

IN THE
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, SUPERINTENDENT, INDIANA
PUBLIC SCHOOLS, in her official capacity,

Defendants,

and

STATE OF INDIANA,

Intervening Defendant-Appellant,

On Appeal from the United States District Court
for the Southern District of Indiana
Case No. 1:22-cv-1075-JMS-DLP
Honorable M. Page Kelley

**BRIEF OF AMICI CURIAE NATIONAL WOMEN'S LAW CENTER AND
58 ADDITIONAL ORGANIZATIONS IN SUPPORT OF APPELLEE AND
AFFIRMANCE**

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ADDITIONAL AMICI CURIAE

Anti-Defamation League (ADL)
American Atheists
American Federation of Teachers (AFL-CIO)
American Humanist Association
American Medical Women's Association
Bay Area Lawyers for Individual Freedom
California Women Lawyers
Capitol Ballroom Council, inc.
Center for Black Equity
Civil Rights Education and Enforcement Center (CREEC)
Clearinghouse on Women's Issues
Collective Power for Reproductive Justice
Desiree Alliance
Disability Rights Advocates
Education Law Center of Pennsylvania
Equal Rights Advocates
Family Equality
Feminist Majority Foundation
FORGE, Inc.
Freedom From Religion Foundation
Fund Texas Choice
Gender Justice
Girls for Gender Equity (GGE)
Human Rights Campaign (HRC)
Indiana State Teachers Association
Interfaith Alliance
Legal Aid at Work
Legal Momentum, the Women's Legal Defense and Education Fund
NARAL Pro-Choice America
National Association of Nurse Practitioners in Women's Health (NPWH)
National Association of Social Workers
National Center for Transgender Equality
National Center for Youth Law
National Consumers League
National Crittenton
National Education Association
National Institute for Reproductive Health
National LGBTQ Task Force

National Organization for Women Foundation
National Women's Political Caucus
Religious Coalition for Reproductive Choice
Reproaction
Reproductive Health Access Project
Secular Student Alliance
SIECUS: Sex Ed for Social Change
SisterReach
SPARK Reproductive Justice NOW
The Sikh Coalition
The Women's Law Center of Maryland
Tom Homann LGBTQ+ Law Association
Transgender Law Center
URGE: Unite for Reproductive & Gender Equity
Women Lawyers Association of Los Angeles
Women Lawyers On Guard Inc.
Women's Bar Association of the District of Columbia
Women's Bar Association of the State of New York
Women's Institute for Freedom of the Press
Women's Law Project

TABLE OF CONTENTS

ADDITIONAL AMICI CURIAEi

TABLE OF AUTHORITIES v

STATEMENT OF INTEREST OF AMICI CURIAE.....1

INTRODUCTION3

ARGUMENT7

 I. H.E.A. 1041 THREATENS OPPORTUNITIES FOR GIRLS AND
 WOMEN WHO SEEK TO PLAY TEAM SPORTS AT SCHOOL7

 A. Appellants’ Position Is Based on Debunked Sex
 Stereotypes8

 B. H.E.A. 1041 Would Create a Discriminatory Ban That
 Harms Women and Girls Who Are Transgender.....12

 C. H.E.A. 1041 Would Harm Women and Girls Who Are
 Intersex and Other Cisgender Women and Girls Who Do
 Not Conform to Sex Stereotypes.....15

 D. Women and Girls of Color Would Be Disproportionately
 Targeted and Harmed by H.E.A. 104118

 II. H.E.A. 1041 WOULD FORCE SCHOOLS TO DISCRIMINATE ON
 THE BASIS OF SEX IN VIOLATION OF TITLE IX AND THE
 EQUAL PROTECTION CLAUSE21

 A. H.E.A. 1041 Would Force Schools to Violate Title IX23

 B. Ensuring Equal Opportunity for Transgender Women and
 Girls Does Not Violate Title IX26

 C. H.E.A. 1041 Would Force Schools to Violate the Equal
 Protection Clause.....28

CONCLUSION30

CERTIFICATE OF COMPLIANCE.....32

TABLE OF CONTENTS - CONTINUED

CERTIFICATE OF SERVICE33

TABLE OF AUTHORITIES

	Page(s)
CASES:	
<i>A.C. ex rel. M.C. v. Metro. Sch. Dist. of Martinsville</i> , No. 1:21-cv-02965-TWP-MPB, 2022 WL 1289352 (S.D. Ind. Apr. 29, 2022)	25
<i>Adams ex rel. Kasper v. Sch. Bd. of St. Johns Cnty.</i> , 968 F.3d 1286 (11th Cir. 2020)	24, 25
<i>Adarand Constructors, Inc. v. Vena</i> , 515 U.S. 200 (1995).....	28
<i>A.M. ex rel. E.M. v. Indianapolis Pub. Schs.</i> , No. 1:22-cv-01075-JMS-DLP, 2022 WL 2951430 (S.D. Ind. July 26, 2022)	3, 4, 7, 25
<i>B.E. v. Vigo Cnty. Sch. Corp.</i> , No. 2:21-CV-00415-JRS-MG, 2022 WL 2291763 (S.D. Ind. June 24, 2022)	25
<i>Bostock v. Clayton Cnty.</i> , 140 S. Ct. 1731 (2020).....	6, 22, 23, 24
<i>Doe v. Boyertown Area Sch. Dist.</i> , 897 F.3d 518 (3d Cir. 2018)	27
<i>Grimm v. Gloucester Cnty. Sch. Bd.</i> , 972 F.3d 586 (4th Cir. 2020)	24, 30
<i>Jackson v. Birmingham Bd. of Educ.</i> , 544 U.S. 167 (2005).....	26
<i>M.A.B. v. Bd. of Educ. of Talbot Cnty.</i> , 286 F. Supp. 3d 704 (D. Md. 2018).....	23
<i>N. Haven Bd. of Educ. v. Bell</i> , 456 U.S. 512 (1982).....	23

TABLE OF AUTHORITIES - CONTINUED

Parents for Privacy v. Barr,
949 F.3d 1210 (9th Cir. 2020)27, 28

Schwenk v. Hartford,
204 F.3d 1187 (9th Cir. 2000)23

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518 U.S. 515 (1996).....29

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CODES:

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Ind. Code § 20-33-13-4(b)3

REGULATIONS:

34 C.F.R. § 106.31(b)(4).....26

34 C.F.R. § 106.3327

34 C.F.R. § 106.41(a).....26

34 C.F.R. § 106.41(b)26

RULE:

7th Cir. R. 29(a)(4)(E)..... 1

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STATEMENT OF INTEREST OF AMICI CURIAE¹

This brief is filed by amici National Women’s Law Center (“NWLC”) and 58 additional organizations committed to gender justice, including the rights of lesbian, gay, bisexual, transgender, queer, and intersex (“LGBTQI”) individuals. Additional amici are listed following the front cover.

NWLC is a non-profit legal advocacy organization that fights for gender justice—in the courts, in public policy, and in our society—working across issues that are central to the lives of women and girls—especially women of color, LGBTQI people, and low-income women and families. Since 1972, NWLC has worked to secure equal opportunity in education for girls and women through full enforcement of the U.S. Constitution, Title IX of the Education Amendments of 1972, and other laws prohibiting sex discrimination. NWLC has participated as counsel or amicus curiae in cases before the Supreme Court and federal courts of appeal to secure equal treatment and opportunity based on sex, including in the context of school athletics. NWLC has long worked for the full enforcement of

¹ All parties have consented to the filing of this brief. Pursuant to Rule 29(a)(4)(E), the undersigned counsel further represent that no party or party’s counsel authored this brief in whole or in part; that no party or party’s counsel contributed money that was intended to fund preparation or submission of this brief; and that no person other than the amici and counsel identified herein contributed money that was intended to fund preparation or submission of this brief.

Title IX, and seeks to ensure that all individuals, including LGBTQI individuals, enjoy strong legal protections against sex discrimination.

NWLC and the additional amici have a shared interest in ensuring that protections against sex discrimination include protections for LGBTQI students and in protecting women and girls of color from discrimination on the basis of race and sex. Amici include entities that are experts in securing protections against sex discrimination, including under Title IX and the U.S. Constitution, and advocating for the rights of LGBTQI students in educational settings. In our brief, amici outline the harm Indiana House Enrolled Act (“H.E.A.”) 1041 will have on women and girls if it is allowed to go into effect, in violation of Title IX and the Equal Protection Clause. Amici submit this brief to make clear that organizations committed to women’s rights firmly recognize that gender equity in schools requires equal access to participation in athletics for women and girls who are transgender.² Amici reject a framework that assumes the rights of cisgender and

² See, e.g., NWLC et al., *Statement of Women’s Rights and Gender Justice Organizations in Support of Full and Equal Access to Participation in Athletics for Transgender People* (Apr. 9, 2019), <https://nwlc.org/wp-content/uploads/2019/04/Womens-Groups-Sign-on-Letter-Trans-Sports-4.9.19.pdf>; Letter from NWLC et al. to Senate Judiciary Comm., *Statement of Women’s Rights and Gender Justice Organizations in Support of the Equality Act*, (Mar. 16, 2021), <https://nwlc.org/resources/statement-of-womens-rights-and-gender-justice-organizations-in-support-of-the-equality-act-2/>; Nat’l Coal. for Women & Girls in Educ., *NCWGE Supports Transgender and Nonbinary Students’ Full and Equal Participation in All Education Programs and Activities* (Feb. 12, 2021),

transgender women and girls are pitted against each other; rather, amici find common cause in addressing the actual harms created by sex discrimination, including through the protections contained in Title IX, one of our nation’s federal civil rights laws, and the U.S. Constitution.

INTRODUCTION

H.E.A. 1041 was created to force Indiana public schools to bar transgender girls from student sports teams. This law, if allowed to go into effect, would bar any woman or girl from participating on a female sports team if the student is deemed to be “male, based on a student’s biological sex at birth in accordance with the student’s genetics and reproductive biology” Ind. Code § 20-33-13-4(b). H.E.A. 1041 is illegal and would negatively impact all women and girls—not just women and girls who are transgender—with particular harms to Black and brown women and girls. As the district court properly recognized, this law constitutes sex discrimination and thus violates both the text and the purpose of Title IX of the Education Amendments of 1972 (“Title IX”), 20 U.S.C. § 1681 et seq. *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. July 26, 2022). H.E.A. 1041 also violates the Equal

<https://www.ncwge.org/activities.html>; Letter from NWLC et al. to the Honorable Kristi L. Noem, Governor of S.D., *RE: Request to Veto HB 1217 Regarding Transgender Students in Sports* (Mar. 10, 2021), <https://nwlc.org/wp-content/uploads/2021/03/SD-HB-1217-sign-on-letter-3.10.21.pdf>.

Protection Clause of the Fourteenth Amendment to the U.S. Constitution.

A.M., a ten-year-old girl who was assigned the sex of male at birth, has lived as a girl since before she was four years old. Indiana has legally recognized that A.M. is a girl by changing her gender marker to female on her birth certificate and changing her legal first name to her chosen female name. A.M. has been diagnosed with gender dysphoria³, receives medical treatment, and is taking a puberty blocker. Last school year, A.M. played on her elementary school's girls' softball team, which helped alleviate the symptoms of gender dysphoria that A.M. suffers from and allowed her to experience life fully as the girl she is. H.E.A. 1041, if allowed to go into effect, will deny A.M. the ability to rejoin the girls' softball team and deprive her, and students like her, of the equal educational opportunities guaranteed by federal civil rights law and the U.S. Constitution.

Amici are gravely concerned about the harm H.E.A. 1041 will cause to many women and girls by banning all transgender women and girls from playing on school sports teams consistent with their gender identity. H.E.A. 1041 rests on fundamentally inaccurate and harmful stereotypes regarding athleticism, biology,

³ Gender dysphoria “is a recognized condition – codified in the American Psychiatric Association’s Diagnostic and Statistical Manual of Mental Disorders and the World Health Organization’s International Classification of Diseases – that occurs when a transgender person experiences a constant sense of distress because of the incongruence between their experienced gender and their birth-assigned sex.” *A.M.*, 2022 WL 2951430, at *5.

and gender, which particularly harm women and girls who are transgender or intersex⁴ and Black and brown girls, who are also likely to be targeted because of racial and gender stereotypes that they are less feminine than white girls. These stereotypes frequently result in girls being told outright that they are not, in fact, girls. Such gender policing has been used to scrutinize, demean, and exclude transgender and cisgender women athletes, including those who do not conform to sex stereotypes regarding “femininity.”

H.E.A. 1041 precludes women and girls who are transgender from participating in sports and receiving the benefits of participation, and invites gender policing that will also harm women and girls who do not conform to sex stereotypes. Sports participation enhances women’s and girls’ physical health and emotional and psychological well-being, improves their educational prospects, and expands their social networks. These benefits are especially important for women and girls who are transgender—who are at heightened risk for discrimination, harassment, and negative mental health outcomes linked to social isolation and

⁴ “Intersex” is “an umbrella term for differences in sex traits or reproductive anatomy.” InterAct, *What Is Intersex?*, (Jan. 26, 2021), <https://interactadvocates.org/faq/>. “Intersex people are born with these differences or develop them in childhood. There are many possible differences in genitalia, hormones, internal anatomy, or chromosomes” *Id.* It is estimated that “[a]bout 1.7% of people are born intersex.” *Id.*

stigma—and they should not be excluded from these critical opportunities.

Appellants wrongly suggest that H.E.A. 1041’s mandated discrimination against transgender women and girls is necessary to ensure equivalent athletic opportunities for cisgender women and girls under Title IX. In fact, enforcing laws like H.E.A. 1041, that discriminate against women and girls who are transgender and others perceived as not conforming to sex stereotypes, is itself a violation of Title IX. As the U.S. Supreme Court confirmed in the Title VII case, *Bostock v. Clayton County*, a policy that discriminates on the basis of transgender status necessarily discriminates on the basis of sex. 140 S. Ct. 1731, 1747 (2020); *see also Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1047 (7th Cir. 2017) (“[T]his [C]ourt has looked to Title VII when construing Title IX.”). Even before *Bostock*, the Seventh Circuit made clear that a school policy that “subjects . . . a transgender student to different rules, sanctions, and treatment than non-transgender students” violates Title IX because it discriminates based on sex stereotypes. *Whitaker*, 858 F.3d at 1049. For these same reasons, the prohibition required by H.E.A. 1041 also violates the Equal Protection Clause by mandating schools to discriminate against students on the basis of sex. *See id.* at 1051.

The district court correctly issued a preliminary injunction enjoining H.E.A. 1041 after finding that A.M. was likely to succeed on the merits of her Title IX

claim. *A.M.*, 2022 WL 2951430, at *11. The court made clear that its decision was “not even a close call,” and that H.E.A. 1041 would force schools to violate Title IX by discriminating against transgender students based on their sex. *Id.* (citing *Bostock* and *Whitaker*). A preliminary injunction was therefore necessary to avoid the irreparable harm that would be caused by forcing A.M. to be “outed” as a transgender girl to her school community—an experience “that would be extremely traumatizing for her.” *Id.* (quoting Compl. at 19-20, Doc. No. 50).

H.E.A. 1041 would not only harm Indiana’s women and girls by violating Title IX and the Equal Protection Clause, but also harm Indiana’s schools by placing them in the untenable position of choosing between violating H.E.A. 1041 or violating Title IX and provisions of the U.S. Constitution that protect against sex discrimination. Thus, amici urge this Court to affirm the preliminary injunction.

ARGUMENT

I. H.E.A. 1041 THREATENS OPPORTUNITIES FOR GIRLS AND WOMEN WHO SEEK TO PLAY TEAM SPORTS AT SCHOOL.

Ensuring equal educational opportunities means providing opportunities for *all* women and girls to play school sports—not gatekeeping which women and girls get a chance to play. Banning certain students from sports teams, merely because of who they are, does not promote fairness or safety for cisgender girls; instead, exclusionary policies like those required by H.E.A. 1041 only serve to

harm transgender students, as well as cisgender women and girls who do not conform to sex stereotypes.

Appellants' claimed concerns about maintaining the "fairness" and "safety" of girls' sports rest on harmful and inaccurate sex stereotypes. Policies like H.E.A. 1041 reinforce antiquated notions of femininity and harm women and girls who do not conform to stereotypes, whether they are cisgender or transgender, by denying them the same rights, opportunities, and dignity as their peers. This kind of policing of who counts as a woman is dangerous and particularly harms Black and brown women and girls, girls born with intersex traits, and transgender and gender nonconforming women and girls.

A. Appellants' Position Is Based on Debunked Sex Stereotypes.

Appellants rely on inaccurate sex stereotypes regarding supposed categorical physiological differences between cisgender and transgender women and girls to argue H.E.A. 1041 is necessary to protect athletic opportunities for cisgender girls. *See* Appellants' Br. 2, 44-46. This narrative is false. Appellants cannot point to any evidence that allowing transgender girls to compete will curtail athletic opportunities for cisgender athletes. To the contrary, research indicates that in states where women and girls who are transgender are included in sports,

participation for all women and girls remains steady or even increases.⁵

Conversely, bans on transgender student sport participation are correlated with drops in school sport participation for all girls and young women.⁶

Athletes come in all shapes, sizes, and physiological makeups. These differences may be advantageous or disadvantageous based on their sport. For example, standing four feet, eight inches tall, professional gymnast Simone Biles is significantly shorter than the average American woman.⁷ Rather than being perceived as providing an unfair advantage, her stature is “seen as positive and as a factor in [her] athletic success—which, for Biles . . . has included winning an Olympic Gold Medal.”⁸ Competitive swimmer Michael Phelps excels in swimming, in part because he “possesses a disproportionately vast wingspan,” and double-jointed ankles that give his kick unusual power.⁹ Phelps also “apparently

⁵ See, e.g., Shoshana K. Goldberg, *Fair Play: The Importance of Sports Participation for Transgender Youth*, Ctr. for Am. Progress 15 (Feb. 2021) (“CAP Report”).

⁶ See, e.g., *id.*

⁷ NWLC, *Fulfilling Title IX’s Promise: Let Transgender and Intersex Athletes Play*, (June 14, 2022), <https://nwlc.org/resource/trans-and-intersex-inclusion-in-athletics/>.

⁸ *Id.*

⁹ Monica Hesse, *We Celebrated Michael Phelps’s Genetic Differences. Why Punish Caster Semenya for Hers?*, Wash. Post (May 2, 2019), <https://www.washingtonpost.com/lifestyle/style/we-celebrated-michael-phelpss->

produces just half the lactic acid of a typical athlete,” making him “simply better equipped at a biological level to excel in his sport.”¹⁰

Transgender athletes likewise have a range of athletic skills, and are far from uniform in their bodies’ sizes or shapes. The assumption that transgender girls and women have categorical athletic advantages over cisgender girls and women is inaccurate and based on stereotypical gender norms around the types of bodies that are more athletic and the qualities connected with athleticism. The assumption that transgender girls will be inherently bigger, stronger, and more athletically skilled is “especially inaccurate when applied to youth who are still developing physically and who therefore display a significantly broader range of variation in size, strength, and skill than older youth and adults.”¹¹ And the notion that a student’s genetic make-up or reproductive biology determines athletic performance is false. “None of these physiological characteristics alone or in any combination can

genetic-differences-why-punish-caster-semenya-for-hers/2019/05/02/93d08c8c-6c2b-11e9-be3a-33217240a539_story.html.

¹⁰ *Id.*

¹¹ Pat Griffin & Helen J. Carroll, *On the Team: Equal Opportunity for Transgender Student Athletes*, 16 (Oct. 4, 2010), <https://www.goucher.edu/policies/documents/NCLR-Equal-Opportunity-For-Transgender-Student-Athletes.pdf>.

‘verify’ sex, nor are any of them alone or in combination accurate proxies for athletic advantage.”¹²

The participation of transgender women and girls in sports is not new, and decades of experience demonstrate there is no categorical dominance. Seventeen states and the District of Columbia have passed laws protecting transgender students’ right to participate in school sports.¹³ Many athletic associations allow transgender athletes to participate in accordance with their gender identity and have done so for over a decade.¹⁴ Since these laws and association policies were adopted, there has been no dominance by transgender athletes or threat to girls’ sports—despite hundreds, if not thousands, of transgender girls competing in girls’ sports.¹⁵ Only one transgender athlete has been part of a team that medaled at the

¹² Expert Decl. of Joshua D. Safer at 13, *Hecox v. Little*, No. 1:20-cv-184-CWD (D. Idaho Apr. 30, 2020), <https://www.aclu.org/legal-document/hecox-v-little-safer-declaration>.

¹³ NWLC, *Fulfilling Title IX’s Promise*, *supra* note 7.

¹⁴ *See, e.g.*, CAP Report, *supra* note 5, at 8, 17; *see also* Transathlete, *K-12 Policies*, <https://www.transathlete.com/k-12> (last visited Nov. 10, 2022) (excerpting Indiana High School Athletic Association rules that, while not inclusive, provided a pathway to participation for transgender students who received certain types of gender affirming medical care).

¹⁵ Although “[t]here is no data available that provides an exact number of transgender students in high school, let alone transgender student-athletes,” studies indicate that it is “statistically possible that there are some 35,000 transgender student-athletes in high school, which would mean 0.44% of high school athletes

Olympics.¹⁶ And only one woman who is transgender has qualified to participate at the Olympics in an individual event, and she did not advance toward medal contention.¹⁷ Appellants' purported concern for protecting opportunities for cisgender girls are not substantiated by data.

B. H.E.A. 1041 Would Create a Discriminatory Ban That Harms Women and Girls Who Are Transgender.

Forbidding women and girls who are transgender from competing on sports teams consistent with their gender identity deprives these athletes of the benefits available to cisgender athletes. Participation in sports provides students with a supportive network and social status that can minimize feelings of difference and isolation, a benefit that is especially crucial for transgender student athletes

are transgender.” Katie Barnes, *Young Transgender Athletes Caught in Middle of States' Debates*, ESPN.com (Sept. 1, 2021), https://www.espn.com/espn/story/_/id/32115820/young-transgender-athletes-caught-middle-states-debates.

¹⁶ NPR, *Canadian Soccer Player Quinn Becomes the First Out Trans and Nonbinary Gold Medalist*, (Aug. 6, 2021), <https://www.npr.org/2021/08/06/1025442511/canadian-soccer-player-quinn-becomes-first-trans-and-nonbinary-olympic-gold-meda>.

¹⁷ Rachel Axon, *New Zealand's Laurel Hubbard Makes History as First Transgender Woman to Compete at Olympics*, USA Today (Aug. 2, 2021), <https://www.usatoday.com/story/sports/olympics/2021/08/02/laurel-hubbard-becomes-openly-first-trans-woman-compete-olympics/5451329001/>.

because it can foster acceptance and positive relationships.¹⁸ Acceptance and positive peer relationships have been shown to be a protective factor for the health and well-being of girls who are transgender.¹⁹

Participating in sports can help counteract the harm caused by disproportionate rates of harassment, abuse, and negative mental health outcomes that transgender girls already face. Research demonstrates that transgender students exhibit “a higher risk for suicide and other life threatening behaviors” because of the “elevated risk of social isolation” and “verbal and physical abuse and harassment at the hands of their peers.”²⁰ The CDC’s 2019 Youth Risk Behavior Survey found transgender students were many times more likely than their cisgender peers to experience violent or harassing incidents, and at a significantly higher risk for suicide and substance abuse.²¹ The CDC data shows

¹⁸ See, e.g., Erin E. Buzuvis, *Transgender Student-Athletes and Sex-Segregated Sport: Developing Policies of Inclusion for Intercollegiate and Interscholastic Athletics*, 21 Seton Hall J. Sports & Ent. L. 1, 48 (2011).

¹⁹ CAP Report, *supra* note 5, at 24 (“It is well-established that sports benefit all youth, and may have particularly positive effects for transgender youth.”).

²⁰ Buzuvis, *supra* note 18, at 48.

²¹ Michelle M. Johns et al., *Transgender Identity and Experiences of Violence Victimization, Substance Use, Suicide Risk, and Sexual Risk Behaviors Among High School Students — 19 States and Large Urban School Districts, 2017*, 68 Morbidity and Mortality Weekly Report 67, 70 (2019).

that 27% of U.S. transgender high school students feel unsafe at school or traveling to or from school, that 35% are bullied at school, and that 35% have attempted suicide.²² Similarly, in a 2020 survey of over 40,000 LGBTQ youth ages thirteen to twenty-four, more than 60% of transgender and nonbinary youth reported engaging in self-harm within the previous twelve months, and over 75% of transgender and nonbinary youth reported experiencing symptoms of generalized anxiety disorder within the previous two weeks.²³ Facing high levels of discrimination based on gender identity has also been found to double the odds of depression in girls and women who are transgender, nearly triple the odds of post-traumatic stress disorder, and increase eightfold the odds of stress caused by suicidal thoughts.²⁴

Inclusive and nondiscriminatory policies are crucial, in both school sports and other settings, to address alarming disparities and ensure equal educational opportunities. Participating on a sports team consistent with one's gender identity

²² *Id.* at 69.

²³ The Trevor Project, *National Survey on LGBTQ Youth Mental Health 2020*, 1-3, <https://www.thetrevorproject.org/wp-content/uploads/2020/07/The-Trevor-Project-National-Survey-Results-2020.pdf> (last visited Nov. 10, 2022) (“Trevor Project National Survey”).

²⁴ Erin C. Wilson et al., *The Impact of Discrimination on the Mental Health of Trans*Female Youth and the Protective Effect of Parental Support*, 20 *AIDS Behav.* 2203, 2208-09 (2016).

mitigates these risks and offers an important “‘respite’ or ‘escape’ from the stress and turmoil associated with” the discrimination and harassment students who are transgender face.²⁵ Indeed, studies have shown that students at schools with transgender-inclusive policies and educators are less likely to experience harassment, violence, or hear anti-LGBTQ remarks.²⁶ And transgender youth who have their gender affirmed and accepted consistently report lower rates of suicide attempts.²⁷

Excluding transgender girls from sports replaces a helpful protective factor with an added risk factor for the health and safety of students who are already experiencing significant discrimination. Inclusive athletic opportunities not only provide transgender youth access to much-needed school belonging, community connectedness, and self-esteem, but also have the potential to save lives.

C. H.E.A. 1041 Would Harm Women and Girls Who Are Intersex and Other Cisgender Women and Girls Who Do Not Conform to Sex Stereotypes.

The harms from Indiana’s law extend beyond women and girls who are

²⁵ See Buzuvis, *supra* note 18, at 49.

²⁶ See, e.g., Joseph G. Kosciw et al., *The 2019 National School Climate Survey: The Experiences of Lesbian, Gay, Bisexual, Transgender, and Queer Youth in Our Nation’s Schools*, GLSEN, xxi-xxv (2020), https://www.glsen.org/sites/default/files/2020-10/NSCS-2019-Full-Report_0.pdf.

²⁷ See, e.g., Trevor Project National Survey, *supra* note 23, at 9.

transgender. H.E.A. 1041 would also harm women and girls who are intersex, as well as cisgender women who identify as nonbinary or gender nonconforming, or who are perceived as not conforming to sex stereotypes.

H.E.A. 1041 requires each school to establish an unspecified “grievance procedure” for purported violations of H.E.A. 1041. As Indiana Governor Eric Holcomb recognized when he vetoed H.E.A. 1041, the “wide-open nature” of the grievance procedure risks that Indiana student athletes “could be treated differently according to which school they attend and compete for.”²⁸ At worst, these grievance procedures could mimic the outdated and harmful sex verification procedures historically present in some women’s sports.²⁹ Beginning in the 1960s, women athletes were systematically required to parade naked in front of a panel of doctors, or submit to direct gynecological examination, to prove that they were women for some international competition organizations.³⁰ Until 1999, the International Olympic Committee (“IOC”) implemented unreliable genetic tests to

²⁸ Letter from Gov’t Holcomb to Rep. Huston at 1 (Mar. 21, 2022), <https://www.in.gov/gov/files/Veto-HEA-1041.pdf>.

²⁹ See, e.g., Human Rights Watch, *‘They’re Chasing Us Away From Sport’: Human Rights Violations in Sex Testing of Elite Women Athletes*, (Dec. 4, 2020), <https://www.hrw.org/report/2020/12/04/theyre-chasing-us-away-sport/human-rights-violations-sex-testing-elite-women>.

³⁰ See, e.g., Vanessa Heggie, *Testing Sex and Gender in Sports; Reinventing, Reimagining, and Reconstructing Histories*, 34 *Endeavour* 157, 159 (2010).

purportedly prevent women with “unfair, male-like” physical advantages from competing.³¹ Women and girls screened out as “chromosomally abnormal” were forced to withdraw from competition or agree to a follow-up gynecological examination to determine if they should be banned for life.³² The IOC rightfully ended compulsory sex verification in 1999 because it was humiliating, unscientific, and ineffective,³³ but it still engaged in case-by-case testing for any competitor the IOC deemed to be “suspicious” until 2010.³⁴

Women and girls who are perceived as not conforming to sex stereotypes—including women and girls who are intersex or gender nonconforming—are most likely to suffer harms caused by any “grievance procedure” established by Indiana schools. Disturbingly, these unscientific and invasive sex testing schemes also exacerbate the risk of sexual abuse by coaches and doctors that student athletes,

³¹ See, e.g., Louis J. Elsas et al., *Gender Verification of Female Athletes*, 2 *Genetics in Med.* 249, 249 (2000).

³² *Id.* at 250.

³³ See Heggie, *supra* note 30, at 160.

³⁴ Lindsay Parks Pieper, *They Qualified for the Olympics. Then They Had to Prove Their Sex*, *Wash. Post* (Feb. 22, 2018), <https://www.washingtonpost.com/news/made-by-history/wp/2018/02/22/first-they-qualified-for-the-olympics-then-they-had-to-prove-their-sex/>.

especially girls and young women, already face.³⁵

D. Women and Girls of Color Would Be Disproportionately Targeted and Harmed by H.E.A. 1041.

Exclusion of transgender women and girls has a far-reaching impact and can adversely affect other women and girls as well. Black and brown girls and women—routinely targeted for not conforming to society’s expectations of white femininity—are particularly vulnerable to harm from the types of exclusionary policies Appellants ask the Court to impose. When Black and brown women’s bodies fall outside of traditional notions of white femininity, they are subject to policing, discrimination, and harassment.³⁶

These harmful stereotypes have resulted in a long history of sporting bodies, competitors, and the media targeting women and girls of color. For example, when Tidye Pickett and Louise Stokes became the first Black women to represent the U.S. in the 1936 Olympics, an official proposed that the IOC “should create a special category of competition for them [Pickett and Stokes]—the unfairly

³⁵ See, e.g., N’dea Yancey-Bragg, *1 in 4 College Athletes Say They Experienced Sexual Abuse From an Authority Figure, Survey Finds*, USA Today (Aug. 26, 2021), <https://www.usatoday.com/story/news/nation/2021/08/26/college-athlete-report-sexual-assault-common-survey/8253766002/>.

³⁶ See, e.g., Brooke Newman, *The Long History of Racist Attacks on Serena Williams*, Wash. Post (Sept. 11, 2018), <https://www.washingtonpost.com/outlook/2018/09/11/long-history-behind-racist-attacks-serena-williams/>.

advantaged ‘hermaphrodites’ who regularly defeated ‘normal women’”³⁷ And in recent years, international athletics bodies forced Santhi Soundarajan and Dutee Chand of India and Caster Semenya of South Africa to undergo humiliating sex-verification testing because competitors and coaches saw their physique as “suspiciously masculine.”³⁸

Serena Williams is perhaps the most prominent woman to experience this policing. Throughout her storied career, Williams has been a consistent target of racism, sexism, and transphobia. Because of her athletic physique and dominance in tennis, with its history of elitism and racial discrimination, people have said that “[s]he is built like a man” and “[she] was born a guy, all because of [her] arms, or because [she’s] strong.”³⁹ This bigotry against Williams rests on narrow and sexist

³⁷ Milton Kent et al., *Beating Opponents, Battling Belittlement: How African-American Female Athletes Use Community to Navigate Negative Images*, Sch. of Glob. Journalism & Commc’ns, Morgan State Univ., 9, <https://www.documentcloud.org/documents/4528427-The-Image-of-Black-Women-in-Sports2.html#document/> (last visited Nov. 10, 2022).

³⁸ Ruth Padawer, *The Humiliating Practice of Sex-Testing Female Athletes*, N.Y. Times Magazine (June 28, 2016), <https://www.nytimes.com/2016/07/03/magazine/the-humiliating-practice-of-sex-testing-female-athletes.html>.

³⁹ Gina Vivinetto, *Serena Williams on How She Struggles With Cruel Remarks About Her Body*, Today (Sept. 7, 2017), <https://on.today.com/3rfdDLQ>; Jason Pham, *Serena Williams Shut Down Body Critics: ‘I Am Strong and Muscular — and Beautiful’*, Bus. Insider (May 31, 2018),

notions of femininity which equate muscular strength with masculinity and muscular weakness with femininity.

The harmful impact of this invasive and humiliating gender policing on athletes is real. Caster Semenya—a Black woman and Olympic track champion—faced intense suspicion from competitors and “experts” who questioned her athletic physique. Time Magazine even ran an article entitled, “Could This Women’s World Champ Really Be a Man?,” and an Australian newspaper labeled her a “hermaphrodite.”⁴⁰ On top of this public scrutiny, she was subjected to a battery of tests to assess whether she should be allowed to compete with women. Semenya reported feeling targeted and “crucified” by this scrutiny, and that it “‘destroyed’ her ‘mentally and physically.’”⁴¹

Santhi Soundarajan, an Indian sprinter who finished second in the 800 meters at the 2006 Asian Games, faced intense scrutiny about her gender from

<https://www.businessinsider.com/serena-williams-shut-down-body-critics-who-said-she-was-born-a-guy-2018-5>.

⁴⁰ Anna North, *‘I am a woman and I am fast’: What Caster Semenya’s Story Says About Gender and Race in Sports*, Vox (May 3, 2019), <https://www.vox.com/identities/2019/5/3/18526723/caster-semenya-800-gender-race-intersex-athletes>.

⁴¹ BBC Sport, *Caster Semenya Says Testosterone Case Against IAAF Has ‘Destroyed’ Her ‘Mentally and Physically’*, (July 1, 2019), <https://bbc.in/2KG2pkC>.

athletics bodies and the media for having a “deep voice” and a “flat chest.”⁴² After allegedly “fail[ing]” a sex verification test, she was stripped of her silver medal. “[T]ormented by ongoing scrutiny and unbearably embarrassed, she attempted suicide, reportedly by swallowing poison.”⁴³

Because “suspicions” of gender nonconformity are projected more often on the bodies of Black and brown women and girls, intrusive “sex verification” policies have also tended to target these individuals. Exclusionary policies like H.E.A 1041 will only further these kinds of harms perpetuated against girls perceived as gender nonconforming, especially those who are Black or brown.

II. H.E.A. 1041 WOULD FORCE SCHOOLS TO DISCRIMINATE ON THE BASIS OF SEX IN VIOLATION OF TITLE IX AND THE EQUAL PROTECTION CLAUSE.

Appellants’ arguments ignore the broad sweep of Title IX: to prohibit sex discrimination and ensure equal opportunities for all girls, including transgender girls. Appellants also incorrectly assert that the Equal Protection Clause requires excluding women and girls who are transgender to ensure athletic opportunities for cisgender girls. These arguments are not only legally incorrect, but also fail to consider the reality that, if allowed to go into effect, H.E.A. 1041 would harm all

⁴² Padawer, *supra* note 38.

⁴³ *Id.*

women and girls.

H.E.A. 1041 not only fails to advance the interests of Title IX, but also forces schools to violate the law. Since its enactment fifty years ago, Title IX has dramatically advanced women’s and girls’ participation in school athletics.⁴⁴ Title IX mandates 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). The Supreme Court has confirmed that discrimination based on a person’s transgender status is a form of sex discrimination. *Bostock*, 140 S. Ct. at 1747. Title IX thus prohibits discrimination against transgender students.

Compliance with H.E.A. 1041 would also force schools to violate the Equal Protection Clause—and this Court’s binding precedent in *Whitaker*—given Appellants’ failure to articulate any “exceedingly persuasive” justification for these restrictions. As a result, H.E.A. 1041 not only fails to advance the goals of Title IX and the Equal Protection Clause, but also requires schools in Indiana to engage in the very discrimination federal law prohibits.

⁴⁴ See, e.g., Women’s Sports Found., *50 Years of Title IX: We’re Not Done Yet*, (May 2022), https://www.womenssportsfoundation.org/wp-content/uploads/2022/05/13_Low-Res_Title-IX-50-Report.pdf (“Title IX’s enactment served as a catalyst for the growth of sport participation opportunities for girls and women”).

A. H.E.A. 1041 Would Force Schools to Violate Title IX.

Prohibiting women and girls who are transgender from playing on sports teams consistent with their gender violates Title IX. Indiana is thus forcing its schools into an impossible situation as complying with H.E.A. 1041 would require violating Title IX.

Appellants' and their amici claim that Title IX's protections are limited, but these arguments simply cannot be squared with precedent from this Court or the Supreme Court. For decades, federal courts, including this one, have affirmed that federal statutes prohibiting sex discrimination include discrimination on the basis of gender identity and transgender status. *See, e.g., Whitaker*, 858 F.3d at 1047 (interpreting Title IX); *Schwenk v. Hartford*, 204 F.3d 1187, 1200-01 (9th Cir. 2000) (interpreting Gender Motivated Violence Act); *M.A.B. v. Bd. of Educ. of Talbot Cnty.*, 286 F. Supp. 3d 704, 719 (D. Md. 2018) (Title IX); *see also N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 521 (1982) ("There is no doubt that if we are to give [Title IX] the scope that its origins dictate, we must accord it a sweep as broad as its language.") (internal quotation omitted) (alteration in original). The Supreme Court put it succinctly in *Bostock*: discrimination tied to sexual orientation or gender identity "necessarily entails discrimination based on sex; the first cannot happen without the second." 140 S. Ct. at 1747. Specifically, in *Harris Funeral Homes*, one of the three underlying cases resolved in *Bostock*, the

Supreme Court found that an employer violated Title VII by firing a transgender woman, in part because she sought to wear work uniforms that conformed to her gender identity instead of her sex assigned at birth. *Id.* at 1738. Thus, the Court found that discrimination on the basis of being transgender and discrimination on the basis of sex are inextricably linked.

Bostock and its progeny clearly indicate that prohibiting women and girls who are transgender from competing on women's sports teams violates Title IX. Two federal circuits have applied *Bostock* to Title IX when ruling against policies that target transgender students. In *Grimm v. Gloucester County School Board*, the Fourth Circuit applied *Bostock* to hold that a bathroom policy prohibiting a transgender boy from using the men's restroom was impermissible sex discrimination. 972 F.3d 586 (4th Cir. 2020). The court found that "Grimm was treated worse than students with whom he was similarly situated because he alone could not use the restroom corresponding with his gender." *Id.* at 618. It rejected the school's reliance on a Title IX regulation allowing sex-segregated bathrooms. The regulation stated that sex-segregated restrooms are not per se discriminatory; it did not state that in "applying bathroom policies to students like Grimm, the Board may rely on its own discriminatory notions of what 'sex' means." *Id.* The Eleventh Circuit reached a similar conclusion in *Adams ex rel. Kasper v. Sch. Bd. of St. Johns Cnty.*, 968 F.3d 1286, 1296 (11th Cir. 2020), *vacated and superseded*,

3 F.4th 1299 (11th Cir. 2021), *reh'g en banc granted, vacated*, 9 F.4th 1369 (11th Cir. 2021).⁴⁵ Applying *Bostock*, it held that a policy restricting restroom use based on “biological sex” “singles out transgender students for differential treatment *because they are transgender.*” *Id.* (emphasis in original).

Whitaker, which this Court decided three years before *Bostock*, is directly on point. There, this Court held that a school district violated Title IX when it denied a transgender boy access to the boys’ restroom. As Judge Williams explained: “A policy that requires an individual to use a bathroom that does not conform with his or her gender identity punishes that individual for his or her gender non-conformance, which in turn violates Title IX.” *Whitaker*, 858 F.3d at 1049.

District courts in the Seventh Circuit, including the District Court below, *see A.M.*, 2022 WL 2951430, at *9-11, have only confirmed that *Whitaker* remains good law and solidified that case’s unambiguous holding. *See, e.g., B.E. v. Vigo Cnty. Sch. Corp.*, No. 2:21-CV-00415-JRS-MG, 2022 WL 2291763, at *4 (S.D. Ind. June 24, 2022) (citing *Bostock* and *Whitaker* and holding that male high school students, who were transgender, were likely to succeed on merits of their claim that their school’s refusal to allow them to use the male restroom and locker room violated Title IX); *A.C. ex rel. M.C. v. Metro. Sch. Dist. of Martinsville*, No. 1:21-cv-

⁴⁵ Oral argument was held in the *Adams* rehearing on February 22, 2022. The Eleventh Circuit has not yet issued its *en banc* decision.

02965-TWP-MPB, 2022 WL 1289352, at *3 (S.D. Ind. Apr. 29, 2022) (citing *Bostock* and *Whitaker* and holding that a transgender student was likely to succeed on merits of his claim that his school district’s refusal to allow him to use the male restroom consistent with his gender identity violated Title IX).

In sum, H.E.A. 1041 targets and excludes women and girls who are transgender, and this is a form of sex discrimination that violates Title IX.

B. Ensuring Equal Opportunity for Transgender Women and Girls Does Not Violate Title IX.

Under Title IX, sex discrimination generally exists where a school subjects someone to “separate or different rules of behavior, sanctions, or other treatment” on the basis of sex that results in the denial of an educational benefit (including participation on sports teams). 34 C.F.R. § 106.31(b)(4); *see Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 173 (2005). However, Title IX’s implementing regulations allow certain exceptions from this general nondiscrimination rule; one such exception permits schools to maintain sex-segregated athletics in limited circumstances. *See* 34 C.F.R. § 106.41(b) (permitting the creating of sex-segregated teams “where selection for such teams is based upon competitive skill or the activity involved is a contact sport”). This limited exception for the maintenance of separate sports teams does not mean that student athletics are exempt from Title IX. Nor does the regulation specify which teams students may—or must—participate in. *Id.* § 106.41(a).

Even Appellants and their amici do not claim that all women and girls will be harmed unless transgender women and girls are excluded from women's sports teams. Nor could they, since any such fear has been disproven around the country, and H.E.A. 1041 would harm many members of the very group it purports to protect: women and girls. *Supra*, § I(B). Instead, Appellants and their amici claim harm only to the interests of some cisgender women who object to participation by their transgender women peers. However, courts have repeatedly rejected any claims that the presence of transgender peers, or trans-inclusive policies themselves, violate Title IX.

For example, in *Doe v. Boyertown Area School District*, the Third Circuit addressed a school district's policy that allowed transgender students to use restrooms and locker rooms consistent with their gender identity. 897 F.3d 518, 535 (3d Cir. 2018). In a similar manner to its treatment of athletics, Title IX's implementing regulations allow for sex-segregated bathrooms and locker rooms as an exception from the general rule prohibiting discrimination on the basis of sex. *See* 34 C.F.R. § 106.33. The Third Circuit determined that schools do not violate this regulation by instituting a policy that allows students to use sex-segregated restrooms based on their gender identity. *See Boyertown*, 897 F.3d at 534-35. Other courts have followed suit. In *Parents for Privacy v. Barr* the Ninth Circuit held that trans-inclusive policies, such as the policy of allowing transgender

students to use facilities that align with their gender identity, do not violate Title IX. 949 F.3d 1210, 1239-40 (9th Cir. 2020). Following this consensus, H.E.A. 1041 would violate Title IX. Ultimately, ensuring protections against sex discrimination for all women and girls, including for women and girls who are transgender, is required by Title IX.

C. H.E.A. 1041 Would Force Schools to Violate the Equal Protection Clause.

If allowed to take effect, H.E.A. 1041 would also compel schools to violate the Equal Protection Clause of the U.S. Constitution by prohibiting transgender women and girls from playing on sports teams consistent with their gender identity. Accordingly, although the District Court ultimately did not reach the issue, the U.S. Constitution provides an independent basis for this Court to affirm the decision below in line with this Circuit's precedents.

Under the Equal Protection Clause, courts must determine what level of scrutiny applies to the allegedly offensive governmental conduct: ranging from low-level, "rational basis" scrutiny, *see Whitaker*, 858 F.3d at 1050, to classifications based on a person's membership in a suspect class, such as race—which are subject to strict scrutiny. *See, e.g., Adarand Constructors, Inc. v. Vena*, 515 U.S. 200, 223-24 (1995). Appellants and their amici claim that discrimination based on transgender status does not trigger heightened scrutiny under the Equal Protection Clause and that, regardless of the level of scrutiny, there are persuasive

reasons for limiting girls' sports teams to cisgender girls. Appellants' Br. at 22-23. However, prohibitions on women and girls who are transgender playing on sports teams consistent with their gender identity, as mandated by H.E.A. 1041, are subject to heightened scrutiny.

This Court has already resolved this question in *Whitaker*. As this Court explained, “the School District’s policy [prohibiting women and girls who are transgender from using the bathroom consistent with their gender identity] cannot be stated without referencing sex, as the School District decides which bathroom a student may use based upon the sex listed on the student’s birth certificate.” 858 F.3d at 1051. So too here—the discrimination at the heart of H.E.A. 1041 cannot be stated without referencing sex. Appellants and their amici make this clear—sex is at the heart of their arguments. *Supra*, § I(A). Accordingly, the Court should follow its decision in *Whitaker* and find that prohibitions on women and girls who are transgender from playing on the sports team consistent with their gender identity are subject to heightened scrutiny.

Because heightened scrutiny applies, H.E.A. 1041 can only survive an equal protection challenge if Appellants can show some “exceedingly persuasive” justification for its restrictions. *United States v. Virginia*, 518 U.S. 515, 533 (1996) (internal quotation omitted). Appellants do not carry this burden, and their purported justifications ring hollow. Appellants do not seek to “preserv[e] athletic

opportunities for” and “protect[]” all women and girls, but rather just a subset of cisgender girls who object to participation by their transgender girl peers, *see supra*, §(I)(C), and the conjecture and stereotypes upon which they predicate their argument are nothing more than “sheer conjecture and abstraction,” which cannot overcome elevated scrutiny under the Equal Protection Clause. *Grimm*, 972 F.3d at 614 (internal quotation omitted). On that basis, H.E.A. 1041 does not survive heightened scrutiny and the Equal Protection Clause provides an independent basis to find for the Appellee.

CONCLUSION

For the foregoing reasons, as well as those set forth in Plaintiff-Appellee’s brief, the District Court’s preliminary injunction order should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The foregoing brief complies with the type-volume limitations in Fed. R. App. P. 29(a)(5) and 32(a)(7) because it contains 6,579 words, excluding those parts exempted by Fed. R. App. P. 32(f).

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/s/ Jessica L. Ellsworth
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CERTIFICATE OF SERVICE

I certify that on November 10, 2022, the foregoing was electronically filed with the Clerk of the Court for the United States Court of Appeals for the First Circuit by using the appellate CM/ECF system. All counsel of record are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

/s/ Jessica L. Ellsworth
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