IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
FORT LAUDERDALE DIVISION

Case No. 21-61344-CIV-ALTMAN/Hunt

D.N., by her next friends, **JESSICA N.**, mother, and **GARY N.**, father,

Plaintiff,

v.

FLORIDA STATE BOARD OF EDUCATION; and **COMMISSIONER MANNY DIAZ, JR.**, in his official capacity as Commissioner of Education,

Defendants.

AMICUS BRIEF BY SELINA SOULE IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

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INTRODUCTION

In March 2022, in an Atlanta swimming pool, Lia Thomas—a biological male who identifies as female—won the women's 500-yard freestyle at the NCAA Swimming and Diving Championships. Fifteen women were bumped down the results list that day. And one woman didn't get to compete in the finals at all. The NCAA failed to protect their hard work—or a fair competition.

That event encapsulates an ongoing national debate. On one side, some policymakers have allowed males who identify as female to compete in women's sports. That has led to women losing championships, medals, and opportunities to compete in the sports they love. On the other side, Florida lawmakers—and those in 18 other states—have passed a Fairness in Women's Sports Act to ensure women can fairly compete for scholarships, recognition, and the chance to be champions. The Act does this by charting a path the law has pursued for decades: separating athletic teams based on sex. This path is legal and logical.

But Plaintiff D.N. seeks to invalidate the Sports Act and redefine women's sports in Florida to include men who identify as women. D.N. agrees that Florida can exclude men from women's sports—if they identify as males. But men who identify as female get to choose which athletic team to join. That's unlawful discrimination. D.N.'s theory would in turn allow males to compete on women's teams; require males who identify as men be excluded from these teams; and force females to compete against bigger, faster, and stronger men anytime they identify as female. It would also upend many state and federal classifications based on sex in bathrooms, locker rooms, dormitories, single-sex schools, and elsewhere. And it cannot justify D.N.'s requested relief because the Act properly applies in most cases, excluding males who identify as men from women's sports.

In the end, the Sports Act makes a common-sense judgment: biological differences between men and women matter in athletics. That judgment is allowed by Title IX and the Fourteenth Amendment. Accordingly, D.N.'s claims attacking this distinction should be dismissed.

ARGUMENT

The Complaint should be dismissed because (I) D.N. fails to state plausible claims for facial relief; (II) the Act does not violate Equal Protection; (III) the Act does not violate Title IX; and (IV) D.N.'s requested relief would violate Title IX.[1]

I. D.N. fails to state any plausible facial challenge.

D.N. asserts that the Act is facially invalid because it is discriminatory to differentiate based solely on biological sex, Compl. ¶¶ 62–64, 69–70, and the Act "target[s] only transgender girls." *id.* ¶¶ 55, 63, 69, 72. Not so.

"[A] plaintiff can only succeed in a facial challenge by establishing that no set of circumstances exists under which the Act would be valid[.]" *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008) (cleaned up). In most applications, the Act prohibits males who identify as male from competing on women's teams, and D.N. *agrees* this distinction is generally valid. *See* Compl. ¶¶ 21, 30, 52 (noting differences between D.N., who has taken estrogen, and other males who progress through puberty naturally). This concedes that the Act has a "plainly legitimate sweep," which precludes facial relief under any standard. *Grange*, 552 U.S. at 449.

In fact, under D.N.'s own allegations, the Act also properly applies to men who identify as women and do not suppress their endogenous testosterone. According to the Complaint, D.N. *differs* from biological males because D.N. "is receiving estrogen," and "will develop as a girl." Compl. ¶¶ 21, 30, 52. But the Act applies to all males—including those who identify as women and do not suppress their testosterone. So D.N. cannot prove these applications are invalid when D.N. admits that testosterone levels materially differentiate D.N. from other males.

Nor can D.N. show that the Act "reflects invidious . . . discrimination." *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 274 (1979). At most, D.N. points to officials' statements that "men are stronger" or "we're going to go based off biology." Compl.

[1] For the reasons discussed in the State Board and Commissioner's Motion to Dismiss, D.N.'s Due Process claims also fail and should be dismissed.

¶¶ 40–41. But these merely reflect a desire to separate sports teams by sex, which has long been allowed. To infer animus requires "judicial psychoanalysis of a drafter's heart of hearts." *McCreary Cnty., Ky. v. ACLU of Ky.*, 545 U.S. 844, 862 (2005). And "'[d]iscriminatory purpose' . . . implies more than intent as volition or intent as awareness of consequences." *Feeney*, 442 U.S. at 279 (cleaned up).

II. The Act does not violate equal protection.

D.N. says that the Act violates equal protection because it "discriminates on the basis of sex and transgender status." Compl. ¶ 4. But it does not: (A) the Act makes distinctions based on biological sex, not gender identity; (B) these sex-based distinctions are permissible because they reflect "'[i]nherent differences' between men and women." *United States v. Virginia,* 518 U.S. 515, 533 (1996); (C) gender identity is not a suspect class; and (D) D.N.'s theory would eviscerate all sex-based classifications.

A. The Act draws lines based on biology, not gender identity.

The Complaint alleges that "[t]he only individuals impacted by the law . . . are members of the transgender community," Compl. ¶ 72, and therefore the Sports Act discriminates based on transgender status. That's wrong.

To evaluate equal-protection claims, courts "begin with the statutory classification itself." *Califano v. Boles*, 443 U.S. 282, 293–94 (1979). And here, the Act demarcates participation in women's sports based solely on the "biological sex at birth of team members." Fla. Stat. § 1006.205(3)(a). Under the Act, all males—those who identify as male, female, nonbinary, fluid, or anything else—cannot compete in women's sports. Teams for males "may be open to students of the female sex," but teams for women "may not be open to . . . the male sex." *Id.* § 1006.205(3)(b)–(c).

Notably, the Act is silent on gender identity. Nowhere does it distinguish between "cisgender" and "transgender" athletes. Compl. ¶ 70. The Act classifies based on based on biology, not identity. Full stop. So biological females may compete on women's sports teams; biological males may not. All persons of the same sex are treated the same, no matter their gender identity.

"[A] policy can lawfully classify on the basis of biological sex without unlawfully discriminating on the basis of transgender status." *Adams ex rel. Kasper v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 809 (11th Cir. 2022). Nor does the fact that the Sports Act may *affect* some transgender athletes mean that the law classifies based on gender identity. Many laws "affect certain groups unevenly, even though the law itself treats them no differently from all other members of the class described[.]" *Feeney*, 442 U.S. at 271–72. A law that favors veterans isn't gender-based even if veterans are 98% male. *Id.* at 270, 274, 281. Nor does "[t]he regulation of a medical procedure" that affects only one sex—like abortion—"trigger heightened constitutional scrutiny." *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2245–46 (2022) (cleaned up). So if the Act only affects half the population (males), there is a stark "lack of identity" between the Act's sex-based classification and transgender persons. *Adams*, 57 F.4th at 809.

"At most, [D.N.'s] challenge amounts to a claim that the [Sports Act] has a disparate impact on the transgender students." *Adams*, 57 F.4th at 810. But any disparate impact is "plausibly explained on a neutral ground." *Feeney*, 442 U.S. at 275. Sex-based distinctions almost always overlap or contradict a person's gender identity and are therefore "essentially an unavoidable consequence of a legislative policy that has in itself always been deemed to be legitimate." *Id.* at 279 n.25. That does not suggest Florida has targeted transgender individuals. Any disproportionate impact on transgender persons of *only* one sex is still based on biology. *See infra* § III.B. The Sports Act prevents all males from competing in women's sports, not just transgender athletes. "Too many men are affected . . . to permit the inference that the statute is but a pretext" for disfavoring transgender persons. *Feeney*, 442 U.S. at 275; *see also Geduldig v. Aiello*, 417 U.S. 484, 496 n.20 (1974) ("nonpregnant" category "includes members of both sexes").

A law violates the Equal Protection Clause if it treats similarly situated persons differently because of an invidious discriminatory purpose "tied to a constitutionally protected interest." *Sweet v. Sec'y, Dep't of Corr.*, 467 F.3d 1311, 1319 (11th Cir. 2006). Without passing this threshold test, "no Equal Protection

violation exists." *S&M Brands, Inc. v. Georgia ex rel. Carr*, 925 F.3d 1198, 1203 (11th Cir. 2019). For a facially neutral law like the Sports Act, courts conduct "a twofold inquiry": (1) asking "whether the statutory classification is indeed neutral in the sense that" it is not "overtly or covertly designed to prefer" a certain class; and (2) asking "whether the adverse effect reflects invidious . . . discrimination." *Feeney*, 442 U.S. at 273–74. "[U]neven effects upon particular groups within a class are ordinarily of no constitutional concern" unless there is "a reason to infer antipathy." *Id.* at 272.

As already explained, statements by the governor or legislators expressing a desire to exclude biological males from girls' sports team are not enough. *See supra* § I. Nothing about the Sports Act "overtly or covertly" disfavors transgender athletes vis-à-vis cisgender athletes. *Feeney*, 442 U.S. at 274.

B. The Act's biological distinctions are valid because sex matters in sports.

The Equal Protection Clause does not remove the State's power to classify, but instead "measure[s] the basic validity of the legislative classification." *Feeney*, 442 U.S. at 271–72. Most classifications "will be sustained" if "rationally related to a legitimate state interest." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985). Only classifications that uniquely disadvantage a suspect class trigger higher scrutiny. *Morrissey v. United States*, 871 F.3d 1260, 1268 (11th Cir. 2017).

"Legislative classifications based on" sex "call for a heightened standard of review." *Cleburne*, 473 U.S. at 440. But sex is not "a proscribed classification." *Virginia*, 518 U.S. at 533. Equal Protection just requires that a sex-based "classification serves important governmental objectives" and that the "means employed are substantially related to the achievement of those objectives." *Tuan Anh Nguyen v. INS*, 533 U.S. 53, 60 (2001) (cleaned up). "[T]he Equal Protection Clause does not demand a perfect fit between means and ends when it comes to sex." *Adams*, 57 F.4th at 801. The Sports Act meets this standard.

To start, the Act promotes equal athletic opportunities for female athletes. Using a sex-based classification to promote this goal is permissible "to advance full

development of the talent and capacities of" women and girls in Florida. *Virginia*, 518 U.S. at 533. In addition, by barring males from competing in women's sports, the Sports Act follows Title IX's footsteps, which "paved the way for significant increases in athletic participation for girls and women at all levels of education." *Adams*, 57 F.4th at 818 (Lagoa, J., specially concurring) (quoting Deborah Brake, *The Struggle for Sex Equality in Sport and the Theory Behind Title IX*, 34 U. Mich. J.L. Reform 13, 15 (2000)). "There is no question that [these objectives are] a legitimate and important governmental interest." *Clark ex rel. Clark v. Ariz. Interscholastic Ass'n* (*Clark I*), 695 F.2d 1126, 1131 (9th Cir. 1982) (rejecting equal-protection challenge to sex-distinct sports for these reasons).

The Sports Act tightly fits those interests. *See B.P.J. v. W. Va. State Bd. of Educ.*, No. 2:21-cv-00316, 2023 WL 111875, at *8 (S.D.W. Va. Jan. 5, 2023) ("The state is permitted to legislate sports rules on [the] basis [of sex] because sex, and the physical characteristics that flow from it, are substantially related to athletic performance and fairness in sports."). The Supreme Court "has consistently upheld statutes where the gender classification is not invidious, but rather realistically reflects the fact that the sexes are not similarly situated in certain circumstances." *Michael M. v. Superior Ct. of Sonoma Cnty.*, 450 U.S. 464, 469 (1981). Laws may distinguish men for having sex with underage women because of pregnancy risks. *Id.* at 471–73. And laws can impose "a different set of rules" to prove biological parenthood because of "the unique relationship of the mother to the event of birth." *Nguyen*, 533 U.S. at 63–64. In fact, "biological sex also is the driving force behind the Supreme Court's sex-discrimination jurisprudence." *Adams*, 57 F.4th at 803 n.6.

With sports, "[t]he difference between men and women . . . is a real one." *Nguyen*, 533 U.S. at 73. "[D]ue to average physiological differences, males would displace females to a substantial extent if they were allowed to compete" for the same teams. *Clark I*, 695 F.2d at 1131. Indeed, without distinct teams, "the great bulk of the females would quickly be eliminated from participation and denied any meaningful opportunity for athletic involvement." *Cape v. Tenn. Secondary Sch. Athletic Ass'n*, 563 F.2d 793, 795 (6th Cir. 1977).

To rebut this, D.N. must argue that *any distinction* based on sex is inherently a stereotype meant to harm those who identify as transgender. But biological sex "is not a stereotype." *Adams*, 57 F.4th at 809; *see also id.* at 819 (Lagoa, J., specially concurring) ("[I]t is neither myth nor outdated stereotype that there are inherent differences between those born male and those born female and that those born male, including transgender women and girls, have physiological advantages in many sports."). The differences between the sexes are "enduring." *Virginia*, 518 U.S. at 533 (cleaned up). As D.N. acknowledges, even organizations like the Olympics and the NCAA do not allow all biological males who identify as females to compete on women's sports team. Compl. ¶ 30. This concedes that biology matters.

In other words, the sexes are not similarly situated in sports because of males' physiological advantages. And "[t]here is no question that the Supreme Court allows for these average real differences between the sexes to be recognized." *Clark I*, 695 F.2d at 1131. Florida's Act reflects these differences to "maintain fairness" and protect "opportunities for female athletes . . . to obtain recognition and accolades, college scholarships and the numerous other long-term benefits" that wouldn't exist if they had to compete with men. Fla. Stat. § 1006.205(2).

In fact, D.N. even assumes that Florida can properly separate boys' and girls' teams. The Complaint asserts that D.N. is "similarly situated" to female athletes because D.N. identifies as a girl and has undergone treatment to suppress endogenous testosterone. Compl. ¶ 30; *see B.P.J.*, 2023 WL 111875, at *6–7 (sports act substantially furthered state's interest given plaintiff's concession that sex-separated sports are generally permissible). D.N. seems to support excluding biological males who identify as male from women's teams. Yet D.N.'s theory would have the effect of *requiring* Florida to discriminate based on gender identity, favoring biological males who identify as women over biological males who do not—solely because of how they identify.

Identifying as female cannot make D.N. similarly situated to female athletes. Nor can taking drugs to suppress endogenous testosterone. Anyone can take such drugs—including males who identify as men. When it comes to female athletics,

biology supplies a better classification than identity or pharmacology. If a state requires a male who identifies as male and has naturally or artificially low testosterone (or athletic ability) to play male sports, then the Act is valid.

The key is that Florida does not have to use a classification "capable of achieving its ultimate objective in every instance." *Nguyen*, 533 U.S. at 63, 70; *Clark I*, 695 F.2d at 1132 (state did not have to use alternative systems like capping number of boys on girls' team). Alternatives aside, the Sports Act protects "females who are athletically superior to many males and excludes males who are less well-endowed athletically than most females." *Petrie v. Ill. High Sch. Ass'n*, 394 N.E.2d 855, 862 (Ill. App. Ct. 1979) (excluding biological males from girls' volleyball team was "the only feasible classification to promote" the state's interests).

And no one disputes that Florida can exclude males who identify as male from girls' sports teams, even when they are competitively "similarly situated to . . . female[s]." Compl. ¶ 30. This concession means that Florida's Act substantially furthers its goals of protecting females. After all, if males displace females "even to the extent of one player . . . the goal of equal participation by females in interscholastic athletics is set back, not advanced." *Clark ex rel. Clark v. Ariz. Interscholastic Ass'n* (*Clark II*), 886 F.2d 1191, 1193 (9th Cir. 1989).

Requiring proof that the Act promotes the State's interests in every instance would require a "perfect fit" in every case and transform intermediate scrutiny into strict scrutiny. *Adams*, 57 F.4th at 801 (a "perfect fit" is not required). "Although 'every reform that benefits some more than others may be criticized for what it fails to accomplish,' that reality does not invalidate the measure under the Equal Protection Clause." *Jones v. Governor of Fla.*, 975 F.3d 1016, 1035 (11th Cir. 2020) (citation omitted). Courts do not apply intermediate scrutiny that way. *See Ward v. Rock Against Racism*, 491 U.S. 781, 801 (1989) ("[T]he validity of the [Act] depends on the relation it bears to the overall problem the government seeks to correct, not on the extent to which it furthers the government's interests in [one] case.").

D.N.'s equal-protection claim should end here. The Supreme Court has recognized states' legitimate interest in sex-based classifications based on biological

differences. *Nguyen*, 533 U.S. at 64, 73. So D.N. cannot plausibly allege that Florida's method for promoting fairness for biological females is unconstitutional.

C. The Act's valid focus on biology cannot be replaced with gender identity, which is not a suspect class.

Gender identity is not a suspect class in any event. The Supreme Court and the Eleventh Circuit have never said otherwise. Quite the opposite, the latter recently expressed "grave 'doubt' that transgender persons constitute a quasi-suspect class." *Adams*, 57 F.4th at 803 n.5. And the Supreme Court has instructed courts to be "very reluctant" to create new suspect categories. *Cleburne*, 473 U.S. at 441. This Court shouldn't do this here either, for two reasons.

First, transgender persons aren't a "discrete and insular" group defined by immutable characteristics. *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 313 (1976). Unlike race, sex, and national origin—which are fixed and "determined solely by the accident of birth," *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973)—the term transgender is more like a catchall, describing anyone whose "gender identity does not align with [that person's] sex." Compl. ¶ 18. For some, "[g]ender dysphoria may begin in childhood." *Id.* ¶ 19. For others, "it does not manifest itself until puberty or adulthood." *Id.* Some may choose to socially transition or take drugs. *Id.* ¶ 20–21. The very concept of "gender fluidity" cannot be reconciled with finding gender identity to be a discrete, quasi-suspect class. *Adams*, 57 F.4th at 804 n.6.[2]

Second, "the distinctive legislative response, both national and state," to transgender persons "belies a continuing antipathy or prejudice and a corresponding need for more intrusive oversight by the judiciary." *Cleburne*, 473 U.S. at 443. Congress recently considered a bill that would make gender identity a protected status under federal laws. Equality Act, H.R. 5, 117th Cong. § 2 (2021). And 22 states and nearly 400 municipalities make gender-identity discrimination

[2] LGBTQ Nation, An (Incomplete) List of Gender Pronouns (Aug. 16, 2022), https://www.lgbtqnation.com/2022/08/incomplete-list-gender-pronouns.

illegal.[3] This "legislative response . . . negates any claim that [transgender persons] are politically powerless." *Cleburne*, 473 U.S. at 445. So even if the Sports Act "fail[ed] to acknowledge the complexity of biology, as it relates to sex and gender identity," Compl. ¶ 41, which it does not, that's "a legislative" choice, "not a judicial responsibility." *Feeney*, 442 U.S. at 272.

D. D.N.'s theory would eviscerate biology-based classifications that promote privacy, safety, and other important interests.

D.N.'s theory doesn't just contradict precedent; it would undermine sex-based classifications everywhere. *Adams*, 57 F.4th at 817 (equating "sex" and "gender identity" in the bathroom context "call[s] into question the validity of sex-separated sports teams"). Start with the sex-specific privacy interests that justify separate bathrooms, showers, and locker rooms. *Cf. Fortner v. Thomas*, 983 F.2d 1024, 1030 (11th Cir. 1993) (recognizing "special sense of privacy" that is heightened "in the presence of people of the other sex"). "When it comes to the bathroom policy, biological sex is the 'relevant respect' with respect to which persons must be 'similarly situated.'" *Adams*, 57 F.4th at 803 n.6 (cleaned up).

The same goes for homeless shelters for women "who[] have been physically or sexually abused." Compl. ¶ 26, *The Downtown Soup Kitchen v. Municipality of Anchorage*, No. 3:21-cv-155 (D. Alaska July 1, 2021) (challenging local law forcing women's homeless shelter to accept biological males). Likewise, separation based on biological sex makes imminent sense in prisons or jails, where "female and male inmates are not housed together" because of the "serious and real" risk of harassment, assault, rape, and even murder. *De Veloz v. Miami-Dade Cnty.*, 756 F. App'x 869, 877 (11th Cir. 2018).[4] Safety matters in sports too. World Rugby recently

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[3] *Local Nondiscrimination Ordinances*, Movement Advancement Project, https://bit.ly/2Xozqbo (last visited Feb. 2, 2023). Though D.N. complains about a "wave of anti-transgender bills" across the country, Compl. ¶ 3, this mischaracterizes laws like Florida's that merely protect fairness for biological females in sports and don't target anyone based on gender identity.

[4] *See, e.g.*, Press Release, District Attorney, Bronx County, *Rikers Island Inmate Sentenced to 7 Years in Prison for Raping Female Inmate* (Apr. 25, 2022),

issued guidelines requiring most biological males to play men's rugby because of the injury risk to females.[5]

The list goes on: selective service registration for males, 50 U.S.C. § 3802; social security laws that favor females, *Califano v. Webster*, 430 U.S. 313, 317 (1977); fitness tests for law-enforcement training programs, *Bauer v. Lynch*, 812 F.3d 340, 348–51 (4th Cir. 2016); and even laws like Title IX that allow for sex classifications in military schools, 34 C.F.R. § 106.13, and sororities and fraternities, *id.* § 106.14, would be invalidated under D.N.'s theory. And because "[o]ver 100 federal statutes prohibit discrimination because of sex," invalidating a sex-based classification like this one is "virtually certain to have far-reaching consequences." *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1778 (2020) (Alito, J., dissenting). "Before issuing [a] radical decision," this Court should "give[] some thought to where its decision [might] lead." *Id.*

III. The Sports Act does not violate Title IX.

D.N. also alleges that the Sports Act violates Title IX by separating "trans-gender girls based solely on their status as transgender girls." Compl. ¶ 63. But Title IX does not address gender identity, and it certainly does not forbid Florida from providing sports based on biological sex.

A. Title IX deals with sex, not gender identity.

Title IX prohibits "discrimination" in educational programs and activities "on the basis of sex." 20 U.S.C. § 1681(a). Because Title IX does not define "sex," we "look to the ordinary meaning of the word when it was enacted in 1972." *Adams*, 57 F.4th at 812. And this ordinary meaning in 1972 was "biological sex." *Id.* (collecting sources); *see also Neese v. Becerra* (*Neese I*), No. 2:21-cv-163, 2022 WL 1265925, at

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https://www.bronxda.nyc.gov/downloads/pdf/pr/2022/35-2022%20ramel-blount-sentenced-rape-rikers.pdf; Patrick Reilly, *Transgender Rikers Inmate Sentenced to 7 Years For Raping Female Prisoner*, NY Post (Apr. 25, 2022), https://nypost.com/2022/04/25/transgender-rikers-inmate-gets-7-years-for-raping-female-prisoner.

[5] *Transgender Women Guidelines*, World Rugby, https://bit.ly/2Z8kFKA (last visited Feb. 8, 2023).

*12 (N.D. Tex. Apr. 26, 2022) (reaching same conclusion). As the Supreme Court put it, "sex . . . is an immutable characteristic determined solely by birth." *Frontiero*, 411 U.S. at 686.

Throughout Title IX, "sex" is used as a binary concept, referring to male and female. 20 U.S.C. § 1681 *et seq*; *see also Neese I*, 2022 WL 1265925, at *8 (Title IX "presumes sexual dimorphism"). For example, Title IX allows schools to change from admitting "only students of *one sex*" to admitting "students of *both sexes*." 20 U.S.C. § 1681(a)(2) (emphases added). Title IX also exempts "father-son or mother-daughter activities . . . 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*." *Id*. § 1681(a)(8) (emphases added). Not only does this provision say "the" other sex—rather than "another" sex—but it uses biology-linked terms like "father-son" and "mother-daughter." In contemporary dictionaries, mother was defined as "a female parent," Webster's New International Dictionary 1474 (3d ed. 1968); "father" as "a male parent," *id*. at 828; "son" as a "male offspring," *id*. at 2172; and "daughter" as "a human female," *id*. at 577. None of this would make sense if "sex" included the non-binary, fluid concept of gender identity.

If sex *did* include gender identity, then many Title IX exemptions would be illogical. For example, Title IX exempts institutions "traditionally" limiting their admissions to "only students of one sex," 20 U.S.C. § 1681(a)(5); sororities, fraternities, and youth organizations limited by "sex," *id.* § 1681(a)(6); "living facilities for the different sexes," *id.* § 1686; "separation of students by sex within physical education classes" for contact sports, 34 C.F.R. § 106.34(a)(1); and human sexuality classes and choirs separated by "sex," 34 C.F.R. § 106.34(a)(3)–(4). But if sex includes gender identity, these provisions would authorize cisgender-only choirs or transgender-only fraternities. "[T]ransgender persons—who are members of the female and male sexes by birth—would be able to live in both in the living facilities associated with their biological sex and living facilities associated with their gender identity." *Adams*, 57 F.4th at 813. Transgender—but not cisgender—individuals could move back and forth between living facilities because (unlike sex)

"gender is fluid." *B.P.J.*, 2023 WL 111875, at *7. That's nonsensical. Title IX's exemptions only make sense if sex means biological sex alone.

Title IX's purpose bolsters this. This purpose, "which is evident in the text itself, is to prohibit the discriminatory practice of treating women worse than men." *Neese v. Becerra* (*Neese II*), No. 2:21-CV-163, 2022 WL 16902425, at *10 (N.D. Tex. Nov. 11, 2022) (quoting *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344 (2011)) (cleaned up). After all, Title IX was "enacted in response to evidence of pervasive discrimination against women with respect to educational opportunities." *McCormick ex rel. McCormick v. Sch. Dist. of Mamaroneck*, 370 F.3d 275, 286 (2d Cir. 2004); *see also N. Haven Bd. of Ed. v. Bell*, 456 U.S. 512, 523 n.13 (1982). Title IX's statutory context and purpose simply focus on biology.

Even contemporary sources distinguish sex from gender identity. *See Bostock*, 140 S. Ct. at 1746–47 (noting that "transgender status" is a "distinct concept[ ] from sex."). D.N. thinks so too because sometimes "gender identity does not align with the sex that was assigned" to a person. Compl. ¶ 18. Simply put, gender identity and sex are distinct concepts. So by forbidding sex discrimination, Title IX does not address gender identity. And Florida's Sports Act does not violate Title IX even if the Act does what D.N. alleges.

B. Title IX sometimes requires sex distinctions.

Sports show that Title IX doesn't just allow sex distinctions; Title IX sometimes requires them. Again, start with the text. Title IX doesn't forbid noticing sex (sex blindness) but states that no person "shall, on the basis of sex, be excluded from participation in [or] be denied the benefits of . . . any education program or activity." 20 U.S.C. § 1681(a). The meaning of these words is straightforward. To "exclude" means "to shut out," "hinder the entrance of," or "bar from participation, enjoyment, consideration, or inclusion." Webster's Third New International Dictionary 793 (1966). To "deny" means (in this context) "to turn down or give a negative answer to." *Id.* 603. And these words must be understood as applying to an "education program or activity," including sports, showers, and locker rooms.

Together, these words forbid schools from shutting women out or hindering them from enjoying, participating in, or reaping *educational* benefits.

And enjoying these *educational* benefits sometimes requires noticing sex. After all, an educational program "made up exclusively of one sex is different from a community composed of both." *Virginia*, 518 U.S. at 533 (cleaned up). And when both sexes are present, recognizing sex differences can be necessary for students to fully take part in educational programs and activities. "The Supreme Court acknowledged this when it stated that admitting women to the Virginia Military Institute for the first time 'would undoubtedly require alterations necessary to afford members of each sex privacy from the other sex in living arrangements.'" *Adams*, 57 F.4th at 805 (citation omitted). As then-Professor Ruth Bader Ginsberg explained: "Separate places to disrobe, sleep, [and] perform personal bodily functions are permitted, in some situations required, by regard for individual privacy." Ruth Bader Ginsburg, *The Fear of the Equal Rights Amendment*, Wash. Post, Apr. 7, 1975. Or as Title IX's principal sponsor put it, sometimes sex separation is "absolutely necessary to the success of the program - such as in classes for pregnant girls or emotionally disturbed students, in sports facilities or other instances where personal privacy must be preserved." 118 Cong. Rec. 5807 (1972). In sports, too, sex separation is necessary to provide girls with "the chance to be champions." *McCormick*, 370 F.3d at 295. "[D]ue to average physiological differences, males would displace females to a substantial extent if they were allowed to compete" for the same teams. *Clark I*, 695 F.2d at 1131.

Accounting for and accommodating the "enduring" differences between men and women is written repeatedly into Title IX. *Virginia,* 518 U.S. at 533. Indeed, Title IX "explicitly permit[s] differentiating between the sexes in certain instances," *Adams*, 57 F.4th at 814—from some single-sex educational institutions and organizations, 20 U.S.C. § 1681(a)(1)-(9), to "separate living facilities for the different sexes," *id.* § 1686. If sex included concepts like gender identity, then Title IX's regulations would be nonsensical. They allow for "separate toilet, locker room, and shower facilities on the basis of sex," 34 C.F.R. § 106.33; "separate sports

teams for members of each sex," *id.* at § 106.41(b), and direct schools to "provide equal athletic opportunity for members of both sexes" to "effectively accommodate the interests and abilities of members of both sexes," *id.* § 106.41(c). Courts must construe a statute "so that effect is given to all its provisions, so that no part of it will be inoperative or superfluous, void or insignificant." *Calzadilla v. Banco Latino Internacional*, 413 F.3d 1285, 1287 (11th Cir. 2005). That means Title IX cannot require sex-blindness. It would make Title IX's text and regulations incoherent.

Title IX's education-focused text and directive to consider sex distinguishes it from Title VII. *Adams*, 57 F.4th at 811 ("Title IX, unlike Title VII, includes express statutory and regulatory carve-outs for differentiating between the sexes"); *see also Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 168 (2005) ("Title VII is a vastly different statute" than Title IX). An "employee's sex is not relevant to the selection, evaluation, or compensation of employees." *Bostock*, 140 S. Ct. at 1741 (cleaned up). But sex is relevant to dormitories, fraternities, and sports.[6]

Title IX's context confirms this conclusion. "Although courts start with the words themselves," *Neese II*, 2022 WL 16902425, at *9, a text "cannot be divorced from the circumstances existing at the time [the statute] was passed, and from the evil which Congress sought to correct and prevent," *United States v. Champlin Refin. Co.*, 341 U.S. 290, 297 (1951). And naturally, "[a] textually permissible interpretation that furthers rather than obstructs the document's purpose should be favored."[7] Numerous courts have recognized that "Title IX was enacted in response to evidence of pervasive discrimination against women with respect to educational opportunities." *McCormick*, 370 F.3d at 286; *Cannon v. Univ. of Chicago*, 441 U.S.

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[6] Title IX and Title VII differ in another material respect: Title IX prohibits discrimination "*on the basis of* sex," 20 U.S.C. § 1681(a) (emphasis added), rather than "*because of* . . . sex," 42 U.S.C. § 2000e-2(a)(1) (emphasis added). The Supreme Court concluded in *Bostock* that the phrase "because of . . . sex" imposed a sweeping "but-for" causation requirement. 140 S. Ct. at 1739. Title IX, by contrast, prohibits discrimination on "on the basis of sex." Courts must give full effect to the different word choice. *Neese II*, 2022 WL 16902425, at *8.

[7] Antonin Scalia & Brian Garner, Reading Law: The Interpretation of Legal Texts 63 (2012).

677, 704 & n.36 (1979). "The circumstances and the evil" that motivated Title IX "are well-known." *Champlin*, 341 U.S. at 297. It had nothing to do with gender identity, particularly since this concept was essentially unknown 50 years ago.

No one seriously disputes that Title IX allows educational institutions to consider sex in some circumstances—athletics being case-in-point. It is almost universally understood that Title IX allows sex-separation in sports. But to interpret Title IX as requiring sex blindness would make sex-specific sports illegal. Schools could no longer use "biology-based classifications to separate physical education classes involving contact sports like boxing or rugby." *Neese II*, 2022 WL 16902425, at *11. That's because there is no explicit sports exception in Title IX's text itself. The sports exception came later, in the form of a regulation. *See* 34 C.F.R. 106.41(b). But that regulation and its passage confirm that Congress never intended Title IX to require sex-blindness in the first place.

Shortly after Title IX, Congress passed the Javits Amendments, directing the Health, Education, and Welfare department (the Department of Education's predecessor) to publish athletics regulations. Pub. L. No. 93-380, § 844, 88 Stat. 484, 612 (Aug. 21, 1974). HEW proposed regulations that included provisions identical to the sports exception now codified at 34 C.F.R. 106.41(b). *Compare* Nondiscrimination on the Basis of Sex Under Federally Assisted Education Programs and Activities, 40 Fed. Reg. 24128, 24142–43 (1975), *with* 34 C.F.R. § 106.41. After six days of hearings, Congress allowed the regulations to take effect. *See McCormick*, 441 U.S. at 287 (recounting this history). Thus, Congress ratified the regulation's understanding of Title IX—an understanding that allows educational institutions to recognize biological sex differences when necessary to ensure equal access in education, such as in sports.[8] In fact, Congress again

[8] Title IX's living facilities exception underscores this point. 20 U.S.C. § 1686 was not written as an exception to an otherwise universal sex-blindness requirement. It was written to make clear that Title IX should not be construed as mandating sex-blind living facilities. It is this interpretive gloss—sex equality, not sex blindness—which pervades the interpretation of § 1681 as well.

endorsed this understanding in 1987, defining Title IX's educational programs to cover *all education programs*, including sports. *See* 20 U.S.C. § 1687(2)(A); *Cohen v. Brown Univ.*, 991 F.2d 888, 894 (1st Cir. 1993) (explaining import of Restoration Act to sports). In all these ways, Congress re-affirmed the universally recognized agency and judicial understanding that Title IX allows for sex separation in sports. *See* Scalia & Garner, *supra*, 322–26 (explaining prior-construction cannon).

Even D.N. appears to agree that Title IX allows for this separation, at least sometimes. Compl. ¶ 30. Given this concession, the only remaining question is what type of distinction Title IX allows "for members of each sex" in sports. And as noted, Title IX's text, structure, history, and purpose all underscore that when Title IX allows distinctions based on "sex," that means biological sex. *See supra* § III.A.[9] This makes sense in the athletic context, where biological distinctions matter most. Florida's Sports Act accounts for these true physiological differences between the sexes by preventing males from dominating women's sports and giving women the chance to compete fairly.

So when the Sports Act distinguishes sports teams based on biological sex, that cannot possibly violate Title IX. Title IX contemplates this precise distinction.

C. *Bostock* does not change Title IX or forbid the Sports Act.

D.N. has argued that *Bostock* requires interpreting Title IX to forbid gender-identity discrimination and thereby requires Florida to allow D.N. on female sports teams. *See* Opp'n to MTD, Dkt. 44, at 7–8. This theory is wrong for two reasons.

First, *Bostock* doesn't apply to Title IX. *Bostock* limited its ruling to Title VII employment. 140 S. Ct. at 1753. As noted above in § III.B, Title VII "is a vastly different statute" than Title IX. *Jackson*, 544 U.S. at 168; *see also Adams*, 57 F.4th at 811; *Neese II*, 2022 WL 16902425, at *8. And *Bostock*'s logic does not work when applied to Title IX. Whereas *Bostock* interpreted Title VII to forbid considering sex when hiring and firing, Title IX often requires sex distinctions. *See supra* § III.A.

[9] Ironically, if the prohibition on sex discrimination in § 1681(a) included gender identity, 34 C.F.R. § 106.41(b) still would allow sex-separated sports teams. Sex cannot mean one thing in § 1681(a) and something else in Title IX's regulations.

"Thus, it does not follow that principles announced in the Title VII context automatically apply" to Title IX. *Meriwether v. Hartop*, 992 F.3d 492, 510 n.4 (6th Cir. 2021); *accord Pelcha v. MW Bancorp, Inc.*, 988 F.3d 318, 324 (6th Cir. 2021) (refusing to extend *Bostock* to outside Title VII for this reason).

Again, athletics proves the point. Sex is "not relevant to the selection, evaluation, or compensation of employees," *Bostock*, 140 S. Ct. at 1741, but in athletics, sex "is not an irrelevant characteristic," *Cohen v. Brown Univ.*, 101 F.3d 155, 176–78 (1st Cir. 1996). Indeed, to achieve Title IX's purpose of giving women equal opportunity in athletics, Title IX *must* treat the sexes differently by providing separate teams for women. *See Clark II,* 886 F.2d at 1193. So courts have frequently refused to read Title VII requirements into Title IX's athletic context. *See Cohen*, 101 F.3d at 177 (refusing to do this because "athletics presents a distinctly different situation from admissions and employment").

In fact, if Title IX prohibits considering a person's sex, then Title IX would forbid *any* sex distinction in sports—even excluding *men who identify as men* from women's team. And Title IX surely does not forbid this, as both caselaw and D.N. concede. *See supra* § III.A. This proves that *Bostock* cannot be applied to Title IX without undermining its entire purpose. And that proves *Bostock* cannot be applied to Title IX. *See* Scalia & Garner, *supra*, 63–65 (favoring interpretations that further, not obstruct, an enactment's purpose).

Second, *Bostock* did not conflate gender identity and biological sex. *Bostock* said that gender-identity discrimination necessarily considered sex, and this constituted sex discrimination under Title VII. 140 S. Ct. at 1741-42. But *Bostock* did not consider the converse—whether considering sex is always gender-identity discrimination. The Sports Act *only* considers biological sex, not gender identity. This does not treat D.N. "worse than others who are similarly situated." *Bostock*, 140 S. Ct. at 1740. Like all males, D.N. can participate on male teams. Like all males, D.N. cannot play on female teams. That way, females have an equal opportunity to compete. That is what Title IX is all about.

IV. Conversely, D.N.'s requested relief would violate Title IX.

The Act doesn't merely comply with Title IX. D.N's requested relief would force Florida to *violate* Title IX. Indeed, D.N. seeks to facially invalidate the Act and in no way limits relief to D.N. or even to males who have taken drugs or undergone surgery. *See supra* § I. As the Complaint alleges, gender identity is a broad concept that "involves how [people] see themselves and present to the outside world." Compl. ¶ 17. As such, D.N.'s legal theory would allow *all* males who identify as females to compete on female teams, destroying women's sports and "equal athletic opportunity" for women. 34 C.F.R. § 106.41(c).

This denial of "equal athletic opportunity" violates Title IX. As various guidance documents explain, the "equal athletic opportunity" requirement can be divided into two categories: 1) equal treatment, and 2) effective accommodation.[10] D.N.'s requested relief violates both categories.

First, for equal treatment, the Department of Education Office of Civil Rights ("OCR") considers whether "program components reveal that treatment, benefits, or opportunities are not equivalent in kind, quality or availability" between the sexes. 44 Fed. Reg. 71,415. That means females must be guaranteed equal opportunities to engage in post-season competition and equal quality of competition. *Id.* at 71,416; *see* Dept. of Educ. Office of C.R., Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test (1996). They also deserve equal access to publicity and scholarships. 34 C.F.R. § 106.41(c); 44 Fed. Reg. 71,415.

But none of this is possible when males take opportunities from female athletes. That's why separating athletic teams based on sex have always been the means to provide an "equal opportunity" for women. And from the beginning of Title IX, schools were advised to "determine the relative abilities of members of

[10] Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,413 (1979). Many circuits have deferred to these documents in determining what violates Title IX. *See Miami Univ. Wrestling Club v. Miami Univ.*, 302 F.3d 608, 615 (6th Cir. 2002) (citing cases).

each sex for each . . . sport offered, in order to decide whether to have single sex teams or teams composed of both sexes." 40 Fed. Reg. 52,656 (1975).

Second, for effective accommodation, OCR's policies elaborate that schools must provide "equal opportunity in . . . *levels of competition*," and competitive opportunities "which *equally reflect [girls'] abilities*." 44 Fed. Reg. 71,417–18 (emphasis added). Compliance with this mandate turns on "[w]hether the policies . . . are discriminatory in . . . effect," or whether "disparities" exist with respect to benefits, treatment, or opportunities that deny equal opportunity. *Id.*

D.N.'s argument would be discriminatory in effect because it would erase any biological distinction in sports. That argument is so broad that not only would all males who identify as women (regardless of hormone levels) be allowed to compete against biological females, but also all males who identify as male could decide they would have more luck in the girls' league and participate there. This takes away any effective accommodation for women by allowing them to be consistently obliterated by physiologically stronger, faster, and bigger males. This violates Title IX, so again, D.N.'s claims should be dismissed.[11]

CONCLUSION

As D.N. agrees, distinguishing between men and women in sports is unremarkable. D.N. just disagrees about where to draw that line. But our law has long done so for at least half a century based on biology because of the physiological differences between the sexes. Recognizing these biological differences isn't discriminatory; it's undeniable—and applies to everyone, regardless of professed identity or athletic ability. That means D.N.'s claims aren't plausible, and D.N.'s Complaint should be dismissed.

[11] Plaintiff cannot avoid this problem by limiting relief to D.N. Though couched as as-applied claims, D.N. makes broad facial arguments against the Sports Act and "the distinction between facial and as-applied challenges is not so well defined." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 331 (2010). This Court could provide broader facial or semi-facial relief no matter what labels D.N. uses. And even as-applied, D.N.'s arguments fail as delineated above.

Respectfully submitted this 5th day of April, 2023.

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CERTIFICATE OF SERVICE

I hereby certify that on April 5, 2023, a true and correct copy of the foregoing was electronically filed with the Clerk of Court by using the CM/ECF filing system, which will send electronic notice of such filing to all counsel of record.

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