



**MOUNTAIN STATES LEGAL
FOUNDATION**
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2596 South Lewis Way | Lakewood, CO 80227 | Tel: 303.292.2021

Date: May 15, 2023

RIN: 1870-AA19

Re: *Comment Objecting to the Department of Education’s Proposed Amendments to Title IX’s Sex-Related Eligibility Criteria for Male and Female Athletic Teams*

INTRODUCTION

The Department of Education (“Department”) should abandon its proposed rule entitled *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance: Sex-Related Eligibility Criteria for Male and Female Athletic Teams*, 88 Fed. Reg. 22,860 (Apr. 13, 2023) (“Current Proposed Rule”), and instead preserve the Title IX regulations as they currently exist.

The Current Proposed Rule would have disastrous effects on the safety of women of all ages and the rule of law. Separately, the Department fundamentally misreads Title IX by attempting to sweep gender identity discrimination into Title IX. To do so is not just arbitrary and capricious, but would also violate the Major Questions doctrine and the *Pennhurst* doctrine. Moreover, the proposed regulations would confuse stakeholders and cause unneeded expenses for schools and students and create regulatory whiplash once the regulations are either struck down or rescinded by a future Administration.

BACKGROUND

Title IX’s essential mandate is contained in 37 simple words: “No 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). Enacted in 1972, Congress provided that the Department may promulgate regulations enforcing its key non-discrimination mandate. 20 U.S.C. § 1682. But in attempting to impose the Current Proposed Rule under Title IX, the Department acts in a manner that is arbitrary and capricious, and not in accordance with the law.

The Current Proposed Rule concerning sports cannot be viewed in a vacuum. The Department’s most recent proposed change to Title IX, *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 87 Fed. Reg. 41,390 (July 12, 2022) (“Prior Proposed Rule”), remains pending, and purports to re-write the definition of sex to include sexual orientation and gender identity. *Id.* at 41,571. Should the Department finalize the Prior Proposed Rule as written, the Department will commit many of the same violations of the Administrative Procedure Act and the Constitution, but this time with a twist—women will be put in danger: both the physical danger of playing sports with biological males, as well as the broader danger of losing the benefits that flow from having equal opportunities to compete on athletic teams. The Department should thus abandon the Current Proposed Rule in its entirety to protect women and women’s athletics.

I. The Current Proposed Rule Would Devastatingly Harm Women and Girls by Allowing Biological Men to Invade Their Spaces.

The Current Proposed Rule welcomes biological males to compete in women’s athletics leagues, against biological women, with only limited exceptions. It states:

If a recipient adopts or applies sex-related criteria that would limit or deny a student's eligibility to participate on a male or female team *consistent with their gender identity*, such criteria must, for *each sport, level of competition, and grade or education level*: (i) [b]e substantially related to the achievement of an important educational objective; and (ii) [m]inimize harms to students whose opportunity to participate on a male or female team consistent with their gender identity would be limited or denied.

Current Proposed Rule, at 22,891 (emphasis added). The Department knows as well as anyone that schools and school districts are risk-averse, and will rarely, if ever, walk themselves into a federal investigation conducted by the Department's Office for Civil Rights, where they will bear the burden of meeting this heavy standard.

The greater likelihood is that all but a few schools will avoid the enormous burdens of applying this test to *every team, for every sport, for every grade*, and allow biological men to shower, travel, room, dress, and compete with and against women. The Current Proposed Rule should thus be abandoned in its entirety for two reasons: (1) its protections for women in contact sports are insufficient, and (2) women cannot reap the life-long benefits from competition if biological men claim their medals and scholarships.

A. Allowing biological men to physically harm women is not progress, nor is it what Title IX envisioned.

The Current Proposed Rule does not do enough to protect women from going toe-to-toe with biological men in contact sports. The Rule claims that:

The Department recognizes that prevention of sports-related injury is an important educational objective in recipients' athletic programs and that—as courts have long recognized in cases involving sex-separate athletic teams—fairness in competition *may be particularly important* for recipients in some sports, grade and education levels, and levels of competition.

Current Proposed Rule, at 22,860–61 (emphasis added). The Current Proposed Rule thus acknowledges the risk to safety and competitive fairness that its adoption will pose for women—

but nevertheless plows through those concerns—by carving out only the narrowest sliver for the bravest schools to use as a last resort.

The consequences will be troubling, to say the least. Biological differences due to sex are encoded permanently during the earliest stages of the human development process. Childhood assessments clearly demonstrate differences between males and females.

Beginning in the womb, men are bathed in testosterone and puberty accelerates that. Men on average have broader shoulders, bigger hands and longer torsos, and greater lung and heart capacity. Muscles are denser[.] . . . [R]ecords for elite adult male swimmers are on average 10 percent to 12 percent faster than the records of elite female swimmers, an advantage that has held for decades.

Ashe Schow, *Even The New York Times Admits Biological Men Have a Huge Advantage Over Women in Sports*, THE DAILY WIRE (May 31, 2022).¹ Those differences persist and grow at every level of high school, collegiate, Olympic and professional sports.

The “organizational” effects of male puberty are profound, and they are permanent: larger hearts and lungs, more oxygenated blood, more fast-twitch muscle fiber, greater upper-body muscle mass, greater lower-body muscle mass, greater bone density. They grant men a massive and unbridgeable advantage over women in nearly every physical contest. Even if a man later takes estrogen and artificially reduces the level of “bioactive” testosterone in his body, he will not surrender these advantages.

Abigail Shrier, *The Transgender Threat to Women’s Sports*, NEWSWEEK (Oct. 20, 2020).² A male athlete, regardless of gender identity or hormone treatments, retains biological and genetic advantages conferred by sex. In fact, “testosterone reduction or suppression does not negate all the physiological advantages of having developed testosterone driven strength, stamina and physique.” Mary Margaret Olohan, *Biologically Male Athletes Have Unfair Advantage Over*

¹ <https://www.dailywire.com/news/even-the-new-york-times-admits-biological-men-have-a-huge-advantage-over-women-in-sports> (internal quotation and citation omitted).

² <https://www.newsweek.com/transgender-threat-womens-sports-opinion-1540418>

Women, Major Review Finds, ALPHA NEWS (Oct. 2, 2021)³ (internal quotation and citation omitted); *see also* Dan Avery, *Trans Women Retain Athletic Edge After a Year of Hormone Therapy, Study Finds*, NBC NEWS (Jan. 5, 2021).⁴

Biological sex, by far, remains the most important factor for creating fair and safe competitions for female athletes. One biological male competed as a mixed martial arts fighter and broke his female opponent's skull. Bhavsha Purohit, *When Transgender Fighter Fallon Fox Broke Her Opponent's Skull in MMA Fight*, SPORTSKEEDA (Sept. 30, 2021).⁵ Another biological male defeated a female mixed martial arts competitor after living "33 years of her life as a man." Ariel Zilber, *'It's Not Progress': Social Media Erupts in Outrage After Transgender MMA Fighter Who Transitioned After Serving in US Army Special Forces Defeats French Woman*, DAILY MAIL (Sept. 13, 2021) (internal quotation and citation omitted).⁶ In a separate incident, a biological male hockey player left a biological female with a concussion. Richard Moorhead, *Brutal 'Transgender' Hockey Hit Leaves Woman with Concussion, Muscle Strains*, THE WESTERN JOURNAL (Dec. 15, 2022).⁷ Although these instances highlight professional sports, the point is illustrative.

Bodily harm is not limited to traditional contact sports contemplated by Title IX. Nor is it limited to the playing field. By simply identifying as female, biological men can easily gain access to the private spaces designated for women, including intimate facilities like bathrooms, locker

³ <https://alphanews.org/biologically-male-athletes-have-unfair-advantage-over-women-major-review-finds/>

⁴ <https://www.nbcnews.com/feature/nbc-out/trans-women-retain-athletic-edge-after-year-hormone-therapy-study-n1252764>.

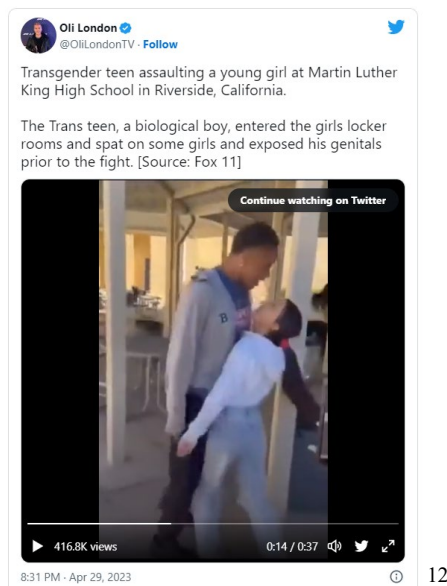
⁵ <https://www.sportskeeda.com/mma/news-when-transgender-fighter-fallon-fox-broke-opponent-s-skull-mma-fight>.

⁶ <https://www.dailymail.co.uk/news/article-9983177/Outrage-transgender-MMA-fighter-defeats-French-woman.html>

⁷ <https://www.westernjournal.com/brutal-transgender-hockey-hit-leaves-woman-concussion-muscle-strains/>

rooms, and even women’s hotel rooms when athletes travel to competitions. See Caroline Downey, *Judge Rules Loudoun County Teen Sexually Assaulted Female Student in Girls’ Bathroom*, YAHOO!NEWS (Oct. 26, 2021)⁸; John Brown, *Trans Woman Crawled into Bed With, Assaulted Female Resident at Women’s Shelter: Police*, FOX NEWS (Apr. 20, 2023)⁹, Erin Coates, *‘No One’s Listening’ as Transgender Inmates End Up in Women’s Prisons, Take Part in Shocking Assaults on Female Prisoners*, THE WESTERN JOURNAL (July 8, 2021).¹⁰

For example, after a transgender biological male “entered the girls locker rooms” in Riverside, California, he “spat on some girls and exposed his genitals” prior to fighting one of the females. Ari Blaff, *Students Blast California School Administrators for Turning Blind Eye after Assault by Trans-Identifying Male*, NATIONAL REVIEW (May 3, 2023).¹¹



⁸ <https://news.yahoo.com/judge-rules-loudoun-county-teen-131413442.html>

⁹ <https://www.foxnews.com/world/trans-woman-crawled-bed-assaulted-female-resident-womens-shelter-police>

¹⁰ <https://www.westernjournal.com/no-ones-listening-transgender-inmates-end-womens-prisons-take-part-shocking-assaults-female-prisoners/>.

¹¹ <https://www.nationalreview.com/news/students-blast-california-school-administrators-for-turning-blind-eye-after-assault-by-transgender-woman/>.

¹² *Id.*

These incidents, sadly, will continue to increase if the Current Proposed Rule is adopted. And the victims will be biological females who ought to be protected by Title IX.

B. Females athletes can only realize the wide-ranging benefits of athletic participation if “sex” means biological sex.

Athletic participation provides significant benefits to female athletes in physical health, mental health, academic achievement, body esteem, social skills, confidence, job performance, and numerous other areas. Studies have shown that participating in sports in high school “may have a positive influence on achievement in science, especially for young women[,]” and positively impacts academic performance generally. *See* Sandra L. Hanson & Rebecca S. Kraus, *Women, Sports, and Science: Do Female Athletes Have an Advantage?*, SOCIO. OF EDUC. 71, 93 (1998); Philip Veliz & Sohaila Shakib, *Gender, Academics, and Interscholastic Sports Participation at the School Level: A Gender-specific Analysis of the Relationship between Interscholastic Sports Participation and AP Enrollment* 47 SOCIOLOGICAL FOCUS (2014). “High school girls who play sports are less likely to be involved in an unintended pregnancy; more likely to get better grades in school and more likely to graduate than girls who do not play sports.” *Benefits—Why Sports Participation for Girls and Women*, WOMEN’S SPORTS FOUND. (Aug. 30, 2016).¹³

Even after the close of an athletic career, female athletes have higher labor force participation and earn higher wages. *See* Betsey Stevenson, *Beyond the Classroom: Using Title IX to Measure the Return to High School Sports*, NAT’L BUREAU OF ECON. RSCH. 1, 4 (2010).¹⁴

Athletic participation is also linked to improved mental health and decreased substance use. *See*

¹³ <https://www.womenssportsfoundation.org/advocacy/benefits-sports-participation-girls-women/>.

¹⁴ https://www.nber.org/system/files/working_papers/w15728/w15728.pdf

Kimberly H. McManama et al., *Psychological Resilience in Young Female Athletes*, NAT'L LIBR. OF MED. (Aug. 17, 2021).¹⁵ Moreover, athletic participation is linked to a decreased chance of breast cancer. *See Physical Activity in Adolescence and Young Adulthood and Breast Cancer Risk: A Quantitative Review*, NAT'L LIBR. OF MED. (Feb. 2004).¹⁶

Female athletes can only realize these benefits from athletic programs if schools facilitate fair athletic competition. Fairness suffers when biological men compete against biological women. *See Terence Jeffrey, Can Biden Not Tell a Boy From a Girl?*, THE DAILY SIGNAL (Apr. 20, 2023) (“But what if Elaine Thompson-Herah[, the second fastest woman in the world,] had been forced to run in the men’s 100-meter final at the Tokyo Olympics? She would have finished last.”)¹⁷; *see also Soule v. Conn. Ass’n of Sch., Inc.*, 57 F.4th 43, 49 (2d Cir. 2022) (listing all the titles biological men took from biological females).

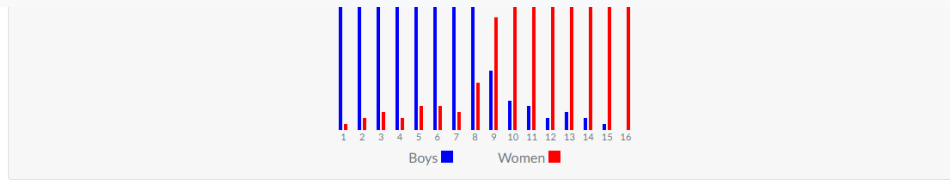
One website “pits the records of male high school athletes in 2016 against those of female Olympians. In the 100-meter, the 200-meter, the 400-meter and 800-meter races, the male high school players handily dominate the female Olympians, claiming all the top spots.” *Id.*

¹⁵ <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8392459/>.

¹⁶

https://journals.lww.com/eurjcancerprev/Abstract/2004/02000/Physical_activity_in_adolescence_and_young.2.aspx.

¹⁷ <https://www.dailysignal.com/2023/04/20/can-biden-not-tell-boy-from-girl/>



Track & Field

2016 High School Boys NBNO Finalists vs 2016 Olympic Women's Finalists

Events common to both competitions are included below. The NBNO is a highly competitive national track and field event where thousands of high schoolers compete. The hammer, discus & javelin competitions were not included because of significant differences in the weights of the objects. Hammer: boys 5.4kg/12lb vs womens 4kg/8.82lb; Discus: boys 1.6kg/3.5lb vs womens 1kg/2.2lb; Javelin: boys 800g/1.76lb vs women 600g/1.3lb

100 Meters		200 Meters	
Boys ■ vs Women ■		Boys ■ vs Women ■	
2016 High School Boys NBNO Finalists vs 2016 Olympic Women's Finalists		2016 High School Boys NBNO Finalists vs 2016 Olympic Women's Finalists	
1st	10.44	1st	20.73
2nd	10.45	2nd	20.78
3rd	10.46	3rd	20.94
4th	10.48	4th	20.95
5th	10.51	5th	21.07
6th	10.53	6th	21.10
7th	10.60	7th	21.34
8th	10.63	8th	21.37
9th	10.71	9th	21.78
10th	10.83	10th	21.88
11th	10.86	11th	22.15
12th	10.86	12th	22.21
13th	10.90	13th	22.31
14th	10.92	14th	22.34
15th	10.94	15th	22.65
16th	11.89	16th	22.69

None of the women's finals performances met the qualifying time to enter the boys' competition.

Biological advantages do more than just obliterate the competition and college scholarships; it means “countless girls [] will take a quick glance at the odds and decide not to try out for the team.” Shrier, *supra*. A sport that allows unfair results ceases to meaningfully be a sport at all.

Dividing teams based on gender identity will permanently sideline biological women, and prevent them from achieving Title IX’s intended benefits. One of the aims of Title IX was to protect the integrity of sports for women—a goal that is undermined if a competition designed to determine the best female athlete permits biological males who merely self-identify as female to participate. Unfair competition damages the sense of community and camaraderie between female competitors; leads to chaos in situations where transgender athletes soundly defeat their competition in record times; eliminates the joy female athletes derive from competitive sports; has

¹⁸ *Male High School Athletes vs Female Olympians, BOYS VS WOMEN*, <https://boysvswomen.com/#/> (last visited May 5, 2023).

a negative impact on women’s self-esteem and confidence; is unsafe; and decreases the opportunities for women’s athletic scholarships, job opportunities, and future earnings.

II. The Prior and Current Proposed Rules, Read Together, Would Undermine Constitutional Free Speech Protections.

The Prior Proposed Rule provides that a Title IX violation occurs when a student suffers gender identity discrimination. Read together with the Current Proposed Rule, we contemplate an unfathomable number of ways that schools may violate Title IX. What if female athletes refuse to call their biological male teammate a “she” when he exposes his fully intact male genitalia in the locker room? Should female athletes be forced to not only share intimate spaces with the opposite sex, but also be forced to call them by non-biologically correct pronouns?¹⁹ Using departmental regulations to chill speech by scaring students out of vocalizing their actual beliefs will potentially violate the First Amendment, meaning that the Current Proposed Rule is not in accordance with law.

III. The Current Proposed Rule’s Provision Addressing Gender Identity Misreads *Bostock* and Title IX, Such That It Is Arbitrary and Capricious.

A mandate that schools generally treat gender identity as determinative for the purpose of “sex” in athletics is not consistent with the statutory text of Title IX.

The text of Title IX is not ambiguous. It disallows recipients of federal funds like schools from discriminating on the basis of sex, and treats sex as limited to the binary categories of male and female, both objective and fixed. *See Neese v. Becerra*, No. 2:21-cv-163, 2022 WL 1265925,

¹⁹ It’s unclear how derogatory speech will be handled by recipients of federal funds. The Prior Proposed Rule says, “although the First Amendment may prohibit a recipient from restricting the rights of students to express opinions about one sex that may be considered derogatory, the recipient can affirm its own commitment to nondiscrimination based on sex and take steps to ensure that competing views are heard.” Prior Proposed Rule, at 41,415. What measures must the school take to “ensure that competing views are heard?” Does this involve telling students what the “right” view is on certain topics? This sort of indoctrination poses serious problems for the broader educational development of students, as well as the diversity of student viewpoints.

at *12 (N.D. Tex. Apr. 26, 2022) (“Title IX presumes sexual dimorphism in section after section, requiring equal treatment for each ‘sex.’”); *see also, e.g.*, 20 U.S.C. § 1681(a)(2) (“[T]his section shall not apply . . . in the case of an educational institution which has begun the process of changing from being an institution which admits only students of *one sex* to being an institution which admits students of *both sexes*[.]”) (emphasis added); *id.* (referring once again to “one sex” and “the other sex”); *see also* 20 U.S.C. § 1681(a)(8) (“[T]his section shall not preclude father-son or mother-daughter activities at an educational institution, but if such activities are provided for students of *one sex*, opportunities for reasonably comparable activities shall be provided for students of *the other sex*[.]”) (emphasis added).

From the beginning, Title IX regulations confirmed this textual reading, establishing a binary, objective, and immutable meaning of sex within the statute’s terms. *See, e.g.*, 34 C.F.R. § 106.34(a)(3) (“Classes or portions of classes in elementary and secondary schools that deal primarily with human sexuality may be conducted in separate sessions for *boys and girls*.”) (emphasis added); 34 C.F.R. § 106.33 (“A recipient may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of *one sex* shall be comparable to such facilities provided for students of the *other sex*.”) (emphasis added); 34 C.F.R. § 106.54(b) (“A recipient shall not make or enforce any policy or practice which, on the basis of sex . . . [r]esults in the payment of wages to employees of *one sex* at a rate less than that paid to employees of *the opposite sex* for equal work . . .”) (emphasis added); *cf.* 34 C.F.R. § 106.37(c)(1) (“To the extent that a recipient awards athletic scholarships or grants-in-aid, it must provide reasonable opportunities for such awards for members of *each sex* in proportion to the number of students of *each sex* participating in interscholastic or intercollegiate athletics.”) (emphasis added).

Non-biological gender identity is not found in the text of Title IX, nor is it consistent with decades of interpretation of that statute. Indeed, in its 2020 regulations on the topic of sexual harassment in schools, the Department once again properly emphasized this point: “Title IX and its implementing regulations include provisions that presuppose sex as a binary classification, and provisions in the Department’s current regulations, which the Department did not propose to revise in this rulemaking, reflect this presupposition.” 2020 Rule, at 30,178.

A. Even after *Bostock*, the Department of Education recognized that Title IX’s treatment of sex differed from Title VII.

Even after *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), where the Supreme Court held that sex discrimination prohibitions in Title VII provided protection against employment discrimination on the basis of transgender status, the Department noted important distinctions that limited *Bostock*’s application to Title IX. Following *Bostock*, the Department of Education’s Office for Civil Rights (“OCR”) queried its Office of the General Counsel, asking for answers regarding the impact of the Supreme Court’s analysis. The Office of the General Counsel responded with a memorandum dated January 8, 2021. *See* U.S. DEP’T OF EDUC., OFFICE OF THE GENERAL COUNSEL, MEMORANDUM FOR KIMBERLY M. RICHEY, ACTING ASSISTANT SECRETARY OF THE OFFICE FOR CIVIL RIGHTS RE: *BOSTOCK V. CLAYTON CTY.*, 140 S. CT. 1731 (2020) (2021).²⁰

In the context of Title IX, the document noted that Title IX, unlike Title VII often *requires* consideration of a student’s biological sex such as determining equal athletic opportunities. Thus, it would be inappropriate to suggest that a recipient of federal funds such as a public school, could ever affirmatively violate Title IX when using its discretion to merely *consider* biological sex.

²⁰ <https://www2.ed.gov/about/offices/list/ocr/correspondence/other/ogc-memorandum-01082021.pdf>. The memorandum was later withdrawn but remains available online in OCR’s Correspondence portal. Its analysis is attentive to and consistent with the text and purpose of Title IX, and therefore persuasive on the issue of Title IX and athletic requirements after *Bostock*.

Question 3: How should OCR view allegations that a recipient targets individuals for discriminatory treatment on the basis of a person’s transgender status or homosexuality?

Answer: Although *Bostock* expressly does not decide issues arising under Title IX or other differently drafted laws, the logic of *Bostock* may, in some cases, be useful in guiding OCR’s understanding as to whether the alleged discrimination on the basis of a person’s transgender status or homosexuality necessarily takes into account the person’s biological sex and, thus, constitutes discrimination on the basis of sex. Depending on the facts, complaints involving discrimination on the basis of transgender status or homosexuality might fall within the scope of Title IX’s non-discrimination mandate because they allege sex discrimination. *See Bostock*, 140 S. Ct. at 1741, 1737 (“Sex plays a necessary and undisguisable role in the decision” to fire an employee because of the employee’s homosexual or transgender status).

However, we emphasize that Title IX and its implementing regulations, unlike Title VII, may *require* consideration of a person’s biological sex, male or female. 20 U.S.C. §§ 1681(a), 1686; 34 CFR §§ 106.32(b), 106.33, 106.34, 106.40, 106.41, 106.43, 106.52, 106.59, 106.61. Consequently, we believe a recipient generally would not violate Title IX by, for example, recording a student’s biological sex in school records, or referring to a student using sex-based pronouns that correspond to the student’s biological sex, *or refusing to permit a student to participate in a program or activity lawfully provided for members of the opposite sex, regardless of transgender status or homosexuality.*

Id. at 4 (emphasis in original) (second emphasis added).

Notably, the Department of Education’s Office of the General Counsel also pointed out that contrary opinions in the Fourth and Eleventh Circuits—including *Grimm v. Gloucester County School Board*, 972 F.3d 586 (4th Cir. 2020)—failed to address the language articulated in the preamble to the 2020 Title IX rule.

B. Sweeping gender identity into Title IX would hinder its statutory purpose.

Title IX was meant to prevent sex discrimination and protect educational opportunities. Interpreting “sex” in Title IX to encompass each and every gender identity would hinder that purpose, and potentially force schools to establish numerous athletics teams for non-binary gender identity. When schools created additional sports teams to comply with Title IX, they incurred

significant costs. Tara García Mathewson, *Colleges Spend Millions on Title IX Compliance*, HIGHER ED DIVE (Mar. 30, 2016).²¹ However, including women’s athletic programs to achieve Title IX compliance did not, and was not meant to bring, financial ruin. Instead, Title IX struck a delicate balance between reasonable compliance costs with the significant benefit of extending the benefits of athletic participation to women.

The Current Proposed Rule that conflates sex with gender identity would require schools to create new athletic teams for each new gender identity represented in its student body. In addition to the costly new teams, colleges would need to hire bureaucrats to ensure Title IX compliance in those programs. *See id.* Schools are a business and must balance the costs of programs in proportion to their benefits. Consequently, schools may forego participation in athletics altogether to avoid the oppressive compliance costs under the Current Proposed Rule. The decision would eliminate all benefits of athletic participation for both men and women and, in one rule, wipe away women’s fifty-year fight for equality in universities.

The Current Proposed Rule will also mean that gender fluid students may often compete as both male and female, and potentially be counted as athletes on both athletic teams for Title IX purposes.²² Indeed, some biological males may identify as gender fluid to double dip: identify as both male and female to maximize their chances at athletic scholarships and prizes. Because they

²¹ <https://www.highereddive.com/news/colleges-spend-millions-on-title-ix-compliance/416525/>

²² It is far from clear how the *Bostock* majority would have handled a plaintiff who identified as gender non-binary, such as bi-gender or pangender. In such a fact pattern, the case’s hypothetical employer who treats two employees who identify as female differently—one because the employee was born male—crumbles quickly, so long as the employer treats all bi-gender or pangender employees equally, regardless of biological sex. *Accord Neese*, 2022 WL 1265925, at *14 (“The Court finds Plaintiffs plausibly plead Section 1557 and *Bostock* do not prohibit healthcare providers from discriminating on the basis of [sexual orientation or gender identity] — ‘as long as they would have acted in the exact same manner if the patient had been a member of the opposite biological sex.’”).

are gender fluid, these students may not even take any hormones. *See GenderGP, Hormone Use for Non-Binary People*, GenderGP (Jul. 12, 2021).²³ Thus, gender fluid biological males would compete against their female peers without testosterone suppression, exacerbating the already unequal competition described above between biological males on estrogen and biological females. *See also Genderfluid*, NONBINARY WIKI.²⁴ In extreme cases, students who experience fluidity in the middle of athletic participation would create intra-competition Title IX violations, as their gender change could occur in the middle of a game, race, or other competition.

In the same vein, a biological male who exposes himself to his biologically female classmates in the locker room, is innocent of indecent exposure only if he identifies as female at the time of the exposure. For gender fluid students, the Current Proposed Rule places schools in a precarious position: question students' gender identity at the face of certain, but predictable, Title IX liability, or defer to the students' gender identities, but not know when they would violate the Current Proposed Rule, and thus potentially face liability.

C. Both the Prior and Current Proposed Rules violate the Major Questions Doctrine.

The Department's broadening of the scope of Title IX runs afoul of the major questions doctrine. If Congress wanted the Department to interpret the word "sex" to prevent schools from assigning students to athletic teams based on sex, it would have said as much. The major questions doctrine establishes that "administrative agencies must be able to point to clear congressional authorization when they claim the power to make decisions of vast economic and political significance." *West Virginia v. EPA*, 142 S. Ct. 2587, 2616 (2022) (Gorsuch, J., concurring) (internal citation and quotations omitted). The Court explicitly rejected Justice Kagan's dissenting

²³ <https://www.gendergp.com/non-binary-hormone-use/>

²⁴ <https://nonbinary.miraheze.org/wiki/Genderfluid> (last accessed May 13, 2023).

view, *id.* at 2628, that “[a] key reason Congress makes broad delegations . . . is so an agency can respond, appropriately and commensurately, to new and big problems.” *Id.* at 2609.

A judicial rule that Congress must speak clearly on “major questions” ensures a strict separation of powers between the Executive and Legislative branches. *Id.* at 2617. Most recently, in *West Virginia v. EPA*, the Supreme Court emphasized, “[a]gencies have only those powers given to them by Congress, and enabling legislation is generally not an open book to which the agency may add pages and change the plot line.” *Id.* at 2609 (majority opinion) (internal quotation and citation omitted). *West Virginia v. EPA* would invalidate both the Prior Proposed Rule and the Current Proposed Rule, if adopted in present forms.

Our democracy depends on vesting power with the people, in the form of elected representatives, rather than with bureaucracies. *See West Virginia*, 142 S. Ct. at 2617 (Gorsuch, J., concurring) (“It is vital because the framers believed that a republic—a thing of the people—would be more likely to enact just laws than a regime administered by a ruling class of largely unaccountable ‘ministers.’”); *id.* at 2618 (“Powerful special interests, which are sometimes ‘uniquely’ able to influence the agendas of administrative agencies, would flourish while others would be left to ever-shifting winds.”).

Congress authorized the Department to carry out provisions of the Education Amendments of 1972. Title IX is within these Amendments. The Department is not authorized to create sweeping new interpretations of terms in derogation of Congress’s intent, particularly when such interpretations have vast economic and political impact. If Congress intended for sex to mean gender identity, it wouldn’t have “hid[den] elephants in mouseholes.” *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 468 (2001). *Compare* Proposed Rule at 41,571 (“Discrimination on the basis of sex includes discrimination on the basis of sex stereotypes, sex characteristics, pregnancy or

related conditions, sexual orientation, and gender identity.”) with *Wilcox v. Lyons*, 970 F.3d 452, 459 (4th Cir. 2020) (“[S]ex, like race and national origin, is an *immutable characteristic* determined solely by the accident of birth, therefore the imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate the basic concept of our system[.]”) (emphasis added) (internal quotations and citation omitted).

Justice Gorsuch dives deeper in his *West Virginia v. EPA* concurrence.²⁵ Justice Gorsuch elucidates a few ways the Supreme Court has historically flagged major questions doctrine issues. Importantly, “th[e] Court has indicated that the doctrine applies when an agency claims the power to resolve a matter of great ‘political significance,’ or end an ‘earnest and profound debate across the country[.]’” *Id.* at 2620 (quoting *NFIB v. OSHA*, 142 S. Ct. 661, 665 (2022); *Gonzales v. Oregon*, 546 U.S. 243, 267 (2006)). Also, if the content of bills rejected by Congress are now the content of the agency’s regulation, that can be a telling sign. *Id.* at 2620–21.

To address the “history and breadth of the authority that [the agency] has asserted,” *id.* at 2608, nonbiological, non-binary gender identity is neither found in the text of Title IX nor consistent with decades of interpretation of that statute. See *Newport News Shipbuilding and Dry Dock Co. v. EEOC*, 462 U.S. 669, 684 (1983) (“[O]nly women can become pregnant[.]”); *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2346 (2022) (dissenting opinion of JJ. Sotomayor, Kagan, and Breyer) (“Withdrawing a *woman’s* right to choose whether to continue a pregnancy does not mean that no choice is being made. It means that a majority of today’s Court has wrenched this choice from *women* and given it to the States.”) (emphasis added); *Doe v.*

²⁵ “[O]ur precedent teaches that there are ‘extraordinary cases’ that call for a different approach—cases in which the ‘history and the breadth of the authority that [the agency] has asserted,’ and the ‘economic and political significance’ of that assertion provide a ‘reason to hesitate before concluding that Congress’ meant to confer such authority.” *West Virginia v. EPA*, 142 S. Ct. 2587, 2608 (2022) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159–60 (2000)).

Hamilton Cty. Bd. of Educ., 329 F. Supp. 3d 543, 580 (E.D. Tenn. 2018) (Title IX is designed to protect against “insidious forms of discriminatory harassment that occurs on the basis of some *immutable characteristic*, such as biological sex”).

From the beginning, Title IX regulations have confirmed the textual reading, establishing a binary, objective, and immutable meaning of sex within the statute’s terms. Furthermore, Title IX’s Proposed Rule would end an earnest and profound policy debate across the country about the meaning of “sex” discrimination. *Bostock* held that Title VII prohibits the firing of a biological man who identifies as a woman for such identification. It is too much, however, to suggest that sex discrimination includes all forms of gender identity discrimination, and that such interpretation carries over to Title IX, when the Court expressly disclaimed any such holding. *See Tennessee v. Dep’t of Educ.*, 2022 WL 2791450, *1 (“The Court was careful to narrow the scope of its holding.”).

The Current Proposed Rule also follows in the wake of failed legislation; Congress unsuccessfully attempted to pass the Equality Act, which “prohibits discrimination based on sex, sexual orientation, and gender identity in areas including . . . education[.]” Equality Act, H.R. Res. 5, 117th Cong. (as passed by House, Feb. 25, 2021); *see also West Virginia*, 142 S. Ct. at 2610 (“And the Agency’s discovery allowed it to adopt a regulatory program that Congress had conspicuously and repeatedly declined to enact itself.”); *id.* at 2620–21 (“[T]his Court has found it telling when Congress has considered and rejected bills authorizing something akin to the agency’s proposed course of action. . . . That [] may be a sign that an agency is attempting to work [a]round the legislative process to resolve for itself a question of great political significance.”) (internal quotations and citations omitted). Likewise, the Department skirts democratic accountability if it chooses to adopt this unpopular proposed rule. “More than 6 in 10 adults in the

[Washington Post-KFF poll] said trans girls and women should not be allowed to compete in girls’ and women’s sports, including professional, college, high school and youth levels.” Laura Meckler & Scott Clement, *Most Americans Support Anti-Trans Policies Favored by GOP, Poll Shows*, THE WASHINGTON POST (May 5, 2023).²⁶ This is not an opinion of a small majority, but a nationwide outcry. Only Congress can be responsive and accountable to the American public, not the Department of Education.

D. The Department did not adhere to basic contract principles under Spending Clause jurisprudence, thus violating the *Pennhurst* doctrine.

All schools that receive federal funds must adhere to Title IX or risk losing funding. Accordingly, “Congress has broad power under the Spending Clause of the Constitution to set the terms on which it disburses federal funds. ‘[L]egislation enacted pursuant to the spending power is much in the nature of a *contract*: in return for federal funds, [the recipients] agree to comply with federally imposed conditions.’” *Cummings v. Premier Rehab Keller, PLLC*, 142 S. Ct. 1562, 1568 (2022) (emphasis added) (quoting *Pennhurst State Sch. and Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)). “Just as a valid contract requires offer and acceptance of its terms, the legitimacy of Congress’s power to legislate under the spending power rests on whether the recipient voluntarily and knowingly accepts the terms of the ‘contract.’” *Barnes v. Gorman*, 536 U.S. 181, 186 (2002) (internal brackets, ellipses, and quotation marks omitted).

But the Current Proposed Rule, if adopted as is, would breach this contractual arrangement. In the same way that forcing schools to pay out emotional damages is an unpredictable result of a contractual bargain, as would be the liability for not allowing biological males to compete alongside women. *See Cummings*, 142 S. Ct. at 1570–71 (“[T]o decide whether emotional distress

²⁶ <https://www.msn.com/en-us/news/us/most-americans-support-anti-trans-policies-favored-by-gop-poll-shows/ar-AA1aLNAH>

damages are available under the Spending Clause statutes . . . we [] ask . . . [w]ould a prospective funding recipient, at the time it engaged in the process of deciding whether [to] accept federal dollars, have been aware that it would face such liability?”) (internal quotation and citation omitted).

Most importantly, when schools accepted federal funds under Title IX, they could never have predicted that (1) they would be forced to permit biological males onto women’s athletic teams; (2) forced to compel their own students to compete against biological male athletes from other schools; and (3) potentially establish innumerable new athletic teams for other gender identities besides male and female. That no school district could predict the terms of this contract makes the Current Proposed Rule invalid *ab initio*. See *Barnes*, 536 U.S. at 188 (“Not only is it doubtful that funding recipients would have agreed to exposure to such unorthodox and indeterminate liability; it is doubtful whether they would even have *accepted the funding* if punitive damages liability was a required condition.”).

It is one thing to say that schools must allow biological females to use the men’s restroom. See *Grimm v. Gloucester Cty. Sch. Bd.*, 972 F.3d 586, 619 n. 18 (4th Cir. 2020) (“[T]he Board knew or should have known that the separate facilities regulation did not override the broader statutory protection against discrimination.”). It is quite another to say that a school is compelled to assign students to athletics teams based solely on gender identity. No school could have predicted that its contractual bargain with the federal government included such a drastic clause.

CONCLUSION

The authors of Title IX would be shocked to learn that the pathbreaking statute was actually a trojan horse for biological men to enter women’s sports, win numerous trophies, shower with them in their locker rooms, and walk back the successes that women have had since 1972. It is for these reasons that both the Current Proposed Rule and the Prior Proposed Rule should be abandoned in full.

Respectfully submitted, this 15th of May, 2023.

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