No. 25-2899

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

FEMALE ATHLETES UNITED,
Plaintiff-Appellant,

v.

KEITH ELLISON, in his official capacity as Attorney General of Minnesota, ET AL.,
Defendants-Appellees.

On Appeal from the United States District Court
for the District of Minnesota
Case No. 0:25-cv-02151-ECT-DLM

BRIEF OF THE NATIONAL WOMEN'S LAW CENTER AND 19 ADDITIONAL EDUCATION, CIVIL RIGHTS, AND GENDER JUSTICE ORGANIZATIONS AS *AMICI CURIAE* IN SUPPORT OF APPELLEES AND IN FAVOR OF AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, counsel of record for *Amici Curiae* National Women's Law Center and 19 additional education, civil rights, and gender justice organizations certifies that none of the *Amici Curiae* is a non-governmental entity with a parent corporation or a publicly held corporation that owns 10% or more of its stock. This representation is made in order so that the judges of this Court may evaluate possible disqualification or recusal.

January 5, 2026

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INTEREST OF *AMICI CURIAE*

Amici curiae are twenty education, civil rights, and gender justice organizations working to advance opportunities for women and girls.[1] *Amici* have a shared interest in ensuring that protections against sex discrimination are inclusive of LGBTQI+ people, and that Title IX's broad nondiscrimination mandate is enforced to allow *every* student to participate in school-based sports without fear of exclusion or discrimination. *Amici* have previously advocated for broad application of Title IX's nondiscrimination mandate in litigation before the U.S. Supreme Court, federal courts of appeals, and state supreme courts.

Amici submit this brief to explain how Title IX's legislative history and regulatory framework should be interpreted broadly to support Minnesota's inclusive athletics policies, while also highlighting how exclusionary policies harm all women and girls by exposing them to inappropriate scrutiny and harassment based on sex stereotypes. *Amici* include:

- National Women's Law Center

[1] No party's counsel authored this brief in whole or in part, nor did a party, its counsel, or any other person contribute money to fund preparing or submitting this brief. *See* Fed. R. App. P. 29(a)(4)(E).

- American Federation of Teachers
- Clearinghouse on Women's Issues
- Feminist Majority Foundation
- GLSEN
- Jewish Community Action
- Minnesota Abortion Action Committee
- National Association of School Psychologists
- National Association of Women Lawyers
- National Council of Jewish Women
- National Education Association
- National Organization for Women Foundation
- OutNebraska
- PFLAG, Inc.
- PROMO
- Public Counsel
- Red River Women's Clinic
- The Trevor Project
- Women's Foundation of Minnesota
- Women's Law Project

INTRODUCTION

Title IX has operated for over fifty years to dismantle entrenched sex stereotypes and ensure equal opportunity for all students. The statute's broad sweep and carefully crafted regulatory framework mandate equal opportunity in school-based athletics through effective accommodation of students' athletic interests and equal treatment in benefits and facilities. Title IX demands that institutions rectify inequities rooted in decades of sex stereotypes and disinvestment in women and girl athletes.

In accordance with Title IX's broad purpose, the Minnesota State High School League (MSHSL) recognized the imperative to provide athletic opportunities for all students by ensuring students can participate on teams consistent with their gender identity. Now, a decade later, Female Athletes United (FAU) asserts categorically—and erroneously—that including transgender student-athletes under the MSHSL bylaw precludes effective accommodation of cisgender girls' athletic interests and fails to ensure their equal treatment. Title IX does not demand such a result. The statute does not define sex and does not limit the benefits of equal opportunity to cisgender women and girls.

To be clear: transgender women and girls are women and girls. Nonetheless, even under FAU's rationale—which misrepresents Title IX's requirements and terms transgender-inclusive teams "mixed-sex"—its arguments still do not hold water. Not only does FAU fail to meaningfully engage with Title IX's regulatory tests, but it also ignores the statute's purpose by advancing the very stereotypes the statute was enacted to fight: casting cisgender women and girls as too weak, fragile, and athletically inferior to play sports with anyone else.

FAU would have this Court believe that transgender girls present the biggest threat to cisgender girls' safety and opportunity. But this is far from reality. Reliance on FAU's stereotypes about women's and girls' supposed athletic fragility invites intrusive scrutiny of *any* woman or girl who might not appear, or act, "feminine enough." Title IX's mandate is fulfilled not only when all women and girls get to play, but when schools do not rely on sex stereotypes to hold students back from achieving their full potential.

ARGUMENT

I. The purpose of Title IX and its implementing regulations is to ensure equal opportunities and benefits for all women and girls.

Congress enacted Title IX and approved its regulatory framework with the broad purpose of combatting sex stereotypes used to deny women and girls educational opportunities, including sports participation. According to FAU, excluding transgender women and girls is the only way institutions can effectively accommodate the interests and abilities of women and girls and ensure their equal treatment. FAU reaches this conclusion by misreading Title IX and entirely bypassing its framework and mischaracterizing its regulatory tests. In reality, Title IX requires a holistic approach, with sex separation being only one of many methods to ensure equal athletic opportunity—none of which require banning transgender women and girls from women's and girls' sports.

A. Title IX's broad mandate and subsequent regulatory framework are aimed at eradicating sex stereotyping.

Congress enacted Title IX using expansive language to address the wide range of sex-based barriers to educational opportunity, including entrenched and misguided stereotypes about women's abilities and interests. It says: "[n]o person in the United States shall, on the basis of

sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). As the Supreme Court stated in 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.'" *N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 521 (1982) (brackets in original); *see also* Katie Eyer, *Title IX in the Age of Textualism*, 86 Ohio St. L. J. 335 (2025).

Title IX's legislative history confirms the breadth of its sweep. Senator Birch Bayh, the statute's principal sponsor, said Title IX was "designed" to be "far-reaching" and "root out, as thoroughly as possible at the present time, the social evil of sex discrimination in education," which was based on "stereotyped notions" of "women as pretty things who go to college to find a husband … marry, have children, and never work again." 118 Cong. Rec. 5111, 5808, 5804 (1972). Numerous witnesses at the hearings leading to Title IX's adoption similarly acknowledged that pernicious stereotypes engendered sex-based inequities in education. *See, e.g.*, Discrimination Against Women: Hearings Before the H. Special Subcomm. On Educ. And Labor on Section 805 of H.R. 16098, 91st Cong.,

2d Sess. 439, 7 (1970) (statement of Myra Ruth Harmon, President, Nat'l Fed'n of Bus. & Prof'l Women's Clubs, Inc.) (discussing "certain sex role concepts which continue to mold our society," including in "educational institutions").

Congress's expansive approach to fighting sex discrimination in Title IX belies FAU's assertion that the statute defines sex narrowly to exclude transgender people. Title IX contains no definition of "sex," much less one based solely on biological traits.[2] Whether Congress expressly contemplated Title IX's application to transgender people is immaterial.[3]

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[2] The Seventh Circuit rejected a narrow reading of "sex" in Title IX, as both the statutory text and contemporaneous dictionary definitions from 1972 were "inconclusive" on this point. *A.C. v. Metropolitan Sch. Dist. of Martinsville*, 75 F.4th 760, 770 (7th Cir. 2023) (citing Webster's New World Dictionary, *Sex* (2d ed. 1972) (defining sex both "with reference to … reproductive functions" and broadly as "all the attitudes by which males and females are distinguished")).

[3] FAU erroneously points to the Supreme Court's order denying an application for a partial stay of a preliminary injunction blocking enforcement of the 2024 Title IX regulations in *Dep't of Educ. v. Louisiana*, 603 U.S. 866 (2024), as instructive on Title IX's definition of sex. Opening Br. of Appellant at 38, Entry ID 5579646. On a limited record and in an emergency posture, the Court did not analyze the definition of "sex." *Louisiana*, 603 U.S. at 867–68, 872 (Sotomayor, J., dissenting in part). If the Court wished to express a position on the definition of "sex," it could have done so, as the Court has demonstrated a willingness to comment on the merits of a case in a stay decision. *See, e.g.*, *Trump v. Am. Fed. of Gov't Emps.*, 145 S. Ct. 2635, 2635 (2025). But

As the Supreme Court has observed repeatedly, "'the fact that [a statute] has been applied in situations not expressly anticipated by Congress' does not demonstrate ambiguity; instead it simply 'demonstrates [the] breadth' of a legislative command." *Bostock v. Clayton Cnty.*, 590 U.S. 644, 674 (2020) (quoting *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 499 (1985)). "[I]t is ultimately the provisions of" our laws "rather than the principal concerns of our legislators by which we are governed." *Id.* (quoting *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998)).

According to FAU, Title IX's regulatory framework supports its contention that ensuring equal athletic opportunity for cisgender women and girls requires banning transgender women and girls. But the history of Title IX's regulations indicates a more expansive approach to eradicating sex-based barriers to athletic opportunity, none of which suggests that including transgender women and girls in women's and girls' sports denies cisgender women and girls equal athletic opportunity.

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it did not, and, thus, the decision offers no guidance on Title IX's definition of "sex."

Following Title IX's enactment, Congress passed the Javits amendment, which directed the Department of Health, Education, and Welfare (HEW) to promulgate regulations on Title IX's application to intercollegiate athletics. Education Amendments of 1974 § 844, Pub. L. No. 93–380, 88 Stat. 484 (1974); *see also* S. Rep. No. 93-1026 (1974) (Conf. Rep.), as reprinted in 1974 U.S.C.C.A.N. 4206, 4271. Congress expressly retained authority to reject these regulations once promulgated, *see* Education Amendments at § 431(d)(1), to ensure that "the regulation writers have read [Title IX] and understood it the way the lawmakers intended it to be read and understood." Sex Discrimination Regulations: Hearings Before the Subcomm. On Postsecondary Educ. Of the H. Comm. On Educ. And Lab., 94th Cong. 12 (1974) ("Sex Discrimination Regulations") (statement of Rep. O'Hara, Chair of the Subcommittee).

At the time, women's and girls' athletic opportunities were limited. Only 294,000 girls played high-school sports in 1971, comprising a mere 7% of all high-school athletes. Nat'l Fed'n of State High Sch. Ass'ns, *High School Athletics Participation Study* (2024), https://perma.cc/2NTG-WHK4 ("NFHS 2024 Data"). Some states had even banned women and girls from playing certain sports. Sex Discrimination Regulations at 71

(describing 1973 rescission of a Tennessee ban on high-school girls playing basketball). When women and girls were permitted to play, they often faced restrictions based on stereotypes linking femininity with frailty. *E.g., Dodson v. Ark. Activities Ass'n*, 468 F. Supp. 394 (E.D. Ark. 1979) (invalidating an Arkansas rule restricting high-school girls to half-court basketball). Against this backdrop, HEW focused on addressing decades of exclusion driven by sex stereotyping. Senator Bayh emphasized that athletic opportunity should not be limited because of "discrimination based on 'stereotyped characterizations of the sexes.'" Sex Discrimination Regulations at 176 (statement of Sen. Bayh).

HEW's 1975 regulations ("the 1975 Regulations") effectuated the statute's directive to extend equal athletic opportunity to *all students*. They used expansive language: "[n]o *person* shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics." 34 C.F.R. § 106.41(a) (emphasis added).

To that end, the regulations *permitted*, but did not require, sex-separated teams under certain specified conditions. *Id.* § 106.41(b). But

in allowing sex-separated teams, legislators and regulators sought to address women's and girls' historical exclusion from sports—not to reify sexist notions about presumed physical differences between women and men. HEW initially considered imposing a gender-neutral nondiscrimination model on athletics, but ultimately decided to *allow* sex-separation in certain sports out of concern that women and girls would not develop meaningful opportunities to play if they could only try out for existing teams. Deborah Brake, *Getting in the Game: Title IX and the Women's Sports Revolution* 21–22 (2010).

Women and girls faced ongoing discrimination while the 1975 Regulations were being drafted: men might harass them, refuse to engage with them as teammates or opponents, or hog the playing field. *See* Nicole Zarrett, Cheryl Cooky, & Philip Veliz, *Coaching through a Gender Lens: Maximizing Girls' Play and Potential* 1, 7 (2019). Senator Bayh thus emphasized the importance of giving women their own spaces to develop their athletic talents. Sex Discrimination Regulations at 179 (statement of Sen. Bayh) ("I see nothing wrong with letting women basketball players get out there … and show their skills with the guys … inasmuch as we are trying to compensate for generations of stereotypes,

I think it is going to take us some time before women [will] be able to develop full potential of their skills.").

When physical differences arose in the regulatory debate, it was not to advance the paternalistic notion that women and girls required "protection" from men and boys. Rather, they emerged in discussions of how specific sports accounted for physical differences to ensure fair competition. Sex Discrimination Regulations at 92 (statement of Nat'l Ass'n of Students, recognizing that weight and size classes address these issues in wrestling). Further, stakeholders identified deeply entrenched "stereotyped cultural expectations" dictating that "men are 'supposed' to be strong and aggressive" and "women are 'supposed' to be weak and passive," *id.* at 390 (statement of Project of the Status and Education of Women, Ass'n of American Colleges). They cautioned that these "[c]ultural attitudes and physiological factors [had] not yet been thoroughly separated," *id.* at 287 (statement of WEAL). Sex separation was intended as a potential method to *disengage* these stereotypes, physical and otherwise, not reinforce them.

Ultimately, HEW settled on permitting, but not requiring, sex separation under certain conditions. The regulations *allow* schools to

create sex-separated teams "where selection for such teams is based upon competitive skill or the activity involved is a contact sport." 34 C.F.R. § 106.41(b). And they prohibit sex separation where it would undermine equal athletic opportunity, such as requiring a non-contact-sport team to include the excluded sex where "athletic opportunities for members of that sex have previously been limited." *Id.* The regulations emphasized equal opportunity and eradicating sex stereotyping, not mandating sex separation or reinforcing the myth that women and girls were athletically inferior to men and boys.

This regulatory history belies FAU's assertion that MSHSL's "only means of ensuring equal opportunity … is sex-designated sports teams." Opening Br. of Appellant at 10, Entry ID 5579646. The contact-sports exception is the only place where physical concerns arguably appeared in the Title IX regulations. *See* 34 C.F.R. § 106.41(b). But, the contact-sports exception *permits*, not compels, sex-separated teams—meaning it enables institutions to approach equal opportunity with flexibility.[4] Applying it otherwise distorts Title IX's text and spirit.

[4] Further, courts have found that the Equal Protection Clause requires schools to permit girls to try out for boys' teams, including contact sports, which "reflects the weakness of the rationale that girls are inherently too

Ultimately, the history of the 1975 Regulations, which Congress reviewed, shows that the regulations permit (but do not require) sex-separated teams to combat harmful sex stereotypes, not because of purported inherent differences between girls and boys. More importantly, the regulatory history fatally undermines FAU's attempt to recast Title IX's *permissive* approach to sex-separated teams as support for its contention that, because of these "innate differences," schools *must* exclude transgender women and girls from participation.

B. MSHSL's bylaw comports with Title IX's flexible regulatory framework for institutions to remedy sex-based inequities in athletic opportunities.

FAU's reliance on rigid sex separation as the only means to achieve equal athletic opportunity is not just rooted in the very sex stereotyping Title IX sought to proscribe, but also ignores its decades-old and carefully

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weak and fragile to participate in rough competition with boys." Deborah Brake, *Title IX's Trans Panic*, 29 William & Mary J. Race, Gender, & Social Justice 41, 65 (2022). *E.g.*, *Adams v. Baker*, 919 F. Supp. 1496, 1505 (D. Kan. 1996) (banning mixed-gender wrestling likely violated Equal Protection Clause); *Saint v. Neb. Sch. Activities Ass'n*, 684 F. Supp. 626, 630 (D. Neb. 1988) (citing *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 725 (1982)) (prohibiting girls from wrestling with boys "because they are presumed … to be innately inferior" likely violated Equal Protection Clause); *Lantz v. Ambach*, 620 F. Supp. 663, 666 (S.D.N.Y. 1985) (rule preventing girl from trying out for boys' football team likely violated Equal Protection Clause).

crafted regulatory framework. Rather than setting rules for individual sports, regulators vested discretion in institutions to determine the best method to ensure equal benefits and increase opportunities for women and girls.

Instead of mandating sex separation or "[r]equiring parallel teams," Title IX regulators opted for "an enforcement scheme that measures compliance by analyzing how a school has allocated its various athletic resources." *Kelley v. Bd. of Trustees, Univ. of Ill.*, 35 F.3d 265, 271 (7th Cir. 1994). This framework allows "flexibility to the [institution] to organize its athletic program as it wishes, so long as the goal of equal athletic opportunity is met." *Williams v. Sch. Dist. of Bethlehem*, 998 F.2d 168, 171 (3d Cir. 1993).

To assess compliance with equal athletic opportunity, the 1975 Regulations lay out ten factors. 34 C.F.R. § 106.41(c). Those factors enunciate two tests, the "effective accommodations" test and the equal "treatment" test. The first assesses whether institutions "effectively accommodate" women's and girls'—and men's and boys'—"interests and abilities" by offering them equal opportunities to play; the second, whether institutions provide all athletes equal benefits and services. *See*

id. Subsequent guidance continued to emphasize flexibility while outlining these tests, as regulators "expressly give[] institutions *different* ways to comply with *different* obligations which the agency has decided Title IX imposes." *Berndsen v. N.D. Univ. Sys.*, 7 F.4th 782, 787 (8th Cir. 2021) (emphasis in original). These tests are not intended to operate "mechanically, but case-by-case, in a fact-specific manner." *Cohen v. Brown Univ.*, 101 F.3d 155, 171 (1st Cir. 1996).

1. Including transgender athletes does not deprive cisgender women and girls of effective accommodations.

Effective accommodations "concern the opportunity to *participate* in athletics." *Mansourian v. Regents of Univ. of Cal.*, 602 F.3d 957, 965 (9th Cir. 2010) (emphasis added). FAU wrongly asserts that including transgender student-athletes means MSHSL no longer sponsors girls' softball teams and only sponsors boys' baseball, which, FAU claims, violates Title IX's requirement to "effectively accommodate [the] athletic interests and abilities [of students of both sexes]." Opening Br. of Appellant at 27, Entry ID 5579646. Whether MSHSL sponsors a mixed-gender or single-gender softball team because of its bylaw is immaterial,

since FAU has not shown *how* MSHSL ineffectively accommodated the interests and abilities of girls.[5]

Effective-accommodations claims are generally evaluated under the "three-part test." Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71413, 71418 (Dec. 11, 1979) ("1979 Interpretation"); *see also* U.S. Dep't of Educ., Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test (Jan. 16, 1996) ("1996 Clarification"). The three-part test emphasizes the opportunity to participate across all offered programming and does not distinguish genuine athletic opportunities based on sex separation of teams, skill, or competitive ability.[6] *See*

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[5] Further, while MSHSL's bylaw rightly recognizes that transgender girls are girls, a narrower definition of sex does not demand creation of a cisgender girls-only team. In accordance with Title IX's permissive approach to sex separation, HEW signaled a preference for "a single integrated team" competing within a single-sex league over a requirement to sponsor a new sex-separated team. 1979 Interpretation at 71418.

[6] FAU suggests that methodological consistency is a factor in an institution's compliance with Title IX; because MSHSL selected sex separation to ensure equal opportunity, it must be "[held to] the … method it chose." Appellant's Emergency Mot. For Injunction Pending Appeal at 22, Entry ID 5564959. But the regulations do not require institutions to use the same methods in perpetuity; they permit flexibility to uphold institutions' evolving and ongoing obligations to effectuate equal athletic opportunity. *See* 1996 Clarification.

Biediger v. Quinnipiac Univ., 691 F.3d 85, 99–105 (2d Cir. 2012) (evaluating "roster manipulation" in the context of the three-part test).

The test's first prong prioritizes statistical analysis to evaluate substantially proportionate athletics participation between men and women on a case-by-case basis. "Rather than create a quota or preference, this unavoidably gender-conscious comparison merely provides for the allocation of athletics resources and participation opportunities between the sexes in a non-discriminatory manner." *Cohen*, 101 F.3d at 177. FAU does not allege substantially disproportionate participation due to transgender-inclusive policies. Nor could it: the presence of one transgender softball player in Minnesota, among the more than 232,000 student-athletes in the state, does not materially alter the statistical balance of athletic participation opportunities for women and girls. *See* NFHS 2024 Data.

Still, the three-part test provides flexibility when participation opportunities are not substantially proportionate, as "institutions need to comply only with any one part of the three-part test …." 1996 Clarification. The second and third prongs provide "individual avenues" to demonstrate Title IX compliance when institutions show "a history and

continuing practice of program expansion" or when "members of [the excluded] sex have been fully and effectively accommodated." *Id.* (citing 1979 Interpretation at 71418). In the almost-ten years MSHSL's bylaw has been in effect, twenty-three Minnesota schools have newly offered fast-pitch softball—a six-percent increase—bringing the sport to a total of 435 schools in the state. *Compare* NFHS 2024 Data, *with* NFHS, *2015-16 High School Athletics Participation Survey*, https://perma.cc/JP4P-QS8T. MSHSL's bylaw neither limits the types of sports available to women and girls in Minnesota nor does it impede greater accessibility of fast-pitch softball specifically.

FAU also invokes the rarely applied "sports selection" test, which clarifies that "where an institution sponsors a team in a particular sport for members of one sex, it may be required either to permit the excluded sex to try out for the team or to sponsor a separate team for the previously excluded sex." 1979 Interpretation at 71418. Though this "mandate has largely disappeared from public view since it was issued" in favor of the three-part test's more global analysis, *Berndsen*, 7 F.4th at 792 (Colloton, C.J., concurring in the judgment), it has at times been applied to ensure opportunity *when no such opportunity exists*. *Id.* at 789 (requiring

reinstatement of a women's ice hockey team after it was discontinued, despite continued interest from students and the ongoing availability of men's ice hockey); *Mercer v. Duke Univ.*, 190 F.3d 643, 647-48 (4th Cir. 1999) (finding an actionable Title IX claim when a school allowed for mixed-sex participation on its football team and subsequently excluded the student when no alternative team for women existed). The sports-selection test remedies "the absence of a […] team for a position on which a […] student [of the excluded sex] should be allowed to try out."[7] *Pederson v. La. State Univ.*, 213 F.3d 858, 871 (5th Cir. 2000).

The sports-selection test does not categorically require sponsorship of new teams, but rather enables institutions flexibility so long as they ensure opportunities for participation.[8] *See Horner v. Ky. High Sch. Athletic Ass'n*, 206 F.3d 685, 697 (6th Cir. 2000) ("This reasoning is

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[7] The sports-selection test is satisfied not by skill, but by the existence of a team that reflects both sexes' interests and abilities. *Pederson*, 213 F.3d at 871 (observing that the court in *Boucher v. Syracuse Univ.*, 164 F.3d 113, 120 (2d Cir. 1999), did not need to consider "whether any of the students possessed the skills necessary to make one of the unfielded varsity teams" to establish standing for an effective accommodations claim).

[8] Indeed, mixed-sex teams are the default under Title IX's regulations, *supra* Part I.A, and the 1979 Interpretation allows for schools to either establish a new, single-sex team, or allows the student of the excluded sex to try out for a single-sex team.

flawed because it reads Title IX as requiring perfect parity … the regulations themselves do not impose an independent requirement that an institution always sponsor separate teams for all sanctioned sports."). As such, FAU's insistence that a cisgender girls-only softball team must be sponsored to accommodate girls' interests is misplaced.

Including transgender student-athletes does not frustrate the sports-selection test's purpose, since fast-pitch softball is already available to girls. Further, FAU cherry-picks elements of the 1979 Interpretation but fails to account for the sports-selection test's exhortation that if "institutions sponsor a team in a particular sport for members of one sex," they "may be required ... to permit the excluded sex to try out for the team ...." 1979 Interpretation at 71418. Even if FAU insists on defining sex narrowly, cisgender-girls-only softball teams would likely cause institutions to run afoul of their obligations to effectively accommodate students' interests *unless* transgender girls were still able to try out. Because MSHSL only sponsors girls' fast-pitch softball, a sport which is similar but ultimately different from baseball, it is no remedy to say that transgender girls can simply try out for boys' baseball.

Though FAU tries to dismiss the efforts taken by MSHSL and schools across the state to expand opportunities for girls and ensure general availability of softball teams, it is ultimately unsuccessful in showing that MSHSL has failed to effectively accommodate girls' interests and abilities.

2. Including transgender athletes does not deny cisgender women and girls equal treatment.

Equal-treatment claims are rooted in an institution's failure to furnish equally to all students the benefits or opportunities articulated in § 106.41(c)(2)-(10). *Parker v. Franklin Cnty. Cmty. Sch. Corp.*, 667 F.3d 910, 919-20 (7th Cir. 2012) (finding disparities from girls' basketball teams being relegated to non-primetime game nights); *McCormick v. Sch. Dist. of Mamaroneck*, 370 F.3d 275, 295-96 (2d Cir. 2004) (finding disparities in girls' soccer season being scheduled at times that deprived team of eligibility to compete at interscholastic championships); *Ollier v. Sweetwater Union High Sch. Dist.*, 858 F. Supp. 2d 1093, 1111 (S.D. Cal. 2012), *aff'd*, 768 F.3d 843 (9th Cir. 2014) (finding multiple disparities, including unequal locker rooms, recruiting efforts, equipment, and number of competitive events or practices). Equal treatment involves "evaluating a program's distribution of treatment and benefits" to either

find "program-wide violations (global) when 'substantial and unjustified' disparities exist" or "a violation where disparities in 'individual segments of the program' (i.e., a specific [§ 106.41(c)(2)-(10)] factor) 'are substantial enough in and of themselves' to deny 'equality of athletic opportunities.'" *Portz v. St. Cloud State Univ.*, 16 F.4th 577, 581 (8th Cir. 2021).

Fundamentally, equal-treatment claims turn on whether a school provides benefits and facilities equally to girls and boys. By seeking to exclude a transgender girl from competition based on stereotypes suggesting increased athletic ability, Opening Br. of Appellant at 42–43, Entry ID 5579646, FAU misrepresents this test's purpose by obligating institutions to police competitions instead of ensuring equitable allocation of resources. Thus, FAU's assumption that transgender women's and girls' participation somehow disadvantages cisgender women and girls not only rests on harmful stereotypes about femininity and athleticism, *see supra* Part I.A, but is untethered from the § 106.41(c)(2)-(10) factors—none of which mandate equalizing skill or competitive ability. Policing competitive ability is beyond the scope of the regulations, which defer adjudication of competitions to sporting

authorities and other non-governmental institutions. *See* 34 C.F.R. § 106.41(c).

Similarly, FAU incorrectly alleges that including transgender girls will subject cisgender girls to unequal treatment by depriving them of *possible* future scholarships. While the regulations require institutions to furnish scholarship dollars proportionally to women's and men's participation rates, 1979 Interpretation at 71415, neither the regulations nor other rights mandate equal treatment with respect to possible *future* scholarships. *See, e.g.*, *Horner v. Ky. High Sch. Athletic Ass'n*, 43 F.3d 265, 270-71 (6th Cir. 1994) (affirming lower court's holding that "plaintiffs' interest in competing for college athletic scholarships did not rise to constitutional significance" in case involving state's refusal to sanction fast-pitch softball); *K. L. v. Mo. State High Sch. Activities Ass'n*, 178 F. Supp. 3d 792, 799 (E.D. Mo. 2016) ("Courts are generally in accord … that the *speculative possibility* of obtaining a college athletic scholarship is not a protected property right justifying judicial intervention.") (emphasis added) (citation omitted, collecting cases).

FAU does not allege that Minnesota women and girls are deprived of sports that accommodate their interests and abilities or that women's

and girls' teams are disadvantaged due to underfunding or unequal treatment proscribed under Title IX. Viewing FAU's claims in light of Title IX's regulatory framework unmasks them for what they are: an attempt to override the statewide sporting authority and disqualify a competitor simply because of her identity.

II. Excluding transgender students in women's sports contravenes Title IX's purpose and harms all women and girls.

In asserting that banning from transgender girls from play is necessary to "protect" cisgender girls' safety and opportunities, FAU plays directly into stereotypes linking purported "maleness" with athletic success and femininity with fragility. These are the very outdated views of women's and girls' abilities Title IX was enacted to counteract. Exclusionary policies harm all women and girls by subjecting them to scrutiny for not adhering to narrow and arbitrary standards of femininity. Moreover, these bans do nothing to remedy the many real sex-based inequities women and girls face. Instead, proper application of Title IX's regulatory tests will deliver the results Congress intended: eliminating sex-based disparities and increasing opportunities for *all* women and girls.

A. Excluding transgender women and girls reinforces sexist myths about athleticism that harm all women and girls.

FAU asserts that schools must exclude transgender girls from sports because their purported "maleness" is inherently associated with athletic prowess cisgender girls supposedly cannot match. In equating one transgender athlete on Minnesota's softball team with the destruction of cisgender girls' opportunities and safety, FAU resurrects the same backward, sexist stereotypes Title IX was enacted to fight.

Though FAU tries to paint a black-and-white picture of the relationship between sex and athleticism, the reality is far more complicated. FAU avers that boys are taller, bigger, and stronger than girls and "on average" "outperform" girls in "nearly every sport." R. Doc. 1, at 21. But athletes come in all shapes and sizes, regardless of gender—and those differences may be more or less advantageous depending on their sport. In some sports, the best athletes might be both flexible and strong; in others, height, weight, hand-eye coordination, left-handedness, or quick reflexes may matter more. Gymnast Simone Biles, for example, is significantly shorter than the average woman at four feet, eight inches tall, which is perceived "as positive" and "a factor in [her] athletic

success." Nat'l Women's Law Ctr., *Fulfilling Title IX's Promise: Let Transgender and Intersex Athletes Play* (June 2022), https://perma.cc/55HN-N2UX. The notion that sex alone confers athletic advantage so unfair as to demand exclusion from competition is simply at odds with the reality of sports.

Further, there are numerous examples of women and girls prevailing over men and boys in sport. In 2024, a cisgender girl in Arizona defeated four cisgender boys when she won a high-school state wrestling title and in Maine, another cisgender girl won her second high-school state wrestling title, beating three boys. Richard Obert, *Sunnyside wrestler Audrey Jimenez's historic win highlights high school championships*, Ariz. Republic (Feb. 17, 2024), https://perma.cc/N2F2-7Y2L; Bill Hutchinson, *No fluke: Maine girl beats boys to win 2nd straight state wrestling title*, ABC News (Feb. 22, 2024), https://perma.cc/8XVT-LDUT. And, all-girls teams have defeated all-boys teams, including a Florida all-girls baseball team that won a national tournament and a California all-girls hockey team that won a state championship. Aixa Diaz, *Girls Baseball Team Wins Championship at Boys Tournament*, WESH 2 News (May 29, 2014), https://perma.cc/J7DB-4U7F; Amy

Powell, *All-girls NorCal Hockey Team Beat Fresno Rivals Twice Despite Bullying on the Ice*, ABC 7 Eyewitness News (Apr. 7, 2018), https://perma.cc/M2ZD-LFQD. Cisgender women and girls proving their athleticism in mixed-sex competition—including in contact sports like wrestling—undermines FAU's argument based on sex stereotypes about athletic ability.

FAU advances overly simplistic assumptions about athleticism and femininity to argue that MSHSL's policy is unlawful because it is "unfair" to include transgender athletes. R. Doc. 1, at 30, 43. Not only is this untrue, but the remedy FAU seeks leaves unaddressed many disparities in advantage unrelated to physiology. For example, not all girls come from families that can afford extra coaching, private softball camps, or higher-quality equipment; have the time to drive them to extra practices; or can provide them higher-quality nutrition. Research shows these socioeconomic factors confer a clear competitive edge. Canadian Ctr. for Ethics in Sports, *Transgender Women Athletes and Elite Sport: A Scientific Review* 6, 39, (2021), https://perma.cc/NMQ9-XRF3. But FAU's

concern about so-called fairness begins and ends with policing physical variations.[9]

Further, associating athleticism with masculinity increases scrutiny and harassment of all women and girls who defy stereotypes linking femininity with weakness, smallness, and fragility. Being too muscular, tall, or exceptional at her sport results in a woman being deemed "biologically suspect" and forced to undergo "sex testing." Sex testing is an invasive and unscientific practice that forces athletes to "prove" they are "truly" women by producing documentation of menstrual history, undergoing chromosomal or hormonal testing, or submitting to intrusive physical inspections. In the 1960s, for example, the International Olympic Committee went so far as to require women athletes to stand naked in front of a panel of doctors. Vanessa Heggie, *Testing sex and gender in sports; reinventing, reimagining, and reconstructing histories*, 34 Endeavor 157, 159 (Dec. 2010),

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[9] FAU also overlooks that a systemic lack of investment in women and girl athletes puts them at a significant disadvantage in developing athletic ability. When men and boys have outplaced women and girls, this is more plausibly the byproduct of schools' long history of prioritizing their access to better coaching, quality of equipment, facilities, and opportunities that have allowed them to develop their talents, while leaving women and girls behind. *See infra*, Part II.B.

https://perma.cc/HU3S-AU8U. This particular practice was rightfully ended, but as outlined below, sex testing continues today, promoted by the sex stereotyping FAU encourages.

Further, sex testing disproportionately impacts Black and brown women and girls because sexist ideals of "true" femininity are inextricably linked with racism. Conventional notions of femininity have long been defined by whiteness: the subjugation and enslavement of Black women was justified, in part, by stereotypes that cast them as "suitable" for physical exploitation because of their "'natural' brute strength," whereas white women were depicted as representing purity and "true womanhood." Lind Withycombe, *Intersecting Selves: African American Female Athletes' Experiences of Sport*, 28 Sociology of Sport 478, 479–80 (2011). There are multiple recent examples of high-profile Black and brown athletes being targeted, none of whom are transgender. Dutee Chand, a sprinter from India, was subjected to invasive testing because competitors and coaches saw her physique as "suspiciously masculine." Ruth Padawer, *The Humiliating Practice of Sex-Testing Female Athletes*, N.Y. Times (June 28, 2016), https://perma.cc/Q2ME-JRZ5. Caster Semenya, a Black South African woman, faced years of

invasive testing and harassment because she was deemed too muscular and fast. *Id.* And, during the 2024 Olympics, boxers Imane Khelif of Algeria and Lin Yu-ting of Taiwan faced intense scrutiny because they were deemed suspiciously athletic, being forced to submit to hormonal tests as a condition of competing. Greg Beachman, *Boxing group answers some questions but raises many more about tests on Imane Khelif and Lin Yu-ting,* AP News (Aug. 5, 2024), https://perma.cc/JM6U-878R.

Exclusionary policies will perpetuate body policing of any girls who defy expectations of "biological purity" because they are especially athletic. This concern is not speculative. In 2022, after Utah passed an anti-transgender sports ban, a state commission secretly investigated a cisgender high-school girl after parental complaints about her athletic success by pulling her private records all the way back to kindergarten to "confirm" her gender. Rick Egan, *Utah parents complained a high school athlete might be transgender after she beat their daughters*, Salt Lake Tribune (Aug. 17, 2022), https://perma.cc/D2KE-BWYC. The commission admitted it was investigating girls that "[did]n't look feminine enough." *Id.* In 2024, another cisgender girl in Utah faced threats and doxxing after a school board member questioned her gender

in an online post because of her athletic body type—resulting in her needing police protection. Courtney Tanner, *Utah's governor, lieutenant governor say school board member Natalie Cline has 'embarrassed the state'*, Salt Lake Tribune (Feb. 8, 2024), https://perma.cc/X39J-WYXF.

FAU's argument that banning transgender girls from playing is necessary to "protect" cisgender girls is not only wrong, but would exacerbate the harms all women and girls face. Exclusionary policies would only invite further gender policing of *all* girls in Minnesota, demonize girls that are deemed "less feminine" because they excel at their sport or their bodies transgress sexist ideals of fragility and smallness, and ultimately resurrect the outdated myths about women and girls Title IX was enacted to fight.

B. Mandating exclusion of transgender athletes does not address sex-based inequities in sports, but proper application of Title IX does.

FAU's unwarranted emphasis on rigid sex separation overlooks the structural disparities women and girls in sports face, which Title IX was enacted to ameliorate. These disparities still do far more to deprive women and girls of equal athletic opportunity than transgender students' participation ever has or could.

Title IX significantly narrowed the deeply entrenched disparities women and girls face, with their sports participation rising dramatically over the last fifty years. In 1971, only about 294,000 high-school girls played sports, compared to over 3.5 million by the 2024-25 school year. NFHS 2024 Data. Girls now account for 43% of the total high-school athletics population, compared to just 7% in the 1971-72 school year. *Id.* College sports have seen similar gains, with the number of women student athletes rising from nearly 30,000 in 1972 to over 215,000 in 2021. Women's Sports Found., 50 Years of Title IX We're Not Done Yet (May 2022), https://perma.cc/5YX2-P2E5.

Even with these gains, women's sports remain underfunded and under-resourced as compared to men's programs—clear violations of Title IX. In 2024, the U.S. Department of Education reported that college athletics programs awarded over $500 million *more* in student aid to men than women, that fewer than 28% of recruitment expenses were directed toward women's teams, and that the average salary for head coaches for men's teams was over double that for women's teams. *See* U.S. Dep't of Educ., Equity in Athletics Data Analysis (2024 data), https://perma.cc/8FMD-8MY5. Excluding transgender students does

nothing to resolve these disparities, which are even more acute in states with bans compared to states, like Minnesota, that have adopted inclusive policies. *See id.*

Title IX has shifted the landscape of school sports by rejecting the notion that opportunity must be rationed in favor of recognizing that it should be available for all. FAU's singular focus on the presence of one transgender athlete as hamstringing enforcement of Title IX ignores the very real harms and unequal treatment women and girl student-athletes face. FAU does not and cannot connect the dots as to how excluding transgender athletes will do anything to address these very real disparities. Title IX's ongoing effectiveness depends on rejecting this exclusionary view and upholding athletics as an educational opportunity available to every student.

CONCLUSION

For these reasons, the Court should affirm the lower court's decision.

Respectfully submitted,

January 5, 2026

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This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because it contains 6,490 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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January 5, 2026

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CERTIFICATE OF SERVICE

I certify that on January 5, 2026, I electronically filed the foregoing brief in PDF format with the Clerk of Court via the appellate CM/ECF system. I certify that all counsel of record are registered CM/ECF users, and service was accomplished via the appellate CM/ECF system.

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