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ATTORNEY GENERAL

May 15, 2023

Secretary Miguel A. Cardona
United States Department of Education
Lyndon Baines Johnson Building
400 Maryland Ave, SW
Washington, DC 20202

RE: Comment by the States of Arkansas, Alabama, Georgia, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, Ohio, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, and West Virginia on "Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance: Sex-Related Eligibility Criteria for Male and Female Athletic Teams," 88 FR 22860 (Docket ID ED-2022-OCR-0143).

Dear Secretary Cardona,

Arkansas, Alabama, Georgia, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, Ohio, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, and West Virginia submit these comments in opposition to the Proposed Rule entitled "Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance: Sex-Related Eligibility Criteria for Male and Female Athletic Teams." 88 Fed. Reg. 22860 (Apr. 13, 2023).

In 1972, Congress enacted Title IX "to promote sex equality." *B.P.J. v. W.Va. State Bd. of Educ.*, 2023 WL 111875, at *9 (S.D. W. Va. Jan. 5, 2023). Title IX prevents "discrimination" "on the basis of sex" in "any education program or activity receiving Federal financial assistance." 20 U.S.C. 1681(a). And for a half century since its enactment, that prohibition on sex discrimination has been understood to refer to "'sex' in the biological sense." *B.P.J.*, 2023 WL 111875, at *9. As this Department explained three years ago, "Title IX and its implementing regulations include provisions that presuppose sex as a binary classification." 85 Fed. Reg. 30178. In Title IX sports cases, courts have described the statue's operations in terms of biological sex. *See, e.g.*, *O'Connor v. Bd. of Educ. of Sch. Dist. 23*, 449 U.S. 1301, 1303 (1980) (in-chambers opinion of Stevens, J.) ("Without a gender–based classification in competitive contact sports, there would be a substantial risk that boys would dominate the girls' programs and deny them an equal opportunity to compete in interscholastic events."). And, of course, schools have complied with Title IX by establishing girls-only sports teams, "pav[ing] the way for significant increases in athletic participation for girls and women at all levels of education." Deborah Brake, *The Struggle for Sex Equality in Sport and the Theory Behind Title IX*, 34 U. Mich. J.L. Reform 13, 14-18 (2000).

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Until now. In recent years, with the number of children who identify as transgender skyrocketing, several biological males who identify as girls have sought to play on girls-only sports teams—sometimes knocking biological girls off the winners' podium. *See, e.g.*, Matt Bonesteel, *Sixteen Penn Swimmers Say Transgender Teammate Lia Thomas Should Not Be Allowed to Compete*, Wash. Post (Feb. 3, 2022).[1] To ensure that female athletes are not crowded out of the field by males, twenty-one States have enacted legislation ensuring that only girls play girls' sports—a number that continues to grow. *See* Natalie Allen, *Here's How Our Laws Can Protect Fairness in Women's Sports*, ADF (Apr. 13, 2023) (compiling States with girls-sports legislation).[2] And similar federal legislation recently passed out of the House of Representatives. H.R. 734, 118th Cong. (2023). According to a recent Washington Post poll, this legislation is supported by an overwhelming majority of Americans. *See* Laura Meckler & Scott Clement, *Most Americans Support Anti-Trans Policies Favored by GOP, Poll Shows*, Wash. Post (May 5, 2023, 6:00 A.M.).[3]

With the Proposed Regulation, the Department of Education second-guesses the legislative judgment of a growing number of States. The Department acknowledges "that schools have an interest in ensuring competition is fair" for female athletes. 88 Fed. Reg. 22872. But rather than let States preserve fair competition for girls in the most straightforward way—by ensuring that girls face only other girls on the field—the Department proposes a complex, case-by-case analysis that preempts the more administrable State rules. The Proposed Regulation has several flaws. But this Comment will focus on five:

(1) it prioritizes "affirmation" over biology;

(2) it is entirely unworkable;

(3) it misinterprets Title IX;

(4) it misunderstands the Constitution; and

(5) it usurps authority from the States and Congress.

Our States hope that the Department will revise or rescind the Proposed Rule and leave the thorny policy questions to the States.

I. The Proposed Regulation elevates "affirmation" over real harms to female athletes.

This Department has a problem. It can't deny the real, biological differences between males and females that impact athletic ability. Indeed, the "genetic" differences "between males and females" include "height, body mass, skeletal structure, strength, muscle quality, center of gravity, limb length ratios, [and] cardiovascular performance." Brief of 67 Female Athletes, Coaches, Sports Officials, and Parents of Female Athletes, as *Amici Curiae* in Support of Applicants, *West Virginia v. B.P.J.*, 2023 WL 2648011, at *6 (Mar. 13, 2023) (hereinafter "Athletes'

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[1] https://www.washingtonpost.com/sports/2022/02/03/lia-thomas-penn-swimming-teammates.
[2] https://adflegal.org/article/protecting-fairness-womens-sports-demands-comprehensive-legislation.
[3] https://www.washingtonpost.com/education/2023/05/05/trans-poll-gop-politics-laws.

Brief").[4] Because of these physical differences, males routinely outperform females at the top of their field. High school boys' track times, for instance, often beat the women's world record:

- The women's 100-meter world record is 10.49 seconds. World Athletics, *100 Metres Women*.[5] The top three performers in boys' high school track in 2023 set 100-meter times of 10.10 seconds, 10.22 seconds, and 10.25 seconds, respectively. Bob Lundeberg, *Top National High School Boys Track and Field Marks in 2023*, SBLive (Apr. 26, 2023).[6]

- The women's 400-meter world record is 47.60 seconds. World Athletics, *400 Metres Women*.[7] The top three performers in boys' high school track in 2023 set 400-meter times of 45.92 seconds, 46.09 seconds, and 46.15 seconds, respectively. Lundeberg, *Top Marks in 2023*.

- The women's 800-meter world record is 1 minute, 53.28 seconds. World Athletics, *800 Metres Women*.[8] The top three performers in boys' high school track in 2023 set 800-meter times of 1 minute, 49.07 seconds, 1 minute, 49.19 seconds, and 1 minute, 49.32 seconds, respectively. Lundeberg, *Top Marks in 2023.*

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[4] For some studies on the biological differences between males and females, see K. M. Halzip et al., *Sex-Based Differences in Skeletal Muscle Kinetics and Fiber-Type Composition*, 30 Physiology 30 (2015); Sandro Bartolomei et al., *A Comparison between Male and Female Athletes in Relative Strength and Power Performances*, 6 J. Functional Morphology and Kinesiology 17 (2021); Sarah R. St. Pierre et al., *Sex Matters: A Comprehensive Comparison of Female and Male Hearts*, Frontiers in Physiology (2022), https://www.frontiersin.org/articles/10.3389/fphys.2022.831179/full#:~:text=Our%20study%20finds%20that%2C%20compared,produces%20universally%20larger%20contractile%20strains; Melanie Schorr et al., *Sex Differences in Body Composition and Association with Cardiometabolic Risk*, Biology of Sex Differences (2018), https://bsd.biomedcentral.com/articles/10.1186/s13293-018-0189-3. For studies on the impact of testosterone on athletic performance, see Louis Gooren, *The Significance of Testosterone for Fair Participation of the Female Sex in Competitive Sports*, 13 Asian J. of Andrology 653 (2011), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3739582; David J. Handelsman, *Sex Differences in Athletic Performance Emerge Coinciding with the Onset of Male Puberty*, 87 Clinical Endocrinology 68 (2017), https://pubmed.ncbi.nlm.nih.gov/28397355; Valérie Thibault et al., *Women & Men in Sport Performance: The Gender Gap Has Not Evolved Since 1983*, 9 J. of Sports Science & Medicine 214 (2010), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3761733; David J. Handelsman et al., *Circulating Testosterone as the Hormonal Basis of Sex Differences in Athletic Performance*, 39 Endocrine Reviews 803 (2018), https://academic.oup.com/edrv/article/39/5/803/5052770; Katherine Semin et al., *Discrepancy Between Training, Competition, and Laboratory Measures of Maximum Heart Rate in NCAA Division 2 Distance Runners*, 7 J. of Sports Science and Medicine 455 (2008), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3761916.

[5] https://worldathletics.org/records/all-time-toplists/sprints/100-metres/outdoor/women/senior (last visited May 5, 2023).

[6] https://news.scorebooklive.com/track-and-field/2023/04/26/top-national-high-school-boys-track-and-field-marks-in-2023.

[7] https://worldathletics.org/records/all-time-toplists/sprints/400-metres/outdoor/women/senior (last visited May 5, 2023).

[8] https://worldathletics.org/records/all-time-toplists/middle-long/800-metres/outdoor/women/senior?regionType=world&timing=electronic&page=1&bestResultsOnly=true&firstDay=1899-12-31&lastDay=2023-05-04 (last visited May 5, 2023).

- The women's mile world record is 4 minutes, 12.33 seconds. World Athletics, *One Mile Women*.[9] The top three performers in boys' high school track in 2023 set mile times of 4 minutes, 0.3 seconds, 4 minutes, 8.3 seconds, and 4 minutes, 8.67 seconds, respectively. Lundeberg, *Top Marks in 2023.*

If girls are to be able to compete at all, they must have their own sports teams. *See generally* Athletes' Brief. The Department's longstanding Title IX regulations have allowed for girls-only sports teams for precisely that reason, as have several courts applying those regulations. *See* 34 C.F.R. 106.41(b), (c); *Clark, by and through Clark v. Ariz. Interscholastic Ass'n*, 695 F.2d 1126, 1130-32 (9th Circ. 1982) (cataloguing several cases recognizing that "males would displace females to a substantial extent if they were allowed to compete for positions" on women's teams).

But these days, a growing number of students identify as transgender and wish to be viewed as members of the opposite sex. *See, e.g.*, *B.P.J.*, 2023 WL 111875, at *4 ("B.P.J., for her part, seeks a legal declaration that a transgender girl is 'female.'"). The Department apparently believes they should be fully affirmed in that identity—even if that means redefining girls' sports. *See* 88 Fed. Reg. 22872 (suggesting that States may not "communicat[e] . . . . disapproval of a . . . student's gender identity").

The Proposed Regulation results from this paradox. To merge the biological understanding of sex with fluid notions of gender identity, it suggests a convoluted rule. On the one hand, because sex-segregated teams are still necessary to ensure "meaningful participation opportunities that were historically lacking for women and girls," *id.* at 22877, schools may still "operate or sponsor separate teams for members of each sex." *Id.* at 22866. Thus, if a biological male who identifies as male wishes to play on a girls' team, he need not be permitted to do so, regardless of his individual skill level. *Accord Clark*, 695 F.2d at 1130-32; *B.P.J.*, 2023 WL 111875, at *8.

But once a student identifies as transgender, the usual rules go out the window. Then, States must show that treating transgender individuals consistent with their biological sex is "substantially related to the achievement of an important educational objective" and "minimize[s] harms to students whose opportunity to participate on a male or female team consistent with their gender identity would be denied." 88 Fed. Reg. 22860. In other words, States must sort transgender kids onto girls' or boys' teams, not based on their biology, but rather after an individualized assessment that predicts how that student would perform in his "chosen sport or position" compared to the "skills, size, strength, and other attributes" of competitors or teammates. *Id.* at 22876. If a biological male who identifies as transgender does not "have greater physical or athletic ability than" female athletes, the Proposed Regulation says he must be allowed to play girls' sports. *Id.* at 22874. So too if the girls' team isn't particularly competitive and "prioritize[s] broad participation." *Id.* at 22875.

[9] https://worldathletics.org/records/all-time-toplists/middle-long/one-mile/outdoor/women/senior?regionType=world&page=1&bestResultsOnly=true&firstDay=1899-12-31&lastDay=2023-05-04 (last visited May 5, 2023).

Essentially, then, the Proposed Regulation requires States to define "girl" or "boy" using some combination of self-identification and stereotyping. If a biological male identifies as a girl and runs or throws "like a girl," then he gets to play on the girls' team. *Cf.* Brief of *Amici Curiae* Alabama, Arkansas, and 19 Other States in Support of Applicants' Emergency Application to Vacate Injunction, *West Virginia v. B.P.J.*, 2023 WL 2648004, at *23 (Mar. 13, 2023) (hereinafter "States' Amicus"). If he's too athletic or competitive, he can't. But if "overbroad generalizations about the different talents, capacities, or preferences of males or females" are no justification for treating the sexes differently, *United States v. Virginia*, 518 U.S. 515, 533 (1996), those stereotypes certainly can't *define* the sexes. (Indeed, labeling someone more or less of a woman based on how well she fits stereotypes is textbook sex discrimination. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 235 (1989) (plurality op.).) It's especially jarring to resort to stereotypes in the Title IX context, which recognizes that women can be athletic too. *See* Maggie Mertens, *50 Years of Title IX: How One Law Changed Women's Sports Forever*, Sports Illustrated (May 19, 2022).[10]

Of course, the Proposed Regulation tries to flip the script: a girls-only sports rule stereotypes transgender people, it says, because "it would not be reasonable to assume that all transgender girls and women are similarly situated in their physical abilities to cisgender boys and men." 88 Fed. Reg. 22873. The Proposed Regulation apparently assumes that early medical intervention can negate the advantages biological males possess in many sports. *Id.* at 22874 ("[M]any transgender girls . . . medically transition at the onset of puberty, thereby never gaining any potential advantages that the increased production of testosterone during male puberty may create." (internal quotation marks omitted)). But at best, the science is unsettled. *See, e.g.*, Lidewij Sophia Boogers, et al., *Transgender Girls Grow Tall: Adult Height Is Unaffected by GnRH Analogue and Estradiol Treatment*, 107 J. of Clin. Endocrinology & Metabolism 3805 (2022);[11] Timothy A. Roberts, et al., *Effect of Gender Affirming Hormones on Athletic Performance in Transwomen and Transmen: Implications for Sporting Organizations and Legislators*, 55 British J. of Sports Med. 577 (2021);[12] Louis J. G. Gooren & Mathijs C. M. Bunck, *Transsexuals and Competitive Sports*, 151 European J. of Endocrinology 425 (2004).[13]

At any rate, biological males who are or aren't transgender are similarly situated in the one way that matters: they are biologically male. And biological sex—unlike perceived athleticism—isn't a stereotype. *Nguyen v. INS*, 533 U.S. 53, 68 (2001). It's of course true that some biological males will run slower or throw softer than some biological females. 88 Fed. Reg. 22873. But that doesn't make them any less male, just like a biological female who loves sports is no less female. Ultimately, biology is the only non-patronizing way to distinguish between the sexes. *Virginia*, 518 U.S. at 533.

To justify resorting to stereotypes, the Proposed Regulation points to alleged emotional harms caused by sex-segregated sports teams. Sex-segregated sports would require "individual

[10] https://www.si.com/college/2022/05/19/title-ix-50th-anniversary-womens-sports-impact-daily-cover.
[11] https://pubmed.ncbi.nlm.nih.gov/35666195.
[12] https://bjsm.bmj.com/content/55/11/577.
[13] https://pubmed.ncbi.nlm.nih.gov/15476439.

students to disclose that they are transgender," which the Proposed Regulation labels "extremely traumatic." 88 Fed. Reg. 22877. And playing on a team consistent with biological sex garners even stronger condemnation; the Proposed Regulation describes it as "dangerous and unethical" like "gender identity conversion efforts" and asserts that it is "not a viable option for many students." *Id.* at 22871 (quoting *Hecox v. Little*, 479 F. Supp. 3d 930, 977 (D. Idaho 2020)).

The Proposed Regulation gets the potential harms backwards. The Department obviously believes that anything short of full affirmation is harmful, but that belief is entirely unproven. For instance, a U.K. independent review of the affirmative treatment model concluded last year that "[t]here are different views on the benefits versus the harms of early social transition" and that "better information is needed." The Cass Review at 62-63 (Feb. 2022). Conversely, the risks of hiding an athlete's transgender status can be quite high: Parents should know whether their children will be exposed to the opposite sex's genitalia in the locker room—especially if there's even a tiny risk of sexual assault. *Cf.* Caroline Downey, *'They Failed at Every Juncture': Loudoun County Mishandled Bathroom Sex Assault, Grand Jury Finds*, Nat'l Rev. (Dec. 6, 2022 11:57 A.M.).[14] And on the court, female athletes must know whether they risk injury by competing against biological males. *Cf.* Yaron Steinbuch, *Injured North Carolina Volleyball Player Urges Transgender Ban for Female Sports Teams in Schools*, N.Y. Post (Apr. 21, 2023, 7:36 A.M.).[15]

Besides, it's quite odd to say that emotional harms can outweigh biology. In equal-protection caselaw, biology is the one (and only) reason for treating the sexes differently. *Virginia*, 518 U.S. at 533. And in the Title IX context, biological factors that counsel against combining males and females into one team generally trump all others. *See Clark,* 695 F.2d at 1130-32; 34 C.F.R. 106.41(b) (contact-sports rules). The Department shouldn't let self-identification and stereotyping trump biology, longstanding caselaw, and common sense.

II. The Proposed Regulation would be impossible to administer.

The Proposed Regulation seeks to balance gender identity and sex, but its proposal for how States do so is self-contradictory and utterly un-administrable. On the one hand, a student's identification as transgender triggers a complex, individualized assessment of that student's athletic performance. 88 Fed. Reg. 22860. On the other hand, the Proposed Regulation discourages States from asking whether any student is transgender in the first place because it says coming out as transgender is "extremely traumatic." *Id.* at 22877 (internal quotation marks omitted). If a State can't ask whether any given student is transgender, how can it assess that student's athletic performance vis-à-vis members of the opposite sex?

And if a State could get past that hurdle, it's also unclear how the case-by-case analysis of athleticism would play out. Would the State have to let the transgender student try out for the team of his choice and just see how he stacks up to his potential teammates? *Id.* at 22876. Or, depending on the sport, would it have to predict how he'd do against other athletes across the State? Such an

[14] https://www.nationalreview.com/news/they-failed-at-every-juncture-loudoun-county-mishandled-bathroom-sex-assault-grand-jury-finds.
[15] https://nypost.com/2023/04/21/nc-volleyball-player-urges-transgender-ban-for-schools-female-sports.

assessment would be difficult at best—and at worse, risky to the female athletes used as test subjects. *Cf.* Luke Gentile, *Watch: Transgender Rugby Player Slams Female Athletes, Coach Says Three Injured*, Wash. Examiner (Apr. 14, 2022, 12:18 P.M.).[16]

The Department's failure to grapple with those questions means this Department has not seriously considered how anyone could ever apply with the Proposed Regulation, and that alone requires that it be rejected. Indeed, this Department's inability to deal with those practical problems is probably why the Proposed Regulation's case-by-case approach appears to operate like the more categorical rule it disclaims. For instance, the Proposed Regulation indicates that self-identification, not biological sex or individualized athleticism, will always win out in elementary school. 88 Fed. Reg. 22875 ("[T]he Department currently believes that there would be few, if any, sex-related eligibility criteria applicable to students in elementary school that could comply with the [P]roposed [R]egulation."). And in middle school. *Id.* at 22874-75. And likely for "'no-cut' teams that allow all students to join the team and participate, and rarely provide elite competition opportunities." *Id.* at 22875. Apparently, the only girls' sports from which a transgender-identified biological male could be excluded are those "at higher grade levels" that are especially competitive or risky. *Id.* at 22876. That is, if the State could uncover a student's transgender identification in the first place. *Id.* at 22877. Essentially, then, the Proposed Regulation would operate more like a mandate (or strong incentive) to let transgender-identified biological males play on girls' teams than a careful balancing act between sex and gender identity. The Department should not go down that path.

III. The Proposed Regulation misapplies Title IX.

For a half-century, this Department has interpreted "sex" in Title IX as referring to biological sex, not gender identity. 34 C.F.R. 106.41(b). But the Department apparently believes that *Bostock* now mandates its departure from biology. The Proposed Regulation notes an executive order which determined that "[u]nder *Bostock*'s reasoning, laws that prohibit sex discrimination—including Title IX . . . along with [its] respective implementing regulations—prohibit discrimination on the basis of gender identity or sexual orientation, so long as the laws do not contain sufficient indications to the contrary." Executive Order 13988 of January 20, 2021; *see also* 88 Fed. Reg. 22862 (citing the Executive Order). And it cites an earlier guidance document which concluded that *Bostock*'s reasoning applies as much to Title IX as to Title VII (though that guidance remains enjoined). *See* 86 Fed. Reg. 32637 (guidance); *Tennessee v. U.S. Dep't of Educ.*, 615 F. Supp. 3d 807 (E.D. Tenn. 2022) (enjoining that guidance); 88 Fed. Reg. 22865 & n.6 (citing that guidance & noting injunction).

That conclusion is wrong. For one, "the Court in *Bostock* was clear on the narrow reach of its decision and how it was limited only to Title VII itself." *Pelcha v. MW Bancorp, Inc.*, 988 F.3d 318, 324 (6th Cir. 2021). *Bostock* itself disclaims answering any other question but "whether an employer who fires someone simply for being homosexual or transgender has . . . discriminated

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[16] https://www.washingtonexaminer.com/news/watch-transgender-rugby-player-slams-female-athletes-coach-says-three-injured.

against that individual 'because of such individual's sex'" under Title VII. *Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1753 (2020). It did not "purport to address" the permissibility of "sex-segregated . . . locker rooms" or interpret any other statute. *Id.* A cursory assumption to the contrary cannot justify upending the understanding of Title IX that has persisted for half a century.

Even if this Department were reluctant to take *Bostock*'s own word on its scope, Title IX's text contains sufficient indicia that, unlike in Title VII, sex doesn't include gender identity. *See Meriwether v. Hartop*, 992 F.3d 492, 510 (6th Cir. 2021) ("Title VII differs from Title IX in important respects[.]"). For one, the statute repeatedly refers to "one," "the other," "each" or "both" sex(es). *See, e.g.*, 20 U.S.C. 1681(a)(2), (a)(6)(B), (a)(8). Plus, as the Eleventh Circuit, sitting en banc, recently explained, "Title IX, unlike Title VII, includes express statutory . . . carve-outs for differentiating between the sexes." *Adams by and through Kasper v. Sch. Bd. of St. John's Cty.*, 57 F.4th 791, 811 (11th Cir. 2022) (en banc). For instance, Title IX explains that it does not "prohibit" schools "from maintaining separate living facilities for the different sexes." 20 U.S.C. 1686. If "sex" included "gender identity," these carveouts "would be rendered meaningless. This is because transgender persons—who are members of the female and male sexes by birth—would be able to live in both living facilities associated with their biological and living facilities associated with their gender identity or transgender status." *Adams*, 57 F.4th at 813. Thus, "reading 'sex' to include 'gender identity' . . . would result in situations where an entity would be prohibited from installing or enforcing the otherwise permissible sex-based carve-outs where the carve-outs come into conflict with a transgender person's gender identity." *Id.* at 814. It would be "difficult to fathom why the drafters of the Title IX" included those carve-outs in the first place if "sex" included "gender identity." *Id.* at 813. This statutory text, which has no clear analogue in Title VII, makes clear that in Title IX the best reading of "sex" is simply "sex."

There's another reason why "sex" in Title IX shouldn't be given the expansive meaning it has in *Bostock*: Title IX, unlike Title VII, is a Spending Clause statute. And when Congress uses its spending power to "impose a condition" on the recipient, "it must do so unambiguously." *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981). Fifty years of experience confirm that Title IX is hardly clear about lumping in gender identity with sex—nor could it be since "gender identity [is] a concept that was essentially unknown" when Title IX was enacted. *Bostock,* 140 S. Ct. at 1755 (Alito, J., dissenting). This Department shouldn't—and indeed can't—change the statute's terms long after schools and States opted-in to receiving federal funds. *Cummings v. Premier Rehab Keller, PLLC*, 142 S. Ct. 1562, 1569-70 (2022).

IV. The Proposed Regulation misinterprets the Constitution.

The Department also appears to believe that its Proposed Regulation is mandated by the U.S. Constitution. *See* 88 Fed. Reg. 22867 ("The proposed regulation is also informed by constitutional principles."). After citing several district court decisions, *id.* at 22870-71, the Proposed Regulation suggests adding a standard purportedly resembling intermediate scrutiny to assess "sex-related criteria that would limit or deny a student's eligibility to participate on a male or female team." *Id.* at 22871. But if borrowing from constitutional law is the goal, the Proposed

Regulation fails in two ways: *First*, intermediate scrutiny is not the right standard; rational basis is. *Second*, though the Proposed Regulation's standard uses intermediate-scrutiny language, it more closely resembles strict scrutiny. Either way, the Proposed Regulation would impose a far higher burden on States and schools than the Constitution does.

A. Rational basis, not intermediate scrutiny, applies here.

1. Challenges to the definition of "sex" do not trigger intermediate scrutiny. Rather than allow States to limit girls' sports to girls only, the Proposed Regulation would require a case-by-case analysis of whether keeping any individual boy off the girls' team is "substantially related to the achievement of an important educational objective"—in other words, whether it passes intermediate scrutiny. *Id.* at 22872. This level of scrutiny, the Department says, "is informed by case law interpreting the Equal Protection Clause, which requires public schools to demonstrate that any sex-based classification they seek to impose is substantially related to the achievement of an important governmental objective." *Id.*

If the Department assumes it is bringing school-sports policies in line with constitutional law, it is wrong. The Equal Protection Clause is concerned with preventing irrational differential treatment. Thus, Sally Reed could contest an Idaho statute that gave her ex-husband preference over her to become administrator of their son's estate, simply because of his sex. *Reed v. Reed*, 404 U.S. 71 (1971). Curtis Craig could challenge an Oklahoma law that prohibited him from drinking alcohol until age 21, though his female friends could start drinking at 18. *Craig v. Boren*, 429 U.S. 190 (1976). And female applicants to the Virginia Military Institute could sue to change the Institute's males-only admissions policy. *United States v. Virginia*, 518 U.S. 515 (1996).

But if the Clause prevents differential treatment, it certainly doesn't provide certain groups with a *right* to differential treatment. Indeed, courts have consistently held that challenges to "the parameters of the beneficiary class," unlike challenges to the existence of such a class, receive only rational basis. *Hoohuli v. Ariyoshi*, 631 F. Supp. 1153, 1159 (D. Haw. 1986); *see* States' Amicus, 2023 WL 2648004, at *8-16 (summarizing cases). As the Second Circuit explained when rejecting a Spanish-American's claim that he should count as "Hispanic" under a New York affirmative action program, "[t]he purpose of [heightened scrutiny] is to ensure that the government's choice to use racial classifications is justified, not to ensure that the contours of the specific racial classification that the government chooses to use are in every particular correct." *Jana-Rock Constr., Inc. v. N.Y. Dep't of Econ. Develop.*, 438 F.3d 195, 210 (2d Cir. 2006). Similarly, the decision to classify based on sex receives heightened scrutiny; the "parameters" of that sex-based classification do not.

Yet, transgender students who seek to play on a team that matches their gender identity (rather than biological sex) challenge the latter, not the former. Those students don't want to eliminate sex classifications; they just want to be included in a different group. Consider *B.P.J. v. West Virginia State Board of Education*. There, a biological male who identifies as transgender has sued "to play girls' sports." 2023 WL 111875, at *1 (S.D. W. Va. Jan. 5, 2023). B.P.J. does not take "issue . . . with the state's offering of girls' sports and boys' sports" but rather "with the state's definitions of 'girl' and 'boy.'" *Id.* at *4; *see also id.* at *7 ("B.P.J. argues that she and

other transgender girls should be able to play on girls' teams despite their male sex, because their gender identity is 'girl.'").

The Proposed Regulation frames the issue similarly. It does not dispute that schools "may operate or sponsor separate teams for members of each sex." 34 C.F.R. 106.41(b); *see* 88 Fed. Reg. 22866 ("Specifically, the Department proposes renumbering the current § 106.41(b) as proposed § 106.41(b)(1). . . ."). It simply claims that "students" should be able "to participate on a male or female team consistent with their gender identity." 88 Fed. Reg. 22860, 22866-67, 22869-74, 22876, 22880, 22884. But the Constitution doesn't require States to pass intermediate scrutiny every time they choose the traditional, biological understanding of sex over recently developed gender theory. Indeed, it would be profoundly odd if a Clause written in 1868 enshrined a theory of gender not developed until the 1960s. *See* Jenna Marina Lee, *What is Gender Identity? And Other Questions You May Have*, Univ. of Cent. Fla. (Oct. 25, 2021) ("Gender identity as a concept was popularized by John Money in the 1960s.").[17] Rather than bring school-sports policies in line with constitutional law, the Proposed Regulation imposes a higher burden than the Constitution requires.

2. Transgender identity is not a suspect class. Because the sex-classification wouldn't trigger intermediate scrutiny here, the Department may argue that "transgender status" is a "quasi-suspect class[]" also triggering heightened review and that sex-segregated sports target the transgender population. 88 Fed. Reg. 22868, 22872. But transgender people do not constitute a suspect class. Aside from the obvious—race, sex, national origin, religion, etc.—the Supreme Court rarely designates suspect or quasi-suspect classes. *See, e.g.*, *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 442-46 (1985). Indeed, the Court has rejected suspect classification for disability, age, and poverty. *Id.*; *Mass. Bd. of Retirement v. Murgia*, 427 U.S. 307, 313 (1976); *San Antonio Ind. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973). The mere fact that so few classifications rise to the level of "suspect" casts "grave doubt" on the assertion that transgender identity does. *Adams*, 2022 WL 18003879, at *7 n.5.

Precedent explains why that is so. Classifications are suspect when they single out "distinguishing characteristics" that have historically been divorced from "the interests the State has the authority to implement." *Cleburne*, 473 U.S. at 441 (noting that classifications attain suspect status when they have historically "provided no sensible ground for differential treatment"). Sex classifications, for example, are suspect because they often "reflect outmoded notions of the relative capabilities of men and women," rather than real differences. *Id.* at 441. Same for racial classifications. *Murgia*, 427 U.S. at 313-14. Thus, to rise to the level of suspect, a classification must single out a so-called "immutable characteristic" that has historically been the basis for deep discrimination. *See Lyng v. Castillo*, 477 U.S. 635, 638 (1986) (looking for (1) immutable characteristics that define (2) a discrete group, (3) historical discrimination, and (4) political powerlessness).

[17] https://www.ucf.edu/news/gender-identity/#:~:text=Gender%20identity%20as%20a%20concept,to%20gender%2Didentity%2Frole.

Transgender identity does not check these boxes. For one, it is not "an immutable characteristic determined solely by the accident of birth." *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973). To the contrary, individuals identify as transgender when their internal perception of who they are departs from the "immutable characteristic" that is their biological sex. Nor have transgender individuals experienced a history of purposeful unequal treatment under the law. And they are not politically powerless. *Murgia*, 427 U.S. at 313. Transgender individuals as a class look quite "unlike" those individuals who were long denied equal protection because of their race, national origin, or sex. *Id.* at 314 (rejecting age as a suspect class because the elderly have not faced discrimination "akin to [suspect] classifications"). States enshrined purposeful race and sex discrimination into their laws for decades; conversely, as the Supreme Court has explained, transgender individuals have been protected by a "major piece of federal civil rights legislation" for nearly a half-century. *Bostock*, 140 S. Ct. at 1753. And the sports-segregation policies (wrongly) described as discriminating against transgender individuals are recent enactments grappling with the policy questions and potential harms arising from the recent spike in transgender identification. Any classification in these laws is closely related to relevant State interests—a far cry from Jim Crow or coverture. *Cleburne*, 473 U.S. at 441.

In short, transgender individuals do not constitute a suspect class, so the impact of sex-based sports rules on them wouldn't trigger heightened review. Again, the Proposed Regulation imposes a higher burden than the Constitution requires. So it cannot be justified as an attempt to comply with the Constitution.

B. Intermediate scrutiny is not as strict as the Proposed Regulation.

Even if intermediate scrutiny were appropriate, segregating sports teams by biological sex would easily pass muster. States have an "important interest in providing equal athletic opportunities for females," and "sex, and the physical characteristics that flow from it, [is] substantially related to athletic performance and fairness in sports." *B.P.J.*, 2023 WL 111875, at *6, *8. And that interest isn't negated just because some athletes may identify as transgender. *Id.* at *6-8. Grafting an intermediate scrutiny-esque requirement onto Title IX would thus be nugatory.

Perhaps unsurprisingly then, the Proposed Regulation's new "intermediate scrutiny" requirement doesn't really operate like intermediate scrutiny at all. To survive intermediate scrutiny, States need not show that they have crafted the narrowest rule possible or the rule that would best serve their interests. *Adams*, 2022 WL 18003879, at *5. Indeed, "[n]one of [the Supreme Court's] gender-based classification equal protection cases have required that the statute under consideration must be capable of achieving its ultimate objective in every instance." *Nguyen*, 533 U.S. at 70. Thus, in a challenge to sex-segregated sports, a State need only point to the general connection between sex and athleticism. They do not need to show that any individual is more or less athletic than any other. *Contra* 88 Fed. Reg. 22876.

Yet that's precisely what the Proposed Regulation would force States to show. The Proposed Regulation requires States to conduct a case-by-case analysis into each transgender athlete's individual situation, apparently predicting how that individual would perform in his "chosen sport or position" compared to the "skills, size, strength, and other attributes" of competitors or

teammates. *Id.* at 22876. Indeed, the Proposed Regulation spends no less than three pages fleshing out several relevant factors, including an individual's "grade or education level," *id.* at 22874, the skill level of the team he wishes to play on, *id.* at 22875, and the sport, *id.* at 22876. This individualized assessment looks far more like the narrow tailoring requirement of strict scrutiny than intermediate scrutiny.

And if this case-by-case analysis seems rigorous enough, the Proposed Regulation adds another layer of difficulty. The Proposed Regulation requires States to "minimize harms to students whose opportunity to participate on a male or female team consistent with their gender identity." *Id.* at 22860. And *that* requirement would apparently limit a State's ability to even inquire into the "skills, size, strength, [or] other attributes" of a transgender-identified athlete: Because the Proposed Regulation suggests that "forc[ing] individual students to disclose that they are transgender . . . can be 'extremely traumatic,'" it requires States to gather information in the most minimally invasive way. *Id.* at 22877 (requiring States to consider the "difficulty of obtaining documentation, risk of invasion of privacy or disclosure of confidential information," among other factors). If a State could theoretically devise a less invasive way of gathering information, it "would not be permitted to adopt the more harmful criteria." *Id.* Needless to say, that is not what the Constitution requires. The Proposed Regulation cannot fall back on constitutional law to justify its un-administrable rule.

V. The States and Congress, not the Department, should decide who may play on girls' sports teams.

To summarize the Comment to this point: the Proposed Regulation departs from the Department's longstanding (and correct) reading of a fifty-year-old statute, takes sides in an unsettled dispute about the best way to treat gender identity, imposes burdens on States beyond what the Constitution requires, and contravenes policymakers in a growing number of States. And to justify this new and radical regime, the Proposed Regulation relies on a case that disclaimed interpreting Title IX at all.

That should raise red flags. Where an agency adopts a "highly consequential" rule, courts take pains to determine whether "Congress could reasonably be understood" to have authorized the agency to do so. *West Virginia v. EPA*, 142 S. Ct. 2587, 2609 (2022). But a 1972 Congress could not "reasonably be understood" to enshrine gender theory and force States to let biological males play on girls' sports teams—not when that Congress would hardly have known what gender identity was, *Bostock*, 140 S. Ct. at 1755 (Alito, J., dissenting); when "gender identity" appears nowhere in the text of Title IX, *Adams*, 57 F.4th at 815-16; or when the Department interpreted "sex" to incorporate gender identity only recently "in [Title IX's] half century of existence," *Nat'l Fed. of Indep. Bus. v. Dep't of Lab.*, 142 S. Ct. 661, 666 (2022).

Rather than shoehorn gender theory into Title IX, this Department should leave the major question of whether to let biological males who identify as transgender play girls' sports to the States and Congress—which are themselves debating this question. Though the Proposed Regulation claims to "provide needed clarity," 88 Fed. Reg. 22860, it really just attempts to supplant the clear rules already adopted by twenty-one States and bypass an ongoing congressional debate.

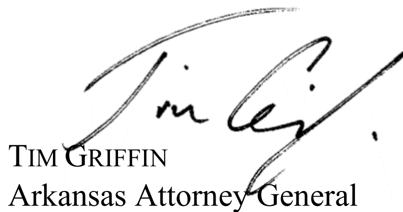
(And it doesn't even provide clarity.) Indeed, the Proposed Regulation barely engages with its "federalism implications," *id.* at 22890, and appears to undercount the number of States that protect girls-only sports. *See* 88 Fed. Reg. 22882 (noting that "a small subset" would "substantially limit or deny transgender students from participating on male or female athletic teams consistent with their gender identity"). Yet the very fact that the question is "the subject of an earnest and profound debate across the country" points against resolution by an unelected agency. *See West Virginia v. EPA*, 142 S. Ct. at 2614 (internal quotation marks omitted). "[T]hat work belongs to state and local governments across the country and the people's elected representatives in Congress" instead. *NFIB*, 142 S. Ct. at 667 (Gorsuch, J., concurring).

If the Department insists on preempting democratic legislation and imposing an unworkable, one-size-fits-all standard, it certainly shouldn't do so on an abbreviated timetable. The Department "usual[ly]" gives "90 days" for comment. *Prometheus Radio Project v. FCC*, 652 F.3d 431, 453 (3d Cir. 2011). Yet it is allowing only 32 days here. Because that short timetable is inadequate to allow States, schools, and female athletes to air out all the problems with the Proposed Regulation, 22 State Attorneys General requested an extension. Yet the Department rejected that request with little explanation, other than the cursory statement that it had "[taken] into account" the States' concerns "when setting the 30-day public comment period." Letter from Catherine E. Lhamon to Attorney General and Reporter Skrmetti, (May 5, 2023). That unreasoned decision is unreasonable—and likely arbitrary and capricious. The Department should reconsider its timetable and allow the usual 90 days for comment.

* * * * *

The Proposed Regulation seeks to upend a half-century's understanding of Title IX and replace the clear, biology-based rules adopted by twenty-one States with a rule focused more on affirmation than on preventing real harms. Our States ask the Department to rescind or revise the Proposed Rule and let the people and their representatives determine policy.

Sincerely,



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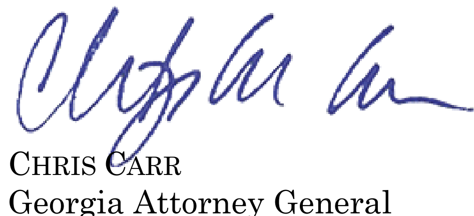

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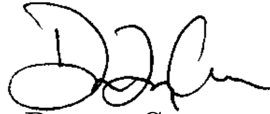
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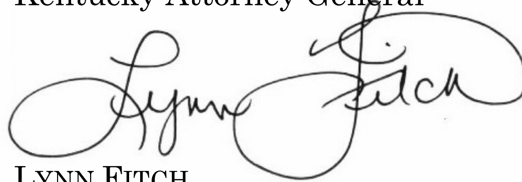
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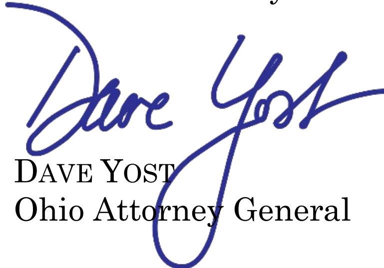
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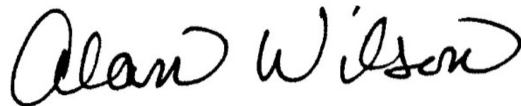
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