No. 21-1365

In the United States Court of Appeals for the Second Circuit

Selina Soule, a minor, by Bianca Stanescu, her mother; Chelsea Mitchell, a minor, by Christina Mitchell, her mother; Alanna Smith, a minor, by Cheryl Radachowsky, her mother; Ashley Nicoletti, a minor, by Jennifer Nicoletti, her mother,
Plaintiffs-Appellants,

v.

Connecticut Association of Schools, Inc. D/B/A Connecticut Interscholastic Athletic Conference; Bloomfield Public Schools Board of Education; Cromwell Public Schools Board of Education; Glastonbury Public Schools Board of Education; Canton Public Schools Board of Education; Danbury Public Schools Board of Education,
Defendants-Appellees,

Andraya Yearwood; Thania Edwards, on behalf of her daughter, T.M.; Commission on Human Rights and Opportunities,
Intervenor-Defendants-Appellees.

On Appeal from the United States District Court
for the District of Connecticut, Case No. 3:20-cv-00201 (RNC)

EN BANC AMICUS BRIEF OF PARENTS DEFENDING EDUCATION IN SUPPORT OF APPELLANTS

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Amicus Curiae Parents Defending Education hereby certifies that it has no parent company and no publicly held corporation owns 10% or more of its stock.

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INTEREST OF *AMICUS CURIAE*[1]

Parents Defending Education ("PDE") is a nationwide, grassroots membership organization consisting largely of parents of school-aged children. PDE's mission is to prevent the politicization of K-12 education, including government attempts to limit personal and professional developmental opportunities for female students in service to radical ideologies. PDE furthers this mission through network and coalition building, disclosure of harmful school policies, advocacy, and, if necessary, litigation.

This case directly implicates PDE's mission, and its outcome will have real-world consequences for PDE's members. Title IX was enacted to prevent discrimination against and ensure equal opportunities for female students. By any metric, it has been wildly successful in achieving that purpose. Over the past five decades, Title IX has "precipitated a virtual revolution for girls and women in sports" and spurred "significant increases in athletic participation" at "all levels of education." Deborah Brake, *The Struggle for Sex Equality in Sport and the Theory Behind Title IX*, 34 U. Mich. J. L. Reform 13, 15 (2000). Indeed, "the number of girls playing high school sports [increased] from one in twenty-seven" in 1972 to "one in three" by 2000. *Id.*

This new era of opportunity has provided measurable benefits for adolescent girls and their families. "Girls who play sports stay in school longer, suffer fewer health problems, enter the labor force at higher rates, and are more likely to land better jobs.

[1] All parties have consented to the filing of this brief. This brief was not authored in whole or in part by counsel for a party. No person other than the amicus made a monetary contribution intended to fund the preparation or submission of this brief.

They are also more likely to lead." Beth A. Brooke-Marciniak & Donna de Varona, *Amazing Things Happen When You Give Female Athletes the Same Funding as Men*, World Econ. F. (Aug. 25, 2016), https://bit.ly/3LSqCle.

The Connecticut Interscholastic Athletic Conference's unprecedented policy—and the district court and panel opinions upholding it—will reverse this progress by effectively eliminating single-sex athletics throughout the state. By conditioning eligibility for girls' sports based on a student's internal perception of gender rather than their biological sex, the policy eliminates Title IX's guarantee of "equal athletic opportunity for members of both sexes." 34 C.F.R. §106.41. Federal courts and common-sense observers have long recognized that, "due to average physiological differences, males [will] displace females to a substantial extent if they [are] allowed to compete" in women's sports, and that "athletic opportunities for women [will] be diminished" as a result. *Clark, By & Through Clark v. Arizona Interscholastic Ass'n*, 695 F.2d 1126, 1131 (9th Cir. 1982). That is exactly what happened to the plaintiffs in this case, and what will continue to happen to children across the Second Circuit if the policy is upheld.

SUMMARY OF ARGUMENT

Congress passed Title IX to ensure that female students in the United States could access the same benefits and opportunities enjoyed by male students. As one might expect, Title IX recognizes two categories of students: males and females. Consistent with its purpose, the law repeatedly speaks about benefits provided by "one

sex" versus "the other sex," and sometimes references "both sexes." Title IX, by its very nature, is comparative: it requires school administrators—and the courts overseeing them—to compare the opportunities afforded to one group with the opportunities afforded to another.

It is impossible to compare two things, however, if neither has a verifiable definition. The issue before the Court in this case is straightforward: what did Congress mean when it required equal treatment for members of each "sex"? The panel opinion tried to sidestep this question by invoking the Supreme Court's decision in *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020). But *Bostock* interpreted a different statute—with a different structure and different purpose—and the Court specifically disavowed that its reasoning was controlling for Title IX purposes.

The plain text, structure, history, and purpose of Title IX all point to one conclusion: that "sex" refers to biological and inalterable differences between males and females. As the Eleventh Circuit recently observed, "[t]here simply is no alternative definition of 'sex' for transgender persons as compared to nontransgender persons under Title IX." *Adams by & through Kasper v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 813-14 (11th Cir. 2022) (en banc). Because CIAC's policy fails to provide equal opportunities for both sexes, plaintiffs have properly alleged an injury under Title IX and the district court's dismissal of this case must be reversed.

ARGUMENT

I. The Supreme Court's decision in *Bostock v. Clayton County* does not authorize schools to condition eligibility for women's athletics on gender identity instead of biological sex.

Title IX of the Education Amendments of 1972 prohibits educational institutions that receive federal funds from excluding, denying the benefits of a program or activity, or otherwise discriminating against individuals "on the basis of sex." 20 U.S.C. §1681, *et seq.*

While Title IX does not itself mention sports, its implementing regulations clarify that the law's protections extend to student athletics. *See* 34 C.F.R. §106.41(a) ("No person shall, on the basis of sex, be excluded from participation in ... any interscholastic, intercollegiate, club or intramural athletics."). Importantly, Congress specifically mandated the creation of those regulations only two years after it enacted Title IX. In 1974, Congress passed the Javits Amendment, which directed the Department of Education to promulgate rules "implementing the provisions of Title IX," including "reasonable provisions considering the nature of the particular sports." Public Law 93–380 (HR 69), Section 844, 88 Stat 484 (Aug. 21, 1974). To ensure that the Department fulfilled Title IX's purpose, the Javits Amendment stated that Congress would review the sports-related regulations to assess whether they were "inconsistent with the Act from which [they] derive[] [their] authority." *Id.*

Put simply, Title IX requires any school that receives federal funds to provide equal athletic opportunities to students of each sex. Basic canons of statutory interpretation leave no doubt that Title IX's use of the term "sex" refers to a binary

classification based on biological differences between males and females. To parse the meaning of a statute, courts must "interpret [its] words consistent with their ordinary meaning at the time Congress enacted the statute." *Wis. Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2070 (2018) (cleaned up). The "overwhelming majority of dictionaries" when Title IX was enacted "define[d] 'sex' on the basis of biology and reproductive function." *Adams*, 57 F.4th at 812 (listing definitions from six contemporary dictionaries); *see also Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) ("[S]ex, like race and national origin, is an *immutable characteristic* determined solely by the accident of birth" (emphasis added)).

This straightforward interpretation is also supported by other sections of the law. *See Util. Air Regul. Grp. v. E.P.A.*, 573 U.S. 302, 321 (2014) ("[R]easonable statutory interpretation must account for both the specific context in which language is used and the broader context of the statute as a whole." (cleaned up)). Section 1681(a)(2), for instance, distinguishes between "institution[s] which admit[] only students of one sex" and "institution[s] which admit[] students of *both sexes*." 20 U.S.C. §1681(a)(2) (emphasis added). Section 1681(a)(8) likewise refers to sex in binary terms. Under that provision, if father-son or mother-daughter activities are provided for "one sex," then reasonably comparable activities must be provided for "the other sex." §1681(a)(8).

A common-sense understanding of "sex" under Title IX is also reinforced by the law's implementing regulations. For example, Title IX regulations specify that discrimination against a student "on the basis of pregnancy" constitutes discrimination

"on the basis of sex." 34 C.F.R. §106.40(b)(1); *see* 20 U.S.C. §1682. Federal courts have recognized this rule as a valid corollary to Title IX's ban on sex-based discrimination, based on the understanding that "sex" refers to "the 'structural' and 'functional' differences between male and female bodies." *Conley v. Nw. Fla. State College*, 145 F. Supp. 3d 1073, 1077 (N.D. Fl. 2015); *see also Muro v. Bd. of Supervisors of Louisiana State Univ. & Agric. & Mech. Coll.*, 2019 WL 5810308, at *3 (E.D. La. Nov. 7, 2019) ("[A]n adverse action taken against a student on the basis of pregnancy or pregnancy-related conditions is taken *because of* her sex." (emphasis original)). Indeed, the reference to "sex" in this context could not possibly contemplate gender identity because biological males are incapable of pregnancy no matter how they identify. Mirroring the language contained in the statute itself, Title IX regulations also frequently refer to sex in binary and biological terms. *See*, *e.g.*, 34 C.F.R. §106.33 (authorizing "separate toilet, locker room, and shower facilities on the basis of sex" but specifying that "such facilities provided for students of one sex shall be comparable to such facilities provided to students of the other sex").

Title IX regulations also contain a provision authorizing sex-specific competitions when "contact sports" are involved. 34 C.F.R. §106.41(b). The regulations define "contact sports" to include boxing, football, and any "other sports the purpose or major activity of which involves bodily contact." *Id.* The wisdom of this rule is intuitive if "sex" refers to biological characteristics. But separating contact sports by sex makes no sense if "sex" is unmoored from physical differences and determined entirely

by each student's internal sense of their gender. If Title IX's protections turned on a particular student's self-identification instead of his or her physical attributes, limiting participation in contact sports to one group but not the other would make no sense.[2]

Based on this overwhelming evidence, the legal conclusion here is straightforward: Title IX and its attendant regulations require schools to provide equal opportunities to male and female students; the equality of those opportunities is evaluated in the context of biological sex; and CIAC's policy fails that standard because it allows biological males to compete in girls' athletic competitions. *See, e.g.*, Doriane Lambelet Coleman, et al., *Re-affirming the Value of the Sports Exception to Title IX's General Non-Discrimination Rule*, 27 Duke J. Gender L. & Pol'y 69, 87–88 (2020) ("[I]t is neither myth nor outdated stereotype that there are inherent differences between those born male and those born female and that those born male, including transgender women and girls, have physiological advantages in many sports.").

Contra the panel opinion, the Supreme Court's decision in *Bostock v. Clayton County* changes none of this. In *Bostock*, the Court held that discrimination "because of sex" under Title VII prohibited employers from terminating employees because of their

[2] By way of example, an elite male lacrosse player can shoot a lacrosse ball between 80-95 miles-per-hour. For this reason, goalies in men's lacrosse games wear helmets and chest protectors to prevent serious injury from projectiles flying towards them at 130 feet-per-second. An elite female lacrosse player, by contrast, shoots the same ball at least 20-30 miles-per-hour slower. Thus, goalies in female lacrosse games have no need for head and chest protection and only wear protective eyeglasses. Under CIAC's policy, however, a 14-year-old female lacrosse goalie with no protective equipment could be forced to stare down high-velocity shots from a 17-year-old, biologically male competitor.

transgender status. *See* 140 S. Ct. 1731, 1739 (2020). The Court "agree[d] that homosexuality and transgender status are distinct concepts from sex," but it concluded that firing employees "based on homosexuality or transgender status" still triggers Title VII's protections because the employer's action "necessarily entails" a decision "made in part because of the affected individuals' sex." *Id.* at 1746-47. The Court's decision thus rested on the premise that sex is binary and immutable, and that an employee's biological sex is a necessary component of any determination about whether "discrimination because of sex" has occurred under Title VII. Put differently, whether an adverse action against a transgender employee violates Title VII under *Bostock* depends not on the specific nature of the employee's gender identity but instead on how the *employer* treats the employee as compared to *other employees of the same biological sex*.

Bostock's reasoning is inapplicable to this case for at least four reasons. First, the Court "proceed[ed] on the assumption that 'sex' … refer[red] only to biological distinctions between male and female." *Id.* at 1739. Second, "[t]he *Bostock* decision only addressed sex discrimination under Title VII; the Supreme Court expressly declined to 'prejudge' how its holding would apply to 'other federal or state laws that prohibit sex discrimination' such as Title IX." *Tennessee v. United States Dep't of Educ.*, 2022 WL 2791450, at *15 (E.D. Tenn. July 15, 2022) (quoting *Bostock*, 140 S. Ct. at 1753). Third, Title IX and its implementing regulations contain several carve-outs specific to biological sex that are not present in Title VII. Finally, Title IX's application to single-sex athletics does not involve the "but-for causation" factor underlying the Court's narrow ruling in *Bostock*.

For this reason, several federal courts have recognized that "the rule in *Bostock* extends no further than Title VII." *Pelcha v. MW Bancorp, Inc.,* 988 F.3d 318, 324 (6th Cir. 2021); *see also Bear Creek Bible Church v. Equal Emp. Opportunity Comm'n*, 571 F. Supp. 3d 571, 621 (N.D. Tex. 2021) (similar). For example, the Eleventh Circuit recently rejected a Title IX challenge to a school district policy requiring students to use bathrooms based on their biological sex, rather than their gender identity. *See Adams*, 57 F.4th at 811. In the process, the en banc court held that *Bostock*'s reasoning was inapplicable in the Title IX context. *See id.* ("We cannot, as the Supreme Court did in *Bostock*, decide only whether discrimination based on transgender status necessarily equates to discrimination on the basis of sex."). *Bostock* was distinguishable, the court held, "because Title IX, unlike Title VII, includes express statutory and regulatory carve-outs for differentiating between the sexes." *Id.* The Eleventh Circuit noted that if Title IX's reference to "'sex' were ambiguous enough to include 'gender identity,'" then those "carve-out[s], as well as the various carveouts under the implementing regulations, would be rendered meaningless." *Id.* at 813.

The Department of Education also evaluated Title IX's scope in the immediate aftermath of *Bostock* and concluded that the Court's decision did not change the decades-long consensus that Title IX's protections are grounded in biological sex. In a January 2021 memorandum, the Department reiterated that its "longstanding construction of the term 'sex' in Title IX to mean biological sex, male or female, is the only construction consistent with the ordinary public meaning of 'sex' at the time of

Title IX's enactment." U.S. Dep't of Educ. Office for Civil Rights, *Memorandum re: Bostock v. Clayton Cnty.*, 1 (Jan. 8, 2021), https://bit.ly/3AsVNw0 ("*Bostock* Memo"). The Department noted that "Title IX text is very different from Title VII text in many important respects." *Id.* Like the Sixth and Eleventh Circuits and other federal courts, the *Bostock* Memo also pointedly observed that the Supreme Court "decided [*Bostock*] narrowly, specifically refusing to extend its holding to Title IX and other differently drafted statutes." *Id.* The *Bostock* Memo emphasized that "[u]nder Title IX and its regulations, a person's biological sex *is* relevant for the considerations involving athletics, and distinctions based thereon are permissible." *Id.* at 7 (emphasis original). The Department further specified that "schools *must* consider students' biological sex when determining whether male and female student athletes have equal opportunities to participate." *Id.* (emphasis added).

The January 2021 *Bostock* Memo was consistent with the Department's other pronouncements in 2020. On October 16, 2020, for instance, the Department Office of Civil Rights settled a complaint against Franklin Pierce University, which had alleged that the University violated Title IX by "den[ying] female student-athletes equal athletic benefits and opportunities by permitting transgender athletes to participate in women's intercollegiate athletic teams." U.S. Department of Education, Office of Civil Rights, *Letter to Kim Mooney*, 1 (Oct. 16, 2020), https://bit.ly/3LU4cjr. The settlement agreement required the University "to rescind the Policy [and] cease any and all practices related

thereto." *Id.* at 6. The terms of the settlement notwithstanding, the Department took the opportunity to make its views known:

> [I]f *Bostock*'s reasoning under Title VII were applied to policies regarding single-sex sports teams under Title IX, it would *confirm that the Department's regulations authorize single-sex teams only based on biological sex*. In *Bostock*, the Court took the position that "homosexuality and transgender status are inextricably bound up with sex," such that "when an employer fires an employee for being homosexual or transgender, it necessarily and intentionally discriminates against that individual in part because of sex." Under that logic, special exceptions from single-sex sports teams based on homosexuality or transgender status would themselves generally constitute unlawful sex discrimination, because homosexuality and transgender status are not physiological differences relevant to the separation of sports teams based on sex. In other words, if *Bostock* applies, it would require that a male student-athlete who identifies as female not be treated better or worse than other male student-athletes. If the school offers separate-sex teams, the male student-athlete who identifies as female must play on the male team, just like any other male student-athlete.

Id. at 5 (emphasis added).

Although the panel identified two circuit cases interpreting Title IX to include gender identity, neither case is persuasive here. The first case, out of the Seventh Circuit, was decided two and a half years before *Bostock* and relied exclusively on Title VII precedents cobbled from disparate cases. *See Whitaker By Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1047 (7th Cir. 2017). As explained above, the analysis for a workplace discrimination claim under Title VII is materially different from the Title IX inquiry. And, as also explained above, *Bostock* itself analyzed Title VII's application to gender identity and expressly declined to apply its reasoning to Title IX. Thus, the Seventh Circuit's decision in *Whitaker* is no help to CIAC here.

The second opinion cited by the panel—the Fourth Circuit's 2-1 decision in *Grimm v. Gloucester County School Board*, 972 F.3d 586 (4th Cir. 2020)—held that a school district policy violated Title IX by requiring students to use bathrooms that align with their biological sex. *Grimm* is an outlier, however, because the majority cited *Bostock* but dedicated "scant analysis" connecting the Court's opinion in that case to the peculiarities of Title IX and "did not elaborate further." *Neese v. Becerra*, --- F. Supp. 3d ---, 2022 WL 16902425, at *6 (N.D. Tex. Nov. 11, 2022). The Fourth Circuit's conclusory statement in that case pales in comparison to the methodical assessment provided by the Eleventh Circuit's en banc opinion in *Adams*.

In sum, "[t]here simply is no alternative definition of 'sex' for transgender persons as compared to nontransgender persons under Title IX," *Adams*, 57 F.4th at 814, and CIAC's attempt to manufacture one is unlawful.

CONCLUSION

This Court should reverse the district court's dismissal of Plaintiffs' complaint.

Dated: March 30, 2023

Respectfully Submitted,

/s/ J. Michael Connolly

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CERTIFICATE OF COMPLIANCE

This brief complies with Rule 32(a)(7)(B) because it contains 3,116 words, excluding the parts that can be excluded. This brief also complies with Rule 32(a)(5)-(6) because it has been prepared in a proportionally spaced face using Microsoft Word 2016 in 14-point Garamond font.

Dated: March 30, 2023 */s/ J. Michael Connolly*

CERTIFICATE OF SERVICE

I filed this brief with the Court via ECF, which will email everyone requiring notice.

Dated: March 30, 2023 */s/ J. Michael Connolly*