APPEAL NO. 22-2332

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

A.M. by her mother and next friend, E.M.,

Plaintiff-Appellee,

v.

INDIANAPOLIS PUBLIC SCHOOLS and SUPERINTENDENT, INDIANAPOLIS PUBLIC SCHOOLS,

Defendants,

and

STATE OF INDIANA,

Intervening Defendant-Appellant.

On Appeal from the United States District Court
for the Southern District of Indiana, Indianapolis Division
Honorable Jane Magnus-Stinson
Case No. 1:22-cv-01075-JMS-DLP

BRIEF OF SEVEN FEMALE ATHLETES AS *AMICI CURIAE* IN SUPPORT OF APPELLANT FOR REVERSAL

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INTEREST OF AMICI CURIAE[1]

Amici Riley Gaines, Selina Soule, Chelsea Mitchell, Madison Kenyon, Macy Petty, Debbie Powers, and Cynthia Monteleone are female athletes from across the country who support Indiana's efforts to protect women's sports. These women have competed against and lost to men in athletic competitions ranging from basketball to track. They have personally suffered the deflating experience of having opportunities stripped away in the name of "progress." Their experiences underscore the need for separating sports based on biology rather than self-professed identity.

[1] No counsel for a party authored this brief in whole or in part, and no person other than amici and their counsel made any monetary contribution intended to fund the preparation or submission of this brief. Counsel were timely notified of this brief as required by Fed. R. App. P. 29, and all parties consented to its filing.

SUMMARY OF ARGUMENT

Fifty years ago, in the face of historic discrimination against women, Congress enacted Title IX of the Education Amendments. This amendment and its implementing regulations aimed to address, among other things, the "unique set of problems" inherent in "discrimination in athletics." *Kelley v. Bd. of Trs.*, 35 F.3d 265, 270 (7th Cir. 1994). They "triggered an athletic revolution that changed the face of intercollegiate athletics." Jodi Hudson, *Complying with Title IX of the Education Amendments of 1972: The Never-Ending Race to the Finish Line*, 5 SETON HALL J. OF SPORT L. 575, 575 (1995).

On Title IX's "golden anniversary," female athletes should experience the equal opportunities that Title IX promised. Instead, it is often the opposite. Earlier this year, swimmer Lia Thomas—a biological male—won the women's NCAA Division I Championships in the 500-yard freestyle—defeating two former Olympians, both biological females. Thomas was even nominated for the NCAA Woman of the Year Award.

The intersection between sex and sports has sparked a nationwide debate. Some believe that anyone who identifies as female, including biological males, should compete in women's sports. Others remain committed to Title IX's intended focus on sex and promise to females.

With this debate surging, the Indiana legislature recognized that "[p]hysical differences between men and women … are enduring" and "the two sexes are not fungible." *United States v. Virginia*, 518 U.S. 515, 533 (1996) (cleaned up). It enacted Indiana Code § 20-33-13-4 (the Sports Act) to demarcate athletics based on "a student's biological sex at birth." By doing so, Indiana wanted to protect equal athletic opportunities for women.

This case does not ask whether Indiana made the right call. That decision rests with Indiana voters. Instead, this case asks whether Indiana can even make the call *at all*, or whether Congress preempted it from doing so in 1972 when it enacted Title IX. Based on Title IX's plain language, its statutory structure, and its history, Congress did not. Title IX prohibits discrimination based not on gender identity but on "sex." When Congress enacted Title IX, the Act's text protected biologically female athletes from biological male competitors, and *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), does not change that fact.

Indiana's Sports Act complements Title IX and is compatible with the Constitution's Equal Protection Clause. The Act makes legitimate distinctions based on biological sex; the Act says nothing about transgender status, and it does not invidiously discriminate based on gender identity.

Because the Sports Act neither conflicts with Title IX nor the Constitution, this Court should respect Indiana's sovereign prerogative to enact laws consistent with its historic police powers and reverse the district court.

ARGUMENT

I. The Sports Act complements and reinforces Title IX.

Like any other statute, when interpreting Title IX, courts "start, of course, with the statutory text." *Mangine v. Withers*, 39 F.4th 443, 447 (7th Cir. 2022). Each word "must be read in [its] context and with a view to [its] place in the overall statutory scheme." *West Virginia v. EPA*, 142 S. Ct. 2587, 2607 (2022). And each word must be afforded its "ordinary meaning at the time Congress adopted" the statute. *Niz-Chavez v. Garland*, 141 S. Ct. 1474, 1480 (2021). Courts must not "add to, remodel, update, or detract from old statutory terms" to fit their "own imaginations," *Bostock*, 140 S. Ct. at 1738, or to "better reflect the current values of society," *id.* at 1756 (Alito, J., dissenting).

Title IX provides that no person "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). Indiana's Sports Act complements this prohibition.

A. Title IX uses "sex" to denote a biological binary, not gender identity.

Title IX does not define "sex," so to ascertain its "ordinary, contemporary, [and] common meaning" in 1972 "when the statute was enacted," this Court should "referenc[e] contemporary dictionaries." *United States v. Melvin*, 948 F.3d 848, 852 (7th Cir. 2020). Virtually every dictionary from this era defines sex as the biological status of male or female. *Sex*, The American Heritage Dictionary 1187 (1976) (defining sex as "[t]he property or quality by which organisms are classified according to their reproductive functions"); *Sex*, Webster's Third New Int'l Dictionary 2081

(1971) ("[T]he sum of the morphological, physiological, and behavioral peculiarities of living beings that subserves biparental reproduction with its concomitant genetic segregation and recombination which underline most evolutionary change[.]").

What dictionaries tell us, the "statutory and historical context" confirms. *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 471 (2001); *accord Adams v. Sch. Bd. of St. Johns Cnty.*, 3 F.4th 1299, 1321 (11th Cir. 2021) (W. Pryor, J., dissenting) ("After all, context matters. As the late Justice Thurgood Marshall once put it, 'A sign that says "men only" looks very different on a bathroom door than a courthouse door.'" (cleaned up)), *reh'g en banc granted*, 9 F.4th 1369 (11th Cir. 2021).

Throughout Title IX, Congress used "sex" to denote a biological binary. For example, Title IX permits schools to go from admitting "only students of *one sex*" to admitting "students of *both sexes*." 20 U.S.C. § 1681(a)(2) (emphases added). It also exempts "father-son or mother-daughter activities … but if such activities are provided for students of *one sex*, opportunities for reasonably comparable activities shall be provided for students of *the other sex*." *Id.* § 1681(a)(8) (emphases added).

The implementing regulations promulgated shortly after Title IX's enactment also reflect this understanding. They permit separate locker rooms and showers so long as facilities "for students of *one sex*" are comparable to facilities "for students of the *other sex*." 34 C.F.R. § 106.33 (emphases added). The sports regulations allow schools to "sponsor separate teams for members of *each sex*." *Id.* § 106.41(b) (emphasis added). And they require schools to "provide equal athletic opportunity for members of *both sexes*" to "effectively accommodate the interests and abilities of members of *both sexes*." *Id.* § 106.41(c) (emphases added).

Further, the history surrounding Title IX's enactment illuminates that the American public would have understood "sex" to denote a biological binary. *Gundy v. United States*, 139 S. Ct. 2116, 2124–26 (2019) (noting that statutory interpretation is a "holistic endeavor" that looks at "purpose and history"). "Title IX was enacted in response to evidence of pervasive discrimination against women with respect to educational opportunities." *McCormick ex rel. McCormick v. Sch. Dist. of Mamaroneck*, 370 F.3d 275, 286 (2d Cir. 2004); *accord Cannon v. Univ. of Chi.*, 441 U.S. 677, 704 & n.36 (1979).

As to athletics specifically, "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. Since "[m]ale athletes had been given an enormous head start," Title IX's athletic regulations aimed "to level the proverbial playing field." *Neal v. Bd. of Trs. of Cal. State Univs.*, 198 F.3d 763, 767 (9th Cir. 1999). Indeed, "it would require blinders to ignore that the motivation for promulgation of the regulation on athletics was the historic emphasis on boys' athletic programs to the exclusion of girls' athletic programs[.]" *Williams v. Sch. Dist. of Bethlehem*, 998 F.2d 168, 175 (3d Cir. 1993).

The district court concluded that the Sports Act conflicts with Title IX because it "singl[es] out … *transgender* females." *A.M. ex rel. E.M. v. Indianapolis Pub. Schs.*, No. 1:22-cv-01075-JMS-DLP, 2022 WL 2951430, at *11 (S.D. Ind. 2022) (emphasis added). But as the Supreme Court recognizes, gender identity is a "distinct concept[ ] from sex." *Bostock*, 140 S. Ct. at 1746–47; *see also Whitaker ex rel. Whitaker v. Kenosha United Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1053 (7th Cir. 2017).

Far from treating words like "sexual orientation" and "gender identity" as synonymous with "sex," the public in 1972 used these words in *contrast* with sex to communicate distinct concepts. When "gender identity" first entered the lexicon, its proponents defined it as "primarily culturally determined"—and, unlike "sex," "societally assigned." David Haig, *The Inexorable Rise of Gender and the Decline of Sex: Social Change in Academic Titles, 1945–2001*, 33 ARCHIVES OF SEXUAL BEHAVIOR 87, 93 (Apr. 2004). Similarly, Virginia Prince—who coined the term "transgender"—differentiated "sex" and "gender" and "elected to change the latter and not the former." *Federal Government on Autopilot: Delegation of Regulatory Authority to an Unaccountable Bureaucracy: Hearing Before the H. Comm. on the Judiciary*, 114th Cong. 13 (2016) (statement of Gail Heriot, Member, U.S. Comm'n on Civil Rights) (quoting Virginia Prince, *Change of Sex or Gender*, 10 Transvestia 53, 60 (1969)).

This public understanding mirrored how government officials interpreted Title IX. In 1976, when asked how Title IX would impact religious schools' stance on homosexuality, the Department of Health, Education, and Welfare confirmed that Title IX did not affect schools' actions based on sexual orientation because that was a distinct concept from sex: "We should, perhaps, note in this connection that Title IX does not address the question of homosexuality—it prohibits discrimination based on sex, not actions based upon sexual preference." Letter from Martin H. Gerry, Acting Dir., Off. for Civ. Rts., Dep't of Health, Educ., & Welfare, to Clifton L. Ganus, Jr., President, Harding Coll. 4–5 (Oct. 14, 1976).[2]

[2] https://perma.cc/XH3U-M2CF.

B. Neither *Bostock* nor *Whitaker* support reading Title IX to encompass gender identity.

Neither *Bostock* nor *Whitaker* compel a different reading of Title IX. To start, the Court in *Bostock* accepted that the word sex "refer[s] only to biological distinctions between male and female." 140 S. Ct. at 1739. The Court further recognized that sex, sexual orientation, and gender identity are "distinct concepts." *Id.* at 1746–47.

Moreover, *Bostock*'s holding was extremely narrow. The case solely involved a hiring decision under Title VII, and the Court explicitly disclaimed *Bostock*'s application to "other federal or state laws that prohibit sex discrimination." 140 S. Ct. at 1753. At most, "the rule in *Bostock* extends no further than Title VII." *Pelcha v. MW Bancorp, Inc.*, 988 F.3d 318, 324 (6th Cir. 2021). And even under Title VII, the Court disclaimed addressing "bathrooms, locker rooms, or anything else of the kind." *Bostock*, 140 S. Ct. at 1753.

Nor did *Bostock* consider the clear-notice canon, which limits statutes like Title IX that, among other things, impose grant conditions on the states. *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17, 24 (1981). This canon requires Congress to use "exceedingly clear language" when "significantly alter[ing] the balance between federal and state power." *Ala. Ass'n of Realtors v. HHS*, 141 S. Ct. 2485, 2489 (2021) (per curiam). But Congress did not "unmistakably" address sexual orientation or gender identity in Title IX. *Gregory v. Ashcroft*, 501 U.S. 452, 460, 464 (1991). The clear-notice canon here compels reading Title IX more narrowly than *Bostock* read Title VII.

Most important, *Bostock*'s analysis does not work under Title IX. Title VII and Title IX have two very different contexts, and, in "law as in life," context matters. *Yates v. United States*, 574 U.S. 528, 537 (2015); *accord id.* at 555 (Kagan, J., dissenting). "[T]he same words, placed in different contexts, sometimes mean different things." *Id.* at 537. Courts should not take "principles announced in the Title VII context [and] automatically apply [them] in the Title IX context." *Meriwether v. Hartop*, 992 F.3d 492, 510 n.4 (6th Cir. 2021).

Title VII and Title IX handle sex distinctions differently. Under Title VII, sex "is not relevant to the selection, evaluation, or compensation of employees"—ever. *Bostock*, 140 S. Ct. at 1741 (cleaned up). So when an employer takes an adverse action, "if changing the employee's sex would have yielded a different choice by the employer[,] a statutory violation has occurred." *Id.* Conversely, to comply with Title IX, schools often "*must* consider sex." *Meriwether*, 992 F.3d at 510 n.4. For example, to ensure that female athletes have an equal opportunity to compete, a school must exclude male athletes from women's teams.

In other words, though sex has no "relevan[ce] to the selection, evaluation, or compensation of employees," *Bostock*, 140 S. Ct. at 1741 (cleaned up), it "is *not* an irrelevant characteristic" in sports, *Cohen v. Brown Univ.*, 101 F.3d 155, 178 (1st Cir. 1996) (emphasis added). Without sex separation in sports, "the great bulk of the females would quickly be eliminated from participation and denied any meaningful opportunity for athletic involvement." *Cape v. Tenn. Secondary Sch. Athletic Ass'n*, 563 F.2d 793, 795 (6th Cir. 1977) (per curiam). Unlike in employment, a male is not "materially identical in all respects" to a female, no matter how each may identify. *Contra Bostock*, 140 S. Ct. at

1741. Accordingly, not only *can* states consider biological sex under Title IX, the statute's plain language *requires* them to do so. Yet under *Bostock*, a school would violate Title IX *by adhering to Title IX*. That's an "absurd result[ ]," and surely one "the legislature did not intend." *Cage v. Harper*, 42 F.4th 734, 741 (7th Cir. 2022).

That's why this Court has already twice recognized that Title IX allows sex separation in the context of athletics. In *Kelley*, this Court noted that, when Congress enacted Title IX, it "recognized that addressing discrimination in athletics presented a *unique* set of problems not raised in areas such as employment and academics." 35 F.3d at 270 (emphasis added). To address these unique challenges, schools must consider sex. 34 C.F.R. § 106.41 (distinctions based on biological sex are relevant for considerations involving athletics). Only then can they "level the proverbial playing field." *Neal*, 198 F.3d at 767.

Moreover, in *O'Connor v. Board of Education of School District No. 23*, a female student wanted to play on the boys' basketball team, but her school separated sports based on sex "to prevent male domination." 645 F.2d 578, 580–81 (7th Cir. 1981). That was "in complete compliance with Title IX and the regulations promulgated thereunder." *Id.* at 582; *accord O'Connor v. Bd. of Educ. of Sch. Dist. 23*, 449 U.S. 1301, 1307 (1980) (Stevens, J., in chambers) (noting that a "gender-based classification in competitive contact sports" prevents boys from dominating "girls' programs" and was "in full compliance" with Title IX).

That's this case. Like A.M., the athlete in *O'Connor* argued that the opposite-sex basketball team was more suitable for her, and she "refus[ed] to try out" for the same-sex team. 645 F.2d at 583. And like the Sports Act here, the "separation of boys' and girls' programs" in *O'Connor*

existed to "prevent male domination of the sports program." *Id.* at 580. This Court held that the school was "adequately justified" under Title IX to separate its sports programs based on sex, *id.* at 582—even if that "policy [was] arbitrary as applied to" the individual athlete, *O'Connor v. Bd. of Educ. of Sch. Dist. 23*, 545 F. Supp. 376, 379 (N.D. Ill. 1982). *O'Connor* dictates the same result here: Indiana may demarcate sports based on sex in full compliance with Title IX.

Whereas *O'Connor* is directly on point, *Whitaker* is far afield.[3] *Whitaker* involved "[a] policy that require[d] an individual to use a bathroom that [did] not conform with his or her gender identity" and "punishe[d] that individual for his or her gender non-conformance, which in turn violate[d] Title IX." 858 F.3d at 1049.

But drawing distinctions between male and female athletes, as Title IX presupposes, does not punish anyone for "gender non-conformance." It merely recognizes the inherent physical differences between males and females, just like Title IX does.

These inherent biological differences matter. As courts have recognized countless times—and as amici's experiences demonstrate—if males who identify as female compete in women's events, those males will, "due to average physiological differences, … displace females to a substantial extent." *Clark v. Ariz. Interscholastic Ass'n,* 695 F.2d 1126, 1131 (9th Cir. 1982) (*Clark I*). That's why women's-only teams are part

[3] As reviewed above, when Title IX uses the word "sex," it does not encompass gender identity—regardless of whether the issue presented involves athletics or bathroom access. *Whitaker* was therefore wrongly decided. Nonetheless, even if this Court retains *Whitaker*, the separate considerations involved in demarcating athletics and bathroom access strongly counsel against extending *Whitaker*'s logic to athletics. In athletics even more than bathroom access, sex actually matters.

of "a long-standing tradition in sports of setting up classifications whereby persons having objectively measured characteristics likely to make them more proficient are eliminated from certain classes of competition." *Petrie v. Ill. High Sch. Ass'n*, 394 N.E.2d 855, 861 (Ill. App. Ct. 1979). Across the country, "athletics programs *necessarily* allocate opportunities separately for [biological] male and female students." *Cohen*, 101 F.3d at 177. As a result, under Title IX, an athlete's sex is not just "relevant"—it is determinative. *Contra Bostock*, 140 S. Ct. at 1741.

C. Amici experienced the real harm that comes from allowing males to compete in women's sports.

The Sports Act remedies real harms faced by women—including amici. *Contra Whitaker*, 858 F.3d at 1052 (criticizing school policy separating restrooms based on biological sex as founded on harms that were "sheer conjecture and abstraction").

Riley Gaines was an accomplished swimmer at the University of Kentucky, and "[e]nded her Wildcat career as one of the most decorated swimmers in program history."[4] Her athletic abilities deserve honor and celebration in their own right. Instead, Riley gained more notoriety in contradistinction to the athletic prowess of a male she was forced to compete against: Lia Thomas. At an event in the NCAA Division I Women's Championships, Riley and Lia tied for fifth place. But NCAA officials "went ahead and gave the fifth place trophy to Lia" because they "want[ed] Lia to hold the fifth place trophy" during photo-ops. Mary Margaret Olohan, *'I Left There With No Trophy': NCAA Female Swimmer Who Tied for Fifth with Trans Athlete Says Officials Put Lia Thomas*

[4] University of Kentucky, Swimming & Diving, https://perma.cc/5T5G-HVHJ.

Ahead of Her, THE DAILY WIRE (Mar. 23, 2022).[5] Ironically, the "NCAA was even passing around Title IX shirts" that "said equity, fairness" "on the back," which Riley felt emblematic of the NCAA "turn[ing] their backs on all of the biological females." *Id.*

Debbie Powers grew up in a world before Title IX. Though constantly told that sports were for "boys only," she honed her skills and played basketball at Indiana University—where men played in the best arena but women could not, where men received athletic scholarships but women did not, and where men stayed in hotels for away games but women were forced to sleep in sleeping bags. Even after Congress enacted Title IX, Debbie—now a women's volleyball coach—watched as her team was forced to compete against boys who were taller and stronger. *See generally* Debbie Millbern Powers, MEETING HER MATCH: THE STORY OF A FEMALE ATHLETE-COACH, BEFORE AND AFTER TITLE IX (2014). These indignities motivated her to submit testimony in favor of the Sports Act.

Cynthia Monteleone, a "Team USA World Masters track athlete," has experienced these harms at multiple levels. At the 2018 World Masters Athletics Championships, Cynthia competed against a male—whom she beat "by only a few tenths of a second." Cynthia Monteleone, *I'm a Team USA World Masters Track Athlete, Mom and Coach Calling for the Protection of Women's Sports,* FOX NEWS (Feb. 18, 2022).[6] Then she watched as both her daughter and the female track athletes she now coaches were forced to compete and lose to males. *Id.*

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[5] https://perma.cc/455V-A4G8.

[6] https://perma.cc/RZ6Q-L39W.

In Connecticut, amici Selina Soule and Chelsea Mitchell suffered the predictable results of allowing males to compete in women's sports. *See generally Soule ex rel. Stanescu v. Conn. Ass'n of Schs., Inc.*, No. 3:20-cv-00201 (RNC), 2021 WL 1617206 (D. Conn. Apr. 25, 2021), *appeal docketed*, No. 21-1365 (2d Cir. May 26, 2021). Selina and Chelsea ran track in high school; at one point, Chelsea was considered the fastest female athlete in Connecticut. But then Connecticut allowed males to compete in women's sports. On over twenty occasions, Chelsea competed head-to-head against two males—and never once won a race in which both males competed. The male athletes ended up winning 15 state championship titles and set 17 new meet records. They displaced Selina from advancing to championship races, and relegated Chelsea to second or third place in many events.

So, too, with Madison Kenyon. Since early childhood, she has pursued athletic training and competition, now describing running as her "passion." Decl. of Madison Kenyon in Supp. of Intervention at 1, *Hecox v. Little*, No. 1:20-cv-00184-DCN (D. Idaho May 26, 2020). Yet during her athletic career at Idaho State University, she repeatedly was forced to compete against a male, who ran times faster than the college women's *national* record and consistently displaced Madison in rankings.

The biological differences between men and women also matter in volleyball, as amici Macy Petty well knows. When Macy played volleyball in high school, her team competed against a male athlete—who ran the court and earned the attention of college recruiters. The male athlete was able to take advantage of the women's net being seven inches lower than the standard men's net due to men's natural biological ability to jump higher than women.

If this Court adopts the district court's atextual and ahistorical interpretation of Title IX, female athletes in Indiana will suffer the same discouragements and humiliations. The district court's interpretation "undermine[s] one of [Title IX's] major achievements, giving young women an equal opportunity to participate in sports." *Bostock*, 140 S. Ct. at 1779 (Alito, J., dissenting). This Court should reject it.

II. The Sports Act comports with the Equal Protection Clause.

As reviewed above, the Sports Act does not conflict with Title IX. Though the district court did not reach the issue, the Sports Act also complies with the Constitution's Equal Protection Clause. Its compliance with the Constitution further counsels reversing the district court's intrusion on Indiana's sovereign prerogatives.

A. The Sports Act makes distinctions based on biological sex, not gender identity.

Like "[m]ost laws," the Sports Act "classif[ies]." *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 271 (1979). It demarcates participation in women's sports based solely on one feature: "a student's biological sex at birth." Ind. Code § 20-33-13-4. Under the statute's text, all males—those who identify as male and those who identify as female—are barred from participating in women's sports.

Notably, the Act says nothing about gender identity or transgender status. As to gender identity, "the statute in fact is facially neutral and applies to everyone who seeks to" participate in sports—regardless of how they identify. *Snyder v. O'Bannon*, No. 99-1098, 1999 WL 569013, at *1 (7th Cir. Aug. 2, 1999). A male who identifies as male and a male who identifies as female receive the same treatment.

That the Act may *affect* some transgender athletes more does not mean it classifies based on gender identity. Many laws "affect certain groups unevenly, even though the law itself treats them no differently from all other members of the class described." *Feeney*, 442 U.S. at 271–72. A law that classifies based on veteran status does not discriminate against women, even if 98% of veterans are men. *Id.* at 274–75. Nor does "[t]he regulation of a medical procedure" that affects only one sex—like abortion—"trigger heightened constitutional scrutiny." *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2245–46 (2022) (cleaned up). A "disparate impact … does not violate the equal protection clause," *Bond v. Atkinson*, 728 F.3d 690, 692–93 (7th Cir. 2013), nor does the mere "fact that [the Sports Act] affects a [certain] group … necessarily mean that [it] classifies" based on that group's characteristics. *St. John's United Church of Christ v. City of Chi.*, 502 F.3d 616, 639 (7th Cir. 2007).

Moreover, any disparate impact is "plausibly explained on a neutral ground." *Feeney*, 442 U.S. at 275. Sex-based distinctions almost always overlap or contradict a person's gender identity and are therefore "essentially an unavoidable consequence of a legislative policy that has in itself always been deemed to be legitimate." *Id.* at 279 n.25. That does not mean that Indiana intentionally targeted the transgender community.

Finally, nothing about the Sports Act "overtly or covertly" disfavors transgender athletes. *Id.* at 274. The Sports Act prevents all males from competing in women's sports, not just transgender athletes. "Too many men are affected … to permit the inference that the statute is but a pretext" for disfavoring transgender persons. *Id.* at 275; *see also Geduldig v. Aiello*, 417 U.S. 484, 496 n.20 (1974) ("nonpregnant" category "includes members of both sexes").

B. The Sports Act makes valid distinctions based on biological sex because sex matters in sports.

The Equal Protection Clause "does not take from the States all power of classification" but instead "measure[s] the basic validity of the legislative classification." *Feeney*, 442 U.S. at 271–72. Most classifications "will be sustained" if they are "rationally related to a legitimate state interest." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985). But "[w]hen state action discriminates against a suspect class or denies a fundamental right," courts review the State's action more closely. *Ostrowski v. Lake Cnty.*, 33 F.4th 960, 966 (7th Cir. 2022).

"Legislative classifications based on" sex "call for a heightened standard of review." *Cleburne*, 473 U.S. at 440. The Equal Protection Clause does not make sex "a proscribed classification," *Virginia*, 518 U.S. at 533, but instead requires the State to demonstrate that the sex-based "classification serves important governmental objectives" and that the "means employed are substantially related to the achievement of those objectives," *Tuan Anh Nguyen v. INS*, 533 U.S. 53, 60 (2001) (cleaned up). The Sports Act satisfies this standard.

To start, the Sports Act promotes equal athletic opportunities for female athletes, and "[t]here is no question" that this goal "is a legitimate and important governmental interest." *Clark I*, 695 F.2d at 1131. In addition, by barring males from competing in women's sports, the Sports Act furthers Indiana's goal of "removing the legacy of sexual discrimination … from our nation's educational institutions." *Kelley*, 35 F.3d at 272. That, too, is "an important governmental objective." *Id.*

And the Sports Act fits tightly with those interests. The Supreme Court "has consistently upheld statutes where the gender classification is not invidious, but rather realistically reflects the fact that the sexes are not similarly situated in certain circumstances." *Michael M. v. Superior Ct. of Sonoma Cnty.*, 450 U.S. 464, 469 (1981). Laws may penalize only men for having sex with underage women because of pregnancy risks. *Id.* at 471–73. And laws can impose "a different set of rules" to prove biological parenthood because of "the unique relationship of the mother to the event of birth." *Nguyen*, 533 U.S. at 63–64.

With sports, "[t]he difference between men and women … is a real one." *Id.* at 73. "[D]ue to average physiological differences, males would displace females to a substantial extent if they were allowed to compete" for the same teams. *Clark I*, 695 F.2d at 1131. As amici's experiences demonstrate, without distinct teams, "the great bulk of the females would quickly be eliminated from participation and denied any meaningful opportunity for athletic involvement." *Cape*, 563 F.2d at 795.

Far from being an exception, the Sports Act is part of a "long-standing tradition in sports of setting up classifications whereby persons having objectively measured characteristics likely to make them more proficient are eliminated from certain classes of competition." *Petrie*, 394 N.E.2d at 861. Recently, World Rugby issued guidelines excluding males from competing in women's events because it concluded "that safety and fairness cannot presently be assured for women competing against transwomen in contact rugby."[7]

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[7] World Rugby, *World Rugby Approves Updated Transgender Participation Guidelines* (Oct. 9, 2020), https://perma.cc/GHG6-LGN5.

Rather than argue that the Sports Act discriminates against females as a class, A.M. concedes that Indiana can generally segregate sports based on sex. A.M. instead asserts that the Act draws upon sex stereotypes. States generally cannot sustain a sex-based classification based on "overbroad generalizations" or "sex-based stereotypes." *Whitaker*, 858 F.3d at 1051. But a State *can* justify sex-based classifications if the differences between the sexes are "genuine," *id.* at 1050, and "realistically reflect[ ] the fact that the sexes are not similarly situated." *Michael M.*, 450 U.S. at 469. And when it comes to athletics, this Court has already rejected the argument that delineating based on biological sex is grounded in stereotyping. In *O'Connor*, a female athlete did not conform to sex stereotypes and wanted to play on the boys' team that better matched her individual preferences and abilities. But the school's insistence that she continue to play on sports teams that matched her biological sex did not violate the Constitution.

Nothing about this Court's decision in *Whitaker* displaces *O'Connor*—which preceded *Whitaker* and continues to bind this Court. *See United States v. Walton*, 255 F.3d 437, 443 (7th Cir. 2001). As reviewed above, *Whitaker* involved a school that continually changed its practice of singling out and excluding a female from boys' restrooms because that student was transgender. 858 F.3d at 1054. But not only are bathrooms different than sports, Indiana has adopted a one-time rule grounded in biological sex—a sharp contrast to the illogical, shifting positions in *Whitaker* that targeted a particular student.

If anything, *Whitaker* supports Indiana's position, not A.M.'s. In *Whitaker* this Court assumed that biological sex is valid and not a mere sex stereotype. For instance, one version of the school's policy required

students to use the restroom that corresponded with the "sex listed on the student's birth certificate." *Id.* at 1051. This Court questioned the school's policy not because it was rooted in a sex stereotype but because a birth certificate could be changed to reflect something different from a student's "chromosomal makeup"—"a key component of one's biological sex"—and was therefore an unreliable "proxy." *Id.* at 1053. The Court faulted the school for not drawing a reliable and consistent biological line. Where that school district failed, however, the Sports Act succeeds.

C. The Act's valid focus on biological sex cannot be replaced with gender identity.

The Sports Act separates males and females, and the Equal Protection Clause "does not deny to States the power to treat *different* classes of persons in different ways." *Reed v. Reed*, 404 U.S. 71, 75 (1971) (emphasis added). But A.M. would have this Court redefine one class, "female," to include not just those born female but also those born male who, like A.M., identify as female and take puberty blockers.

A.M. cannot gerrymander a class defined by sex to also include gender identity. Proper comparators must be alike "in all relevant respects." *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992); *accord Reed v. Freedom Mortg. Corp.*, 869 F.3d 543, 549 (7th Cir. 2017). And what qualifies as "different and what is the same" depends on "the nature of the problem" that the State is trying to solve. *Plyler v. Doe*, 457 U.S. 202, 216 (1982) (cleaned up).

Indiana recognized that "inherent" and "[p]hysical differences between men and women" exist and are "enduring." *Virginia*, 518 U.S. at 533. Those biological differences are genuinely meaningful in athletics. When it comes to athletics, males and females are not similarly situated.

So, to "redress[ ] past discrimination against women in athletics and promot[e] equality of athletic opportunity between the sexes," Indiana decided to separate collegiate sports based solely on sex. *See Clark I*, 695 F.2d at 1131. The Equal Protection Clause therefore asks whether males who identify as female are "different" from or the "same as" the female athletes the State wanted to protect.

To ask the question is to answer it. A.M. "misconceives" Indiana's "interest" by trying to redefine the classes to include gender identity. *Nguyen*, 533 U.S. at 69. The Sports Act focuses on one thing, biological sex, because sex is "an accurate proxy" for athletic ability and performance, accounting for the "average real differences between the sexes." *Clark I*, 695 F.2d at 1131; *see Craig v. Boren*, 429 U.S. 190, 204 (1976) (noting that sex is a valid classification if it "represents a legitimate, accurate proxy"); *see supra* § II.B. To allow one male—even one who identifies as female and takes puberty blockers—to displace "one [female] player" would take "the goal of equal participation by females in interscholastic athletics" and "set [it] back, not advance[ ]" it. *Clark v. Ariz. Interscholastic Ass'n*, 886 F.2d 1191, 1193 (9th Cir. 1989) (*Clark II*).

Nor can A.M. redefine Indiana's interests by labeling this lawsuit as an as-applied challenge. "[C]lassifying a lawsuit as facial or as-applied … does not speak at all to the substantive rule of law necessary to establish a constitutional violation." *Bucklew v. Precythe*, 139 S. Ct. 1112, 1127 (2019). The substantive rule here is clear: A.M.'s individual characteristics are constitutionally irrelevant. The Equal Protection Clause "reference[s] … characteristics typical of the affected classes rather than … focusing on selected, atypical examples." *Califano v. Jobst*, 434 U.S. 47, 55 (1977).

That A.M. concedes that sex-segregated sports are generally permitted proves the point and makes this an easy case. "[T]he validity of the [Sports Act] depends on the relation it bears to the overall problem the government seeks to correct, not on the extent to which it furthers the government's interests in an individual case." *Ward v. Rock Against Racism*, 491 U.S. 781, 801 (1989). That's why this Court upheld a sex-segregated sports policy in *O'Connor*, even though the school conceded the "policy [was] arbitrary as applied to" the individual athlete. *O'Connor*, 545 F. Supp. at 379. So too here. It does not matter that A.M. takes hormones and has the same athletic skills as some females. No matter how they identify, many males also have the same or lower athletic skills than females. If Indiana can exclude males who identify as male—and it can—then it can also exclude A.M. In the vast majority of cases, the Sports Act addresses the problem Indiana set out to solve.

Even if "specific athletic opportunities could be equalized more fully in a number of ways"—like separating sports based on skill or testosterone levels—Indiana can use sex as the line of demarcation. *Clark I*, 695 F.2d at 1131. The Sports Act need not achieve its "ultimate objective in every instance," *Nguyen*, 533 U.S. at 70, but must use "a fit that," while "not necessarily perfect," is "reasonable," *Ezell v. City of Chi.*, 651 F.3d 684, 708 (7th Cir. 2011). The Act does that via an "easily administered scheme" that, in the vast majority of cases, "promote[s] the … substantial interest of ensuring" that men do not displace women. *Nguyen*, 533 U.S. at 69. That's true even if the line does not "maximize equality" and even if it "represent[s] [some] trade-offs between equality and practicality." *Clark I*, 695 F.2d at 1131–32; *Petrie*, 394 N.E.2d at 862 (noting that a classification based on physical parity "would be too difficult to devise").

In fact, this Court in *O'Connor* already validated the administrability of sex-segregation. There the female middle schooler was "a good athlete … equal to that of a male eighth-grade player." 645 F.2d at 579. But rather than evaluate her particular "advantage[s]" or disadvantages, this Court asked solely whether it was "permissible for the defendants to structure their athletic programs by using sex as one criterion for eligibility." *Id.* (cleaned up). It was. So too here.

Biological demarcation certainly protects the State's interests more than the district court's rule. The district court and A.M. would delineate participation in sports based solely on gender identity. But unlike biological sex, gender identity says nothing about athletic ability. Moreover, the district court's rule itself discriminates based on gender identity without offering female athletes *any* protection.[8] Under the district court's interpretation, males who identify as female get to compete in women's sports, while those who identify as male—regardless of athletic prowess—may not. (To say nothing of the scores of other alleged gender identities.)

[8] Though the district court made much ado about the fact that A.M. "is indistinguishable from other girls," "has no competitive or physiological advantages," and "is not particularly accomplished at the sport," those facts are red herrings. 2022 WL 2951430, at *7. A.M.'s complaint seeks not only to "allow[ ] [A.M.] to participate in school sponsored girls' sports teams" but also to "enjoin[ ] HEA 1041 [the Sports Act]" entirely. Compl. at 13. And the district court's injunction does just that: based on the district court's interpretation of sex to encompass "gender identity"—notably, not "gender identity *and* no physiological advantages"—any male who identifies as female can now compete in women's sports in Indiana, whether they obtain any particular medical intervention or not.

CONCLUSION

The district court interpreted "sex" contrary to its original public meaning and in conflict with Title IX's structure and purpose. Its equation of "sex" with gender identity would undermine the half-century advancements Title IX has secured in women's sports—advancements that benefit female athletes like amici. This Court should reject the district court's interpretation and reverse. The Indiana Sports Act is consistent with both Title IX and the Equal Protection Clause.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Circuit Rule 29 because this brief contains 6,338 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), as determined by the word counting feature of Microsoft Office 365.

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CERTIFICATE OF SERVICE

I hereby certify that on September 13, 2022, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system, which will accomplish service on counsel for all parties through the Court's electronic filing system.

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