

No. 23-16026 c/w No. 23-16030

In the United States Court of Appeals
for the Ninth Circuit

HELEN DOE, PARENT AND NEXT FRIEND OF JANE DOE, ET AL.,
Plaintiffs-Appellees,

v.

THOMAS C. HORNE, IN HIS OFFICIAL CAPACITY AS
STATE SUPERINTENDENT OF PUBLIC INSTRUCTION, ET AL.,
Defendants-Appellees,

WARREN PETERSEN, SENATOR,
PRESIDENT OF THE ARIZONA STATE SENATE; BEN TOMA, REPRESENTATIVE,
SPEAKER OF THE ARIZONA HOUSE OF REPRESENTATIVES,
Intervenor-Defendants-Appellees.

Appeal from the United States District Court for the District of Arizona
Honorable Jennifer G. Zipps
(4:23-cv-00185-JGZ)

**BRIEF OF *AMICUS CURIAE* INDEPENDENT WOMEN'S LAW
CENTER SUPPORTING DEFENDANTS-APPELLANTS**

JENNIFER C. BRACERAS
INDEPENDENT WOMEN'S LAW CENTER
1802 Vernon Street NW, Suite 1027
Washington, DC 20009
(202) 807-9986
jennifer.braceras@iwf.org

GENE C. SCHAERR
Counsel of Record
ANNIKA BOONE BARKDULL
SCHAERR | JAFFE LLP
1717 K St. NW, Suite 900
Washington, DC 20006
(202) 787-1060
gschaerr@schaerr-jaffe.com

Counsel for Amicus Curiae

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, *Amicus* has no parent corporation and no stock.

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INTRODUCTION AND INTEREST OF *AMICUS CURIAE*¹

Allowing even a single biological male to compete on a women's team or in a women's event injures female athletes in multiple ways.

- If a biological male is offered a spot on a women's team with limited roster spots, a female athlete loses a roster spot;
- If a biological male is allowed to take the field with a women's team, a female athlete loses playing time;
- If a biological male is allowed to race in a women's event with limited heats, a female athlete loses the opportunity to compete;
- If a biological male wins a women's event, a female athlete loses a trophy and a spot on the podium;
- And if a biological male is granted a women's athletic scholarship, a female athlete may lose a chance to attend the college of her dreams.

This isn't fair. In fact, it's discriminatory, and it violates the very statute (Title IX) that Appellees argue requires these results.

But that's not all. Allowing biological males to compete in women's sports contradicts the underlying premise and legal basis for women's sports and, thus, threatens to destroy them altogether.

¹ No counsel for a party authored this brief in whole or in part, and no person other than *amicus*, its members, or its counsel made a monetary contribution intended to fund the brief's preparation or submission. All parties consented to the filing of this brief.

The threat to women's sports is of particular concern to *Amicus* Independent Women's Law Center (IWLC), which is a project of Independent Women's Forum (IWF), a nonprofit, non-partisan 501(c)(3) organization founded by women to foster education and debate about legal, social, and economic policy issues. IWF promotes access to free markets and the marketplace of ideas and supports policies that expand freedom, especially on matters of particular concern to women. IWLC supports this mission by advocating for a legal regime that protects equal opportunity, individual liberty, and women's sex-based rights.

IWLC writes here to describe the harm that the district court's injunction does to the public interest in single-sex sports and to explain that, far from violating Title IX, Arizona's Save Women's Sports Act serves Title IX's purpose in preserving equal opportunity for female athletes.

SUMMARY OF ARGUMENT

Martina Navratilova, winner of 18 Grand Slam Tennis singles titles, has noted that, “sex segregation is the only way to achieve equality for girls and women.”² Without their own teams, female students simply will not have the same opportunities as male students to participate in athletics, as required by Title IX of the Education Amendments of 1972.

Arizona’s Save Women's Sports Act (“the Save Women’s Sports Act” or “the Act”), A.R.S. § 15-120.02, fulfills Title IX’s equal opportunity mandate by protecting the integrity of the female sporting category. The Act does not “ban” any student from participating in sports, nor does it prohibit mixed-sex athletic teams. It simply requires that teams designated for women and girls be open solely to students who are biologically female.

The court below held that the Save Women’s Sports Act violates Title IX’s prohibition of discrimination “on the basis of sex.”³ In fact, just

² Jennifer C. Bracerias, *On the anniversary of Title IX, are women’s sports in jeopardy?*, The Hill (June 3, 2023), <https://tinyurl.com/3x2395xf>.

³ This brief uses the term “sex” to refer to one’s biological sex recognized at birth. It uses the term “woman” to mean an adult human female, and the term “female” to mean the biological sex that produces ova or eggs. It uses the phrase “male-bodied athlete” to clarify the sex of

the opposite is true: The Act ensures that schools follow Title IX's command to provide equal opportunity for women and girls in athletics.

In granting the injunction, the district court got both the facts and the law wrong. It clearly erred by minimizing evidence that, even before puberty, there is a male-female gap in athletics. And it misapplied *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020) and this Court's precedents to support its finding of a Title IX violation. Affirming that decision would harm female athletes, prevent schools from fulfilling their obligations under Title IX and threaten the very existence of single-sex sports.

For the reasons explained below and by Appellants, this Court should reverse.

a biological male (trans-identified or not) who is competing (or seeking to compete) on a women's team.

ARGUMENT

I. Title IX Was Enacted To Increase Opportunities for Women and Girls, Not To Reduce Them.

Congress passed Title IX to end unjust sex discrimination in education and to expand educational opportunities for women and girls. *See Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 286 (1998) (one of Title IX’s principal objectives was “[t]o avoid the use of federal resources to support discriminatory practices”); *McCormick ex rel. McCormick v. Sch. Dist. of Mamaroneck*, 370 F.3d 275, 286, 295 (2d Cir. 2004) (“Title IX was enacted in response to evidence of pervasive discrimination against women with respect to educational opportunities”). Congress did *not* pass this landmark protection to force females to compete for resources and playing time against male-bodied athletes, trans-identified or not, who have inherent physical advantages and have long had abundant athletic opportunities.

A. Title IX Remedies the Historical Denial of Opportunities for Female Athletes.

Title IX prohibits discrimination in all aspects of the educational experience. 20 U.S.C. § 1681. And there is no question that, before Title IX, “girls and women were historically denied opportunities for athletic competition based on stereotypical views that participating in highly

competitive sports was not ‘feminine’ or ‘ladylike.’” *McCormick*, 370 F.3d at 295; *see also* Doriane Lambelet Coleman, *Sex in Sport*, 80 *Law & Contemp. Probs.* 63, 84 (2017) (“In the beginning, females were classified out of sport—that is, they were excluded entirely because of sex.”) [hereinafter “*Sex in Sport*”].

To rectify that problem, Title IX’s athletic regulations require that schools “provide equal athletic opportunity for members of both sexes.” 34 C.F.R. § 106.41(c). Because of the unique nature of sport, separating athletes on the basis of sex advances this equal opportunity mandate. The regulations, therefore, expressly permit single-sex teams. *Id.* at § 106.41(b).

The requirement that schools provide equal athletic opportunity for members of both sexes is not limited to the opportunity to play. *See id.* at § 106.41(c) (citing factors Department of Education will consider in evaluating program). As the Second Circuit has recognized, because “[a] primary purpose of competitive athletics is to strive to be the best,” Title IX requires that schools provide girls with the same “chance to be champions” they provide boys. *McCormick*, 370 F.3d at 295.

B. Single-Sex Teams Are Critical to Providing Women and Girls Opportunity in Sports.

The premise behind sex-specific sports is the simple scientific reality that, on average, males are stronger, faster, and more powerful than females.⁴ The significant and enduring male-female athletic gap is well-documented. *See* Indep. Women’s Forum & Indep. Women’s Law Ctr., *Competition: Title IX, Male-Bodied Athletes, and the Threat to Women’s Sports* (2nd Edition) 35-37 [hereinafter *Competition 2.0*], available at <https://www.iwf.org/competition-report/> (collecting numerous scientific studies on the male athletic advantage).

1. Given these “enduring” “[p]hysical differences between men and women,” *United States v. Virginia*, 518 U.S. 515, 533 (1996), female athletes simply will not have the same “chance to be champions” if forced to compete against male-bodied athletes. Title IX and its regulations thus play a crucial role in leveling the proverbial playing field by adopting a

⁴ The male-female athletic differential is not the result of human variation between top athletes and non-athletes. Nor is it the result of socialization, unequal opportunity, or lack of funding. Rather, the male-female athletic gap is almost entirely the result of biology. *See* Indep. Women’s Forum & Indep. Women’s Law Ctr., *Competition: Title IX, Male-Bodied Athletes, and the Threat to Women’s Sports* 25 (2nd Edition [hereinafter *Competition 2.0*], available at <https://www.iwf.org/competition-report/>).

binary approach to athletics that explicitly contemplates separate teams for males and females.

That binary approach has worked. It has “chang[ed] society’s view of female athletes” by “showcas[ing] their athletic ability and competitiveness.” *Parker v. Franklin Cnty. Cmty. Sch. Corp.*, 667 F.3d 910, 916 (7th Cir. 2012). It has fostered the “realization by many that women’s sports [can] be just as exciting, competitive, and lucrative as men’s sports.” *Neal v. Bd. of Trustees of Cal. State Univ.*, 198 F.3d 763, 773 (9th Cir. 1999). But all that progress risks being unraveled if female-bodied athletes are forced to compete against male-bodied athletes. That isn’t women’s sport; it’s open sport. And open-sport has “the perverse effect of enabling non-elite boys and men to win spots and championships from elite girls and women.”⁵

The experience of 12-time All-American and 5-time SEC Champion swimmer Riley Gaines confirms these dangers.⁶ Gaines competed against Lia Thomas, a male-bodied athlete who competed on the University of

⁵ *Sex in Sport* at 97.

⁶ Letter from Riley Gaines, to Gov. Charlie Baker, President, Nat’l Collegiate Athletic Ass’n (Jan. 5, 2023), available at <https://tinyurl.com/mv9ez7eu> (hereinafter “Letter”).

Pennsylvania women’s swimming team, winning the national championship in the NCAA Division I women’s 500-yard freestyle.⁷ In the 200-yard freestyle, 5’6” Gaines beat the odds to tie 6’4” Thomas—down to a hundredth of a second—for 5th place.⁸ But Riley was told that Thomas would receive the 5th place trophy at the award ceremony for “photo purposes.”⁹

Riley was not the only female swimmer to be deprived of the honors she earned that day. Other women lost opportunities to compete and receive medals, including 5th-year senior and former finalist Reka Gyorgy, who placed 17th and thus lost a final spot to Thomas, and 9th-place finisher Tylor Mathieu who was likewise excluded from the final and thus prevented from becoming an All-American.¹⁰ As Gyorgy

⁷ *Id.*

⁸ Beverly Hallberg & Riley Gaines, *Riley Gaines: Why Competing Against Lia Thomas Isn’t Fair to Female Swimmers*, Indep. Women’s Forum (Apr. 22, 2022), <https://tinyurl.com/yf7m8wfr>. That Thomas and Gaines’s competition came down to a hundredth of a second confirms what Appellants explain (at 56)—even supposedly “minor” differences in athletic abilities can make the difference between getting a spot on a team or a podium. *Contra* 1 ER 20–22.

⁹ Letter, *supra* note 6.

¹⁰ Kaylee McGee White, *The Women Who Lost to Lia Thomas*, Indep. Women’s Forum (Mar. 21, 2022), <https://tinyurl.com/3v26a2ry>.

explained, every event a male-bodied athlete competed in “was one spot taken away from biological females.”¹¹

2. The district court erred in holding that biological males who have not experienced puberty have no athletic advantage over girls. In fact, the district court was presented with compelling evidence that even biological males like Plaintiffs who have not experienced male puberty still have an athletic advantage over females.¹² At least one study of males treated with puberty blockers as young as 12, followed by hormone treatment at 16, found that early intervention did not reduce height, lean body mass, or grip strength to age-matched female levels. *Competition 2.0* at 39. The district court was presented with, and clearly erred by minimizing, such evidence. *See* Appellants’ Br. 51–59.

The district court also ignored evidence that female bodies have distinct and significant athletic *disadvantages* that biological males cannot create for themselves. For example, female athletes “must

¹¹ *Id.*

¹² A review of fitness data from Australian children reveals that, when compared with 9-year-old females, 9-year-old males were 9.8% faster over short sprints, were 16.6% faster over a mile, could jump 9.5% further from a standing start, could complete 33% more push-ups in 30 seconds, and had a 13.8% stronger grip. 1 ER 186–87; *Competition 2.0* at 39.

typically deal with the effects of the menstrual cycle and the cyclical effects of hormones on training capacity and performance,” which is “known to affect cardiovascular, respiratory, brain function, response to ergogenic aids, orthopedics, and metabolic parameters.” 2 ER 132. That is “a barrier to athletic capacity not experienced by males”—even those like Plaintiffs who take puberty blockers. *Ibid.* For these and other reasons, even biological males who never experience male puberty are likely to have an athletic advantage over females. *Competition 2.0* at 39.

3. Even putting aside the question of whether younger biological males have an athletic advantage over female athletes significant enough to render their participation in girls’ sports unfair, their participation nevertheless excludes female athletes in violation of Title IX. On competitive teams with limited roster spots, the participation of a single male-bodied athlete takes a spot from a female athlete. It also takes away playing time from female players.¹³ This undermines the primary

¹³ See *Sex in Sport* at 97–98 & nn.173–76. See also Appellants’ Br. at 44 (explaining that preventing the displacement of biological female athletes is also a purpose of the Save Women’s Sports Act, and that service of that goal is relevant to the constitutionality of the Act).

objective of Title IX: providing equal opportunities to both males and females in all aspects of the educational experience, including sports.

II. Interpreting Title IX To Require Women’s Sports Teams To Roster Trans-Identifying Biological Males Contradicts the Express Statutory and Regulatory Language.

To provide equal educational opportunities to men and women, Title IX prohibits discrimination on the basis of a single characteristic: “sex.” Imbuing Title IX with extratextual requirements based on “gender identity” or any other trait not mentioned in the statute would collapse the regulatory scheme in on itself. Neither *Bostock* nor this Court’s precedent supports that unacceptable result.

A. Title IX Is Premised on a Binary Concept of Biological Sex.

The text of Title IX and its accompanying regulations adopt a biological and binary definition of sex. *See* 20 U.S.C. § 1681(a); *Sex in Sport* at 69 n.29. Indeed, immediately after prohibiting discrimination on the basis of “sex,” the statute refers to “both sexes,” 20 U.S.C. § 1681(a)(2), a phrase that would make no sense if the term “sex” were being used to describe the range of identifications included within the concept of gender identity.

The statute likewise refers to “Men’s” and “Women’s” organizations, “the membership of which has traditionally been limited to persons of one sex.” 20 U.S.C. § 1681(a)(6)(B). And it requires that, if opportunities “are provided for students of one sex, opportunities for reasonably comparable activities shall be provided for students of *the other sex*,” *id.* §1681(a)(8) (emphasis added). The regulations governing sports are in accord. *See* 34 C.F.R. § 106.41(c) (requiring institutions to “provide equal athletic opportunity for members of both sexes”); *see also id.* § 106.41(b) (referring to members of the “excluded sex,” singular). There can be no question, therefore, that the statute adopts a binary concept of sex based on biology. And, as shown below, applicable precedent does not hold otherwise.

B. Because Male and Female Athletes Are Not Similarly Situated, *Bostock* Does Not Support Finding a Title IX Violation Here.

The district court erroneously imported *Bostock*’s holding regarding employment discrimination under Title VII to support its injunction against the Save Women’s Sports Act. 1 ER 32. But this case concerns an entirely different context—school athletics—under an entirely different

statutory scheme—Title IX. It therefore requires a different analysis, not rote application of *Bostock*.

As the *Bostock* court made clear, “[a]n individual employee’s sex is not relevant to the selection, evaluation, or compensation of employees.” 140 S. Ct. at 1741 (internal quotation marks and citation omitted). And an employer violates Title VII’s prohibition on sex discrimination when it intentionally penalizes a person for traits or actions that it tolerates in a similarly-situated employee of the opposite sex.¹⁴ This is no less true when the employee is transgender. *Id.* at 1741 (employer violates statute when it “intentionally penalizes a person identified as “male at birth for traits or actions that it tolerates in an employee identified as female at birth”). In other words, *Bostock* adopts a but-for test, whereby an employer who would not have fired an employee for presenting at work as a woman but for the fact that the employee was born male, has discriminated in violation of Title VII. *Id.* at 1739.

¹⁴ It is important to note that the Court in *Bostock* did *not* define sex to mean anything other than biological sex at birth. To the contrary, it proceeded on the assumption that the term “refer[s] only to biological distinctions between male and female.” 140 S. Ct. at 1739; *see also id.* at 1746–47.

But while an individual’s “sex is not relevant to the selection, evaluation, or compensation of employees,” it is highly relevant to athletics. In fact, it is often dispositive. That is why Title IX does not require a sex-blind environment. To the contrary, and as explained above, both Title IX and its regulations explicitly refer to sex in a binary way, contemplating that schools will offer—and need to offer—separate sex-based teams in order to comply with the requirement that they provide *equal* athletic opportunities for *both* sexes. *See* 34 C.F.R. § 106.41 (b)–(c).

As the Supreme Court has held, “[d]iscrimination” in the legal sense involves treating “similarly situated” people differently. *Bostock*, 140 S. Ct. at 1740. As Title IX recognizes, however, different treatment of the sexes is warranted when it comes to athletics because the two sexes are *not* similarly situated. *Bostock*’s conclusion that employment discrimination against a trans-identified person “necessarily entails discrimination based on sex” under Title VII, *id.* at 1747, is thus inapplicable to the athletics governed by Title IX. *See Kleczek v. R. I. Interscholastic League, Inc.*, 612 A.2d 734, 738 (R.I. 1992) (“Because of innate physiological differences, boys and girls are not similarly situated

as they enter athletic competition.”); *cf. Bauer v. Lynch*, 812 F.3d 340, 350 (4th Cir. 2016) (“Men and women simply are not physiologically the same for the purposes of physical fitness programs”). Here, the Save Women’s Sports Act excludes Plaintiffs from the girls’ cross-country, soccer, basketball, and volleyball teams not because Plaintiffs are transgender but because they have male bodies. If this constitutes unlawful sex discrimination, then Title IX’s regulations are just as discriminatory.

C. This Court’s Precedents Do Not Support the District Court’s Decision.

Contrary to the district court’s view, this Court’s decisions do not support its assertion that “discrimination based on transgender status also constitutes impermissible discrimination under Title IX” in the athletics context. 1 ER 32 (citing *Grabowski v. Arizona Bd. of Regents*, 69 F.4th 1110, 1116 (9th Cir. 2023); *Doe v. Snyder*, 28 F.4th 103, 114 (9th Cir. 2022)).¹⁵ Both *Snyder* and *Grabowski* are inapposite.

¹⁵ *Hecox v. Little*, No. 20-35813, 2023 WL 5283127 (9th Cir. Aug. 17, 2023), was not decided when the district court issued its order. That decision did not reach the Title IX question and thus has no bearing on *amicus*’s arguments concerning that statute, which “exempts from its restrictions several activities that may be challenged on constitutional

1. As a threshold matter, the *Snyder* panel’s analysis regarding the application of *Bostock* to Title IX was quintessential dicta. The panel explicitly stated that it did not reach the merits of the plaintiff’s constitutional and Title IX challenges, and that it ruled “only that even accepting the merits of [the plaintiff’s] underlying claim of discrimination,” he had not satisfied the standard to challenge denial of an injunction. *Snyder*, 28 F.4th at 113. The panel’s subsequent discussion of *Bostock* was unnecessary to its decision, and thus does not bind this Court in this or any other case. See *United States v. Pinjuv*, 218 F.3d 1125, 1129 (9th Cir. 2000) (“We are not bound by dicta in decisions from our court or any other circuit.”). Moreover, the *Snyder* panel looked only to the similar—though not identical—phrasing in the two statutes, ignoring the structural differences between Title VII and Title IX. See Section II.A, *supra*.

Even if, however, *Snyder*’s discussion of *Bostock* were precedential, it would not support the district court’s conjuration of a Title IX violation

grounds,” and is thus narrower than the Equal Protection Clause. *Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 247 (2009). And as Appellants explain (at 37–38, 59–60), *Hecox* does not compel a finding that the Save Women’s Sports Act violates the Equal Protection Clause either.

from the requirement that only biological females, regardless of gender identity, can play on teams designated for girls. The question in *Snyder* was whether refusal to cover sex-reassignment surgery constituted sex discrimination, which has no relevance to the proper interpretation of Title IX's treatment of single-sex athletic teams—and the panel explicitly declined to forecast its thoughts on whether that denial constituted discrimination under *Bostock*, in any event. *Snyder*, 28 F.4th at 114.

2. Likewise, *Grabowski* did not confront the question presented here: that case concerned sexual orientation, not gender identity. *Grabowski*, 69 F.4th at 1116. But even if applied to gender identity, *Grabowski* holds only that discrimination based on these characteristics includes discrimination on the basis of sex. *Id.* It did not face the converse question of whether designating sports teams based on biological sex constitutes discrimination on the basis of transgender status, despite Title IX's explicit endorsement of single-sex teams.

Grabowski also relied on Title VII's theory of sex-stereotyping. *Id.* at 1117. Regardless of the merits of that theory in the context of Title IX harassment allegations, it does not apply in the context of eligibility for athletic teams. To the contrary, the Supreme Court has explained that

Title VII forbids sex stereotyping because it is an “irrational impediment[] to job opportunities.” *City of L.A., Dep’t of Water & Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978). Thus, “employment decisions cannot be predicated on mere ‘stereotyped’ impressions about the characteristics of males or females,” because those stereotypes are “fictional difference[s]” irrelevant to work. *Id.* at 707; *see also Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) (“[W]e are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group.”), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, § 107(a), 105 Stat. 1071 (codified at 42 U.S.C. § 2000e–2(m) (2012)).

On the other hand, the biological differences between men and women that undergird Title IX’s athletic regulations are neither “fictional” nor “irrational.” *See Competition 2.0* 25–39 (describing physiological differences in males and females and summarizing the scientific literature on the male athletic advantage). Ensuring that single-sex teams exist for women, as the Sports Act does, is not sex

stereotyping. It is a recognition of science and an attempt to implement Title IX, the goal of which was to increase opportunities for females.¹⁶

D. A Ruling for Appellants Is Inconsistent with the Longstanding Recognition That Title IX’s Provision for Single-Sex Teams is Constitutional.

The lower court erred for another reason: its rationale cannot be squared with longstanding precedent recognizing that single-sex sports are constitutionally permitted. As one commenter has noted, “the very constitutional basis for allowing differential treatment on the basis of sex (so long as the proper scrutiny is applied and satisfied) hinges on there being physical differences between the sexes.”¹⁷ Title IX’s provisions separating men’s and women’s sports teams are based on those differences and have been repeatedly held constitutional because they were designed to “remov[e] the legacy of sexual discrimination—

¹⁶ In that regard, the success of Title IX and its athletic regulations cannot be overstated. Prior to the passage of Title IX, only one in 27 high school girls participated in organized sports. By 2018, three in five participated. See Women’s Sports Found., *50 Years of Title IX* (2022), <https://tinyurl.com/wccu4865>. Only 31,852 women played college sports during the 1971-72 school year. During the 2021-22 school year, the number of female college athletes reached 226,212. *Competition 2.0* at 12.

¹⁷ Caleb R. Trotter, *Approaching 50 Years: Title IX’s “Competitive Skill” Exception to the Prohibition on Single-Sex Sports*, 10 Miss. Sports L. Rev. 153, 169 (2021).

including discrimination in the provision of extra-curricular offerings such as athletics.” *Equity In Athletics, Inc. v. Dep’t of Educ.*, 639 F.3d 91, 104 (4th Cir. 2011) (quoting *Kelley v. Bd. of Trs.*, 35 F.3d 265, 272 (7th Cir. 1994)). Because Title IX “directly protects the interests of the disproportionately burdened gender, it passes constitutional muster.” *Kelley*, 35 F.3d at 272 (citing *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 728 (1982)).

Courts cannot evade that constitutional command by simply waving aside demonstrated evidence of the male athletic advantage. If they could, the regulatory exception permitting single-sex teams based on the “enduring” “[p]hysical differences between men and women,” *Virginia*, 518 U.S. at 533, would fail to serve its legitimate purpose of “directly protect[ing] the interests” of girls and women. The district court’s decision was inconsistent with that framework and threatens the progress girls and women have taken decades to make under Title IX.

III. The Lower Court’s Decision Threatens the Very Existence of Single-Sex Sports.

As explained above, *Bostock* does not apply to athletics under Title IX because male and female athletes are not similarly situated. Any decision to affirm the district court and apply *Bostock*’s analysis to athletics will have far-reaching implications and jeopardize Title IX’s purpose: providing equal opportunities in athletics for female athletes.

A. Applying *Bostock*’s But-For Test to Athletics Would Open Up Women’s Sports to All Males, Not Just Those Who Identify as Women.

In *Bostock*, the Supreme Court held that an employment decision that would have been made differently “but for” an employee’s biological sex discriminates in violation of Title VII. 140 S. Ct. at 1742. Applying that test to athletics under Title IX would call into question not just individual coaching decisions about particular players, but the existence of single-sex teams altogether. That is because a coach who decides that an otherwise qualified male athlete cannot play on a women’s team is clearly making a decision that would have been different but for the student’s sex.

1. Suppose that a male student who is cut from the men’s lacrosse team then tries out for the women’s team and demonstrates that he is a

better player than any of the female students. A blind application of *Bostock* to every aspect of Title IX would forbid a coach from denying a roster spot to the athletically superior male player simply because he is male, all at the expense of the very biological girls and women Title IX is designed to protect.

It makes no difference that the district court's decision purports to apply only to biological males who receive puberty blockers: its reasoning applies equally to all males, no matter whether they have undergone male puberty *or even whether they identify as girls*. If physical differences between prepubescent boys and girls are irrelevant simply because they “overlap,” there is no justification for separating the sexes in athletics at all. True enough, as the district court asserted, some girls may be taller than average, and some males who have taken puberty blockers may be taller than average—what the district court left unspoken is that some boys who have undergone male puberty may, nevertheless, be shorter than average, and shorter than some biological females. 1 ER 21–22. If overlap is sufficient reason to declare physical differences irrelevant, then *any* male can challenge his exclusion from a female team.

2. This scenario has already occurred in sports such as field hockey, where schools tend not to offer men's teams. Schools initially created many of these programs to increase opportunities for female athletes, so as to comply with Title IX.¹⁸ But now some of those same teams have been forced to include males. In Massachusetts, for example, schools have been required to allow boys to participate on girls' field hockey teams if the schools do not offer a corresponding team for boys. Allowing males to compete on those teams has raised alarm among parents, officials, and coaches alike, not to mention the female players who have been injured or reported feeling "scared" when forced to compete against physically larger and stronger male athletes.¹⁹ In the 2010 Western Massachusetts

¹⁸ See Tom Daykin, *This Milwaukee hockey facility doesn't need ice - just girl power*, Milwaukee J. Sentinel (Feb. 7, 2017), <https://tinyurl.com/yta9dcyp> (explaining that "[s]everal universities added field hockey as a women's sport after Title IX").

¹⁹ Rick Reilly, *Not Your Average Skirt Chaser*, Sports Illustrated (Nov. 26, 2001), <https://tinyurl.com/2p97z75v> (quoting one female field hockey player as stating, after playing against a male, 220-pound former football lineman: "I was scared I don't think he has a right to come into our game and make us scared."); see Tom Fargo, *Coalition takes field hockey concerns to State House*, Bos. Herald (Jan. 23, 2020) (describing coalition of parents, coaches, and officials seeking to change rules governing boys' participation in girls' field hockey), <https://tinyurl.com/nhht2ct6>; see also *Williams v. Sch. Dist. of Bethlehem*, 998 F.2d 168, 169–70, 176–77 (3d Cir. 1993) (remanding for fact-finding on Title IX, Equal Protection, and

Division I title game, for example, a male player scored the winning goal “on a late breakaway, colliding at full speed” with the female goaltender, who experienced a concussion on the play and suffered from severe headaches for about six months.²⁰ The problems caused by males playing on girls’ teams were so acute that in 2021 the Massachusetts Interscholastic Athletic Council ratified a vote to approve Boys High School Field Hockey, although girls may still have to share the field with boys if they attend or play against schools that do not have teams for each sex.²¹

3. As explained above, Title IX does not require the dismantling of single-sex teams. Yet a growing number of women’s sports abolitionists

Pennsylvania Equal Rights Amendment challenges to school’s attempt to bar male plaintiff from playing on girls’ field hockey team).

²⁰ Mike Cullity, *Equal Rights vs. Title IX*, ESPN (June 15, 2012), <https://tinyurl.com/25wemr4p>.

²¹ Gage Nutter, *MIAA Sanctions Boys High School Field Hockey, Play Could Start in Fall 2021*, MassLive (June 10, 2021), <https://tinyurl.com/4hk6wuxu>. Girls’ swim teams have similarly been required to include male athletes, one of whom broke a female record that had previously stood for decades. See Zuri Berry, *In Massachusetts, Boys Playing on Girls Teams Causes a Ruckus*, MaxPreps (Jan. 10, 2012) (quoting holder of girls’ record broken by boy as stating: “I have held the south sectional 50 freestyle record for 26 years. That is a very long time. It’s time that that record be broken. But broken by a talented swimmer who is a girl.”), <https://tinyurl.com/bdftw3m8>.

seek to accomplish just that. Opponents of single-sex sports argue that separate men's and women's athletic teams constitute a form of segregation that damages women and girls.²² Women's sports abolitionists believe that allowing males and females to compete in separate divisions reinforces pernicious stereotypes about male and female abilities and perpetuates the presumption that sex is binary.²³ For these activists, the inclusion of transgender athletes on single-sex teams is not an end in itself; it is a vehicle for getting rid of single-sex sports in their entirety. Reflexively applying *Bostock's* but-for test to sports will help them achieve this radical objective.

²² See, e.g., Elizabeth Sharrow, *Five States Ban Transgender Girls From Girls' School Sports. But Segregating Sports By Sex Hurts All Girls*, Wash. Post (Apr. 16, 2021) (arguing that single-sex teams reinforce gender stereotypes and arguing in favor of open-sport), <https://tinyurl.com/2p9y723b>.

²³ See, e.g., Robin Ryle, *Opinion, The Case of Transgender Athletes. Why Sports Aren't Fair and That's OK*, Newsweek (Feb. 17, 2021), <https://tinyurl.com/3u7cmrzz> (asserting that "sports remain one of the last strongholds for the cult of gender differences" and suggesting that sex is not a meaningful category when it comes to competitive sport); Nancy Leong, *Against Women's Sports*, 95 Wash. U. L. Rev. 1251, 1251 (2018).

B. Schools Cannot Fulfill Their Legal Duties to Girls and Women Under Title IX if They Must Open Female Teams to Male Athletes.

In short, the district court's erroneous interpretation of the Equal Protection Clause and Title IX prevents educational institutions that receive federal funding from providing equal athletic opportunities to both sexes. Affirming that ruling would prevent such institutions from making any sex-based distinctions at all, regardless of whether such distinctions are relevant to important educational interests. Under that interpretation, schools will be required to allow athletes who were born male to compete on women's teams without restriction or exception. And yet, Title IX and its athletic regulations still require that schools provide equal athletic opportunities for "both sexes." 34 C.F.R. § 106.41(c). How can schools with limited budgets, roster spots, and scholarship money possibly satisfy both obligations? They cannot.

Nor can the Department of Education enforce Title IX in a way that both ensures equal athletic opportunity for biological females and the inclusion of trans-identified, male-bodied athletes. For example, the Department's Office for Civil Rights opened an investigation into whether Connecticut's policy allowing male-bodied athletes to participate

in women's track discriminates against female athletes.²⁴ Title IX cannot both require that athletic associations provide equal athletic opportunities for biological males and females *and* prohibit athletic associations from excluding male-bodied athletes from female teams and competitions. The statute can do one or the other, not both.

CONCLUSION

Title IX and its implementing regulations have done a world of good for females seeking athletic opportunities on par with those offered to males. Nothing in the text of those provisions or applicable precedent requires that those opportunities be offered on a sex-blind basis, to the detriment of the girls and women whom the statute was designed to advance. The court below erred in concluding otherwise and in disregarding both the public interest in single-sex sports and the harm done by enjoining application of the Save Women's Sports Act.

This Court should vacate the injunction and reverse the decision of the district court.

²⁴ The Associated Press, *Civil rights probe opened into transgender athlete policy*, NBC News (Aug. 9, 2019), <https://tinyurl.com/mr2fkxua>.

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Respectfully submitted,

JENNIFER C. BRACERAS
INDEPENDENT WOMEN'S LAW CENTER
1802 Vernon Street NW, Suite 1027
Washington, DC 20009
(202) 807-9986
jennifer.braceras@iwf.org

/s/Gene C. Schaerr
GENE C. SCHAERR
ANNIKA BOONE BARKDULL*
SCHAERR | JAFFE LLP
1717 K Street NW, Suite 900
Washington, DC 20006
(202) 787-1060
gschaerr@schaerr-jaffe.com

*Counsel for Amicus Curiae
Independent Women's Law Center*

*Not yet admitted in D.C.

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with Federal Rule of Appellate Procedure 29(a)(5) and 9th Circuit Rule 32-3(2) as it contains 5,623 words, excluding the portions exempted by Fed. R. App. P. 32(f).

The brief's typesize and typeface comply with Federal Rule of Appellate Procedure 32(a)(5) and (6) because it was prepared in 14-point Century Schoolbook, a proportionally spaced font.

Dated: September 15, 2023

/s/ Gene C. Schaerr

Gene C. Schaerr

Counsel for Amici Curiae

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing brief with the Clerk of Court for the United States Court of Appeals for the Ninth Circuit by using the Court's CM/ECF system. I further certify that service was accomplished on all parties via the Court's CM/ECF system.

Dated: September 15, 2023

/s/ Gene C. Schaerr

Gene C. Schaerr

Counsel for Amici Curiae