IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 22-2332

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

Plaintiff-Appellee,

v.

INDIANAPOLIS PUBLIC SCHOOLS; SUPERINTENDENT, INDIANAPOLIS 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, No. 1:22-cv-1075-JMS-DLP
The Honorable Jane Magnus-Stinson, Judge

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INTRODUCTION

Ever since Title IX's enactment in 1972—and long before that—schools have separated students in sports by sex. Separate teams for men and women are the "norm." *Cohen v. Brown Univ.*, 101 F.3d 155, 177 (1st Cir. 1996). As Congress, regulators, and courts have consistently recognized, separating students by sex in sports does not violate Title IX, but instead furthers Title IX's goal of securing equal opportunity for the sexes. Without sex-separated sports, "there would be a substantial risk that boys"—who possess superior speed, strength, and endurance—"would dominate the girls' programs and deny them an equal opportunity." *O'Connor v. Bd. of Educ. of Sch. Dist. No. 23*, 449 U.S. 1301, 1036–37 (1980) (Stevens, J., in chambers).

In this case, no one disputes that Title IX both permits Indianapolis Public Schools (IPS) to sponsor separate sports teams for boys and girls and (as required under Indiana law) to tell most members of the male sex that they cannot play on teams reserved for girls. But the district court required IPS to let A.M.—a student who was born male and possesses male advantages—play girls' softball because A.M. *identifies* as a girl. It concluded that a "law that prohibits an individual from playing on a sports team that does not conform to his or her *gender identity* . . . violates the clear language of Title IX." SA22 (emphasis added). That rationale, however, defies Title IX's plain text and places schools in an untenable position.

By its terms, Title IX does not protect "gender identity." It instead prohibits both discrimination and denial of equal opportunities "on the basis of sex," a biological characteristic determined by reproductive function. 20 U.S.C. § 1681(a). When it

comes to sports, moreover, schools do not discriminate when sponsoring "separate-sex teams" that "exclu[de]" members of the opposite sex. *O'Connor v. Bd. of Educ. of Sch. Dist. No. 23*, 645 F.2d 578, 582 (7th Cir. 1981). Being born male confers superior height, speed, strength, endurance, and other characteristics that yield significant advantages. Having all co-ed teams would disadvantage girls on the basis of sex.

Requiring schools to let males who declare themselves transgender play girls' sports would undermine Title IX's guarantee that women will not be denied equal opportunities to participate in and benefit from sports "on the basis of sex." Self-identifying as a girl, as no gender, or as a blend of genders does not negate the advantages that come from being born male. That means transgender athletes born male will outperform athletes born female who have equivalent levels of dedication, training, and skill, displacing those female athletes from rosters and podiums. It would turn Title IX on its head to construe the statute to privilege gender identity, an unprotected characteristic, at the expense of sex, the protected characteristic.

Bostock v. Clayton County, 140 S. Ct. 1731 (2020), and *Whitaker v. Kenosha Unified School District No. 1 Board of Education*, 858 F.3d 1034 (7th Cir. 2017), do not support a different conclusion. Neither decision addresses sex-segregated sports under Title IX. And neither can be extended to sports—a context in which enduring physiological differences between men and women impact fairness and girls' safety—without jeopardizing the foundation for women's progress in sports.

JURISDICTIONAL STATEMENT

Plaintiff A.M., a minor, by next friend and mother E.M., filed this action for declaratory and injunctive relief against Defendants Indianapolis Public Schools and the Superintendent of Indianapolis Public Schools, in her official capacity. A3. The State of Indiana intervened as a defendant under 28 U.S.C. § 2403(b) and Federal Rules of Civil Procedure 5.1 and 24. ECF No. 18; ECF No. 27. The district court had jurisdiction under 28 U.S.C. § 1331 because the complaint alleged that Indiana Code § 20-33-13-4 violated federal law, specifically Title IX, 20 U.S.C. § 1681(a), and the Equal Protection Clause. A13. On July 26, 2022, the district court entered an order and a preliminary injunction enjoining IPS and its superintendent "from applying Indiana Code § 20-33-13-4 to prohibit Plaintiff A.M. from playing on any IPS girls' softball team." SA1; *see* SA2–SA29. On July 27, 2022, the State filed a timely notice of appeal. ECF No. 64. This Court has jurisdiction over this appeal from an order granting a preliminary injunction under 28 U.S.C. § 1292(a)(1).

STATEMENT OF THE ISSUE

Whether A.M., whose birth sex is male but who now identifies as a girl, is entitled to a preliminary injunction under Title IX, 20 U.S.C. § 1681(a), or the Equal Protection Clause requiring IPS to let A.M. play girls' softball.

STATEMENT OF THE CASE

I. The Science Behind Sex-Segregated Sports

Most sports and school sports programs have separate competition categories for boys and girls and men and women. A85 ¶ 4.2 (Dr. Tommy Lundberg). The principal reason is that "[p]hysical differences between men and women . . . are enduring." *United States v. Virginia*, 518 U.S. 515, 533 (1990); *see* A85 ¶ 4.2 (Lundberg). Male physiology confers advantages "so great that athletic competition is not considered meaningful for girls/women if they must compete against boys/men." A85 ¶ 4.2 (Lundberg).

A. Males and females exhibit physiological differences at all ages

Physiological differences between males and females emerge at the earliest stages of development, increase during puberty, and remain throughout their lifetimes. A57 ¶ 2.1 (Dr. Emma Hilton); A85 ¶ 4.2 (Lundberg); A89 ¶ 5.12 (Lundberg). In utero, males exhibit longer body lengths, larger skull diameters, larger abdominal circumferences, and higher estimated fetal weights. A59 ¶ 2.1 (Hilton). As infants, males tend to be longer and heavier. A59 ¶ 2.2 (Hilton). Similarly, throughout childhood, males exhibit greater muscle mass, superior oxygen uptake, lower body fat, and better fitness overall. A88–A89 ¶¶ 5.6–5.10 (Lundberg); A135–A139 ¶¶ 3–19 (Lundberg); A63–A64 ¶¶ 4.1–4.4 (Hilton).

Puberty accentuates male and female differences. During puberty, male testosterone production jumps to 15–20 times that of children and females of any age.

A87 ¶ 5.4 (Lundberg). Testosterone gives males "greater lean body mass (more skeletal muscle and less fat), larger hearts (both in absolute terms and scaled to lean body mass), higher cardiac outputs, larger hemoglobin mass (also both in absolute terms and scaled to lean body mass), larger V O2max (higher aerobic capacity) (also both in absolute terms and scaled to lean body mass), greater glycogen utilization, higher anaerobic capacity, and different economy of motion." Benjamin D. Levine et al., *The Role of Testosterone in Athletic Performance*, Duke Ctr. for Sports L. & Pol'y, at 1 (Jan. 2019); *see* A59–A60 ¶¶ 2.1–2.3 (Hilton); A87 ¶¶ 5.3–5.4 (Lundberg). Overall, adult males "have 45% higher lean body mass, 33% higher lower body muscle mass," "40% high upper body muscle mass," "54% higher knee extension strength, and 30% higher maximum cardiac output." A87 ¶ 5.3 (Lundberg).

B. Male and female differences impact performance and safety

Male and female differences impact sports performance and safety at all ages. As a study by Dr. David Handelsman reports, "sex differences in athletic performance" are "generally measurable before puberty and gr[o]w substantially by age 12." A89 ¶ 5.11 (Lundberg). A study involving 6-year-old children found that boys exhibit greater speed (16.6% advantage), explosive strength (9.7% advantage), and aerobic-endurance capacity than girls. A88 ¶¶ 5.6–5.7 (Lundberg); *see* A63–A65 ¶¶ 4.3–4.4 (Hilton). A study involving 8-year-olds found that boys exhibit greater cardio-respiratory fitness (18% difference), greater hand-eye coordination (44% difference), and lower body fat than girls. A88–A89 ¶¶ 5.9–5.10 (Lundberg); A135–A139 ¶¶ 3–19 (Lundberg). A study involving 9-year-olds found boys can complete more push-ups

(33% advantage), grip more strongly (13.8% advantage), and run faster (up to 16.6% advantage) than girls. A88 ¶ 5.6 (Lundberg). And a study involving 5- and 10-year-olds likewise found a "clear[]" "male advantage in throwing events." A63 ¶ 4.3 (Hilton). Physical fitness studies of school-age children demonstrate that males are consistently faster and stronger than females of the same age. A88–A89 ¶¶ 5.6–5.11 (Lundberg).

The "average sex differences in athletic performance are accentuated during puberty, when circulating testosterone concentrations increase in males, resulting in circulating testosterone 15–20 times higher than in children or females of any age." A87 ¶ 5.4 (Lundberg). Thus, "by the age of 14–15," "many male junior athletes outperform adult female elite athletes." A87 ¶ 5.3 (Lundberg). Depending on the sport, "the performance advantage of men over women is typically 10–50%." A86–A87 ¶ 5.1 (Lundberg). That is a "class-level advantage" that no amount of training, dedication, or other efforts can mitigate. A63 ¶ 4.1 (Hilton); *see* A86 ¶¶ 4.6–4.7 (Lundberg); Doriane Lambelet Coleman et al., *Re-Affirming the Value of the Sports Exception to Title IX's General Non-Discrimination Rule*, 27 Duke J. of Gender L. & Pol'y 69, 88 (2020). Women also must contend with menstrual cycles and fluctuating hormones that "affect cardiovascular, respiratory, brain function, . . . metabolic parameters," and more, creating an additional "barrier to athletic capacity not experienced by males." A65 ¶ 4.5 (Hilton).

Male and female physiological differences affect safety as well. Female athletes are at greater risk of concussion and other adverse consequences from head injuries

than their male counterparts. A65–A66 ¶ 4.6 (Hilton); A86 ¶ 4.8 (Lundberg). For example, "[e]merging research shows that compared with males, female rugby players appear more susceptible to concussive injuries, with more severe outcomes." A65–A66 ¶ 4.6 (Hilton); *see* Katharine Sanderson, *Why Sports Concussions Are Worse for Women*, Nature (Aug. 3, 2021), https://www.nature.com/articles/d41586-021-02089-2 ("Studies from US collegiate sports have shown that female athletes are 1.9 times more likely to develop a sports-related concussion than are their male contemporaries in comparable sports."). That increased susceptibility has been attributed to differences in female physiology and brain development. A65–A66 ¶ 4.6 (Hilton); Sanderson, *supra*. When women compete against men in sports where collisions and combat may occur, males' greater height, weight, and strength increase females' risk of injury. A86 ¶ 4.8 (Lundberg).

C. Male-to-female transgender athletes retain male advantages

Increasingly, transgender athletes born male are seeking to compete in women's and girls' sports categories. A90 ¶ 6.1 (Lundberg). Several international sporting bodies have required transgender athletes born male to suppress testosterone to levels below that which would naturally occur during male puberty as a condition of participating in women's sports categories. A71 ¶¶ 7.1–7.2 (Hilton). World Rugby, by contrast, imposed a complete *ban* because it "concluded that player welfare and fairness of competition could not be ensured if transgender women were allowed to play in the women's category." A90 ¶ 6.5 (Lundberg).

As World Rugby's decision reflects, a significant concern regarding transgender athletes is that declaring oneself transgender does not negate the advantages males have over females. In the absence of any interventions, transgender athletes born male will have the same performance advantage over females as non-transgender males. A76 ¶ 8.1 (Hilton). That includes advantages existing before puberty and the additional advantages acquired during male puberty. To mitigate advantages acquired during (but not before) puberty, transgender athletes born male may be administered "puberty blockers" after they start showing signs of male puberty. A69 ¶ 6.3 (Hilton). Puberty blockers mitigate the increased testosterone production that occurs during male puberty, but do not "completely block the entirety of male puberty." *Id.*

Many questions remain regarding the efficacy of puberty blockers. No studies have been conducted on "strength, muscle mass, and other athletic indicators" to determine whether administering puberty blockers at or before male puberty will prevent the changes that occur during male puberty to widen the gap between male and female athletic performance. A84 ¶ 2.4 (Lundberg); A92–A93 ¶¶ 8.3–8.6 (Lundberg). But a recent finding that "trans girls grow taller than reference females" despite taking puberty blockers indicates that puberty blockers cannot prevent transgender athletes born male from acquiring advantages from male puberty. A92–A93 ¶ 8.4 (Lundberg); *see* A74–A75 ¶ 7.9 (Hilton).

There is, moreover, "no scientific evidence that suppression of testosterone in transgender girls/women who have undergone male puberty negates the athletic advantage" acquired during male puberty. A84 ¶ 2.3 (Lundberg). Research instead shows that, after 12 months of testosterone suppression, lean body mass in transgender women decreases only by "approximately 3-5%" and grip strength decreases only by about "4%." A93–A94 ¶¶ 9.4, 9.6 (Lundberg). The "transgender women still had a 21% advantage in grip strength over a comparison group of females." *Id.* Other characteristics of adult transgender individuals born male, including bone mass and height, were altogether "unaffected." A71 ¶ 7.4 (Hilton).

II. Title IX and Sex-Separated Sports

A. Congress enacted Title IX to provide equal opportunities for both sexes, including in athletics

Enacted in 1972, Title IX addresses sex discrimination in institutions receiving federal funds. It provides that "[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). Through that provision, Congress sought to rectify "the simple, if unpleasant, truth . . . that we still do not have in law the essential guarantees of equal opportunity in education for men and women." 118 Cong. Rec. 5,808 (Feb. 28, 1972) (statement of Sen. Bayh). To cite one example, "[j]ust before Title IX's enactment there were only 2.5 women's teams per NCAA school and only 16,000 female intercollegiate athletes, and just 294,015 girls participating in high school athletics—one girl for every twelve boys." Linda Jean Carpenter & R. Vivian

Acosta, *Women in Intercollegiate Sport: A Longitudinal, National Study, Thirty-Seven Year Update, 1977–2014*, at 1. As Indiana's Senator Bayh, who sponsored Title IX, explained, Title IX "strike[s] a death blow at discrimination . . . against women in having equal access to . . . education." 118 Cong. Rec. 5,809 (Feb. 28, 1972).

In enacting Title IX, however, Congress "recognized that addressing discrimination in athletics presented a unique set of problems." *Kelley v. Bd. of Trs.*, 35 F.3d 265, 270 (7th Cir. 1994). As Senator Bayh explained, Title IX would provide "equal access for women and men" but would not "mandate the desegregation of football fields." 117 Cong. Rec. 30,407 (Aug. 6, 1971) (statement of Sen. Bayh). Football and other sports involved "*unique* facet[s]" that would justify separating men and women. *Id.* (emphasis added); *see* 118 Cong. Rec. 5,807 (Feb. 28, 1972) (statement of Sen. Bayh) (explaining Title IX "permits differential treatment by sex . . . in sports facilities or other instances where personal privacy must be preserved").

B. Implementing regulations recognize that separate-sex sports are consistent with Title IX

Two years after enacting Title IX, Congress directed the Department of Health, Education, and Welfare (HEW) to adopt regulations implementing Title IX's "prohibition of sex discrimination," including "reasonable provisions" for "intercollegiate athletic activities" that "consider[ed] the nature of particular sports." Pub. L. No. 93-380, 88 Stat. 484, § 844 (1974).

The resulting regulations, *Nondiscrimination on the Basis of Sex in Education Programs and Activities Receiving or Benefiting from Federal Financial Assistance*, 40 Fed. Reg. 24,128 (June 4, 1975), remain in effect today. The regulations permit

separate athletic teams based on sex both "where the selection for such teams is based on competitive skill" or where "the activity involved is a contact sport," which "include[s] boxing, wrestling, rugby, ice hockey, football, basketball, and other sports the purpose or major activity of which involves bodily contact." 34 C.F.R. § 106.41(b). They allow "separation of students by sex within physical education classes or activities during participation in wrestling, boxing, rugby, ice hockey, football, basketball and other sports the purpose or major activity of which involves bodily contact." *Id.* § 106.34(c). And "[w]here use of a single standard of measuring skill or progress in a physical education class has an adverse effect on members of one sex, the recipient shall use appropriate standards which do not have such effect." *Id.* § 106.34(d).

Congress held hearings on these regulations. *Sex Discrimination Regulations: Hearings before the Subcomm. on Postsecondary Educ. of the Comm. on Educ. & Lab.*, 94th Cong. 1 (1975). In its summary, HEW acknowledged that "inequality of opportunity may exist even where women participate on the same teams with men." *Id.* at 22. Laurie Mabry, President, Association of Intercollegiate Athletics for Women, observed that it would be "pure discrimination" to integrate all male and female teams "except a few women who might qualify on the basis of skill." *Id.* at 129. And a representative from the Eastern Association for Intercollegiate Athletics for Women stated, "physiological differences between the male and female" "prevent equality of opportunity" in some integrated sports. *Id.* at 526; *see also id.* at 54. As one scholar summarizes, the "biological differences between males and females that account for the performance gap, as well as those sex traits and related customs that raised safety

and privacy concerns, were key to the discussions and decisions around inclusion and segregation." Coleman, *supra*, at 80. The regulations' allowance for sex-segregated sports served the "goal [of] parity across all categories of opportunity," and "reflect[s] the general consensus at the time regarding sex segregation in sport." *Id.* at 81.

Agency guidance regarding the regulations Congress approved reflected similar concerns. As HEW explained in 1975, the regulations' fundamental goal was to guarantee men and women an equal opportunity "to compete in athletics in a meaningful way." *Sex Discrimination in Athletic Programs*, 40 Fed. Reg. 52,655, 52,656 (Nov. 11, 1975). "[A]n institution wou[l]d not be effectively accommodating the interests and abilities of women if it abolished all its women's teams and opened up its men's teams to women, but only a few women were able to qualify." *Id.*

In 1979, HEW issued a formal policy interpretation of Title IX and implementing regulations, reaffirming HEW's commitment to equal opportunity and "clarify[ing] the meaning of 'equal opportunity' in intercollegiate athletics." *Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics*, 44 Fed. Reg. 71,413 (Dec. 11, 1979). According to the guidance, Title IX compliance depends in part on whether an institution has effectively accommodated students' interests and abilities: "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." *Id.* at 71,418. Institutions must accommodate "interests and abilities . . . to the extent necessary to provide equal opportunity." *Id.* at 71,417.

Twenty years later, the Department of Education issued a "Dear Colleague" memorandum expressly stating that the "Title IX regulation allows institutions to operate athletic programs for men and women." Letter from U.S. Department of Education, Office of Civil Rights, *Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test* (Jan 16, 1996), https://www2.ed.gov/about/offices/list/ocr/docs/clarific.html. Title IX's athletic provisions are "unique" in that they allow "separate athletic programs on the basis of sex" "notwithstanding the long history of discrimination based on sex in athletic programs." *Id.* "By contrast, Title VI of the Civil Rights Act of 1964 forbids institutions from providing separate athletic programs on the basis of race or national origin." *Id.*

C. Issues emerge as to transgender athlete participation

For the first forty-four years of Title IX's existence, the Department of Education never suggested that Title IX requires transgender students to be treated differently from other members of their sex. Then, in 2016, the Department issued a letter stating that Title IX's prohibition of sex discrimination encompassed "discrimination based on a student's gender identity." Catherine Lhamon & Vanita Gupta, *Dear Colleague Letter: Transgender Students*, U.S. Dep't Of Educ.: Off. of Civ. Rights, at 1 (May 13, 2016). That informal position was short lived. Four years later, the Department formally took a contrary stance in a notice-and-comment rulemaking. *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 85 Fed. Reg. 30,025 (May 19, 2020). It explained that "Title IX and its implementing regulations . . . presuppose sex as a binary classification"—in

fact, past regulations and guidance "expressly acknowledged physiological differences between the male and female sexes." *Id.* at 30,178.

Now, after a change in administration, the Department has shifted its stance again. Last year, it issued an interpretive document stating that "Title IX's prohibition on sex discrimination . . . encompass[es] discrimination based on . . . gender identity." *Enforcement of Title IX of the Education Amendments of 1972 With Respect to Discrimination Based on Sexual Orientation and Gender Identity in Light of Bostock v. Clayton County*, 86 Fed. Reg. 32,637 (2021). That agency action, and any reliance on it, however, have been preliminarily enjoined in a lawsuit brought by twenty States, including Indiana. *See Tennessee v. U.S. Dep't of Educ.*, No. 3:21-cv-308, 2022 WL 2791450, *24 (E.D. Tenn. July 15, 2022).

The Department separately issued a notice of proposed rulemaking in the same vein, which is currently in the comment period. *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 87 Fed. Reg. 41,390 (2022). Even in that notice, however, the Department acknowledged that "athletics presents unique circumstances" and announced its intention to conduct a separate notice-and-comment rulemaking on "what criteria, if any, recipients should be permitted to use to establish students' eligibility to participate on a particular male or female athletics team." *Id.* at 41,538.

III. The Indiana General Assembly Enacts HEA 1041 To Preserve Equal Opportunities for Female Athletes

A. Indiana institutions lacked coherent, consistent policies for addressing transgender participation in girls' sports

Indiana schools and sports associations have long provided for sex-segregated sports. The Indiana High School Athletic Association (IHSAA), for example, recognizes ten boys' sports and ten girls' sports for state championships as well as two new emerging sports, boys' volleyball and girls' wrestling. A23 (15:1–3); A38 (94:13–14). As IHSAA puts it, providing for single-sex sports and teams serves to "protect the integrity of girls' ability to participate on a fair, balanced, equal playing field." A24–A25 (24:22–25:1).

Indiana schools and athletic programs have struggled to address transgender athletes. In 2006, IHSAA first developed a transgender-participation policy, which required a surgical change of anatomy for a transgender person to participate in a sport or team aligned with the person's gender identity rather than birth sex. A26 (34:2–20); A27–A28 (35:20–36:2). In 2017, upon concluding that surgery was an unnecessarily high bar—particularly for young people who (according to the IHSAA Commissioner) are prone to "chang[ing] their mind[s]" and "may go back . . . [and] change their identity or how they identify at some point," A29 (37:13–21)—IHSAA overhauled its policy to permit waivers on a case-by-case basis using ad hoc standards, A28–A29 (36:21–37:3); A30 (48:9–12).

Although the 2017 policy requires IHSAA to consider whether birth males will have a biological "competitive advantage" over girls, A29 (37:2–3), IHSAA will not

deny a waiver to male applicants who fail to undergo physiological testing to measure such advantages, A31 (51:9–17). IHSAA has no metrics or standards by which it compares a male applicant's physical and physiological condition to "the physical and physiological condition of a genetic female of the same age group." A33–A34 (53:25–54:1); A35 (56:13–14); A37 (62:12–19). Unlike international sporting bodies, IHSAA "do[es] not have a level" of testosterone suppression required for males seeking to compete on girls' teams. A35–A36 (55:24–56:1). The "standard" is set in "each case independently" by three individuals—the Commissioner, Board President, and counsel—none of whom must consult medical experts. A30 (48:9–12); A32–A33 (52:21–53:5); A37 (58:10–15).

For high-school sports, defendant IPS follows IHSAA's transgender-participation policy. ECF No. 36-4 at 101:3–6. For elementary and middle-school sports, IPS permits transgender students to "participate" "consistent" with the "gender identity" they and their families embrace—no medical evaluations, testosterone testing, or puberty blockers required. *Id.* at 102:12–20. Although IPS has discussed abolishing sex-based eligibility criteria altogether for elementary girls' softball and making it a co-ed sport, *id.* at 35:8-16, IPS is concerned that "re-designating girls' sports as co-ed sports would likely run afoul of Title IX," ECF No. 35 at 2.

B. The Indiana General Assembly enacts HEA 1041 to safeguard girls' opportunities in school sports

In May 2022, the Indiana General Assembly enacted HEA 1041 to shield women's and girls' sports from risks that arise from transgender participation. HEA

1041 applies to sports and sports teams "organized, sanctioned, or sponsored" by public and private schools—and by athletic associations such as IHSAA—for interscholastic competition. 2022 Ind. Legis. Serv. 177-2022 (H.E.A. 1041), codified at Ind. Code § 20-33-13-1 (eff. July 1, 2022). Under HEA 1041, a school or association must "expressly designate the athletic team or sport" as (1) a "male, men's, or boys' team or sport"; (2) a "female, women's, or girls' team or sport"; or (3) a "coeducational or mixed team or sport." Ind. Code § 20-33-13-4. If a sport or team is designated as female, women's, or girls', "[a] male, based on a student's biological sex at birth in accordance with the student's genetics and reproductive biology, may not participate." *Id.* HEA 1041 otherwise lets schools and associations establish eligibility criteria.

IV. Proceedings Below

A. A.M. challenges HEA 1041 as discrimination based on "gender identity"

Hours after HEA 1041's enactment, A.M., a 10-year-old IPS student born male but now identifying as a girl, filed this suit against Indianapolis Public Schools and its Superintendent, alleging violations of Title IX and the Equal Protection Clause. A1–A13. The complaint alleges that, "because of HEA 1041, A.M. will not be able to play softball this year" on an IPS girls' elementary softball team. A11 ¶ 58; *see* A1 ¶ 1; A12 ¶ 68. A.M. faults HEA 1041 for preventing "transgender female students . . . from participating in female-only sports because they are girls who are transgender." A1 ¶ 1; *see* A12 ¶ 65. The complaint alleges that HEA 1041 violates Title IX and discriminates "on the basis of transgender status, as well as sex, in violation of the Equal Protection Clause of the United States Constitution." A2 ¶ 2. The State of Indiana

intervened under 28 U.S.C. § 2403(b) and Federal Rules of Civil Procedure 5.1 and 24 to defend the legality and enforceability of HEA 1041. ECF No. 18; ECF No. 27.

Shortly after filing suit, A.M. moved for a preliminary injunction. ECF No. 8. In support, A.M. filed a declaration of Dr. James Fortenberry, a doctor who works on "gender identity issues." A15–A16 ¶¶ 2, 5. He regards "gender identity" as "one's sense of oneself as congruent with a particular gender." A17 ¶ 11.

Fortenberry does not "assess athletic performance," A50 (172:4), does no "research on athletic performance," A41 (17:18–19); A42 (25:16–18), and could not name any of the "leading scholars and researchers" who study prepubertal athletic ability, A42–A43 (25:19–26:3). Fortenberry's declaration nonetheless opined that "pre-pubertal transgender girls' height, weight, lean body mass, and muscle strength does not differ from that of other pre-pubertal girls." A20 ¶ 39. His declaration, however, cited no study for that assertion. Nor did it acknowledge studies finding—as A.M. later admitted—that "birth males perform better than birth females as to various metrics even before puberty." ECF No. 49 at 15; *see* pp. 5–6, *supra* (discussing studies).

Fortenberry also opined that, appropriately treated, post-pubertal transgender girls have "no competitive advantages in athletic participation compared to other girls." A21 ¶ 40. Again, however, Fortenberry's declaration cited no supporting study. He later admitted that his opinion was an "extrapolation" from assumptions that (1) pre-pubertal boys have no athletic advantages over girls and (2) puberty blockers prevent male puberty entirely. A52 (174:13); *see* A20–A21 ¶¶ 39–40. Fortenberry did not reconcile that reasoning with studies finding pre-pubertal male-female performance

gaps or greater height among transgender girls on puberty blockers compared with females. *See* pp. 5–6, 8, *supra*. He also admitted that starting puberty blockers after male puberty is underway could alter his conclusion. A51–A52 (173:21–174:4).

In opposition, the State submitted opinions from several experts. ECF No. 36. Dr. Emma Hilton, a developmental biologist, opined that, as detailed above, pp. 4–5, *supra*, physiological differences between males and females exist through all stages of development. A57 ¶ 2.1. Males, for example, have physical advantages, such as superior skeletal-muscle metrics and more efficient cardiovascular systems, which translate to competitive advantages in athletics. A57 ¶¶ 2.1, 2.3. Dr. Tommy Lundberg, a sports scientist conducting original research on transgender women's athletic performance, similarly explained that biological males outperform comparable biological females in almost all sports and athletic competitions "primarily due to differences in male physiology compared to female physiology." A82 ¶¶ 1.1, 1.5; A84 ¶ 2.1; A86–A87 ¶ 5.1. Lundberg explained that male and female "sex differences are observed in childhood, adolescence, and adulthood." A89 ¶ 5.12. "[T]he collective body of scientific evidence," he further opined, "suggests that testosterone suppression is highly unlikely to reverse the athletic advantage of males over females." A94 ¶ 9.10.

Dr. James Cantor, a neuroscientist and sex researcher and the director of the Toronto Sexuality Centre, addressed issues concerning gender dysphoria and mental health. A114 ¶ 1. Cantor criticized several of Fortenberry's opinions as contrary to "clinical science," including that "gender dysphoric children (cases of early-onset gender dysphoria) . . . represent the same phenomenon as adult gender dysphoria (cases

of late-onset gender dysphoria).” A118 ¶ 35. For individuals with childhood-onset gender dysphoria, Cantor explained, “the majority cease to want to be the other gender over the course of puberty—ranging from 61–88% desistance across the large, prospective studies.” A119 ¶ 43. Furthermore, Cantor stated, there is “little” evidence to support Fortenberry’s claim that social transition improves the mental health of gender dysphoric children, A127 ¶ 74, or lowers the rate of suicidality, A133 ¶ 93. “However plausible it might seem that failing to affirm transition causes suicidality, the epidemiological evidence indicates that hypothesis to be incorrect.” *Id.*

B. The district court enters a preliminary injunction

The district court granted A.M.’s motion for a preliminary injunction and enjoined IPS “from applying Indiana Code § 20-33-13-4 to prohibit A.M. from playing on any IPS girls’ softball team.” SA1, SA29. The injunction is not limited to elementary softball teams and does not require A.M. to suppress male puberty.

In determining whether A.M. was likely to succeed on the merits, the district court addressed Title IX only. SA28. It conceded that “[t]he United States Supreme Court has not yet considered whether ‘sex’ for purposes of Title IX means just an individual’s biological sex at birth, or also includes their gender identity.” SA19. Relying on *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), and *Whitaker v. Kenosha Unified School District No. 1 Board of Education*, 858 F.3d 1034 (7th Cir. 2017), however, the district court held that complying with HEA 1041 would violate Title IX. SA21–22. It said that a “law that prohibits an individual from playing on a sports team that does not conform to his or her *gender identity* ‘punishes that individual for

his or her gender non-conformance, which violates the clear language of Title IX." SA22 (emphasis added). The court also characterized HEA 1041—which prohibits all males from playing girls' sports—as "singling out . . . transgender females" and "unequivocally discriminating on the basis of sex." *Id.* In so holding, however, the district court did not address that Title IX permits students to be separated by sex in sports. Nor did the district court address the retained physiological advantages of birth males who identify as girls.

The district court also ruled that considerations of irreparable harm, the equities, and the public interest warranted an injunction. SA22–SA26.

SUMMARY OF ARGUMENT

The preliminary injunction barring IPS from complying with HEA 1041, a law providing for separate-sex sports, with respect to A.M. should be vacated.

I. HEA 1041 is consistent with Title IX. "Sex" in Title IX does not encompass the modern concept of "gender identity," but rather refers to a binary, biological characteristic. And in prohibiting "discrimination" and exclusion from activities on the "basis of sex," Congress did not require schools to blind themselves to sex-based differences that affect athletic performance and safety. Because the sexes are not similarly situated in athletics due to males' physical advantages over females, limiting girls' athletic teams to females does not constitute "discrimination."

Requiring schools to let males play girls' sports whenever doing so is consistent with their identities would undermine Title IX's guarantee that women will not be denied equal opportunities to "participate in" and "benefit[]" from sports "on the basis

of sex." 20 U.S.C. § 1681(a). Regardless of how they identify, individuals born male retain their male sex and associated male athletic advantages. It would upend Title IX to privilege gender identity, an unprotected characteristic, at the expense of sex, the protected characteristic.

The district court relied on *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), and *Whitaker v. Kenosha Unified School District No. 1 Board of Education*, 858 F.3d 1034 (7th Cir. 2017), to conclude otherwise. But neither case addresses sex-segregated sports under Title IX. And the cases cannot be extended to sports without jeopardizing equal opportunity for women in athletics.

II. The Equal Protection Clause does not provide an alternative ground for affirmance. The Equal Protection Clause directs that similarly situated persons should be treated alike, which does not require schools to ignore biological differences between males and females that impact athletics. The law has long recognized that "sex-based classification[s]" in school sports are constitutionally permissible. *O'Connor v. Bd. of Educ. of Sch. Dist. No. 23*, 645 F.2d 578, 581 (7th Cir. 1981) (quoting *O'Connor v. Bd. of Educ.*, 449 U.S. 1301, 1306 (1980) (Stevens, J., in chambers)).

To the extent sex-separate teams impact transgender individuals, the Equal Protection Clause does not require heightened scrutiny. Transgender status is not a specially protected characteristic, and it lacks the qualities of other specially protected characteristics. Regardless, exceedingly persuasive reasons justify limiting girls' sports teams to the female sex—namely, securing equal athletic opportunities

for the female sex (a protected class under the Equal Protection Clause) and protecting female athletes from injury. Transgender athletes born male retain male advantages. Allowing them to play on girls' teams would undermine the fairness of competition for women and subject women to greater risk of injury.

A.M.'s specific circumstances do not change the analysis. A.M. brought a facial challenge to the separate-sex sports policy embodied in HEA 1041. And the Equal Protection Clause does not require classifications to be a perfect fit regardless.

III. None of the remaining preliminary injunction factors favor relief here. In weighing them, the district court (1) bypassed a material factual dispute as to the existence of irreparable harm, (2) ignored evidence of harm to the State and third-parties, and (3) misapprehended the public interest.

STANDARD OF REVIEW

"A preliminary injunction is an extraordinary remedy never awarded as of right." *Winter v. Nat. Res. Defense Council, Inc.*, 555 U.S. 7, 24 (2008). "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Id.* at 20. Legal conclusions underlying a preliminary injunction are reviewed de novo, factual findings for clear error, and the balancing of equities for abuse of discretion. *See United Air Lines, Inc. v. Air Line Pilots Ass'n, Int'l*, 563 F.3d 257, 269 (7th Cir. 2009).

ARGUMENT

I. A.M. Does Not Have a Substantial Likelihood of Success Under Title IX

Title IX permits schools to limit participation on girls' sports teams to females, as HEA 1041 requires. Under Title IX, schools both must refrain from sex discrimination and provide both sexes with equal opportunities. As Congress, federal regulators, and courts have long recognized, schools may (and perhaps must) separate students by sex in sports, lest men and boys—who possess superior height, strength, lung capacity, etc.—dominate athletics to the detriment of women and girls. Limiting participation on girls' sports teams to biological girls avoids discrimination and secures equal opportunities for both sexes.

Critically, the district court did not hold that IPS must permit *all* biological boys to play on girls' sports teams. IPS must do so only when, as with A.M., a boy's sex and "gender identity" diverge and a person born into the male sex identifies as a girl. SA22. But Title IX is concerned with "sex," not "gender identity." 20 U.S.C. § 1681(a). If a school may exclude boys from girls' sports based on the protected characteristic of sex, it may do so regardless of an additional, unprotected characteristic such as gender identity. Adopting the district court's view would undermine Title IX's guarantee of equal opportunities for females.

A. To preserve equal opportunities for the male and female sexes, Title IX permits the male sex to be barred from girls' sports

As Congress, regulators, and courts have long recognized, Title IX permits—and may require—schools to exclude boys from girls' teams. Title IX provides that

"[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 usual," those words must be interpreted "consistent with their 'ordinary meaning . . . at the time Congress enacted the statute.'" *Wis. Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2070 (2018) (quoting *Perrin v. United States*, 444 U.S. 37, 42 (1979)).

1. When Title IX was enacted in 1972, "sex" carried a "narrow, traditional interpretation." *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1085–86 (7th Cir. 1984). That term, scientific in nature, referred to the "two divisions" of organisms, "designated *male* and *female*," classified "according to their reproductive functions." *Sex*, The American Heritage Dictionary of the English Language 1187 (1980). "[V]irtually every dictionary definition of 'sex' referred to the *physiological* distinctions between males and females—particularly with respect to their reproductive functions." *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 632 (4th Cir. 2020) (Niemeyer, J., dissenting); *see Adams v. Sch. Bd. of St. Johns Cnty.*, 3 F.4th 1299, 1322, 1336 (11th Cir.) (Pryor, C.J., dissenting), *reh'g en banc granted*, 9 F.4th 1369 (11th Cir. 2021).

Title IX reflects Congress's understanding that "sex" refers to a binary, biological characteristic. It distinguishes between institutions, organizations, and activities open to "only students of one sex" and those open to "students of both sexes." 20 U.S.C. § 1681(a)(2); *see also id.* § 1681(a)(5), (a)(6), (a)(7), (a)(8), (a)(9), (b). And as examples

of organizations and activities open to "one sex," Title IX lists the "Young Men's Christian Association, Young Women's Christian Association, Girl Scouts, Boy Scouts, Camp Fire Girls," "father-son" activities, "mother-daughter" activities, and "beauty pageants." *Id.* § 1681(a)(6)(B), (a)(8), (a)(9). Title IX also speaks of "separate living facilities for the different sexes," authorizing separate showers, bathrooms, and bunks. *Id.* § 1686. Those provisions presume two discrete sexes with different anatomies and physiologies. "Sex" cannot be stretched to include "gender identity," an "individual's self-identification as being male, female, neither gender, or a blend of both genders." *Gender Identity*, The American Heritage Dictionary of the English Language (5th ed. 2022.).

In prohibiting "discrimination" and exclusion from activities on the "basis of sex," however, Congress did not require schools to blind themselves to sex-based differences that affect athletic participation. To "discriminate" means to subject *similarly situated* students to "differential," "'less favorable'" treatment. *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 174 (2005); *see Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1740 (2020) ("To 'discriminate against' a person . . . mean[s] treating that individual worse than others who are similarly situated."). So sex-based distinctions where the "sexes are not similarly situated" do not constitute "discrimination." *Michael M. v. Superior Ct. of Sonoma Cnty.*, 450 U.S. 464, 469 (1981).

Other statutory language reinforces that conclusion, "help[ing] give content to the term 'discrimination.'" *Davis Next Friend LaShonda D. v. Monroe Cnty. Bd. of*

Educ., 526 U.S. 629, 650 (1999). The same provision of Title IX that prohibits "discrimination" also guarantees that no student will be denied the "benefits of" or be "excluded from participation in" any program or activity "on the basis of sex." 20 U.S.C. § 1681(a). "Discrimination" cannot be construed to require schools to ignore differences between the sexes that affect their abilities to "participat[e] in" and "benefit[]" from programs and activities equally. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000). Elsewhere, moreover, Title IX expressly prohibits adopting any "construc[tion]" of its operative provisions that would prevent "separate living facilities for the different sexes." 20 U.S.C. § 1686. That provision reflects differences between the sexes that must be respected under Title IX.

2. When it comes to sports, sex is "not an irrelevant characteristic." *Cohen v. Brown Univ.*, 101 F.3d 155, 178 (1st Cir. 1996); *see* A85 ¶ 4.2 (Lundberg). "Enduring" differences between boys and girls and men and women, including "physical differences," affect the ability to compete fairly and safely together. *United States v. Virginia*, 518 U.S. 515, 533 (1996); *see id.* at 550 n.19 ("[a]dmitting women to VMI would undoubtedly require alterations . . . to . . . the physical training programs" due to "'physiological'" differences); A85–A86 ¶¶ 4.2–4.8 (Lundberg). Most obviously, male puberty induces changes that give males a 10% to 50% performance advantage over females. A86–A87 ¶¶ 5.1–5.3 (Lundberg); *see* A63–A64 ¶ 4.1 & fig. 2 (Hilton); Doriane Lambelet Coleman et al., *Re-Affirming the Value of the Sports Exception to Title IX's General Non-Discrimination Rule*, 27 Duke J. of Gender L. & Pol'y 69, 87–99 (2020)

(discussing additional literature). That amounts to "a class-level advantage." A63 ¶ 4.1 (Hilton).

"[E]ven before puberty," moreover, sex-based differences between males and females impact athletic performance and safety. ECF No. 49 at 15; *see* pp. 5–6, *supra*. As sports scientist Dr. Tommy Lundberg explained, boys as young as six exhibit greater speed (16.6% advantage), explosive strength (9.7% advantage), and aerobic-endurance capacity than girls. A88 ¶ 5.7; *see* A63–A65 ¶¶ 4.3–4.4 (Hilton). Eight-year-old boys exhibit greater cardio-respiratory fitness (18% difference), hand-eye co-ordination (44% difference), and lower body fat than girls. A88–A89 ¶¶ 5.9–5.10 (Lundberg); A135–A139 ¶¶ 3–19 (Lundberg). And nine-year-old boys can complete more push-ups (33% advantage), grip more strongly (13.8% advantage), and run faster (up to 16.6% advantage) than girls. A88 ¶ 5.6 (Lundberg).

Given the stark differences between the sexes at even young ages, Title IX permits institutions to separate students by sex in sports and exclude the male sex from women's teams. "Title IX does not require that all teams be co-ed." *Kelley v. Bd. of Trs.*, 35 F.3d 265, 271 (7th Cir. 1994); *accord Biediger v. Quinnipiac Univ.*, 691 F.3d 85, 98 (2d Cir. 2012); *Miami Univ. Wrestling Club v. Miami Univ.*, 302 F.3d 608, 615 (6th Cir. 2002); *Cohen*, 101 F.3d at 177; *Williams v. Sch. Dist. of Bethlehem, Pa.*, 998 F.2d 168, 171–76 (3d Cir. 1993). The "choice to allocate specific athletic opportunities on the basis of sex will not violate Title IX provided that, in general, the participation opportunities afforded the two sexes are 'equal.'" *Biediger*, 691 F.3d at 98.

This Court's decision in *O'Connor v. Board of Education of School District No. 23*, 645 F.2d 578 (7th Cir. 1981)—which upheld an 11-year-old girl's exclusion from boys' basketball—makes clear that schools may field separate boys' and girls' teams. "Title IX," the Court explained, "aims to provide equal opportunity in educational programs without discrimination on the basis of sex." *Id.* at 582. But Title IX does not prohibit "separate-sex teams" or the "exclusion of girls from [boys'] contact sports, including basketball." *Id.* As Justice Stevens had explained, without sex-separated sports, "there would be a substantial risk that boys would dominate the girls' programs and deny them an equal opportunity to compete." *O'Connor v. Bd. of Educ. of Sch. Dist. No. 23*, 449 U.S. 1301, 1306–07 (1980) (Stevens, J., in chambers).

3. Congress and regulators agree. In enacting Title IX, "Congress itself recognized that addressing discrimination in athletics presented a unique set of problems." *Kelley*, 35 F.3d at 270. The statute's architect, Senator Bayh, observed that sports like football presented "unique" considerations. 117 Cong. Rec. 30,407 (Aug. 6, 1971); *see* 118 Cong. Rec. 5,807 (Feb. 28, 1972) (statement of Sen. Bayh). Title IX, he explained, would not "requir[e] the integration of dormitories between the sexes" or "mandate[] the [sexual] desegregation of football fields." 117 Cong. Rec. 30,407 (Aug. 6, 1971). "Congress therefore specifically directed the agency in charge of administering Title IX" to issue regulations for "'intercollegiate athletic activities'" that contained "'reasonable provisions considering the nature of particular sports.'" *Kelley*, 35 F.3d at 270 (quoting Education Amendments Act of 1974, Pub. L. No. 93-380, § 844, 88 Stat. 484, 612 (1974)).

The resulting regulations provided for separate men's and women's sports and were "formally presented to, reviewed, and passed over by Congress in 1975." Coleman, *supra*, at 81; pp. 11–12, *supra*. In approving those regulations, Congress heard testimony explaining that "general physical differences between men and women" necessitated separate men's and women's sports. *Sex Discrimination Regulations: Hearings before the Subcomm. on Postsecondary Educ. of the Comm. on Educ. & Lab.*, 94th Cong. 54, 130, 197, 390, 339, 343 (1975). Women's advocates expressed concern that mandating "complete integration of the sexes in all sports" would perpetuate discrimination because "differences in training and physiology . . . would effectively eliminate opportunities for women to play in organized competitive athletics." *Id.* at 343; *see id.* at 130 (similar).

Federal regulations continue to reflect such concerns today. Now, as in 1975, Title IX's implementing regulations permit schools to "separat[e]" students "by sex within physical education classes" and athletic activities involving significant "bodily contact." 34 C.F.R. § 106.34(a)(1). They permit different standards for "measuring skill or progress" in physical-education classes, observing that a "single standard" could have "an adverse effect on members of one sex." § 106.43. And they sanction "separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport." § 106.41(b); *see also* § 106.41(c) (evaluating equal opportunity by whether schools "effectively accommodate the interests and abilities of members of both sexes").

As the Department of Education and its predecessor have explained, schools may sponsor separate men's and women's athletics programs because men's and women's "interests and abilities may be different." *Title IX of the Education Amendments of 1972; A Proposed Policy Interpretation*, 43 Fed. Reg. 58,070, 58,072 (Dec. 11, 1978); *see* pp. 10–13, *supra*. Schools may likewise use different standards for boys and girls to measure performance in physical-education classes due to "difference[s] in strength between average persons of each sex." *Nondiscrimination on the Basis of Sex in Education Programs and Activities Receiving or Benefiting from Federal Financial Assistance,* 40 Fed. Reg. 24,128, 24,132 (June 4, 1975). In fact, regulators have observed, making all sports teams co-ed or subjecting both sexes to the same performance metrics could violate Title IX if "only a few women were able to qualify." *Sex Discrimination in Athletic Programs*, 40 Fed. Reg. 52,655, 52,656 (Nov. 11, 1975).

B. Complying with HEA 1041 does not violate Title IX

Because Title IX permits the exclusion of boys from girls' sports teams, IPS may comply with HEA 1041. HEA 1041 merely requires schools to make a choice that Title IX permits (and perhaps requires) them to make. The district court criticized HEA 1041 because it "singl[es] out . . . transgender females." SA22. By that, the court meant that HEA 1041 prohibits *all* males from playing on girls' sports teams, without regard to gender identity, but does not address females playing on boys' sports teams. But that rationale ignores the reason sex-separate teams are permissible: the substantial risk that boys—who have significant physiological advantages over girls—will injure girls or displace them from sports. No one worries about girls displacing

boys from sports. Title IX thus does not require restrictions in both directions. Regardless, nothing in HEA 1041 prevents IPS, the entity subject to Title IX and the defendant in this case, from prohibiting females from playing on boys' teams as well. So only IPS (and not HEA 1041) can be faulted for any shortcoming there.

Moreover, in precluding A.M., a student whose sex is male but who identifies as a girl, from playing on a softball team IPS designated for girls, HEA 1041 does not treat A.M. any differently from any other member of the male sex. Under HEA 1041, *no* male is permitted to play on girls' teams. To hold that IPS must treat A.M. differently from all other members of the male sex because A.M. is transgender would make gender identity a protected characteristic. But that result would be contrary to Title IX's text: Only "sex"—a biological characteristic that corresponds to "reproductive function[]"—is protected. *Grimm*, 972 F.3d at 632 (Niemeyer, J., dissenting); *see* pp. 25–26, *supra*. And if excluding boys from girls' teams based on sex—the characteristic Title IX protects—does not constitute unlawful discrimination, neither does maintaining that arrangement when a student alleges special hardship based on some unprotected characteristic such as gender identity.

C. *Bostock* and *Whitaker* do not support a different conclusion

In reaching a contrary conclusion, the district court invoked two recent decisions addressing different issues: *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), and *Whitaker v. Kenosha Unified School District No. 1 Board of Education*, 858 F.3d 1034 (7th Cir. 2017). Under those decisions, the district court stated, "a law that prohibits an individual from playing on a sports team that does not conform to his or her

gender identity" violates Title IX. SA21–SA22. Neither decision precludes schools from separating students by sex in sports regardless of gender identity.

1. The "*only* question" *Bostock* addressed was "whether an employer who fires someone simply for being homosexual or transgender has discharged or otherwise discriminated against that individual 'because of such individual's sex'" in violation of Title VII. 140 S. Ct. at 1753 (emphasis added). *Bostock* did not address Title IX or sex-segregated sports. Indeed, the Supreme Court expressly declined to "prejudge" whether "sex-segregated bathrooms," "locker rooms," "dress codes," or "anything else of the kind" are permissible under Title VII—much less "other federal or state laws that prohibit sex discrimination." *Id*. *Bostock*'s holding thus "extends no further than Title VII." *Pelcha v. MW Bancorp., Inc.*, 988 F.3d 318, 324 (6th Cir. 2021); *see Tennessee v. U.S. Dep't of Educ.*, No. 3:21-CV-308, 2022 WL 2791450, at *21 (E.D. Tenn. July 15, 2022) ("in applying *Bostock* to Title IX, the Department overlooked the caveats expressly recognized by the Supreme Court and created new law").

Nor does *Bostock*'s reasoning "automatically apply in the Title IX context." *Meriwether v. Hartop*, 992 F.3d 492, 510 n.4 (6th Cir. 2021). Title VII makes it "unlawful . . . for an employer . . . to discriminate against any individual with respect to . . . employment, because of such individual's . . . sex." 42 U.S.C. § 2000e-2(a)(1). Critically, *Bostock* declined to embrace the notion that the term "sex" in Title VII includes "gender identity." It "proceeded on the assumption" that "sex" refers to a "biological distinction[] between male and female" and that concept is "distinct" from "transgender status." 140 S. Ct. at 1739, 1746–47. The Court also agreed that an

adverse action constitutes "discriminat[ion]" only if it causes an individual to be treated "worse than others who are *similarly situated*." *Id.* at 1740 (emphasis added).

The Court, however, adopted a strict but-for causation standard under which sex is *never* a permissible basis for differential treatment in employment. Under Title VII, the Court stated, an "individual employee's sex is 'not relevant to the selection, evaluation, or compensation of employees.'" 140 S. Ct. at 1741. An employer cannot consider sex even "in part" when hiring, firing, or compensating individual employees, even where it treats "men and women as groups more or less equally." *Id.* Put another way, Title VII does not merely prohibit group-level sex discrimination; it instead prohibits individual treatment based (at all) on sex. *Id.* So "fir[ing] an individual for being homosexual or transgender"—an action that *Bostock* deemed to require consideration of an individual's sex at least "in part"—violates Title VII's protection of the individual from sex-based job actions. *Id.* at 1737, 1746–47.

That standard is fundamentally incompatible with Title IX, which contemplates situations where schools "*must* consider sex." *Meriwether*, 992 F.3d at 510 n.4 (emphasis added). "In contrast to the employment and admissions contexts, in the athletics context, [sex] is not an irrelevant characteristic." *Cohen*, 101 F.3d at 178; *see Kelley*, 35 F.3d at 271 ("Congress itself recognized that addressing discrimination in athletics presented a unique set of problems not raised in areas such as employment and academics."). Schools cannot ignore sex if they are to honor Title IX's command—which has no counterpart in Title VII—to ensure that girls receive an equal

opportunity to "participate in" and "benefit[]" from athletics programs. 20 U.S.C. § 1681(a); *see* pp. 27–31, *supra*.

Moreover, unlike Title VII, Title IX permits compliance through policies that take account of sex so long as both sexes are, in the aggregate, afforded equal opportunities. Title IX expressly disapproves of any "constru[ction]" that would prohibit "separate living facilities for the different sexes." 20 U.S.C. § 1686. Congress recognized that schools must have latitude under Title IX to "allocate specific athletic opportunities on the basis of sex . . . provided that, in general, the participation opportunities afforded the two sexes are 'equal.'" *Biediger*, 691 F.3d at 98; *see* pp. 10–12, *supra*. Title VII—which prohibits treating individuals based on their biological sex even where the two sexes are treated equally as groups—could not be more different.

Finally, because Title IX, unlike Title VII, was enacted under the spending power, reasonable distinctions are sufficient to defeat extending *Bostock* to sex-segregated sports. *Smith v. Metro. Sch. Dist. Perry Twp.*, 128 F.3d 1014, 1028 (7th Cir. 1997). Any condition placed on the receipt of federal funds under Title IX—including the statutory prohibition against discrimination "on the basis of sex"—must be "unambiguous[]," *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981), and give "clear" notice of "'what is expected,'" *Davis*, 526 U.S. at 640.

When Title IX was enacted in 1972, schools had *zero* notice that enforcing sex-based eligibility criteria for sports teams against transgender students would be impermissible. After all, the Supreme Court did not apply Title VII to transgender em-

ployees until 2020. And even then, the majority stopped short of holding that its reasoning would condemn "sex-segregated bathrooms," "locker rooms," "dress codes," or "anything else of the kind" under Title VII. *Bostock*, 140 S. Ct. at 1753. So a recent decision under Title VII cannot be the basis for invaliding separate-sex sports policies under Title IX, especially given the differences between the two statutes.

2. The district court also relied on *Whitaker v. Kenosha Unified School District No. 1 Board of Education*, 858 F.3d 1034 (7th Cir. 2017), where this Court sustained a preliminary injunction permitting a transgender boy to use boys' bathrooms under the protection of Title IX. *See id.* at 1039–41. The decision, however, did not address sports. Nor did it address—much less overrule—this Court's earlier decision in *O'Connor*, which rejected the argument that Title IX forbids the "exclusion" of one sex from a sports team reserved for the opposite sex. 645 F.2d at 582. Simply put, *Whitaker* never addressed how schools are permitted to organize sports teams.

In upholding the preliminary injunction, moreover, *Whitaker* relied on an abrogated legal standard. *Whitaker* asked whether the student had a "'better than negligible'" chance of establishing a Title IX violation, 858 F.3d at 1046, 1050—a lenient standard that the Supreme Court has "expressly . . . retired," *Ill. Republican Party v. Pritzker*, 973 F.3d 760, 762–63 (7th Cir. 2020). Under the proper, more stringent standard, "a mere possibility of success is not enough" for a preliminary injunction; a plaintiff "must make a strong showing that she is likely to succeed." *Id.* at 762 (citing *Winter v. Nat. Res. Defense Council*, 555 U.S. 7, 22 (2008); *Nken v. Holder*, 556 U.S. 418, 434 (2009)). *Whitaker*'s holding—that a transgender student had met the "low

threshold" of establishing "a probability of success"—cannot be considered conclusive under the controlling standard. 858 F.3d at 1046, 1050.

Nor did *Whitaker* provide any basis for extending its school-bathrooms holding to school sports. It agreed, for example, that the term "sex" in Title IX should be given a 'narrow, traditional interpretation'" that "'exclude[s] transsexuals.'" 858 F.3d at 1047 (quoting *Ulane*, 742 F.2d at 1085–86). But it found "discrimination" on the basis of biological sex (not gender identity) because, in the court's view, the school excluded the student from the preferred bathroom only by resort to "sex stereotyping." *See id.* at 1047–49. "By definition," the Court observed, "a transgender individual does not conform to the sex-based stereotypes of the sex that he or she was assigned at birth." *Id.* at 1048. So requiring "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." *Id.* at 1049.

Whatever the merits of asking whether Whitaker's school engaged in nothing more than "sex stereotyping" when it enforced separate bathrooms for boys and girls, courts have no need to engage in that inquiry with sports teams. Whenever an athletics policy provides for separate boys' and girls' sports teams, all agree that the policy operates "on the basis of sex," so purporting to use a sex-stereotyping analysis to expose more subtle discrimination on the basis of sex adds nothing. The only question is whether sex is a legitimate consideration for differential treatment. If Title IX permits schools to exclude boys from girls' sports teams on account of their sex—the

actual characteristic that Title IX protects—it cannot violate Title IX to exclude boys who fail to conform to a male stereotype.

This Court's decision in *O'Connor* makes that clear. In that case, the female plaintiff sought to play boys' basketball because she wanted more "competition" than the girls' team provided—in other words, she did not conform to a female stereotype. 645 F.2d at 579, 581. Yet the Court still permitted her exclusion from the boys' basketball team, observing that Title IX and its regulations permit "separate-sex teams" and the "exclusion of girls" from boys' contact sports. *Id.* at 582. It found a "'strong probability'" that the schools' sex-based classification could be "'adequately justified'" under Title IX. *Id.* (quoting *O'Connor*, 449 U.S. at 1308 (Stevens, J., in chambers)). That outcome cannot be reconciled with the district court's view that *Whitaker* precludes schools from excluding students of one sex from a team for the opposite sex whenever they do not conform to expected sex stereotypes.

Indeed, carried to its logical conclusion, the district court's view would destroy girls' sports and undermine compliance with Title IX. Neither *Whitaker* nor the district court identified any reason why *Whitaker*'s sex-stereotyping reasoning is good for transgender students only. Logically, *any* student who is treated differently on account of failing to conform to a sex stereotype should be able to assert a Title IX claim. That would include male students who identify as male but who deviate from male stereotypes in other ways—perhaps the students are less aggressive in sports, less assertive about their desires, or simply feel more comfortable around girls. But

admitting males to girls' teams would deprive girls of an "equal opportunity" to benefit from athletics by forcing girls to compete against boys with sex-based advantages for limited slots. *O'Connor*, 449 U.S. at 1037 (Stevens, J., in chambers). This Court should not adopt a theory that turns Title IX on its head.

Nor does limiting *Whitaker*'s sex-stereotyping theory to transgender students avoid the problem. Whether supported by a "medical[] diagnos[is]" or not, *Whitaker*, 858 F.3d at 1050, declaring oneself to be transgender does not negate the sex-based differences between males and female athletes that impact performance and safety. Birth males who declare themselves female still retain the significant physiological advantages birth males have over birth females—including advantages in height, lean body mass, and strength—even when taking medication to mitigate male puberty. A92–A94 ¶¶ 8.1–9.10 (Lundberg); A71–A75 ¶¶ 7.1–7.10 (Hilton). That is why transgender athletes like Lia Thomas, a male who now identifies as a woman, have placed higher when competing in women's categories instead of men's. ECF No. 36-8 ¶ 42 (Nancy Hogshead-Makar). Extending *Whitaker* to sports would have a disparate adverse impact on women, disadvantaging them "on the basis of sex," contrary to Title IX's commands. "[B]asic biological differences" between males and females cannot be reclassified "as stereotypes" without making Title IX's guarantee of equal opportunities to women in athletics "illusory." *Nguyen v. INS*, 533 U.S. 53, 73 (2001); *Cohen*, 101 F.3d at 167.

D. A.M.'s specific circumstances do not change the analysis

The answer to whether HEA 1041 and IPS can preclude A.M. and other males from playing girls' softball depends on the meaning of Title IX's text, not on the facts of A.M.'s situation. Thus, in *O'Connor*, this Court asked whether it was permissible to have "separate-sex teams" as a general matter, without delving into the particulars of the 11-year-old plaintiff's case. 645 F.2d at 581–82.

Indeed, the district court did not rely on any facts specific to A.M. It instead concluded that *any* law that restricts "an individual from playing on a sports team that does not conform to his or her gender identity 'punishes that individual for his or her gender non-conformance,' which violates the clear language of Title IX." SA22 (internal citation omitted). And in the same vein, the preliminary injunction permits A.M. to play on "any" IPS girls' softball team, including high-school teams. SA1. That categorical decree does not expire once A.M. reaches a particular age or stage of physical development. Nor is it contingent upon whether A.M. takes drugs to mitigate the effects of male puberty—a step that would not mitigate the prepubertal advantages birth males have over birth females in any event. *See* pp. 5–6, 8, *supra*. Whether the injunction can stand thus depends on whether Title IX permits schools to restrict sports teams to a single sex without regard to gender identity.

* * *

HEA 1041's policy of restricting girls' sports to the female sex accords with Title IX and its overriding goal to provide women equal opportunities in athletics. The district court's reasoning, in contrast, would upend Title IX. It would require

schools to let members of the male sex—with the physical advantages that males gain by virtue of being born male—participate on girls' teams whenever they claim not to fit someone's stereotype of a male athlete. Women would quickly see erosion of the gains they have made under Title IX during the last 50 years. Title IX does not require sports policies that favor the unprotected characteristic of gender identity at the expense of women, a class expressly protected by Title IX.

II. A.M. Does Not Have a Substantial Likelihood of Success on the Equal-Protection Claim

A.M.'s equal-protection claim does not provide an alternative basis upon which to uphold the injunction. HEA 1041's implementation is subject only to rational-basis scrutiny, which it undisputedly meets. And HEA 1041 withstands even heighted review because it furthers important objectives of promoting athletic opportunities for female athletes, preserving the integrity of sport, and protecting athletes' safety.

A. Sex-based classifications in sports are lawful

In the district court, A.M. contended that HEA 1041's and IPS's sports policy reflects a "sex"-based classification subject to heightened scrutiny under the Equal Protection Clause. ECF No. 24 at 21–22. The law has long recognized, however, that "sex-based classification[s]" in school sports are constitutionally permissible. *O'Connor v. Bd. of Educ. of Sch. Dist. No. 23*, 645 F.2d 578, 581 (7th Cir. 1981) (quoting *O'Connor v. Bd. of Educ*, 449 U.S. 1301, 1306 (1980) (Stevens, J., in chambers)); *see, e.g.*, *Cape v. Tenn. Secondary Sch. Athletic Ass'n*, 563 F.2d 793, 795 (6th Cir. 1977) ("distinct differences in physical characteristics and capabilities between the sexes" justify "[e]ntirely separate basketball leagues"); *Mularadelis v. Haldane Central Sch.*

Bd., 74 A.D.2d 248, 256 (N.Y. App. Div. 1980) (upholding policy to "preclud[e] male students from becoming members of the girls' tennis team").

The Equal Protection Clause "is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). It "simply keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike." *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992). But it does not preclude separating students by sex where—as in sports—the "distinct differences in physical characteristics and capabilities" between men and women are highly relevant. *Cape*, 563 F.2d at 795; *see O'Connor*, 645 F.2d at 582; *cf. United States v. Virginia*, 518 U.S. 515, 550 n.19 (1996). "To fail to acknowledge even our most biological differences" would "risk[] making the guarantee of equal protection superficial, and so disserv[e] it." *Nguyen v. INS*, 533 U.S. 53, 73 (2001).

B. Any classification affecting transgender individuals is subject only to rational-basis review

At bottom, A.M.'s claim is that IPS's compliance with HEA 1041 constitutes discrimination based on "transgender" status. ECF No. 24 at 23. Unlike sex, however, transgender status is not a suspect or quasi-suspect class requiring heightened scrutiny. The Supreme Court has recognized only sex, *Craig v. Boren*, 429 U.S. 190, 197 (1976), and illegitimacy, *Mathews v. Lucas*, 427 U.S. 495, 505–06 (1976), as quasi-suspect classes. It has repeatedly declined to recognize others. *See, e.g.*, *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 441–42 (1985) (mental disability); *Mass. Bd. of Retirement v. Murgia*, 427 U.S. 307, 313 (1976) (age); *Romer v. Evans*,

517 U.S. 620, 640 n.1 (1996) (sexual orientation); *cf. Whitaker*, 858 F.3d at 1051 (declining to decide whether "transgender status" is "per se entitled to heightened scrutiny").

Transgender status does not meet the criteria for a new protected classification. Unlike sex, race, and national origin—which are "immutable characteristic[s] determined solely by the accident of birth," *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973)—transgender status is not obvious, immutable, or determined by birth. A.M.'s expert Dr. Fortenberry describes "gender identity" as a subjective "sense of oneself." A17 ¶ 11; *see* A44–A45 (54:25–55:2); A46–A47 (76:24–77:11). It is, Dr. Cantor agreed, a "subjective experience" that cannot be falsified by objective evidence. A115 ¶ 19. That subjective sense of self is also amenable to change, especially when children are concerned. Dr. Fortenberry admitted that gender dysphoria typically does not present until a child is at least a few years old, A48 (111:15–18), and does not always continue into adulthood, A49 (120:5–19). Indeed, of the eleven studies following the outcomes of children experiencing gender dysphoria, "every study without exception" has concluded that "the majority cease to want to be the other gender over the course of puberty." A119 ¶ 43 (Cantor).

There are also other significant differences between protected classes and transgender individuals. Unlike women and minorities, transgender individuals have not historically been targets of discrimination in sports. "We don't separate men from women, girls from boys, in competitive sport because they have a different gender

identity; we separate them because they have different sex-linked anatomy and physiology." Coleman, *supra*, at 108 n.152; *see* A85–A86 ¶¶ 4.2–4.6 (Lundberg). Relatedly, transgender individuals are not a politically powerless minority with "no ability to attract the attention of lawmakers." *Cleburne*, 473 U.S. at 445. President Biden has issued several executive orders intended to advance transgender rights. *See, e.g.*, Exec. Order No. 13,988, 86 Fed. Reg. 7,023 (Jan. 20, 2021); Exec. Order No. 14,020, 86 Fed. Reg. 13,797 (Mar. 8, 2021); Exec. Order No. 14,021, 86 Fed. Reg. 13,803 (Mar. 8, 2021). And an abundance of advocacy groups support transgender individuals. *Transgender Resources*, ABA, https://www.americanbar.org/groups/diversity/sexual_orientation/resources/transgenderrights/ (last visited Sept. 6, 2022).

Transgender status thus does not meet any indicia of a quasi-suspect class, so this challenge is subject only to deferential rational-basis review. *See St. Joan Antida High Sch. Inc. v. Milwaukee Pub. Sch. Dist.*, 919 F.3d 1003, 1008 (7th Cir. 2019).

C. Multiple exceedingly persuasive rationales justify sex-separated sports

Below, A.M. offered no argument that excluding males from girls' softball as HEA 1041 requires fails rational-basis review. *See* ECF No. 24 at 21–27 (urging merely that it fails "heightened scrutiny"). Even if heighten scrutiny applies, however, the State has multiple "exceedingly persuasive justification[s]" that are "substantially related" to its policy. *Virginia*, 518 U.S. at 533–34. By ensuring that participation in female teams and sports is reserved for female students, HEA 1041 furthers the State's important interests in fostering equal athletic opportunities for girls and women, maintaining the integrity of sport, and ensuring student-athlete safety.

As Title IX's regulations and equal-protection decisions upholding separate men's and women's sports categories attest, it is important to ensure fair and safe competition in sports. *See Kelley*, 35 F.3d at 272; *Clark v. Ariz. Interscholastic Ass'n*, 695 F.2d 1126, 1131 (9th Cir. 1982); *O'Connor*, 645 F.2d at 581; *Cape*, 563 F.2d at 795. And separating students by sex in sports, without regard to gender identity, is substantially related to promoting those objectives. *See Clark*, 695 F.2d at 1131; *O'Connor*, 645 F.2d at 581; *Cape*, 563 F.2d at 795. As discussed above, males are consistently faster, stronger, and more athletic than females at even early ages. *See* A86–A89 ¶¶ 5.1–5.12 (Lundberg); pp. 5–6, *supra*. Puberty increases the male advantage further still, giving males a "class-level advantage over females" with equal skill, dedication, and training. A63 ¶ 4.1 (Hilton); *see* p. 6, *supra*. And male advantages in size, weight, and other traits also increase the risk of injury for females competing against them. A86 ¶ 4.8 (Lundberg). Limiting female sports categories to females is therefore essential for fairness and safety. A85–A86 ¶¶ 4.2–4.4 (Lundberg); *see* pp. 5–7, *supra*.

Making exceptions for males who identify as girls would undermine important interests in giving females equal opportunities to compete fairly and safely in sports. Merely identifying as a girl does not negate any male advantages, and medical interventions are incomplete at best. Puberty blockers are not medically indicated until the onset of male puberty is visually discernible, which means they do not affect advantages males obtain over females before that time. A92 ¶ 8.1 (Lundberg). Puberty blockers also do not "completely block the entirety of male puberty"; "trans girls [still]

grow taller than reference females," increasing transgender girls' advantages over females still further. A69 ¶ 6.3 (Hilton); *see* A92–A93 ¶ 8.4 (Lundberg). And if puberty blockers are started well after male puberty begins, their effects will be even smaller. Studies of adult transgender women taking puberty blockers have shown they retain significant advantages over females. A71–A73 ¶¶ 7.3–7.6 (Hilton); A93–A94 ¶¶ 9.1–9.10 (Lundberg). Permitting transgender individuals born male to compete in female sports would "displace females who are the classification's raison d'être" from competitive teams and "championship positions." Coleman, *supra*, at 108.

The State is justified in preserving athletic opportunities for women and protecting female athletes from injury by reserving female sports for female athletes through HEA 1041. Altering the regime would favor transgender status over sex, which is a protected class under the Equal Protection Clause. The Equal Protection Clause does not require that unprecedented tradeoff.

D. A.M.'s individual circumstances are irrelevant

A.M.'s individual circumstances do not alter the analysis. Neither A.M.'s age nor athletic skill alters the fact that, as an accident of birth, A.M. holds an inherent advantage over female athletes of the same age with equal skill, dedication, and training. Nor would it matter if A.M. could identify circumstances that somehow make the justifications for sex-separated sports teams less compelling here. The Equal Protection Clause does not require a classification to "be capable of achieving its ultimate objective in every instance," even when that classification triggers heightened scrutiny. *Nguyen v. INS*, 533 U.S. 53, 70 (2001). In *O'Connor*, this Court thus

rejected an 11-year-old's equal-protection challenge to a separate-sex sports policy, explaining that the "general rule can[not] be said to be unconstitutional simply because it appears arbitrary in an individual case." 645 F.2d at 581 (quoting *O'Connor v. Bd. of Educ.*, 449 U.S. 1301, 1306 (1980) (Stevens, J., in chambers)).

Additionally, A.M. has not brought a class-of-one claim—an equal-protection claim that might permit consideration of individualized circumstances. A.M.'s complaint instead alleges discrimination "against A.M. and *all* transgender-female students." A13 ¶ 73 (emphasis added). So that general classification is the only one relevant here. *See John Doe No. 1 v. Reed*, 561 U.S. 186, 194 (2010) ("The important point is that the plaintiffs' claim and the relief that would follow . . . reach beyond the particular circumstances of these plaintiffs."). No matter how construed, A.M.'s equal-protection claim fails.

III. The District Court Erred in Analyzing the Remaining Considerations

The remaining preliminary-injunction considerations do not support the preliminary injunction here. No matter the strength of a plaintiff's claim, a preliminary injunction may issue only if the plaintiff "is likely to suffer irreparable harm in the absence of preliminary relief," "the balance of equities tips in [the plaintiff's] favor," and "an injunction is in the public interest." *Winter v. Nat. Res. Defense Council*, 555 U.S. 7, 20 (2008). The district court ruled that those considerations supported its preliminary injunction. SA23–SA27. But it "'overlook[ed] essential evidence'" and "'fail[ed] to consider relevant factors,'" tainting its analysis. *James v. Eli*, 889 F.3d 320, 328 (7th Cir. 2018).

A. The district court overlooked evidence of no irreparable harm

Quoting an affidavit from A.M.'s mother, the district court stated that A.M. would suffer irreparable harm without an injunction because not playing softball will aggravate "'the distressing symptoms of [A.M.'s] gender dysphoria'" and "'undermine her social transition.'" SA24. But whether socially transitioning through activities like playing girls' softball will alleviate or aggravate the symptoms of gender dysphoria—a medically diagnosed condition, A18 ¶¶ 18, 20 (Fortenberry)—is a medical question. Although A.M.'s mother undoubtedly has A.M.'s best interests at heart, she is not qualified to opine on what treatment for gender dysphoria is best for A.M. or other transgender children. The answer to that medical question is not "rationally based" on a lay witness's "perception" but instead depends on "scientific, technical, or other specialized knowledge." Fed. R. Evid. 701(a), (c). The district court, however, declined to consider the "dueling" evidence that actual experts offered on the issue. SA8.

That error was not harmless. As the State's expert explained, "there is little evidence that transition improves the mental well-being of children," such as by decreasing mental distress and suicidality. A127 ¶ 74 (Cantor); *see* A120–A127 ¶¶ 58–73 (Cantor); A132–A133 ¶¶ 90–93 (Cantor). "However plausible it might seem that failing to affirm transition causes suicidality, the epidemiological evidence indicates that hypothesis to be incorrect." A133 ¶ 93 (Cantor). To be sure, A.M. offered contrary testimony from Fortenberry. A19 ¶ 28. But two of the five studies that Fortenberry cited confused correlation with causation, and the other three were not "treatment

studies at all." A116–A117 ¶¶ 30–31 (Cantor). Fortenberry ignored "more advanced studies" with contrary findings, including a recent 2017 study finding "social support"—not "transition"—to decrease suicidality. A116 ¶ 30 (Cantor); A131–A132 ¶ 89 (Cantor); *see* A128–A133 ¶¶ 83–91 (Cantor). There is thus, at a minimum, an unresolved factual question impacting whether A.M. will suffer irreparable harm absent an injunction.

B. The district court overlooked evidence of harms to others

The district court also declared there was "no evidence of concrete harm to . . . the State." SA24. But "[a]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers); *see Abbott v. Perez*, 138 S. Ct. 2305, 2324 n.17 (2018). Courts "must consider that all judicial interference with a public program has the cost of diminishing the scope of democratic governance." *Ill. Bell Tel. Co. v. WorldCom Tech., Inc.*, 157 F.3d 500, 503 (7th Cir. 1998). The district court, however, never even acknowledged that cost.

The district court ignored evidence of harm to others as well, claiming that "there is no evidence in the record" that its injunction will adversely impact girls' sports. SA25. As Congress, regulators, and the courts have long recognized, however, sex-separated sports ensure that girls have "an equal opportunity to compete." *O'Connor*, 449 U.S. at 1036–37 (Stevens, J., in chambers); *see* pp. 9–13, *supra*. That common-sense observation is not "speculative." SA25. As the State's experts explained, multiple studies have found that prepubertal boys exhibit greater speed, strength,

explosive strength, cardio-respiratory fitness, lean body-mass, lung capacity, and hand-eye coordination than girls. A86–A89 ¶¶ 5.1–5.12 (Lundberg); *see* A59 ¶¶ 2.1–2.2 (Hilton); A62–A66 ¶¶ 3.5, 4.3–4.6 (Hilton); A135–A139 ¶¶ 3–19 (Lundberg). Even A.M. admitted that "birth males perform better than birth females as to various metrics even before puberty." ECF No. 49 at 15. That evidence defies the district court's characterization of the record.

The district court's attempt to minimize the injunction's impact, SA25, cannot excuse its failure even to consider "'essential evidence,'" *James*, 889 F.3d at 328. Nor do its objections have merit. A.M. might not be the most talented softball player, ECF No. 23 ¶ 20, SA25, making the impact of A.M.'s sex-based advantages over female athletes less obvious to casual observers. But being born male still confers on A.M. an advantage that girls with comparable talent cannot achieve "by dedicated training, nutrition, or recovery habits." A86 ¶ 4.6 (Lundberg). The absence of "complain[ts]" from "other players . . . about A.M. being on the [IPS girls' softball] team," SA25, does not establish otherwise. A.M.'s physiology does not depend on whether others complain. Besides, other athletes apparently do not know that A.M. was born male. A1–A2 ¶ 1; *see* ECF No. 53 (prohibiting disclosure of A.M.'s true name). So the absence of complaints only shows other players are in the dark.

C. The district court misapprehended the public interest

Finally, the district court stated there was no "tangible evidence that the public will be harmed by the issuance of an injunction in this case." SA26. Again, however, the district court overlooked that the public suffers "irreparable injury" where laws

enacted by its representatives are enjoined, *Maryland*, 567 U.S. at 1303 (Roberts, C.J., in chambers), and that its injunction disadvantages the female sex.

Due to the preliminary injunction's limited scope—it applies only to A.M. and only to girls' softball, SA1—the immediate harm is more limited than it would be under an injunction "that 'reaches beyond A.M. alone.'" SA26. But the district court identified no principle that would preclude *any* male athlete who identifies as a girl (or who otherwise does not conform to a male stereotype) from obtaining a similar injunction. Upholding the decision below would throw open girls' sports to members of the male sex with all the advantages being born male confers, depriving women of equal opportunities to compete fairly and safely in sports.

CONCLUSION

The preliminary injunction should be vacated.

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

I verify that this brief contains 13,334 words according to the word-count function of Microsoft Word, the word-processing program used to prepare this brief.

By: *s/ Thomas M. Fisher*
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REQUIRED SHORT APPENDIX

Pursuant to Circuit Rule 30, Appellants submit the following as their Required Short Appendix. Appellants' Required Short Appendix contains all of the materials required under Circuit Rule 30(a) and 30(b).

By: s/ *Thomas M. Fisher*
Thomas M. Fisher
Solicitor General

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 22-2332

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

Plaintiff-Appellee,

v.

INDIANAPOLIS PUBLIC SCHOOLS; SUPERINTENDENT, INDIANAPOLIS 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, No. 1:22-cv-1075-JMS-DLP
The Honorable Jane Magnus-Stinson, Judge

REQUIRED SHORT APPENDIX OF APPELLANT

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

A.M., *by her mother and next friend, E.M.*,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 1:22-cv-01075-JMS-DLP
	)	
INDIANAPOLIS PUBLIC SCHOOLS and	)	
SUPERINTENDENT, INDIANAPOLIS PUBLIC SCHOOLS,	)	
	)	
Defendants.	)	

PRELIMINARY INJUNCTION

For the reasons stated in the Court's Order entered this day, Defendants are **PRELIMINARILY ENJOINED** until further order of this Court from applying Indiana Code § 20-33-13-4 to prohibit Plaintiff A.M. from playing on any IPS girls' softball team.

Date: 7/26/2022

Hon. Jane Magnus-Stinson, Judge
United States District Court
Southern District of Indiana

Distribution via ECF only to all counsel of record

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

A.M., *by her mother and next friend, E.M.*,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 1:22-cv-01075-JMS-DLP
	)	
INDIANAPOLIS PUBLIC SCHOOLS and	)	
SUPERINTENDENT, INDIANAPOLIS PUBLIC SCHOOLS,	)	
	)	
Defendants.	)	

ORDER

Indiana Code § 20-33-13-4, which took effect just a few weeks ago on July 1, 2022, explicitly prohibits a male, based on an individual's sex at birth, from participating on an athletic team that is designated as being a female, women's, or girls' athletic team. Plaintiff A.M. is a ten-year-old transgender girl whose birth-assigned sex was male. Since informing her family before she was four years old that she was a girl, she has been living as a girl and has consistently used her preferred female first name and dressed and appeared as a girl. A.M. has been diagnosed with gender dysphoria,[1] receives medical treatment, and is currently taking a puberty blocker. In 2021, an Indiana state court entered an order changing the gender marker on A.M.'s birth certificate to female and changing her legal first name to her preferred female first name. A.M. is a rising fifth grader at one of the elementary schools within Defendant Indianapolis Public Schools ("IPS"), and her classmates know her only as a girl. Last school year, she played on an IPS girls' softball team,

[1] As discussed more fully below, gender dysphoria occurs when a transgender person experiences a constant sense of distress because of the incongruence between their experienced gender and their birth-assigned sex. [Filing No. 8-1 at 4.]

but IPS has informed A.M.'s mother that because of Indiana Code § 20-33-13-4, A.M. will not be able to play on the girls' softball team this year.

A.M., by her mother and next friend, E.M., initiated this litigation against IPS and the Superintendent of IPS ("the Superintendent"), alleging that § 20-33-13-4 violates Title IX, 20 U.S.C. § 1681(a), and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution by discriminating against A.M. and all transgender-female students. [Filing No. 1.] She has filed a Motion for Preliminary Injunction, seeking to enjoin the enforcement of § 20-33-13-4 so that she can play on the girls' softball team beginning in mid-August. [Filing No. 8.] IPS and the Superintendent take no position regarding whether the Court should issue a preliminary injunction, [Filing No. 35], but the State of Indiana ("the State") has intervened in this case and opposes A.M.'s motion, [Filing No. 27; Filing No. 36]. Additionally, both A.M. and the State have filed motions to exclude expert opinions offered by the other in connection with the Motion for Preliminary Injunction, [Filing No. 38; Filing No. 47], and five female athletes have filed a Motion for Leave to File Brief of Amici Curiae in support of the State's opposition to the issuance of a preliminary injunction ("the Amici Curiae Motion"), [Filing No. 31]. All of these motions are now ripe for the Court's adjudication.

I.
EVIDENTIARY MOTIONS

Before addressing A.M.'s Motion for Preliminary Injunction, the Court considers the Amici Curiae Motion, [Filing No. 31], the State's Motion to Exclude Opinions of Fortenberry, [Filing No. 38], and A.M.'s Motion to Exclude Expert Testimony, [Filing No. 47]. All of these motions bear on what evidence the Court will consider in ruling on the Motion for Preliminary Injunction.

A. The Amici Curiae Motion

In its Amici Curiae Motion, the State seeks leave to file a Brief of Amici Curiae on behalf of five female athletes who, the State argues, "bring a unique perspective to this case and to the public discourse more generally." [Filing No. 31 at 2.] The State asserts that: (1) several of the proposed amici are female athletes who are materially interested in this case because they are involved in cases pending elsewhere; (2) all of the proposed amici offer a unique perspective on how § 20-33-13-4 will affect biological females; and (3) the amicus brief will assist the Court by offering "ideas, arguments, theories, insights, facts, or data that are not to be found in the parties' briefs." [Filing No. 31 at 2-4 (quotation and citation omitted).] A.M. did not file a response to the Amici Curiae Motion.

The Seventh Circuit "has held that whether to allow the filing of an amicus curiae brief is a matter of 'judicial grace.'" *Voices for Choices v. Illinois Bell Tel. Co.*, 339 F.3d 542, 544 (7th Cir. 2003) (quoting *National Organization for Women, Inc. v. Scheidler*, 223 F.3d 615, 616 (7th Cir. 2000)). In deciding whether to permit such a brief, courts should consider "whether the brief will assist the judges by presenting ideas, arguments, theories, insights, facts, or data that are not to be found in the parties' briefs." *Voices for Choices*, 339 F.3d at 545. "The criterion is more likely to be satisfied in a case in which a party is inadequately represented; or in which the would-be amicus has a direct interest in another case that may be materially affected by a decision in this case; or in which the amicus has a unique perspective or specific information that can assist the court beyond what the parties can provide." *Id.* (citing *Scheidler*, 223 F.3d at 616-17).

The five women who seek to file the amicus brief all wish to bring to the Court's attention their experiences either participating in athletics before and after the enactment of Title IX, competing against transgender female athletes, or observing others competing against transgender

female athletes. They include Debbie Powers, who played basketball in Indiana before Title IX was enacted and then coached volleyball after its enactment; Selina Soule, a Connecticut track and field athlete who lost to two transgender female athletes in her preliminary race at the state championship and did not qualify for the finals in her event by two spots; Chelsea Mitchell, a runner who lost to two transgender female athletes more than twenty times; Cynthia Monteleone, a track coach, athlete, and mother, who watched her daughter lose to a transgender female athlete at her first high school track meet; and Madison Kenyon, a collegiate track athlete who has competed against transgender female athletes and who watched her teammate be bumped from placing in a race by a transgender female athlete. The Court acknowledges these experiences, and discusses them generally below in connection with its consideration of the public interest involved in the grant or denial of A.M.'s Motion for Preliminary Injunction. But the Court's duty in deciding A.M.'s Motion for Preliminary Injunction is to consider the effect of an injunction on the parties to this litigation – A.M. on the one hand, and IPS and the Superintendent on the other – and not on the five amici or other hypothetical individuals. The Court finds that the proposed amicus brief will not aid the Court and does not alter its analysis. Accordingly, the Amici Curiae Motion, [Filing No. 31], is **DENIED**.

B. Motions to Exclude

1. The State's Motion to Exclude Opinions of Fortenberry

In its Motion to Exclude Opinions of Fortenberry, the State asks the Court to exclude Dr. James Fortenberry's opinions on "athletic performance, competitiveness, and transgender athletes" from consideration in connection with A.M.'s Motion for Preliminary Injunction. [Filing No. 39 at 8.] The State contends that A.M. did not adequately disclose all of the information underlying Dr. Fortenberry's opinions. [Filing No. 39 at 3-5.] It argues further that Dr. Fortenberry is not an

expert on those issues and that his opinions are not reliable because he has not pointed to any studies or data that support his opinions. [Filing No. 39 at 5-8.]

In her response, A.M. outlines Dr. Fortenberry's experience and argues that his report adequately identifies the source of his opinions, that his opinions are the same types that are set forth by the State's experts, and that he is qualified to testify regarding the physical effects of testosterone-induced puberty on athletic advantage. [Filing No. 49 at 6-14.] A.M. also asserts that the fact that the State's expert disagrees with Dr. Fortenberry's opinions does not make those opinions unreliable. [Filing No. 49 at 14-17.]

The State replies that Dr. Fortenberry was obligated to disclose all materials he reviewed, not only those he actually relied upon. [Filing No. 54 at 3-4.] It also reiterates its arguments that Dr. Fortenberry is not an expert regarding athletic performance and that his opinions are not reliable. [Filing No. 54 at 8-14.]

As will be addressed below, the Court relies on the Declaration of Dr. Fortenberry only to set forth basic background information regarding gender identity and gender dysphoria – information with which the State's expert does not appear to disagree. [*See* Filing No. 8-1.] Because the State does not seek to exclude the only information Dr. Fortenberry provides that is relied upon by the Court, the State's Motion to Exclude Opinions of Fortenberry is **DENIED AS MOOT**. [Filing No. 38.]

2. A.M.'s Motion to Exclude Expert Testimony

A.M. seeks to exclude the expert testimony of Dr. James Cantor and Dr. Emma Hilton in its entirety, and the expert testimony of Dr. Tommy Lundberg to a certain extent. The Court considers each expert's testimony in turn.

a. Dr. Cantor

A.M. seeks to exclude the opinions of Dr. Cantor, who opines that gender dysphoria in adults is not the same as in children or adolescents, that many children who experience gender dysphoria cease to do so during puberty, that there is little evidence that social transition improves the mental health of gender dysphoric children, and that suicide in transgender individuals is rare. [*See* Filing No. 36 at 12-14.] A.M. argues that Dr. Cantor does not discuss any facts or circumstances specific to her or the facts of this case, but instead that he opines generally regarding the diagnosis of gender dysphoria and the standard of care. [Filing No. 48 at 8.] She also contends that Dr. Cantor's opinions are not relevant to the State's purported interests in connection with § 20-33-13-4 – to foster separate athletic opportunities for girls and boys, to promote the safety of student athletes, and to maintain the integrity of sports – that he is not qualified to offer his opinions, and that his opinions are unreliable because they conflict with applicable standards of care and legal precedent. [Filing No. 48 at 8-18.]

In its response, the State argues that Dr. Cantor's opinions are relevant because A.M. asserts that § 20-33-13-4 is overbroad and does not set forth an as-applied challenge, so Dr. Cantor need not address A.M.'s medical situation specifically. [Filing No. 57 at 14.] It asserts that Dr. Cantor is qualified even though he has not treated anyone under the age of 16 because he only seeks to "provide an overview of the scientific literature relevant to this case." [Filing No. 57 at 15.] The State highlights Dr. Cantor's qualifications as a "neuroscientist and sex researcher" who completed "a clinical internship assessing and treating people with a wide range of sexual and gender identity issues." [Filing No. 57 at 15 (quotation and citation omitted).] The State also takes issue with A.M.'s assertion that Dr. Cantor's methodology is flawed, noting that he relied on numerous studies

for his opinions and that A.M. does not point to additional studies he should have considered but did not. [Filing No. 57 at 16-18.]

A.M. reiterates many of her arguments in her reply brief. [Filing No. 58.]

The Court can make short shrift of A.M.'s request to exclude Dr. Cantor's opinions. The main disagreements Dr. Cantor has with Dr. Fortenberry relate to the effects of gender dysphoria generally and the appropriate treatment. Here, the Court is concerned with the effects of gender dysphoria on A.M. and the treatment she has had and hopes to receive, and A.M.'s mother has provided sufficient evidence such that the Court need not and will not look to the dueling testimony of Dr. Cantor and Dr. Fortenberry on those issues. Consequently, the Court **DENIES AS MOOT** A.M.'s Motion to Exclude as it applies to Dr. Cantor's testimony. [Filing No. 47.]

b. Dr. Hilton

A.M. seeks to exclude the opinions of Dr. Hilton, upon whom the State relies for testimony regarding "sex differences in development and how they affect sporting performance,…[and] performance gaps between males and females in sports," and for her proposition that puberty blockers do not completely negate "male athletic advantage." [Filing No. 36 at 14-15.] A.M. argues that Dr. Hilton is not qualified to opine regarding differences in athletic performance between transgender women and cisgender women, or on the nature, treatment, or "reversibility" of gender dysphoria. [Filing No. 48 at 22-26.]

The State argues in its response that Dr. Hilton is qualified because she has a Ph.D. in developmental biology and extensive "experience in the field," that her research with animals is applicable to humans, and that she can opine regarding "how biology affects sports performance." [Filing No. 57 at 6-13.]

In her reply, A.M. argues that Dr. Hilton's general experience does not make her qualified to opine on the specific issues in this case. [Filing No. 58 at 10-15.]

As discussed above, the Court need not, and will not, consider expert evidence regarding the general effects of or appropriate treatment for gender dysphoria. Additionally, the issue here is whether A.M. has met her burden of showing that the requirements for the issuance of a preliminary injunction are present under the circumstances of this case, and the Court – as discussed more fully below – need not, and will not, consider expert evidence regarding the athletic performance of transgender athletes in order to resolve that issue. Accordingly, A.M.'s Motion to Exclude is **DENIED AS MOOT** as it applies to Dr. Hilton's testimony. [Filing No. 47.]

c. Dr. Lundberg

Finally, A.M. seeks to exclude Dr. Lundberg's opinion that "biological differences between birth males and birth females affect [athletic] performance before the onset of puberty." [Filing No. 48 at 31.] A.M. argues that Dr. Lundberg's opinion is flawed for various reasons and "is not good science." [Filing No. 48 at 26-31.] The state responds that Dr. Lundberg's opinion is supported by available literature and data, and is consistent with his deposition testimony. [Filing No. 57 at 2-6.] A.M. argues in her reply that Dr. Lundberg's opinion that males have an athletic advantage over females even before puberty due to biological differences is based on speculation. [Filing No. 58 at 16-18.]

Consistent with the Court's findings regarding the testimony of Dr. Fortenberry and Dr. Hilton, the Court need not consider opinions regarding whether differences between the sexes in athletic performance exist before the onset of puberty in order to decide A.M.'s Motion for

Preliminary Injunction. The Court **DENIES AS MOOT** A.M.'s Motion to Exclude to the extent that Dr. Lundberg opines regarding that issue. [Filing No. 47.][2]

II.
MOTION FOR PRELIMINARY INJUNCTION

A. Factual Background

1. Gender Identity and Gender Dysphoria

Gender identity refers to one's sense of oneself as being a particular gender. [Filing No. 8-1 at 4.] Individuals whose gender identities are congruent with the sex that they were assigned at birth are referred to as "cisgender." [Filing No. 8-1 at 4.] Conversely, transgender and nonbinary individuals have gender identities that are not the same as their sex as assigned at birth. [Filing No. 8-1 at 4.] Studies indicate that up to 0.6% of adolescent and adult individuals in Indiana identify as transgender, but no studies provide reliable estimates of the population proportion of pre-pubertal children with gender dysphoria. [Filing No. 8-1 at 4.] 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. [Filing No. 8-1 at 4.]

2. A.M.

A.M. is ten years old and finished fourth grade at an IPS elementary school in the spring of 2022. [Filing No. 23 at 1.] She will be attending the same elementary school for her fifth grade

[2] The State has filed a Motion for Leave to File Surreply in Opposition to Plaintiff's Motion to Exclude Expert Testimony. [Filing No. 59.] Because the Court denies as moot A.M.'s Motion to Exclude, it also **DENIES AS MOOT** the State's Motion for Leave to File Surreply. [Filing No. 59.]

year. [Filing No. 23 at 1.] A.M.'s birth-assigned sex was male, but before she was four years old she informed her mother and other family members that she was a girl. [Filing No. 23 at 1.] At that time, A.M. informed her mother that she was having thoughts of mutilating herself to get rid of her penis. [Filing No. 23 at 1.] Since that time, A.M. has been living as a girl. [Filing No. 23 at 2.] She consistently uses her preferred female first name and consistently dresses and appears as a girl, both at home and in public. [Filing No. 23 at 2.] Very few people outside of A.M.'s immediate family know that A.M.'s sex assigned at birth was male. [Filing No. 23 at 2.]

A.M.'s mother has informed A.M.'s teachers and administrators at her school that A.M.'s sex assigned at birth was male, but her classmates know her only as a girl. [Filing No. 23 at 2.] The teachers and administrators at her school refer to her by her female first name and allow her to use the girls' restrooms at the school. [Filing No. 23 at 2.]

A.M. was diagnosed with gender dysphoria by the Riley Gender Clinic when she was six years old. [Filing No. 23 at 2.] Gender dysphoria has caused A.M. to be suicidal, depressed, anxious, angry about her body, and afraid that she will not be able to be a girl. [Filing No. 23 at 2.] A.M. has been receiving care at the Gender Health Clinic at Riley Hospital in Indianapolis since 2018. [Filing No. 23 at 2.] Since August 2021, she has been taking a puberty blocker, Leuprorelin, to prevent her from going through puberty. [Filing No. 23 at 2.] A.M. is not experiencing any of the physiological changes that an adolescent male would experience during puberty. [Filing No. 23 at 3.] A.M. and her mother would like for her to be given estrogen, or some other appropriate feminizing hormone, when she is old enough so that she can develop female physical characteristics. [Filing No. 23 at 3.]

In the fall of 2021, a Marion County court entered an order changing the gender marker on A.M.'s birth certificate from male to female and changing her first name to her preferred female

first name. [Filing No. 23 at 3.] Also in 2021, A.M. played on her elementary school's girls' softball team, which plays in the late summer and fall. [Filing No. 23 at 3.] At that time, her team played against another IPS school that also had a girls' softball team. [Filing No. 23 at 3.] A.M. has enjoyed playing softball and did not appear to have a competitive advantage over the other girls on the team. [Filing No. 23 at 3.] In fact, she was one of the weaker athletes on the team. [Filing No. 23 at 3.] Playing softball helps to lessen the distressing symptoms of gender dysphoria that A.M. suffers from and has allowed her to experience her life more fully as a girl. [Filing No. 23 at 3.] Softball participation has resulted in a better self-image and confidence for A.M. [Filing No. 23 at 3.]

3. Indiana Code § 20-33-13-4

On May 24, 2022, both houses of the Indiana General Assembly approved House Enrolled Act 1041 over the veto of Governor Eric Holcomb, and it became law as codified at Indiana Code § 20-33-13-4. Section 20-33-13-4 applies to the following:

> (1) An athletic team or sport that is organized, sanctioned, or sponsored by a school corporation or public school in which the students participating on the athletic team or in the sport compete against students participating on an athletic team or in a sport that is organized, sanctioned, or sponsored by another school corporation, public school, or nonpublic school.
>
> (2) An athletic team or sport that is organized, sanctioned, or sponsored by a nonpublic school that voluntarily competes against an athletic team or sport that is organized, sanctioned, or sponsored by a school corporation or public school.
>
> (3) An athletic team or sport approved or sanctioned by an association for purposes of participation in a high school interscholastic event.

Ind. Code § 20-33-13-1.

Section 20-33-13-4 provides that:

> (a) A school corporation, public school, nonpublic school, or association that organizes, sanctions, or sponsors an athletic team or sport described in section 1 of

> this chapter shall expressly designate the athletic team or sport as one (1) of the following:
>
> (1) A male, men's, or boys' team or sport.
>
> (2) A female, women's, or girls' team or sport.
>
> (3) A coeducational or mixed team or sport.
>
> (b) *A male, based on a student's biological sex at birth in accordance with the student's genetics and reproductive biology,* may not participate on an athletic team or sport designated under this section as being a female, women's, or girls' athletic team or sport.

Ind. Code § 20-33-13-4 (emphasis added).

Section 20-33-13-5 provides a grievance procedure for students and parents, stating:

> (a) A student or parent of a student may submit a grievance to a school corporation, public school, nonpublic school, or association for a violation of section 4 of this chapter.
>
> (b) Each school corporation, public school, nonpublic school, and association described in section 4 of this chapter shall:
>
> (1) establish and maintain a grievance procedure; or
>
> (2) maintain a grievance or protest procedure that the school corporation, public school, nonpublic school, or association established before July 1, 2022;
>
> for the resolution of a grievance submitted under this section.

Ind. Code § 20-33-13-5.

4. The Effect of Indiana Code § 20-33-13-4 on A.M.

In 2022, there will be four elementary schools, including the elementary school A.M. attends, that will field girls' softball teams that will compete against each other. [Filing No. 23 at 3.] IPS staff have informed A.M.'s mother that because of § 20-33-13-4, A.M. will not be able to play on the girls' softball team. [Filing No. 23 at 4.] A.M.'s school has a boys' baseball team, but she cannot play on it because she is not a boy and no one at school recognizes her as anything but

a girl. [Filing No. 23 at 4.] A.M.'s mother believes that forcing A.M. to play on the boys' team would undermine her core identity as a girl and her social transition that is essential to moderate the symptoms of her gender dysphoria, and would be so traumatic that she would not play on the boys' team. [Filing No. 23 at 4.] Additionally, denying her the opportunity to participate on the girls' team will "out" her to her classmates as someone who is not "really" a girl, which would be extremely traumatic for her, would undermine her social transition, and would injure her. [Filing No. 23 at 4.] A.M. would like to be able to play girls' team sports as she progresses through school. [Filing No. 23 at 4.]

B. Standard of Review

"A preliminary injunction is an extraordinary remedy." *Whitaker By Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1044 (7th Cir. 2017). It is "'an exercise of a very far-reaching power, never to be indulged in except in a case clearly demanding it.'" *Cassell v. Snyders*, 990 F.3d 539, 544 (7th Cir. 2021) (quoting *Girl Scouts of Manitou Council, Inc. v. Girl Scouts of U.S. of Am., Inc.*, 549 F.3d 1079, 1085 (7th Cir. 2008)). "[A] party requesting a preliminary injunction must generally show reasonable diligence." *Benisek v. Lamone*, 138 S. Ct. 1942, 1944 (2018) (holding that "plaintiffs' unnecessary, years-long delay in asking for preliminary injunctive relief weighed against their request").

The purpose of a preliminary injunction is to preserve the parties' positions until a trial on the merits can be held. *GEFT Outdoors, LLC v. City of Westfield*, 922 F.3d 357, 371 (7th Cir. 2019). "To determine whether a situation warrants such a remedy, a district court engages in an analysis that proceeds in two distinct phases: a threshold phase and a balancing phase." *Valencia v. City of Springfield, Ill.*, 883 F.3d 959, 965 (7th Cir. 2018) (quotation and citation omitted).

In the "threshold phase," a party seeking a preliminary injunction must show that: "(1) it will suffer irreparable harm in the period before the resolution of its claim; (2) traditional legal remedies are inadequate; and (3) there is some likelihood of success on the merits of the claim." *HH-Indianapolis, LLC v. Consol. City of Indianapolis & Cnty. of Marion, Ind.*, 889 F.3d 432, 437 (7th Cir. 2018) (citation omitted). "If the plaintiff fails to meet any of these threshold requirements, the court must deny the injunction." *GEFT Outdoors, LLC*, 922 F.3d at 364 (quotation and citation omitted). "However, if the plaintiff passes that threshold 'the court must weigh the harm that the plaintiff will suffer absent an injunction against the harm to the defendant from an injunction, and consider whether an injunction is in the public interest.'" *Id.* (quoting *Planned Parenthood of Ind. & Ky., Inc. v. Comm'r of Ind. State Dep't of Health*, 896 F.3d 809, 816 (7th Cir. 2018)).

C. Discussion

A.M. argues that § 20-33-13-4 violates both Title IX and the Equal Protection Clause of the Fourteenth Amendment. The Court first considers whether A.M. has met the standard for the issuance of a preliminary injunction as to her Title IX claim.

1. Title IX Claim

a. Likelihood of Success on the Merits

In support of her Motion for Preliminary Injunction, A.M. argues that she will succeed on the merits of her Title IX claim because discrimination on the basis of a student's transgender status constitutes discrimination on the basis of sex under Title IX. [Filing No. 24 at 17.] A.M. points to *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034 (7th Cir. 2017), and *Bostock v. Clayton Cnty., Ga.*, 140 S. Ct. 1731 (2020), to support her argument. [Filing No. 24 at 17-19.] A.M. asserts that, under § 20-33-13-4, she is being treated differently than her cisgender classmates because they can play on the girls' softball team and she cannot, based solely on the

fact that she is a transgender girl. [Filing No. 24 at 20.] A.M. points to the fact that the State of Indiana changed the gender marker on her birth certificate and recognizes that she is a girl, and that because she is taking puberty blockers, she "is indistinguishable from other girls her age and she has no competitive or physiological advantages over her teammates or opponents" and "is not particularly accomplished at the sport." [Filing No. 24 at 20.] A.M. asserts that because she, as a transgender female, is being subjected to different rules, sanctions, and treatment than non-transgender students, § 20-33-13-4 violates Title IX. [Filing No. 24 at 21.]

In its response, the State argues that "[t]he statutory context of Title IX confirms that its drafters understood sex as a binary concept." [Filing No. 36 at 19.] It asserts that *Whitaker* is distinguishable because the Seventh Circuit applied the wrong standard to the likelihood of success on the merits analysis, determining that the plaintiff had a "better than negligible" chance of succeeding rather than requiring a "strong showing" of success on the merits. [Filing No. 36 at 20-21.] The State also argues that the Seventh Circuit in *Whitaker* did not address "the interplay between Title IX's ban on sex discrimination and its requirement that schools provide equal opportunities to girls." [Filing No. 36 at 21.] It further contends that *Bostock* involved Title VII, and that the Supreme Court expressly refused to "prejudge any…question" about what "other federal or state laws" addressing "sex discrimination" require. [Filing No. 36 at 22 (quotation and citation omitted).] The State asserts that § 20-33-13-4 actually promotes the same goals as Title IX by providing equal opportunities to both sexes. [Filing No. 36 at 22.] It further argues that § 20-33-13-4 restricts a male, based on a student's biological sex at birth, from participating in a girls' athletic sport, but A.M. claims discrimination based on her status as transgender – a status that, it argues, Title IX does not govern. [Filing No. 36 at 22.] The State argues that changing A.M.'s birth certificate does not change her biological sex at birth, "which is [§ 20-33-13-4's] only

concern." [Filing No. 36 at 23.] It contends that A.M. is then left with a claim of discrimination based on gender identity, which Title IX does not address. [Filing No. 36 at 23.] The State also asserts that Title IX does not govern opportunities for "high and low testosterone individuals, however that might be defined," and that A.M.'s individual athletic performance "says nothing about Title IX." [Filing No. 36 at 24.] Finally, the State argues that A.M.'s position creates an untenable situation for schools because Title IX requires schools to create equal opportunities for girls in athletics, but "[a]ccess of biological males to girls' sports threatens those opportunities and places Title IX in tension with itself." [Filing No. 36 at 24-25.]

In her reply, A.M. argues that *Whitaker* remains good law, and that the Seventh Circuit's application of the "better than negligible" standard does not affect its holding that discriminating against a transgender student based on his or her transgender status is discrimination on the basis of sex and is prohibited by Title IX. [Filing No. 50 at 5-7.] She asserts that although the Supreme Court in *Bostock* did not address the propriety of sex-segregated athletics under Title IX, it did hold that discriminating against an individual for being transgender constitutes sex discrimination. [Filing No. 50 at 8.] A.M. argues that the State asks the Court to ignore the Seventh Circuit's holding in *Whitaker*, and that Title IX "does not purport to define transgender students by their sex assigned at birth or by other physiological characteristics" in any event. [Filing No. 50 at 10.] A.M. takes issue with the State's argument that she wants participation in girls' sports to be determined by self-identification, testosterone, and athletic skill, arguing that "it is insulting to A.M. and other transgender persons to imply that persons will casually choose or switch gender identities," and that "the State presents no evidence that such a practice is an actual problem in need of [a] solution." [Filing No. 50 at 11.] A.M. notes that IPS does not claim that allowing A.M. to play on the girls' softball team would place it in a difficult position and that, instead, IPS

has no issue with letting her play. [Filing No. 50 at 11.] Finally, A.M. points to "numerous athletic organizations that have found ways to accommodate transgender persons and that would allow A.M. to participate if she had the athletic ability," including the Indiana High School Athletic Association's ("IHSAA") policy that allows transgender athletes to play sports consistent with their gender identities if certain standards are met, such as completing one year of hormone treatment for transgender females. [Filing No. 50 at 12-13.]

"The likelihood of success on the merits is an early measurement of the quality of the underlying lawsuit." *Michigan v. U.S. Army Corps of Eng'rs*, 667 F.3d 765, 788 (7th Cir. 2011). "A plaintiff need not prove beyond a preponderance of the evidence that it will win on the merits, but it must at least make a 'strong' showing of likelihood of success." *Protect Our Parks, Inc. v. Buttigieg*, --- F.4th ----, 2022 WL 2376716, at *4 (7th Cir. July 1, 2022) (citing *Ill. Republic Party v. Pritzker*, 973 F.3d 760, 762-63 (7th Cir. 2020)).

Title IX provides that no person "shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). Among other things, an institution covered by Title IX may not:

> (1) Treat one person differently from another in determining whether such person satisfies any requirement or condition for the provision of such aid, benefit, or service;
>
> (2) Provide different aid, benefits, or services or provide aid, benefits, or services in a different manner;
>
> (3) Deny any person such aid, benefit, or service; [or]
>
> (4) Subject any person to separate or different rules of behavior, sanctions, or other treatment.

34 C.F.R. § 106.31(b). The parties do not dispute that IPS receives federal funds and is an institution covered by Title IX. The question is whether A.M. has a strong likelihood of showing that IPS's and the Superintendent's application of § 20-33-13-4 to prohibit A.M. from playing on the girls' softball team constitutes discrimination against A.M. based on her sex.

The United States Supreme Court has not yet considered whether "sex" for purposes of Title IX means just an individual's biological sex at birth, or also includes their gender identity. In *Bostock*, however, it considered the meaning of "sex" in the Title VII context, a context that the Seventh Circuit has found instructive when defining "sex" under Title IX. *See Whitaker*, 858 F.3d at 1047 ("[T]his court has looked to Title VII when construing Title IX."); *Smith v. Metro. Sch. Dist. Perry Twp.*, 128 F.3d 1014, 1023 (7th Cir. 1997) ("[I]t is helpful to look to Title VII to determine whether the alleged sexual harassment is severe and pervasive enough to constitute illegal discrimination on the basis of sex for purposes of Title IX."). In *Bostock*, the Supreme Court found that an employer violates Title VII by firing an employee based on their status as homosexual or transgender. In doing so, the Supreme Court stated:

> [H]omosexuality and transgender status are inextricably bound up with sex. Not because homosexuality or transgender status are related to sex in some vague sense or because discrimination on these bases has some disparate impact on one sex or another, but because to discriminate on these grounds requires an employer to intentionally treat individual employees differently because of their sex….
>
> ***
>
> At bottom, these cases involve no more than the straightforward application of legal terms with plain and settled meanings. For an employer to discriminate against employees for being homosexual or transgender, the employer must intentionally discriminate against individual men and women in part because of sex. That has always been prohibited by Title VII's plain terms.

Bostock, 140 S. Ct. at 1742-43. As to the fact that Title VII does not mention homosexuality or transgender status as a protected characteristic, the Supreme Court "agree[d] that homosexuality and transgender status are distinct concepts from sex," but found that:

> [D]iscrimination based on homosexuality or transgender status necessarily entails discrimination based on sex; the first cannot happen without the second. Nor is there any such thing as a 'canon of donut holes,' in which Congress's failure to speak directly to a specific case that falls within a more general statutory rule creates a tacit exception. Instead, when Congress chooses not to include any exceptions to a broad rule, courts apply the broad rule…. As enacted, Title VII prohibits all forms of discrimination because of sex, however they may manifest themselves or whatever other labels might attach to them.

Id. at 1746-47.

The Supreme Court has not similarly considered whether discrimination based on an individual's transgender status constitutes discrimination on the basis of sex in the Title IX context, and the Court acknowledges the Supreme Court's caveat in *Bostock* that no "other federal or state laws that prohibit sex discrimination" were before it. 140 S. Ct. at 1753. But the Supreme Court also did not foreclose the application of its holding to the Title IX context, and the Court finds it appropriate to look to *Bostock* for guidance here. Moreover, the Seventh Circuit has considered whether discrimination based on one's status as transgender constitutes discrimination based on sex under Title IX. In *Whitaker*, decided more than three years before *Bostock*, the Seventh Circuit found that a school's unwritten policy barring a transgender boy from using the boys' bathroom violated Title IX. The Seventh Circuit stated:

> By definition, a transgender individual does not conform to the sex-based stereotypes of the sex that he or she was assigned at birth…. 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. The School District's policy also subjects [plaintiff], as a transgender student, to different rules, sanctions, and treatment than non-transgender students, in violation of Title IX.

Whitaker, 858 F.3d at 1048-49. As to the School District's argument in *Whitaker* that the plaintiff could not "unilaterally declare" his gender, the Seventh Circuit noted that "[t]his is not a case where a student has merely announced that he is a different gender. Rather, [plaintiff] has a medically

diagnosed and documented condition. Since his diagnosis, he has consistently lived in accordance with his gender identity." *Id.* at 1050.

Courts within this district have followed *Whitaker* and *Bostock*, finding that it is a violation of Title IX for a public institution to discriminate against an individual on the basis of their transgender status in the context of prohibiting a transgender student from using the bathroom of the sex with which he or she identifies. *See, e.g.*, *B.E. v. Vigo Cnty. Sch. Corp.*, --- F. Supp. 3d ----, 2022 WL 2291763 (S.D. Ind. June 24, 2022) (granting motion for preliminary injunction filed by transgender male students who were undergoing gender-affirming testosterone therapy, and who have been prohibited from using male bathrooms at school); *A.C. by M.C. v. Metro. Sch. Dist. of Martinsville*, --- F. Supp. 3d ----, 2022 WL 1289352 (S.D. Ind. April 29, 2022) (holding that transgender male student had established a likelihood of success on the merits of his claim that school district violated Title IX when it prohibited him from using male bathrooms). The court in *B.E.* specifically noted that the fact that the Seventh Circuit applied the "better than negligible" standard in *Whitaker* to the issue of whether there was a likelihood of success on the merits does not affect *Whitaker*'s ultimate holding. *B.E.*, 2022 WL 2291763 at *4 ("[I]t makes sense intuitively that a court's view is not rendered meaningless merely because it looked through the wrong lens…. That seems particularly true here, where the *Whitaker* court never indicated that the issue was a close one or hinted that the low threshold it applied was determinative."). And the court in *A.C. by M.C.* stated that *Whitaker* "remains good law and thus is binding on this court." 2022 WL 1289352, at *6.

Applying *Bostock* and *Whitaker* – both of which are binding on this Court – to the facts of this case leads to a result that is not even a close call: A.M. has established a strong likelihood that she will succeed on the merits of her Title IX claim. IPS and the Superintendent cannot

discriminate against A.M. based on her sex, and § 20-33-13-4 will force them to do just that. A law that prohibits an individual from playing on a sports team that does not conform to his or her gender identity "punishes that individual for his or her gender non-conformance," *Whitaker*, 858 F.3d at 1049, which violates the clear language of Title IX. *See also B.P.J. v. West Virginia St. Bd. of Educ.*, 550 F. Supp. 3d 347, 356 (S.D. W. Va. 2021) (granting preliminary injunction in favor of transgender female who wished to join girls' cross country and track teams but was prohibited by West Virginia law from doing so, and noting "[a]ll other students in West Virginia secondary schools – cisgender girls, cisgender boys, transgender boys, and students falling outside of any of these definitions trying to play on the boys' teams – are permitted to play on sports teams that best fit their gender identity. Under this law, B.P.J. would be the only girl at her school…that is forbidden from playing on a girls' team and must join the boys' team…. [T]his law both stigmatizes and isolates B.P.J."). And, notably, § 20-33-13-4 does not prohibit all transgender athletes from playing with the team of the sex with which they identify – it only prohibits transgender females from doing so. The singling out of transgender females is unequivocally discrimination on the basis of sex, regardless of the policy argument as to why that choice was made. The Court finds that A.M. has established a strong likelihood that she will succeed on the merits of her Title IX claim.

b. Adequacy of Traditional Legal Remedies

A.M. argues that she has no adequate remedy at law because "the emotional harm identified by [A.M.] could not be fully rectified by an award of damages." [Filing No. 24 at 29 (quotation and citation omitted).] The State does not address the adequacy of traditional legal remedies requirement in its response brief, [*see* Filing No. 36], nor does A.M. address it in her reply brief, [Filing No. 50].

A.M.'s mother has identified significant emotional harm that she believes A.M. will suffer if she cannot play on the girls' softball team, including that it will undermine her social transition and potentially cause her the trauma of being "outed" as not "really" a girl. [Filing No. 23 at 4.] The Court finds that this emotional harm could not be addressed adequately through a remedy at law. *See Whitaker*, 858 F.3d at 1046 (holding there was no adequate remedy at law where transgender male had shown that he would suffer prospective emotional harm absent an injunction allowing him to use male restrooms at school). A.M. has sustained her burden of showing that there is no adequate remedy at law for the harm she would suffer absent a preliminary injunction.

c. Likelihood of Suffering Irreparable Harm Absent an Injunction

A.M. argues that a violation of Title IX constitutes irreparable harm *per se*. [Filing No. 24 at 28.] She also asserts that she will suffer the irreparable harm of having her social transition disrupted and being "outed" as a transgender girl. [Filing No. 24 at 28-29.]

The State responds that there are many activities that "enable social transition," and relies on its expert witness, Dr. Cantor, for the proposition that "there is little evidence that transition improves the mental well-being of children." [Filing No. 36 at 36 (quotation and citation omitted).]

In her reply, A.M. reiterates her argument that denying an injunction would force her to disclose that she is a transgender girl, which would be "an irreparable event that would be extremely traumatizing for her." [Filing No. 50 at 19-20.]

"A finding of irreparable harm to the moving party, if the injunction is denied, is 'a threshold requirement for granting a preliminary injunction.'" *DM Trans, LLC v. Scott*, 38 F.4th 608, 617 (7th Cir. 2022) (quoting *Life Spine, Inc. v. Aegis Spine, Inc.*, 8 F.4th 531, 539 (7th Cir. 2021)). Establishing a likelihood of irreparable harm "requires more than a mere possibility of harm. It does not, however, require that the harm actually occur before injunctive relief is

warranted. Nor does it require that the harm be certain to occur before a court may grant relief on the merits." *Whitaker*, 858 F.3d at 1045 (quotations and citations omitted). The Seventh Circuit has instructed that "[h]arm is irreparable if legal remedies available to the movant are inadequate, meaning they are seriously deficient as compared to the harm suffered." *DM Trans, LLC*, 38 F.4th at 618.

As discussed above, A.M.'s mother has explained that although teachers and administrators at A.M.'s school know that A.M.'s sex at birth was male, she is known at school only as a female, is referred to by her female first name, and uses the girls' restrooms at school. [Filing No. 23 at 2.] She explains further that A.M.'s gender dysphoria has caused A.M. to be suicidal, depressed, anxious, and angry. [Filing No. 23 at 2.] A.M.'s mother believes that playing softball helped "to lessen the distressing symptoms of [A.M.'s] gender dysphoria and allowed her to experience her life more fully as a girl," which has "resulted in a better self-image and confidence." [Filing No. 23 at 4.] A.M.'s mother notes that prohibiting A.M. from playing on the girls' softball team will "out" her to her classmates as someone who is not "really" a girl, and "[t]his will be extremely traumatic for her and will also undermine her social transition and will injure her." [Filing No. 23 at 4.] The Court finds that A.M. has sustained her burden of showing that she would suffer irreparable harm absent an injunction.

d. Balance of Harms

A.M. argues that the balance of harms favors entering a preliminary injunction, stating that "[i]t is difficult to theorize what possible harm can occur in maintaining the status quo so that A.M. may continue to play with the other girls on the softball team." [Filing No. 24 at 29.] She asserts that an injunction will only force IPS to conform its conduct to Title IX, which it cannot claim is harmful. [Filing No. 24 at 29.]

In response, the State argues that issuing an injunction would "inflict harm to the governance process" and also "could force biological girls to compete against students who identify as girls but retain all the biological advantages of boys." [Filing No. 36 at 37.]

A.M. asserts in her reply that "no harm has occurred by allowing A.M. to play on her softball team and this is all that will occur when the preliminary injunction is granted." [Filing No. 50 at 20.]

Once the plaintiff has met her burden of showing that she has a likelihood of success on the merits, that she has no adequate remedy at law, and that she will suffer irreparable harm absent an injunction, "the court must weigh the harm that the plaintiff will suffer absent an injunction against the harm to the defendant from an injunction, and consider whether an injunction is in the public interest." *Planned Parenthood of Ind. and Ky., Inc.*, 896 F.3d at 816. The Seventh Circuit "employs a sliding scale approach," where "'[t]he more likely the plaintiff is to win, the less heavily need the balance of harms weigh in [her] favor; the less likely [she] is to win, the more need it weigh in [her] favor.'" *Id.* (quoting *Valencia*, 883 F.3d at 966).

As the Court has already recognized, A.M. has presented evidence that the harm she would face absent an injunction is substantial. On the other side of the scale, there is no evidence of concrete harm to IPS or the State that would occur if an injunction issues. The harm the State suggests could occur – that biological girls will be forced to compete against transgender girls who allegedly have an athletic advantage – is speculative, and there is no evidence in the record that allowing A.M. to play on the girls' softball team will make this harm a reality. Indeed, A.M. played on the girls' softball team last season, and the State has not set forth any evidence that this harmed anyone. There is no evidence that other players complained about A.M. being on the team due to an athletic advantage, or that she actually has an athletic advantage. Given the strong likelihood

that A.M. will succeed on the merits of her Title IX claim, the State would need to show that the balance of harms significantly weighs in IPS's or the State's favor. *Planned Parenthood of Ind. and Ky., Inc.*, 896 F.3d at 816. It has not done so, and the Court finds that the balance of harms weighs in favor of issuing a preliminary injunction.

e. Public Interest

Finally, A.M. argues that the public interest would be furthered by issuing an injunction because "an injunction in favor of…the rights secured by Title IX is always in the public interest." [Filing No. 24 at 29-30.]

The State reiterates its balance-of-harms arguments – that an injunction would harm the governance process and could harm others by "forc[ing] biological girls to compete against students who identify as girls but retain all the biological advantages of boys." [Filing No. 36 at 37.]

In her reply, A.M. also relies on her balance-of-harms arguments, noting that no harm has occurred from A.M. playing on the girls' softball team thus far. [Filing No. 50 at 20.]

After finding that the plaintiff has satisfied the threshold requirements for a preliminary injunction, the Court must also consider "whether an injunction is in the public interest." *Planned Parenthood of Ind. and Ky.*, 896 F.3d at 816. Again, the State has not presented any tangible evidence that the public will be harmed by the issuance of an injunction in this case. The State relies on situations where high school female athletes in other states have had to compete against transgender females, to the detriment of their athletic goals. The State warns of dire consequences if an injunction issues that "reaches beyond A.M. alone." [Filing No. 36 at 37.] The Supreme Court in *Bostock* acknowledged similar "policy appeals" set forth by employers arguing that Title VII should not be applied to protect homosexual and transgender employees, noting:

> [T]he employers are left to abandon their concern for expected applications and fall back to the last line of defense for all failing statutory interpretation arguments: naked policy appeals. If we were to apply the statute's plain language, they complain, any number of undesirable policy consequences would follow…. Gone here is any pretense of statutory interpretation; all that's left is a suggestion we should proceed without the law's guidance to do as we think best. But that's an invitation no court should ever take up. The place to make new legislation, or address unwanted consequences of old legislation, lies in Congress.

Bostock, 140 S. Ct. at 1753.

Following the Supreme Court's lead, the Court declines the State's invitation to delve into the "what ifs." Here, in this case, the public interest lies in enjoining IPS and the Superintendent from applying a statute that discriminates against A.M. based on her status as a transgender female in violation of Title IX. *See B.E.*, 2022 WL 2291763, at *7 (finding it was in the public interest to issue injunction prohibiting school district from implementing policy requiring transgender boys to use girls' restrooms). The State has not presented any countervailing legal right that should outweigh A.M.'s right to be protected by Title IX.

f. Security

A.M. argues in support of her Motion for Preliminary Injunction that the Court should not require a bond because the issuance of a preliminary injunction "will not impose any monetary injuries on IPS." [Filing No. 24 at 30.] IPS and the Superintendent do not discuss the bond requirement in their response brief.

Federal Rule of Civil Procedure 65(c) provides that a court may issue a preliminary injunction "only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined." But if "there's no danger that the opposing party will incur any damages from the injunction," a court may choose not to require a bond. *Habitat Educ. Ctr. v. U.S. Forest Serv.*, 607 F.3d 453, 458 (7th Cir. 2010). Because IPS and the Superintendent do not address A.M.'s argument in their response,

the Court presumes that they do not object to A.M.'s request that the Court not require a bond. *See Sojka v. Bovis Lend Lease, Inc.*, 686 F.3d 394, 395 (7th Cir. 2012) (noting that a party concedes a point by failing to respond to it in their response brief). Consequently, and because IPS and the Superintendent have not shown that they will incur any damages if an injunction issues in any event, the Court will not require A.M. to post a bond.

In sum, A.M. has established that she has a strong likelihood of succeeding on the merits of her claim that IPS's and the Superintendent's application of § 20-33-13-4 to prohibit her from playing on the girls' softball team violates Title IX. She has also established that she would suffer irreparable harm for which there is no adequate legal remedy, and that both the balance of harms and the public interest favor issuing an injunction. Consequently, A.M.'s Motion for Preliminary Injunction, [Filing No. 8], is **GRANTED** and the Court will not require A.M. to post a bond.

2. Equal Protection Claim

A.M. also alleges that prohibiting her from playing on the girls' softball team pursuant to § 20-33-13-4 violates her rights under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. [Filing No. 1 at 13.] "[F]ederal courts are supposed to do what they can to avoid making constitutional decisions, and strive doubly to avoid making unnecessary constitutional decisions." *ISI Int'l, Inc. v. Borden Ladner Gervais LLP*, 256 F.3d 548, 552 (7th Cir. 2001). Because the Court has found that A.M. is entitled to a preliminary injunction on her Title IX claim, it will not consider whether she is entitled to a preliminary injunction on her Equal Protection claim.

IV.
CONCLUSION

A.M.'s challenge to the lawfulness of § 20-33-13-4 raises controversial issues regarding the boundaries of Title IX and whether and how those boundaries should stretch and shift in an

ever-changing world. But "the limits of the drafters' imagination supply no reason to ignore the law's demand. When the express terms of a statute give us one answer and extratextual considerations suggest another, it's no contest. Only the written word is the law, and all persons are entitled to its benefit." *Bostock*, 140 S. Ct. at 1737. A.M. has shown – along with satisfying the other requirements for the issuance of a preliminary injunction – that she has a likelihood of succeeding on the merits of her claim that § 20-33-13-4 violates Title IX. Accordingly, the Court **GRANTS** A.M.'s Motion for Preliminary Injunction, [8]. The Court also **DENIES** the Motion for Leave to File Brief of Amici Curiae From Five Female Athletes in Support of Defendant-Intervenor the State of Indiana, [31], **DENIES AS MOOT** the State's Motion to Exclude Opinions of Fortenberry, [38], **DENIES AS MOOT** A.M.'s Motion to Exclude Expert Testimony, [47], and **DENIES AS MOOT** the State's Motion for Leave to File Surreply in Opposition to Plaintiff's Motion to Exclude Expert Testimony, [59]. IPS and the Superintendent are **PRELIMINARILY ENJOINED** until further order of this Court from applying Indiana Code § 20-33-13-4 to prohibit A.M. from playing on the girls' softball team. The injunction shall issue in a separate Order.

Date: 7/26/2022

Jane Magnus-Stinson

Hon. Jane Magnus-Stinson, Judge
United States District Court
Southern District of Indiana

Distribution via ECF only to all counsel of record

CERTIFICATE OF SERVICE

I hereby certify that on September 6, 2022, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/ Thomas M. Fisher
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