic advantages, such as their greater strength, size, speed, and endurance.

29. Even my brother, who is two years younger than me and only in his mid-teens, can dominate me in basketball due to his strength, height, and

endurance advantages.

30. Brookland High School has a boys' basketball team and I have noticed that not only their practices, but their games, look different from our girls' events. For example, the boys' team lifts weights every day in practice (we girls do not). The boys' practice more aggressively and at a faster pace. The post player is stronger—something I can determine just from watching a layup.

31. In basketball, I see males throw the basketball further and run faster. They are stronger. More aggressive. Faster. And generally taller.

32. Basketball is an aggressive contact sport.

33. Knee injuries (such as ACL or meniscus tears) and ankle injuries are common injuries girls experience in basketball.

34. If I had to compete against a male in basketball, I would be terrified of being injured due simply to their greater strength and aggression. For example, in a basketball charge, a defensive player will step under the basket and cross their arms. If the offense approaches that player too aggressively, that player can be pushed down and may fall on their back. I would be terrified of being charged by a male.

35. Males move faster. And the faster the defense is, the less balance you have on offense, and the easier it is to get hurt.

36. Even the close body contact of competing on the basketball court with a male would make me uncomfortable. Basketball involves body contact and close proximity to the person you're defending against, and it would be uncomfortable to play in such close proximity to a male.

37. In tennis, too, I see male advantages in the speed and power of their swing, their speed, and their endurance.

38. And in track, too, males have advantages of speed, strength, explosive

power, and endurance.

Protecting Girls' Sports

39. I first heard about males competing in women's sports within the last couple of years. My immediate thought was that this situation is unfair.

40. I think everyone should be treated with dignity and respect. And people are welcome to dress as they prefer. But it is not fair to allow someone with male advantages to take athletic opportunities away from girls.

41. If I were forced to compete against a male athlete—especially in a contact sports like basketball—I suspect I would hold back. I would not want to try as hard because I would feel defeated from the outset.

42. Title IX provides opportunities for women in sports. And to see those opportunities go to boys or men would mean that girls and women were not getting the opportunities that they deserved.

43. I hope to teach elementary school someday. If the opportunity presents itself, I would love to compete in college athletics and I hope to earn a scholarship.

44. I only recently heard that my home state, Arkansas, passed a Save Women's Sports law to protect the integrity of women's sports and ensure that female athletes like me have a future in sports. I was excited to learn that my state was playing a part in this and trying to fight for what it right.

45. Women's sports are extremely important to me. If not for Title IX, I would not be the person I am today. Sports has taught me so much and been such an integral part of my life. I am very grateful for that and want to ensure it continues to be available to future young women.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

C[redacted] F[redacted]

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
KNOXVILLE DIVISION

THE STATE OF TENNESSEE; THE STATE OF ALABAMA; THE STATE OF ALASKA; THE STATE OF ARIZONA; THE STATE OF ARKANSAS; THE STATE OF GEORGIA; THE STATE OF IDAHO; THE STATE OF INDIANA; THE STATE OF KANSAS; THE COMMONWEALTH OF KENTUCKY; THE STATE OF LOUISIANA; THE STATE OF MISSISSIPPI; THE STATE OF MISSOURI; THE STATE OF MONTANA; THE STATE OF NEBRASKA; THE STATE OF OHIO; THE STATE OF OKLAHOMA; THE STATE OF SOUTH CAROLINA; THE STATE OF SOUTH DAKOTA; THE STATE OF WEST VIRGINIA,

Plaintiffs,

—and—

ASSOCIATION OF CHRISTIAN SCHOOLS INTERNATIONAL; A. S., a minor, by Brandi Scarborough, her mother; **C.F.,** a minor, by Sara Ford, her mother; **A.F.,** a minor, by Sara Ford, her mother,

Intervenor-Plaintiffs,

v.

UNITED STATES DEPARTMENT OF EDUCATION; MIGUEL CARDONA, in his official capacity as Secretary of Education; **EQUAL EMPLOYMENT OPPORTUNITY COMMISSION; CHARLOTTE A. BURROWS**, in her official capacity as Chair of the Equal Employment Opportunity Commission; **UNITED STATES DEPARTMENT OF JUSTICE; MERRICK B. GARLAND,** in his official capacity as Attorney General of

Case No. 3:21-CV-00308-CEA-DCP

the United States; **KRISTEN CLARKE**, in her official capacity as Assistant Attorney General for Civil Rights at the United States Department of Justice,

Defendants.

DECLARATION of A.F.
IN SUPPORT OF MOTION TO INTERVENE

I, A.F., under penalty of perjury, declare as follows:

1. I am a thirteen-year-old resident of Jonesboro, Arkansas, in Craighead County, and have personal knowledge of the information below.

2. I am an eighth-grade student and multi-sport athlete at Brookland Junior High School in Brookland, Arkansas, where I compete on the girls' basketball and volleyball teams, and I intend to compete in track this year.

Athletic Experience

3. Both of my parents were multi-sport athletes: my mom played tennis and volleyball, and my dad played baseball and golf. Both of my siblings are also talented athletes and compete in high school sports.

4. Sports has always been my world. Dad would play ball with my siblings and me from as early as I can remember. Though I loved playing with balls of all shapes and sizes, the basketball has always been my favorite. As a small child, I remember spending hours playing with our Little Tykes basketball set in our driveway.

5. When I reached kindergarten, I started playing organized sports. My parents signed me up for our town's youth recreational league called City Stars. I played basketball with City Stars from kindergarten through second grade.

6. In second grade, I started playing intermural basketball at Brookland

Elementary School. And I have continued to play on my school's girls' basketball team each school year from second grade to present. I currently compete on my school's eight-grade girls' basketball team.

7. In basketball, there are five girls per team (ten total) on the court at any given time.

8. And those five girls play one of these three positions:

a. a point guard;

b. two shooting guards on the wings; and

c. two post players, who used to be known as centers.

9. I am point guard for our team, which means I lead the offense, call the plays, start the plays, run the ball, and carry the ball.

10. Positions on the girls' basketball team are limited by a girl's capabilities demonstrated during tryouts. There are typically more than five girls on a given basketball team.

11. The five starting positions on the court are highly coveted and competitive.

12. Basketball season generally runs November through March and culminates with a state tournament. There is no downtime, no off-season. It's a very active sport and keeps me in shape with the constant running.

13. But I love it! Basketball is by far my favorite sport. I love the adrenaline rush and fast pace. I love the satisfaction of making of a shot or stealing the basketball. And, most of all, I love to win.

14. I intend to continue competing in basketball in high school, and possibly even college.

15. But basketball is not the only sport I compete in. In fifth grade, my mom asked me to try volleyball—in part, because it involves less physical contact

than basketball due to the net between you and your opponents.

16. I have played on Brookland High School's girls' volleyball team for the last three years and I intend to continue playing volleyball in high school.

17. In volleyball, there are six girls per team (twelve total) on the court at a given time. Just like in basketball, those initial starting positions are highly coveted and competitive.

18. While basketball is my favorite sport, I do enjoy a close team bond with my volleyball teammates.

19. And, because I love to compete, I also intend to try out for outdoor track this year. I do not yet know which events I would compete in, but I suspect I would enjoy sprints or middle-distance races.

20. Being a multi-sport athlete takes sacrifice. I have early morning practices every day before school. I lose a lot of sleep. I sacrifice time to hang out with my friends or have dinner with my family.

21. Though I am only in junior high, sports has played an important role in my life. As a Type-1 diabetic, sports gives me the opportunity to exercise and keep my body healthy. It has taught me how to work hard and persevere. It has taught me people skills, such as how to be a leader and communicate well with others. It has helped me grow in self-confidence. It has opened opportunities that I never imagined, such as singing the national anthem at basketball games or local college events.

22. I am eager to see what doors sports continues to open for me. My goal is to compete in high school. Beyond that, I would love to earn an athletic scholarship and compete in college.

Males Competing in Girls' Sports

23. The idea of males competing in girls' sports is completely unfair. A

couple years ago, I started hearing about this becoming an issue. And then over this past summer, I heard more about girls losing athletic opportunities from high school sports all the way up to the Olympics.

24. Males have physical advantages over females. For example, they are generally taller, larger, stronger, and faster. Their height makes it easier for them to shoot goals or spike balls. Their larger frame means they can block and defend more effectively. Their upper body strength means they can hit or throw the ball harder and faster. Their speed means they can get to the ball or run down the court more quickly. They have more endurance than girls.

25. Even at my age and grade level, I can see the difference in athletic performance between boys and girls. And this is something I have noticed for years.

26. I have observed that the boys' basketball team at my junior high school plays more roughly, more aggressively, and less cooperatively. My girls' basketball team is a little more laid back, shares the ball more, and works together more cohesively.

27. Basketball is a rough contact sport. It is common to see girls get knee and ankle injuries. The risk of injury, plus the constant running, mean that basketball is a sport that not many girls play.

28. I fear that if males start competing in girls' basketball, even fewer girls will want to try.

29. Title IX means everything to me. I love sports. And the fact that Title IX was passed to give girls like me the opportunity to play sports at school—just like boys get to do—means so much to me. I can't imagine what life would be like without those opportunities.

30. I am proud of my state for standing up for women's rights.

31. Males playing in girls' sports violates our rights as females to have fair

play and not be displaced by males. We should be able to play against our own sex, and not be forced to compete against someone who is biologically enhanced and could injure us.

32. If we girls lose our sports, I fear that it won't stop there. We could lose our scholarships and college opportunities to males, too. I fear that girls might stop even trying out for sports if they know they can't be competitive against a male.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

A[redacted] F[redacted]

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
KNOXVILLE DIVISION

THE STATE OF TENNESSEE; THE STATE OF ALABAMA; THE STATE OF ALASKA; THE STATE OF ARIZONA; THE STATE OF ARKANSAS; THE STATE OF GEORGIA; THE STATE OF IDAHO; THE STATE OF INDIANA; THE STATE OF KANSAS; THE COMMONWEALTH OF KENTUCKY; THE STATE OF LOUISIANA; THE STATE OF MISSISSIPPI; THE STATE OF MISSOURI; THE STATE OF MONTANA; THE STATE OF NEBRASKA; THE STATE OF OHIO; THE STATE OF OKLAHOMA; THE STATE OF SOUTH CAROLINA; THE STATE OF SOUTH DAKOTA; THE STATE OF WEST VIRGINIA,

Plaintiffs,

—and—

ASSOCIATION OF CHRISTIAN SCHOOLS INTERNATIONAL; A.S., a minor, by Brandi Scarborough, her mother; **C.F.,** a minor, by Sara Ford, her mother; **A.F.,** a minor, by Sara Ford, her mother,

Intervenor-Plaintiffs,

v.

UNITED STATES DEPARTMENT OF EDUCATION; MIGUEL CARDONA, in his official capacity as Secretary of

Case No. 3:21-CV-00308-CEA-DCP

Education; **EQUAL EMPLOYMENT OPPORTUNITY COMMISSION; CHARLOTTE A. BURROWS**, in her official capacity as Chair of the Equal Employment Opportunity Commission; **UNITED STATES DEPARTMENT OF JUSTICE; MERRICK B. GARLAND,** in his official capacity as Attorney General of the United States; **KRISTEN CLARKE**, in her official capacity as Assistant Attorney General for Civil Rights at the United States Department of Justice,

Defendants.

DAVID BALIK'S DECLARATION
IN SUPPORT OF MOTION TO INTERVENE

I, David Balik, under penalty of perjury, declare as follows:

1. I am the Vice President - USA of the Association of Christian Schools International (ACSI), and have personal knowledge of the information below.

2. In my role as Vice President - USA, I oversee ACSI's field operations in the United States and supervise ACSI's division directors who are in regular contact with ACSI member schools. I also regularly review reports generated from ACSI's database, which includes statistics and other information about ACSI's member schools.

Association of Christian Schools International Background

3. ACSI is a Christian educational organization that serves member individuals and schools ranging from early education to colleges and universities.

4. ACSI is a non-profit corporation organized under California law with its principal place of business in Colorado.

5. ACSI serves member schools in all fifty states, with approximately 2,000 member schools from preschool to high school and more than sixty colleges and universities in the United States.

6. ACSI member schools serve approximately 500,000 students throughout the United States.

7. ACSI also serves over sixty colleges and universities in twenty-nine different states.

8. ACSI is the largest Protestant association of Christian schools in the world.

9. ACSI was founded in 1978 when several regional U.S. school associations joined together to advance excellence in Christian education.

10. ACSI's mission is to "strengthen Christian schools and equip Christian educators worldwide as they prepare students academically and inspire them to become devoted followers of Jesus Christ."

11. ACSI follows a Statement of Faith, which explains some of ACSI's religious beliefs on topics including the Bible, Jesus Christ, and the need for redemption.

12. The Statement of Faith also explains ACSI's position on biological sex as "believe[ing] that God wonderfully foreordained and immutably created each person as either male or female in conformity with their biological sex. These two distinct yet complementary genders together reflect the image and nature of God (Genesis 1:26–27)."

13. ACSI promotes Christian education and provides training and resources to Christian member schools and Christian educators by enhancing Christian educators' professional and personal development and providing vital support functions for Christian schools.

14. ACSI's member schools all affirm ACSI's Statement of Faith, including its position on gender.

15. ACSI offers several services to its members.

16. For example, ACSI offers teacher and administrator certifications, credentials educators and administrators, accredits and evaluates schools to ensure the educational quality and integrity of member schools, offers curriculum and textbook publishing and development, and provides research and resources on how member schools can create communities marked by healthy and productive spiritual, emotional, and cultural characteristics.

17. ACSI also helps member schools gain a better understanding of laws that impact them by holding workshops, providing member schools with guidance on how to develop better policies, procedures, and practices, sending alerts and policy memos to its member schools explaining issues related to religious education, religious freedom and other issues that relate to ACSI's mission, and providing other resources and articles.

18. ACSI submits public comment on regulations that affect its member schools, such as the implementation of the Emergency Assistance to Non-Public Schools, the Small Business Administration's loan and disaster assistance programs, and other regulations that affect charitable entities.

19. ACSI provides advocacy, policy, and other types of advice to its member schools about their athletic programs.

20. ACSI also offers certification services for its member schools' athletic directors.

The Interpretation and the Fact Sheet have a direct effect ACSI as an organization.

21. In January 2021, President Biden declared that Bostock's analysis changed the meaning of all federal law regarding sex discrimination to include gender identity and sexual orientation discrimination "so long as the laws do not contain sufficient indications to the contrary." Exec. Order No. 13,988, 86 Fed. Reg. 7023–25 (Jan. 20, 2021).

22. On June 22, 2021, the U.S. Department of Education (Department) published in the Federal Register its "Enforcement of Title IX of the Education Amendments of 1972 With Respect to Discrimination Based on Sexual Orientation and Gender Identity in Light of Bostock v. Clayton County." 86 Fed. Reg. 32,637 (June 22, 2021) ("Interpretation").

23. On June 23, 2021, Acting Assistant Secretary Suzanne B. Goldberg issued a "Dear Educator" letter notifying Title IX recipients of the Department's new Interpretation and reiterating that the Department "will fully enforce Title IX to prohibit discrimination based on sexual orientation and gender identity." Letter to Educators on Title IX's 49th Anniversary (June 23, 2021), https://bit.ly/3ksLLDj.

24. The Dear Educator letter was accompanied by a "fact sheet" issued by the Civil Rights Division of the DOJ and the Office for Civil Rights ("OCR") at the Department. U.S. Dep't of Justice & U.S. Dep't of Educ., Confronting Anti-LGBTQI+ Harassment in Schools, https://bit.ly/3sQjZnM (together with the Dear Educator Letter, "Fact Sheet").

25. ACSI has diverted resources by preparing and submitting a written comment in response to Exec. Order No. 13,988, 86 Fed. Reg. 7023-25 (Jan. 20, 2021), which preceded and resulted in the issuance of the Interpretation and the Fact Sheet.

26. ACSI submitted the written comment on June 10, 2021.

27. ACSI's written comment urged the Office of Civil Rights and the Department "to evaluate … questions of sexual orientation and gender identity [and] how it will ensure – as it must – that faith-informed institutions and their participants of good will are protected and continue to have every means at hand to teach and to live out Christian standards of conduct." P. George Tryfiates, *Written Comment—Title IX Public Hearing, June 7-11, 2021* (June 10, 2021), https://bit.ly/3A037Ng.

28. ACSI executive-level officials and staff diverted time from other tasks by drafting, reviewing, and submitting this written comment.

29. But the government never provided a notice and comment period before issuing its Interpretation and Fact Sheet.

30. Therefore, ACSI lost the opportunity to use its written comment to influence the rule making process in a meaningful way.

31. The Interpretation and the Fact Sheet frustrate ACSI's mission and purpose by requiring it to divert its resources to protect opportunities for female athletes in an unfair athletic environment created by Interpretation and Fact Sheet.

32. The Interpretation and the Fact Sheet also frustrate ACSI's mission and purpose by announcing and promoting an official governmental preference of a different and contrary view of gender than that held by ACSI and its member schools in their Statement of Faith, which places the government as opposing ACSI's mission and working to discourage public support of ACSI's mission and of promoting the position that God created each person as either male or female and equipping its member schools to provide a Christian education to their students.

The Interpretation and the Fact Sheet effect ACSI's member schools and their female athletes

33. Many ACSI member high schools view athletics as a way to further their mission of providing uniquely Christian educations for their students by teaching students how to foster physical development and athletic skills while learning the value of personal discipline, commitment, and promoting team goals over individual aspirations.

34. The majority of ACSI member high schools, colleges, and universities in the United States provide athletic opportunities for their students.[1]

35. ACSI member schools offer opportunities for student athletes to compete on separate teams for males and females.

36. For example, member schools compete in one or a combination of the following sports: basketball, cross country, cheerleading, diving, golf, volleyball, swimming, track and field, tennis, soccer, softball, pom, and water polo.

37. ACSI member schools promote their athletic teams as a distinct value to the education of their students.

38. ACSI member high schools, colleges, and universities promote their athletic programs to prospective students as one way to attract those students.

39. ACSI member colleges and universities also use their existing athletic programs—and the success of those programs—to recruit prospective student-athletes.

40. Many ACSI member high schools, colleges, and universities compete with other public schools attract prospective students and to recruit prospective student-athletes.

[1] Throughout the remainder of this declaration "ACSI member schools," "ACSI member high schools," or "ACSI member colleges and universities" denotes a significant number of, but not necessarily all, of ACSI member schools.

41. The athletic success of ACSI member schools provides many benefits.

42. For example, ACSI member schools host athletic events on their campuses.

43. This hosting allows them to obtain fees from their athletic programs in the form of ticket sales that support these programs and generally increases awareness of the member schools by allowing members of the public to visit the campus.

44. Athletic programs provide direct support through donations to the athletic programs.

45. ACSI member schools use their athletic programs to help brand their schools, develop campus unity, and offer entertainment and social activities for their prospective students, current students, alums, and the broader community.

46. Athletic programs also help ACSI member schools to develop strong alumni networks and encourage donations.

47. Successful athletic programs contribute to ACSI member schools' reputation and prestige by allowing them to advertise that success to the public and increase name-recognition of the schools in their local community and even on a national level.

48. For ACSI member colleges and universities, athletic success can also lead to increased applications for admission.

49. For example, one ACSI member university participated in the NCAA's post-season basketball tournament in 2021.

50. I have read that schools that perform well in the NCAA post-season basketball tournament typically receive an increase in public awareness and an increase in applications for enrollment. *See* Hayley Glatter, *The March Madness Application Bump*, The Atlantic, https://bit.ly/39UDeE4.

51. The websites of ACSI member schools have specific pages dedicated to athletics and the athletic achievements of current and past teams and individuals, including information on the number of championships the schools' teams have won and individual and team records.

52. ACSI member high school athletic teams have won state, conference, and district championships and their athletes have won individual titles.

53. ACSI member college and university athletic teams have won national and conference championships and their athletes compete for national individual titles.

54. I understand that students at ACSI member high schools that participated in athletics in high school have earned athletic scholarships to play their sport in colleges and universities affiliated with the NCAA.

55. My understanding is that these athletic scholarships significantly reduce the cost of higher education and provide other benefits including access to medical facilities, health benefits, travel expenses, and gear such as shoes, clothes, and bags.

56. I understand that some former students of ACSI member high schools that participated in athletics are now professional athletes and make their living playing the sport they played while at the ACSI member high school.

57. The Interpretation and the Fact Sheet threaten to reduce substantially the benefits of athletics to ACSI member schools.

58. For example, many of ACSI's member high schools, colleges, and universities are in direct competition with other public high schools, colleges, and universities and compete in the same arenas.

59. For example, ACSI member schools compete against public schools in at least the following 35 states: Arizona, Alaska, Alabama, Arkansas, California,

Delaware, Florida, Georgia, Hawaii, Idaho, Iowa, Illinois, Indiana, Kansas, Kentucky, Louisiana, Michigan, Minnesota, Mississippi, Missouri, Montana, North Carolina, North Dakota, Nebraska, Ohio, Oklahoma, Oregon, South Carolina, South Dakota, Tennessee, Texas, Virgina, Washington, Wisconsin, and West Virginia.

60. More than 1,300 schools in these states are members of ACSI.

61. Many ACSI member high school sports teams compete against athletic teams from public high schools for state championships, conference championships, and district championships and records.

62. ACSI member college and university school sports teams compete in the NCAA Divisions I, II, and III and the National Association of Intercollegiate Athletics (NAIA) and frequently compete against public colleges and universities' athletic teams for national, regional, and conference championships and records.

63. For example, many ACSI member high schools, colleges, and universities compete against public high schools, colleges, and universities in head-to-head athletic events, where the schools' teams and individual athletes compete against each other and for national, state, conference, and/or district championships.

64. ACSI member high schools, colleges, and universities may also compete against public high schools, colleges, and universities for opportunities to host athletic events.

65. ACSI member high schools, colleges, and universities compete against public high schools, colleges, and universities to attract students to their schools based on the reputations of their athletic programs.

66. ACSI member colleges and universities compete against other public colleges and universities to recruit top-tier athletes to their athletic programs.

67. The Interpretation and Fact Sheet impose burdens on ACSI member high schools, colleges, and universities that it does not impose on other public high

schools, colleges and universities, which gives ACSI's member schools' competitors a competitive advantage.

68. For example, ACSI member schools only allow females to compete on their female sports teams.

69. But the Interpretation and the Fact Sheet create an uneven playing field for ACSI's member schools' female athletic teams by requiring them to compete against other public schools' female athletic teams that include biological males or withdraw from competition.

70. ACSI member high schools, colleges, and/or universities compete in the areas listed in paragraphs 59-69 against public schools in states with laws that that protect women by preserving biology-based eligibility standards for participation in female sports ("Save Women's Sports laws").

71. ACSI member schools' female teams would be at a competitive disadvantage if they were forced to play against athletics teams with males and therefore lose opportunities to fairly compete in athletic events by playing against teams with males.

72. The Interpretation and the Fact Sheet create a credible threat and substantial risk that the female athletic teams of ACSI member schools will be required to compete against biological males on a more frequent basis.

73. For example, ACSI member schools and their female athletic teams in Alabama, Arkansas, Florida, Idaho, Montana, Mississippi, Tennessee, and West Virginia. I understand that these states currently protect females against competing against biological males in athletics because of Save Women's Sports laws.

74. By forcing ACSI members schools into a competitive disadvantage by requiring their female athletic teams to compete against males, the Interpretation and the Fact Sheet make it more difficult for ACSI member schools' female teams to

compete in female athletics, make it easier for public schools that compete against ACSI member schools to have athletic success, and illegally structure an unfair competitive environment.

75. The Interpretation and the Fact Sheet also make it harder for ACSI member schools' athletic teams to win games and titles compared to public schools' female athletic teams with males and therefore imposes a reputational harm on ACSI member schools that other public schools do not suffer.

76. By making it more difficult for ACSI member schools' athletic teams to win games and titles, the Interpretation and the Fact Sheet also harm ACSI member colleges and universities by making it more difficult to recruit top-tier athletes and therefore impedes the success of these programs.

77. The Interpretation and the Fact Sheet also deprive ACSI member schools and their female athletes of the benefit of laws that ensure a fair playing field for females by requiring sex designations in school-sponsored athletic teams to be based on biological sex.

78. For example, ACSI has member high schools in Alabama, Arkansas, Florida, Idaho, Montana, Mississippi, Tennessee, West Virginia that field sports teams for girls. All of these states have laws that ensure female athletes compete only against female athletes.

79. ACSI's member high schools and their female athletes compete in athletics against public high schools in these states.

80. ACSI has member high schools in Alabama and Mississippi that field sports teams for girls where Save Women's Sports laws require state high school associations to protect female athletes.

81. ACSI's member high schools and their female athletes are members of state high school associations in Alabama and Mississippi and compete in athletics against public high schools in these associations.

82. ACSI member colleges and/or universities have female athletes compete in sports against public colleges and universities which would include competing against colleges and universities in or from some if not all of the states of Arkansas, Florida, Idaho, Montana, Mississippi, Tennessee, or West Virginia.

83. ACSI has member high schools that field sports teams for girls that are members of state high school associations.

84. So ACSI member schools that are members of state high school associations must choose between remaining members of associations that require males to compete against females or leave the associations entirely.

85. For example, I have read that one ACSI member school previously decided to leave its athletic conference because of the conference's policies allowing males to compete against females. Samantha Pell, *Maryland High School Leaves Athletic Association over Transgender Policy* (Mar. 22, 2019), *available at* https://wapo.st/3B3uh7k.

86. The Interpretation and the Fact Sheet put ACSI member high schools to the same choice, only nationwide.

87. Therefore, the Interpretation and the Fact Sheet create a credible threat and substantial risk that ACSI member schools will be forced to re-evaluate their membership in state athletic associations, including by leaving those associations.

88. If ACSI member high schools remain members of high school athletic associations to which the Interpretation and the Fact Sheet apply, then their female athletic teams will be forced to compete against member schools who permit males to compete on their female athletic teams.

89. If ACSI member schools leave high school athletic associations, then they will suffer harm by being excluded from state-wide competitions, events, and championships, by suffering reputational harm by being excluded from a state-wide association, and by not being able to offer female student athletes to compete at the highest levels of high school competition.

90. For example, many ACSI member schools compete against public schools in at least the following 35 states: Arizona, Alaska, Alabama, Arkansas, California, Delaware, Florida, Georgia, Hawaii, Idaho, Iowa, Illinois, Indiana, Kansas, Kentucky, Louisiana, Michigan, Minnesota, Mississippi, Missouri, Montana, North Carolina, North Dakota, Nebraska, Ohio, Oklahoma, Oregon, South Carolina, South Dakota, Tennessee, Texas, Virgina, Washington, Wisconsin, and West Virginia.

91. These schools have more than 200,000 students in middle school and high school, many thousands of whom are female athletes.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

David Balik, Ed.D.

EXHIBIT E

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
KNOXVILLE DIVISION

THE STATE OF TENNESSEE; THE STATE OF ALABAMA; THE STATE OF ALASKA; THE STATE OF ARIZONA; THE STATE OF ARKANSAS; THE STATE OF GEORGIA; THE STATE OF IDAHO; THE STATE OF INDIANA; THE STATE OF KANSAS; THE COMMONWEALTH OF KENTUCKY; THE STATE OF LOUISIANA; THE STATE OF MISSISSIPPI; THE STATE OF MISSOURI; THE STATE OF MONTANA; THE STATE OF NEBRASKA; THE STATE OF OHIO; THE STATE OF OKLAHOMA; THE STATE OF SOUTH CAROLINA; THE STATE OF SOUTH DAKOTA; THE STATE OF WEST VIRGINIA,

Plaintiffs,

—and—

ASSOCIATION OF CHRISTIAN SCHOOLS INTERNATIONAL; A.S., a minor, by Brandi Scarborough, her mother; **C.F.,** a minor, by Sara Ford, her mother; **A.F.,** a minor, by Sara Ford, her mother,

Intervenor-Plaintiffs,

v.

UNITED STATES DEPARTMENT OF EDUCATION; MIGUEL CARDONA, in his official capacity as Secretary of Education; **EQUAL EMPLOYMENT OPPORTUNITY COMMISSION; CHARLOTTE A. BURROWS**, in her official capacity as Chair of the Equal Employment Opportunity Commission;

Case No. 3:21-CV-00308-CEA-DCP

INTERVENOR-PLAINTIFFS' PROPOSED VERIFIED COMPLAINT

UNITED STATES DEPARTMENT OF JUSTICE; MERRICK B. GARLAND, in his official capacity as Attorney General of the United States; **KRISTEN CLARKE**, in her official capacity as Assistant Attorney General for Civil Rights at the United States Department of Justice,

Defendants.

Introduction

1. Intervenor-Plaintiff Association of Christian Schools International (ACSI) is an association representing thousands of schools nationwide with hundreds of thousands of students, many of whom are female athletes. Intervenor-Plaintiffs A.S., C.F., and A.F. are female athletes in Arkansas who compete in girls' sports like soccer, basketball, and volleyball. Athletics provides numerous benefits to ACSI member school athletes and A.S., C.F., and A.F.—self-esteem; teamwork; joy in victory and lessons from defeat; opportunities to compete; collegiate recruiting and athletic scholarship options; and more. Fifty years ago, Title IX of the Education Amendments paved the way for these athletes by ensuring that girls and women had the same opportunities to compete in interscholastic athletics as boys and men.[1]

2. But the U.S. Department of Education will curtail these gains—and reduce the advantages of sports for girls—through its unlawful re-interpretation of Title IX to permit boys who are biologically male to compete in girls' athletic competitions if they claim a female gender identity. In doing so, the government puts girls at a competitive disadvantage, increases their risk of injury, and creates an unfair playing field that deprives girls of the inherent benefits of athletics.

[1] For clarity, this complaint refers to biological males as "boys," "men," or "males" and biological females as "girls," "women," or "females." This nomenclature reflects that this case concerns the effects of *biological* differences between males and females and Title IX's focus on creating equal opportunities for members of both biological sexes.

3. The Constitution and the Administrative Procedure Act bar unelected bureaucrats from singlehandedly upending longstanding federal law and starting a sea change in sports and education. The re-interpretation itself violates Title IX by denying girls athletic opportunities. And the government acted unlawfully when it rewrote Title IX through an arbitrary rule without public participation and oversight.

4. Intervenor-Plaintiffs will suffer irreparable harm if this Court does not enjoin the government's attempted revision of Title IX and declare its interpretation illegal. Intervenor-Plaintiffs need a preliminary and permanent injunction and declaratory relief to ensure that they can continue to enjoy the benefits of athletics and fair competition.

Jurisdiction and Venue

5. This Court has subject-matter jurisdiction under 28 U.S.C. § 1331 because this action arises under the U.S. Constitution and federal law.

6. This Court also has jurisdiction under 28 U.S.C. § 1346(a) because this is a civil action against the United States.

7. This Court has jurisdiction under 28 U.S.C. § 1361 to compel an officer of the United States or any federal agency to perform his or her duty.

8. This Court has jurisdiction to review Defendants' unlawful actions and enter appropriate relief under the Administrative Procedure Act (APA), 5 U.S.C. §§ 553, 701–706, and the Regulatory Flexibility Act (RFA), 5 U.S.C. § 611.

9. This Court has inherent jurisdiction to review and enjoin ultra vires or unconstitutional agency action through an equitable cause of action. *Larson v. Domestic & Foreign Com. Corp.*, 337 U.S. 682, 689–71 (1949).

10. This case seeks declaratory relief under the Declaratory Judgment Act, 28 U.S.C. §§ 2201–2202, 5 U.S.C. § 705–706, and Federal Rule of Civil Procedure 57; injunctive relief under 28 U.S.C. § 1343 and Federal Rule of Civil Procedure 65; costs

and attorneys' fees under the Equal Access to Justice Act, 28 U.S.C. § 2412; and other relief under this Court's inherent equitable powers.

11. Venue is proper in this Court under 28 U.S.C. § 1391 because a substantial part of the events or omissions giving rise to the claims occurred in this district, the effects of Defendants' challenged actions are felt in this district, and Defendants can and do perform official duties in this district.

Intervenor-Plaintiffs

A.S.

12. A.S. is a twelfth-grade female student and soccer athlete at Brookland High School in Brookland, Arkansas. Because A.S. is a minor, she brings this action by her mother, Brandi Scarborough.

C.F.

13. C.F. is a twelfth-grade female student and basketball, tennis, and track athlete at Brookland High School in Brookland, Arkansas. Because C.F. is a minor, she brings this action by her mother, Sarah Ford.

A.F.

14. A.F. is an eighth-grade female student and basketball and volleyball athlete, and intends to compete in track at Brookland Junior High School in Brookland, Arkansas. Because C.F. is a minor, she brings this action by her mother, Sarah Ford.[2]

Association of Christian Schools International

15. ACSI is a Christian educational organization that serves member individuals and schools ranging from early education to colleges and universities. It is the largest Protestant association of Christian schools in the world.

[2] This complaint refers to A.S., C.F., and A.F. collectively as the "individual athletes."

16. ACSI is a non-profit corporation organized under California law with its principal place of business in Colorado.

17. ACSI serves member schools in all fifty states, including approximately 2,000 member schools from preschool to high school and more than sixty colleges and universities in the United States.

18. ACSI member schools serve approximately 500,000 early education through high school students throughout the United States.

19. ACSI also serves over sixty colleges and universities located in twenty-nine different states.

20. ACSI serves more than seventy members in Tennessee, including early education, elementary, middle, and high schools, a college, and a university.

21. ACSI regularly conducts in-person audits of its accredited member schools, including those located in Tennessee.

22. ACSI regularly provides consultation, accreditation, curriculum, and other services for its member schools, including those located in Tennessee.

23. ACSI advertises itself to schools throughout Tennessee.

24. ACSI seeks relief on behalf of itself, its current and future members, and its current and future members' female athletes.

Defendants

25. Defendant United States Department of Education (Department) is an executive agency of the federal government responsible for enforcing and administrating Title IX. 20 U.S.C. §§ 3411, 3441.

26. Defendant Miguel Cardona is the United States Secretary of Education and is responsible for the operation of the Department and enforcing and administrating Title IX. *Id.* § 3411.

27. Defendant United States Department of Justice (DOJ) is an executive agency of the United States. DOJ also has the authority to enforce Title IX. Exec. Order No. 12,250, 28 C.F.R. part 41, app. A (1980).

28. Defendant Merrick B. Garland is the Attorney General of the United States and is responsible for the operation of the DOJ, including enforcing Title IX.

29. Defendant Kristen Clarke is the Assistant Attorney General for Civil Rights at DOJ. She is responsible for enforcing Title IX. 28 C.F.R. § 42.412.

30. Defendants Cardona, Garland, and Clarke are sued in their official capacities.

Factual Allegations

Designed to promote equal opportunities for women in education, including school-sponsored sports, Title IX has fostered and protected women's athletics.

31. In 1972, Congress enacted Title IX, 20 U.S.C. § 1681, which forbids education programs or activities receiving federal financial assistance from discriminating against persons based on their sex. Title IX provides:

> "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).

32. Title IX was designed to eliminate discrimination against women in education.

33. Recognizing that athletics are integral to the educational process, Title IX was also designed to actively promote equal opportunities for women in athletics.

34. Before Title IX, schools often emphasized boys' athletic programs "to the exclusion of girls' athletic programs." *Williams v. Sch. Dist. of Bethlehem*, 998 F.2d 168, 175 (3rd Cir. 1993).

35. For example, many high schools did not have girls' sports teams, which drastically reduced the number of women who could compete in college. And the average university devoted a mere two percent of its athletic budget to women's sports.

36. To end this discrimination against women in athletics, Title IX and its implementing regulations have defined "program or activity" to include interscholastic athletics (including high school and intercollegiate athletics). *See* 34 C.F.R. § 106.41(a); 44 Fed. Reg. 71,413–15 (Dec. 11, 1979); *Id.* at 71,417–418.

37. Title IX and its implementing regulations require that, if an entity subject to Title IX provides athletic programs or opportunities separated by sex, then it must do so in a manner that "provide[s] *equal athletic opportunity* for members of both sexes." 34 C.F.R. § 106.41(c) (emphasis added).

38. Title IX requires athletic opportunities to "effectively accommodate the interests and abilities" of girls and boys. 34 C.F.R. § 106.41(c).

39. Title IX also requires that male and female athletes "receive *equivalent treatment*, benefits and opportunities." 44 Fed. Reg. at 71,414 (emphasis added).

40. Title IX has been strikingly successful towards its intended goals in providing women with opportunities for athletic competition and scholarships.

41. For example, between 1972 and 2011, girls' participation in high school athletics increased from approximately 250,000 to 3.25 million students. U.S. Dept. of Educ., OCR, *Protecting Civil Rights, Advancing Equity* 33 (2015), https://bit.ly/2VF516Q.

42. In college, women's numbers have grown almost as steeply, from 30,000 in 1972 to more than 288,000 in 2017-18.

43. By 2018, forty-four percent of athletes in the NCAA were female student athletes. *National Collegiate Athletic Association, Number of NCAA College Athletes Reaches All-time High* (Oct. 10, 2018), https://bit.ly/3inIG6Z.

44. These developments have increased the opportunities for women and girls to benefit from being on athletic teams, developing skills associated with competitive sports, attending college on athletic scholarships, and competing in high-level competitions.

45. In short, Title IX has "enhanced, and will continue to enhance, women's opportunities to enjoy the thrill of victory [and] the agony of defeat." *Neal v. Bd. of Trs. of Cal. State Univs.*, 198 F.3d 763, 773 (9th Cir. 1999).

The term "sex" in Title IX refers to biological sex.

46. Although Title IX does not define "sex" or "on the basis of sex," these terms clearly refer to biological sex based on Title IX's text, history, and past application.

47. The dictionary definition of the term "sex" has never meant gender identity, including when Title IX was enacted in 1972.

48. For decades, Title IX has been understood to allow distinctions by sex, rather than require an androgenous or interchangeable view of the sexes. This is why, for example, the Supreme Court recognized the need to continue separating sex-specific privacy facilities when integrating women into the Virginia Military Institute. *United States v. Virginia*, 518 U.S. 515, 556–58 (1996) (Ginsburg, J.).

49. Throughout Title IX, the term "sex" is used as a binary concept, containing only male and female.

50. For example, Title IX contemplates a transition period for schools to change "from being an institution which admits only students of *one sex* to being an institution which admits students of *both sexes*," in certain circumstances. 20 U.S.C. § 1681(a)(2) (emphases added).

51. In the sports context, Title IX and its implementing regulations similarly make clear that the term "sex" means biological sex.

52. For example, Title IX and its implementing regulations expressly permit schools to sponsor sex-specific teams "where selection for such teams is based on competitive skill or the activity involved is a contact sport," 34 C.F.R. 106.41(b), and allow "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).

53. Ignoring the physical differences between the sexes would in many sports make it impossible to, as Title IX requires, "accommodate the . . . abilities" of girls and women, and to provide athletic opportunities of equal quality to girls and women.

54. Dr. Bernice Sandler—who is frequently recognized as "the Godmother of Title IX"— testified to the House Subcommittee on Postsecondary Education in support of regulations implementing Title IX in 1975, that ignoring differences in male and female physiology would for many sports "effectively eliminate opportunities for women to participate in organized competitive athletics. For these reasons, such an arrangement would not appear to be in line with the principle of equal opportunity." Statement of Dr. Bernice Sandler, Director, Project on the Status & Education of Women, Ass'n of American Colleges, June 25, 1975, Hearings on Sex Discrimination Regulations at 343.

55. Dr. Sandler was correct. Permitting males to compete in girls' or women's athletic events doesn't make victory for girls and women more difficult; it makes victory over comparably talented and trained male athletes all but impossible for girls and women in most athletic competitions, because of inherent and biologically dictated differences between the sexes.

Males have marked performance advantages over women in almost all athletic contests.

56. Male puberty quickly increases the levels of circulating testosterone in healthy teen and adult males to levels ten to twenty times higher than the levels that

occur in healthy females, and this natural flood of testosterone drives a wide range of physiological changes that give males a powerful physiological athletic advantage over females.

57. From puberty on, males have large and natural advantages over females that effect boys' and men's muscle gain, bone strength, and cardiovascular and respiratory system, which enhance their strength, speed, and recovery.

58. Physiological athletic advantages enjoyed over females by similarly fit males after puberty include advantages in the respiratory, cardiovascular, muscular, and other systems which result in faster oxygen uptake, higher short-term and sustained levels of oxygen to transport to the muscles, increased muscle fibers and muscle mass, and the ability to unleash more power (e.g., in vertical jumps), superior protection against stress fractures and fractures from collisions, and taller average heights.

59. These advantages render females, on average, unable to compete against males in power-based or endurance-based sports.

60. Meanwhile, female puberty brings distinctive changes to girls and women that impede athletic performance, including increased body fat levels which—while healthy and essential to female fertility—creates increased weight without providing strength, as well as wider hips and different hip-joint orientation that result in decreased hip rotation and running efficiency.

61. These are inescapable biological facts of the human species, not stereotypes, "social constructs," or relics of past discrimination.

62. Likewise, no amount of testosterone suppression can eliminate male physiological advantages relevant to performance and safety.

63. One year (or more) of testosterone suppression does not substantially eliminate male performance advantages, including in the areas of muscle mass and lean body mass, which together contribute to greater average male weight.

64. After male pubertal growth, testosterone suppression does not materially shrink bones so as to eliminate height, leverage, performance, and weight differences that follow from simply having longer, larger bones, and being taller after male puberty.

65. Because of these inherent physiological differences between men and women after puberty, male athletes consistently achieve records superior to those of comparably fit and trained women across almost all athletic events, with wider consistent disparities in long-term endurance and strength events.

66. The physiological differences between males and females after puberty directly result in stark disparities in the athletic record books because boys and men can consistently run faster and jump higher and farther than comparably fit girls and women.

67. For example, in Olympic sport competitions since 1983, men have performed between 5.5% (800-m freestyle, swimming) and 36.8% (weightlifting) better than women.

68. Likewise, Olympic world records indicate that in running events men perform 10.7% better than women and that in jumping events men perform 17.5% better than women.

69. While this gap is clearly pronounced at the elite level, it is equally evident at the high school level, including in Arkansas where the individual athletes and ACSI member schools and their female athletes compete.

70. To illustrate, the tables below show the top five boys' and girls' results in the state of Arkansas in different high school athletic events during the 2021 season. [3]

[3] Results listed in this table are publicly available online at AthleticNET: https://bit.ly/3F6i5VY.

Table 1: Best Arkansas High School Outdoor 100m Times in 2021

Boy	Time	Girl	Time
Woyn Chatmon	10.60	Takiria Brown	12.07
Ja'keylen Haney	10.63	Raghan Allen	12.17
Shunderick Powell	10.70	Kamaria Russell	12.30
Jaylen Hopson	10.70	Kinleigh Hall	12.31
Damari Smith	10.73	Jalia Bunn	12.43

Table 2: Best Arkansas High School Outdoor 400m Times in 2021

Boy	Time	Girl	Time
Woyn Chatmon	48.18	Kinleigh Hall	57.25
Adrian Carranco	49.00	Grace Lueders	57.29
Carson Lenser	49.03	Anna Woolsey	58.21
DeAndra Burns Jr.	49.06	Joey Babel	59.65
Patrick Elliott	49.87	Joli Ducharme	59.86

Table 3: Best Arkansas High School Outdoor High Jump Results in 2021

Boy	Height	Girl	Height
Sam Hurley	6' 10	Sydney Billington	5' 10
Jaqualen Moore	6' 10	Madison Holloway	5' 7
Trey Haworth	6' 7	Carshaila Rozier	5' 6
Dewayne Ashford	6' 6	Rachel Wilson	5' 6
Antwan Jones	6' 6	Brandi Rottman	5' 6

Table 4: Best Arkansas High School Outdoor Long Jump Results 2021

Boy	Distance	Girl	Distance
Sam Hurley	23' 2	Madison Holloway	18' 9.25
Daryl Searcy	23' 0	Blakelee Winn	18' 6.75
Link Lindsey	22' 10.5	Ta'Nya Burnett	17' 11.5
Treyvon Woodard	22' 9.75	Essence Flowers	17' 10.5
Bryson Bailey	22' 8.75	Hannah Brewer	17' 9.5

71. Each year, hundreds of high school boys achieve times or results in track and field events better than the world's single best elite woman competitor that year.[4]

72. This reality is evident in the performance of male athletes who have competed as women after undergoing testosterone suppression regimes.

73. For example, CeCe Telfer, a male who ran as Craig Telfer throughout high school and the first two years of college, certified compliance with the NCAA requirement of one year on testosterone-suppressing drugs and began competing in female track events in CeCe's senior collegiate year, for the 2019 indoor and outdoor track and field seasons.

74. CeCe's "personal bests" in events either improved or did not substantially decline following at least one year on testosterone suppressing drugs, as Table 5 demonstrates.

Table 5: Comparison of "Craig" and "CeCe" Telfer Performance Times Before and After Hormone Suppression

Event	"Craig" Telfer	"Cece" Telfer
Indoor 200 Meter Dash	24.64s (2017)	24.45s(2019)
Indoor 60 Meter Hurdles	8.91s (2018)	8.33s (2019)
Outdoor 100 Meter Dash	12.38s (2017)	12.24s(2019)

4 Doriane Lambelet Coleman, Martina Navratilova, et al., *Pass the Equality Act, But Don't Abandon Title IX*, Washington Post (Apr. 29, 2019), https://wapo.st/2VKlNN1.

Outdoor 400 Meter Hurdles	1:02.00s (2017)	57.53s(2019)

75. In short, when males compete in female events after puberty, gifted and dedicated female athletes are denied the equal athletic opportunity guaranteed by Title IX by being forced to compete against male athletes with inherent, biological, and immutable advantages.

The inclusion of males in female "contact" sports creates an enhanced risk of injury for female participants.

76. In many women's sports collisions between players, or between players and equipment such as balls or sticks, is a common cause of injury.

77. For example, in soccer, head injuries occur from collisions with another player's head or body, collision with the goal or ground, or from an unanticipated blow from a kicked ball.

78. In basketball, players often collide with each other during screens, while diving for a loose ball, or while driving to the basket.

79. Physiological differences between the biological sexes, combined with basic principles of physics, create enhanced risks of injury—and more severe injuries—for female athletes when competing against male athletes.

80. For example, males are larger, heavier, and run faster than females, thus bringing more kinetic energy into any collision between athletes. When a collision occurs between male and female athletes, the lighter females will suffer more abrupt deceleration in collisions with male bodies, creating heightened injury risk for impacted females.

81. Males also hit and kick balls faster, resulting in higher speed collisions between balls and athletes. For example, university-level male soccer players kick the ball on average with 20% greater velocity than university-level female soccer players. A soccer ball kicked by a male, travelling an average 20% faster than a ball

kicked by a female, will deliver more energy on head impact, and will thus increase the risk of an impact injury such as concussion.

82. All other variables being equal, females are more vulnerable to injuries including concussions and ACL tears than are males. Allowing males to participate in female athletics increases the risk to female athletes of sustaining these injuries because of the likelihood of more forceful collisions between male and female athletes than compared to collisions between only female athletes.

83. In 2020, after an extensive review of the scientific literature, consultation with experts, and modeling of expected injuries, World Rugby published revised rules governing male participation on female teams, along with a detailed explanation of how the new policy was supported by current evidence.[5]

84. Their analysis found that "the magnitude of known risk factors for head injury are … predicted by the size of the disparity in mass between players," and that the "addition of [male] speed as a biomechanical variable further increases these disparities." They observed an increase of up to 50% in neck and head acceleration that would be experienced in a typical tackle scenario in women's rugby if men were to participate.

85. While rugby is a contact-heavy sport, females forced to compete against male athletes in any contact sport will face an enhanced risk of injury due to immutable physiological differences between the sexes.

86. In female team sports, each player is vital to the success of the team and the loss of a single athlete due to injury can reduce the chances for success of the other girls and women on the team.

[5] World Rugby Transgender Guidelines, https://bit.ly/3ortlpU (accessed September 21, 2021).

Increasing numbers of girls already are losing athletic victories and opportunities to male competitors who identify as females.

87. Increasing numbers of boys and men are competing and trying to compete in female sports and depriving girls and women of athletic opportunities and accomplishments.

88. For example, male athletes seeking to compete against female athletes have challenged laws in Idaho, West Virginia, and Florida that require or permit schools to maintain separation based on sex for school-sponsored athletic teams or sports based on biological sex.

89. Therefore, in Idaho, West Virginia, and Florida, males are actively seeking access to compete in female sports through litigation.

90. In Connecticut, two biological males competing in female athletics won 15 women's state championship titles in girls' high school track and field (titles previously held by nine different girls).

91. At the University of Montana, a National Collegiate Athletic Association (NCAA) Division I school, June Eastwood, a male who previously competed on the men's track and cross-country teams, began competing on the women's track and cross-country teams after being treated for a year with testosterone suppression medication.

92. June Eastwood placed first in the women's mile at the University of Montana's conference championships and won the race by more than 3.5 seconds.

93. Likewise, Craig Telfer ranked 212th and 433rd in the 400-meter hurdles among men's Division II athletes in 2016 and 2017 respectively, yet CeCe Telfer took the Division II national championship in women's 400-meter hurdles in 2019 by almost two seconds.[6] *See supra* ¶¶ 73–74.

[6] Results listed are available online at Track & Field Results Reporting System: https://bit.ly/2YeXM8a (accessed September 21, 2021).

94. The Connecticut athletes, June Eastwood, and CeCe Telfer displaced women and prevented women from earning championships.

95. Likewise, in the 2020 Olympics, Laurel Hubbard, a biological male, qualified for and participated in the Tokyo Olympic Games in weightlifting.

96. Rachel McKinnon, a biological male, won a UCI Masters World Track Cycling Championship in the 2018 women's 200-meter sprint record, setting a new world record.

97. Laurel Hubbard and Rachel McKinnon displaced women and prevented women from competing in or winning championship events.

98. For example, Hannah Mouncey, a biological male, competed in Australian rules football before being banned from entering the Australian Football League Women's league based on "strength, stamina or physique." *Transgender footballer Hannah Mouncey threatens legal action against AFL*, News.com.au (Jan. 17, 2021), https://bit.ly/3Bb7si0.

99. The photograph below shows Hannah Mouncey (in red) tackling a female during a match:

100. In addition to displacement, men competing against women have caused significant injuries to women in athletics.

101. For example, Fallon Fox, a biological male, competed against females in mixed martial arts.

102. In a match, Fallon Fox gave a female opponent a concussion and fractured the orbital bone in her skull. The opponent said afterwards, "I have never felt the strength I felt in a fight like that." Richard Presley, *Transgender MMA Fighter Fallon Fox Breaks Opponent's Skull*, ATBK (May 20, 2021), https://bit.ly/39UDnaA.

103. Meanwhile, multiple sources report that the percentage of children identifying as transgender has multiplied rapidly within just the last few years.

104. In 2017, a study reported that 3–4 in 100 teens in the United States reported that they are or may be transgender. A more recent 2021 study suggests that the rate of transgender identification among America's youth may be as high as 9 in 100. William Malone, *Time to Hit Pause on 'Pausing' Puberty in Gender-Dysphoric Youth*, Medscape (Sept. 17, 2021), https://wb.md/3D4IVf5. This marked increase has been attributed in part to social and peer pressure, as documented in a 2018 study of "Rapid Onset Gender Dysphoria" conducted by Brown University professor Lisa Littman.

105. As more males identifying as females compete against females in high school and college, more females will lose competitive opportunities; lose out on varsity spots, playing time, medals, and advancements to regional meets and games, championship titles, and records; lose the experience of fair competition; lose the opportunities for victory and the satisfaction, public recognition, and scholarship opportunities that can come from victory; and lose scholarship opportunities, as well as facing an increased risk of injury in contact sports.

106. For female athletes who train hard to be the best that they can be, the situation is neither fair nor safe.

President Biden directs executive agencies to interpret and apply Title IX in light of *Bostock*.

107. In *Bostock v. Clayton County*, the U.S. Supreme Court held that terminating an employee "simply for being homosexual or transgender" constitutes discrimination "because of . . . sex" under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2. 140 S. Ct. 1731, 1737–38 (2020).

108. The Court assumed that "sex" in Title VII "refer[s] only to biological distinctions between male and female." *Id.* at 1739.

109. The Court reiterated that "other federal or state laws that prohibit sex discrimination," such as Title IX, were not "before" the Court. *Id*. at 1753. The Court thus expressly declined to "prejudge" whether its decision in *Bostock* would "sweep beyond Title VII" to those other laws. *Id*. at 1737–38.

110. The Court did not consider or decide what Title IX's statutory phrase "on the basis of sex" means. *Id*. at 1737–38.

111. Nor did the Court address Title IX's safe harbor for sex-separated living facilities or any of the other distinctions Title IX makes between the two biological sexes.

112. Even so, in January 2021, President Biden declared that *Bostock*'s analysis changed the meaning of all federal law regarding sex discrimination to include gender identity and sexual orientation discrimination "so long as the laws do not contain sufficient indications to the contrary." Exec. Order No. 13,988, 86 Fed. Reg. 7023–25 (Jan. 20, 2021).

113. Accordingly, President Biden directed federal agencies to "review all existing orders, regulations, guidance documents, policies, programs, or other agency actions" that either "(i) were promulgated or are administered by the agency under

Title VII or any other statute or regulation that prohibits sex discrimination, including any that relate to the agency's own compliance with such statutes or regulations" or "(ii) are or may be inconsistent with the policy set forth" in the Executive Order. *Id*.

114. President Biden further directed that the "head of each agency" "consider whether there are additional actions that the agency should take to ensure that it is fully implementing the policy" set forth in the Executive Order. *Id*.

115. Finally, President Biden directed "the head of each agency [to] develop, in consultation with the Attorney General, as appropriate, a plan to carry out actions that the agency has identified" within 100 days of the Executive Order. *Id*.

116. On February 23, 2021, citing the Executive Order, the Department and the DOJ withdrew the previous administration's litigation position that Title IX does not allow schools to let men compete in women's sports. Dep't of Educ. Office for Civil Rights, Letter to City of Hartford, et al. (Feb. 23, 2021), *available at* https://bit.ly/3uBeJpa (last visited September 30, 2021).

117. At the top of case documents in which the Department and the DOJ had defended women's sports just the last year, the Department and the DOJ added a red-lettered disclaimer stating, "This document expresses policy that is inconsistent in many respects with Executive Order 13988 on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation." Dep't of Educ., Letter to City of Hartford, et al. (Aug. 31, 2020), available at https://bit.ly/2ZH5ubr (last viewed September 30, 2021).

118. Two months later, President Biden then issued a second executive order specific to Title IX, with provisions similar to the February 23, 2021 letter. Exec. Order No. 14,021, 86 Fed. Reg. 13,803 (Mar. 8, 2021).

119. The Title IX executive order stated, that under Title IX, "all students should be guaranteed an educational environment free from discrimination on the

basis of sex, including discrimination in the form of sexual harassment, which encompasses sexual violence, and including discrimination on the basis of sexual orientation or gender identity." *Id.* It also provided for a 100-day review period of Department of Education regulations under Title IX. *Id.*

120. On March 26, 2021, the Civil Rights Division of the DOJ released a memorandum concluding that Title IX "prohibit[s] … discrimination on the basis of gender identity and sexual orientation." U.S. Dep't of Justice, Memorandum Regarding Application of Bostock v. Clayton County to Title IX of the Education Amendments of 1972 (Mar. 26, 2021), https://bit.ly/2WpV5zq.

121. The Department then held hearings in June 2021 soliciting public input on the correct understanding and enforcement of Title IX, at which a female athlete explained the devastating impact of allowing men to compete on women's teams. U.S. Dep't of Educ., Office of Civil Rights, Transcript, Virtual Public Hearing on Title IX of the Education Amendments of 1972 at 104–07 (June 7 to June 11, 2021) (testimony of Selina Soule).

The Department of Education re-defines Title IX's definition of "sex."

122. The Department of Education has engaged in at least two agency actions to implement President Biden's Executive Order.

Notice of Interpretation

123. *First*, on June 22, 2021, the Department published in the Federal Register its "Enforcement of Title IX of the Education Amendments of 1972 With Respect to Discrimination Based on Sexual Orientation and Gender Identity in Light of Bostock v. Clayton County." 86 Fed. Reg. 32,637 (June 22, 2021) ("Interpretation") (attached as Exhibit A).

124. In the Interpretation, the Department acknowledged that it previously "stated that Title IX's prohibition on sex discrimination does not encompass discrimination based on sexual orientation and gender identity." *Id.*

125. Contrary to these pronouncements, *earlier this year*, the Department concluded that *Bostock* did not apply to Title IX or require a different interpretation of Title IX. *See* U.S. Dep't of Educ., Memorandum for Kimberly M. Richey Acting Assistant Secretary of the Office for Civil Rights Re: Bostock v. Clayton Cnty., 140 S. Ct. 1731 (2020) (Jan. 8, 2021), https://bit.ly/3mwKI7H.

126. And in 2017, the Department rescinded and withdrew prior statements of policy and guidance on Title IX that had determined that Title IX's "prohibitions on discrimination 'on the basis of sex' … and its implementing regulations require access to sex-segregated facilities based on gender identity." Dear Colleague Letter (Feb. 22, 2017), https://bit.ly/3nSpG47.

127. Now, the Department's current view is that "Title IX Prohibits Discrimination Based on Sexual Orientation and Gender Identity." 86 Fed. Reg. at 32,637 (June 22, 2021).

128. The Interpretation relied heavily on *Bostock*'s analysis of Title VII and applied the analysis to Title IX. *See id.* at 32,637–38.

129. The Department concluded that "[t]here is textual similarity between Title VII and Title IX" and cited decisions from federal courts of appeals that "recognize that Title IX's prohibition on sex discrimination encompasses discrimination based on sexual orientation and gender identity." *Id.* at 32,637–639 (collecting cases).

130. In fact, the texts of Title VII and Title IX are materially different. *Compare* 42 U.S.C. § 2000e-2(a) *with* 20 U.S.C. § 1681(a).

131. The Department failed to cite decisions from federal courts of appeals that recognized that "Title VII differs from Title IX in important respects." *See, e.g.*, *Meriwether v. Hartop*, 992 F.3d 492, 510 n.4 (6th Cir. 2021).

132. The Department failed to consider that Title IX uses the term "sex" as a binary concept and any contrary reading would lead to inconsistent application, create conflicts within Title IX, and cause other problems in application. *See, e.g.*, 20 U.S.C. § 1686; 20 U.S.C. § 1681(a)(8); 34 C.F.R. § 106.40(b).

133. Nevertheless, the Department concluded that the phrase "on the basis of sex" in Title IX has the same meaning as the phrase "because of . . . sex" in Title VII and that this interpretation "is most consistent with the purpose of Title IX." 86 Fed. Reg. at 32,638–39.

134. The Department also noted that the DOJ "concluded that *Bostock*'s analysis applies to Title IX." *Id.*

135. The Department failed to mention that the DOJ had reached the exact opposite conclusion about *Bostock* just two months before. U.S. Dep't of Justice, Memorandum for the Civil Rights Division Regarding Application of *Bostock v. Clayton County* 4 (Jan. 17, 2021) ("*Bostock* does not require any changes to . . . sex-specific facilities or policies.") (attached as Exhibit B).

136. Finally, the Department pledged to enforce its Title IX interpretation and declared that it "will fully enforce Title IX to prohibit discrimination based on sexual orientation and gender identity in education programs and activities that receive Federal financial assistance from the Department." 86 Fed. Reg. at 32,639.

137. The Department also declared that its Interpretation "will guide the Department in processing complaints and conducting investigations." *Id.*

Fact Sheet

138. *Second*, on June 23, 2021, Acting Assistant Secretary Suzanne B. Goldberg issued a "Dear Educator" letter notifying Title IX recipients of the

Department's new Interpretation and reiterating that the Department "will fully enforce Title IX to prohibit discrimination based on sexual orientation and gender identity." Letter to Educators on Title IX's 49th Anniversary (June 23, 2021), https://bit.ly/3ksLLDj.

139. The Dear Educator letter was accompanied by a "fact sheet" issued by the Civil Rights Division of the DOJ and the Office for Civil Rights ("OCR") at the Department of Education. U.S. Dep't of Justice & U.S. Dep't of Educ., Confronting Anti-LGBTQI+ Harassment in Schools, https://bit.ly/3sQjZnM (together with the Dear Educator Letter, "Fact Sheet") (attached as Exhibit C).

140. The Fact Sheet purports to provide examples of what constitutes discrimination under Title IX.

141. For example, the Fact Sheet indicates that preventing a "transgender high school girl" from "try[ing] out for the girls' cheerleading team" would constitute discrimination, notwithstanding that the decision in *Bostock* did not address athletics, and indeed, made clear it was not addressing athletics or other situations outside the narrow factual situation of the case.

142. In fact, *Bostock* did not address any of the examples of purported discrimination identified in the Fact Sheet.

143. The Department also issued guidance on sexual harassment, confirming that it understood any differences in school's codes of conduct or other actions based on sexual orientation or gender identity to fall under this prohibited Title IX rubric, including its procedures for handling complaints on campus. Questions and Answers on the Title IX Regulations on Sexual Harassment 1, 7, (July 2021), https://bit.ly/3zToUWV (last accessed Sept. 30, 2021).

States pass Save Women's Sports laws to protect female athletes.

144. In response to the increasing number of males trying to compete against and defeat females in athletic competitions, many states have passed laws that protect women by preserving biology-based eligibility standards for participation in female sports.

145. Alabama, Arkansas, Florida, Idaho, Montana, Mississippi, Tennessee, and West Virginia have laws providing that sex designations for school-sponsored athletic teams in high school must be based on biological sex. Ala. Code § 16-1-52(b)(2); Ark. Code § 6-1-107(b)-(c); Fla. Stat. Ann. § 1006.205(3)(a); Idaho Code § 33-6203(1); 2021 Mont. Laws ch. 405(1); Miss. Code. Ann. § --(-) (-)--; 2021 Tenn. Pub. Acts, c. 40, § 1; W. Va. Code Ann. § 18-2-25d.[7]

146. The laws in Alabama, Arkansas, Florida, Idaho, Mississippi, Tennessee, and West Virginia also provide that sex designations for school-sponsored athletic teams in middle school must be based on biological sex. Ala. Code § 16-1-52(b)(2); Ark. Code § 6-1-107(b)-(c); Fla. Stat. Ann. § 1006.205(3)(a); Idaho Code § 33-6203(1); Miss. Code. Ann. § --(-) (-)--; Tenn. Code Ann. § 49-6-310(a); W. Va. Code Ann. § 18-2-25d.

147. For example, Alabama and Mississippi have laws providing that sex designations for school-sponsored athletic teams that are members of the state high school associations must be based on biological sex. Ala. Code § 16-1-52(b)(1); Miss. Code. Ann. § --(-) (-)--.

148. Moreover, Arkansas, Florida, Idaho, Montana, Mississippi, and West Virginia have laws providing that sex designations for school-sponsored athletic teams in public colleges and universities must be based on biological sex. Ark. Code § 6-1-107(b)-(c); Fla. Stat. Ann. § 1006.205(3)(a); Idaho Code § 33-6203(1); 2021 Mont. Laws ch. 405(1); Miss. Code. Ann. § --(-) (-)--; W. Va. Code Ann. § 18-2-25d.

[7] This complaint refers to these laws collectively as "Save Women's Sports laws."

149. But the Interpretation and the Fact Sheet eviscerates these protections for female athletes.

150. The Department and the DOJ are also actively seeking to eliminate these protections.

151. On June 17, 2021, the Department and DOJ filed a statement of interest in which they took the position that Title IX prohibits West Virginia from "categorically exclud[ing] transgender girls from participating in single-sex sports restricted to girls" and that West Virginia's law violates Title IX. Statement of Interest of the United States at 1, 7, *B.P.J. v. W.V. State Bd. of Educ.*, No. 2:21-cv-00316 (S.D. W. Va. June 17, 2021), ECF No. 42 (footnote omitted).

152. Likewise, on June 17, 2021, the DOJ filed a statement of interest in which it took the position that the Equal Protection Clause of the Fourteenth Amendment prohibits Arkansas's law. Statement of Interest of the United States at 6–17, *Brandt v. Rutledge*, No. 21-cv-00450 (E.D. Ark. June 17, 2021), ECF No. 19.

153. By seeking to reverse protections for female athletes in these states, the Department and the DOJ, via their application of the Interpretation and the Fact Sheet, harm the Intervenor-Plaintiffs: the three individual athletes (A.S., C.F., and A.F.) who compete in female athletics in Arkansas, and ACSI, its member schools, and their female athletes who compete in states that currently ensure a fair playing field for women.

A.S. is a female high school soccer player.

154. A.S. is a twelfth-grade female student and soccer athlete at Brookland High School in Brookland, Arkansas.

155. Brookland High School is a public high school in Arkansas that competes in athletics against other public high schools.

156. Brookland High School is a member of the Arkansas Activities Association, Arkansas' primary sanctioning body for high school sports.

157. A.S. began playing soccer in first grade.

158. A.S. has won many athletic awards, including being voted a team captain, other team awards, and all-conference honors.

159. Soccer is a physically demanding sport. It often involves physical contact with other players and the ball and injuries are common among female athletes.

160. Soccer teams—including A.S.'s soccer team—are only allowed 11 players on the field at one time.

161. On A.S.'s team, those positions are highly coveted and competitive.

162. Positions on the team are determined during tryouts and throughout the season based on athletic ability and skill.

163. Soccer has shaped A.S. significantly as a person, including by teaching her valuable lessons, giving her self-confidence, and allowing her to form strong relationships with the other girls on and off the field.

164. A.S. is currently being recruited by coaches to play college soccer, and receiving an athletic scholarship would impact her decision of where to attend college.

C.F. is a female high school basketball, tennis, and track athlete.

165. C.F. is a twelfth-grade female student and basketball, tennis, and track athlete at Brookland High School in Brookland, Arkansas.

166. As a member of Brookland High Schools teams, C.F. competes against other public schools. *See supra* ¶¶ 155–156.

167. C.F. began playing organized basketball in third grade.

168. C.F. has played on basketball teams that have won several conference championships and she has received team-awards for her sports leadership.

169. Basketball is a physically demanding sport, often involves physical contact with other players, and injuries are common among female athletes.

170. Basketball teams—including C.F.'s teams—only allow a limited number of players on the court at one time.

171. On C.F.'s teams, those positions are highly coveted and competitive.

172. C.F. also plays tennis at Brookland High School.

173. For the district competition in tennis, C.F.'s coach only takes two doubles teams and two singles teams and not every tennis player gets to compete in the district competition.

174. C.F. also runs track at Brookland high school and specializes in the 800-meter run.

175. As a freshman, C.F. was the conference champion in the 800-meter run.

176. Positions, roles, and opportunities on C.F.'s teams are determined based on athletic ability and skill.

177. Basketball has shaped C.F. significantly as a person, including by teaching her how to strive for a goal and helping her overcome anxiety and gain confidence.

178. C.F. would love to compete in college athletics and hopes to earn an athletic scholarship.

A.F. is a middle school basketball, volleyball, and track athlete.

179. A.F. is an eighth-grade female student at Brookland Junior High in Brookland, Arkansas.

180. A.F. currently plays basketball and volleyball and intends to compete in track when the season starts.

181. A.F. will be attending Brookland High School next year where she will compete against other public schools as Brookland High School is a member of the Arkansas Activities Association. *See supra* ¶¶ 155–156.

182. A.F. began playing organized sports in kindergarten, started playing basketball in second grade, and started playing volleyball in fifth grade.

183. Basketball is a physically demanding sport. It often involves physical contact with other players and injuries are common among female athletes.

184. A.F. intends to play basketball at Brookland High School.

185. Basketball and volleyball teams—including A.F.'s teams—only allow a limited number of players on the court at one time.

186. On A.F.'s teams, those positions are highly coveted and competitive.

187. Positions on the team are determined during tryouts based on athletic ability and skill.

188. Athletics have shaped A.F. as a person by giving her an opportunity to exercise and stay healthy, teaching her how to work hard and persevere, giving her self-confidence, and opening opportunities for her including singing at the national anthem at basketball games and local college events.

189. A.F. hopes to earn an athletic scholarship in basketball and play basketball in college.

The Interpretation and Fact Sheet have a direct effect on ACSI as an organization.

190. ACSI was founded in 1978 when several regional U.S. school associations joined together to advance excellence in Christian education.

191. ACSI's mission is to "strengthen Christian schools and equip Christian educators worldwide as they prepare students academically and inspire them to become devoted followers of Jesus Christ."

192. ACSI follows a Statement of Faith, which explains some of ACSI's religious beliefs on topics including the Bible, Jesus Christ, and the need for redemption.

193. The Statement of Faith also explains ACSI's position on biological sex as "believe[ing] that God wonderfully foreordained and immutably created each person as either male or female in conformity with their biological sex. These two distinct yet complementary genders together reflect the image and nature of God (Genesis 1:26–27)."

194. ACSI promotes Christian education and provides training and resources to Christian member schools and Christian educators by enhancing Christian educators' professional and personal development and providing vital support functions for Christian schools.

195. ACSI's member schools all affirm ACSI's Statement of Faith, including its position on gender.

196. ACSI offers several services to its members.

197. For example, ACSI offers teacher and administrator certifications, credentials educators and administrators, accredits and evaluates schools to ensure the educational quality and integrity of member schools, offers curriculum and textbook publishing and development, and provides research and resources on how member schools can create communities marked by healthy and productive spiritual, emotional, and cultural characteristics.

198. ACSI also helps member schools gain a better understanding of laws that impact them by holding workshops, providing member schools with guidance on how to develop better policies, procedures, and practices, sending alerts and policy memos to its member schools explaining issues related to religious education, religious freedom and other issues that relate to ACSI's mission, and providing other resources and articles.

199. ACSI submits public comment on regulations that affect its member schools, such as the implementation of the Emergency Assistance to Non-Public Schools, the Small Business Administration's loan and disaster assistance programs, and other regulations that affect charitable entities.

200. ACSI provides advocacy, policy, and other types of advice to its member schools about their athletic programs.

201. ACSI also offers certification services for its member schools' athletic directors.

202. ACSI diverted resources by preparing and submitting a written comment in response to Exec. Order No. 13,988, 86 Fed. Reg. 7023-25 (Jan. 20, 2021), which preceded and resulted in the issuance of the Interpretation and the Fact Sheet.

203. ACSI submitted the written comment on June 10, 2021.

204. ACSI's written comment urged the Office of Civil Rights and the Department "to evaluate … questions of sexual orientation and gender identity [and] how it will ensure – as it must – that faith-informed institutions and their participants of good will are protected and continue to have every means at hand to teach and to live out Christian standards of conduct." P. George Tryfiates, *Written Comment—Title IX Public Hearing, June 7-11, 2021* (June 10, 2021), https://bit.ly/3A037Ng.

205. ACSI executive-level officials and staff diverted time from other tasks by drafting, reviewing, and submitting this written comment.

206. But the Department never considered ACSI's written comment because it did not provide a notice and comment period before issuing its Interpretation and Fact Sheet.

207. Therefore, ACSI lost the opportunity to use its written comment to influence the rule making process in a meaningful way.

208. Likewise, the Department failed to consider an important aspect of the Interpretation and the Fact Sheet—i.e., how those documents affected religious organizations and schools—and therefore failed to take those important religious considerations into account when promulgating the Interpretation and the Fact Sheet.

209. The Interpretation and the Fact Sheet also frustrate ACSI's mission and purpose by requiring it to divert its resources to protect opportunities for female athletes in an unfair athletic environment created by Interpretation and Fact Sheet.

210. The Interpretation and the Fact Sheet also frustrate ACSI's mission and purpose by announcing and promoting an official governmental preference of a different and contrary view of gender than that held by ACSI and its member schools in their Statement of Faith, which places the government as opposing ACSI's mission and working to discourage public support of ACSI's mission and of promoting the position that God created each person as either male or female and equipping its member schools to provide a Christian education to their students.

Because the Interpretation and the Fact Sheet affect all public schools nationwide, it necessarily will harm the many ACSI member schools whose female athletes compete against those public schools.

211. Many ACSI member high schools view athletics as a way to further their mission of providing uniquely Christian educations for their students by teaching students how to foster physical development and athletic skills while learning the value of personal discipline, commitment, and promoting team goals over individual aspirations.

212. The majority of ACSI member high schools, colleges, and universities in the United States provide athletic opportunities for their students.[8]

213. ACSI member schools offer opportunities for student athletes to compete on separate teams for males and females.

214. For example, member schools compete in one or a combination of the following sports: basketball, cross country, cheerleading, diving, golf, volleyball, swimming, track and field, tennis, soccer, softball, pom, and water polo.

215. ACSI member schools promote their athletic teams as a distinct value to the education of their students.

216. ACSI member high schools, colleges, and universities promote their athletic programs to prospective students as one way to attract those students.

217. ACSI member colleges and universities also use their existing athletic programs—and the success of those programs—to recruit prospective student-athletes.

218. Many ACSI member high schools, colleges, and universities compete with other public schools regulated by Title IX and its implementing regulations to attract prospective students and to recruit prospective student-athletes.[9]

219. The athletic success of ACSI member schools provides many benefits.

220. For example, ACSI member schools host athletic events on their campuses.

221. This hosting allows them to obtain fees from their athletic programs in the form of ticket sales that support these programs and generally increases

[8] Throughout the remainder of this complaint "ACSI member schools," "ACSI member high schools," or "ACSI member colleges and universities" denotes a significant number of, but not necessarily all, of ACSI member schools.

[9] As used for the remainder of the complaint the use of the adjective "public" to describe a school means that the school receives federal funding and is regulated by Title IX and its implementing regulations, including the Interpretation and the Fact Sheet.

awareness of the member schools by allowing members of the public to visit the campus.

222. Athletic programs provide direct support through donations to the athletic programs.

223. ACSI member schools use their athletic programs to help brand their schools, develop campus unity, and offer entertainment and social activities for their prospective students, current students, alums, and the broader community.

224. Athletic programs also help ACSI member schools to develop strong alumni networks and encourage donations.

225. Successful athletic programs contribute to ACSI member schools' reputation and prestige by allowing them to advertise that success to the public and increase name-recognition of the schools in their local community and even on a national level.

226. For ACSI member colleges and universities, athletic success can also lead to increased applications for admission.

227. For example, one ACSI member university participated in the NCAA's post-season basketball tournament in 2021.

228. Schools that perform well in the NCAA post-season basketball tournament typically receive an increase in public awareness and an increase in applications for enrollment. *See* Hayley Glatter, *The March Madness Application Bump*, The Atlantic, https://bit.ly/39UDeE4.

229. The websites of ACSI member schools have specific pages dedicated to athletics and the athletic achievements of current and past teams and individuals, including information on the number of championships the schools' teams have won and individual and team records.

230. ACSI member high school athletic teams have won state, conference, and district championships and their athletes have won individual titles.

231. ACSI member college and university athletic teams have won national and conference championships and their athletes compete for national individual titles.

232. Students at ACSI member high schools that participated in athletics in high school have earned athletic scholarships to play their sport in colleges and universities affiliated with the NCAA.

233. These athletic scholarships significantly reduce the cost of higher education and provide other benefits including access to medical facilities, health benefits, travel expenses, and gear such as shoes, clothes, and bags.

234. Some former students of ACSI member high schools that participated in athletics are now professional athletes and make their living playing the sport they played while at the ACSI member high school.

235. The Interpretation and the Fact Sheet threaten to reduce substantially the benefits of athletics to ACSI member schools.

236. For example, many of ACSI's member high schools, colleges, and universities are in direct competition with other public high schools, colleges, and universities and compete in the same arenas.

237. For example, ACSI member schools compete against public schools in at least the following 35 states: Arizona, Alaska, Alabama, Arkansas, California, Delaware, Florida, Georgia, Hawaii, Idaho, Iowa, Illinois, Indiana, Kansas, Kentucky, Louisiana, Michigan, Minnesota, Mississippi, Missouri, Montana, North Carolina, North Dakota, Nebraska, Ohio, Oklahoma, Oregon, South Carolina, South Dakota, Tennessee, Texas, Virgina, Washington, Wisconsin, and West Virginia.

238. More than 1,300 schools in these states are members of ACSI.

239. Many ACSI member high school sports teams compete against athletic teams from public high schools for state championships, conference championships, and district championships and records.

240. ACSI member college and university school sports teams compete in the NCAA Divisions I, II, and III and the National Association of Intercollegiate Athletics (NAIA) and frequently compete against public colleges and universities' athletic teams for national, regional, and conference championships and records.

241. For example, many ACSI member high schools, colleges, and universities compete against public high schools, colleges, and universities in head-to-head athletic events, where the schools' teams and individual athletes compete against each other and for national, state, conference, and/or district championships.

242. ACSI member high schools, colleges, and universities may compete against public high schools, colleges, and universities for opportunities to host athletic events.

243. ACSI member high schools, colleges, and universities compete against public high schools, colleges, and universities to attract students to their schools based on the reputations of their athletic programs.

244. ACSI member colleges and universities compete against other public colleges and universities to recruit top-tier athletes to their athletic programs.

245. The Interpretation and Fact Sheet illegally impose burdens on ACSI member high schools, colleges, and universities that it does not impose on other public high schools, colleges and universities, which gives ACSI's member schools' competitors a competitive advantage.

246. For example, ACSI member schools only allow females to compete on their female sports teams.

247. But the Interpretation and the Fact Sheet create an uneven playing field for ACSI's member schools' female athletic teams by requiring them to compete against other public schools' female athletic teams that include biological males.

248. ACSI member high schools, colleges, and/or universities compete in the areas listed in paragraphs 236–246 against public schools in states with Save Women's Sports laws. *See supra* ¶¶ 144–148.

249. For example, ACSI member schools in Alabama, Arkansas, Florida, Idaho, Montana, Mississippi, Tennessee, and West Virginia compete against public high schools, colleges, and/or universities.

250. Because of the inherent biological and physiological athletic advantages of biological males compared to similarly fit biological females, ACSI member schools' female teams are at a competitive disadvantage and therefore lose opportunities to fairly compete in athletic events by playing against teams with males who identify as females.

251. The Interpretation and the Fact Sheet create a credible threat and substantial risk that the female athletic teams of ACSI member schools will be required to compete against biological males on a more frequent basis.

252. For example, ACSI member schools and their female athletic teams in Alabama, Arkansas, Florida, Idaho, Montana, Mississippi, Tennessee, and West Virginia are currently protected from competing against biological males in athletics because of Save Women's Sports laws.

253. But the Interpretation and the Fact Sheet would eliminate that protection and create a credible threat and substantial risk that ACSI member schools' female athletic teams and their female athletes will be forced to compete against (and lose to) biological males.

254. For example, males in Florida, Idaho, and West Virginia are actively challenging those states' Save Women's Sports laws and are actively seeking to compete against female athletes. *See supra* ¶¶ 88–89.

255. By forcing ACSI member schools into a competitive disadvantage by requiring their female athletic teams to compete against males, the Interpretation

and the Fact Sheet make it more difficult for ACSI member schools' female teams to compete in female athletics, make it easier for public schools that compete against ACSI member schools to have athletic success, and illegally structure an unfair competitive environment in violation of Title IX and other federal law.

256. The Interpretation and the Fact Sheet also make it harder for ACSI member schools' athletic teams to win games and titles compared to public schools' female athletic teams with males and therefore imposes a reputational harm on ACSI member schools that other public schools do not suffer.

257. By making it more difficult for ACSI member schools' athletic teams to win games and titles, the Interpretation and the Fact Sheet also harm ACSI member colleges and universities by making it more difficult to recruit top-tier athletes and therefore impedes the success of these programs.

258. The Interpretation and the Fact Sheet also deprive ACSI member schools and their female athletes of the benefit of laws that ensure a fair playing field for females by requiring sex designations in school-sponsored athletic teams to be based on biological sex.

259. For example, ACSI has member high schools in Alabama, Arkansas, Florida, Idaho, Montana, Mississippi, Tennessee, and West Virginia that field sports teams for girls.

260. ACSI's member high schools and their female athletes compete in athletics against public high schools in these states.

261. ACSI has member high schools in Alabama and Mississippi that field sports teams for girls where Save Women's Sports laws require state high school associations to protect female athletes.

262. ACSI's member high schools and their female athletes are members of state high school associations in Alabama and Mississippi and compete in athletics against public high schools in these associations.

263. ACSI member colleges and/or universities have female athletes compete in sports against public colleges and universities which would include competing against colleges and universities in or from some if not all of the states of Arkansas, Florida, Idaho, Montana, Mississippi, Tennessee, or West Virginia.

264. The states in paragraphs 259–263 have Save Women's Sports laws that require public colleges and universities to protect female athletes. *See supra* ¶¶ 144–148.

265. The female athletic teams of ACSI member schools in paragraphs 259–263 are currently able to compete on an even playing field against other female athletic teams from schools covered by the laws in paragraphs 144–148.

266. The Interpretation and the Fact Sheet deprive ACSI member schools and their female athletes of that protection and benefit and force them to compete against biological males.

267. In fact, the Department and the DOJ are actively trying to eliminate these laws by intervening in pending litigation challenging these laws. *See supra* ¶¶ 151–152.

268. In challenging these laws, the Department and the DOJ rely on the same incorrect interpretation of Title IX as the interpretation taken in the Interpretation and the Fact Sheet. Statement of Interest of the United States at 6–10, *B.P.J. v. W.V. State Bd. of Educ.*, No. 2:21-cv-00316 (S.D. W. Va. June 17, 2021), ECF No. 42.

269. These athletes challenge these laws based on a similarly incorrect interpretation of Title IX and argue—like the Department and the DOJ—that Title IX requires males to compete against females. Complaint, *D.N. v. DeSantis*, No. 21-cv-61344 (S.D. Fla. June 29, 2021), ECF No. 1; *B.P.J. v. West Virginia State Bd. of Educ.*, No. 21-cv-00316 (S.D.W.V. May 26, 2021), ECF No. 1.

270. Therefore, the Interpretation and the Fact Sheet create a credible threat and substantial risk that ACSI member schools in Idaho, West Virginia, and Florida and their female athletic teams and athletes will be forced to compete against (and lose to) biological males because males in these states are already trying to access women's sports.

271. The Interpretation and the Fact Sheet also require ACSI member schools to evaluate their membership in state-wide athletic associations.

272. The Interpretation and the Fact Sheet apply to high school athletic associations and require those associations to force member schools to allow biological males to compete on female athletic teams.

273. ACSI has member high schools that field sports teams for girls that are members of state high school associations.

274. So ACSI member schools that are members of state high school associations must choose between remaining members of associations that require males to compete against females or leave the associations entirely.

275. For example, one ACSI member school previously decided to leave its athletic conference because of the conference's policies allowing males to compete against females. Samantha Pell, *Maryland High School Leaves Athletic Association over Transgender Policy* (Mar. 22, 2019), *available at* https://wapo.st/3B3uh7k.

276. The Interpretation and the Fact Sheet put ACSI member high schools to the same choice, only nationwide.

277. Therefore, the Interpretation and the Fact Sheet create a credible threat and substantial risk that ACSI member schools will be forced to re-evaluate their membership in state athletic associations, including by leaving those associations.

278. If ACSI member high schools remain members of high school athletic associations to which the Interpretation and the Fact Sheet apply, then their female

athletic teams will be forced to compete against member schools who permit males to compete on their female athletic teams.

279. If ACSI member schools leave high school athletic associations, then they will suffer harm by being excluded from state-wide competitions, events, and championships, by suffering reputational harm by being excluded from a state-wide association, and by not being able to offer female student athletes to compete at the highest levels of high school competition.

The individual athletes and ACSI member schools' female athletes are harmed by the Interpretation and the Fact Sheet.

280. The individual athletes and ACSI's member schools' female athletes are harmed by the Interpretation and the Fact Sheet.

281. Athletics provides female athletes with countless advantages. *See supra* ¶¶ 31–45.

282. Athletic participation is associated with positive educational outcomes, including better attendance, higher grades, fewer disciplinary issues, a greater desire to go to college, and higher advanced placement enrollment rates.

283. Females who participate in sports are more confident and have higher self-esteem.

284. Participating in high school sports can provide girls with the opportunities for athletic scholarships in college which significantly reduce the cost of education and provide other benefits.

285. For example, participating in a collegiate sport affiliated with the NCAA can include benefits such as access to top-tier coaching, facilities, and equipment; consultation with nutritionists and dieticians; paid travel to games, academic support services; medical and wellness care; access to psychologists; access to the NCAA Student Assistance Fund; team gear and apparel; and the opportunity to make money on their own name, image, and likeness.

286. Women's increased participation in sports creates network effects at all levels of athletic competition so that more women competing means more women pushing each other forward and raising the bar for athletic achievement.

287. For example, many ACSI member schools compete against public schools in at least the following 35 states: Arizona, Alaska, Alabama, Arkansas, California, Delaware, Florida, Georgia, Hawaii, Idaho, Iowa, Illinois, Indiana, Kansas, Kentucky, Louisiana, Michigan, Minnesota, Mississippi, Missouri, Montana, North Carolina, North Dakota, Nebraska, Ohio, Oklahoma, Oregon, South Carolina, South Dakota, Tennessee, Texas, Virgina, Washington, Wisconsin, and West Virginia.

288. These schools have more than 200,000 students in middle school and high school, many thousands of whom are female athletes.

289. The individual athletes and many female athletes at ACSI member high schools, colleges, and universities are currently protected against being forced to compete against males because of state Save Women's Sports laws. *See supra* ¶¶ 144–148.

290. But the Interpretation and the Fact Sheet deprive female athletes of these opportunities and these benefits.

291. Upon information and belief, female athletes at ACSI member schools face an obstacle in asserting their own right to challenge the Interpretation and the Fact Sheet because many of the athletes are minors, value anonymity, and face a financial burden in legal costs associated with such challenges.

292. As a result of the Interpretation and the Fact Sheet, the individual athletes and ACSI's member schools' female athletes will be forced to compete against biological males.

293. But males enjoy performance advantages over females in virtually all athletic contests. *See supra* ¶¶ 56–106.

294. As a result of these advantages and the inherent and biologically dictated differences between the male and female sex, female athletes are unlikely to win when competing against comparably talented and trained male athletes.

295. Consequently, the individual athletes and ACSI's member schools' female athletes are put at a significant disadvantage in competing against males in athletic competitions.

296. The individual athletes and ACSI's member schools' female athletes will also be exposed to heightened risks of injury on the soccer field, basketball court, or any other contact sport when competing against males. Such injuries could range in severity, but at the extreme end might result in the end of their participation in athletics altogether.

297. As a result of their biologically dictated performance disadvantage and increased risk for injury, the individual athletes and ACSI's member schools' female athletes will have fewer opportunities to stand on the victory podium, fewer opportunities to participate in post-season elite competition, fewer opportunities for public recognition as champions, and a much smaller chance of setting recognized records.

298. For example, the Interpretation and the Fact Sheet create a credible threat that the individual athletes will be forced to compete against males for roster spots and positions on the soccer, tennis, basketball, and track at Brookland High School and Junior High School.[10]

299. The Interpretation and the Fact Sheet create a credible threat that the individual athletes will be forced to compete against males from other teams in soccer, tennis, basketball, and track.

[10] Males will be unable to compete for roster spots on female teams at ACSI member schools.

300. Likewise, the individual athletes and ACSI's member high schools' female athletes will lose opportunities to be noticed by college recruiters for scholarship opportunities and will therefore lose scholarships to compete in athletics at the collegiate level.

301. The individual athletes are training to compete in a sport in college and to gain an athletic scholarship.

302. But athletic scholarships are limited and competitive.

303. For example, NCAA Division I female soccer teams are limited to providing approximately 14 full-tuition scholarships, NCAA Division II female soccer teams are limited to providing approximately 10 full-tuition scholarships, and NAIA Division I female soccer teams are limited to providing 12 scholarships.

304. Likewise, NCAA Division I female basketball teams are limited to providing approximately 15 full-tuition scholarships, NCAA Division II female basketball teams are limited to providing approximately 10 full-tuition scholarships, and NAIA Division I female basketball teams are limited to providing 11 scholarships.

305. Other collegiate sports have other scholarship restrictions.

306. Collegiate soccer and basketball teams—as well as other athletic teams—also have a limited number of roster spots for non-scholarship athletes.

307. NCAA and NAIA schools recruit female athletes from a national market.

308. Therefore, the individual athletes and ACSI member schools' female athletes are competing against a national market for a limited number of available scholarships.

309. Because the Department and the DOJ open each sports league to new competitors and because it changes the rules of play, including the introduction of new and serious safety risks, the Department's and the DOJ's enforcement actions pose imminent injury to, and thus create competitor standing for, female athletes,

colleges, and schools to vindicate their educational, athletic, aesthetic, and recreational interests, protected by law, in competing fairly in single-sex sports.

310. By allowing biological males to participate in female sports in high school, the Interpretation and the Fact Sheet force the individual athletes and ACSI member schools' female athletes to compete for limited collegiate athletic scholarships and collegiate roster spots against competitors who have inherent physical advantages over them.[11]

311. This reduces their chances of earning a college scholarship or making a collegiate team.

312. ACSI, its members, its members athletes, and the individual athletes have no adequate or speedy remedy at law to correct or redress the deprivation of rights caused by the Interpretation and the Fact Sheet.

313. Unless the Interpretation and the Fact Sheet is set aside and enjoined, ACSI, its members, its members athletes, and the individual athletes will suffer irreparable injury.

Claims for Relief

Claim One
Sex Discrimination by Failing to Provide Effective Accommodation for the Interests and Abilities of Girls
(20 U.S.C. § 1681)

314. Intervenor-Plaintiffs repeat and reallege each allegation contained in paragraphs 1–313 of this complaint.

315. Title IX and its related regulations consider whether "program components reveal that treatment, benefits, or opportunities are not equivalent in kind, quality or availability" between the sexes. 44 Fed. Reg. at 71,415.

[11] This holds true at all colleges that accept federal funds and have not claimed a religious exemption under Title IX.

316. This requires that females be guaranteed equal opportunities to engage in post-season competition and equal quality of competition. *See, e.g.*, *Id*. at 71,416.

317. As a result of profound physiological differences between the sexes after puberty, the athletic abilities of girls are not equal to those of comparably fit and trained boys.

318. As a result of this inescapable difference, by permitting males to compete in female sporting events, the Interpretation and the Fact Sheet violate Title IX by failing to provide competitive opportunities for female athletes that accommodate their abilities and provide equal opportunities in levels of competition.

319. All Intervenor-Plaintiffs are harmed by Defendants' failure to provide competitive opportunities that fairly and effectively accommodate the athletic abilities of girls.

320. Such harm includes loss of the experience of fair competition; loss of victories and the public recognition associated with victories; loss of opportunities to advance to higher-level competitions; loss of visibility to college recruiters; and emotional distress, pain, anxiety, and other damages.

321. Title IX provides Intervenor-Plaintiffs with a private right of action. *Cannon v. Univ. of Chicago*, 441 U.S. 677, 703 (1979).

322. Accordingly, the Interpretation and the Fact Sheet violate Title IX.

Claim Two
Sex Discrimination by Failing to Provide Equal Treatment, Benefits, and Opportunities for Girls
(20 U.S.C. § 1681)

323. Intervenor-Plaintiffs repeat and reallege each allegation contained in paragraphs 1–322 of this complaint.

324. Title IX and its related regulations require "equal opportunity in . . . *levels of competition*," and competitive opportunities "which *equally reflect [girls'] abilities*." 44 Fed. Reg. at 71,417–418 (emphasis added).

325. Equivalent treatment and opportunities require equal opportunities to engage in post-season competition, and more broadly the right to be free of any policies which are "discriminatory in language or effect" or have the effect of denying "equality of athletic opportunity."

326. The Interpretation and Fact Sheet deprives female athletes, including Intervenor-Plaintiffs, of equal opportunities to engage in post-season competition, is discriminatory in effect, and denies girls equality in athletic opportunities, including equal opportunities to achieve and be recognized for victory.

327. By providing males with the athletic opportunities to participate in female events and be recognized as winners of female events, all Defendants have violated their obligation under Title IX to provide equal treatment, benefits and opportunities in athletic competition to females.

328. All Intervenor-Plaintiffs are harmed by Defendants' failure to provide competitive opportunities that fairly and effectively accommodate the athletic abilities of female athletes. Such harm includes loss of the experience of fair competition; loss of victories and the public recognition associated with victories; loss of opportunities to advance to higher-level competitions; loss of visibility to college recruiters; emotional distress, pain, anxiety, and other damages.

329. Title IX provides Intervenor-Plaintiffs with a private right of action. *Cannon*, 441 U.S. at 703.

330. Accordingly, the Interpretation and the Fact Sheet violate Title IX.

Claim Three
Agency Action Without Observance of Procedure Required by Law
(5 U.S.C. § 706)

331. Intervenor-Plaintiffs repeat and reallege each allegation contained in paragraphs 1–330 of this complaint.

332. Under the APA, a reviewing court must "hold unlawful and set aside agency action, findings, and conclusions found to be . . . without observance of procedure required by law." 5 U.S.C. § 706(2)(D).

333. Likewise, a court must "compel agency action unlawfully withheld." 5 U.S.C. § 706(1).

334. The Department is an "agency" under the APA. *Id.* § 701(b)(1).

335. The Department has promulgated, and Defendants are enforcing nationwide, a new legislative rule, namely the Interpretation and the Fact Sheet, that uses Title IX and its implementing regulations and agencies to prohibit discrimination on the basis of sexual orientation and gender identity.

336. The Department's Interpretation and Fact Sheet are "rules" under the APA. *Id.* § 701(b)(2); 5 U.S.C. § 551(4).

337. The Department, through the Interpretation and the Fact Sheet, is unlawfully withholding agency action by refusing to enforce Title IX as applied to sex separation for school-sponsored athletic teams.

338. Defendants have communicated the Interpretation and the Fact Sheet to covered entities nationwide through public statements and press releases, and to state and local governments and implementing agencies nationwide.

339. The Interpretation and the Fact Sheet announce a new rule that creates new law, rights, and obligations under Title IX and its implementing regulations.

340. The Interpretation and the Fact Sheet are final agency actions subject to judicial review. *Id.* § 704.

341. The Interpretation and the Fact Sheet are definitive in their declaration of what Defendants think that the law requires, and mandatory on entities covered by Title IX and its implementing regulations and on entities subject to Defendants' enforcement.

342. Legal consequences are required in and already flowing from the Interpretation and the Fact Sheet.

343. The Interpretation and the Fact Sheet declare themselves to be treated as if they have the full force of law, and Defendants have done so.

344. The APA requires agencies to engage in "notice and comment" for legislative rules. 5 U.S.C. § 553.

345. Notice-and-comment requirements mandate that an agency (1) provide notice to the public of the proposed rulemaking, typically by publishing notice in the Federal Register, (2) give interested parties an opportunity to submit written data, views, or arguments on the proposed rule, and consider and respond to significant comments received, and (3) include in the promulgation of the final rule a concise general statement of the rule's basis and purpose. *Id.*

346. Notice-and-comment requirements also mandate that an agency consider all the relevant comments offered during the public-comment period before finally deciding whether to adopt a proposed rule.

347. The APA also requires that a rule not be made effective until at least 30 days after it was published. *Id.*

348. The Department failed to provide the public with advance notice and comment before issuing the Interpretation and the Fact Sheet, in violation of the APA.

349. Because the Interpretation and Fact Sheet are legislative rules that were adopted without the required notice-and-comment procedures, they are unlawful and should be "set aside." 5 U.S.C. § 706(2).

350. In the alternative, the Interpretation and the Fact Sheet were guidance documents, which, prior to publication, were required to be (but were not) submitted for public notice and an opportunity for comment or to provide a statement of good cause for omitting these procedures under 34 C.F.R. Pt. 9.

351. The Interpretation and the Fact Sheet must also be enjoined and declared unenforceable under 5 U.S.C. § 705 in order to preserve status and rights pending review of this Court.

352. The Interpretation and the Fact Sheet must be set aside under 5 U.S.C. § 706.

353. Under 5 U.S.C. § 701(a), no statute precludes judicial review of the Interpretation or the Fact Sheet, and they are not committed to agency discretion by law.

Claim Four
Agency Action That is Arbitrary, Capricious, and an Abuse of Discretion (5 U.S.C. § 706)

354. Intervenor-Plaintiffs repeat and reallege each allegation contained in paragraphs 1–353 of this complaint.

355. Under the APA, a reviewing Court must "hold unlawful and set aside agency action" if the agency action is "arbitrary," "capricious," or "an abuse of discretion." 5 U.S.C. § 706(2)(A).

356. Likewise, a court must "compel agency action unlawfully withheld." 5 U.S.C. § 706(1).

357. The Department is an "agency" under the APA. *Id.* § 701(b)(1).

358. The Interpretation and the Fact Sheet, and Defendants' enforcement of them, explicitly rely on an interpretation of the Title IX or its implementing regulations and *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020) that is erroneous—

that Title IX prohibits discrimination on the basis of sexual orientation and gender identity.

359. Without reliance on this legal interpretation, the Interpretation and the Fact Sheet would not have been promulgated.

360. The Department failed adequately to consider important aspects of the issue and to give due consideration to public comments.

361. The Interpretation and the Fact Sheet contradict the text, structure, legislative history, and historical judicial interpretation of Title IX and its implementing regulations, all of which confirm that "sex" means biological sex—that is, a person's status as male or female as determined by biology.

362. The Interpretation and the Fact Sheet create inconsistent and confusing standards, allow absurd results, lead to discrimination, and undermine other sex-based classifications because the text, structure, legislative history, and historical judicial interpretation of Title IX and its implementing regulations impose requirements that "sex" means biological sex—that is, a person's status as male or female as determined by biology.

363. In promulgating the Interpretation and the Fact Sheet, the Department failed to consider their impact on private religious schools, universities, and colleges and the students that attend those schools, universities, and colleges, including their First Amendment interests in freedom of speech, religion, and association; their interests under the Religious Freedom Restoration Act; their other liberty interests; their interests in allowing sex-segregated facilities; and their interests in allowing sex-segregated athletic teams.

364. In promulgating the Interpretation and the Fact Sheet, the Department failed to consider their impact on the interests of female athletes including their First Amendment interests in freedom of speech, religion, and association; their interests under the Religious Freedom Restoration Act; their other liberty interests, including

their privacy interests; and their interests in receiving an equal opportunity to participate in and benefit from interscholastic athletics as part of their education.

365. In promulgating the Interpretation and the Fact Sheet, the Department failed to consider reliance interests of private religious schools, universities, and colleges in not being subject to a prohibition on discrimination on the basis of sexual orientation or gender identity under Title IX.

366. In promulgating the Interpretation and the Fact Sheet, the Department failed to consider the inconsistent and confusing standards, absurd result, discrimination, and the effect on other sex-based classifications that are caused by the Interpretation and the Fact Sheet.

367. The Department also failed to consider the reliance and structural interests of the States and other grant recipients, especially States accepting federal funds contingent on compliance with Title IX.

368. The Interpretation and the Fact Sheet did not separately consider each component of the policy, let alone articulate a reasoned decision that considers alternatives and that considers legitimate liberty, privacy, and reliance interests, and therefore is inconsistent with the requirements of *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1910–15 (2020).

369. The Department failed to adequately acknowledge that the Interpretation and the Fact Sheet were a change in position from its existing regulations and initial post-*Bostock* guidance.

370. The Department failed to consider any alternative policies that respect the interests of private religious schools, universities, and colleges and their students, including their female students and female student-athletes, such as (1) taking no action; (2) creating rules to protect female sports and privacy under the correct understanding of Title IX; (3) grandfathering existing categories of programs and practices covered by Title IX; (4) confirming that religious exemption apply under the

Religious Freedom Restoration Act and the First Amendment, even in the context of sexual orientation and gender identity; (5) creating or expanding existing exemptions for those with safety concerns, moral objections or other reliance on past policies.

371. These failures render the Interpretation and the Fact Sheet arbitrary, capricious, and an abuse of discretion.

372. The Interpretation's and the Fact Sheet's rationale is contrived for the President's policy convenience, set forth in his sweeping and mandatory Executive Order 13,988, rather than based on law and necessary considerations under the APA. *See Dep't of Com. v. New York*, 139 S. Ct. 2551, 2575–76 (2019).

373. The Department, through the Interpretation and the Fact Sheet, is unlawfully withholding agency action by refusing to enforce Title IX as applied to sex separation for school-sponsored athletic teams.

374. Therefore, the Interpretation and the Fact Sheet must be set aside under 5 U.S.C. § 706.

375. The Interpretation and the Fact Sheet must also be enjoined and declared unenforceable under 5 U.S.C. § 705, in order to preserve status and rights pending review of this Court.

376. Under 5 U.S.C. § 701(a), no statute precludes judicial review of the Interpretation or the Fact Sheet, and they are not committed to agency discretion by law.

Claim Five
Agency Action that is Contrary to Law, *Ultra Vires*, Issued in Excess of Statutory Authority, and Contrary to Constitutional Rights
(5 U.S.C. § 706)

377. Intervenor-Plaintiffs repeat and reallege each allegation contained in paragraphs 1–376 of this complaint.

378. Under the APA, a reviewing Court must "hold unlawful and set aside agency action" if the agency action is "not in accordance with law," "in excess of

statutory jurisdiction, authority, or limitations, or short of statutory right," or "contrary to constitutional right, power, privilege, or immunity." 5 U.S.C. § 706(2)(A)–(C).

379. Likewise, a court must "compel agency action unlawfully withheld." 5 U.S.C. § 706(1).

380. The Department is an "agency" under the APA. *Id.* § 701(b)(1).

381. As a federal agency, the Department has no power to act unless Congress confers that power, and actions that are unauthorized by Congress are ultra vires.

382. Title IX and its regulations do not prohibit discrimination on the basis of sexual orientation or gender identity.

383. The Interpretation and the Fact Sheet mandate to the contrary exceeds Defendants' authority under Title IX and related regulations.

384. Congress has not delegated to the Executive Branch any authority to mandate the Interpretation and the Fact Sheet.

385. This reading of Title IX and its regulations is compelled by the U.S. Constitution's clear-notice rule, a substantive canon of statutory interpretation that applies because the displacement of traditional state police power authority, any implicit abrogation of state sovereign immunity, and the attachment of conditions under Title IX and its regulations to Spending Clause legislation.

386. The Interpretation and the Fact Sheet violate the major questions doctrine of statutory interpretation because Congress did not, in Title IX, clearly give the Department of Education authority to impose the Interpretation and the Fact Sheet since it vastly changes the rights and obligations set forth in Title IX and the way that student athletics are operated in the country.

387. Because the Interpretation and the Fact Sheet exceed Defendants' authority under Title IX and its implementing regulations, the Interpretation and

Fact Sheet are *ultra vires*, contrary to law, and issued in excess of the Department's authority.

388. The Interpretation and the Fact Sheet go so far beyond any reasonable reading of the relevant Congressional text and its implementing regulations such that the new rules, regulations, guidance, and interpretations functionally exercise lawmaking power reserved only to Congress. U.S. Const. art. I, § 1.

389. The Department's Interpretation and Fact Sheet are contrary to law and exceed the Department's statutory authority because *Bostock*'s interpretation of Title VII's language is inapplicable to Title IX's materially different language.

390. The Department's Interpretation and Fact Sheet are contrary to law because, properly interpreted, Title IX's prohibition of discrimination "on the basis of sex" does not encompass discrimination based on sexual orientation or gender identity, either as a component of the term sex, on any sex stereotyping theory, or as separate or subsidiary protected classes.

391. The Department's Interpretation and Fact Sheet are contrary to law because Title IX and longstanding Department regulations expressly permit distinctions based on biological sex in certain circumstances.

392. Any application or enforcement of the Title IX and its regulations to discrimination because of sexual orientation or gender identity exceeds Congress's Article I enumerated powers and transgresses on the reserved powers of the State under the federal constitution's structural principles of federalism and the Tenth Amendment, as discussed below in Claim Seven.

393. The Department, through the Interpretation and the Fact Sheet, is unlawfully withholding agency action by refusing to enforce Title IX as applied to sex separation for school-sponsored athletic teams.

394. Therefore, the Interpretation and Fact Sheet must be set aside under 5 U.S.C. § 706 and the Court's inherent equitable power to enjoin *ultra vires* and unconstitutional actions.

395. The Interpretation and Fact Sheet must also be enjoined and declared unenforceable under 5 U.S.C. § 705 in order to preserve status and rights pending review of this Court.

396. Under 5 U.S.C. § 701(a), no statute precludes judicial review of the Interpretation or the Fact Sheet, and they are not committed to agency discretion by law.

Claim Six
Regulatory Flexibility Act
(5 U.S.C. § 601, *et seq.*)

397. Intervenor-Plaintiffs repeat and reallege each allegation contained in paragraphs 1–396 of this complaint.

398. The RFA requires federal agencies to prepare and make available for public comment an initial and final regulatory flexibility analysis before issuing a new rule. 5 U.S.C. § 603(a).

399. The Interpretation and the Fact Sheet are rules subject to the RFA. 5 U.S.C. § 601.

400. The Department failed to prepare and make available for public comment an initial and final regulatory flexibility analysis before issuing the Interpretation and the Fact Sheet.

401. An agency can avoid performing a flexibility analysis if its top official certifies that the rule will not have a significant economic impact on a substantial number of small entities. 5 U.S.C. § 605(b).

402. The certification must include a statement providing the factual basis for the agency's determination that the rule will not significantly impact small entities. *Id.*

403. The agency shall provide such certification and statement to the Chief Counsel for Advocacy of the Small Business Administration. *Id.*

404. The Department did not comply with 5 U.S.C. § 605 in issuing the Interpretation and the Fact Sheet.

405. The Interpretation and the Fact Sheet would impose disproportionate and unnecessary burdens on small businesses and organizations.

406. The Department's actions in promulgating and enforcing their new rule thus violate the RFA.

407. ACSI is a "small organization" under the RFA, as are at least some of its current and future members. 5 U.S.C. § 601.

408. ACSI is adversely affected and aggrieved by the Interpretation and the Fact Sheet and is entitled to judicial review under 5 U.S.C. § 611.

409. Therefore, the Directive should be set aside and its enforcement enjoined. *Id.*

410. Under 5 U.S.C. § 701(a), no statute precludes judicial review of the Interpretation or the Fact Sheet, and they are not committed to agency discretion by law.

Claim Seven
Structural Principles of Federalism and Lack of Enumerated Powers
(Constitutional Structure, Spending Clause, and the Tenth Amendment)

411. Intervenor-Plaintiffs repeat and reallege each allegation contained in paragraphs 1–410 of this complaint.

412. Any application or enforcement of Title IX to discrimination because of gender identity or sexual orientation exceeds Congress's Article I enumerated powers and transgresses on the reserved powers of the State under the federal constitution's structural principles of federalism and the Tenth Amendment. U.S. Const. art. I, § 8, cl. 1; *id*. amend. X.

413. Although protecting the States, these structural principles serve to "protect the individual as well." *Bond v. United States*, 564 U.S. 211, 222 (2011). By providing protections for the sovereignty of the States, the Constitution secures "'the liberties that derive'" to individual citizens "'from the diffusion of sovereign power.'" *New York v. United States*, 505 U.S. 144, 181 (1992) (internal quotation omitted).

414. Under the U.S. Constitution's structural principles of federalism and the Tenth Amendment, the U.S. Constitution's clear-notice rule governs any interpretation of federal law in this area.

415. A "clear and manifest" statement is necessary for a statute to preempt "the historic police powers of the States," *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947), to abrogate state sovereign immunity, or to permit an agency to regulate a matter in "areas of traditional state responsibility," *Bond v. United States*, 134 S. Ct. 2077, 2089–90 (2014).

416. The federal Constitution limits the States and the public's obligations to those requirements "unambiguously" set forth on the face of any Spending Clause statute. *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981).

417. Under the U.S. Constitution's structural principles of federalism and the Tenth Amendment, a clear contemporaneous statement is necessary both to make a statute apply to the States and to show that the statute applies in the particular manner claimed. *Gregory v. Ashcroft,* 501 U.S. 452, 460–70 (1991).

418. This canon resolves ambiguity in the substantive scope of many statutes that preempt traditional state regulation. *Bond*, 572 U.S. at 859.

419. The Supreme Court thus applies this canon to protect private parties when the government "intrudes into an area that is the particular domain of state law" because Congress must "'enact exceedingly clear language if it wishes to significantly alter the balance between federal and state power and the power of the Government over private property.'" *Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, No. 21A23, 2021 WL 3783142, at *3 (U.S. Aug. 26, 2021) (citations omitted).

420. This canon applies here because the federal officials seek to displace state authority over education and privacy in education, with a possible abrogation of state sovereignty from suit, and under a statute that is enacted under the Spending Clause, in order to extend federal law to the College's housing.

421. The U.S. Constitution's clear-notice rule governs any interpretation of federal law in this area because the federal officials displaced traditional state authority over education and educational privacy, with a possible abrogation of state sovereignty from suit, and under a statute that is enacted under the Spending Clause, to extend federal law to the Intervenor-Plaintiffs.

422. In the Interpretation and the Fact Sheet, and actions taking to implement those measures, Defendants expressly and impliedly, but improperly, preempt the prerogative of States to safeguard privacy expectations in educational settings.

423. Defendants also subject States to private lawsuits for damages and attorney's fees on these new theories, even though States did not know of these liabilities and could not have known or consented to this waiver of their sovereign immunity.

424. Title IX does not prohibit, let alone clearly and unmistakably prohibit, discrimination on the basis of gender identity or sexual orientation, and therefore does not support any clear notice to justify the burden the gender identity mandate imposes on Intervenor-Plaintiffs, the public, or the States.

425. The Interpretation and the Fact Sheet are not in accord with the understanding that existed among the public or the courts at the passage of Title IX or when the States chose to begin accepting federal money for educational purposes.

426. No State could unmistakably know or "clearly understand" that Title IX would impose on it the conditions created by the Interpretation and the Fact Sheet.

427. The public and the States thus lacked the constitutionally required clear notice when the Act was passed or the grants were made that the Act would apply in this way. *Bennett v. New Jersey*, 470 U.S. 632, 638 (1985).

428. Likewise, under the major questions doctrine, Congress must "speak clearly when authorizing an agency to exercise powers of "vast 'economic and political significance." *Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, No. 21A23, 2021 WL 3783142, at *3 (U.S. Aug. 26, 2021) (citations and quotation marks omitted).

429. The Interpretation and the Fact Sheet fail this test, as Title IX contradicts their requirements, and did not clearly authorize them.

430. Because Defendants have violated these constitutional standards of clear notice, any application or enforcement of Title IX to discrimination on the basis of gender identity or sexual orientation violates the structural principles of federalism, the Spending Clause, and the Tenth Amendment and effectively coerces or commandeers the States, including in grant conditions and in the States' historical and well- established regulation of healthcare, freedom of speech, conscience protection, and religious freedom. *New York v. United States*, 505 U.S. 144, 162 (1992).

431. These structural principles protect citizens, not just states. *Bond v. United States*, 564 U.S. 211, 220, 222 (2011).

432. This Court may review and enjoin ultra vires or unconstitutional agency action. 5 U.S.C. §§ 702–705; *Larson*, 337 U.S. at 689-91.

433. The Court should therefore declare that the Interpretation and Fact Sheet are unconstitutional and enjoin their application.

PRAYER FOR RELIEF

Intervenor-Plaintiffs respectfully request that this Court enter judgment against Defendants and provide Intervenor-Plaintiffs, including ACSI's current and future members and their members current and future students, with the following relief:

1. A declaratory judgment holding unlawful the Department's Interpretation and Fact Sheet.

2. A declaratory judgment holding that the Department lacked authority to issue the Interpretation and Fact Sheet.

3. A judgment setting aside and vacating the Interpretation and Fact Sheet.

4. A declaratory judgment that Title IX and its implementing regulations do not prohibit discrimination on the basis of sexual orientation or gender identity, including by any acts that tend to prohibit males from participating in female athletics.

5. A preliminary and permanent injunction prohibiting Defendants and their officers, agents, servants, employees, attorneys, and any other persons who are in active concert or participation with those individuals from enforcing the Interpretation and Fact Sheet.

6. In the alternative, if Title IX is deemed to prohibit discrimination on the basis of sexual orientation and gender identity, then:

   a. A declaratory judgment that, as applied to ACSI (including its current and future members) and the individual athletes, that Title IX violates constitutional principles of federalism, the Spending Clause, the Tenth Amendment, and Congress's enumerated powers;

b. A preliminary and permanent injunction against the implementation of, enforcement of, application of, or taking any action relying on any such interpretation or application of Title IX or any of its implementing regulations, by Defendants, and their officers, agents, servants, employees, attorneys, and any other persons who are in active concert or participation with those individuals that is inconsistent with the declaratory relief described in paragraph 5.b.

7. That this Court adjudge, decree, and declare the rights and other legal relations of the parties to the subject matter here in controversy so that such declarations will have the force and effect of final judgment;

8. That this Court award nominal damages and any actual damages;

9. That this Court retain jurisdiction of this matter to enforce this Court's order;

10. That this Court grant to Intervenor-Plaintiffs reasonable costs and expenses of this action, including attorneys' fees in accordance with any applicable federal statute, including 28 U.S.C. § 2412;

11. That this Court grant the requested injunctive relief without a condition of bond or other security being required of Intervenor-Plaintiffs;

12. That this Court grant such other and further relief as this Court deems just and proper; and

13. All other relief to which Intervenor-Plaintiffs are entitled.

Respectfully submitted this 4th day of October, 2021.

s/ W. Andrew Fox

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Pro hac vice applications forthcoming

Attorneys for Intervenor-Plaintiffs

DECLARATION UNDER PENALTY OF PERJURY

I declare under penalty of perjury pursuant to 28 U.S.C. § 1746 that the foregoing is true and correct to the best of my knowledge as to paragraphs 15–24, 190–280, 288–289, 311–313, and 315–433 as they relate to ACSI, its member schools, and its member schools' athletes.

Executed this 4th day of October, 2021, at Trussville, Alabama

David Balik, Ed.D.

DECLARATION UNDER PENALTY OF PERJURY

I, A[redacted] S[redacted], a citizen of the United States and a resident of the State of Arkansas, hereby declare under penalty of perjury pursuant to 28 U.S.C. § 1746 that the foregoing is true and correct to the best of my knowledge.

Executed this 2 day of October, 2021, at Paragould, Arkansas.

A[redacted] S[redacted]

DECLARATION UNDER PENALTY OF PERJURY

I, _____[redacted]_____, a citizen of the United States and a resident of the State of Arkansas, hereby declare under penalty of perjury pursuant to 28 U.S.C. § 1746 that the foregoing is true and correct to the best of my knowledge.

Executed this 3rd day of October, 2021, at Jonesboro, Arkansas.

_____[redacted]_____

DECLARATION UNDER PENALTY OF PERJURY

I, [redacted], a citizen of the United States and a resident of the State of Arkansas, hereby declare under penalty of perjury pursuant to 28 U.S.C. § 1746 that the foregoing is true and correct to the best of my knowledge.

Executed this 30th day of October, 2021, at Jonesboro, Arkansas.

[redacted]

EXHIBIT A

to Complaint

requirements, Security measures, Waterways.

For the reasons discussed in the preamble, the Coast Guard amends 33 CFR part 165 as follows:

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

■ 1. The authority citation for part 165 continues to read as follows:

Authority: 46 U.S.C. 70034, 70051; 33 CFR 1.05–1, 6.04–1, 6.04–6, and 160.5; Department of Homeland Security Delegation No. 0170.1.

■ 2. Add § 165.T11–057 to read as follows:

§ 165.T11–057 Safety Zone; Southwest Shelter Island Channel Entrance Closure, San Diego, CA.

(a) *Location.* The following area is a safety zone: The Northeast Shelter Island Channel Entrance and all navigable waters of San Diego Bay encompassed by by a three hundred yard circle centered on the coordinate 32°43′13.7″ N, longitude 117°13′7.8″ W.

(b) *Definitions.* As used in this section, *designated representative* means a Coast Guard Patrol Commander, including a Coast Guard coxswain, petty officer, or other officer operating a Coast Guard vessel and a Federal, State, and local officer designated by or assisting the Captain of the Port Sector San Diego (COTP) in the enforcement of the safety zone.

(c) *Regulations.* (1) Under the general safety zone regulations in subpart C of this part, you may not enter the safety zone described in paragraph (a) of this section unless authorized by the COTP or the COTP's designated representative.

(2) To seek permission to enter, contact the COTP or the COTP's representative by VHF Channel 16. Those in the safety zone must comply with all lawful orders or directions given to them by the COTP or the COTP's designated representative.

(d) *Enforcement period.* This section will be enforced from 8:30 a.m. until 10:30 a.m. on June 22, 2021.

Dated: June 16, 2021.

T.J. Barelli,

Captain, U.S. Coast Guard, Captain of the Port Sector San Diego.

[FR Doc. 2021–13136 Filed 6–21–21; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF EDUCATION

34 CFR Chapter I

Enforcement of Title IX of the Education Amendments of 1972 With Respect to Discrimination Based on Sexual Orientation and Gender Identity in Light of Bostock v. Clayton County

AGENCY: Office for Civil Rights, Department of Education.

ACTION: Interpretation.

SUMMARY: The U.S. Department of Education (Department) issues this interpretation to clarify the Department's enforcement authority over discrimination based on sexual orientation and discrimination based on gender identity under Title IX of the Education Amendments of 1972 in light of the Supreme Court's decision in *Bostock* v. *Clayton County.* This interpretation will guide the Department in processing complaints and conducting investigations, but it does not itself determine the outcome in any particular case or set of facts.

DATES: This interpretation is effective June 22, 2021.

FOR FURTHER INFORMATION CONTACT: Alejandro Reyes, Director, Program Legal Group, Office for Civil Rights. Telephone: (202) 245–7272. Email: *Alejandro.Reyes@ed.gov.*

If you use a telecommunications device for the deaf (TDD) or a text telephone (TTY), call the Federal Relay Service (FRS), toll-free, at 1–800–877–8339.

SUPPLEMENTARY INFORMATION:

Background: Title IX of the Education Amendments of 1972, 20 U.S.C. 1681–1688, prohibits discrimination on the basis of sex in any education program or activity offered by a recipient of Federal financial assistance. The Department's Office for Civil Rights (OCR) is responsible for the Department's enforcement of Title IX.

OCR has long recognized that Title IX protects all students, including students who are lesbian, gay, bisexual, and transgender, from harassment and other forms of sex discrimination. OCR also has long recognized that Title IX prohibits harassment and other forms of discrimination against all students for not conforming to stereotypical notions of masculinity and femininity. But OCR at times has stated that Title IX's prohibition on sex discrimination does not encompass discrimination based on sexual orientation and gender identity. To ensure clarity, the Department issues this Interpretation addressing Title IX's coverage of discrimination based on sexual orientation and gender identity in light of the Supreme Court decision discussed below.

In 2020, the Supreme Court in *Bostock* v. *Clayton County,* 140 S. Ct. 1731, 590 U.S. ____ (2020), concluded that discrimination based on sexual orientation and discrimination based on gender identity inherently involve treating individuals differently because of their sex. It reached this conclusion in the context of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e *et seq.,* which prohibits sex discrimination in employment. As noted below, courts rely on interpretations of Title VII to inform interpretations of Title IX.

The Department issues this Interpretation to make clear that the Department interprets Title IX's prohibition on sex discrimination to encompass discrimination based on sexual orientation and gender identity and to provide the reasons for this interpretation, as set out below.

Interpretation:

Title IX Prohibits Discrimination Based on Sexual Orientation and Gender Identity.

Consistent with the Supreme Court's ruling and analysis in *Bostock,* the Department interprets Title IX's prohibition on discrimination ''on the basis of sex'' to encompass discrimination on the basis of sexual orientation and gender identity. As was the case for the Court's Title VII analysis in *Bostock,* this interpretation flows from the statute's ''plain terms.'' *See Bostock,* 140 S. Ct. at 1743, 1748–50. Addressing discrimination based on sexual orientation and gender identity thus fits squarely within OCR's responsibility to enforce Title IX's prohibition on sex discrimination.

I. The Supreme Court's Ruling in Bostock

The Supreme Court in *Bostock* held that sex discrimination, as prohibited by Title VII, encompasses discrimination based on sexual orientation and gender identity. The Court explained that to discriminate on the basis of sexual orientation or gender identity ''requires an employer to intentionally treat individual employees differently because of their sex.'' 140 S. Ct. at 1742.[1] As the Court also explained,

[1] The Court recognized that the parties in *Bostock* each presented a definition of ''sex'' dating back to Title VII's enactment, with the employers' definition referring to ''reproductive biology'' and the employees' definition ''capturing more than anatomy[.]'' 140 S. Ct. at 1739. The Court did not adopt a definition, instead ''assum[ing]'' the definition of sex provided by the employers that the employees had accepted ''for argument's sake.'' *Id.* As the Court made clear, it did not need to adopt

Continued

when an employer discriminates against a person for being gay or transgender, the employer necessarily discriminates against that person for ''traits or actions it would not have questioned in members of a different sex.'' *Id.* at 1737.

The Court provided numerous examples to illustrate why ''it is impossible to discriminate against a person'' because of their sexual orientation or gender identity ''without discriminating against that individual based on sex.'' *Id.* at 1741. In one example, when addressing discrimination based on sexual orientation, the Court stated:

> Consider, for example, an employer with two employees, both of whom are attracted to men. The two individuals are, to the employer's mind, materially identical in all respects, except that one is a man and the other a woman. If the employer fires the male employee for no reason other than the fact he is attracted to men, the employer discriminates against him for traits or actions it tolerates in his female colleague. Put differently, the employer intentionally singles out an employee to fire based in part on the employee's sex, and the affected employee's sex is a but-for cause of his discharge.

Id.

In another example, the Court showed why singling out a transgender employee for different treatment from a non-transgender (*i.e.,* cisgender) employee is discrimination based on sex:

> [T]ake an employer who fires a transgender person who was identified as a male at birth but who now identifies as a female. If the employer retains an otherwise identical employee who was identified as female at birth, the employer intentionally penalizes a person identified as male at birth for traits or actions that it tolerates in an employee identified as female at birth. Again, the individual employee's sex plays an unmistakable and impermissible role in the discharge decision.

Id. at 1741–42.

II. Bostock's Application to Title IX

For the reasons set out below, the Department has determined that the interpretation of sex discrimination set out by the Supreme Court in *Bostock*—that discrimination ''because of . . . sex'' encompasses discrimination based on sexual orientation and gender identity—properly guides the Department's interpretation of discrimination ''on the basis of sex'' under Title IX and leads to the conclusion that Title IX prohibits discrimination based on sexual orientation and gender identity.

a. *There is textual similarity between Title VII and Title IX.*

Like Title VII, Title IX prohibits discrimination based on sex.

Title IX provides, with certain exceptions: ''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).

Title VII provides, with certain exceptions: ''It shall be an unlawful employment practice for an employer (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex[ ] . . .; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's . . . sex[ ] . . . .'' 42 U.S.C. 2000e–2(a). (Title VII also prohibits discrimination based on race, color, religion, and national origin.)

Both statutes prohibit sex discrimination, with Title IX using the phrase ''on the basis of sex'' and Title VII using the phrase ''because of'' sex. The Supreme Court has used these two phrases interchangeably. In *Bostock,* for example, the Court described Title VII in this way: ''[I]n Title VII, Congress outlawed discrimination in the workplace *on the basis of* race, color, religion, sex, or national origin.'' 140 S. Ct. at 1737 (emphasis added); *id.* at 1742 (''[I]ntentional discrimination *based on sex* violates Title VII . . . .'' (emphasis added)); *see also Jackson* v. *Birmingham Bd. of Educ.,* 544 U.S. 167, 174 (2005) (''[W]hen 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.'' (second emphasis added)); *Meritor Sav. Bank* v. *Vinson,* 477 U.S. 57, 64 (1986) (''[W]hen a supervisor sexually harasses a subordinate *because of* the subordinate's sex, that supervisor 'discriminate[s]' *on the basis of sex.*'' (emphasis added)).

In addition, both statutes specifically protect *individuals* against discrimination. In *Bostock,* 140 S. Ct. at 1740–41, the Court observed that Title VII ''tells us three times—including immediately after the words 'discriminate against'—that our focus should be on individuals.'' The Court made a similar observation about Title IX, which uses the term *person,* in *Cannon* v. *University of Chicago,* 441 U.S. 677, 704 (1979), stating that ''Congress wanted to avoid the use of federal resources to support discriminatory practices [and] to provide *individual* citizens effective protection against those practices.'' *Id.* (emphasis added).

Further, the text of both statutes contains no exception for sex discrimination that is associated with an individual's sexual orientation or gender identity. As the Court stated in *Bostock,* ''when Congress chooses not to include any exceptions to a broad rule, courts apply the broad rule.'' 140 S. Ct. at 1747. The Court has made a similar point regarding Title IX: ''[I]f we are to give Title IX the scope that its origins dictate, we must accord it a sweep as broad as its language.'' *N. Haven Bd. of Ed.* v. *Bell,* 456 U.S. 512, 521 (1982) (citations and internal alterations omitted). It also bears noting that, in interpreting the scope of Title IX's prohibition on sex discrimination the Supreme Court and lower Federal courts have often relied on the Supreme Court's interpretations of Title VII. *See, e.g., Franklin* v. *Gwinnett Cnty. Pub. Sch.,* 503 U.S. 60, 75 (1992); *Jennings* v. *Univ. of N.C.,* 482 F.3d 686, 695 (4th Cir. 2007); *Frazier* v. *Fairhaven Sch. Comm.,* 276 F.3d 52, 66 (1st Cir. 2002); *Gossett* v. *Oklahoma ex rel. Bd. of Regents for Langston Univ.,* 245 F.3d 1172, 1176 (10th Cir. 2001).

Moreover, the Court in *Bostock* found that ''no ambiguity exists about how Title VII's terms apply to the facts before [it]''—*i.e.,* allegations of discrimination in employment against several individuals based on sexual orientation or gender identity. 140 S. Ct. at 1749. After reviewing the text of Title IX and Federal courts' interpretation of Title IX, the Department has concluded that the same clarity exists for Title IX. That is, Title IX prohibits recipients of Federal financial assistance from discriminating based on sexual orientation and gender identity in their education programs and activities. The Department also has concluded for the reasons described in this document that, to the extent other interpretations may exist, this is the best interpretation of the statute.

In short, the Department finds no persuasive or well-founded basis for declining to apply *Bostock's* reasoning—discrimination ''because of

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either definition to conclude that discrimination ''because of . . . sex'' encompasses discrimination based on sexual orientation and gender identity. *Id.* (''[N]othing in our approach to these cases turns on the outcome of the parties' debate . . . .''). Similar to the Court's interpretation of Title VII, the Department's interpretation of the scope of discrimination ''on the basis of sex'' under Title IX does not require the Department to take a position on the definition of sex, nor do we do so here.

. . . sex'' under Title VII encompasses discrimination based on sexual orientation and gender identity—to Title IX's parallel prohibition on sex discrimination in federally funded education programs and activities.

b. Additional case law recognizes that the reasoning of Bostock *applies to Title IX and that differential treatment of students based on gender identity or sexual orientation may cause harm.*

Numerous Federal courts have relied on *Bostock* to recognize that Title IX's prohibition on sex discrimination encompasses discrimination based on sexual orientation and gender identity. *See, e.g., Grimm* v. *Gloucester Cnty. Sch. Bd.,* 972 F.3d 586, 616 (4th Cir. 2020), *as amended* (Aug. 28, 2020), *reh'g en banc denied,* 976 F.3d 399 (4th Cir. 2020), *petition for cert filed,* No. 20–1163 (Feb. 24, 2021); *Adams* v. *Sch. Bd. of St. Johns Cnty.,* 968 F.3d 1286, 1305 (11th Cir. 2020), *petition for reh'g en banc pending,* No. 18–13592 (Aug. 28, 2020); *Koenke* v. *Saint Joseph's Univ.,* No. CV 19–4731, 2021 WL 75778, at *2 (E.D. Pa. Jan. 8, 2021); *Doe* v. *Univ. of Scranton,* No. 3:19–CV–01486, 2020 WL 5993766, at *11 n.61 (M.D. Pa. Oct. 9, 2020).

The Department also concludes that the interpretation set forth in this document is most consistent with the purpose of Title IX, which is to ensure equal opportunity and to protect individuals from the harms of sex discrimination. As numerous courts have recognized, a school's policy or actions that treat gay, lesbian, or transgender students differently from other students may cause harm. *See, e.g., Grimm,* 972 F.3d at 617–18 (describing injuries to a transgender boy's physical and emotional health as a result of denial of equal treatment); *Adams,* 968 F.3d at 1306–07 (describing ''emotional damage, stigmatization and shame'' experienced by a transgender boy as a result of being subjected to differential treatment); *Whitaker ex rel. Whitaker* v. *Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.,* 858 F.3d 1034, 1044–46, 1049–50 (7th Cir. 2017) (describing physical and emotional harm to a transgender boy who was denied equal treatment); *Dodds* v. *U.S. Dep't of Educ.,* 845 F.3d 217, 221–22 (6th Cir. 2016) (describing ''substantial and immediate adverse effects on the daily life and well-being of an eleven-year-old'' transgender girl from denial of equal treatment); *Doe,* 2020 WL 5993766, at **1–3 (describing harassment and physical targeting of a gay college student that interfered with the student's educational opportunity); *Harrington ex rel. Harrington* v. *City of Attleboro,* No. 15–CV–12769–DJC, 2018 WL 475000, at **6–7 (D. Mass. Jan. 17, 2018) (describing '' 'wide-spread peer harassment' and physical assault [of a lesbian high school student] because of stereotyping animus focused on [the student's] sex, appearance, and perceived or actual sexual orientation'').

c. The U.S. Department of Justice's Civil Rights Division has concluded that Bostock*'s analysis applies to Title IX.*

The U.S. Department of Justice's Civil Rights Division issued a Memorandum from Principal Deputy Assistant Attorney General for Civil Rights Pamela S. Karlan to Federal Agency Civil Rights Directors and General Counsels regarding Application of *Bostock* v. *Clayton County* to Title IX of the Education Amendments of 1972 (Mar. 26, 2021), *https://www.justice.gov/crt/page/file/1383026/download.*

The memorandum stated that, after careful consideration, including a review of case law, ''the Division has determined that the best reading of Title IX's prohibition on discrimination 'on the basis of sex' is that it includes discrimination on the basis of gender identity and sexual orientation.'' Indeed, ''the Division ultimately found nothing persuasive in the statutory text, legislative history, or caselaw to justify a departure from *Bostock*'s textual analysis and the Supreme Court's longstanding directive to interpret Title IX's text broadly.''

III. Implementing This Interpretation

Consistent with the analysis above, OCR will fully enforce Title IX to prohibit discrimination based on sexual orientation and gender identity in education programs and activities that receive Federal financial assistance from the Department. As with all other Title IX complaints that OCR receives, any complaint alleging discrimination based on sexual orientation or gender identity also must meet jurisdictional requirements as defined in Title IX and the Department's Title IX regulations, other applicable legal requirements, as well as the standards set forth in OCR's Case Processing Manual, *www.ed.gov/ocr/docs/ocrcpm.pdf.*[2]

Where a complaint meets applicable requirements and standards as just described, OCR will open an investigation of allegations that an individual has been discriminated against because of their sexual orientation or gender identity in education programs or activities. This includes allegations of individuals being harassed, disciplined in a discriminatory manner, excluded from, denied equal access to, or subjected to sex stereotyping in academic or extracurricular opportunities and other education programs or activities, denied the benefits of such programs or activities, or otherwise treated differently because of their sexual orientation or gender identity. OCR carefully reviews allegations from anyone who files a complaint, including students who identify as male, female or nonbinary; transgender or cisgender; intersex; lesbian, gay, bisexual, queer, heterosexual, or in other ways.

While this interpretation will guide the Department in processing complaints and conducting investigations, it does not determine the outcome in any particular case or set of facts. Where OCR's investigation reveals that one or more individuals has been discriminated against because of their sexual orientation or gender identity, the resolution of such a complaint will address the specific compliance concerns or violations identified in the course of the investigation.

This interpretation supersedes and replaces any prior inconsistent statements made by the Department regarding the scope of Title IX's jurisdiction over discrimination based on sexual orientation and gender identity. This interpretation does not reinstate any previously rescinded guidance documents.

Accessible Format: On request to the contact person listed under **FOR FURTHER INFORMATION CONTACT**, individuals with disabilities can obtain this document in an accessible format. The Department will provide the requestor with an accessible format that may include Rich Text Format (RTF) or text format (txt), a thumb drive, an MP3 file, braille, large print, audiotape, or compact disc, or other accessible format.

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You may also access documents of the Department published in the **Federal Register** by using the article search feature at *www.federalregister.gov.* Specifically, through the advanced search feature at this site, you can limit

[2] Educational institutions that are controlled by a religious organization are exempt from Title IX to the extent that compliance would not be consistent with the organization's religious tenets. *See* 20 U.S.C. 1681(a)(3).

your search to documents published by the Department.

Suzanne B. Goldberg,

Acting Assistant Secretary for Civil Rights.

[FR Doc. 2021–13058 Filed 6–21–21; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF COMMERCE

Patent and Trademark Office

37 CFR Part 11

[Docket No.: PTO–C–2013–0042]

RIN 0651–AC91

Changes to Representation of Others Before the United States Patent and Trademark Office; Correction

AGENCY: United States Patent and Trademark Office, Commerce.

ACTION: Final rule; correction.

SUMMARY: The United States Patent and Trademark Office (USPTO or Office) is correcting an earlier final rule, ''Changes to the Representation of Others Before the United States Patent and Trademark Office,'' that appeared in the **Federal Register** on May 26, 2021 and which takes effect on June 25, 2021. This document corrects a minor error. No other changes are being made to the underlying final rule.

DATES: This rule is effective June 25, 2021.

FOR FURTHER INFORMATION CONTACT: William R. Covey, Deputy General Counsel for Enrollment and Discipline and Director of the Office of Enrollment and Discipline, at 571–272–4097.

SUPPLEMENTARY INFORMATION: This document corrects an error pertaining to revisions to definitions made in the final rule. Specifically, the Office intended to change the listed definition of ''Roster'' to ''Roster or register.'' The Code of Federal Regulations editors informed the Office that the original **Federal Register** instruction to ''revise'' the definition was incorrect. Rather, the correct instruction should be to ''remove and add'' the intended definition. This document corrects that instruction.

In FR Doc. 2021–10528, appearing on page 28442 in the **Federal Register** of Wednesday, May 26, 2021, the following correction is made:

§ 11.1 [Corrected]

■ On page 28452, in the first column, in part 11, correct amendatory instruction 4 to read as follows:

■ 4. Amend § 11.1 by:

■ a. Revising the definitions of ''Conviction or convicted'' and ''Practitioner;''

■ b. Removing the entry for ''Roster'' and adding, in alphabetical order, an entry for ''Roster or register;'' and

■ c. Revising the definitions for ''Serious crime'' and ''State.''

The revisions and addition read as follows:

Andrew Hirshfeld,

Commissioner for Patents, Performing the Functions and Duties of the Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office.

[FR Doc. 2021–13145 Filed 6–21–21; 8:45 am]

BILLING CODE 3510–16–P

LIBRARY OF CONGRESS

Copyright Office

37 CFR Parts 201, 202, 203, 210, and 370

[Docket No. 2021–3]

Technical Amendments Regarding the Copyright Office's Organizational Structure

AGENCY: U.S. Copyright Office, Library of Congress.

ACTION: Final rule.

SUMMARY: This final rule makes technical changes to the U.S. Copyright Office's regulations pertaining to its organizational structure in light of the agency's recent reorganization. It reflects recent structural changes, updates certain of the Office's division names, and adds a new section for the Copyright Claims Board established by the Copyright Alternative in Small-Claims Enforcement Act of 2020.

DATES: Effective July 22, 2021.

FOR FURTHER INFORMATION CONTACT: Regan A. Smith, General Counsel and Associate Register of Copyrights, by email at *regans@copyright.gov,* Kevin R. Amer, Deputy General Counsel, by email at *kamer@copyright.gov,* or Joanna R. Blatchly, Attorney-Advisor, by email at *jblatchly@copyright.gov* or by telephone at (202) 707–8350.

SUPPLEMENTARY INFORMATION: The Copyright Office is publishing this final rule pursuant to its May 2021 reorganization. This effort is intended to accomplish two goals: (1) Rename divisions and realign certain reporting structures to improve the Office's effectiveness and efficiency; and (2) reflect the agency structure for the new copyright small-claims tribunal established by the Copyright Alternative in Small-Claims Enforcement (''CASE'') Act of 2020.[1] The Register has determined that these changes will optimize business processes and aid in the administration of her functions and duties as Director of the Copyright Office.[2]

Operational reorganization. The reorganization reduces the number of direct reports to the Register of Copyrights and is expected to create administrative and cost efficiencies by consolidating operational organizations currently headed by senior-level positions. The reorganization brings the Office of the Chief Financial Officer (renamed the Financial Management Division) and the Copyright Modernization Office (renamed the Product Management Division) under the supervision of the Chief of Operations (renamed the Assistant Register and Director of Operations (''ARDO'')). Realigning these divisions under the ARDO consolidates operational support elements under one senior manager, in line with operational structures across the Library of Congress. This consolidation is expected to facilitate Office coordination with centralized Library services, and with similar functional elements of other service units. It is also expected to allow the Office to increase the effectiveness of communications across areas of operational responsibility, in alignment with strategic objectives.

The reorganization renames certain organizational elements and senior positions for purposes of greater clarity and consistency. The Office of Public Records and Repositories is renamed the Office of Copyright Records. As noted above, the Office of the Chief of Operations is renamed the Office of the Director of Operations. The following subordinate offices are also renamed: The Copyright Acquisitions Division (''CAD'') is renamed Acquisitions and Deposits (''A&D''); the Administrative Services Office (''ASO'') is renamed the Administrative Services Division (''ASD''); and the Receipt Analysis and Control Division (''RAC'') is renamed the Materials Control and Analysis Division (''MCA''). The Copyright Modernization Office (''CMO'') is renamed the Product Management Division (''PMD'').

Further, the Office of the Chief Financial Officer (''CFO'') is renamed the Financial Management Division (''FMD'') and work units under this division are also renamed, including by

[1] Public Law 116–260, sec. 212, 134 Stat. 1182, 2176 (2020).

[2] *See* 17 U.S.C. 701(a).

EXHIBIT B

to
Complaint

Department of Justice

January 17, 2021

MEMORANDUM FOR THE CIVIL RIGHTS DIVISION

FROM: ACTING ASSISTANT ATTORNEY GENERAL JOHN B. DAUKAS

SUBJECT: Application of *Bostock v. Clayton County*

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, makes it an "unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise . . . discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of, *inter alia*, such individual's . . . sex." 42 U.S.C. § 2000e-2(a)(1). On June 15, 2020, the Supreme Court held that this provision prohibits covered employers from firing an individual "simply for being homosexual or transgender." *Bostock v. Clayton County*, 590 U.S. __, __, 140 S. Ct. 1731, 1737 (2020).

Perhaps unsurprisingly, questions have been raised about the consequences of the decision in *Bostock* for other applications and provisions of Title VII, as well as for other statutes. No one in 1964—whether the Member of Congress voting on the statute or the average person on the street—would have understood Title VII the way that the Supreme Court interpreted it in *Bostock*. The Court did not contend otherwise, acknowledging that its interpretation of Title VII "reaches 'beyond the principal evil' legislators may have intended or expected to address," but asserting that "many, maybe most, applications of Title VII's sex provision were 'unanticipated' at the time of the law's adoption." *Bostock*, 140 S. Ct. at 1749, 1752. It is thus unsurprising that questions would be raised about the unintended consequences of the *Bostock* decision. The Supreme Court acknowledged, but expressly reserved, such questions. *Id.* at 1753 ("Whether other policies and practices might or might not qualify as unlawful discrimination . . . are questions for future cases, not these.").

Because the federal government is tasked with enforcing many civil rights protections that could be implicated by *Bostock*, this memorandum provides guidance for Civil Rights Division Attorneys and staff on this subject, recognizing that many additional questions will need to be addressed individually as they arise.[1] Specifically, the memorandum first addresses whether

[1] Some have criticized the *Bostock* majority's literal and context-free interpretation of Title VII, and suggested such an approach dooms race-based affirmative action under Title VI, Title VII, and the Equal Protection Clause of the United States Constitution, if applied in those contexts. *See, e.g.*, Nelson Lund, *Unleashed and Unbound: Living Textualism in* Bostock v. Clayton County, 21 Federalist Soc. Rev. 158 (Aug. 6, 2020); Jason Mazzone, Bostock: *Were the Liberal Justices*

Bostock must lead to change in the Department's own employment practices. It then addresses federal law protections for religious liberty. Finally, it analyzes *Bostock*'s implications with regard to other statutory provisions, including provisions of Title VII not at issue in *Bostock*, DOJ's enforcement responsibilities under Title VII, Title IX, the Fair Housing Act, the Equal Credit Opportunity Act, the Justice System Improvement Act of 1979, and the Constitution.

As explained with greater detail in the attached analysis, I conclude as follows:

- The Department of Justice does not need to change its employment practices to comply with *Bostock*. The Department does not discriminate on the basis of sexual orientation or gender identity in its employment decisions.
- The Department, like any other entity subject to federal prohibitions on sex discrimination, may continue to maintain sex-specific facilities and policies, including bathrooms, locker rooms, dress codes, and physical fitness standards, where physiological differences between the sexes are relevant.
- The Department may hire individuals based on biological sex where sex is a bona fide occupational qualification for the position.
- The Civil Rights Division will apply *Bostock*'s reasoning to federal statutory provisions where the reasoning logically applies, but will not extend it to distinguishable contexts or language. Under that approach, the reasoning of *Bostock* likely applies to prohibit discrimination based on homosexual or transgender status as unlawful "sex" discrimination under Title VII of the Civil Rights Act, 42 U.S.C. § 2000e-2(a), Title IX of the Educational Amendments Act, 20 U.S.C. § 1681, the Fair Housing Act, 42 U.S.C. §§ 3604(a), (b), (d), 3605, 3606, the Equal Credit Opportunity Act, 15 U.S.C. § 1691(a)(1), and the Justice System Improvement Act of 1979, 34 U.S.C. § 10228(c). The reasoning of *Bostock* also severely erodes the doctrinal underpinnings of Supreme Court decisions that allow employers to maintain affirmative action policies despite Title VII's prohibition on race discrimination. The reasoning does not necessarily, however, affect the interpretation of the Constitution; statutes that incorporate constitutional standards, *see, e.g.*, 42 U.S.C. 2000c-6; disparate impact liability under Title VII, 42 U.S.C. § 2000e-2(a)(2), or the Fair Housing Act, 42 U.S.C. § 3604(a); or other distinguishable statutory or regulatory language.
- The Civil Rights Division will continue to abide by, and provide guidance on, the multiple statutory and constitutional protections that may exempt religious employers and educational institutions from the rule announced in *Bostock*, or applications of *Bostock*'s reasoning to other statutes.

Namudnoed?, Balkanization (July 6, 2020). Others suggest *Bostock* was result driven, and the Court will not apply the same mode of analysis in other cases where the result would be to rein in applications of federal statutes. For the purposes of this memorandum, we take the Court at its word and seek to analyze what impact a fair reading of *Bostock* has on various statutes enforced by the Civil Rights Division. We will not, however, address in-depth broader questions about whether the reasoning of *Bostock* requires an end to all forms of race discrimination—including affirmative action—in employment, higher education, and other areas of society.

- Given the sea change effected by *Bostock*, the Civil Rights Division will exercise civil and criminal enforcement discretion relating to conduct predating *Bostock*.

Implementation

After studying the decision, I have advised leadership that the Department of Justice does not need to change its employment practices to comply with *Bostock*. A provision of Title VII not at issue in *Bostock* applies to the federal government, 42 U.S.C. § 2000e-16, but regardless of whether the reasoning in *Bostock* would apply to that provision, the Department has already committed itself to ensuring that "no applicant for employment or employee of our Department will be denied equal employment opportunity because of race, color, religion, national origin, sex, age, sexual orientation, disability (physical or mental), gender identity, protected genetic information, pregnancy, status as a parent, marital status, political affiliation, or any other nonmerit-based factor." DOJ EEO Statement. The Department may and should continue to adhere to this commitment, as well as to its commitment to equal justice and equal opportunity more broadly.

The Department likewise may and should continue its commitment to take "swift and appropriate corrective and/or disciplinary action when employees are found to have engaged in discrimination, retaliation, or harassment, including sexual harassment." DOJ EEO Statement. Although Justice Alito's dissent in *Bostock* suggests that the majority's logic might preclude a covered Title VII employer from refusing to hire an applicant with a history of sexual harassment, *Bostock*, 140 S. Ct. at 1761 (Alito, J. dissenting), and presumably from firing an employee who engages in such conduct, the Department need not read Title VII in that manner. The Supreme Court has held that "sexual harassment so severe or pervasive as to alter the conditions of the victim's employment and create an abusive working environment violates Title VII," *Faragher v. City of Boca Raton*, 524 U.S. 775, 786 (1998) (cleaned up), and the Department need not read the *Bostock* decision to undermine its ability as an employer to prevent or address such harassment.

The Department has long expected all of its employees to behave professionally and respectfully toward each other. To be clear, Title VII does not impose a "general civility code," *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 81 (1998), nor reach "the ordinary tribulations of the workplace, such as the sporadic use of abusive language, gender-related jokes, [or] occasional teasing," *Faragher*, 524 U.S. at 788. "The prohibition of harassment on the basis of sex . . . forbids only behavior so objectively offensive as to alter the 'conditions' of the victim's employment." *Oncale*, 523 U.S. at 81. But the Department has long recognized that respectful and professional behavior amongst its diverse workforce is important to the Department's ability to carry out its mission of ensuring fair and impartial administration of justice for all Americans. Thus, the Department may and should continue to respect its employees' right to express traditional views regarding marriage and gender identity, "view[s] long . . . held . . . in good faith by reasonable and sincere people here and throughout the world," *Obergefell v. Hodges*, __ U.S. __, __, 135 S. Ct. 2584, 2594 (2015), just as it continues to respect its employees' right to express contrary views.

Bostock does not require any changes to the Department's sex-specific facilities or policies. Although the Court refrained from opining on the validity of "sex-segregated bathrooms, locker rooms, and dress codes," 140 S. Ct. at 1753, its reasoning confirms that such practices do not run afoul of Title VII so long as they do not treat an individual "worse than others who are similarly situated," *id.* at 1740. That is because "discrimination"—as used in the statute—requires this type of difference in treatment between similarly situated individuals. *Id.* And men and women are not similarly situated where physiological differences are relevant. *See Jespersen v. Harrah's Operating Co.*, 444 F.3d 1104, 1109-10 (9th Cir. 2006) ("Grooming standards that appropriately differentiate between the genders are not facially discriminatory."); *Gerdom v. Continental Airlines, Inc.*, 692 F.2d 602, 606 (9th Cir. 1982) (en banc), *cert. denied*, 460 U.S. 1074 (1983) (recognizing that "physiologically based policies which set a higher maximum weight for men than for women of the same height" would not be problematic where "no significantly greater burden of compliance was imposed on either sex").

The physiological differences between men and women are relevant for physical fitness standards, bathrooms, locker rooms, and dress codes. These practices do not, like the odious practice of maintaining race-segregated bathrooms or locker rooms, treat similarly situated people differently. Rather, they treat *differently*-situated people differently—men and women are simply not similarly situated for policies under which physiological differences are relevant. Indeed, in effectively requiring Virginia Military Institute (VMI) to admit women, the Supreme Court stated that "[a]dmitting women to VMI would undoubtedly require alterations necessary to afford members of each sex privacy from the other sex in living arrangements, and to adjust aspects of the physical training programs." *United States v. Virginia*, 518 U.S. 515, 550 n.19 (1996); *id.* (noting that, when the service academies admitted women, Congress specified that standards for women "shall be the same as those required for male individuals, except for those minimum essential adjustments in such standards required because of physiological differences between male and female individuals"). Although *Virginia* involved a claim under the Equal Protection Clause, rather than Title VII, the Supreme Court's implicit approval of policies that ensure privacy of the sexes from each other and that take into account the physiological differences between men and women for physical training purposes suggests that such policies are not inherently discriminatory.

It is thus no surprise that courts have repeatedly rejected challenges to sex-specific policies and facilities where physiological differences are relevant. For example, courts have held that the FBI does not violate Title VII when it "utilizes physical fitness standards that distinguish between the sexes on the basis of their physiological differences but impose an equal burden of compliance on both men and women." *Bauer v. Lynch,* 812 F.3d 340, 351 (4th Cir. 2016), *cert. denied*, 137 S. Ct. 372 (2016) (discussing cases). Courts have also held that "regulations promulgated by employers which require male employees to conform to different grooming and dress standards than female employees is not sex discrimination within the meaning of Title VII." *Fountain v. Safeway Stores, Inc.*, 555 F.2d 753, 755 (9th Cir. 1977) (collecting cases). And for the more than 50 years that Title VII has been in place, no court has held that Title VII requires the *elimination* of sex-segregated bathrooms or locker rooms, even as some courts have struggled with the application of bathroom policies to transgender individuals in various stages of transition. Indeed,

some courts have suggested that failure to have sex-specific bathrooms and locker rooms could, in some circumstances, itself create liability under Title VII. *See, e.g.*, *Pucino v. Verizon Wireless Commc'ns, Inc.*, 618 F.3d 112, 118 (2d Cir. 2010) (concluding that evidence that "there was an attempt to force female employees to use restrooms that had no locks" could support a hostile work environment claim); *DeClue v. Central Illinois Light Co.*, 223 F.3d 434, 437 (7th Cir. 2000) (suggesting that failure to offer "toilet facilities sufficiently private to meet [a female] plaintiff's needs . . . may have been a perfectly good claim of sex discrimination"); *James v. Nat'l R.R. Passenger Corp.*, No. 02-civ-3915, 2005 WL 6182322, at *5 (S.D.N.Y. Mar. 28, 2005) (holding that a jury could reasonably conclude that a policy of offering only unisex bathrooms and changing rooms could have a disparate impact on women in violation of Title VII). *Bostock* did not disturb this body of case law.

To the contrary, *Bostock* made clear that special treatment for homosexual or transgender persons would itself constitute sex discrimination in some circumstances. The Court explained, for example, that "[a]n individual's homosexuality or transgender status *is not relevant* to employment decisions." 140 S. Ct. at 1741. That means that no one should be given either a preference or a demerit in hiring and firing decisions based on the person's sexual orientation or transgender status. It also means that exceptions for homosexual or transgender persons from sex-specific policies and facilities where physiological differences are relevant may themselves constitute unlawful sex discrimination. The Court said that "discrimination based on homosexuality or transgender status necessarily entails discrimination based on sex; the first cannot happen without the second." *Id.* at 1747.

With respect to its enforcement responsibilities under Title VII, the Division will exercise enforcement discretion with respect to the pursuit of retroactive relief under *Bostock*. The Supreme Court has recognized that "Title VII does not require a district court to grant any retroactive relief. A court that finds unlawful discrimination 'may enjoin [the discrimination] . . . and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement . . . with or without back pay . . . or any other equitable relief as the court deems appropriate.'" *City of Los Angeles, Dept of Water & Power v. Manhart*, 435 U.S. 702, 718 (quoting 42 U.S.C. § 2000e-5(g)). "To the point of redundancy, the statute stresses that retroactive relief 'may' be awarded if it is appropriate." *Id.* In *Manhart*, although the Court had "no doubt about the application of the statute," it reversed an award of retroactive relief. *Id.* at 719. In doing so, it "recognize[d] that conscientious and intelligent administrators of pension funds, who did not have the benefit of the extensive briefs and arguments presented to [the Court], may well have assumed that a program like the Department's was entirely lawful," noting that "[t]he courts had been silent on the question and the administrative agencies had conflicting views." *Id.* at 719-20. The Court further noted that the rule announced in *Manhart* represented a "marked departure from past practice" and that it could have significant potential impact on the economy. *Id.* at 721-23.

Although *Bostock* did not arise out of the pension context at issue in *Manhart*, much of *Manhart*'s reasoning counsels against retroactive relief under *Bostock*. Specifically, many conscientious and intelligent employers may have assumed that discrimination based on sexual orientation or transgender status did not run afoul of Title VII's prohibition on discrimination

based on sex. As Justice Alito noted in his dissent in *Bostock*, "until 2017, every single Court of Appeals to consider the question interpreted Title VII's prohibition against sex discrimination to mean discrimination on the basis of biological sex." 140 S. Ct. at 1757 (Alito, J. dissenting). Indeed, "[s]ome 30 federal judges" to consider whether Title VII prohibited discrimination based on sexual orientation "said no, based on the text of the statute. 30 out of 30." *Id.* at 1824 (Kavanaugh, J., dissenting). For its part, the EEOC did not hold that Title VII prohibited discrimination based on transgender status and sexual orientation until 2012 and 2015 respectively. *Id.* at 1757-58 & n.7 (Alito, J. dissenting). Thus, "for the first 48 years after Title VII became law," the Commission "[d]ay in and day out" enforced Title VII under an interpretation contrary to the one announced by the Supreme Court in *Bostock*. *Id.* at 1575-58. Likewise, with the exception of a brief period from 2014 to 2017, the Department consistently interpreted the plain text of Title VII not to prohibit discrimination on the basis of transgender status or sexual orientation, and it vigorously argued that position to the Supreme Court. *See* Br. of the United States, *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC*, No. 18-107, Br. of the United States, *Bostock v. Clayton County, Ga.*, Nos. 17-1618, 17-1623. *Bostock* thus represents at least as equally significant a break in past practice as *Manhart*. Under these circumstances, the Civil Rights Division will exercise its enforcement discretion in individual cases not to seek back pay for conduct predating *Bostock* unless particular facts suggest that such relief is necessary and appropriate. *Cf. Manhart*, 435 U.S. at 720; *Barr v. Am. Ass'n of Political Consultants, Inc.*, 140 S. Ct. 2335, 2355 n.12 (2020) (plurality op.).

Protections for Religious Employers

The Department of Justice does not have primary responsibility for the enforcement of Title VII against private employers, but it has promulgated guidance on the federal protections for religious liberty, including those that may affect Title VII enforcement. *See* Memorandum for All Executive Departments and Agencies, 82 Fed. Reg. 49,668 (Oct. 26, 2017). The *Bostock* decision identified three such protections for religious liberty that may limit the reach of its decision: the "express statutory exception for religious organizations" in Title VII itself, the Religious Freedom Restoration Act, and the First Amendment's protection of "the employment relationship between a religious institution and its ministers." 140 S. Ct. at 1754. This memorandum addresses each of these protections, along with additional statutory protections in Title VII and the First Amendment. The expression of these protections should not be taken as a suggestion that they are the exclusive protections for religious liberty that may apply in any given case.

First, the Court acknowledged in *Bostock* that its decision does not disturb Title VII's exemption for religious organizations in 42 U.S.C. § 2000e-1(a), which states that Title VII "shall not apply to . . . a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities." This provision protects the right of religious employers to "choose to employ only persons whose beliefs and conduct are consistent with the organizations' religious precepts." *See* 82 Fed. Reg. at 49,670, 49,677. As explained at greater length in the Memorandum regarding Federal Protections for Religious Liberty, that protection is not limited "to organizations that carry on only religious

activities, or to organizations established by a church or formally affiliated therewith." 82 Fed. Reg. 49,677. Instead, it applies broadly to organizations that are organized for religious purposes and engage in activity consistent with, and in furtherance of, such purposes. *Id.* Thus, for example, a religious charity that meets this test and holds traditional Christian views on marriage could choose to employ only those individuals who share those beliefs and conduct themselves accordingly.

And, although not expressly mentioned in *Bostock*, Title VII contains two additional protections for the hiring decisions of religious organizations. Specifically, Title VII makes clear that "it shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion." 42 U.S.C. § 2000e-2(e). Nor shall it be "an unlawful employment practice for an employer to hire and employ employees . . . on the basis of his religion . . . in those certain instances where religion . . . is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." *Id.* "Because Title VII defines 'religion' broadly to include 'all aspects of religious observance and practice, as well as belief,' 42 U.S.C. 2000e(j), these exemptions include decisions to employ only persons whose beliefs and conduct are consistent with the employer's religious precepts." *See* 82 Fed. Reg. 49,677 (internal quotation marks omitted).

Second, as the Supreme Court noted in *Bostock*, employers that do not qualify for any of the Title VII religious exemptions may nevertheless qualify for an exemption under the Religious Freedom Restoration Act of 1993. *Cf. Bostock*, 140 S. Ct. at 1754 ("Because RFRA operates as a kind of super statute, displacing the normal operation of other federal laws, it might supersede Title VII's commands in appropriate cases."). RFRA prohibits the federal government from imposing a substantial burden on the religious exercise of an employer unless doing so is the least restrictive means of achieving a compelling governmental interest. *See Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 705 (2014). Title VII may impose such a burden if it compels an act inconsistent with an adherent's religious observance or practice—as it would if, for example, an employer sincerely believes that employing someone who is publicly undergoing a gender transition would render the employer complicit in conduct that the employer's religion forecloses. *See* 82 Fed. Reg. 49,674 (describing the substantial burden test). The Civil Rights Division does not anticipate that there would be many employers who would face such a substantial burden, in light of the express Title VII exceptions for religious organizations described above, §§ 2000e-1(a), 2000e-2(e), and the general exception for employers with fewer than 15 employees, § 2000e(b).

Under RFRA, government may impose such a burden only if "application of the challenged law 'to the person'—the particular claimant whose sincere exercise of religion is being substantially burdened"—is the least restrictive means of furthering a compelling governmental

interest. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegatal*, 546 U.S. 418, 430-31 (2006) (quoting 42 U.S.C. § 2000bb-1(b)). In other words, as relevant here, RFRA requires the government to show that the "marginal interest in" substantially burdening a particular covered entity or person's religious exercise is sufficiently compelling to withstand strict scrutiny. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 727 (2014). For example, in *O Centro*, the fact that a particular controlled substance, dimethyltryptamine (DMT), was "exceptionally dangerous" could "not provide a categorical answer that relieves the Government of the obligation to shoulder its burden under RFRA" to justify its refusal to allow a particular church to use a sacramental tea (hoasca) containing that drug. 546 U.S. at 432. Rather, the Court explained any application of RFRA must "look[] beyond broadly formulated interests justifying the general applicability of government mandates and scrutinize[] the asserted harm of granting specific exemptions to particular religious claimants." *Id.* at 431. As the Court observed, "there is no indication that Congress, in classifying DMT, considered the harms posed by the particular use at issue here—the circumscribed, sacramental use of *hoasca* by the [church]." *Id.* at 432.

Although any application of RFRA will depend on the applicable facts, it is unlikely that the government would be able to justify imposing a substantial burden in this context. As the Supreme Court said "in *Sherbert v. Verner*, 374 U.S. 398 (1963), the decision that provides the foundation for the rule codified in RFRA, . . . only the gravest abuses, endangering paramount interest could give occasion for a permissible limitation on the free exercise of religion." *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2392 (2020) (Alito, J., joined by Gorsuch, J., concurring) (internal quotation marks omitted). As an initial matter, "Congress' determination that" sex "should be listed" as a protected characteristic in Title VII "simply does not provide a categorical answer that relieves the Government of its obligation to shoulder its burden under RFRA." *O Centro*, 546 U.S. at 432. As in *O Centro*, "there is no indication that Congress," in prohibiting covered employers from firing employees because of their sex, "considered the harms posed" by firing employees because of their sexual orientation or transgender status, much less concluded that the government had a compelling interest in forcing employers to violate their faith to prevent such harms. 546 U.S. at 432; *see supra* XX; *see also Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. at 2392 (Alito, J., joined by Gorsuch, J., concurring) ("We can answer the compelling interest question simply by asking whether *Congress* has treated the provision of free contraceptives to all women as a compelling interest."). And unlike racial discrimination, the Supreme Court has never held that a religious employer's decision not to hire homosexual or transgender persons "violates deeply and widely accepted views of elementary justice" or that the government has a "compelling" interest in the eradication of such conduct. *Cf. Bob Jones Univ. v. United States*, 461 U.S. 574, 592, 604 (1983). To the contrary, the Court has held that a government's interest in "ensur[ing] by statute [that] gays and lesbians desiring to make use of public accommodations . . . will not be turned away merely on the proprietor's exercise of personal preference" could not justify compelled modification of speech. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 578 (1995) (applying heightened scrutiny). It likewise has held that the "state interests embodied in" a public "accommodations law" prohibiting discrimination on the basis of sexual orientation could "not justify" compelling the Boy Scouts to retain a gay man as an assistant scoutmaster in conflict with their expressive activity. *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 659 (2000)

(applying heightened scrutiny). In light of these precedents, and in the absence of a legislative judgment about the interests served by this application of Title VII, it is difficult to see how the government could show that any "marginal interest in enforcing" this unexpected construction of Title VII could be so compelling as to justify forcing certain employers to violate their faith. *Hobby Lobby*, 573 U.S. at 727.

The difficulty in establishing a compelling interest here may be heightened by the many employers not covered by the rule announced in *Bostock*. As described above, Congress expressly allowed religious organizations and educational institutions owned, supported, controlled, or managed in whole or in substantial part by a particular religion to hire only those employees whose beliefs and conduct are consistent with the employer's precepts. 42 U.S.C. §§ 2000e-1(a), 2000e-2(e). Congress also included an exemption for hiring on the basis of religion or sex where either characteristic is a bona fide occupational qualification. § 2000e-2(e). And Congress exempted all employers with fewer than 15 employees from Title VII's reach, § 2000e-2(b)—a category that, according to one recent estimate, covers 85 percent of U.S. employers, Reply Br. for the Resp. at 22-23 & n.90, *Altitude Express, Inc. v. Zarda*, No. 17-1623, *aff'd sub nom. Bostock v. Clayton County*, 2019 WL 4464222. These exemptions only further support the conclusion that it is hard to see how the government could demonstrate that it has a compelling interest in forcing certain employers to contravene their religious convictions in this particular context. *See O Centro*, 546 U.S. at 433 (quoting *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 547 (1993) (counseling that "a law cannot be regarded as protecting an interest of the highest order . . . when it leaves appreciable damage to that supposedly vital interest unprohibited").

Notably, RFRA controls whether an employer faces a lawsuit from a government actor or a private party. RFRA expressly "applies to all federal law, and the implementation of that law, whether statutory or otherwise," 42 U.S.C. § 2000bb–3(a), and broadly defines "government" to "include[]" every "branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States," *id.* § 2000bb–2(1). That language covers actions by private plaintiffs seeking to enforce federal statutes such as Title VII: the federal judiciary is a "branch … of the United States" and its application of Title VII in a private lawsuit constitutes "implementation" of federal law. *Cf. New York Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964) (applying First Amendment because "[a]lthough this is a civil lawsuit between private parties, the Alabama courts have applied a state rule of law which petitioners claim to impose invalid restrictions on their constitutional freedoms of speech and press"). RFRA also directs that "[a] person whose religious exercise has been burdened" by the government "may assert" the Act's protection as a "defense in a judicial proceedings," *id.* § 2000bb–1(c), and nothing in that provision limits that defense to suits brought by a government actor. Accordingly, "RFRA's language surely seems broad enough" to reach "an action by a private party seeking relief under a federal statute against another private party who claims that the federal statute substantially burdens his or her exercise of religion." *Hankins v. Lyght*, 441 F.3d 96, 103 (2d Cir. 2006). This reading also fits with RFRA's codified "declaration of purposes," one of which was "to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963), and *Wisconsin v. Yoder*, 406 U.S. 205 (1972), and to guarantee its application in all cases where free exercise of religion is substantially burdened." 42 U.S.C. § 2000bb(b). The pre-*Smith* compelling interest regime that RFRA was designed to restore applied to suits among private parties, *see, e.g.*, *McDaniel v. Paty*, 435 U.S. 618 (1978), and limiting RFRA's scope to litigation involving government actors does

not guarantee the Act's application "in all cases" where religious exercise is substantially burdened. *Cf. Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 705-06, 709-10, 714-15 (2014) (relying on pre-*Smith* cases to conclude that RFRA covered for-profit corporations).

That RFRA requires the "[g]overnment" to "demonstrate[]" that substantially burdening a person's religious exercise survives strict scrutiny, 42 U.S.C. § 2000bb–1(b), does not mean, as some courts have concluded, that the Act's protections vanish in suits bought by private parties, *see Listecki v. Official Comm. of Unsecured Creditors*, 780 F.3d 731, 736–37 (7th Cir. 2015); *General Conference Corp. of Seventh-Day Adventists v. McGill*, 617 F.3d 402, 410–12 (6th Cir. 2010); *see also Hankins*, 441 F.3d at 114–15 (Sotomayor, J., dissenting). To the contrary, RFRA's strict-scrutiny provision is an "exception" to RFRA's "general" rule that "[g]overnment shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability." *Compare* 42 U.S.C. § 2000bb–1(a), *with id.* § 2000bb–1(b). Reading that exception to give the government *carte blanche* to substantially burden religious exercise so long as it did so through private rights of action would turn RFRA's strict-scrutiny provision on its head. Instead, private parties must carry the government's burden when they seek to use federal law (and federal courts) to substantially burden another person's religious exercise. That is akin to how courts approached private suits involving the Free Exercise Clause under the pre-*Smith* regime. *See, e.g. Paul v. Watchtower Bible & Tract Soc. of New York*, Inc., 819 F.2d 875, 883 (9th Cir. 1987); *cf. Florida Star v. B.J.F.*, 491 U.S. 524, 537 (1989) (requiring private party invoking statute to impose liability on newspaper to show that the statute's application "serves 'a need to further a state interest of the highest order'" under the First Amendment).[2]

Third, *Bostock*, a statutory decision, cannot intrude upon the First Amendment's protections for religious autonomy, including in ecclesiastical and internal governance matters. The Free Exercise Clause and Establishment Clause prevent governmental intrusion into the autonomy of religious institutions "with respect to internal management decisions that are essential to the institution's central mission," including "the selection of the individuals who play certain key roles" for carrying out their missions. *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049, 2060 (2020). For example, "[j]udicial review of the way in which religious schools discharge those responsibilities would undermine the independence of religious institutions in a way that the First Amendment does not tolerate." *Id.* at 2055. In identifying which employees are covered by this protection, the Supreme Court has explained that "a variety of factors may be important," but "[w]hat matters, at bottom, is what an employee does." *Id.* at 2063, 2064. Employees whose "work lie[s] at the core of the[] mission" of a religious institution are covered by the ministerial exception. *Id.* at 2055. And because, "[i]n a country with the religious

[2] Similarly, RFRA's directive that anyone "whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief *against a government*," does not, as some courts have assumed, narrow the unqualified right to assert a RFRA "defense in a judicial proceeding." 42 U.S.C. § 2000bb–1(c) (emphasis added); *see, e.g.*, *Listecki*, 780 F.3d at 737. Rather, the relevant clause broadens the rights of a party asserting RFRA. "The narrowing interpretation—permitting the assertion of the RFRA as a defense only when relief is also sought against a governmental party—involves a convoluted drawing of a hardly inevitable negative implication." *Hankins*, 441 F.3d at 103.

diversity of the United States, judges cannot be expected to have a complete understanding and appreciation of the role played by every person who performs a particular role in every religious tradition," "[a] religious institution's explanation of the role of such employees in the life of the religion in question is important" to this analysis. *Id.* at 2066. Neither Title VII in general, nor *Bostock* in particular, can overcome the First Amendment's protection for a religious institution's selection or supervision of these employees.

Fourth, although not mentioned in *Bostock*, "religious and secular groups alike" may claim a right to freedom of association under the First Amendment. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171, 189 (2012). That right applies to any group engaged in public or private expressive activity—even if not associated primarily for that purpose. *Boy Scouts of America*, 530 U.S. at 648. And it generally protects such groups from being forced to accept members if the presence of such members would "affect[] in a significant way the group's ability to advocate public or private viewpoints." *Id.* The Supreme Court has described this right as "crucial in preventing the majority from imposing its views on groups that would rather express other, perhaps unpopular, ideas." *Id.* at 647-48; *Masterpiece Cakeshop*, 138 S. Ct. at 1737 (Gorsuch, J., concurring) ("Popular religious views are easy enough to defend. It is in protecting unpopular religious beliefs that we prove this country's commitment to serving as a refuge for religious freedom."). Thus, the Supreme Court held in *Boy Scouts of America* that the Boy Scouts, which at that time "believe[d] that homosexual conduct is inconsistent with the values it seeks to instill in its youth members," could not be forced to accept a gay scoutmaster. *Boy Scouts*, 530 U.S. at 654-56. By comparison, in *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984), the Court had allowed the forced inclusion of women because "the Jaycees had failed to demonstrate . . . any serious burdens on the male members' freedom of expressive association." *Boy Scouts*, 530 U.S. at 657-58. Employers who are able to show that they are engaged in expressive activity whose message would be significantly affected by application of the *Bostock* rule may be exempt from it.

Implications for other statutes

Provisions of Title VII not addressed by Bostock

Bostock will have consequences for the interpretation of Title VII beyond those addressed by the decision itself. The provision at issue in *Bostock* declares it an unlawful employment practice for an employer "(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex." 42 U.S.C. § 2000e-2(a)(1). The Supreme Court reasoned in *Bostock* that the words "because of" in the disparate treatment provision "incorporate the simple and traditional standard of but-for causation," which is "established whenever a particular outcome would not have happened 'but for' the purported cause." *Bostock*, 140 S. Ct. at 1739 (internal quotation marks omitted). The Court further reasoned that this provision focuses on the employer's treatment of individuals, rather than groups, *id.* at 1740-41, and that, because "homosexuality and transgender status are inextricably bound up with sex," any "discriminat[ion] on those grounds requires an employer to intentionally treat individual employees differently because of their sex," *id.* at 1742.

The reasoning of *Bostock* raises significant concerns about the vitality of Supreme Court precedent permitting covered employers to adopt affirmative action policies. In *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979), the Supreme Court held that § 2000e-2(a)(1), the same provision at issue in *Bostock*, did not outlaw such policies. *Id.* at 197; *see also Johnson v. Transportation Agency*, 480 U.S. 616 (1987) (permitting sex-based affirmative action policies under *Weber*). The *Weber* Court took the position that although a prohibition on affirmative action policies was "within the letter of the statute"—as a policy that "discriminate[s] against white employees solely because they are white" plainly constitutes "discriminat[ion] because of race"—it was "not within its spirit nor within the intention of its makers." 443 U.S. at 201 (quoting 42 U.S.C. § 2000e-2(a)(1) and *Holy Trinity Church v. United States*, 143 U.S. 457, 459 (1892)) (ellipses omitted). Based on an examination of "legislative history" and "historical context," the *Weber* Court concluded that an interpretation of Title VII "that forbade all race-conscious affirmative action would 'bring about an end completely at variance with the purpose of the statute'"—*i.e.*, to "open employment opportunities" for African Americans—and therefore "must be rejected." *Id.* at 201-02 (citation omitted).

Bostock squarely rejected that method of interpreting Title VII. In the Court's view, it was irrelevant whether its interpretation of § 2000e-2(a)(1) conflicted with "the legislature's purpose in enacting Title VII or certain expectations about its operations." *Bostock*, 140 S. Ct. at 1745; *see id.* at 1749-54. As the Court explained: "When the express terms of a statute give us one answer and extratextual considerations suggest another, it's no contest. Only the written word is the law." *Id.* at 1737. There is no way to reconcile that analysis with the one in *Weber—i.e.*, that even if the express terms of § 2000e-2(a)(1) prohibit affirmative action policies, Congress in 1964 neither intended nor expected that result. In addition, *Bostock* concluded that § 2000e-2(a)(1)'s use of the term "individual" mandated that the judicial focus of that provision "be on individuals, not groups" and thus that Title VII did not permit inquiring as to "how a policy affects one sex as a whole versus the other as a whole." *Id.* at 1740-41. That reasoning also cannot be squared with *Weber*'s conclusion that discrimination against an individual because of his race is permissible so long as it benefits another racial group.

Accordingly, while employers presently may rely on *Weber* to adopt affirmative action policies, they should be on notice that its "doctrinal underpinnings" have been significantly "eroded" by *Bostock*. *Kimble v. Marvel Entm't, LLC*, 576 U.S. 446, 458 (2015). And that is important because the Supreme Court has observed that "'the primary reason' for overruling statutory precedent" is that "subsequent legal developments . . . have removed the basis for a decision." *Id.* (citation omitted); *see also Patterson v. McLean Credit Union*, 491 U.S. 164, 173 (1989) ("[W]here the later law has rendered the decision irreconcilable with competing legal doctrines or policies, the Court has not hesitated to overrule an earlier decision.") (internal citations omitted). In addition, when, as here, civil-rights statutes are involved, the Supreme Court has often declined to "place on the shoulders of Congress the burden of the Court's own error." *Monell v. Department of Social Servs.*, 436 U.S. 658, 695 (1978) (citation omitted); *see Johnson*, 480 U.S. at 672-73 (Scalia, J., dissenting). Covered employers therefore should not be surprised if the Supreme Court eventually overrules *Weber* and holds that 42 U.S.C. § 2000e-2(a)(1) prohibits affirmative action policies in the workplace.

Bostock also likely affects the traditional interpretation of the second general prohibition in Title VII. Under § 2000e-2(a)(2), it is an unlawful employment practice "to limit, segregate, or classify . . . employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's . . . sex." 42 U.S.C. § 2000e-2(a)(2). The Supreme Court has interpreted this provision to prevent both intentional discrimination and disparate impact. *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-30 (1971). The *Bostock* reasoning may make a claim of intentional discrimination arising out of sexual orientation or transgender status discrimination cognizable under this provision, although it would not support a claim for disparate impact based on either group.

With respect to intentional discrimination, *Bostock* appears to contemplate that certain employer actions taken to limit, segregate, or classify employees based on sexual orientation or transgender status may run afoul of the prohibition on doing so "because of such individual's . . . sex," § 2000e-2(a)(2). Specifically, the Supreme Court discussed a hypothetical case in which "an employer asked homosexual or transgender applicants to tick a box on its application form" and concluded that even such a box implicates sex discrimination because "[t]here is no way for an applicant to decide whether to check the homosexual or transgender box without considering sex." *Bostock*, 140 S. Ct. at 1746. In the Court's view, the employer that decides not to hire anyone who checks the hypothetical homosexual or transgender box "intentionally refuses to hire applicants in part because of the affected individuals' sex, even if it never learns any applicant's sex." *Id.* Thus, a policy that limits, segregates, or classifies employees based on sexual orientation or transgender status may support a claim of intentional discrimination because of sex under § 2000e-2(a)(2) although such claim remains subject to the statutory requirement that, to be actionable, the limitation, segregation, or classification "deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee," § 2000e-2(a)(2). *See infra* p.14 (discussing this limitation).

The reasoning of *Bostock*, however, does not support a disparate impact claim based on a policy's effect on homosexual or transgender persons as such. Disparate impact may occur even when the employer has "good intent or absence of discriminatory intent," *see Griggs*, 401 U.S. at 432, and focuses on the effect of a policy on a particular group, *see id.* at 431 (considering an employment practice that operated to exclude African American employees from promotions or transfers to other jobs). The relevant group for purposes of the provision's reference to "sex" is men and women. *See Nashville Gas Co. v. Satty*, 434 U.S. 135, 141-42 (1977); *see also Bostock*, 140 S. Ct. at 1739 (proceeding on the assumption that sex in 1964 "[r]eferr[ed] only to biological distinctions between male and female). A policy targeted at homosexual or transgender status in general is not one targeted to either men or women and thus does not necessarily "cause[] a disparate impact on the basis of . . . sex," § 2000e-2(k).

To the extent that a policy had a disparate impact on a subset of men or women based on sexual orientation or transgender status—for example, biological men who identify as women—a disparate impact claim might be cognizable based on sex. *See Nashville Gas Co.*, 434 U.S. at 141 (finding liability based on disparate impact based on policy that deprived employees returning

from pregnancy leave of accumulated seniority). But that claim would have to satisfy the various limitations that Title VII imposes on disparate impact liability. Most notably, the disparate impact must be one that "deprive[s] or tend[s] to deprive any individual of employment opportunities or otherwise adversely affect[s] his status as an employee," § 2000e-2(a)(2). Moreover, the challenged policy must actually deprive or tend to deprive an individual of employment opportunities or otherwise adversely affect his status as an employee. *See Nashville Gas Co.*, 434 U.S. at 143; *E.E.O.C. v. AutoZone, Inc.*, 860 F.3d 564, 570 (7th Cir. 2017) (lateral job transfer that entailed no loss in pay, benefits, or job responsibilities did not adversely affect employment opportunity or status). Mere discomfort in a work place would not meet that standard. *See Garcia v. Spun Steak Co.*, 998 F.2d 1480, 1487-89 (9th Cir. 1993), *cert denied*, 512 U.S. 1228 (1994) (rejecting claim by Spanish-speaking employees that an "English-only policy … deprives them of a privilege given by the employer to native-English speakers: the ability to converse on the job in the language with which they feel most comfortable" because "there is no disparate impact with respect to a privilege of employment if the rule is one that the affected employee can readily observe and nonobservance is a matter of individual preference"). And in all events, the complaining party would need to meet the special burden of proof set forth in statute for Title VII disparate impact claims. 42 U.S.C. § 2000e-2.

Bostock also does not mean that employers cannot "hire or employ employees. . . on the basis of [employees'] . . . sex . . . in those certain instances where . . . sex . . . is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." § 2000e-2(e)(1). *Bostock* proceeded on the assumption that, as used in Title VII, "'sex . . . referr[ed] only to biological distinctions between male and female." 140 S. Ct. at 1739. And the bona fide occupational qualification provision rests on the understanding that an employee's biological sex may, in some narrow circumstances, interfere with the employee's ability to perform the job. *See International Union, United Auto., Aerospace & Agri. Implement Workers of Am. v. Johnson Controls*, 499 U.S. 187, 204 (1991); *see also Dothard v. Rawlinson*, 433 U.S. 321, 335-36 (1977) (recognizing that male sex was a bona fide occupational qualification "for the job of correctional counselor in a 'contact' position in an Alabama male maximum-security penitentiary"); *Wilson v. Chertoff*, 699 F. Supp. 2d 364 (D. Mass. 2010) (recognizing that female sex is a bona fide occupational qualification for a TSA employee hired "to conduct pat-down searches of female passengers"). In these cases, employers may hire or employ employees based on their biological sex.

Other Statutes

Bostock is not directly relevant to the interpretation of statutes outside of Title VII. The Court in *Bostock* emphasized that its holding was rooted in a conclusion about "the ordinary public meaning" of Title VII in 1964. 140 S. Ct. at 1738.[3] Because the Court cautioned that "only the words on the page constitute the law adopted by Congress and approved by the President," *id.*, we must hesitate to apply the reasoning of *Bostock* to different texts, adopted at different times, in different contexts. As the Court noted, any attempt to "add to, remodel, update, or detract from

[3] Though the majority's assertion was vigorously contested by the dissent. 140 S. Ct at 1755 ("The Court tries to convince readers that it is merely enforcing the terms of the statute, but that is preposterous.")(Alito, J dissenting).

old statutory terms" would "deny the people the right to continue relying on the original meaning of the law they have counted on to settle their rights and obligations." *Id.* Although more than "100 federal statutes prohibit discrimination because of sex," *see Bostock*, 140 S. Ct. at 1778 & Appendix C (Alito, J., dissenting), this memorandum of necessity addresses only four for which the Civil Rights Division has some enforcement authority.

Title IX

The application of *Bostock*'s reasoning to Title IX of the Education Amendments Act of 1972, 20 U.S.C. § 1681 *et seq.*, requires due care. Both Title VII and Title IX relate to discrimination based on sex, and both use sex in its ordinary, binary meaning. Indeed, if there were any doubt on that point, Title IX includes express references to "one sex" and "the other sex," as well as to "both sexes," usage that confirms the ordinary, binary meaning of the term. § 1681(a)(2), (8). But Title VII is also "a vastly different statute from Title IX" in both text and context. *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 175 (2005). Title IX provides, subject to a number of express exemptions, that "[n]o 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. It does not authorize disparate impact liability, nor does it use precisely the same "because of such individual's . . . sex" language that the Court relied upon in *Bostock*. *Compare* 42 U.S.C. § 2000e-2 *with* 20 U.S.C. § 1681. And while Title VII imposes a regulatory prohibition on covered employers, Title IX acts as a condition on the receipt of certain federal funding. *See Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 275, 286-87 (1998). The Supreme Court has explained that, when Congress acts pursuant to its power under the Spending Clause, a "central concern . . . [is] ensuring that the receiving entity of federal funds [had] notice" of its prospective liability. *Id.*

Nevertheless, the similarities in language between Title VII and Title IX suggest that the *Bostock* reasoning may carry over in some respects. Justice Thomas has, for example, reasoned that the phrases "on the basis of sex" and "because of such individual's . . . sex" have been used by Congress "interchangeably." *Jackson*, 544 U.S. at 185-86 (Thomas, J., dissenting); *see also Comcast Corp. v. Nat'l Ass'n of African American-Owned Media*, 140 S. Ct. 1009, 1016 (2020) ("When it first inferred a private cause of action under § 1981, this Court described it as 'afford[ing] a federal remedy against discrimination . . . *on the basis of* race,' language (again) strongly suggestive of a but-for causation standard."). If that is the case, then it seems to follow from the Supreme Court's reasoning in *Bostock* that an individual who is, on the basis of sexual orientation or transgender status, "excluded from participation in, . . . denied the benefits of, or . . . subjected to discrimination under any education program or activity receiving Federal financial assistance" may be able to make out a claim of intentional discrimination on the basis of sex in violation of Title IX. *See Bostock*, 140 S. Ct. at 1741. Like Title VII, Title IX recognizes that an individual's sex is "not relevant" to many, if not most, aspects of education programs or activities.

But where the physiological differences of the sexes *are* relevant to education programs or activities, sex may be taken into account. Several indicia from the statute establish this proposition, three of which are discussed here. First, Congress expressly provided that "notwithstanding anything to the contrary contained in this chapter, nothing contained herein shall be construed to

prohibit any educational institution receiving funds under this Act, from maintaining separate living facilities for the different sexes." 20 U.S.C. § 1686. The fact that this provision is phrased as a rule of construction, rather than an exemption, is a textual indicator that Congress did not believe that its general prohibition on sex discrimination must be read to cover different living facilities. That makes sense, as separate-sex living facilities do not generally exclude anyone from participation in education programs or activities, nor deny them the benefits thereof. Nor do separate-sex living facilities subject any person to discrimination, because discrimination requires treating an "individual worse than others who are similarly situated," *Bostock*, 140 S. Ct. at 1740, and men and women are not similarly situated for these purposes. Rather, the physiological differences between men and women may justify the additional privacy and security that can only be guaranteed by such separate facilities. This provision supports the conclusion that Title IX's prohibition on sex discrimination does not prohibit different treatment of the sexes where the physiological differences of the sexes are relevant.

Second, Congress expressly exempted certain single-sex activities from Title IX's reach where it is not clear that physiological differences are relevant. For example, Congress expressly exempted from Title IX the "membership practices of" sororities and fraternities, 20 U.S.C. § 1681(6)(A), or "voluntary youth service organization" that traditionally serve minors of a single sex, § 1681(6)(B); programs and activities undertaken in connection with Boys State, Boys Nation, Girls State, and Girls Nation, § 1681(7); and "father-son or mother-daughter activities at an educational institution," so long as "reasonably comparable activities [are] provided for students of the other sex," § 1681(8). The justification for the single-sex practices of these activities cannot be that men or women are particularly ill suited to partake of the activities given that parallel organizations or activities are available to men and women. Rather, the apparent justification is that the exempted activities have unique value as single-sex activities. Namely, because men and women are not fungible, they may gain unique perspectives and experiences from participating in these activities with only members of their own sex. *See United States v. Virginia*, 518 U.S. 515, 533, 535 (1996) (recognizing the "reality" that "[s]ingle-sex education affords pedagogical benefits to at least some students"). But Congress's decision to exempt these activities, rather than construe them as not covered by Title IX, confirms that Congress understood its prohibition on sex discrimination in the ordinary sense—as prohibiting discrimination based on sex only where men and women were similarly situated.

Third, Congress has long hailed the rise of women's athletics as one of the crowning achievements of Title IX. Although athletics was not expressly discussed in the text of Title IX, Congress tasked the Executive Branch with issuing regulations on the subject. *See* Pub. L. 93-380, § 844, 88 Stat. 484 (Aug. 21, 1974) ("The Secretary shall prepare and publish … proposed regulations implementing the provisions of Title 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."). These Title IX regulations have, from the very beginning, authorized schools to offer separate-sex teams "where selection for such teams is based upon competitive skill or the activity involved is a contact sport" and required recipients to "provide equal athletic opportunity for members of both sexes." 34 C.F.R. 106.41. Congress extensively studied and

held hearings on these regulations before ultimately leaving them in place. *See North Haven Bd. of Ed. v. Bell*, 456 U.S. 512, 531-33 (1982). And agencies across the federal government have incorporated them into their implementing regulations. *See* 65 Fed. Reg. 52,857 (common rule for 21 federal agencies). Women's sports teams have accordingly flourished, allowing women to compete against other women, including in sports for which a school does not offer a men's team. Such separate teams would only be permissible under Title IX if the text prohibits differential treatment of the sexes only where the physiological differences between the sexes are irrelevant.

The Civil Rights Division will not lightly assume that Title IX should be interpreted in a way that "would frustrate the purposes" of that law, *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 285 (1998). It would frustrate Title IX's purpose to read its text as prohibiting the single-sex teams that have ensured women equal opportunity in athletics for nearly 50 years. It would likewise frustrate those purposes to read Title IX to prohibit sex-specific facilities that allow men and women privacy from the other sex, particularly given that many boys and girls will be undergoing physiological changes associated with their biological sex at the same time that they are participating in, or attempting to participate in, education programs and activities. And it would frustrate the purposes of Title IX's express statutory and regulatory exemptions for single-sex activities to require such activities to admit members of the opposite sex in accordance with gender identity. A formerly single-sex activity that admits members of the opposite sex based on gender identity is by definition no longer single sex. And allowing admission of members of the opposite sex to a single-sex activity based on gender identity would actually end up discriminating on the very basis that it would be attempting to accommodate: A girls' volunteer organization that accepts all females and all males who identify as females *excludes* males who identify as males. But if the benefits from the single-sex nature of the activity were not a reason to exclude transgender members of the opposite sex from the group, it is hard to understand the reason for excluding non-transgender members of the opposite sex. At a bare minimum, no statute should be read to require or permit giving transgender individuals special—as opposed to equal—treatment. Discrimination in favor of transgender status is still discrimination on the basis of gender identity and, under the reasoning of *Bostock*, on the basis of sex.

To sum up, after *Bostock*, it would behoove recipients to ensure that they do not discriminate on the basis of sexual orientation or transgender status. In most cases, sex (and therefore sexual orientation and transgender status) are not relevant in decisions relating to admissions, employment, or grading. Homosexual or transgender persons should thus not be treated either more or less favorably than other persons. *Bostock* does not prevent recipients from adopting sex-specific policies and facilities when the physiological differences of the sexes *are* relevant, including with respect to living assignments, bathrooms, locker rooms, and competitive sports teams. Men and women are not "materially identical in all respects," *Bostock*, 140 S. Ct. at 1741, and nothing in *Bostock* requires recipients to treat them as if they are. With respect to such policies, however, *Bostock*'s reasoning forecloses special preferences based on homosexual or transgender status. Thus, for example, a women's volleyball team, ice hockey team, weightlifting team, or rugby team may not allow men who identify as women to play on the team if other men are not allowed to, because doing so would discriminate against non-transgender men and in favor of transgender men based on sex, which is unlawful under *Bostock*. Sex is relevant to the team

assignment policy; transgender status is not, and transgender individuals may have no more and no less opportunity than non-transgender individuals.[4]

As with Title VII, it is worth noting the religious exemptions that may be applicable to Title IX recipients. The statute expressly provides that its prohibition "shall not apply to an educational institution which is controlled by a religious organization if the application of [the prohibition] would not be consistent with the religious tenets of such organization." 20 U.S.C. § 1681(a)(3); *see also* § 1687 (defining "program or activity" to exclude "any operation of an entity which is controlled by a religious organization if the application of section 1681 . . . would not be consistent with the religious tenets of such organization"). Although under existing regulations "eligible institutions may 'claim the exemption' in advance by 'submitting in writing to the Assistant Secretary a statement by the highest ranking official of the institution, identifying the provisions . . . [that] conflict with a specific tenet of the religious organization,' 34 CFR § 106.12(b), they are not required to do so to have the benefit of it." 82 Fed. Reg. at 49,679. Organizations that do not qualify for that exemption may still be able to claim the protection of RFRA, *id.*, as well as the constitutional protections described *supra*.

Fair Housing Act

The reasoning of *Bostock* is also applicable to some provisions of the Fair Housing Act, 42 U.S.C. § 3601 *et seq.* Like Title VII, the Fair Housing Act imposes a series of prohibitions, rather than conditions on federal funding. And like Title VII, the Act uses the phrase "because of," which the Supreme Court interpreted in *Bostock* to require but-for causation. *Bostock*, 140 S. Ct. at 1739 For example, as made applicable, and subject to some exemptions, § 3604(a) makes it unlawful "[t]o refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of . . . sex." § 3604(a).[5] This language incorporates the legal test of but-for causation. *Cf. Univ. of Texas Southwestern Med. Ctr. v. Nassar*, 570 U.S. 338, 350 (2013). And under the reasoning of *Bostock*, but-for causation is established in the case of discrimination because of homosexuality or transgender status "because to discriminate on those grounds requires an employer to treat individual[s] . . . differently because of their sex." *Bostock*, 140 S. Ct. at 1742. Thus, after *Bostock*,

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[4] *Bostock* addressed "transgender status" only in the binary, *see, e.g.*, 140 S. Ct. at 1741, and, as noted above, did not define "sex" to include "gender identity," *id.* at 1739. It is unclear how some of the sex-specific provisions of Title IX could even operate if "sex" were defined to include "gender identity," given that these provisions presuppose a binary view of sex and according to the American Psychiatric Association, gender identity may include "an individual's identification as . . . some category other than male or female." Diagnostic and Statistical Manual of Mental Disorders Fifth Edition 451 (2013).

[5] The Supreme Court has interpreted the phrase "otherwise makes unavailable" in § 3604(a) to authorize disparate-impact liability as well. *Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc.*, __ U.S. __, 135 S. Ct. 2507, 2518 (2015). Because such liability focuses on the effects on groups, rather than individuals, *see supra* at 8, the *Bostock* reasoning does not support liability for disparate impact based on sexual orientation or transgender status under the Fair Housing Act.

a person who refuses to sell or rent a dwelling because of sexual orientation or transgender status may violate this provision.

The same reasoning applies to several other provisions of the Fair Housing Act. It applies, for example, to § 3604(b), which makes it unlawful "[t]o discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin," to § 3604(d), which makes it unlawful "[t]o represent to any person because of . . . sex . . . that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available," and to § 3605, which makes it unlawful "for any person or other entity whose business includes engaging in residential real estate-related transactions to discriminate against any person in making available such a transaction, or in the terms or conditions of such a transaction, because of . . . sex." Those provisions use the same "because of . . . sex" language discussed above. In addition, the phrase "discriminate against any person" in § 3604(b) is similar to the phrase "discriminate against any individual" in Title VII, which the Court in *Bostock* interpreted to support its conclusion that to "discriminate" because of homosexuality or transgender status necessarily requires one to discriminate because of sex. 140 S. Ct. at 1741.[6] And a similar conclusion may be reached with respect to § 3606, which provides, that "it shall be unlawful to deny any person access to or membership or participation in any multiple-listing service, real estate brokers' organization or other service, organization, or facility relating to the business of selling or renting dwellings, or to discriminate against him in the terms or conditions of such access, membership, or participation, on account of . . . sex." The language "on account of . . . sex" is not identical to the language in *Bostock*, but it is similar to the "on the basis of" language discussed above that the Supreme Court has used interchangeably with "because of," *see supra* XX, and it shares the focus on the individual that the *Bostock* court relied so heavily upon in its analysis, *see Bostock*, 140 S. Ct. at 1740-41.

This interpretation of the Fair Housing Act will likely come as a surprise to any ordinary reader of the Act, which includes no mention of sexual orientation or transgender status. Indeed, until very recently, all courts to have considered such claims had rejected them. *See, e.g.*, *Lath v. OakBrook Condominium Owners' Ass'n*, 2017 WL 1051001, at *4 n.5 (D. N.H. 2017) (collecting

[6] It is less clear how the *Bostock* reasoning applies to § 3604(c) and § 3604(e). Section 3604(c) makes it unlawful to "make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin, or an intention to make any such preference, limitation, or discrimination." Section 3604(e) makes it unlawful "[f]or profit, to induce or attempt to induce any person to sell or rent any dwelling by representations regarding the entry or prospective entry into the neighborhood of a person or persons of a particular . . . sex." These provisions are not focused on the but-for causation of any act, but rather on the particular language used in advertisements and representations. Because a notice that indicates a preference, limitation, or discrimination on sexual orientation or transgender status does not necessarily indicate "any preference, limitation, or discrimination based on . . . sex," it is unclear how the Supreme Court would apply the *Bostock* reasoning to these provisions.

cases); *Miller v. 270 Empire Realty LLC*, 2012 WL 193798, at *5 (E.D.N.Y. 2012); *Neithamer v. Brenneman Property Services, Inc.*, 81 F. Supp. 2d 1, 4 (D.D.C. 1999). The same, of course, may be said of *Bostock* itself.

But to those concerned about overbroad enforcement, the Civil Rights Division notes that the Act expressly does not apply to "rooms or units in dwellings containing living quarters occupied or intended to be occupied by no more than four families living independently of each other, if the owner actually maintains and occupies one of such living quarters as his residence," § 3603(b)(2), nor to certain sales or rentals of small-scale owners, § 3604(b)(1). It also exempts a "religious organization, association, or society, or any nonprofit institution or organization operated, supervised or controlled by or in conjunction with a religious organization, association, or society, from limiting the sale, rental or occupancy of dwellings which it owns or operates for other than a commercial purpose to persons of the same religion, or from giving preference to such persons, unless membership in such religion is restricted on account of race, color, or national origin." § 3607. In addition, RFRA applies to the Fair Housing Act and may prevent courts from imposing liability under the reasoning of *Bostock*. § 2000bb-3(a) ("This chapter applies to all Federal law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after November 16, 1993.").

The Civil Rights Division will exercise its enforcement discretion, in both civil and criminal matters, in a manner that takes into account the unexpected nature of this interpretation. On the civil side, for many of the same reasons that retroactive liability under Title VII for the rule announced in *Bostock* may not be appropriate, retroactive liability under the Fair Housing Act may also not be appropriate. 42 U.S.C. § 3612(g)(3) (noting that in administrative enforcement proceedings, an administrative law judge "shall promptly issue an order for such relief as may be appropriate, which *may* include actual damages suffered by the aggrieved person and injunctive or other equitable relief" and "may, to vindicate the public interest" include a civil penalty); § 3613(c) (noting that in civil actions by private persons a court "*may* award to plaintiffs actual and punitive damages"); § 3614(d) (noting that in enforcement proceedings by the Attorney General a court "*may* award . . . preventive relief" and "*may* award such other relief as the court deems appropriate, including monetary damages to persons aggrieved"). On the criminal side, *see* 42 U.S.C. § 3631, "the Government retains 'broad discretion' as to whom to prosecute." *Wayte v. United States*, 470 U.S. 598, 607 (1985). It would be a rare case in which prosecution would be appropriate for conduct that appears to violate the Fair Housing Act under the *Bostock* reasoning but predated that decision—indeed there likely is none.

Equal Credit Opportunity Act

The Equal Credit Opportunity Act, 15 U.S.C. § 1691 *et seq.*, declares that it "shall be unlawful for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction on the basis of . . . sex," § 1691(a)(1). The Act contains a number of provisions outlining activities that do not constitute discrimination, *id.* § 1691(b), (c), and provides for administrative enforcement, in addition to civil enforcement by private parties, *id.* § 1691e. The Act caps any damages that may be available under the Act to aggrieved individuals. *Id.*

For much the same reason discussed above with respect to the Fair Housing Act, the *Bostock* reasoning is likely applicable to claims that a creditor has discriminated on the basis of sexual orientation or transgender status with respect to any aspect of a credit transaction. To succeed, however, any potential plaintiff would need to make an actual showing of discrimination—that is, treatment of an applicant worse than other applicants similarly situated. § 1691(a). Moreover, the claim must not fall within any applicable statutory or regulatory exclusions. *See, e.g.*, § 1691(b), (c) (setting forth certain exemptions); § 1691(b) (authority to grant regulatory exemptions). The Civil Rights Division again recognizes that this reading of ECOA is unanticipated for many Americans, and it will take notice concerns into account in deciding whether to institute a civil action, including upon referral, for any conduct that appears to violate ECOA under the *Bostock* reasoning but predated that decision.

Justice System Improvement Act of 1979

The Justice System Improvement Act of 1979, as amended, 34 U.S.C. 10101 *et seq.*, added a nondiscrimination provision to the Omnibus Crime Control and Safe Streets Act of 1968. Specifically, under that provision, "[n]o person in any State shall on the ground of race, color, religion, national origin, or sex be excluded from participation in, be denied the benefits of, or be subjected to discrimination under or denied employment in connection with any programs or activity funded in whole or in part with funds made available under this title." 34 U.S.C. § 10228(c). The language is similar to that of Title IX of the Education Amendments Act of 1972, except that it uses the phrase "on the ground of" instead of "on the basis of" and prohibits not just discrimination on the ground of sex, but on the grounds of race, color, religion, or national origin as well. *Compare* 34 U.S.C. § 10228(c) *with* 20 U.S.C. § 1681. The language also has narrower application, in that it applies to State and local governments receiving federal funds, rather than the many private parties who are subject to Title IX. Finally, the Justice System Improvement Act expressly provides for enforcement by both the Attorney General and, after exhaustion, by private parties. *See* 34 U.S.C. § 10228(c)(3), (4). A violation of this Act may also provide grounds for an enforcement action by the Department under 34 U.S.C. § 12601, which declares it "unlawful for any governmental authority, or any agent thereof, or any person acting on behalf of a governmental authority, to engage in a pattern or practice of conduct by law enforcement officers or by officials or employees of any governmental agency with responsibility for the administration of juvenile justice or the incarceration of juveniles that deprives persons of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States," § 12601(a).

For many of the same reasons discussed above with respect to Title VII and Title IX, the *Bostock* reasoning suggests that this nondiscrimination provision prohibits intentional discrimination on the basis of sexual orientation or transgender status, but does not require law enforcement agencies to alter longstanding sex-specific practices or facilities where physiological differences between the sexes are relevant. *See Curl v. Reavis*, 740 F.2d 1323, 1326, 1331 (4th Cir. 1984) (affirming district court decision treating the discrimination on the basis of sex in violation of Title VII as sufficient also to violate the nondiscrimination provision of the Justice System Improvement Act). As with the other statutes discussed, the Civil Rights Division will

exercise enforcement discretion that takes due account of the unanticipated interpretation of this statutory condition on grants to state and local governments.

Implications for the Constitution (and statutes that incorporate constitutional standards)

Finally, *Bostock* has no bearing on the proper interpretation of the Constitution, including on whether classifications based on sexual orientation or transgender status should be treated as sex-based classifications (or otherwise trigger heightened scrutiny). The Supreme Court in *Bostock* interpreted a specific phrase in Title VII—"discriminate against any individual because of such individual's . . . sex." 140 S. Ct. at 1753 (ellipsis omitted). That text does not appear in either the Equal Protection Clause of the Fourteenth Amendment, U.S. Const. amend. XIV, or the Fifth Amendment's Due Process Clause in which the Supreme Court has identified an equal protection principle, *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954). The Supreme Court's assessment that it did not need to consult "historical sources" to interpret the meaning of Title VII does not suggest that it would approach the Constitution in like manner. 140 S. Ct. at 1750. To the contrary, the Court recognized that it had repeatedly "consulted the understandings of the law's drafters" in order to discern "subtle distinctions between literal and ordinary meaning" in the context of older statutes. *Id.* And it has done so likewise in the context of constitutional provisions. *See, e.g.*, *Ramos v. Louisiana*, 140 S. Ct. 1390, 1395 (2020) (Sixth Amendment right to jury trial); *Bucklew v. Precythe*, 139 S. Ct. 1112, 1122-23 (2019) (Eighth Amendment); *Timbs v. Indiana*, 139 S. Ct. 682, 688-89 (2019) (Excessive Fines Clause); *District of Columbia v. Heller*, 554 U.S. 570, 581 (2008) (Second Amendment); *Crawford v. Washington*, 541 U.S. 36, 50 (2004) (Confrontation Clause). In short, there is no indication the Supreme Court will apply its literal and context-free mode of interpretation to the Constitution, as doing so would upend over two centuries of precedent. *Bostock* may simply be an aberration.

Given the very different context of Title VII from the Constitution, it should be no surprise that the Supreme Court has not imported its construction of Title VII into the Constitution. The Court has, for example, refused to import disparate-impact liability from its Title VII precedents to the constitutional context, stressing that "[w]e have never held that the constitutional standard for adjudicating claims of invidious racial discrimination is identical to the standards applicable under Title VII, and we decline to do so today." *Washington v. Davis*, 426 U.S. 229, 239 (1976). Conversely, the Supreme Court has also imposed more stringent limits on affirmative action under the Equal Protection Clause than Title VII. *See Johnson*, 480 U.S. at 627 n.6. The Court has also recognized that "[t]he Equal Protection Clause . . . is essentially a direction that all persons similarly situated should be treated alike," and thus is not limited to the protected categories listed in Title VII. *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439 (1985). But most governmental classifications—including those related to sexual orientation and transgender status—continue to be subject only to rational basis review, and nothing in *Bostock* casts doubt on those precedents. *See Romer v. Evans*, 517 U.S. 620, 632 (1996). In all events, as with Title VII, *Bostock* does not undermine the authority of government to draw distinctions based on sex where, due to physiological differences, the sexes are not similarly situated. *See United States v. Virginia*, 518 U.S. 515, 533 (1996) (recognizing that "[p]hysical differences between men and women . . . are enduring" and that the "two sexes are not fungible").

EXHIBIT C

to Complaint

Letter to Educators on Title IX's 49th Anniversary
Notice of Language Assistance

Notice of Language Assistance: If you have difficulty understanding English, you may, free of charge, request language assistance services for this Department information by calling 1-800-USA-LEARN (1-800-872-5327) (TTY: 1-800-877-8339), or email us at: Ed.Language.Assistance@ed.gov.

Aviso a personas con dominio limitado del idioma inglés: Si usted tiene alguna dificultad en entender el idioma inglés, puede, sin costo alguno, solicitar asistencia lingüística con respecto a esta información llamando al 1-800-USA-LEARN (1-800-872-5327) (TTY: 1-800-877-8339), o envíe un mensaje de correo electrónico a: Ed.Language.Assistance@ed.gov.

給英語能力有限人士的通知: 如果您不懂英語, 或者使用英语有困难, 您可以要求獲得向大眾提供的語言協助服務, 幫助您理解教育部資訊。這些語言協助服務均可免費提供。如果您需要有關口譯或筆譯服務的詳細資訊, 請致電 1-800-USA-LEARN (1-800-872-5327) (聽語障人士專線：1-800-877-8339), 或電郵: Ed.Language.Assistance@ed.gov。

Thông báo dành cho những người có khả năng Anh ngữ hạn chế: Nếu quý vị gặp khó khăn trong việc hiểu Anh ngữ thì quý vị có thể yêu cầu các dịch vụ hỗ trợ ngôn ngữ cho các tin tức củaBộ dành cho công chúng. Các dịch vụ hỗ trợ ngôn ngữ này đều miễn phí. Nếu quý vị muốn biết thêm chi tiết về các dịch vụ phiên dịch hay thông dịch, xin vui lòng gọi số 1-800-USA-LEARN (1-800-872-5327) (TTY: 1-800-877-8339), hoặc email: Ed.Language.Assistance@ed.gov.

영어 미숙자를 위한 공고: 영어를 이해하는 데 어려움이 있으신 경우, 교육부 정보 센터에일반인 대상 언어 지원 서비스를 요청하실 수 있습니다. 이러한 언어 지원 서비스는 무료로제공됩니다. 통역이나 번역 서비스에 대해 자세한 정보가 필요하신 경우, 전화번호 1-800- USA-LEARN (1-800-872-5327) 또는 청각 장애인용 전화번호 1-800-877-8339 또는 이메일주소 Ed.Language.Assistance@ed.gov 으로 연락하시기 바랍니다.

Paunawa sa mga Taong Limitado ang Kaalaman sa English: Kung nahihirapan kayong makaintindi ng English, maaari kayong humingi ng tulong ukol dito sa inpormasyon ng Kagawaran mula sa nagbibigay ng serbisyo na pagtulong kaugnay ng wika. Ang serbisyo na pagtulong kaugnay ng wika ay libre. Kung kailangan ninyo ng dagdag na impormasyon tungkolsa mga serbisyo kaugnay ng pagpapaliwanag o pagsasalin, mangyari lamang tumawag sa 1-800-USA-LEARN (1-800-872-5327) (TTY: 1-800-877-8339), o mag-email sa: Ed.Language.Assistance@ed.gov.

Уведомление для лиц с ограниченным знанием английского языка: Если вы испытываете трудности в понимании английского языка, вы можете попросить, чтобы вампредоставили перевод информации, которую Министерство Образования доводит до всеобщего сведения. Этот перевод предоставляется бесплатно. Если вы хотите получить более подробную информацию об услугах устного и письменного перевода, звоните по телефону 1-800-USA-LEARN (1-800-872-5327) (служба для слабослышащих: 1-800-877- 8339), или отправьте сообщение по адресу: Ed.Language.Assistance@ed.gov.

UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

THE ASSISTANT SECRETARY

June 23, 2021

Dear Educator:

On this 49th anniversary of the passage of Title IX of the Education Amendments of 1972—our nation's most powerful legal tool for combating sex discrimination in education—I take this opportunity to highlight a selection of resources available for you to ensure that the education environment you provide is free from sex discrimination in all forms. Among these resources is our recent public notice clarifying Title IX's protection against discrimination based on sexual orientation and gender identity.

The U.S. Department of Education's Office for Civil Rights works to ensure that Title IX's mandate protects students in all aspects of their education, including recruitment, admissions, and counseling; financial assistance; athletics; protections from sex-based harassment, which encompasses sexual assault and other forms of sexual violence; treatment of pregnant and parenting students; discipline; equal access to classes and activities; and treatment of lesbian, gay, bisexual, transgender, queer and intersex (LGBTQI+) students.

I encourage you to review OCR's recent report, Education in a Pandemic: The Disparate Impacts of COVID-19 on America's Students, in which we address the disparities based on sex, including sexual orientation and gender identity, as well as race, disability, and other characteristics experienced by students both before and during the pandemic in K-12 and postsecondary settings. On this anniversary of Title IX, I recognize the particular vulnerability of LGBTQI+ students and the often overwhelming challenges these students face in education compared to their peers, including feeling less safe, experiencing poor mental health, facing a higher risk of suicide, being more likely to miss school, and facing a disproportionate risk of being homeless.

I also want to bring to your attention OCR's public notice based on the Supreme Court's recent decision in *Bostock v. Clayton County*, 140 S. Ct. 1731, 590 U.S. ___ (2020), which clarifies that Title IX's protection against sex discrimination encompasses discrimination based on sexual orientation and gender identity. Specifically, OCR clarifies that the Supreme Court's decision in *Bostock* applies to the Department's interpretation of Title IX. In its decision, the Supreme Court explained that "it is impossible to discriminate against a person" because of their sexual orientation or gender identity "without discriminating against that individual based on sex." *Id.* at 1741. That reasoning applies regardless of whether the individual is an adult in a workplace or a student in school.

Consistent with this notice, OCR will fully enforce Title IX to prohibit discrimination based on sexual orientation and gender identity in education programs and activities that receive Federal financial assistance from the Department. For more information, please see our accompanying fact sheet in which OCR and the U.S. Department of Justice's Civil Rights Division provide examples of the kinds of incidents we can investigate.

OCR has also updated its website to provide the resources mentioned above and to provide additional information and resources for LGBTQI+ students.

On Title IX more generally, you might find it useful to review this Overview of the Law and these Answers to Frequently Asked Questions about Sex Discrimination.

We realize educators may have questions about the Department's 2020 amendments to the Title IX regulations, and we appreciate that so many of you shared your insights and experiences during our virtual public hearing on Title IX held on June 7-11, 2021. We are reviewing the comments we received and, as previously noted, anticipate issuing a notice of proposed rulemaking to amend the regulations. In addition, we plan to issue a question-and-answer document to provide additional clarity about how OCR interprets schools' existing obligations under the 2020 amendments, including the areas in which schools have discretion in their procedures for responding to reports of sexual harassment.

If you have questions or would like additional information or technical assistance, please visit us at www.ed.gov/ocr or contact OCR at 800-421-3481 (TDD: 800-877-8339) or at ocr@ed.gov.

We at OCR share with you the responsibility to ensure that all students have equal access to education, regardless of race, color, national origin, sex, disability, or age. Thank you for all that you do to support all of our nation's students and to ensure that they have the opportunity to learn and thrive in school.

Sincerely,

Suzanne B. Goldberg
Acting Assistant Secretary for Civil Rights