21-1365

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SELINA SOULE, a minor, by Bianca Stanescu, her mother; et al.,

Plaintiffs-Appellants,

v.

CONNECTICUT ASSOCIATION OF SCHOOLS, INC., d/b/a Connecticut Interscholastic Athletic Conference; et al.,

Defendants-Appellees,

v.

ANDRAYA YEARWOOD; et al.,

Intervenor-Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT, NO. 3:20-CV-00201 (RNC)

EN BANC BRIEF OF AMICI CURIAE STATE OF TENNESSEE AND 22 OTHER STATES SUPPORTING PLAINTIFFS-APPELLANTS AND REVERSAL

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The States of Tennessee, Alabama, Alaska, Arkansas, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, Ohio, South Carolina, South Dakota, Texas, Utah, Virginia, and Wyoming (the "States") submit this amicus brief in support of Appellants pursuant to States' authority under Fed. R. App. P. 29(a)(2). The States urge this Court to reverse the decision below.

For decades, the stories of female student-athletes have inspired girls throughout the country to strive for victory in all their endeavors. Each of the States operates educational programs and activities that receive federal funding and thus are subject to Title IX's requirements. The States and their political subdivisions spend millions of dollars to support female student-athletes.

The decision below wrongly ruled that Defendants did not have notice that they violated Title IX when they allowed biological boys to win thirteen of fourteen track-and-field championships. JA159, 283.[1]

[1] Students who are biologically male won six of the seven competitions nominally designated for girls and all seven designated for boys.

Under Title IX, girls must have an equal "chance to be champions." *McCormick v. Sch. Dist. of Mamaroneck*, 370 F.3d 275, 295 (2d Cir. 2004). Amici have an interest in protecting female sports and in this Court correcting the district court's flawed approach to Title IX.

SUMMARY OF ARGUMENT

In 1960, Tennessee State University student Wilma Rudolph electrified the country by becoming "the fastest woman in the world" and the first American woman to win three gold medals in one Olympics. M.B. Roberts, *Rudolph Ran and World Went Wild*, ESPN (1999), https://es.pn/3LUHgkj. Wilma Rudolph's inspiring journey from childhood polio survivor to Olympic champion was a testament to her work ethic and athleticism.

But Wilma Rudolph was the first to acknowledge that she never would have made it to the 1960 Summer Olympics were it not for a series of individuals opening doors that were closed to most female athletes before Title IX. Her basketball coach decided to start a girls' track-and-field team after her eighth-grade season, giving Wilma an early opportunity to run competitively. Wilma Rudolph, *Wilma* 45 (1977). By further happenstance, one of her referees during a girls'

basketball game was Ed Temple, the track coach at Tennessee State University. *Id.* at 58; *see* Wilma Rudolph, *Foreword* to Ed Temple, *Only the Pure in Heart Survive* (1973). That nearby university was one of the few that provided even minimal support for women's track-and-field.

After Wilma Rudolph's success, politicians across the political aisles began to acknowledge the importance of providing equal opportunities for female student-athletes. Then-Vice President Richard Nixon met with Wilma Rudolph and other Olympic champions when he toured Tennessee in 1960. Tennessean, *Nixon, Pat Swing Corner, Greet Olympic Stars* 8 (Oct. 7, 1960). Vice President Nixon's wife famously admonished him not to "forget my girl, Wilma Rudolph." Colleen Shogan, *Olympian Wilma Rudolph Visits the White House*, White House Historical Ass'n (June 23, 2021), https://bit.ly/3YXuunH. The next year, Wilma Rudolph traveled to the White House to meet President John F. Kennedy and then-Vice President Johnson. *Id.* (quoting President Kennedy as telling her "It's not every day that I get to meet an Olympic champion."). In 1972, President Nixon heeded his wife's advice not to forget female student-athletes like Wilma Rudolph and signed Title IX into law.

The district court's approach to Title IX squarely conflicts with the original understanding of Title IX and threatens decades of progress toward equal participation by the two sexes in athletics.[2]

First, the district court wrongly viewed defining "sex" based on "biological differences" at birth "as needlessly provocative." JA263. Plaintiffs are correct that, when Congress used the term "sex" in 1972, it meant the immutable biological binary between males and females that doctors and parents observe at the time of a child's birth. Defendants might prefer to substitute "gender identity" for "sex," but "gender identity" is not the term Title IX uses. Departing from that biological binary would render unworkable many provisions of Title IX and its implementing regulations.

Second, Defendants violated Plaintiffs' Title IX rights by denying females, over several track-and-field seasons, an equal chance to be champions. Providing girls the opportunity to experience the thrill of victory was one of the main athletic purposes of Title IX. At the time of Title IX's enactment, the public understood that allowing biological boys

[2] The States take no position on the second or third questions this Court has asked the parties to brief.

to compete against girls would result in boys taking away championship opportunities designated for girls. In this circumstance, Defendants have failed to "effectively accommodate the interests and abilities of members of both sexes" by refusing to offer truly sex-separated track-and-field competitions for the two sexes. 34 C.F.R. § 106.41(c)(1).

ARGUMENT

I. The word "sex" in Title IX refers to the immutable biological binary between males and females that is observed at birth, not to the subjective concept of gender identity.

Under Title IX, with a few exceptions, "[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). "[W]hen Congress prohibited discrimination on the basis of 'sex' in education, it meant biological sex, i.e., discrimination between males and females." *Adams v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 812 (11th Cir. 2022) (en banc). The distinction between males and females turns on "biology and reproductive function," not an individual's internal understanding of his gender identity. *Id.*

The text of Title IX confirms that Congress understood "sex" to mean an immutable biological binary. Defendants' alternative "gender identity" approach—determining eligibility based on "the gender identification of [the] student in current school records and daily life activities in the school"—renders unworkable many of Title IX's requirements and protections. JA260.

A. The original understanding of "sex" in Title IX was of an immutable biological binary.

Because Title IX does not provide a statutory definition of "sex," this Court's "job is to interpret the word[] consistent with [its] ordinary meaning at the time Congress enacted the statute." *Wis. Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2070 (2018) (cleaned up) (quoting *Perrin v. United States*, 444 U.S. 37, 42 (1979)).

In 1972, the word "sex" referred to the immutable biological binary distinguishing the organization of male and female reproductive systems. The en banc Eleventh Circuit recently compiled dictionary after dictionary from the time of Title IX's enactment confirming that understanding of "sex." *Adams*, 57 F.4th at 812. The 1972 *Webster's New World Dictionary*, for example, defined "sex" as "either of the two divisions, male or female, into which persons, animals, or plants are

divided, with reference to their reproductive functions." *Id.* (alteration omitted). The 1978 *Oxford English Dictionary* similarly defined "sex" as "either of the two divisions of organic beings distinguished as male and female respectively," with "male" defined as "of or belonging to the sex which begets offspring, or performs the fecundating function of generation" and "female" defined as "belonging to the sex which bears offspring." *Id.* (alterations omitted); *see also id.* (quoting similar definitions of "sex," "female," and "male" in 1969 *Webster's Seventh New Collegiate Dictionary*).[3]

Judicial opinions from the time of Title IX's enactment agree with the popular understanding of sex as, "like race and lineage, [] an immutable trait, a status into which the class members are locked by the accident of birth." *Sail'er Inn, Inc. v. Kirby*, 485 P.2d 529, 540 (Cal. 1971). Justice Brennan agreed one year after Title IX's enactment that "sex" is "an immutable characteristic determined solely by the accident of birth." *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (plurality op.).

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[3] Most Americans still consider "sex" to refer to "[e]ither of the two divisions, designated female and male, by which most organisms are classified on the basis of their reproductive organs and functions." *The American Heritage Dictionary of the English Language* (5th ed. 2022 online update).

No dictionary from the time of Title IX's enactment defines "sex" based on edited school records and "daily life activities in the school." JA260. Sex is a biological characteristic and does not merely "indicate personal modes of dress or cosmetic effects." *Baker v. Cal. Land Title Co.*, 507 F.2d 895, 897 (9th Cir. 1974). Wearing a dress, putting on makeup, or using the female restroom does not turn a man into a woman.

Nor does modern wordplay with the terms "boy" and "girl" provide Defendants with any other support from dictionaries at the time of Title IX's enactment. In the 1970s, Americans understood that a "boy" is "a male child" with "male" meaning "of or belonging to the sex that begets young by fertilizing the female" because "male always refers to sex." *The Random House College Dictionary* (1973). And Americans understood that a "girl" is "a female child" with "female" meaning "belonging to the sex that bears young or produces eggs." *Id.* In 1972, a teenager whom Defendants would refer to as a "transgender girl"—a biological boy who claims a female gender identity—would have been classified as a boy. The district court thought this "isn't a case involving males who have decided that they want to run in girls' events." JA104. But that is precisely how an ordinary American from 1972 would describe this case.

B. Title IX itself presupposes that sex is an immutable biological binary.

The "statutory context of Title IX" confirms that Congress unambiguously had the same understanding of "sex" as the general public did in 1972. *Adams*, 57 F.4th at 813. "Ambiguity is a creature not of definitional possibilities but of statutory context." *Brown v. Gardner*, 513 U.S. 115, 118 (1994). Here, the context of Title IX "negates" Defendants' attempt to equate "sex" with "gender identity." *Id.*

Title IX repeatedly treats "sex" as a biological binary. Section 1681(a)(2) allows educational institutions to change from admitting "only students of *one sex* to being an institution which admits students of *both sexes*." 20 U.S.C. § 1681(a)(2) (emphases added). Section 1681(a)(6) contrasts a "social fraternity" with a "social sorority." *Id.* § 1681(a)(6). Section 1681(a)(7) similarly contrasts "Boy or Girl conferences." *Id.* § 1681(a)(7). And Section 1681(a)(8) allows "father-son or mother-daughter activities" when, "if such activities are provided for students of *one sex*, opportunities for reasonably comparable activities [are] provided for students of *the other sex*." *Id.* § 1681(a)(8) (emphases added). Title IX treats sex as a binary, not as a subjective identity capable of virtually infinite variations. *Cf. United States v. Varner*, 948 F.3d 250, 256-57 (5th

Cir. 2020) (providing examples from this "galaxy" of identities (quoting Dylan Vade, *Expanding Gender & Expanding the Law: Toward a Social & Legal Conceptualization of Gender that Is More Inclusive of Transgender People*, 11 Mich. J. Gender & L. 253, 261 (2005)).

Congress did not forget the biological differences between men and women when it enacted Title IX. Significantly, Section 1686 clarifies that, "[n]otwithstanding anything to the contrary contained in [Title IX], nothing contained herein shall be construed to prohibit any educational institution . . . from maintaining separate living facilities for *the different sexes*." 20 U.S.C. § 1686 (emphasis added). Senator Bayh, the chief sponsor of Title IX in the Senate, explained that this statutory instruction on how to construe Title IX was intended to "permit differential treatment by sex . . . in sports facilities or other instances where personal privacy must be preserved." 118 Cong. Rec. 5,807 (1972). Congress did not want schools to force children to expose their reproductive anatomy to members of the opposite sex.

C. Longstanding Title IX regulations presuppose that sex is an immutable biological binary.

For over four decades, Title IX's regulations "presuppose[d] sex as a binary classification." Nondiscrimination on the Basis of Sex in

Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30,026, 30,178 (May 19, 2020). For example, consistent with Section 1686, a Title IX recipient could "provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of *one sex* shall be comparable to such facilities provided for students of *the other sex*." 34 C.F.R. § 106.33 (emphases added).

Longstanding Title IX athletic regulations also operate on the assumption that there are two biologically distinct sexes. Title IX regulations for sex-separated teams refer to "one sex" and "the other sex." *Id.* § 106.41(b). When a school operates a team for males but not for females—understood in the regulations as the sex for whom "athletic opportunities . . . have previously been limited"—the school must allow females to try out for the team "unless the sport involved is a contact sport." *Id.* The "contact sport" exception accounts for the physiological differences between boys and girls; it makes little sense if sex turns on how a student identifies. And Title IX regulations even *require* universities to distinguish between "each sex" when awarding athletic scholarships. *Id.* § 106.37(c).

The district court erred in relying on 2016 Guidance that flew in the face of those longstanding regulations. JA281-82, 286 (citing Letter from Catherine E. Lhamon, Ass't Sec. for Civil Rights, U.S. Dep't of Educ. & Vanita Gupta, Principal Dep. Ass't Attorney for Civil Rights, U.S. Dep't of Justice (May 13, 2016)). That 2016 Guidance was preliminarily enjoined within months because "the plain meaning of the term sex as used in" the regulations "following the passage of Title IX meant the biological and anatomical differences between male and female students as determined at their birth." *Texas v. United States*, 201 F. Supp. 3d 810, 832-33 (N.D. Texas 2016). The 2016 Guidance remained enjoined until the U.S. Department of Education rescinded it in February 2017, *before* every state championship race where Defendants allowed biological boys to compete against and defeat girls. JA151, 282.

Courts have also stymied more recent regulatory attempts by the U.S. Department of Education to prohibit schools from allowing only biological girls to participate in girls' sports. *See Tennessee v. U.S. Dep't of Educ.*, No. 3:21-cv-308, 2022 WL 2791450, at *21, *24 (E.D. Tenn. July 15, 2022) (preliminarily enjoining 2021 guidance), *appeal pending*, No. 22-5807 (6th Cir. 2023). A requirement "not to discriminate based on . . .

gender identity" "appears nowhere in *Bostock*, Title IX, or its implementing regulations." *Id.* at *21.

D. Interpreting Title IX to give precedence to gender identity over biological sex renders it unworkable.

Defendants unwisely ignore the consequences of replacing the stability of biological sex with the fluctuating concept of gender identity.

1. Gender identity is an amorphous concept.

Sex, as the term was understood in 1972, is an objective and immutable standard for deciding what locker room, shower, or dormitory a student should use and for deciding what athletic category a student should participate in. Sex, or "biological gender," is "definitively ascertainable at the moment of birth" for virtually every child. *Ondo v. City of Cleveland*, 795 F.3d 597, 609 (6th Cir. 2015). Even simpler than "the analytical and practical[ ]problems present in preferential programs premised on racial or ethnic criteria," "there are only two possible classifications" for sex. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 302-03 (1978) (op. of Powell, J.).[4] As Justice Ginsburg wrote for the

[4] Judicial opinions from the decades after Title IX's enactment often use "sex" and "gender" as equivalent terms, both referring to the biological distinction between males and females. *See, e.g.*, *Craig v. Boren*, 429 U.S. 190, 202-04 (1976). Many Americans continue to use "gender" as a

Supreme Court, the "physical differences between men and women are enduring: The two sexes are not fungible." *United States v. Virginia*, 518 U.S. 515, 533 (1996) (cleaned up).

Gender identity, as its proponents usually define it, lacks all those attributes. Individuals have expressed gender identities "other than those of men and women," including "nonbinary, genderqueer, gender neutral, agender, gender fluid, and 'third' gender, among others." World Pro. Ass'n for Transgender Health ("WPATH"), *Standards of Care for the Health of Transgender and Gender Diverse People* 252 (8th version) (2022) (hereafter "WPATH Guidelines").[5] Many of these terms, such as "genderqueer" and "nonbinary" did not emerge until the 1990s or 2000s, decades after Title IX's enactment. *Id.* at 80. New gender identities are invented every year. *See id.* at 9, 31, 88 (including "eunuchs" as a gender identity and providing a "new chapter" in the WPATH Guidelines to

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synonym for "sex." *Cf. Gender*, *Fowler's Dictionary of Modern English Usage* (4th ed. 2015) ("In the early 20th cent., as *sex* came increasingly to mean sexual intercourse, *gender* began to replace it (in early use euphemistically) as the usual word for the biological grouping of males and females.").

[5] The States cite the WPATH Guidelines merely as an example of public claims about gender identity and do not accept their authoritativeness for treatment of gender dysphoria or any other condition.

describe their "unique needs").

Gender identity is not stable. Many purported gender identities, such as "genderfluid," are defined by how an individual claims to "have a gender that changes over time." *Id.* at 80. The same goes for "nonbinary" people who claim to have "more than one gender identity simultaneously or at different times." *Id.* And that mutability is especially common among children, who "may experience gender fluidity or even detransition after an initial social transition." *Id.* at 77.

Nor is gender identity objective. The term "refers to a person's deeply felt, internal, intrinsic sense of" the person's "own gender" and does not require any physical alteration. *Id.* at 252. That approach to identity is fundamentally "subjective." *Id.* at 81. Accordingly, even the WPATH Guidelines agree that the "*non-linear* spectrum" of gender identity should not be used "for the purpose of situating" individuals in a "binary model" of male and female. *Id.*

2. Gender identity is incompatible with Title IX.

Because Congress understood "sex" as an immutable, objective binary, reading "gender identity" into Title IX makes a pig's breakfast of the statute and its implementing regulations. An institution allowed to

continue admitting "only students of one sex" under Title IX might be required to admit "students of both sexes." 20 U.S.C. § 1681(a)(2). Third-grade girls would be required to share a restroom with a biological boy even though "the very purpose" of Section 1686 is to allow separate living facilities for the two different biological sexes. *D.H. v. Williamson Cnty. Bd. of Educ.*, No. 3:22-cv-00570, 2022 WL 16639994, at *1, *10 (M.D. Tenn. Nov. 2, 2022) (denying the eight-year-old biological boy's request for a preliminary injunction).

In athletics, privileging gender identity over sex would allow students to switch between boys' and girls' divisions, as happened here. For three athletic seasons, T.M. competed in boys' events, generally without success. JA153. T.M. then abruptly switched to competing in the girls' events and immediately started winning championships. JA153-55. Deferring to modified school records and "daily life activities in the school," JA260, forces Plaintiffs and Defendants to debate in vain whether a student such as T.M. "walk[s] femininely, talk[s] more femininely, [or] dress[es] more femininely." *Price Waterhouse v. Hopkins*, 490 U.S. 228, 235 (1989) (plurality op.) (quotation omitted). Title IX countered the notion that society's understanding of femininity should

define who plays sports. *Cf.* Rudolph, *Wilma*, *supra* at 43-44 (describing how girls "never got involved in sports" or put in minimal effort because they wanted to be "considered feminine and not masculine").

Replacement of sex with gender identity also obscures what sports teams "members of both sexes" are competing on despite the requirement to provide the two sexes with "equal athletic opportunity." 34 C.F.R. § 106.41(c). At the university level, treating biological men who identify as women (or something else) *as women* makes it impossible to judge whether the institution awards scholarships "in proportion to the number of students of each sex participating in interscholastic or intercollegiate athletics." *Id.* § 106.37(c)(1). Title IX is nonsensical if gender identity trumps biological sex.

3. *Bostock* is not to the contrary.

In its narrowly circumscribed decision in *Bostock v. Clayton County*, the Supreme Court held that firing an employee "simply for being homosexual or transgender" constitutes discrimination "because of . . . sex" under Title VII. 140 S. Ct. 1731, 1737-38 (2020) (quoting 42 U.S.C. § 2000e-2(a)(1)). In reaching that conclusion, however, the Court "assum[ed]" that the term "sex" means "biological distinctions between

male and female." *Id.* at 1739. And the Court made clear that its decision did not "sweep beyond Title VII to other federal or state laws that prohibit sex discrimination" or address other issues that were not before the Court. *Id.* at 1753; *cf. Pelcha v. MW Bancorp, Inc.*, 988 F.3d 318, 324 (6th Cir. 2021) ("[T]he Court in *Bostock* was clear on the narrow reach of its decision and how it was limited only to Title VII itself.").

Nor is Bostock's analysis necessarily applicable to Title IX. As the Sixth Circuit has explained, "Title VII differs from Title IX in important respects." *Meriwether v. Hartop*, 992 F.3d 492, 510 n.4 (6th Cir. 2021). It therefore "does not follow that principles announced in the Title VII context automatically apply in the Title IX context." *Id.* Unlike Title VII, Title IX expressly authorizes sex-separated living facilities, *id.* (citing 20 U.S.C. § 1686), and its implementing regulations require universities to "consider sex in allocating athletic scholarships," *id.* (citing 34 C.F.R. § 106.41(c)).

Even if *Bostock*'s analysis applied to Title IX with respect to employment termination, that analysis would not extend to decisions concerning athletics. Discrimination requires treating individuals "worse than others who are similarly situated." *Bostock*, 140 S. Ct. at

1740. While "[a]n individual's homosexuality or transgender status *is not relevant* to employment decisions" about hiring and firing, *id.* at 1741 (emphasis added), sex *is* relevant in contexts such as athletics or living facilities where physiological differences between the sexes matter. As Justice Thurgood Marshall put it, "[a] sign that says 'men only' looks very different on a bathroom door than a courthouse door." *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 468-69 (1985) (Marshall, J., concurring in the judgment in part and dissenting in part); *see also Virginia*, 518 U.S. at 550 n.19 (acknowledging that admitting women to the Virginia Military Institute "would undoubtedly require alterations necessary to afford members of each sex privacy from the other sex in living arrangements").

So too for athletics. "When the classification, as here, relates to athletic activity, it must be apparent that" there are "distinct differences in physical characteristics and capabilities between the sexes." *Cape v. TSSAA*, 563 F.2d 793, 795 (6th Cir. 1977). Athletes such as Wilma Rudolph fought for racial integration. At her insistence, her victory celebration became "the first racially integrated event to take place in the history of Clarksville," Tennessee. Shogan, *supra*. But she was also

proud "of Title IX and the big boom" it created for "women's track and field." Rudolph, *Foreword*, *supra*. Title IX does not require Defendants to ignore the immutable differences between the two sexes.

II. Defendants violated Plaintiffs' Title IX rights by repeatedly denying females an equal chance to be champions.

As this Court ruled in *McCormick*, Title IX prohibits entities from "[t]reating girls differently regarding a matter so fundamental to the experience of sports—the chance to be champions." 370 F.3d at 295. But over the course of several seasons, Defendants allowed biological boys to win thirteen of fourteen track-and-field championships. JA159. That disparity "sends a message to" biological girls "that they are not expected to succeed and that" Defendants do "not value their athletic abilities as much as it values the abilities of boys." *McCormick*, 370 F.3d at 295.

Title IX regulations are generally permissive about allowing sex-separated teams when, as in track-and-field, selection "is based upon competitive skill." 34 C.F.R. § 106.41(b). Nevertheless, allowing a small minority of biological boys who identify as girls to cross over to girls track-and-field and dominate competitions violates the requirement for institutions to "effectively accommodate the interests and abilities of members of both sexes." *Id.* § 106.41(c)(1).

A. Providing females the chance to become champions was a primary athletic purpose of Title IX.

"A primary purpose of competitive athletics is to strive to be the best." *McCormick*, 370 F.3d at 294-95. Success, of course, is never guaranteed. But the "greater the potential victory, the greater the motivation to the athletes." *Id.* at 294. Title IX recipients, under *McCormick*, must give female athletes a chance to be champions—including a "chance to be State champions"—equal to the chances provided to male athletes. *Id.* at 279.

Championships matter to athletes and coaches. Wilma Rudolph identified herself as "Winner of Three Olympic Gold Medals," not even mentioning the bronze medal she won at another Olympics. Rudolph, *Foreword*, *supra*. The U.S. Information Agency created a film in 1961 titled "Wilma Rudolph Olympic Champion"; Congress passed a law putting the film in the public domain so that it could feature in a program about "Women Gold Medal Winners." 90 Stat. 193 (1976). Interscholastic sports are about more than who has the most hardware in the trophy room or banners in the rafters, but the striving after success builds the character of student-athletes.

Pat Summitt, the trailblazing coach of the Tennessee Lady Volunteers basketball team, summed it up this way: What Title IX and turning women's basketball into an Olympic sport "did was to make winning *available* to women. Previously, competition was a hobby—not a very socially acceptable one. But now that there were trophies, gold medals, and prestige on the table, interest in women's sports surged." Pat Summitt, *Sum It Up* 69 (2013). Pat Summitt leveraged that interest in winning championships into a basketball program that has won eight NCAA championships and participated in every NCAA tournament since women's basketball became an NCAA sport in 1982.

Ed Temple's experience at Tennessee State University was similar. Even before Title IX, the Tigerbelles' Olympic success directly persuaded the Governor of Tennessee to increase Ed Temple's budget and scholarships so that his team would have "whatever else [it] needed" to continue its success. Temple, *supra* at 31. After Title IX's enactment, the team "finally got a decent track facility." *Id.* at 29. Protecting females' right to an equal chance to be champions was a primary athletic purpose of Title IX and a central reason why American women perform so well on the world stage. *See* Summitt, *supra* at 69.

B. Title IX does not allow biological boys to take away so many championship opportunities for girls.

Because of the "differences in physical characteristics and capabilities" between the two sexes, "[i]t takes little imagination to realize that[,] were play and competition not separated by sex, the great bulk of females would quickly be eliminated from participation and denied any meaningful opportunity for athletic involvement." *Cape*, 563 F.2d at 795. That denial of opportunity is what Plaintiffs experienced after a few biological boys decided they wanted to compete in girls' track-and-field. Title IX does not allow institutions to deny females equal opportunity by treating some biological boys as girls.

In 1975, Title IX regulations promulgated by the U.S. Department of Health, Education, and Welfare ("HEW"), the predecessor to the U.S. Department of Education, became effective. 40 Fed. Reg. 24,128 (June 4, 1975). Since that time, Title IX regulations have required institutions to "provide equal athletic opportunity for members of both sexes" with the first factor considered of "[w]hether the 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).

HEW immediately issued a Fact Sheet to explain the new regulation. HEW Fact Sheet, *Title IX – Civil Rights* (June 1975), https://bit.ly/3K2rCSy. HEW explained that the regulation allowing sex-separated teams when membership is based on skill or when the sport is a contact one, *see* 34 C.F.R. § 106.41(b), did "not alter the responsibility which a recipient has with regard to the provision of equal opportunity," HEW Fact Sheet at 7. An institution, for example, "would be required to provide separate teams for men and women[] in situations where the provision of only one team" with both sexes "would not 'accommodate the interests and abilities of both sexes.'" *Id.* (quoting the equivalent of 34 C.F.R. § 106.41(c)(1)).

The public understood that, "if teams theoretically open to all on a competitive basis result in exclusion of women from athletic participation, separate teams for women may be required by the regulation and are certainly required by the statute itself." *Implementing Title IX: The HEW Regulations*, 124 U. Pa. L. Rev. 806, 840 (1976). By allowing boys who identify as girls to compete in girls' track-and-field, Defendants are essentially opening up girls' athletics to members of both sexes. That is how the average American in 1972 would

have understood it—as "[s]ome boys" asking "if they could come out for the girls' track team" by identifying as girls. Temple, *supra* at 36.

Advocates for Title IX warned against such a result. The Project on the Status and Education of Women, shortly after its Title IX lobbying efforts succeeded, explained that "complete integration of the sexes in all sports . . . would effectively eliminate opportunities for women to play in organized competitive athletics" because of "differences in training and physiology." Project on the Status & Educ. of Women, *What Constitutes Equality for Women in Sport?*, Ass'n of Am. Colleges 10 (Apr. 1974), https://bit.ly/3JAnR5f. That outcome is not "in line with the principle of equal opportunity." *Id.*; *see also Adams*, 57 F.4th at 819 (Lagoa, J., specially concurring) ("Such a commingling of the biological sexes in the female athletics arena would significantly undermine the benefits afforded to female student athlete's under Title IX's allowance for sex-separated sports teams.").

If courts ignore Title IX's equal opportunity mandate, then more women will lose their chance to become a champion. Last year, the NCAA had its "first transgender athlete to win an NCAA D-I title." Eric Levenson & Steve Almasy, *Swimmer Lia Thomas Becomes First*

Transgender Athlete to Win an NCAA D-I Title, CNN (Mar. 17, 2022), https://cnn.it/406psGU. Predictably, that athlete was a biological man who claimed to be a woman. Thomas defeated two Olympic medalists during the final, *id.*, and apparently exposed his male genitalia to competitors in the women's locker room, Jesse O'Neill, *Ex-swimmer Demands Transgender Locker Rooms After Lia Thomas Allegedly Exposed 'Male Genitalia,'* N.Y. Post (Feb. 9, 2023), https://bit.ly/40uB862. Female athletes should not have to "[j]ust deal with it," as one Massachusetts high school athlete switching over to girls' track-and-field competitions has told them. Molly Louison, *Transgender Athletes Reflect on Their Experiences With Track Teams*, The Cypress (June 12, 2022), https://bit.ly/3n4fWFC.

Without enforcement of Title IX, many teams of solely biological females have had to leave girls' sports altogether. After a boy identifying as a girl injured a biological girl by spiking a volleyball so hard it sent her to the hospital, the North Carolina school district whose female athlete was injured voted to forfeit all matches against the other school. Jenny Goldsberry, *Footage Shows Moment Female High School Volleyball Player Injured By Spike From Trans Opponent*, Wash.

Examiner (Oct. 22, 2022), https://bit.ly/3ndcGIe. Earlier this month, the Vermont Principals' Association declared Mid Vermont Christian School ineligible to compete in all sports after the school declined to play against a girls' basketball team that included a biological boy. Isabel Gonzalez, *Vermont High School Banned From Tournaments After Refusing to Play Team With Transgender Player*, CBS Sports (Mar. 14, 2023), https://bit.ly/3ncE1Ku. Accommodating students who claim to be transgender should not cost female athletes the chance to be champions.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's judgment.

Dated: March 30, 2023.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(g)(1) and Local Rule 29.1(c) because it contains 5,272 words, excluding the parts exempted by Fed. R. App. P. 32(f).

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March 30, 2023