

21-1365

United States Court of Appeals for the Second Circuit

SELINA SOULE, a minor, by Bianca Stanescu, her mother,
Plaintiffs-Appellants,

v.

CONNECTICUT ASSOCIATION OF SCHOOLS, INC. D/B/A
CONNECTICUT INTERSCHOLASTIC ATHLETIC CONFERENCE,
Defendants-Appellees,

ANDRAYA YEARWOOD,

Intervenors-Defendants-Appellees.

(caption continues inside front cover)

On Appeal from the United States District Court
for the District of Connecticut

**EN BANC BRIEF FOR STATES OF NEW YORK, HAWAII,
CALIFORNIA, COLORADO, DELAWARE, ILLINOIS, MAINE,
MASSACHUSETTS, MINNESOTA, NEVADA, NEW JERSEY,
OREGON, RHODE ISLAND, VERMONT, AND WASHINGTON,
AND THE DISTRICT OF COLUMBIA AS AMICI CURIAE
IN SUPPORT OF APPELLEES**

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Dated: May 1, 2023

(caption continues from front cover)

CHELSEA MITCHELL, a minor, by Christina Mitchell, her mother;
ALANNA SMITH, a minor, by Cheryl Radachowsky, her mother;
ASHLEY NICOLETTI, a minor, by Jennifer Nicoletti, her mother,

Plaintiffs-Appellants,

v.

BLOOMFIELD PUBLIC SCHOOLS BOARD OF EDUCATION; CROMWELL
PUBLIC SCHOOLS BOARD OF EDUCATION; GLASTONBURY PUBLIC
SCHOOLS BOARD OF EDUCATION; CANTON PUBLIC SCHOOLS BOARD
OF EDUCATION; DANBURY PUBLIC SCHOOLS BOARD OF EDUCATION,

Defendants-Appellees,

THANIA EDWARDS, on behalf of her daughter, T.M.; COMMISSION
ON HUMAN RIGHTS AND OPPORTUNITIES,

Intervenors-Defendants-Appellees.

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INTERESTS OF THE AMICI STATES

This lawsuit concerns policies implemented by the Connecticut Interscholastic Athletic Conference (CIAC) that allow for transgender students, such as intervenors-defendants-appellees Andraya Yearwood and Terry Miller, to participate in sex-segregated sports consistent with their gender identity. Plaintiffs claim that such policies discriminate against cisgender female students in violation of Title IX of the Education Amendments of 1972. That argument has no basis in the statutory text or appellate decisions interpreting Title IX. If accepted, that argument would both undermine efforts to create inclusive school communities and impose new conditions on recipients of federal funds in contravention of the Spending Clause. The States of New York, Hawai‘i, California, Colorado, Delaware, Illinois, Maine, Massachusetts, Minnesota, Nevada, New Jersey, Oregon, Rhode Island, Vermont, and Washington, and the District of Columbia file this brief as amici curiae in support of Yearwood and Miller. *See* Fed. R. App. P. 29(a)(2).

Amici file this brief to explain that in their experience, allowing transgender female students to participate in women’s sports promotes

inclusive school environments that benefit all, and does not compromise fairness or reduce opportunities for cisgender students.

Amici States strongly support the right of transgender people to live with dignity, be free from discrimination, and have equal access to education, government-sponsored opportunities, and other incidents of life, including student athletic programs. Discrimination and exclusion on the basis of one's transgender status cause tangible economic, educational, emotional, and health harms. To prevent these injuries, many of the amici States have adopted policies aimed at combatting discrimination against transgender people and facilitating inclusive environments. Amici submit this brief to describe their experiences with administering such policies—including policies permitting transgender students to participate in sex-segregated athletic programs on an equal basis with other students. As amici's experiences show, allowing transgender female students to participate in women's sports does not deprive cisgender female students of the benefits of participating in athletic activities.

The amici States also share a strong interest in seeing that Title IX is properly applied. The amici States agree with plaintiffs and their amici that Title IX has served an important role in promoting women's sports.

But contrary to the position of plaintiffs and their amici, Title IX does not compel the exclusion of transgender students from those benefits. Thus, if this Court does not affirm the dismissal of plaintiffs' complaint based on the bars to justiciability identified by the district court,¹ the Court should affirm on the grounds that plaintiffs have failed to state a valid claim.

¹ The district court and defendants have explained why plaintiffs' claims are moot. (*See* Appellants' Appendix (A.) 265-275; En Banc Br. for Defs.-Appellees at 15-57.) Amici agree with that analysis.

ARGUMENT

POINT I

PROTECTING TRANSGENDER PEOPLE FROM DISCRIMINATION CONFERS WIDE SOCIETAL BENEFITS WITHOUT REDUCING OPPORTUNITIES FOR OTHERS

Over 1.6 million people in the United States—including approximately 300,000 youth between the ages of thirteen and seventeen—identify as transgender.² Transgender people have been part of cultures worldwide “from antiquity to the present day.”³ They contribute to our communities in myriad ways, including as students, teachers, essential workers, firefighters, police officers, lawyers, nurses, and doctors.

Unfortunately, transgender people often experience discrimination that limits their ability to realize their potential. To combat such discrimination, States began providing civil rights protections for transgender people nearly a quarter century ago. Today, at least twenty-two States

² Jody L. Herman et al., Williams Inst., *How Many Adults and Youth Identify as Transgender in the United States?* 1 (2022). (For authorities available online, full URLs appear in the table of authorities. All URLs were last visited on May 1, 2023.)

³ American Psych. Ass’n (APA), *Answers to Your Questions About Transgender People, Gender Identity, and Gender Expression* 1 (3d ed. 2014); see also APA, *Guidelines for Psychological Practice with Transgender and Gender Nonconforming People*, 70 Am. Psych. 832, 834 (2015).

and the District of Columbia,⁴ and at least 225 local governments,⁵ offer express protections against discrimination based on gender identity in

⁴ **California:** Cal. Civ. Code § 51(b), (e)(5) (public accommodations); Cal. Educ. Code §§ 220 (education), 221.5(f) (education and school athletic participation); Cal. Gov’t Code §§ 12926(o), (r)(2), 12940(a), 12949 (employment); *id.* § 12955 (housing); Cal. Penal Code §§ 422.55, 422.56(c) (hate crimes). **Colorado:** Colo. Rev. Stat. § 24-34-301(7) (definition); *id.* § 24-34-402 (employment); *id.* § 24-34-502 (housing); *id.* § 24-34-601 (public accommodations). **Connecticut:** Conn. Gen. Stat. § 10-15c (schools); *id.* § 46a-51(21) (definition); *id.* § 46a-60 (employment); *id.* § 46a-64 (public accommodations); *id.* § 46a-64c (housing). **Delaware:** Del. Code Ann. tit. 6, § 4501 (public accommodations); *id.* tit. 6, § 4603(b) (housing); *id.* tit. 19, § 711 (employment). **Hawai‘i:** Haw. Rev. Stat. § 368D-1 (education); *id.* § 302A-461 (school athletics); *id.* § 489-2 (definition); *id.* § 489-3 (public accommodations); *id.* § 515-2 (definition); *id.* § 515-3 (housing). **Illinois:** 775 Ill. Comp. Stat. 5/1-102(A) (housing, employment, access to financial credit, public accommodations); *id.* 5/1-103(O-1) (definition). **Iowa:** Iowa Code § 216.2(10) (definition); *id.* § 216.6 (employment); *id.* § 216.7 (public accommodations); *id.* § 216.8 (housing); *id.* § 216.9 (education). **Kansas:** Kansas Hum. Rts. Comm’n, *Kansas Human Rights Commission Concurs with the U.S. Supreme Court’s Bostock Decision* (Aug. 21, 2020) (advising that Kansas laws prohibiting discrimination based on “sex” in “employment, housing, and public accommodation” contexts “are inclusive of LGBTQ and all derivatives of ‘sex’”). **Maine:** Me. Rev. Stat. Ann. tit. 5, § 4553(9-C) (definition); *id.* § 4571 (employment); *id.* § 4581 (housing); *id.* § 4591 (public accommodations); *id.* § 4601 (education). **Maryland:** Md. Code Ann., State Gov’t § 20-304 (public accommodations); *id.* § 20-606 (employment); *id.* § 20-705 (housing); Md. Code Ann., Educ. § 26-704 (schools). **Massachusetts:** Mass. Gen. Laws ch. 4, § 7, fifty-ninth (definition); *id.* ch. 76, § 5 (education); *id.* ch. 151B, § 4 (employment, housing, credit); *id.* ch. 272, §§ 92A, 98 (public accommodations) (as amended by Ch. 134, 2016 Mass. Acts). **Minnesota:** Minn. Stat. § 363A.03(44) (definition); *id.* § 363A.08 (employment); *id.* § 363A.09 (housing); *id.* § 363A.11 (public accommodations); *id.* § 363A.13

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(education). **Nevada:** Nev. Rev. Stat. §§ 118.075, 118.100 (housing); *id.* §§ 613.310(4), 613.330 (employment); *id.* §§ 651.050(2), 651.070 (public accommodations). **New Hampshire:** N.H. Rev. Stat. Ann. § 354-A:2(XIV-e) (definition); *id.* § 354-A:6 (employment); *id.* § 354-A:8 (housing); *id.* § 354-A:16 (public accommodations); *id.* § 354-A:27 (education). **New Jersey:** N.J. Stat. Ann. § 10:5-5(rr) (definition); *id.* § 10:5-12 (public accommodations, housing, employment); *id.* § 18A:36-41 (directing issuance of guidance to school districts permitting transgender students “to participate in gender-segregated school activities in accordance with the student’s gender identity”). **New Mexico:** N.M. Stat. Ann. § 28-1-2(Q) (definition); *id.* § 28-1-7(A) (employment); *id.* § 28-1-7(F) (public accommodations); *id.* § 28-1-7(G) (housing). **New York:** N.Y. Exec. Law §§ 291, 296 (education, employment, public accommodations, housing). **Oregon:** Or. Rev. Stat. § 174.100(4) (definition); *id.* § 659.850 (education); *id.* § 659A.006 (employment, housing, public accommodations). **Rhode Island:** 11 R.I. Gen. Laws § 11-24-2 (public accommodations); 28 R.I. Gen. Laws §§ 28-5-6(11), 28-5-7 (employment); 34 R.I. Gen. Laws §§ 34-37-3(9), 34-37-4 (housing). **Utah:** Utah Code Ann. § 34A-5-106 (employment); *id.* § 57-21-5 (housing). **Vermont:** Vt. Stat. Ann. tit. 1, § 144 (definition); *id.* tit. 9, § 4502 (public accommodations); *id.* tit. 9, § 4503 (housing); *id.* tit. 21, § 495 (employment). **Washington:** Wash. Rev. Code Ann. § 28A.642.010 (education); *id.* § 49.60.030(1)(a)-(e) (employment, public accommodations, real estate transactions, credit transactions, and insurance transactions); *id.* § 49.60.040(27) (definition); *id.* § 49.60.180 (employment); *id.* § 49.60.215 (public accommodations); *id.* § 49.60.222 (housing). **District of Columbia:** D.C. Code § 2-1401.02(12A-i) (definition); *id.* § 2-1402.11 (employment); *id.* § 2-1402.21 (housing); *id.* § 2-1402.31 (public accommodations); *id.* § 2-1402.41 (education).

⁵ Human Rts. Campaign, *Cities and Counties with Non-Discrimination Ordinances That Include Gender Identity* (current as of January 28, 2021).

areas such as education, housing, public accommodations, and employment.⁶

The experiences of amici States and other jurisdictions show that policies and practices that facilitate participation of transgender people—including policies permitting young people to participate in the single-sex sports teams consistent with their gender identity—promote inclusive communities, workplaces, and school environments that benefit all.

A. Transgender Youth Face Pervasive and Harmful Discrimination That Causes Them Serious Health and Academic Harms.

Transgender youth experience levels of discrimination, violence, and harassment that exceed those experienced by their cisgender peers.⁷

⁶ The U.S. Supreme Court has confirmed that longstanding federal law similarly prohibits employment discrimination based on gender identity. *See Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1742-43 (2020).

⁷ Joseph G. Kosciw et al., GLSEN, *The 2021 National School Climate Survey: The Experiences of LGBTQ+ Youth in Our Nation's Schools* xxvii, 84 (2022); *see also* GLSEN, *Improving School Climate for Transgender and Nonbinary Youth: Research Brief 1* (2021); Emily A. Greytak et al., GLSEN, *Harsh Realities: The Experiences of Transgender Youth in Our Nation's Schools* xi (2009); Michelle M. Johns et al., *Transgender Identity and Experiences of Violence Victimization, Substance Use, Suicide Risk, and Sexual Risk Behaviors Among High School Students — 19 States and Large Urban School Districts, 2017*, 68 *Morbidity & Mortality Wkly. Rep.* 67, 67-70 (2019).

The 2015 U.S. Transgender Survey (USTS), the largest survey of transgender people to date, found:

- Over three quarters (77%) of respondents who were known or perceived as transgender in grades K-12 reported negative experiences at school, including being harassed or attacked;
- More than half of transgender students (54%) reported verbal harassment;
- Almost a quarter (24%) reported suffering a physical attack; and
- Approximately one in eight (13%) reported being sexually assaulted.⁸

A 2021 survey of LGBTQ students in grades six to twelve showed that 74% of transgender student respondents experienced in-person victimization at school because of their gender expression, and 42% experienced online victimization because of their gender expression.⁹ In December 2016 and January 2017, more than a quarter of transgender

⁸ Sandy E. James et al., Nat'l Ctr. for Transgender Equal., *The Report of the 2015 U.S. Transgender Survey* 131-35 (2016).

⁹ Kosciw et al., GLSEN, *The 2021 National School Climate Survey*, *supra*, at 86-87.

respondents to a survey of LGBTQ teenagers aged thirteen to eighteen reported being bullied or harassed within the past thirty days.¹⁰ And in a 2022 survey, 71% of transgender and nonbinary youth reported being discriminated against because of their gender identity.¹¹ As a consequence of this discrimination, violence, and harassment, transgender students in grades six through twelve, who were surveyed in 2021, reported feeling less connected to their schools, and had less of a sense of belonging, than other students.¹² Transgender youth of color, in particular, face unique difficulties as a result of their intersecting marginalized identities.¹³

Discrimination against transgender youth—including denying them the opportunity to participate in extracurricular activities consistent with their gender identity—can have serious health consequences. Research has demonstrated that discrimination against LGBTQ people—including

¹⁰ Human Rts. Campaign Found., *Human Rights Campaign Post-Election Survey of Youth* 2, 8 (2017).

¹¹ The Trevor Project, *2022 National Survey on LGBTQ Youth Mental Health* 17 (2022).

¹² Kosciw et al., GLSEN, *The 2021 National School Climate Survey*, *supra*, at 88.

¹³ Nhan L. Truong et al., GLSEN, *Erasure and Resilience: The Experiences of LGBTQ Students of Color* 3 (2020).

discriminatory policies and the denial of opportunities—“increases the risks of poor mental and physical health” for LGBTQ people.¹⁴ For example, LGBTQ students who experienced discriminatory policies or practices in school were found to have lower self-esteem and higher levels of depression than students who had not encountered such discrimination.¹⁵ Respondents to the 2015 USTS who reported negative experiences in grades K-12 were more likely than other respondents to be under serious psychological distress, to have experienced homelessness, and to have attempted suicide.¹⁶ Transgender people attempt suicide at a rate nearly nine times that of the general population, and more than half of transgender and nonbinary youth in a 2022 mental health survey reported having seriously considered attempting suicide in the past twelve months.¹⁷

¹⁴ What We Know Project, *What Does the Scholarly Research Say About the Effects of Discrimination on the Health of LGBTQ People?*, Cornell Univ. (2019).

¹⁵ Kosciw et al., GLSEN, *The 2021 National School Climate Survey*, *supra*, at 43; *see also* April J. Ancheta et al., *The Impact of Positive School Climate on Suicidality and Mental Health Among LGBTQ Adolescents: A Systematic Review*, 37 J. Sch. Nursing 75, 76 (2021).

¹⁶ James et al., Nat’l Ctr. for Transgender Equal., *2015 U.S. Transgender Survey*, *supra*, at 132.

¹⁷ *See id.* at 114; The Trevor Project, *2022 National Survey on LGBTQ Youth Mental Health*, *supra*, at 5.

Positive school climates, on the other hand, have been linked to lower suicidality in LGBTQ youth.¹⁸

Discrimination in school settings also negatively affects educational outcomes. A 2021 survey showed that LGBTQ students who had experienced discriminatory policies and practices had lower levels of educational achievement, lower grade point averages, and lower levels of educational aspiration than other students.¹⁹ Discriminatory school climates have also been found to exacerbate absenteeism. In the month before a 2021 survey, LGBTQ students who had experienced discrimination in their schools were almost three times as likely (43.3% versus 16.4%) to have missed school because they felt unsafe or uncomfortable.²⁰

¹⁸ Ancheta et al., *The Impact of Positive School Climate*, *supra*, at 80; *see also* Cady Stanton, *As 'Don't Say Gay' and Similar Bills Take Hold, LGBTQ Youths Feel They're 'Getting Crushed'*, USA Today (May 9, 2022) (noting that LGBTQ youths in affirming schools were nearly 40% less likely to attempt suicide than LGBTQ youths in non-affirming schools).

¹⁹ Kosciw et al., GLSEN, *The 2021 National School Climate Survey*, *supra*, at 36-37; *see also* Greytak et al., GLSEN, *Harsh Realities*, *supra*, at 25, 27 fig. 15 (showing that more-frequently harassed transgender students had significantly lower grade point averages than other transgender students).

²⁰ Kosciw et al., GLSEN, *The 2021 National School Climate Survey*, *supra*, at 36.

B. The Amici States’ Experiences Confirm That Protecting Transgender People from Discrimination Yields Broad Benefits.

Policies that allow transgender students to access facilities and activities consistent with their gender identity create school climates that enhance students’ well-being and facilitate their ability to learn.²¹ For example, transgender students permitted to live consistently with their gender identity have mental health outcomes comparable to their cisgender peers.²² These benefits redound to society as a whole because education advances not only the private interests of students, but also prepares them to contribute to society—socially, culturally, and economically. *See, e.g., Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954).

Several of the amici States have enacted laws or issued guidance to ensure equal opportunities for transgender students—including with

²¹ *See, e.g., Br. of Amici Curiae Sch. Adm’rs from Thirty-One States & D.C. in Supp. of Resp’t (Br. of Amici Curiae Sch. Adm’rs) at 3-4, Gloucester Cnty. Sch. Bd. v. G.G. ex rel. Grimm*, 137 S. Ct. 1239 (2017) (No. 16-273), 2017 WL 930055; [Office of Elementary & Secondary Educ., Safe & Supportive Schools](#) (Feb. 15, 2023).

²² *See Kristina R. Olson et al., Mental Health of Transgender Children Who Are Supported in Their Identities*, *Pediatrics*, Mar. 2016, at 5-7; *Br. of Amici Curiae Sch. Adm’rs at 4, Gloucester Cnty. Sch. Bd.*, 137 S. Ct. 1239 (No. 16-273), 2017 WL 930055.

regard to school activities and sports programs.²³ For example, both California and Massachusetts have long mandated that transgender students in K-12 schools be permitted to participate in school programs and activities—including sports—consistent with their gender identity. See Cal. Educ. Code § 221.5(f) (2013); Mass. Gen. Laws ch. 76, § 5 (2011);

²³ **Connecticut:** Conn. Gen. Stat. § 10-15c (prohibiting discrimination on basis of gender identity in student access to public school activities and programs). **Michigan:** State Bd. of Educ., Mich. Dep’t of Educ., *State Board of Education Statement and Guidance on Safe and Supportive Learning Environments for Lesbian, Gay, Bisexual, Transgender, and Questioning (LGBTQ) Students* 5-6 (Sept. 14, 2016) (advising that K-12 students be permitted to participate in sports in accordance with their gender identity). **Minnesota:** Minnesota Dep’t of Educ., *A Toolkit for Ensuring Safe and Supportive Schools for Transgender and Gender Non-conforming Students* 8 (Sept. 25, 2017) (same). **New Jersey:** New Jersey Dep’t of Educ., *Transgender Student Guidance for School Districts* p. 6 (same, as to “gender-segregated classes or athletic activities, including intramural and interscholastic athletics”); Division on C.R., N.J. Dep’t of L. & Pub. Safety, *5 Things You Should Know About LGBTQ+ Student Rights in Schools* (June 15, 2022) (under the New Jersey Law Against Discrimination “students are allowed to . . . participate in extracurricular activities, including intramural or interscholastic athletics and physical education, that best correspond to their gender identity and expression”). **Washington:** Wash. Rev. Code Ann. § 28A.642.010 (prohibiting discrimination based on gender identity in public schools); Washington Off. of Superintendent of Pub. Instruction, *Gender-Inclusive Schools* (transgender students in K-12 schools must be permitted to participate in “physical education and athletics” consistent with their gender identity). **District of Columbia:** D.C. Code §§ 2-1402.41, 38-841.02; D.C. Mun. Regs. tit. 5-F, § 102.6 (prohibiting gender identity discrimination by educational institutions generally and in the context of school athletics).

603 Mass. Code Regs. 26.06(5). Likewise, New York law expressly prohibits discrimination and harassment of students “on school property or at a school function” on the basis of gender identity in K-12 schools, N.Y. Educ. Law §§ 11(6), 12(1), and the New York State Education Department has made clear that transgender students in K-12 schools should be allowed to access school facilities and participate in activities, consistent with their gender identity, New York State Educ. Dep’t, *Guidance to School Districts for Creating a Safe and Supportive School Environment for Transgender and Gender Nonconforming Students* 9-11 (July 2015).

Athletic participation has been linked to academic achievement and improved academic performance.²⁴ Participants in interscholastic sports “have higher grades, spend more time on homework, have higher educational aspirations, and are more likely to attend college than are their counterparts.”²⁵ Young women who participate in high school athletics,

²⁴ Alison R. Snyder et al., *Health-Related Quality of Life Differs Between Adolescent Athletes and Adolescent Nonathletes*, 19 J. Sport Rehab. 237, 238 (2010); Kelly P. Troutman & Mikaela J. Dufur, *From High School Jocks to College Grads: Assessing the Long-Term Effects of High School Sport Participation on Females’ Educational Attainment*, 38 Youth & Soc’y 443, 444 (2007).

²⁵ Troutman & Dufur, *From High School Jocks to College Grads*, *supra*, at 444.

in particular, are more likely on average to complete college.²⁶ Athletic participation has also been linked to “more successful outcomes in adulthood, such as employment.”²⁷

There are also many health benefits to sports participation. Regular physical activity “decreases the risk of developing diabetes, hypertension, cancer, and obesity, as well as cardiovascular and bone and joint diseases.”²⁸ For youth, “[p]articipation in physical activity during childhood and adolescence has a positive impact on physical health throughout the life span.”²⁹ Mental health benefits also result from sports participation,³⁰

²⁶ *Id.* at 454.

²⁷ Scott B. Greenspan et al., *LGBTQ+ Youth’s Experiences and Engagement in Physical Activity: A Comprehensive Content Analysis*, 4 *Adolescent Rsch. Rev.* 169, 170 (2019).

²⁸ Snyder et al., *Health-Related Quality of Life*, *supra*, at 237-38; see also Greenspan et al., *LGBTQ+ Youth’s Experiences and Engagement in Physical Activity*, *supra*, at 170; Troutman & Dufur, *From High School Jocks to College Grads*, *supra*, at 444.

²⁹ Ellis Barrera et al., *The Medical Implications of Banning Transgender Youth from Sport Participation*, 176 *JAMA Pediatrics* 223, 223 (2022); see, e.g., Landon D. Hughes et al., *Pediatric Provider Perspectives on Laws and Policies Impacting Sports Participation for Transgender Youth*, 9 *LGBT Health* 247, 251 (2022).

³⁰ Richard Bailey, *Physical Education and Sport in Schools: A Review of Benefits and Outcomes*, 76 *J. Sch. Health* 397, 398 (2006); Snyder et al., *Health-Related Quality of Life*, *supra*, at 238, 244.

including “improved emotion regulation, decreased hopelessness and suicidality, fewer depressive symptoms, and higher self-esteem.”³¹ For LGBTQ students in particular, sports participation has been linked to higher levels of self-esteem and lower levels of depression.³²

All students, moreover, stand to benefit from an inclusive, supportive environment.³³ This is especially true of sports, given the importance of teamwork and cooperation in athletic competition.³⁴

³¹ Caitlin M. Clark & Joseph G. Kosciw, *Engaged or Excluded: LGBTQ Youth’s Participation in School Sports and Their Relationship to Psychological Well-Being*, 59 Psych. Schs. 95, 96 (2022) (citations omitted); see also Jennifer R. Pharr et al., *Serial Mediation Analysis of the Association of Familiarity with Transgender Sports Bans and Suicidality Among Sexual and Gender Minority Adults in the United States*, 19 Int’l J. Env’t Rsch. & Pub. Health, Aug. 2022, at 1, 11-12.

³² Caitlin M. Clark et al., GLSEN, *LGBTQ Students and School Sports Participation: Research Brief 8* (2021).

³³ See Br. of Amici Curiae Sch. Adm’rs at 2, *Gloucester Cnty. Sch. Bd.*, 137 S. Ct. 1239 (No. 16-273), 2017 WL 930055 (“[I]nclusive policies not only fully support the reality of transgender students’ circumstances, but also foster a safer and more welcoming learning environment for all students.”); see also Office of Elementary & Secondary Educ., *Safe & Supportive Schools*, *supra* (“Safe and supportive schools are critical to the well-being of the whole school community . . .”).

³⁴ See Troutman & Dufur, *From High School Jocks to College Grads*, *supra*, at 444-45.

POINT II

TITLE IX DOES NOT UNAMBIGUOUSLY BAR TRANSGENDER STUDENTS FROM PARTICIPATING IN SEX-SEGREGATED SPORTS CONSISTENT WITH THEIR GENDER IDENTITY

Title IX prohibits sex discrimination in schools receiving federal funding. Under Title IX, “[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) (emphasis added). Title IX’s implementing regulations confirm that the nondiscrimination mandate applies to school athletics as well, while expressly permitting sex-segregated teams in certain circumstances. *See* 34 C.F.R. § 106.41(a)-(b); 28 C.F.R. § 54.450(a)-(b). The parties here do not dispute the propriety of sex-segregated athletics. Rather, they dispute how Title IX’s nondiscrimination mandate and the rules’ allowance for sex-segregated teams apply to transgender students, and whether defendants had unambiguous notice that their receipt of federal funds purportedly obligated them to exclude transgender students from participating on athletic teams consistent with their gender identity.

The district court correctly concluded (A. 279-287) that interpreting Title IX to mandate the exclusion of transgender girls from girls' sports would impose a new condition on the receipt of federal funds in violation of the Spending Clause. Congress must speak "unambiguously" when it places conditions on the receipt of federal funds in the exercise of its Spending Clause power. *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981). The plain text of Title IX's nondiscrimination mandate does not prohibit inclusive policies like those adopted by CIAC, and neither the federal courts nor the U.S. Department of Education have interpreted it to impose such a requirement, much less provided "unambiguous" notice to recipients of federal funds that they must exclude transgender girls from girls' sports teams.

A. Title IX's Statutory Language Does Not Require the Exclusion of Transgender Students from Sex-Segregated Sports Teams.

Plaintiffs fail to establish that—by virtue of competing in athletic competitions with transgender girls as well as cisgender girls—they have been discriminated against *on the basis of sex*, as is required to state a Title IX claim. *See Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 616 (4th Cir. 2020), *cert. denied*, 141 S. Ct. 2878 (2021). Neither the text of

Title IX nor its implementing regulations dictate that recipients of federal funds must assign transgender students to sports teams, or any other sex-segregated program or activity, based on their sex assigned at birth.³⁵

Plaintiffs' argument also lacks support in the case law construing Title IX and analogous statutes. Courts have rejected arguments, similar to those raised here, that transgender students' use of sex-segregated spaces that align with their gender identity somehow violates cisgender students' Title IX rights. *See Parents for Privacy v. Barr*, 949 F.3d 1210, 1228-29 (9th Cir. 2020); *Doe ex rel. Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518, 534-35 (3d Cir. 2018). Indeed, some courts have concluded that Title IX not only permits but requires providing transgender students with sex-segregated spaces that align with their gender identity. *See Grimm*, 972 F.3d at 616-19; *Whitaker ex rel. Whitaker v. Kenosha Unified*

³⁵ In fact, the U.S. Department of Education recently issued a notice of proposed rulemaking interpreting Title IX to prohibit categorical bans on transgender students participating on sex-segregated sports teams consistent with their gender identity. *See Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance: Sex-Related Eligibility Criteria for Male and Female Athletic Teams*, 88 Fed. Reg. 22,860, 22,873 (Apr. 13, 2023).

Sch. Dist. No. 1 Bd. of Educ., 858 F.3d 1034, 1046-50 (7th Cir. 2017); *Dodds v. United States Dep’t of Educ.*, 845 F.3d 217, 221-22 (6th Cir. 2016).³⁶

These decisions are in accord with the Supreme Court’s decision in *Bostock v. Clayton County*, which concluded that gender identity discrimination is necessarily sex discrimination under Title VII of the Civil Rights Act of 1964.³⁷ See 140 S. Ct. at 1741-42, 1745-47; see also *Glenn v. Brumby*, 663 F.3d 1312, 1317 (11th Cir. 2011) (citing cases). As the Supreme Court explained, discriminating against a person for being transgender is sex discrimination because “[i]t is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex.” *Bostock*, 140 S. Ct. at 1741. In reaching its conclusion, the Supreme Court acknowledged that “transgender status” is a distinct concept from “sex,” but observed that sexual harassment and

³⁶ But see *Adams ex rel. Kasper v. School Bd. of St. Johns Cnty.*, 57 F.4th 791 (11th Cir. 2022) (en banc).

³⁷ When determining whether conduct constitutes discrimination based on sex under Title IX, courts routinely look to and apply case law interpreting Title VII. See, e.g., *Davis ex rel. LaShonda D. v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 636, 651 (1999); *Franklin v. Gwinnett Cnty. Pub. Schs.*, 503 U.S. 60, 75 (1992).

discrimination based on motherhood are also distinct concepts that, unquestionably, still qualify as sex discrimination. *Id.* at 1742, 1746-47.

These principles require the dismissal of plaintiffs' claims here. CIAC has adopted a policy providing that a transgender girl may join a girls' sports team if she is recognized as a girl "in current school records and daily life activities in the school." (A. 149.) The text of Title IX and its implementing regulations do not prohibit CIAC from treating transgender students consistently with their gender identity in athletics and other school activities, let alone provide unambiguous notice of such a prohibition. And appellate precedent confirms that transgender students' participation in school activities and programs in accordance with their gender identity, as provided by the CIAC policy, is, at a minimum, consistent with Title IX's nondiscrimination mandate. *See Grimm*, 972 F.3d at 616-19; *Parents for Privacy*, 949 F.3d at 1228-29; *Boyertown*, 897 F.3d at 534-35; *Whitaker*, 858 F.3d at 1046-50; *Dodds*, 845 F.3d at 221-22. Accordingly, plaintiffs' damages claims should be dismissed because defendants lacked unambiguous notice that CIAC's policy violates Title IX.

B. The Participation of Transgender Students in Athletic Events Does Not Deprive Cisgender Students of Equal Treatment or Effective Accommodation Under Title IX.

Even if plaintiffs were correct that Title IX’s reference to discrimination “on the basis of sex” refers only to an individual’s sex assigned at birth—and they are not—plaintiffs would still fail to establish a viable Title IX claim. Plaintiffs have not plausibly alleged that the participation of Yearwood and Miller on other schools’ track teams violates plaintiffs’ entitlement to equal treatment and effective accommodation under Title IX. *See Biediger v. Quinnipiac Univ.*, 691 F.3d 85, 92 (2d Cir. 2012). As the experiences of amici States show, allowing transgender girls to participate on sports teams aligned with their gender identity does not substantially displace athletic opportunities for cisgender girls.

A Title IX equal treatment claim looks at whether the “athletic benefits and opportunities provided male and female athletes” are equivalent in terms of availability, quality, and kind. *Mansourian v. Regents of the Univ. of Cal.*, 602 F.3d 957, 964-65 (9th Cir. 2010) (quotation marks omitted). An effective accommodation claim looks at “[w]hether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes.” 34 C.F.R. § 106.41(c)(1).

In reviewing such a claim, courts look at a school's entire athletic program to ensure equal participation opportunities. *See Biediger*, 691 F.3d at 92-93.

Here, plaintiffs fail to state either an equal-treatment or an accommodation claim under Title IX. Plaintiffs acknowledge that they participated on girls' track teams and competed in numerous meets. And their complaint contradicts any claim that they "do not possess sufficient skill . . . to compete actively" in athletic events that include two transgender girls. *See* Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,413, 71,418 (Dec. 11, 1979). As plaintiffs describe, they are successful athletes; they have won awards in multiple events and, in some instances, they have placed higher than Yearwood and Miller in events in which they directly competed with Yearwood and Miller.³⁸

³⁸ Plaintiffs have also failed to allege that they are treated differently from cisgender boys (or transgender girls) in terms of the provision of equipment and supplies, coaching opportunities, locker room facilities, or scheduling of games and practice time. *See* 34 C.F.R. § 106.41(c); *Biediger*, 691 F.3d at 92; *McCormick ex rel. McCormick v. School Dist. of Mamaronck*, 370 F.3d 275, 291 (2d Cir. 2004).

More generally, there is no basis to the claims of plaintiffs (Opening En Banc Br. of Appellants at 12, 14) and their amici (En Banc Br. of Amici Curiae State of Tenn. & 22 Other States (Tenn. Br.) at 23-27) that CIAC’s policy will result in transgender students substantially displacing cisgender students in girls’ sports. District courts reviewing factual records have found “no ‘problem’ with transgender students playing school sports,” emphasizing that transgender students’ participation on sports teams consistent with their gender identity did not create unfair competition or unsafe conditions. *B.P.J. v. West Virginia State Bd. of Educ.*, No. 21-cv-316, 2023 WL 111875, at *4 (S.D. W. Va. Jan. 5, 2023); *see A.M. ex rel. E.M. v. Indianapolis Pub. Schs.*, No. 22-cv-1075, 2022 WL 2951430, at *12 (S.D. Ind. July 26, 2022), *appeal dismissed*, No. 22-2332, 2023 WL 371646 (7th Cir. Jan. 19, 2023). In terms of sheer numbers, one court observed that it is implausible to suggest that “one half of one percent of the population (transgender women) could” substantially displace roughly half the population (cisgender women) on high school athletic teams. *Hecox v. Little*, 479 F. Supp. 3d 930, 977-78 (D. Idaho 2020).

The experiences of the amici States with inclusive and equitable school athletics policies confirm that permitting transgender students

like Yearwood and Miller to participate in women’s sports will not compromise fairness or reduce opportunities for cisgender athletes. Interscholastic sports organizations and local school districts in the amici States have adopted policies to ensure that transgender students will have equal access to sports participation—and these policies have not resulted in fewer opportunities for cisgender students.³⁹ *See Grimm*, 972 F.3d at 614.

³⁹ *See, e.g., California: California Interscholastic Fed’n, Constitution & Bylaws 2022-23*, at 98 (transgender students must be afforded opportunity to participate in sports in manner consistent with their gender identity); *Fresno Unified Sch. Dist., Fresno Unified Admin. Regul. (AR) 5145.3: Nondiscrimination/Harassment 6* (Mar. 7, 2022) (same). **Colorado:** *Colorado High Sch. Activities Ass’n, CHSAA Transgender Inclusion Bylaw & Policy* p. 2 (same). **Delaware:** 14 Del. Admin. Code § 1024(8.5.1). **Maryland:** *Maryland Pub. Secondary Schs. Athletic Ass’n, MPSSAA Guidance for Participation of Transgender Youth in Interscholastic Athletics* pp. 1-2 (Aug. 2016) (same, for interscholastic sports); **Massachusetts:** *Massachusetts Interscholastic Athletic Ass’n, Rules and Regulations Governing Athletics: A Handbook for Principals and Athletic Directors* 41 (same). **Minnesota:** *Minnesota State High Sch. League, Official Handbook, 300.00: Administration of Student Eligibility Bylaws* 61 (same); *University of Minn., Equity and Access: Gender Identity, Gender Expression, Names and Pronouns* (same, for all university programs and activities). **Nevada:** *Nevada Interscholastic Activities Ass’n, NIAA Transgender Participation Position Statement and Policy* p. 1 (Apr. 6, 2016) (same, for “gender specific sports team[s]”). **New York:** *New York State Pub. High Sch. Athletic Ass’n, NYSPHSAA Handbook* 49-51 (Feb. 2023) (equal participation by transgender students in all interscholastic sports activities consistent with their gender identity). **Oregon:** *Oregon Sch.*

(continued on the next page)

For example, since 2009, the New Jersey State Interscholastic Athletic Association, a voluntary organization that administers interscholastic athletics in the State, has permitted transgender students to participate in gender-segregated competitive sports consistent with their gender identity.⁴⁰ The Albuquerque Public Schools—the largest school district in New Mexico—mandates that transgender students have equal access to recreational and competitive sports programs “in a manner consistent with their gender identity.”⁴¹ And the Los Angeles Unified School District, one of the largest school districts in the country, has implemented a transgender-inclusive sports policy for many years “without problems.”⁴² As a school district official in Los Angeles has reported, the district’s policy has led to a positive “transformation” in the district’s

Activities Ass’n, 2022-2023 Oregon Sch. Activities Association Handbook 80-82 (same). **Rhode Island:** Rhode Island Interscholastic League, *Rules and Regulations, Article 3* (June 21, 2022) (same). **Washington:** Washington Interscholastic Activities Ass’n, *WIAA Handbook 2022-23*, at 35 (Dec. 6, 2022) (same).

⁴⁰ New Jersey State Interscholastic Athletic Ass’n, *NJSIAA & NJSCA Coaches Handbook: 2020-2021*, at 28-30.

⁴¹ See Albuquerque Pub. Schs., *Non-Discrimination for Students: Gender Identity and Expression* (May 2016).

⁴² See Patrick McGreevy, *California Transgender Students Given Access to Opposite-Sex Programs*, L.A. Times (Aug. 12, 2013).

schools: an experience that “stands in stark contrast” to “expressed concerns that students will abuse the policy.”⁴³ Notwithstanding this lengthy history, amici States are not aware of evidence that transgender athletes have dominated any sport or competition, or have caused scholarship opportunities to be unfairly denied to cisgender competitors.

In sum, concerns about compromising fair competition rest on baseless assumptions and generalizations concerning the participation of transgender female athletes in sex-segregated sports and are inconsistent with the experiences of the amici States. Indeed, the amici States supporting plaintiffs fail to identify a single instance of transgender students displacing cisgender students in their States (*see* Tenn. Br.), and some of their own Governors have recognized that no such harm exists. For instance, Indiana’s Governor concluded that there was no evidence to support claims that “the goals of consistency and fairness in competitive female sports” were not being met under previous policies that allowed for transgender girls to participate on girls’ sports teams.⁴⁴ And

⁴³ *See* Judy Chiasson, *Success and Opportunity for Transgender Students*, HuffPost (updated Feb. 2, 2016).

⁴⁴ *Letter from Eric J. Holcomb, Ind. Governor, to Todd Huston, Speaker, Ind. H.R., at pp. 1-2 (Mar. 21, 2022).*

Utah's Governor similarly observed an absence of such problems in Utah, noting that, out of 75,000 high school athletes, only four were transgender: four kids who were simply "trying to find some friends and feel like they are a part of something."⁴⁵ Title IX permits schools to afford transgender students those opportunities.

⁴⁵ Letter from Spencer J. Cox, Utah Governor, to J. Stuart Adams, President, Utah S., & Brad R. Wilson, Speaker, Utah H.R., at pp. 4-5 (Mar. 22, 2022).

CONCLUSION

This Court should affirm the judgment dismissing plaintiffs' complaint.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a) of the Federal Rules of Appellate Procedure, Kelly Cheung, an employee in the Office of the Attorney General of the State of New York, hereby certifies that according to the word count feature of the word processing program used to prepare this brief, the brief contains 5,876 words and complies with the typeface requirements and length limits of Rules 29 and 32(a)(5)-(7) and Local Rules 29.1 and 32.1.

/s/ Kelly Cheung