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' REPLY 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 and an association of Christian schools seek to join this lawsuit because they are the very people Title IX and the state Save Women's Sports laws were designed to protect. They have a clear personal stake in whether the executive branch can rewrite Title IX to force them to compete against males, take away their equal athletic opportunities, and trample state laws in the process. Their interests are important, and they should be allowed to intervene by right or permissively.

Defendants' (the Department) opposition gets the legal standard wrong at every turn. First, the Department contends that Intervenors [1] need Article III standing to intervene. Not so. Because Intervenors seek the same practical relief as Plaintiffs—invalidating the Interpretation and Fact Sheet—standing is not required. The Department's position conflates Intervenors' distinct arguments, interests, and evidence—the very things that allow intervention by right under Federal Rule of Civil Procedure 24—with a request for distinct relief, which Intervenors have not made and do not need. Indeed, if the Department were correct that mere differences in argument and interests required independent standing, Rule 24 would become irrelevant, and every intervention motion would be decided on Article III standing alone.

Next, the Department characterizes Intervenor's interests as "nothing more than generalized concerns," ignoring the fact that Intervenors are direct beneficiaries of both Title IX and their states' Save Women's Sports laws that provide for fair and safe athletic competition for females competing within public schools and

[1] Unless otherwise noted, capitalized terms have the same definitions as set forth in Intervenor-Plaintiffs' Memorandum in Support of Their Motion to Intervene, ECF No. 51-1.

also for females competing for private schools when they compete against public schools. That's more than enough under the Sixth Circuit's expansive intervention standards. The Department also contends that Intervenors lack interests or arguments distinct from Plaintiffs, which is puzzling in light of the Department's earlier contention that those very same arguments constitute distinct requests for relief that require Article III standing. In any event, Intervenors' personal stake in protecting Title IX and the Save Women's Sports laws, the potential this case would impair those interests, and the potential the states won't adequately represent those interests easily satisfy the requirements for intervention by right.

Finally, the Department ignores the standard for permissive intervention. They do not even appear to contest that Intervenors have claims that share common legal and factual questions with those at issue here, which is the primary requirement for permissive intervention. Intervenors should be allowed to intervene permissively because their addition will allow for a more complete airing of the issues, will promote judicial economy, and will not delay or prejudice anyone.

Argument

I. The female athletes and ACSI do not need Article III standing because they seek the same relief as Plaintiffs: invalidation of the Interpretation and Fact Sheet.

The Department argues that Intervenors need Article III standing for intervention, but that is flat wrong. "An intervenor need not have the same standing necessary to initiate a lawsuit in order to intervene in an existing district court suit where the plaintiff has standing, at least where the intervenor does not seek additional relief beyond that which the plaintiff requests." *Chapman v. Tristar Prods., Inc.*, 940 F.3d 299, 304 (6th Cir. 2019) (cleaned up) (relying on *Town of Chester v. Laroe Ests., Inc.*, 137 S. Ct. 1645, 1651 (2017)).

Here, Intervenors and Plaintiffs seek the same relief: invalidation of the Interpretation and Fact Sheet. *Compare* Compl. Prayer for Relief ¶ A, ECF No. 1 (seeking "[a] declaratory judgment holding unlawful the Department's Interpretation and Fact Sheet"), *with* Proposed Compl. Prayer for Relief ¶ 1, ECF No. 51-6 (seeking "[a] declaratory judgment holding unlawful the Department's Interpretation and Fact Sheet"). That is why Intervenors asked to join Plaintiffs' motion for a preliminary injunction in full—because the relief they seek is the same.

The Department only points to two aspects of Intervenors' proposed complaint that they contend seek relief different from that sought by Plaintiffs: (1) Intervenors' contention that Title IX does not prohibit discrimination on the basis of sexual orientation or gender identity and (2) Intervenors' contention that construing Title IX in accordance with the Interpretation and Fact Sheet would render Title IX unconstitutional. *See* Defs.' Opp'n to Intervention Mot. by Ass'n of Christian Schs. Int'l, A.S., C.F., and A.F. (Defs.' Opp'n) 4, ECF No. 63 (citing Proposed Compl. Prayer for Relief ¶¶ 4, 6).

That the Department could only identify two clauses in the Proposed Complaint that purportedly seek distinct relief is telling, as Intervenors filed a 433-paragraph proposed complaint containing a prayer for relief with 15 sub-parts. *See generally* Proposed Compl. It thus appears that even the Department agrees that the vast majority of Intervenor's requested relief overlaps with Plaintiffs' and therefore does not require Article III standing.[2]

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[2] This overlap is clear. The first paragraphs of the prayers for relief in Plaintiffs' and Intervenors' respective complaints are identical. Compl. Prayer for Relief ¶ A; Proposed Compl. Prayer for Relief ¶ 1. The similarities continue from there. *Compare* Compl. Prayer for Relief ¶¶ B, F, G, H, I (seeking relief setting aside and enjoining enforcement of the Interpretation and Fact Sheet), *with* Proposed Compl. Prayer for Relief ¶¶ 2, 3, 5, 6 (also seeking relief setting aside and enjoining enforcement of the Interpretation and Fact Sheet). Indeed, it is Plaintiffs who seek broader relief than Intervenors, as Intervenors are focused exclusively on the matter of women's sports,

Regardless, neither clause triggers a standing requirement. Standing is only required when the practical relief sought by the intervenor is separate and distinct, such as a request for separate money damages. Here, Intervenors simply approach getting to the same practical result—invalidation of the Interpretation and Fact Sheet—in ways distinct from Plaintiffs' approach.

A. An intervenor need not demonstrate standing to represent different interests or make different arguments than the parties; standing is only required if the intervenor seeks different relief.

The Department mislabels the differences in Intervenors' interests and arguments as requests for different relief. But *Town of Chester*, the only case cited by the government to support its standing argument, reveals the flaw in their position. In *Town of Chester*, the Court did not order dismissal but remanded the case because it was unclear whether the intervenor sought to recover money damages from the defendant in its own right, or whether it sought merely to support the original plaintiff's claim for damages. *Id.* at 1651. The Court held standing would only be required if the intervenor sought "a money judgment of its own running directly against the [Defendant]," but not if it sought to "maximize [original owner's] recovery." *Id.* at 1652 & n.4.

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whereas Plaintiffs seek relief in a wide variety of other areas. Compl. Prayer for Relief ¶¶ D, E, J through Q (addressing, among other things, bathrooms, living facilities, and EEOC interpretation of Title VII).

Even if standing is required for some of the relief sought by Intervenors (and it is not), Intervenors also seek relief that tracks the relief sought by Plaintiffs and does not require standing. A determination that Intervenors lack standing would not preclude intervention; it would merely preclude intervention for purposes of seeking relief beyond that sought by Plaintiffs. *See, e.g.*, *Sherman v. Town of Chester*, 339 F. Supp. 3d 346, 358 (S.D.N.Y 2018) (holding that intervenor lacked standing to pursue damages in his own right but qualified under Rule 24(a) to intervene to support plaintiff's claim for damages); *McKinley v. Grisham*, CV 20-01331, 2021 WL 4290178, at *8 (D.N.M. Sept. 21, 2021).

What's clear from *Town of Chester* is that the intervenor did not need Article III standing to support the original owner's request for money damages. On remand, the district court dismissed the intervenor's claim for damages on its own behalf but allowed intervention by right to support the original owner's claim for damages. *Sherman*, 339 F. Supp. 3d at 358.

The Supreme Court reaffirmed this position in *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367 (2020). There, the Court held that intervenors did not need standing to appeal an injunction against the federal government's religious exemption to the Affordable Care Act's contraception mandate because the federal government, which clearly had standing, was also appealing and both sought dissolution of the injunction. *Id.* at 2379 n.6.

Courts have applied *Town of Chester* pragmatically, not requiring Article III standing if an intervenor and party seek the same practical relief, even if for different reasons. *See, e.g.*, *Kane County v. United States*, 928 F.3d 877, 887 & n.13 (10th Cir. 2019) (holding that environmental organization with different interests that the government did not need standing because both sought to maximize government's property); *Doe v. Zucker*, No. 1:17-CV-1005 (GTS/CFH), 2019 WL 111020 (N.D.N.Y. Jan. 4, 2019), at *8 (holding that intervenor did not need standing even though it would make different arguments than state because intervenor and state sought to uphold same regulation); *California v. Health & Human Services*, 330 F.R.D. 248, 254 & n.2 (N.D. Cal. 2019) (holding that Oregon did not need standing because it sought "the same relief as the existing Plaintiff States—a declaratory judgment and an injunction against the [challenged regulation."). Thus, as long as intervenors seek the same practical relief as a party, like the invalidation of a federal agency action as in *California*, Article III standing is not required.

B. The female athletes and ACSI's contention that Title IX does not prohibit discrimination on the basis of sexual orientation and gender identity is one of many reasons to set aside the Interpretation and Fact Sheet.

Intervenors' request that the Court rule that Title IX and its implementing regulations do not prohibit discrimination on the basis of sexual orientation and gender identity is not a request for distinct relief.[3] It is merely one of many arguments that Plaintiffs and Intervenors make for obtaining the same relief: setting aside the Interpretation and Fact Sheet. As set forth in both Plaintiffs' Complaint and Intervenors' Proposed Complaint, the reasons to set aside the Interpretation and Fact Sheet are legion. The Interpretation and Fact Sheet are procedurally defective under the Administrative Procedures Act and the Regulatory Flexibility Act (Compl. ¶¶110-28; Proposed Compl. ¶¶ 331-76, 397-410); they conflict with and violate Title IX (Compl. ¶¶ 129-34; Proposed Compl. ¶¶ 314-30, 377-96); and they violate the Constitution (Compl. ¶¶ 135-55; Proposed Compl. ¶¶ 411-33).

But all of those reasons add up to the same basic result: the Interpretation and Fact Sheet should be set aside. Intervenors' contention that Title IX does not prohibit discrimination on the basis of sexual orientation and gender identity squarely attacks the Interpretation, which states: "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." (Interpretation at 4.)

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[3] In one breath, the Department calls this argument a request for distinct relief (Defs.' Opp'n 4), yet, in the next, it contends the argument is not distinct at all because "Plaintiff states make virtually exactly the same contentions, arguing that 'sex' in Title IX refers only to biological sex, and not gender identity, and that statutory context confirms this binary understanding of 'sex.'" Defs.' Opp'n 23 (quoting Mem. in Supp. of Pls.' Mot. for Prelim. Inj. (Pl.'s PI Mem.) 15, ECF No. 11) (cleaned up). Regardless, the argument that sex discrimination in Title IX does not include sexual orientation or gender identity is just that—an argument, not a standalone request for relief.

If Intervenors are correct that the Interpretation and Fact Sheet conflict with Title IX, the remedy is to declare the Interpretation and Fact Sheet unlawful, and to enjoin their enforcement. *See, e.g.*, *Combined Commc'ns Corp. v. U.S. Postal Serv.*, 891 F.2d 1221, 1230 (6th Cir. 1989) (declaring Postal Service regulation invalid and enjoining its enforcement); *Herr v. U.S. Forest Serv.*, 865 F.3d 351, 358-59 (6th Cir. 2017) (declaring Forest Service regulations unlawful because of conflict with the Michigan Wilderness Act). This is exactly what Plaintiffs have requested. Compl. Prayer for Relief ¶¶ A, B, H, I. Intervenors' request for a ruling "that Title IX and its implementing regulations do not prohibit discrimination on the basis of sexual orientation or gender identity" is simply one means of getting to that same remedy and does not request different relief requiring Article III standing.

C. Intervenors' contention that construing Title IX in accordance with the Interpretation and Fact Sheet would render Title IX unconstitutional is another reason to set them aside.

The government next contends that Intervenors seek distinct relief because they argue that construing Title IX consistent with the Interpretation and Fact Sheet would violate the Spending Clause, the Tenth Amendment, and structural provisions of the Constitution. Defs.' Opp'n 4. But Plaintiffs and Intervenors both contend that the Interpretation and Fact Sheet violate these constitutional provisions. *Compare* Compl. ¶¶ 135-155 (outlining Spending Clause, Tenth Amendment, and structural objections), *with* Proposed Compl. ¶¶ 385, 392, 411-33 (outlining similar objections). Plaintiffs emphasize that these constitutional problems are reasons to avoid allowing the government to re-write Title IX via the Interpretation and Fact Sheet. See Pls.' PI Mem. 18-20. Intervenors agree but also note that if Title IX is construed in accordance with the Interpretation and Fact Sheet, it will suffer these same constitutional defects. Proposed Compl. ¶ 430, Prayer for Relief ¶ 6(a).

Plaintiffs' and Intervenors' articulations of the constitutional problems with the Interpretation and Fact Sheet are two sides of the same coin. Plaintiffs and Intervenors agree that any proper interpretation of Title IX avoids these problems altogether. Intervenors simply point out the logical consequence of wrongly interpretating Title IX—rendering the statute itself unconstitutional. Still, what Intervenor's seek is the proper interpretation of Title IX and an injunction against improper administrative interpretations—the same thing Plaintiffs seek. Proposed Compl. Prayer for Relief ¶¶ 5, 6(b); Compl. Prayer for Relief ¶¶ C-F, H, I. Intervenors do not need Article III standing to point out that the Interpretation and Fact Sheet place a venerable civil rights statute in dire constitutional jeopardy.[4]

II. The female athletes' and ACSI's meet the requirements for intervention as of right since their interests are affected by this litigation and the states may not adequately represent those interests.

The female athletes and ACSI satisfy the requirements for intervention by right in Federal Rule of Civil Procedure 24(a). In particular, they have shown that they have a substantial legal interest in equality of opportunity in women's sports, which may be impaired by the resolution of this case. Likewise, they have

[4] To the extent the Court regards anything in the Proposed Complaint or intervention papers as a request for additional or distinct relief than that requested by Plaintiffs, Intervenors hereby clarify that they seek only overlapping relief with the state plaintiffs. *See, e.g.*, *N. Am. Interpipe, Inc. v. United States*, 519 F. Supp. 3d 1313, 1322 (Ct. Int'l Trade 2021) (allowing intervenor to disclaim seeking relief beyond that of a party). Given the Sixth Circuit's broad construction of Rule 24 in favor of potential intervenors and lenient approach to the requirement to attach a pleading to the motion to intervene. This Court should construe Intervenor's Proposed Complaint in accordance with Intervenor's representation that it disclaims any request for relief distinct from Plaintiffs' requests. *Cf. Purnell v. City of Akron*, 925 F.2d 941, 950 (6th Cir. 1991) (outlining broad construction of Rule 24 in favor of intervention); *League of Women Voters of Mich. v. Johnson*, 902 F.3d 572, 580 (6th Cir. 2018) (outlining lenient approach to requirement to attach intervention pleading and holding that failure to attach a pleading at all is not fatal to intervention motion).

demonstrated that they will make arguments that Plaintiffs are unlikely to make, and they have personal interests in this case that Plaintiffs cannot adequately represent.

A. The female athletes and ACSI have a direct and legally protectable interest in fair and safe competition that this litigation could impair.

The Department attempts to re-write Title IX, and that directly affects the female athletes and ACSI. They have much more than a generalized interest in this case, as they are the very people Title IX and the state Save Women's Sports laws were designed to protect, and the Interpretation and Fact Sheet seek to undo those protections.

To qualify for intervention by right, proposed intervenors must only show a "direct, substantial interest" which is "legally protectable." *Gratz v. Bollinger*, 183 F.R.D. 209, 214 (E.D. Mich. 1998), *rev'd on other grounds sub nom. Grutter v. Bollinger*, 188 F.3d 394 (6th Cir. 1999). The Sixth Circuit "reject[s] the notion that Rule 24(a)(2) requires a specific legal or equitable interest.'" *Grutter v. Bollinger*, 188 F.3d 394, 397-98 (6th Cir. 1999). And Intervenors must only show that there is a *possibility* that their rights in the lawsuit would be impaired. *Id.* at 399 (emphasis added). The impairment does not have to be definite or probable, only 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 Department does not appear to contest that Intervenors' interest in equal athletic opportunity for women is a substantial, protectable interest as both Title IX and their states' Save Women's Sports laws provide for fair and safe athletic competition for females competing within public schools and also for females competing for private schools when they compete against public schools. *See Miami Univ. Wrestling Club v. Miami Univ.*, 302 F.3d 608, 615 (6th Cir. 2002) (affirming

this point). And as beneficiaries of these laws, intervenors have a substantial interest in wanting these laws to continue to protect them. Indeed, a law's direct beneficiaries often have an interest in upholding that law. *See California ex rel. Lockyer v. United States*, 450 F.3d 436, 441 (9th Cir. 2006) (finding substantial interest the intervenors were the "the intended beneficiaries" of a challenged law and the "proposed intervenors' interest thus is neither "undifferentiated" nor "generalized."). Instead, the Department appears to contend that Intervenors cannot show a sufficient impairment because the Save Women's Sports laws that benefit Intervenors "are not challenged or otherwise directly implicated here" and because they do not "provide any reason to think they are about to compete against a transgender athlete." Defs.' Opp'n 18.

But that's wrong on multiple levels. First, Intervenors have an interest protected by Title IX, and no one doubts that this lawsuit directly affects Title IX. Second, the Department's claim that state Save Women's Sports laws are not implicated here is borderline disingenuous, as the government has taken the opposite position in *B.P.J. v. West Virginia State Board of Education*, No. 2:21-cv-00316 (S.D.W. Va. 2021). There, a male student who identifies as female sued West Virginia officials under the theory that the state's Save Women's Sports law, H.B. 3293, violates Title IX and the Equal Protection Clause. And the government filed a Statement of Interest arguing that "H.B.3293 Requires Recipients To Discriminate In Violation of Title IX." Statement of Interest 7, attached as Exhibit A. The government further claimed H.B. 3293 is "in violation of Title IX's mandate to offer educational opportunities free of sex discrimination," using the same arguments contained in the Interpretation and Fact Sheet. *Id.* at 12. The Department's broad arguments in *B.P.J.* merely reflect the broad arguments in the Interpretation, Fact Sheet, and Karlan Memorandum. *See* Memorandum on Application of *Bostock v. Clayton County* to Title IX of the Education Amendments of 1972 from Pamela S.

Karlan of March 26, 2021 (Karlan Memorandum), attached as Exhibit B. All these confirm that the Department views any attempt to consistently separate women's sports by biology (rather than identity) as a violation of Title IX.[5] That puts the Save Women's Sports laws squarely on the chopping block. Any suggestion otherwise ignores reality and the government's own representations to the federal courts. Intervenors, then, are the direct beneficiaries of state laws that the Department seeks to overturn.

Third, the Department cites nothing for the proposition that Intervenors must show that they are "about to compete against a transgender athlete" because no such requirement exists. What the female athletes have shown is that they regularly compete in interscholastic women's sports and are currently protected from competing against biological males by their states' Save Women's Sports laws, which, as noted, will fall if the Interpretation and Fact Sheet are allowed to stand. Decl. of A.F. in Supp. of Mot. to Intervene ¶¶ 6-22, ECF No. 51-4; Decl. of C.F. in Supp. of Mot. to Intervene ¶¶ 5-27, ECF No. 51-3; Decl. of A.S. in Supp. of Mot. to Intervene ¶¶ 6-19, ECF No. 51-2. And ACSI has shown that its member schools, including three specific member schools, regularly compete against public schools in states where they are protected by Save Women's Sports laws. Supp. Decl. of David Balik ¶¶ 9-15, attached as Exhibit C.

These showings are sufficient to establish a protectable interest with the possibility of impairment. *Grutter* is decisive on this point. There, the intervenors were students and individuals of different races interested in preserving the law

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[5] In this vein, a White House spokesman called Texas's Save Women's Sports law "hateful" and "bullying disguised as legislation." Todd J. Gillman, *White House Blasts Texas' Pending Restriction on Transgender Student-Athletes as 'Hateful'*, Dallas Morning News, Oct. 19. 2021, available at https://www.dallasnews.com/news/politics/2021/10/19/white-house-blasts-texas-pending-restriction-on-transgender-student-athletes-as-hateful/.

school's admissions policy. *Grutter*, 188 F.3d at 397. None of them had a current, pending application to the law school. They either had applied, or "intended to apply." Defs.' Opp'n 19. The intervening minority students did not show they were competing head-to-head against non-minority students for the same spot in the law school. But the Sixth Circuit still found these students had "a sufficient substantial legal interest in educational opportunity[ies]" and granted their request for intervention as of right because they had an interest in "gaining admission to the University." *Grutter*, 188 F.3d at 399.

Intervenors' interest and impairment is similar. The female athletes and ACSI have a direct interest in ensuring that their sports remain spaces of female competition only, and that interest may be impaired if the Interpretation and Fact Sheet stand. In *Grutter*, the mere interest in an equal opportunity in a future process was enough, as was the potential that their likelihood of being admitted would be reduced. *Id.* So too here. The interest in an equal opportunity to compete in athletics is a substantial interest for intervention, and the potential that interest will be impaired by allowing biological males to compete against them is sufficient.

The Department attempts to distinguish *Grutter* on the grounds that the intervenors there were "covered by the [challenged] policy." Defs.' Opp'n 19. But Intervenors here are covered by Title IX and their states' Save Women's Sports laws. If anything, Intervenors here have a *stronger* case than those in *Grutter*. Here, Intervenors currently benefit from the Save Women's Sports laws (and should benefit from Title IX), and those benefits will be stripped from them if the Department wins this case. That means the Department's victory here will necessarily harm Intervenors—it will necessarily raise the probability that they will have to compete against biological men above its current level, which is zero.

Even beyond that, intervenors also face a real likelihood that their opportunities will be reduced in the national market for scholarships and other

benefits by the nationwide requirement that schools allow biological men to compete against women. These kinds of increases in the likelihood of harm are precisely what satisfied the potential for impairment standard in *Grutter*. 188 F.3d at 400 (finding substantial interest because there was a possibility that loss of challenged policy would "diminish[] [intervenor's] likelihood of obtaining admission to the University and by reducing the number of African–American and Latino/a students at the University").

Contrary to the Department's contention, *Hecox* applies here as well. In *Hecox*, the intervenors wanted to secure their right to equally compete. The Department claims *Hecox* is not relevant because the intervenors directly competed against male athletes who identify as female and therefore the interest was not speculative. Defs.' Opp'n 18; *Hecox v. Little*, 479 F. Supp. 3d 930, 951 (D. Idaho 2020). But the court there considered whether the case affected the female athletes' *future* interests, not whether they had competed against male competitors in the past. *Id.* at 952. There was no proof that the female athletes in *Hecox* would compete against male athletes in the future. But the court still found the intervenors' interest in future athletic opportunity under threat by the mere possibility of removing the state law protecting their athletic opportunity. The same future interests are at stake here, and, like the *Hecox* intervenors, that interest is substantial and there is a possibility of its impairment.

ACSI also has a direct interest in ensuring the students at their member schools only have to compete against female athletes.[6] The Department counters

[6] Although not required for the Rule 24 inquiry, it is worth pointing out that the Department's contention that ACSI is not a bona fide membership organization are spurious. ACSI is a traditional membership organization with a written vision statement, mission statement, and strategic plan. Members are required to affirm a written Statement of Faith and comply with other ACSI policies. Through membership dues and other fees, ACSI members finance 82% of the organization's

that ACSI does not fall within the "zone of interest of Title IX." Defs.' Opp'n 20. But the "zone of interest" test is part of a standing analysis that is not a relevant here. *Grutter*, 188 F.3d at 398. ("[A]n intervenor need not have the same standing necessary to initiate a lawsuit."). What's more, the Sixth Circuit in *Grutter* addressed this issue. There, the Citizens for Affirmative Action's Preservations (CAAP) had a right to intervene on behalf of their students. Their organization's mission was the "to preserve opportunities in higher education for African–American and Latino/a students in Michigan." *Id.* at 397. Their purpose was advocating for students to have equal opportunities. *Id.* So the court assumed CAAP had the same interest as the students and permitted its intervention as well. *Id.* ACSI has the same interest as the student athletes, to ensure the equality of sports for female athletes, and it has demonstrated that its schools' athletic programs will likely have to compete against biological males if the Interpretation and Fact Sheet stand. Balik Supp. Decl. ¶¶ 9-15.

Further, the cases the Department relies on to support their augments against ACSI's interest are inapposite. The examples of the wrestling coach, the nanny, or the public-school parents do not address the same issue. *See Moe v. Univ. of N. Dakota*, No. CIV A2-98-123, 1999 WL 33283358, at *2 (D.N.D. May 7, 1999); *see T.L. ex rel. Lowry v. Sherwood Charter Sch.*, 68 F. Supp. 3d 1295, 1315 (D. Or. 2014), *aff'd sub nom. Lowry v. Sherwood Charter Sch.*, 691 F. App'x 310 (9th Cir. 2017); *Williams v. Pinellas Park Elementary Sch.*, No. 8:21-CV-1559-CEH-SPF, 2021 WL 4125764, at *3 (M.D. Fla. Aug. 24, 2021). Each of those cases was about an *individual* trying to advocate for the Title IX rights of someone else. But ACSI is an association of

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budget, and ACSI's primary beneficiaries are its members. The organization is led by a Board of Directors composed almost entirely of the current or former heads of member schools. In short, ACSI is a classic membership organization. Balik Supp Decl. ¶¶ 4-8.

schools, and the Sixth Circuit recognizes that schools have standing to assert their students' rights. *Ohio Ass'n of Ind. Schs. v. Goff*, 92 F.3d 419, 422 (6th Cir. 1996). Moreover, schools are directly regulated by Title IX and are therefore clearly within the statute's "zone of interests."

At bottom, the Department's interest argument is an attempt to introduce a *de facto* standing requirement and change the Sixth Circuit intervention standard. In reality, Intervenors do not have to prove they have standing or that the Department's actions *will* impair their interests. Possible impairment is enough. *Grutter*, 188 F.3d at 399 ("[A] would-be intervenor must show only that impairment of its substantial legal interest is possible if intervention is denied. This burden is minimal." (cleaned up)); *Dumont v. Lyon*, No. 17-CV-13080, 2018 WL 8807229, at *5 (E.D. Mich. Mar. 22, 2018) (noting that "even a 'diminished likelihood' of acceptance at the University satisfied the minimal impairment requirement"). Indeed, even "potential stare decisis effects can be a sufficient basis for finding an impairment of interest." *Mich. State AFL-CIO v. Miller*, 103 F.3d 1240, 1247 (6th Cir. 1997).

Here, Intervenors have shown that they are direct beneficiaries of Title IX and the Save Women's Sports laws and that those benefits may be stripped away if the Department wins this case. And that easily demonstrates a possibility that their substantial interests may be impaired. *See Meriwether v. Tr. of Shawnee State Univ.*, No. 1:18-cv-753, 2019 WL 2052110, at *9-10 (S.D. Ohio May 29, 2019) (holding that possibility that ruling may invalidate university policy that benefitted intervenor was sufficient to show impairment).

B. The current parties do not adequately represent the female athletes and ACSI's interests because they offer different arguments, interests, and perspectives that Plaintiffs do not and cannot provide.

Intervenors will present different arguments, interests, and perspectives than Plaintiffs. Accordingly, they easily satisfy the "minimal" burden of showing that

Plaintiffs' representation of their interests "may be inadequate." *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972) (cleaned up).

In response, the Department fails to acknowledge that "the *possibility* of inadequate representation" is sufficient to meet Intervenor's burden. *Grutter*, 188 F.3d at 401 (emphasis added). Instead, the Department contends that Intervenors must demonstrate that Plaintiffs are "unlikely" to make the same arguments as Intervenors (Defs.' Opp'n 21), but that is not what *Grutter* or any other Sixth Circuit case has required.[7] In *Grutter*, the Court required only that the intervenors' inadequacy concerns be "legitimate and reasonable." *Grutter*, 188 F.3d at 401.

Regardless, Intervenors have presented several ways that Plaintiffs are unlikely to adequately represent their interests.

First, Intervenors will argue that the Interpretation and Fact Sheet cannot stand because Title IX *affirmatively requires* sex-separated sports teams in contests of speed, strength, or physical contact. This requirement derives from the mandate to provide women "equal athletic opportunity." *See* 34 C.F.R. § 106.41(c); Proposed Compl., ¶¶ 314-30; Proposed Compl. Prayer for Relief ¶¶ 4, 6.

Intervenors' argument on this point is *not* the same as Plaintiffs' argument that the Interpretation and Fact Sheet are unlawful because Title IX *authorizes* sex-separated teams, or because its regulations require universities to consider sex in awarding athletic scholarships, as the Department contends (Defs.' Opp'n 22-23).

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[7] Likewise, the government cites *Ohio v. United States*, 313 F.R.D. 65 (S.D. Ohio 2016) in arguing that Plaintiffs' representation of Intervenor's interests is adequate. But the *Ohio* Court required proposed intervenors to show there was "substantial doubt" the existing parties would adequately represent their interests. *Id.* at 69. This "substantial doubt" standard directly contradicts the "possibility of inadequate representation" standard announced in *Grutter*, 188 F.3d at 401, and should therefore be disregarded.

There is an obvious difference between arguing that Title IX *requires* sex-separated teams and arguing that it merely *authorizes* them. And Plaintiffs are unlikely to argue that Title IX contains such a requirement because a federal mandate for sex-separated teams necessarily constricts Plaintiffs' discretion and requires a financial commitment from them to support such teams. As the *Grutter* Court noted, parties are unlikely to advance arguments or present evidence that may conflict with their interests, and it is appropriate to allow intervention to ensure such arguments are made. *Grutter*, 188 F.3d at 401 (noting that University of Michigan was unlikely to present evidence of past discrimination to justify race-conscious admissions policies).

To be sure, Plaintiffs point to a regulation that requires equality between the sexes in offering athletic scholarships. *See* Pls.' PI Mem. 14-15; 34 C.F.R. § 106.37(c) (requiring schools to offer athletic scholarships equally to members of each sex "in proportion to the number of students of each sex participating in interscholastic or intercollegiate athletics"). But Plaintiffs include this citation in the context of arguing that Title IX "authorizes" them to "differentiate between the sexes in circumstances where those differences matter." Pls.' PI Mem. 14-15.

In contrast, Intervenors' argument relies on a different regulation—one that requires schools to provide "equal athletic opportunity for members of both sexes." 34 C.F.R. § 106.41(c). And Intervenors contend this regulation reaches further than mere scholarships and requires both equal treatment and effective accommodation in competitions and benefits generally.[8] For example, equal treatment includes equal opportunity for post-season play, equal quality of competition, and equal access to scholarships and publicity. *Id.* at 71,416; 34 C.F.R. § 106.41(c); *McCormick*

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[8] Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,413 (Dec. 11, 1979).

ex rel. McCormick v. Sch. Dist. of Mamaronek, 370 F.3d 275, 302-03 (2d Cir. 2004) (holding school districts violated Title IX by providing unequal opportunities for post-season play). And effective accommodation requires that all of a school's athletics offerings "effectively accommodate the interests and ability of members of both sexes." 34 C.F.R. § 106.41(c); *see also Roberts v. Colo. State. Bd. of Agric.*, 998 F.2d 824, 829 (10th Cir. 1993) (holding that school violated this requirement by discontinuing girls' softball team).

Intervenors argue these requirements can *only* be fulfilled by providing sex-separated teams in contests of speed, strength, or physical contact because of the inherent physical differences between boys and girls. Proposed Compl. ¶¶ 314-30. And Intervenors have cited substantial evidence concerning those physical differences and will demonstrate to the Court equal treatment and effective accommodation cannot be provided without sex-separated teams in some sports. *See* Proposed Compl. ¶¶ 56-106. Thus, sex-separated teams are not merely authorized; they are required to fulfil the statute's guarantee of equal opportunity for women.

This argument is not a minor difference in litigation strategy between Plaintiffs and Intervenors, as the Department would have it (Defs.' Opp'n 23). It is an independent reason under the APA to invalidate the Interpretation and Fact Sheet that Plaintiffs are unlikely to present. Under Intervenors' argument, sex separation in certain sports is the irreducible foundation for providing women equal opportunities in athletics. A ruling along those lines would demonstrate just how backwards the Interpretation and Fact Sheet are and would have a powerful and salutary effect on shaping the government's approach to Title IX going forward. This argument should be presented to the Court and, for that reason alone, Intervenors have demonstrated at least a possibility that they will not be adequately represented.

Second, Intervenors have distinct interests and harms that Plaintiffs do not share. Plaintiffs are states, and their primary harm is "interfer[ence] with their sovereign authority to make and enforce laws." *See* Pls.' PI Mem. 9. Intervenors, on the other hand, have a personal interest in challenging the Interpretation and Fact Sheet, as they are female athletes who have poured their time, talents, and energy into athletic pursuits with the assurance from state law of a level playing field that the Interpretation and Fact Sheet take away from them. *Cf. Day v. Sebelius*, 227 F.R.D. 668, 674 (D. Kan. 2005) (highlighting the personal effect of challenged law on intervenors as reason to find inadequate representation by the state). ACSI, too, has a personal connection to this matter, both through its member schools' maintenance of women's athletic programs affected by the Interpretation and Fact Sheet, and by the impact of the Interpretation and Fact Sheet on the schools' female students.

As public entities, Plaintiff states have different interests and goals than private parties like Intervenors. For public entities, the task of "protect[ing] not only the interest of the public but also the private interest of the petitioners in intervention . . . is on its face impossible." *Nat'l Farm Lines v. I.C.C.*, 564 F.2d 381, 384 (10th Cir. 1977). This is so because public entities have duties to all their citizens and are thus "obligated to consider a broad spectrum of views, many of which may conflict with the particular interest of the would-be intervenor." *Utah Ass'n of Counties v. Clinton*, 255 F.3d 1246, 1256 (10th Cir. 2001). As the Sixth Circuit has noted, public entities are "subject to internal and external institutional pressures" not held by private citizens. *Grutter*, 188 F.3d at 400. Likewise, in *Michigan State AFL-CIO v. Miller*, 103 F.3d 1240, 1247 (6th Cir. 1997), the court noted that the state would not have the same interests as a chamber of commerce in defending a challenged regulation. *Id.* at 1247 (stating that "[o]ne would expect" the state's and chamber's interests to diverge); *accord Meriwether*, 2019 WL 2052110, at *12

(holding that state would not adequately represent interests of individual allegedly harmed by professor's refusal to use preferred pronouns).

The same is true here. Plaintiffs are twenty states, each of which has a duty to serve the interests of all of its citizens and each of which has its own political interests. *See Clark v. Putnam County*, 168 F.3d 458, 462 (11th Cir. 1999) (holding public entity's political interests rendered it inadequate to represent the interests of particular private citizens). These general public interests will inevitably diverge from the particular interests advanced by the individual female athletes and Christian school association that seek to intervene.

More fundamentally, to Plaintiffs, Title IX is a federal mandate with which they must comply. To Intervenors, it is a cornerstone civil rights statute designed to provide them equal opportunities in athletics. Intervenors have a deeply personal interest in seeing Title IX rightly interpreted that state governments cannot share. This interest should be before the Court, and there is at least a "possibility" that Plaintiffs will not fully represent it.

Third, Intervenors will provide perspectives and expertise the States do not share. For example, Intervenors will raise the implications of the re-definition of what constitutes sex discrimination on other sex-based classifications. The government contends this perspective is already represented by Plaintiffs, but Plaintiffs raise only the potential effects *on their own state laws*. Defs.' Opp'n 23 (citing Compl. ¶¶ 97-98). While those effects are no doubt important, Intervenors will provide a broader perspective by discussing the implications of the Interpretation and Fact Sheet on other *federal* laws, over 100 of which prohibit sex-based discrimination, and on the *federal* constitutional right to bodily privacy. *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1778 (2020) (Alito, J., dissenting) (citing federal laws prohibiting sex-based discrimination); *Brannum v. Overton Cnty. Sch.*

Bd., 516 F.3d 489, 494 (6th Cir. 2008) (recognizing that right to privacy "includes the right to shield one's body from exposure to viewing by the opposite sex").

These effects are profound, stretching from homeless shelters, to prisons, to Selective Service registration, to dormitories, to fraternities and sororities, and to sports. *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); *Iglesias v. True*, 403 F. Supp. 3d 680, 684 (S.D. Ill. 2019) (citing Bureau of Prisons policy that prisoner assignment is based on biological sex and reassignment based on gender identity is "appropriate only in rare cases"); 50 U.S.C. § 3802(a) (Selective Service); 34 C.F.R. § 106.32 (dormitories); *id.* § 106.14 (fraternities and sororities). Allowing Intervenors to highlight the myriad ways the logic of the Interpretation and Fact Sheet would re-write dozens of federal laws will give the Court a fuller and better record for deciding the issues presented.

Intervenors are also well-placed to give the Court unique expertise and perspective on the harm to women caused by the Interpretation and Fact Sheet. The female athletes will highlight how being asked to compete against biological males with natural physical advantages prevents them from competing at the highest level and causes them emotional harm. And ACSI will highlight how Christian schools are harmed when their women's athletic programs cannot compete on a level playing field and are handicapped by simply living out their religious belief that biological sex is immutable. Plus, Intervenors are represented by an organization that represents female athletes and contends with these issues all over the country, so their participation will provide a national perspective and ensure these issues are not decided in a vacuum. *See, e.g.*, *Hecox v. Little*, 479 F. Supp. 3d 930, 955 (D. Idaho 2020) (allowing intervention by female athletes in action challenging Save Women's Sports law); *Soule v. Conn. Ass'n of Schs., Inc.*, No. 3:20-cv-00201 (RNC), 2021 WL 1617206 (D. Conn. Apr. 25, 2021) (allowing transgender students to intervene in case

brought by female athletes challenging district policy under Title IX); *B.P.J. v. W. Va. State Bd. of Educ.*, No. 2:21-cv-00316 (S.D.W. Va. 2021) (representing proposed intervenor in challenge to West Virginia's Save Women's Sports law); *D.N. v. DeSantis*, No. 0:21-cv-61334 (S.D. Fla. 2021) (representing proposed intervenor in challenge to Florida's Save Women's Sports law). There is plainly a "legitimate and reasonable concern[]" the Plaintiffs will not adequately represent these perspectives, and intervention should therefore be allowed. *Grutter*, 188 F.3d at 401.

III. The female athletes and ACSI meet the permissive-intervention requirements, as their motion is timely and shares common questions of fact and law.

Federal Rule of Civil Procedure 24(b) allows permissive intervention by anyone who "has a claim or defense that shares with the main action a common question of law or fact." The Department does not appear to contest that Intervenors meet this threshold. Instead, they make several arguments against permissive intervention, none of which are requirements under this standard.

First, the Department claims that Intervenors would not "add value" to the case. Defs.' Opp'n 24; *Masterpiece Cakeshop Inc. v. Elenis*, No. 18-CV-02074-WYD-STV, 2019 WL 9514601, at *4 (D. Colo. Feb. 28, 2019). Not only is "adding value" not a requirement for intervention in the Sixth Circuit, but Intervenors would add value to this litigation with a more thorough airing of the issues impacting the individual athletes and Christian schools that Plaintiffs cannot adequately represent.

Second, the Department argues the Intervenors are not "compelled" to bring this challenge. Again, this is unnecessary to meet the intervention requirements. *Bd. of Educ. of the Highland Loc. Sch. Dist. v. United States Dep't of Educ.*, No. 2:16-CV-524, 2016 WL 4269080, at *3 (S.D. Ohio Aug. 15, 2016): ("even though a judgment on the Title IX claim in this suit would not be preclusive of [intervenor's] constitutional claims in future separate litigation, a showing of preclusion is not

required for a finding of impairment."). Intervenors can show that an adverse ruling could have a "detrimental effect" on their "Title IX claims ... [and] this lawsuit could influence ruling on subsequent constitutional challenges, even if not squarely controlling them." *Id.*; *see Ne. Ohio Coal. For Homeless and Serv. Emps. Int'l Union, Local 1199 v. Blackwell*, 467 F.3d 999, 1007-08 (6th Cir. 2006) (finding that an "adverse ruling could hinder the [proposed intervenor's] ability to litigate the validity of the [law at issue]" and acknowledging that "potential *stare decisis* effects can be a sufficient basis for finding an impairment of interest").

The Department further contends that Intervenors have not demonstrated Article III standing, but such a showing is not required. *See supra* § I.

Putting these irrelevancies aside, Intervenors meet the requirements for permissive intervention. First, their motion is timely. The intervention motion was filed only five weeks after the case arose, before the start of any discovery or issuing a scheduling order. The Department argues Intervenors' motion causes it prejudice because it will not be able to respond to Intervenors on the preliminary injunction motion, even though Intervenors did not add any arguments to Plaintiffs' motion, and the Department consented to the briefing schedule. Defs.' Opp'n 24-25. In any event, the right to respond to arguments in a motion is not one of the timeliness factors courts consider. *Blount-Hill*, 636 F.3d at 284 (citing the timeliness factors). The only case the Department uses to claim it has the right to respond to new claims does not discuss this right in the intervention context. Defs.' Opp'n 24-25; *United States v. Moore*, No. 05 C 3806, 2006 WL 163148, at *3 (N.D. Ill. Jan. 18, 2006) (discussing amendments to a motion to vacate a criminal sentence).

Further, the Department is not prejudiced in any cognizable way. The kind of prejudice that defeats intervention is delay caused by the intervenors' lack of diligence, not the delay or complication caused by the intervention itself. *United States v. City of Detroit,* 712 F.3d 925, 930-31 (6th Cir. 2013) (evaluating "the

prejudice to the original parties due to the proposed intervenor's failure, after he or she knew or reasonably should have known of his or her interest in the case, to apply promptly for intervention"). The Department does not even argue that Intervenors here lacked diligence.

Finally, Intervenors' involvement will allow for a more complete airing of the issues and promote judicial economy by allowing for a more complete resolution. *Buck v. Gordon*, 959 F.3d 219, 225 (6th Cir. 2020) ("Strong interest in judicial economy and desire to avoid multiplicity of litigation wherever and whenever possible therefore supports permissive intervention."). Contrary to the Department's claim, Intervenors will not add complexity to the case. Defs.' Opp'n 25. Intervenors will not add any new arguments to the preliminary injunction briefs but will only raise unique arguments at trial to favor their interests. *See supra* § II.B. In short, The Department cannot have it both ways—it cannot claim that the Plaintiffs adequately represent the Intervenors' interests and also claim the Intervenors addition will complicate the litigation. *Id*. Intervenors satisfy the conditions for permissive intervention.

Conclusion

The female athletes and ACSI deserve to be heard, for themselves, and for other women in their positions. They will aid in the resolution of the issues, not cause delay or prejudice. They have shown they meet the test for intervention as of right and permissively. For these reasons, the Intervenors respectfully request that this Court allow them to intervene and oppose the attempted redefinition of Title IX.

Respectfully submitted this 25th day of October, 2021.

s/ Jonathan A. Scruggs

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Certificate of Service

I hereby certify that on the 25th 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/ Jonathan A. Scruggs
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EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
CHARLESTON DIVISION

B.P.J., by her next friend and mother, HEATHER JACKSON, *Plaintiff*,	)	
vs.	)	Case No. 2:21-cv-00316
WEST VIRGINIA STATE BOARD OF EDUCATION, HARRISON COUNTY BOARD OF EDUCATION, WEST VIRGINIA SECONDARY SCHOOL ACTIVITIES COMMISSION, W. CLAYTON BURCH in his official capacity as State Superintendent, and DORA STUTLER in her official capacity as Harrison County Superintendent, *Defendants*.	)	

STATEMENT OF INTEREST OF THE UNITED STATES

The United States respectfully submits this Statement of Interest, under 28 U.S.C. § 517,[1] to advise the Court of its view that Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.*, and the Equal Protection Clause of the Fourteenth Amendment do not permit West Virginia to categorically exclude transgender girls[2] from participating in single-sex sports restricted to girls.

[1] "The Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States." 28 U.S.C. § 517.

[2] The term "transgender" describes a person whose gender identity differs from the person's sex assigned at birth. For example, a transgender girl is a person who identifies as a girl but whose sex assigned at birth was male. The term "cisgender" describes a person whose gender identity is the same as the person's sex assigned at birth. Given Plaintiff's age, the United States refers only to "girls" and "boys," but the analysis applies equally to women and men.

The United States has a significant interest in ensuring that all students, including students who are transgender, can participate in an educational environment free of unlawful discrimination and that the proper legal standards are applied to claims under Title IX and the Equal Protection Clause. The U.S. Department of Justice ("DOJ") and U.S. Department of Education enforce Title IX to protect students from sex discrimination in federally funded education programs and activities. This includes ensuring that recipients offer equal athletic opportunities to students regardless of their sex. DOJ is further charged with coordinating federal agencies' implementation and enforcement of Title IX. 28 C.F.R. Pt. 54; Exec. Order No. 12,250, 45 Fed. Reg. 72,995 (Nov. 2, 1980); 28 C.F.R. 0.51. DOJ also has authority to investigate and resolve complaints that a school board is depriving students of equal protection based on sex (and other bases). 42 U.S.C. § 2000c-6.

Under the law challenged here, West Virginia (or the "State") prohibits girls who are transgender from participating on female "[i]nterscholastic, intercollegiate, intramural, or club athletic teams or sports that are sponsored by any public secondary school or a state institution of higher education." W. Va. Code §§ 18-2-25d(c)(1)-(2) ("H.B. 3293"). The State claims that H.B. 3293 will protect athletic opportunities for girls. Neither the facts nor the law supports that assertion. To be sure, there remain significant barriers to providing full equity in athletics for female students.[3] But permitting participation by transgender girls, who make up "approximately one half of one percent" of the United States' population, is not one of them. *See Hecox v. Little,* 479 F. Supp. 3d 930, 977 (D. Idaho 2020), *appeals docketed*, Nos. 20-35813, 20-35815 (9th Cir.

[3] Indeed, on the day Plaintiff filed this lawsuit, the United States filed an *amicus* brief in the Sixth Circuit to clarify the standards for assessing whether a school equitably meets its students' athletic interests and abilities, regardless of sex. *See* U.S. Br. as Amicus Curiae, *Balow v. Michigan State Univ.*, No. 21-1183 (6th Cir. May 26, 2021).

Sep. 17, 2020). The United States submits this Statement of Interest to provide its view that Plaintiff's Title IX and Equal Protection Clause challenges are likely to succeed on the merits.

BACKGROUND

The Governor of West Virginia signed H.B. 3293 into law on April 28, 2021, and it is set to go into effect on July 8, 2021. The law mandates that "[i]nterscholastic, intercollegiate, intramural, or club athletic teams or sports that are sponsored by any public secondary school or a state institution of higher education . . . shall be expressly designated as [male, female, or coed] based on biological sex." W. Va. Code § 18-2-25d(c)(1). The law defines "biological sex" as "an individual's physical form as a male or female based solely on the individual's reproductive biology and genetics at birth." *Id.* § 18-2-25d(b)(1). It further defines "female" to mean "an individual whose biological sex determined at birth is female," with a corresponding definition for "male."[4] *Id.* §§ 18-2-25d(b)(2)-(3). The law prohibits girls who are transgender from participating on girls' sports teams, stating that "[a]thletic teams or sports designated for females, women, or girls shall not be open to students of the male sex"—where "male sex" is determined by sex assigned at birth—"where selection for such teams is based upon competitive skill or the activity involved is a contact sport." *Id.* § 18-2-25d(c)(2). There is no parallel provision for participation on boys' sports teams. The law also creates a private cause of action for "[a]ny student aggrieved" by a violation, allowing for injunctive relief, damages, fees, and costs against a county board of education or state institution of higher education. *Id.* § 18-2-25d(d)(1). The Legislature's proffered justification is that "[c]lassification of teams according to biological sex is necessary to promote equal athletic opportunities for the female sex." *Id.* § 18-2-25d(a)(5). Specifically, "[b]iological males would displace females to a substantial extent if permitted to compete on teams

[4] The United States does not concede the accuracy of these definitions.

designated for biological females." *Id.* § 18-2-25d(a)(3).

Plaintiff B.P.J is an 11-year-old girl who is transgender. She argues that Defendants' compliance with H.B. 3293 will bar her from participating in school athletics in violation of Title IX and the Equal Protection Clause. No. 1 at 2.[5] B.P.J. participated on an all-girls cheerleading team while in elementary school, and she wants to participate in girls' athletics as she enters middle school in the 2021-22 school year. No. 2-1 at 21-22. Specifically, B.P.J. wants to try out for Bridgeport Middle School's girls' cross-country and track teams. The middle school principal informed B.P.J.'s mother that her daughter may not participate on the girls' cross-country or track teams because of H.B. 3293. No. 2-1 at 23. B.P.J. does not seek to join the boys' cross-country and track teams because she is a girl and such participation would "devastate" B.P.J., "completely erase who she is," and undermine her social transition. No. 1 at 17; No. 2-1 at 23. Even if B.P.J. wanted to participate on the boys' team, the principal said it would be "confusing" for her to join the boys' teams because she looks like and presents as a girl. No. 2-1 at 23. In reality, then, H.B. 3293 will exclude B.P.J. entirely from the cross-country and track programs at her middle school. B.P.J. has moved for a preliminary injunction, arguing that Defendants' compliance with H.B. 3293 violates Title IX and the Equal Protection Clause. She requests this Court to enjoin West Virginia from enforcing H.B. 3293 and "any other law, custom, or policy that precludes B.P.J.'s participation on girls' school sports teams in West Virginia" and allow B.P.J. to participate on girls' sports teams consistent with her gender identity. No. 19 at 8.

ARGUMENT

On a motion for a preliminary injunction, the court reviews: (1) the movant's likelihood

[5] "No.__ at __" refers to the docket entry number and page number of documents filed in this case, using the Court's CM/ECF pagination.

of success on the merits; (2) the threat of irreparable harm to the movant absent an injunction; (3) the balance of hardships; and (4) the public interest. *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 236 (4th Cir. 2014) (citation omitted). The United States believes that Plaintiff will likely succeed on the merits of her Title IX and equal protection claims and does not address the other factors.

A state law that limits or denies a particular class of people's ability to participate in public, federally funded educational programs and activities solely because their gender identity does not match their sex assigned at birth violates both Title IX and the Equal Protection Clause. H.B. 3293 does exactly this. H.B. 3293's prohibition applies to all transgender girls in public secondary and postsecondary education—regardless of a student's specific circumstances—and to no one else.[6]

H.B. 3293 violates Title IX by effectively prohibiting, solely on the basis of sex, a certain subset of students—girls who are transgender—from participating in athletic programs offered by recipients of federal financial assistance ("recipients"). On its face, H.B. 3293 restricts girls who are transgender from participating on girls' teams. But because forcing transgender girls to participate on boys' teams also causes discriminatory harm, H.B. 3293 affords them no opportunity to participate on single-sex sports teams at all.

H.B. 3293 also violates the Equal Protection Clause. Discriminatory treatment against transgender people is subject to heightened scrutiny because it constitutes both discrimination based on sex and discrimination against a quasi-suspect class. H.B. 3293 fails heightened scrutiny

[6] To be sure, West Virginia may not remedy the violation by extending its categorical ban to boys who are transgender. The Supreme Court has explained that federal nondiscrimination mandates protect individuals. By extending its discriminatory ban to boys, West Virginia would not avoid liability, but rather would double it. *See Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1741 (2020) ("Nor is it a defense for an employer to say it discriminates against both men and women because of sex. . . . Instead of avoiding Title VII exposure, this employer doubles it.").

analysis because West Virginia cannot demonstrate that prohibiting a handful of transgender student athletes from playing on athletic teams consistent with their gender identity is substantially related to any important government interest. Thus, this Court should find a likelihood that Plaintiff will succeed on the merits of both her Title IX and Equal Protection Clause claims.

I. B.P.J. Is Likely To Prevail On Her Title IX Claim

B.P.J. is likely to prevail on her Title IX claim against Defendants. Title IX provides 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(a). Title IX's implementing regulations mandate that "[n]o person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient." 34 C.F.R. § 106.41(a); 28 C.F.R. § 54.450(a). Although the regulations allow recipients to operate or sponsor separate teams based on sex, the regulations do not define "sex" or address how students who are transgender should be assigned to such teams. 34 C.F.R. § 106.41(b); 28 C.F.R. § 54.450(b). The regulations do not require, or even suggest, that recipients assign students who are transgender to teams based on their sex assigned at birth, as H.B. 3293 requires.

This Court should reject any attempt by the State to argue that *the regulations* do not prohibit the assignment of students to teams based on sex assigned at birth, regardless of whether such a classification harms transgender students. When assigning students to single-sex sports teams, a recipient must still comply with the *statutory* prohibition against discrimination based on sex in Title IX itself. *See, e.g., Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 618 (4th Cir. 2020) ("[T]he implementing regulation cannot override the statutory prohibition against

discrimination on the basis of sex."), *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. 19, 2021). And the Supreme Court has recently clarified that discrimination against a person for being transgender *is* discrimination based on sex. *See Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1746-47 (2020); *see also Grimm*, 972 F.3d at 619. Therefore, any interpretation of Title IX's regulations that requires gender identity discrimination would violate the statute's nondiscrimination mandate. Because H.B. 3293 requires the Defendants to engage in precisely this type of sex discrimination that causes harm to B.P.J, the law violates Title IX. A discriminatory state law is no defense to a Title IX violation.

A. H.B. 3293 Requires Recipients To Discriminate In Violation Of Title IX

B.P.J. prevails on her Title IX claim by showing: (1) she was excluded from an education program or activity on the basis of sex; (2) the educational institution in question is a recipient of federal financial assistance; and (3) the improper discrimination caused her harm. *See Grimm*, 972 F.3d at 616 (citation omitted). The United States believes she is likely to make this showing.

There is no question that the school district that B.P.J. attends is a recipient of federal funds. Nor can there be any doubt that B.P.J. will be excluded from a recipient's education program or activity: Bridgeport Middle School's principal told B.P.J.'s mother that B.P.J. is ineligible for the girls' cross-country and track program. *See* No. 2-1 at 23. That is precisely the effect of H.B. 3293. It excludes all girls who are transgender from participating in girls' athletics in public secondary and postsecondary schools.

Any argument that B.P.J. has not been excluded because she could join the boys' team is untenable. B.P.J. is a girl, not a boy. She describes herself as a girl. No. 2-1 at 31. She lives and identifies as a girl in her daily life. No. 2-1 at 20. Her middle school principal acknowledged it would be "confusing" for B.P.J. to join the boys' teams given that she neither looks like, nor

presents herself as a boy. No. 2-1 at 23. As the Fourth Circuit has explained, for purposes of a discrimination analysis, B.P.J. is similarly situated to other girls. *See Grimm*, 972 F.3d at 610, 618 ("Grimm was similarly situated to other boys, but was excluded from using the boys[']restroom facilities based on his sex-assigned-at-birth."). Requiring her to join a boys' team would harm B.P.J. for the reasons discussed below. In practice, Harrison County Schools' compliance with H.B. 3293 will exclude B.P.J. from all of her school's single-sex sports teams.

It is also clear that this exclusion is based on sex. H.B. 3293 targets girls who are transgender. In *Bostock*, the Supreme Court explained that "discrimination based on . . . transgender status necessarily entails discrimination based on sex." *See* 140 S. Ct. at 1746-47. Following *Bostock*, the Fourth Circuit held that Title IX prohibits discrimination against students because they are transgender. *Grimm*, 972 F.3d at 616-17; *see also 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 (11th Cir. Aug. 28, 2020). In *Grimm*, the Fourth Circuit found that a school board policy violated Title IX because the school board:

> could not exclude Grimm from the boys[']bathrooms without referencing his 'biological gender' under the policy, which it has defined as the sex marker on his birth certificate. Even if the Board's primary motivation in implementing or applying the policy was to exclude Grimm because he is transgender, his sex remains a but-for cause for the Board's actions.

972 F.3d at 616. So too here. H.B. 3293 separates students onto athletic teams by their "sex determined at birth," W. Va. Code § 18-2-25d (b)(2)-(3), and it is impossible to enforce H.B. 3293 against B.P.J. without referencing her sex assigned at birth.

Finally, H.B. 3293 causes B.P.J. discriminatory harm. To comply with H.B. 3293, B.P.J.'s school district must exclude her from girls' sports entirely, all the way through high school. *See Gregor v. W. Va. Secondary Sch. Activities Comm'n*, 2020 WL 6292813, at *4 (S.D. W. Va. Oct.

27, 2020) (citations omitted) (acknowledging a person may be irreparably harmed if they cannot participate in a sport at all); No. 2-1 at 60 ("[I]t can be extremely harmful for transgender youth to be excluded from the team consistent with their gender identity.").[7] B.P.J., unlike her cisgender peers, would miss the many benefits of interscholastic athletics, including skill-building, exercise, motivation, social ties, and increased confidence. No. 2-1 at 46-47. As many courts have recognized, this type of exclusion would cause a student like B.P.J. to experience stigma, isolation, and dignitary harm. *See Grimm*, 972 F.3d at 597-601, 617-18 (bathroom policy made plaintiff feel "alienat[ed]" and "humiliate[ed]"); *Adams*, 968 F.3d at 1307 (bathroom policy made plaintiff feel "sorely 'alienated' and 'different' from other students because he is transgender"); *Whitaker By Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1045-47 (7th Cir. 2017) (exclusion from boys' restroom "stigmatized" transgender boy, causing him "significant psychological distress" including "depression and anxiety"), *cert. dismissed*, 138 S. Ct. 1260 (2018); *Dodds v. Dep't of Educ.,* 845 F.3d 217, 221-222 (6th Cir. 2016) (finding that exclusion from the girls' restrooms "had substantial and immediate adverse effects" on plaintiff's "daily life," "health," and "well-being").[8]

Requiring that B.P.J. participate on a boys' team would likewise cause her real and lasting harm. Joining the boys' team would contravene B.P.J.'s medically-supervised social transition. No. 2-1 at 20-21, 60. It would "erase who she is" and "devastate her," causing mental and

[7] If she attends a public college in West Virginia, B.P.J. also will be banned from women's intercollegiate sports.

[8] Conversely, the mere presence of transgender students in sex-segregated spaces that align with their gender identity does not violate cisgender students' Title IX rights. *See Doe by & through Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518, 534 (3d Cir. 2018) (restrooms and locker rooms), *cert. denied*, 139 S. Ct. 2636 (2019); *Parents for Privacy v. Barr*, 949 F.3d 1210, 1228-29 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 894 (2020) (restrooms, locker rooms, and showers).

emotional distress. No. 2-1 at 23, 32-33. Forcing her to run on the boys' team would "constitute harm under Title IX, as it 'invites more scrutiny and attention' from other students, 'very publicly branding all transgender students with a scarlet 'T'.'" *Grimm*, 972 F.3d at 617-18 (quoting *Doe by & through Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518, 530 (3d Cir. 2018) (brackets omitted), *cert. denied*, 139 S. Ct. 2636 (2019)). Being on a boys' team would make B.P.J. vulnerable to invasive questions, gossip, and ridicule for participating on the "wrong" team. This "emotional and dignitary" harm is "legally cognizable under Title IX." *See id.* at 618 (citing *Adams*, 968 F.3d at 1306-07, 1310-11). On these facts, the United States believes B.P.J. is likely to prevail on the merits of her Title IX claim.

B. Title IX Itself Provides Sufficient Protection Against H.B. 3293's Concern That Boys Will Displace Girls In Athletics

In addition to requiring recipients to discriminate based on sex, the West Virginia Legislature's justification for H.B. 3293 ignores Title IX's existing protections in the athletics context. The State seeks to justify the law on the theory that "[i]n the context of sports involving competitive skill or contact, biological males and biological females are not in fact similarly situated. Biological males would displace females to a substantial extent if permitted to compete on teams designated for biological females." W. Va. Code § 18-2-25d(a)(3).[9] As an initial matter, there are no facts to suggest that, in this case, allowing B.P.J. to participate in girls' sports will substantially displace other girls, or that any cisgender boy seeks a spot on a girls' team. An overview of Title IX's regulations, which can be credited with creating hundreds of thousands of athletic opportunities for girls, demonstrates why H.B. 3293 is unnecessary.

[9] H.B. 3293's definition of "biological males" wrongly conflates two distinct groups, cisgender boys and transgender girls. The legislature's conflation of these groups is inappropriate given the Fourth Circuit's analysis of similarly situated students in *Grimm*. 972 F.3d at 610, 618 (finding that the plaintiff, a transgender boy, was "similarly situated to other boys").

Since 1975, Title IX's implementing regulations have required recipients to provide equal athletic opportunities for their students regardless of sex. 45 C.F.R. § 86.41(c) (subsequently codified at 34 C.F.R. § 106.41(a) and 28 C.F.R. § 54.450(a)). The regulations recognized that in order to expand opportunities for girls, as the underrepresented sex, recipients could offer sex-segregated sports teams. 45 C.F.R. § 86.41(b) (subsequently codified at 34 C.F.R. § 106.41(b); 28 C.F.R. § 540(b). B.P.J. does not challenge her school's ability to offer separate boys' and girls' sports teams. She simply challenges how her school and her state intend to assign her, as a transgender girl, to a single-sex team.

The regulations further require that a recipient's "selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes." 34 C.F.R. § 106.41(c); 28 C.F.R. § 54.450(c). The regulation ensures that recipients provide athletic participation opportunities that effectively accommodate the interests and abilities of each sex, and protects against boys usurping girls' athletic participation opportunities. *See Ollier v. Sweetwater Union High Sch. Dist.*, 768 F.3d 843, 856-57 (9th Cir. 2014). It does not preclude recipients from treating transgender students consistent with their gender identity. Nor can it. *See Grimm*, 972 F.3d at 618 ("[T]he implementing regulation cannot override the statutory prohibition against *discrimination* on the basis of sex."). And as a factual matter, there is no discernible risk that transgender girls will somehow "displace" cisgender girls "to a substantial extent." W. Va. Code § 18-2-25d(a)(3); *see also Hecox*, 479 F. Supp. 3d at 977 ("It is inapposite to compare the potential displacement allowing approximately half of the population (cisgender men) to compete with cisgender women, with any potential displacement one half of one percent of the population (transgender women) could cause cisgender women.").

Moreover, under Title IX, recipients may both permit transgender girls to participate on girls' athletic teams *and* exclude cisgender boys from the girls' teams. B.P.J. is a girl. She has participated on an all-girls community cheerleading team for the last two years. No. 2-1 at 21. Her middle school principal acknowledged that it would be confusing to identify her any other way. No. 2-1 at 23. Consistent with Fourth Circuit precedent, B.P.J. is similarly situated to other girls. *See Grimm*, 972 F.3d at 610. An analogous claim by a cisgender boy to play on a girls' team rather than the corresponding boys' team would fail because: (1) he lives and presents as a boy and therefore is not similarly situated to girls for purposes of permissibly sex-segregated activities; and (2) he experiences no cognizable "emotional and dignitary harm" from being excluded from the girls' team. *Id.* at 618 (citing *Adams*, 968 F.3d at 1306-07, 1310-11).

At its core, Title IX is about ensuring equal educational opportunities to all students regardless of their sex. Despite its claim of "promot[ing] equal athletic opportunities" for girls, W. Va. Code § 18-2-25d(a)(5), H.B. 3293 does the opposite. It targets a vulnerable and historically marginalized subset of girls and prohibits them from participating in athletics. It bars girls who are transgender from teams that are consistent with their gender identity—and effectively bars them from all single-sex sports teams at the secondary and postsecondary levels—without regard to any individual's specific circumstances and without any facts to suggest that there is a "problem" that requires solving in the first place. H.B. 3293 does so despite the fact that Title IX already protects equal athletic opportunities for all students and H.B. 3293 does so in violation of Title IX's mandate to offer educational opportunities free of sex discrimination.

II. H.B. 3293 Cannot Survive Heightened Scrutiny Under The Equal Protection Clause

B.P.J. is also likely to succeed on the merits of her equal protection claim because H.B. 3293 discriminates based on sex and transgender status. The Equal Protection Clause

prevents states from discriminating against individuals on the basis of sex and against people who are transgender absent an "exceedingly persuasive" justification. *Grimm*, 972 F.3d at 610-13. The State cannot demonstrate such a justification.

A. H.B. 3293 Is Subject To Heightened Scrutiny

To determine whether a statute or policy warrants heightened scrutiny under the Equal Protection Clause, a court asks whether the classification at issue jeopardizes the exercise of a fundamental right or categorizes based on an inherently suspect characteristic. *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992) (citations omitted). Heightened scrutiny applies here for two separate reasons: H.B. 3293 discriminates based on sex and H.B. 3293 discriminates based on transgender status.

The Supreme Court has long held that classifications based on sex warrant heightened scrutiny. *See, e.g.*, *United States v. Virginia*, 518 U.S. 515, 533 (1996) (*VMI*) (citing *Miss. Univ. for Women v. Hogan*, 458 U.S. 718 (1982)). H.B. 3293 singles out girls who are transgender, including B.P.J., for different treatment based on the sex they were assigned at birth. W. Va. Code § 18-2-25d(b)(1). The Fourth Circuit's controlling precedent holds that excluding transgender students from sex-segregated spaces that align with their gender identity is discrimination based on sex under the Equal Protection Clause. *Grimm*, 972 F.3d at 607-10. Other circuits agree. *See Adams*, 968 F.3d at 1296; *Whitaker By Whitaker*, 858 F.3d at 1051. Just as in *Grimm*, H.B. 3293 discriminates on the basis of sex: it treats B.P.J. differently from all other students with the same gender identity based solely on her sex assigned at birth. 972 F.3d at 608 (school district policy limiting bathroom access to "corresponding biological genders" or sex listed on birth certificate "creates sex-based classifications").

Fourth Circuit precedent also requires heightened scrutiny here because people who are

transgender are a quasi-suspect class. *Grimm,* 972 F.3d at 611–13. The Fourth Circuit observed, "one would be hard-pressed to identify a class of people more discriminated against historically or otherwise more deserving of the application of heightened scrutiny when singled out for adverse treatment." *Id.* at 610-11 (citation omitted). It does not matter that H.B. 3293 categorizes teams without explicitly referencing "transgender students": by categorizing teams based on that law's definition of "biological sex," girls who are transgender are the only group who cannot compete on sports teams that align with their gender identity. W. Va. Code § 18-2-25d(b). Because H.B. 3293 discriminates against a quasi-suspect class—girls who are transgender—this Court must apply heightened scrutiny. *Grimm,* 972 F.3d at 610.

B. H.B. 3293 Is Not Substantially Related To Achieving The State's Articulated Governmental Interest

H.B. 3293 cannot survive the rigorous analysis that heightened scrutiny demands. To survive heightened scrutiny, the state must show the law "serves important governmental objectives" and the "discriminatory means employed are substantially related to the achievement of those objectives." *See VMI*, 518 U.S. at 533 (quoting *Miss. Univ. for Women*, 458 U.S. at 724) (internal quotation marks omitted). "The burden of justification is demanding" and the justification must be "'exceedingly persuasive.'" *Id.* (quoting *Miss. Univ. for Women,* 458 U.S. at 724). The inquiry provides enhanced protection in circumstances where there is a greater danger that the legal classification results from either impermissible prejudice or stereotypes, *see, e.g.*, *Grimm*, 972 F.3d at 614–15, or "a bare . . . desire to harm a politically unpopular group," *United States Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973).

Moreover, when evaluating an articulated governmental interest, the "justification must be genuine, not hypothesized" and "must not rely on overbroad generalizations." *VMI*, 518 U.S. at 533; *see also Grimm*, 972 F.3d at 615 (holding that policy restricting access to restroom by

"biological sex" is "marked by misconception and prejudice" against transgender plaintiff) (citation omitted); *Adams*, 968 F.3d at 1297 (finding no substantial relationship between defendants' articulated justification and restroom policy where the concerns were hypothesized and treated transgender plaintiff unfavorably "simply because he defies gender stereotypes"). A classification does not withstand heightened scrutiny when "the alleged objective" differs from the "actual purpose" underlying the classification. *Miss. Univ. for Women,* 458 U.S. at 730.

The State proffers "promoting equal athletic opportunities for the female sex" as its governmental interest. W. Va. Code § 18-2-25d(a)(4). There is no doubt that promoting equal athletic opportunities is an important governmental interest. *See Equity in Athletics, Inc. v. Dep't of Educ.*, 639 F.3d 91, 104 (4th Cir. 2011) (citing *Kelley v. Bd. of Tr., Univ. of Ill.*, 35 F.3d 265, 272 (7th Cir. 1994)). The State contends this law is necessary to "promote equal athletic opportunities for the female sex" because "[i]n the context of sports involving competitive skill or contact, biological males and biological females are not . . . similarly situated" and "[b]iological males would displace females to a substantial extent if permitted to compete on teams designated for biological females." W. Va. Code § 18-2-25d(a)(3)-(5). But as explained above, Title IX already ensures that cisgender boys will not "displace [girls] to a substantial extent" and the State does not claim that cisgender boys have sought to do so. The truth is H.B. 3293 targets transgender girls. This Court should reject the State's proffered explanation as factually inaccurate, based on biases, and employing overbroad generalizations about transgender girls. Further casting doubt on the State's justification, H.B. 3293 hinders equal athletic opportunities for girls by creating an additional hurdle for participation.

First, the State's justification lacks a factual basis. H.B. 3293's text and legislative record make clear that the law was calculated to exclude girls who are transgender from girls' athletic

teams. The State already allows schools to have "separate teams for members of each sex," and under existing state law, cisgender boys cannot join a girls' team except in limited circumstances. W. Va. Code R. § 127-2-3.8.[10] When asked how H.B. 3293 would change this status quo, counsel for the bill explained that it "would affect those that changed their sex after birth." No. 1-1 at 14. Other delegates, including bill sponsors, also made clear that the bill's focus was on transgender girls. No. 1-1 at 21, 25. So, when the State says, "biological males would displace females" in athletics, W. Va. Code § 18-2-25d(a)(3), and defines students by their sex assigned at birth, *id.* § 18-2-25d(b)(1), the State's objective is clear: to define transgender girls as "boys" and then to prevent them from participating on girls' athletics teams. *See VMI*, 518 U.S. at 535-36 ("[B]enign justifications proffered in defense of categorical exclusions will not be accepted automatically; a tenable justification must describe actual state purposes, not rationalizations for actions in fact differently grounded." (internal quotation marks and citation omitted)).

Recently, an Idaho District Court found a similar law unconstitutional. *See Hecox*, 479 F. Supp. 3d at 979. The *Hecox* court rejected Idaho's claim that barring girls who are transgender from girls' athletic teams had any relationship to ensuring equality and opportunities for girls' athletics. As was the case in *Hecox*, H.B. 3293's legislative record "reveals no history of transgender athletes ever competing in sports" in West Virginia and no evidence that female athletes have been displaced by transgender athletes in West Virginia. *Id.* at 978. The West

[10] H.B. 3293's reliance on *Clark v. Ariz. Interscholastic Ass'n*, 695 F.2d 1126 (9th Cir. 1982), does not support the law's discriminatory means. W. Va. Code § 18-2-25d(a)(3). *Clark* did not address the participation of transgender athletes. Instead, *Clark* upheld a school district's policy that cisgender boys could not play on a girls' volleyball team where "boys' overall opportunity is not inferior to girls'." 695 F.2d at 1131. At issue here is a transgender girl who seeks to play on a girls' team. *Clark* thus provides no support for the State's discriminatory purpose because, simply, transgender women "have not and could not 'displace' cisgender women in athletics 'to a substantial extent.'" *Hecox*, 479 F. Supp. 3d. at 977 (quoting *Clark*, 695 F.3d at 1131).

Virginia Department of Education's Executive Director of Policy and Government Relations testified that the agency has received no complaints about transgender athletes. No. 1-1 at 14-15. One of the bill's sponsors, Delegate Ellington, stated that he knew of no complaints regarding transgender athletes in West Virginia, *see* No. 1-1 at 9, 19, much less that transgender girls are so numerous and skilled that they could "displace" other women and girls in sports.[11] Instead, he pointed to "two transgender girls" who "were allowed to compete in state track and field meets in Connecticut." No. 1-1 at 21. The existence of two runners in another state fails to provide an "exceedingly persuasive justification" for H.B. 3293's categorical bar. *See Hecox*, 479 F. Supp. 3d. at 979 (citing *VMI*, 518 U.S. at 533). As in Idaho, the record here contains "no evidence to suggest a categorical bar against transgender female athlete's participation in sports is required in order to promote 'sex equality' or to 'protect athletic opportunities for females'" in West Virginia. *Id.* at 978-79 (citation omitted). The State can point to no valid evidence to justify H.B. 3293.

On the contrary, the State disregarded evidence that giving girls who are transgender the same athletic opportunities that all other girls enjoy has not displaced cisgender girls. The West Virginia Legislature had before it evidence that sixteen states successfully allow transgender students to participate in sports consistent with their gender identity. No. 25 at 38-39, 75. The National Collegiate Athletic Association ("NCAA") has allowed transgender students who meet certain conditions to participate in intercollegiate sports consistent with their gender identity for over ten years. *Id.*; *see also* NCAA, *NCAA Inclusion of Transgender Student-Athletes* (2011), https://www.ncaa.org/sites/default/files/Transgender_Handbook_2011_Final.pdf. Yet, girls and young women who are transgender have not displaced cisgender girls in those states or in college

[11] The bill's co-sponsors and the Governor of West Virginia also stated that they did not know of any girls who are transgender in West Virginia who competed on girls' teams, much less who dominated or displaced cisgender girls. No. 1 at 2, 14.

athletics. The lack of "empirical evidence that transgender inclusion will hinder sex equality in sports or athletic opportunities" for girls shows that H.B. 3293's exclusion of transgender girls "has no relationship" to the law's objective. *Hecox*, 479 F. Supp. 3d. at 979, 982.

Second, statements by H.B. 3293's sponsors show that a misunderstanding or fear of transgender girls, and in certain instances, outright anti-transgender bias, rather than an interest in promoting women's athletic opportunities, motivated this bill. For example, Delegate Mazzochi said that she did not "want all this mixing and matching" of transgender and cisgender children in "locker rooms." No. 1 at 12. Delegate Bridges announced on Facebook he was co-sponsoring H.B. 3293, then "liked" comments to his post that advocated for physical violence against girls who are transgender, compared them to pigs, and called them by a pejorative term ("tranny"). Jordan Bridges, "Update: The bill passed out of committee." Facebook (Mar. 16, 2021), https://perma.cc/HA5C-VJ4N.[12] He also made other anti-transgender comments, saying that "this country is going down hill [sic] fast" in response to a news article discussing transgender-inclusive business practices. Jordan Bridges, "I swear my hand." Facebook (Oct. 23, 2019), https://perma.cc/8BHK-7V5Z. The biases and moral disapproval articulated by the bill's sponsors are not justifiable reasons to legislate. *See Lawrence v. Texas*, 539 U.S. 558, 577-78 (2003) (holding moral disapproval of same-sex sexual conduct was impermissible basis for legislation); *see also Palmore v. Sidoti,* 466 U.S. 429, 433 (1984) (finding in a race discrimination suit that "[t]he Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.").[13]

[12] The archived and live Facebook pages are available via the permalink. DOJ has retained permanent copies of these Facebook pages in the event that they are modified or deleted.

[13] Intermediate scrutiny is the appropriate level of review in this case. But even under rational basis review, H.B. 3293 would fail because bare dislike of an unpopular social group is never a

Third, even if this Court were to credit the State's purported objective of wanting to protect girls' athletic opportunities, H.B. 3293's categorical exclusion of transgender girls is not "substantially related" to that objective, as the equal protection caselaw requires. *See VMI*, 518 U.S. at 533 (quoting *Miss. Univ. for Women*, 458 U.S. at 724) (internal quotation marks omitted). H.B. 3293's assumption that transgender girls, as a group, enjoy some inherent competitive advantage over their cisgender classmates ignores the facts of this case. Excluding B.P.J., who has not gone through puberty and is receiving puberty-delaying treatment, No. 2-1 at 21, 32, contributes nothing to ensuring competitive fairness. *See* No. 2-1 at 6-8. By sweeping so broadly, the State proved itself "less concerned with ensuring equality in athletics than [] with ensuring exclusion of transgender women athletes." *Hecox*, 479 F. Supp. 3d at 984.

Finally, H.B. 3293 may hinder rather than promote athletic opportunities for all girls. Though the law purports to bar only transgender girls from joining the girls' team, the practical effect is that *every* girl in West Virginia may be subject to having her eligibility for a single-sex team challenged merely because some other student claims the girl in question is not a "real" girl. This is likely to affect girls who do not adhere to sex stereotypes and who present as less stereotypically feminine. While intended to expose transgender girls, the consequences would be harmful for gender non-conforming cisgender girls as well. Indeed, two doctors testified that being the subject of such a challenge would be "psychologically devastating," "embarrassing, humiliating," "lead to the . . . person being ostracized," and increase her suicide risk. No. 25 at 97-98, 101. Thus, rather than protecting opportunities for girls, the law could reasonably chill

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legitimate legislative motive. *See Cleburne v. Cleburne Living Ctr.,* 473 U.S. 432, 446-47 (1985)*; Moreno*, 413 U.S. at 534. The State's prohibition of transgender girls from girls' teams is not rationally related to its stated interest of protecting girls' athletic opportunities. *See Cleburne,* 473 U.S. at 446 ("The State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational.").

athletic participation by all girls who do not conform to sex stereotypes.

H.B. 3293 cannot survive heightened scrutiny. The State cannot point to any valid evidence that allowing transgender girls to participate on girls' sports teams endangers girls' athletic opportunities. Instead, the State legislated based on misconceptions and overbroad assumptions about transgender girls. It is illogical for the State to believe it can protect girls' athletic opportunities by barring girls from playing sports. The harm to B.P.J. is real and it will be lasting. The United States believes B.P.J. will succeed on the merits of her equal protection claim.

CONCLUSION

Title IX and the U.S. Constitution bar Defendants from implementing the policy commanded by H.B. 3293. That policy does nothing to further the State's purported goal of protecting athletic opportunities for girls. At the same time, it violates the nondiscrimination mandates of Title IX and the Equal Protection Clause.

Respectfully submitted, this 17th day of June, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that on June 17, 2021, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all attorneys of record.

Respectfully submitted,

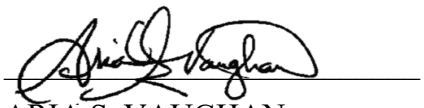

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EXHIBIT B

U.S. Department of Justice

Civil Rights Division

Principal Deputy Assistant Attorney General
950 Pennsylvania Ave, NW - RFK
Washington, DC 20530

MEMORANDUM

March 26, 2021

TO: Federal Agency Civil Rights Directors and General Counsels

FROM: Principal Deputy Assistant Attorney General Pamela S. Karlan
Civil Rights Division

PSK

SUBJECT: Application of *Bostock v. Clayton County* to Title IX of the Education Amendments of 1972

Several federal agencies have recently contacted the Civil Rights Division with questions regarding the application of the Supreme Court's reasoning in *Bostock v. Clayton County*, 140 S. Ct. 1731, 590 U.S. ___ (2020), to Title IX of the Education Amendments of 1972, as amended (20 U.S.C. § 1681 *et seq*.) (Title IX), particularly in light of Executive Order 13988, *Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation*, 86 Fed. Reg. 7023 (Jan. 25, 2021). The Department of Justice is charged with coordination of the implementation and enforcement of Title IX by Executive agencies. Exec. Order No. 12250, § 1-2, 45 Fed. Reg. 72,995 (Nov. 4, 1980). Under the Executive Order 12250 authority delegated to the Civil Rights Division, 28 C.F.R. § 0.51(a) (1981) and 28 C.F.R. § 42.412(a) (1981), I write to share the Division's view as to whether *Bostock* applies to Title IX.

Executive Order 13988 sets out the Administration's policy that "[a]ll persons should receive equal treatment under the law, no matter their gender identity or sexual orientation." Citing the Supreme Court's holding in *Bostock* that the prohibition on discrimination "because of . . . sex" under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* (Title VII), covers discrimination on the basis of gender identity and sexual orientation, the Executive Order explains that *Bostock*'s reasoning applies with equal force to other laws that prohibit sex discrimination "so long as the laws do not contain sufficient indications to the contrary." The Executive Order directs agencies to review other laws that prohibit sex discrimination, including Title IX, to determine whether they prohibit discrimination on the basis of gender identity and sexual orientation. We conclude that Title IX does.

Title IX provides 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(a). Because their statutory prohibitions against sex discrimination are similar, the Supreme Court and other federal courts consistently look to interpretations of Title VII to inform Title IX. *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); *Gossett v. Oklahoma ex rel. Bd. of Regents for Langston Univ.*, 245 F.3d 1172, 1176 (10th Cir. 2001). Thus, *Bostock's* discussion of the text of Title VII informs the Division's analysis of the text of Title IX.

First, like Title VII, Title IX applies to sex discrimination against individuals. The *Bostock* Court focused on this feature of Title VII in reaching its holding. *Bostock*, 140 S. Ct. at 1740–41 ("[The statute] tells us three times—including immediately after the words "discriminate against"—that our focus should be on individuals"). Similarly, Title IX focuses on individuals when it uses the term "person." *See Cannon v. Univ. of Chicago*, 441 U.S. 677, 704 (1979) (stating that, in enacting Title IX, Congress "wanted to provide *individual citizens* effective protection against those [discriminatory] practices" (emphasis added)).

Second, Title IX's "on the basis of sex" language is sufficiently similar to "because of" sex under Title VII as to be considered interchangeable. In *Bostock* itself, the Supreme Court described Title VII's language that way: "[I]n Title VII, Congress outlawed discrimination in the workplace *on the basis of* race, color, religion, sex, or national origin." *Bostock*, 140 S. Ct. at 1737 (emphasis added); *see also Meritor Sav. Bank, FSB 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)). The *Bostock* Court concluded that Title VII's prohibition of discrimination "because of" sex includes discrimination because of sexual orientation and transgender status, finding that when an employer discriminates against employees for being gay or transgender, "the employer must intentionally discriminate against individual men and women in part because of sex." *Bostock*, 140 S. Ct. at 1740–43. The same reasoning supports the interpretation that Title IX's prohibition of discrimination "on the basis of" sex would prohibit recipients from discriminating against an individual based on that person's sexual orientation or transgender status. This interpretation of Title IX is consistent with the Supreme Court's longstanding directive that "if 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).

In the months following the *Bostock* decision, two appellate courts have reached the same conclusion, citing *Bostock* to support their holdings that Title IX protects transgender students from discrimination on the basis of gender identity. *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). Other circuits reached this conclusion before *Bostock*. *See Whitaker By Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.,* 858 F.3d 1034, 1049–50 (7th Cir. 2017) (transgender boy was likely to succeed on his claim that school district violated Title IX by excluding him from the boys' restroom); *Dodds v. U.S. Dep't of Educ.,* 845 F.3d 217, 221–22 (6th Cir. 2016) (per curiam) (school district that sought to exclude transgender girl from girls' restroom was not likely to succeed on the claim because Title IX prohibits discrimination based on sex stereotyping and gender nonconformity).

After considering the text of Title IX, Supreme Court caselaw, and developing jurisprudence in this area, 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. Before reaching this conclusion, the Division considered whether Title IX "contain[s] sufficient indications" that would merit a contrary conclusion. The Division carefully considered, among other things, the dissenting opinions in

Gloucester and *Adams*, and the concerns raised in the dissents in *Bostock*. Like the majority opinions in those cases, however, 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. Whether allegations of sex discrimination, including allegations of sexual orientation or gender identity discrimination, constitute a violation of Title IX in any given case will necessarily turn on the specific facts, and therefore this statement does not prescribe any particular outcome with regard to enforcement.

I hope this memorandum provides a starting point for your agencies to ensure the consistent and robust enforcement of Title IX, in furtherance of the commitment that every person should be treated with respect and dignity. The Civil Rights Division is available to answer any questions your agencies have as you implement Title IX's protections against sexual orientation and gender identity discrimination.

EXHIBIT C

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 Sarah Ford, her mother; **A.F.,** a minor, by Sarah 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 SUPPLEMENTAL 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.

3. I am submitting this supplemental declaration to outline ACSI's status as a membership association and to more specifically outline the effects of the Interpretation and Fact Sheet on three specific member schools.

ACSI is a membership organization

4. Membership in ACSI is limited to individuals and schools that subscribe

to ACSI's shared Statement of Faith. In addition, member schools must agree to abide by ACSI's shared Code of Conduct and make further affirmations with respect to certain policies, including that all of the school's "personnel and board members are followers of Christ who acknowledge Jesus as Lord and Savior." ACSI also maintains written mission and vision statements, as well as a written "3 Pillars" strategic plan. All of these materials are available on ACSI's website. Accordingly, ACSI serves a discrete community of Christian schools with a definable set of common interests in Christian education.

5. ACSI members are required to pay annual dues based on school type and size in order to fund the organization's activities. Membership dues account for approximately 32% of ACSI's annual budget. In addition, while ACSI offers educational products, services, and events to non-members, members of the organization are the primary users of those materials. Between membership dues and fees associated with specific products, services, and events, members finance more than 82% of ACSI's annual budget.

6. The primary beneficiaries of ACSI's activities are its members. From developing academic curricula to organizing extra-curricular events like art and choral festivals to certifying teachers and accrediting schools to providing public policy and advocacy resources, ACSI's operations are focused on helping its member schools flourish and provide exemplary Christian education experiences.

7. ACSI is governed by a Board of Directors, more than two-thirds of whom are current or former heads of ACSI member schools. Governance by the current and former heads of member schools has been a consistent feature and normal practice of ACSI throughout its history.

8. One of the "3 Pillars" of ACSI's strategic plan is advocacy for Christian education. To that end, ACSI has two full-time employees in Washington, DC, whose job is to advocate on behalf of ACSI member schools. Advocacy for members' shared

interests is a key benefit of ACSI membership.

Specific member schools affected by the Interpretation and Fact Sheet

9. As an example of how its members are affected by the Interpretation and Fact Sheet, ACSI can identify a member high school in Florida that maintains a robust athletics program and fields women's teams in the following sports: volleyball, cross-country, track, basketball, and softball. Based on its Christian beliefs, this school does not permit biological males to compete on its women's sports teams.

10. The school is a member of the Florida High School Athletic Association (FHSAA), which is the largest high school athletics association in Florida. The FHSAA has both public and private high schools as members. The school's women's teams and women athletes compete head-to-head against public schools for state championships, individual championships, and records.

11. The school presently benefits from Florida's Save Women's Sports laws, which protects females against competing against biological males in athletics.

12. As additional examples of how its members are affected by the Interpretation and Fact Sheet, ACSI can identify two member high schools in Idaho that maintain robust athletics programs. One fields women's teams in softball, volleyball, cross-country, basketball, track, soccer, swimming, cheerleading, and golf. The other fields women's teams in softball, volleyball, basketball, track, swimming, cheerleading, and golf. Based on their Christian beliefs, these schools do not permit biological males to compete on their women's sports teams.

13. Both schools are members of the Idaho High School Activities Association (IHSAA), which is the largest high school athletics association in Idaho. The IHSAA has both public and private high schools as members. Both schools' women's teams and women athletes compete head-to-head against public schools for state championships, individual championships, and records.

14. Both schools presently benefit from Idaho's Save Women's Sports laws,

which protect females against competing against biological males in athletics.

15. These three schools are similarly situated to many other ACSI schools that compete in their state's premier athletics association against public schools and are currently protected from unfair competition by state Save Women's Sports laws. I am not identifying the name of the particular schools described in this Declaration because of the schools' legitimate fear of retaliation.

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

David Balik, Ed.D.