

22-2332

United States Court of Appeals
for the Seventh Circuit

A.M., by her mother and next friend, E.M.,
Plaintiff-Appellee,

v.

INDIANAPOLIS PUBLIC SCHOOLS and SUPERINTENDENT,
INDIANAPOLIS PUBLIC SCHOOLS,

Defendants,

STATE OF INDIANA,

Intervening Defendant-Appellant.

On Appeal from the United States District Court for the
Southern District of Indiana, No. 1:22-cv-1075-JMS-DLP,
The Honorable Jane Magnus-Stinson, Judge

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

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INTERESTS OF THE AMICI STATES

In this case, the district court granted plaintiff-appellee A.M.'s motion for a preliminary injunction against enforcement of Indiana Code § 20-33-13-4. That statute categorically bars transgender female students, like A.M., who are attending K-12 schools from participating in sex-segregated sports consistent with their gender identity. The States of New York, Hawai'i, California, Colorado, Delaware, Illinois, Maine, Maryland, Massachusetts, Minnesota, New Jersey, New Mexico, Oregon, Rhode Island, Vermont, and Washington, and the District of Columbia, file this brief as amici curiae in support of plaintiff-appellee A.M. *See* Fed. R. App. P. 29(a)(2).

A.M., a ten-year-old transgender girl, wants to play with her friends on her school's girls' softball team, as she has done in the past without any issues. A.M. has lived as a girl since the age of four. She has always been known to her classmates as a girl. But her school no longer lets her play on the girls' softball team based on Indiana's recent enactment of § 20-33-13-4. This statute singles out transgender females by categorically barring them from participating in sex-segregated sports consistent with their gender identity. The statute does not prohibit cisgender females, cisgender males, or transgender males from participating on single-sex teams consistent with their gender identity.

The district court granted a preliminary injunction against enforcement of § 20-33-13-4, finding that it likely violates Title IX of the Education Amend-

ments of 1972. 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 federal law is properly applied to protect transgender people from discrimination. This appeal does not challenge the authority of schools to offer single-sex athletic teams. Rather, this case challenges a statute that categorically excludes trans-

gender girls from participating on athletic teams consistent with their gender identity based solely on their sex assigned at birth. Indiana's law violates Title IX by denying A.M. and transgender girls like her access to the same athletic opportunities that other girls have. Further, because the sole function of Indiana's law is to exclude and stigmatize transgender girls like A.M., it violates equal protection under any level of scrutiny.

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.¹ Transgender people have been part of cultures worldwide “from antiquity to the present day.”² 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 and the District of

¹ Jody L. Herman et al., *How Many Adults and Youth Identify as Transgender in the United States?* 1 (Williams Inst. 2022) ([internet](#)). (For authorities available online, full URLs appear in the table of authorities. All URLs were last visited on November 10, 2022.)

² American Psych. Ass’n (APA), *Answers to Your Questions About Transgender People, Gender Identity, and Gender Expression* 1 (3d ed. 2014) ([internet](#)); see also APA, *Guidelines for Psychological Practice with Transgender and Gender Nonconforming People*, 70 Am. Psych. 832, 834 (2015) ([internet](#)).

Columbia,³ and at least 225 local governments,⁴ offer express protections against discrimination based on gender identity in areas such as education, housing, public accommodations, and employment.⁵

³ **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. § 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) ([internet](#)) (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 (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-

(continued on the next page)

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.

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) (definition); *id.* § 2-1402.11 (employment); *id.* § 2-1402.21 (housing); *id.* § 2-1402.31 (public accommodations); *id.* § 2-1402.41 (education).

⁴ Human Rts. Campaign, *Cities and Counties with Non-Discrimination Ordinances That Include Gender Identity* ([internet](#)) (current as of January 28, 2021).

⁵ 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).

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 counterparts.⁶ 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.⁷

Another 2015 survey of LGBTQ students in grades six to twelve showed that three-fourths of transgender student respondents felt unsafe at school

⁶ Joseph G. Kosciw et al., *The 2019 National School Climate Survey: The Experiences of Lesbian, Gay, Bisexual, Transgender, and Queer Youth in Our Nation's Schools* xxvii, 93 (GLSEN 2020) ([internet](#)); see also GLSEN, *Improving School Climate for Transgender and Nonbinary Youth* 1 (2021) ([internet](#)); Emily A. Greytak et al., *Harsh Realities: The Experiences of Transgender Youth in Our Nation's Schools* xi (GLSEN 2009) ([internet](#)).

⁷ Sandy E. James et al., *The Report of the 2015 U.S. Transgender Survey* 131-35 (Nat'l Ctr. for Transgender Equal. 2016) ([internet](#)).

because of their gender expression.⁸ More than a quarter of transgender respondents to a survey of LGBTQ teenagers aged thirteen to eighteen in December 2016 and January 2017 reported being bullied or harassed within the past thirty days.⁹ And 71% of transgender and nonbinary youth in a 2022 survey reported being discriminated against because of their gender identity.¹⁰ As a consequence of this discrimination, violence, and harassment, transgender students in grades six through twelve surveyed in 2019 reported feeling less connected to their schools, and had less of a sense of belonging, than other students.¹¹

Discrimination against transgender youth—including denying them the opportunity to participate in extracurricular activities consistent with their gender identity—can have serious health and academic consequences. 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.¹² Respondents to the 2015 USTS

⁸ Joseph G. Kosciw et al., *The 2015 National School Climate Survey: The Experiences of Lesbian, Gay, Bisexual, Transgender, and Queer Youth in Our Nation's Schools* xv, 84-85 (GLSEN 2016) ([internet](#)).

⁹ Human Rts. Campaign Found., *Human Rights Campaign Post-Election Survey of Youth 2*, 8 (2017) ([internet](#)).

¹⁰ The Trevor Project, *2022 National Survey on LGBTQ Youth Mental Health* 17 (2022) ([internet](#)).

¹¹ Kosciw et al., *The 2019 National School Climate Survey*, *supra*, at xviii, 95.

¹² *Id.* at 52, 54.

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.¹³ Transgender people attempt suicide at a rate nearly nine times that of the general population,¹⁴ 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.¹⁵

Discrimination in school settings also negatively affects educational outcomes. A 2019 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.¹⁶ Discriminatory school climates have also been found to exacerbate absenteeism. In the month before a 2019 survey, LGBTQ students who had experienced discrimination in their schools based on their sexual

¹³ James et al., *2015 U.S. Transgender Survey*, *supra*, at 132.

¹⁴ *Id.* at 114.

¹⁵ The Trevor Project, *2022 National Survey on LGBTQ Youth Mental Health*, *supra*, at 5.

¹⁶ Kosciw et al., *The 2019 National School Climate Survey*, *supra*, at 45, 48; *see also* Greytak et al., *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).

orientation or gender identity were almost three times as likely (44.1% versus 16.4%) to have missed school because they felt unsafe or uncomfortable.¹⁷

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.¹⁸ For example, transgender students permitted to live consistently with their gender identity have mental health outcomes comparable to their cisgender peers.¹⁹ 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 regard to

¹⁷ Kosciw et al., *The 2019 National School Climate Survey*, *supra*, at 49.

¹⁸ *See, e.g., Br. of Amici Curiae Sch. Adm'rs from Thirty-One States and 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.

¹⁹ *See* Kristina R. Olson et al., *Mental Health of Transgender Children Who Are Supported in Their Identities*, *Pediatrics*, Mar. 2016, at 5-7 ([internet](#)); *Br. of Amici Curiae Sch. Adm'rs at 4, Gloucester Cnty. Sch. Bd.*, 137 S. Ct. 1239 (No. 16-273), 2017 WL 930055.

school activities and sports programs.²⁰ 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); 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

²⁰ **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) ([internet](#)) (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 Nonconforming Students* 8 (Sept. 25, 2017) ([internet](#)) (same). **New Jersey:** New Jersey Dep’t of Educ., *Transgender Student Guidance for School Districts* p. 6 ([internet](#)) (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) ([internet](#)) (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* ([internet](#)) (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).

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) ([internet](#)).

Athletic participation has been linked to academic achievement and improved academic performance.²¹ 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.”²² Young women who participate in high school athletics, in particular, are more likely on average to complete college.²³ Athletic participation has also been linked to “more successful outcomes in adulthood, such as employment.”²⁴

There are also many health benefits to sports participation. Regular physical activity “decreases the risk of developing diabetes, hypertension, cancer,

²¹ Alison R. Snyder et al., *Health-Related Quality of Life Differs Between Adolescent Athletes and Adolescent Nonathletes*, 19 J. Sport Rehab. 237, 238 (2010) ([internet](#)); 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) ([internet](#)).

²² Troutman & Dufur, *From High School Jocks to College Grads*, *supra*, at 444.

²³ *Id.* at 454.

²⁴ 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) ([internet](#)).

and obesity, as well as cardiovascular and bone and joint diseases.”²⁵ For youth, “[p]articipation in physical activity during childhood and adolescence has a positive impact on physical health throughout the life span.”²⁶ Mental health benefits also result from sports participation,²⁷ including “improved emotion regulation, decreased hopelessness and suicidality, fewer depressive symptoms, and higher self-esteem.”²⁸ For LGBTQ students in particular, sports participation has been linked to higher levels of self-esteem and lower levels of depression.²⁹

²⁵ Snyder et al., *Health-Related Quality of Life*, *supra*, at 237-38; see also Green-span 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.

²⁶ Ellis Barrera et al., *The Medical Implications of Banning Transgender Youth from Sport Participation*, 176 *JAMA Pediatrics* 223, 223 (2022) ([internet](#)); 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) ([internet](#)).

²⁷ Richard Bailey, *Physical Education and Sport in Schools: A Review of Benefits and Outcomes*, 76 *J. Sch. Health* 397, 398 (2006) ([internet](#)); Snyder et al., *Health-Related Quality of Life*, *supra*, at 238, 244.

²⁸ 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) ([internet](#)) (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 ([internet](#)).

²⁹ Caitlin M. Clark et al., *LGBTQ Students and School Sports Participation: Research Brief 8* (GLSEN 2021) ([internet](#)).

All students, moreover, stand to benefit from an inclusive, supportive environment.³⁰ This is especially true of sports, given the importance of teamwork and cooperation in athletic competition.³¹

POINT II

TITLE IX AND THE EQUAL PROTECTION CLAUSE PROHIBIT THE GENDER-IDENTITY DISCRIMINATION IN THIS CASE

Title IX broadly 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 and expressly permit sex-segregated teams consistent with the nondiscrimination mandate. *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

³⁰ *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.”).

³¹ *See* Troutman & Dufur, *From High School Jocks to College Grads*, *supra*, at 444-45.

athletics; rather, they dispute how Title IX's definition of "sex" and the rules' allowance for sex-segregated teams apply to transgender students.

The Indiana law at issue operates as a blanket prohibition on female transgender students' participation in school athletics consistent with their gender identity. Indiana Code § 20-33-13-4 requires K-12 schools to designate athletic teams or sports as either (1) a boys' team or sport; (2) a girls' team or sport; or (3) a coeducational or mixed team or sport. Ind. Code Ann. § 20-33-13-4(a). It then prohibits a "male, based on a student's sex at birth in accordance with the student's genetics and reproductive biology" from participating on an athletic team or sport designated as a girls' athletic team or sport. *Id.* § 20-33-13-4(b). Indiana also allows a student who is "deprived of an athletic opportunity" or "otherwise directly or indirectly injured" by a violation of § 20-33-13-4 to assert a civil action against the entity responsible for the violation for injunctive relief, damages, and attorney's fees. *Id.* §§ 20-33-13-6 to -7.

Relying on this Court's precedent in *Whitaker ex rel. Whitaker v. Kenosha Unified School District No. 1 Board of Education*, 858 F.3d 1034 (7th Cir. 2017), the district court correctly concluded that Indiana Code § 20-33-13-4 likely violates Title IX's prohibition of discrimination "on the basis of sex" by categorically barring A.M. from participating on the girls' softball team. As the district court found, A.M. has been living as a girl since she was four years old. Indeed, "[v]ery few people outside of A.M.'s immediate family know that A.M.'s

sex assigned at birth was male,” and A.M. has been taking a puberty blocker and is not experiencing any of the physiological changes associated with male puberty. *A.M. ex rel. E.M. v. Indianapolis Pub. Schs.*, No. 22-cv-1075, 2022 WL 2951430, at *5 (S.D. Ind. July 26, 2022). She also played on the girls’ softball team in the past without any issues and there was no evidence that she had a competitive advantage; to the contrary, she was one of the weaker players on her team. *See id.* at *6.

The district court correctly concluded that a straightforward application of *Whitaker* compels the conclusion that § 20-33-13-4 likely violates Title IX. Section 20-33-13-4 prohibits A.M. from playing on a sports team that conforms with her gender identity and punishes her “for . . . her gender non-conformance.” *Id.* at *11 (quoting *Whitaker*, 858 F.3d at 1049). That “singling out of transgender females is unequivocally discrimination on the basis of sex.” *Id.* Based solely on her sex assigned at birth, § 20-33-13-4 needlessly denies A.M. something that her classmates take for granted: the ability to participate on an athletic team at school with her friends consistent with her lived identity. Indiana’s law singles out A.M. based on her sex assigned at birth, without any regard to whether she has any competitive advantage, and forces her either to forgo participation on single-sex sports teams or to participate on teams inconsistent with her gender identity. That sex-based discrimination contravenes a core aspect of transgender people’s identities, subjecting them to potential harass-

ment, and violates medical treatment protocols. The court thus properly determined that A.M. was likely to succeed on her claims that she had been discriminated against based on her sex in violation of Title IX.

The district court's decision accords with not only this Court's decision in *Whitaker* but also other courts, including the Supreme Court in *Bostock v. Clayton County*, which concluded that gender identity discrimination is necessarily sex discrimination.³² See 140 S. Ct. at 1741-42, 1745-47; *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. For example, a female who is discriminated against because she was designated male at birth is necessarily being discriminated against based on sex—i.e., she would not be subject to discrimination if not for the fact that her designated sex at birth was male. *Id.* In reaching its conclusion, the Supreme Court acknowledged that “transgender status” is a distinct concept from “sex,” but observed that sexual harassment and discrim-

³² 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).

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

Applying much the same reasoning as in *Bostock*, courts have repeatedly and correctly recognized that Title IX's bar against sex discrimination prohibits discrimination against transgender students. For example, appellate courts have consistently concluded that policies barring transgender students from using the bathroom that aligns with their gender identity violate Title IX. As these courts have explained, the discriminator is necessarily relying on a student's sex assigned at birth to deny access to a bathroom that aligns with their gender identity. *See Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 616-19 (4th Cir. 2020), *cert. denied*, 141 S. Ct. 2878 (2021); *Dodds v. United States Dep't of Educ.*, 845 F.3d 217, 221-22 (6th Cir. 2016); *see also Parents for Privacy v. Barr*, 949 F.3d 1210, 1228-29 (9th Cir.) (transgender students' use of sex-segregated spaces that align with their gender identity does not violate Title IX rights of cisgender students), *cert. denied*, 141 S. Ct. 894 (2020); *Doe ex rel. Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518, 534-35 (3d Cir. 2018).

Indiana Code § 20-33-13-4 likewise violates Title IX's prohibition against sex discrimination by *categorically* barring transgender girls from participating on sports teams that align with their gender identity. As with the unlawful bathroom policies discussed above, Indiana's law bars every transgender girl from participating in athletics consistent with her gender identity simply

because of the sex she was assigned at birth. The law singles out transgender girls for discriminatory treatment because it has no effect on the ability of cisgender students to participate on sports teams consistent with their gender identity. Moreover, the law has no effect on transgender boys who wish to participate on sports teams consistent with their gender identity. As the district court correctly observed, this unequal treatment of transgender *females* alone “is unequivocally discrimination on the basis of sex, regardless of the policy argument as to why that choice was made.” *A.M.*, 2022 WL 2951430, at *11.

There is no merit to Indiana’s claim (*see, e.g.*, Br. of Appellant (Br.) at 39) that an injunction against enforcement of § 20-33-13-4 will result in boys dominating girls’ sports. The experiences of the amici States with inclusive and equitable school athletics policies show that such policies do 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.³³

³³ *See, e.g., California*: California Interscholastic Fed’n, *Constitution & Bylaws 2022-23*, at 97 ([internet](#)) (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* (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.³⁴ 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.”³⁵ And the Los Angeles Unified School District, one of the largest

(Mar. 7, 2022) ([internet](#)) (same). **Colorado:** Colorado High Sch. Activities Ass’n, *CHSAA Transgender Inclusion Bylaw & Policy* p. 2 ([internet](#)) (same). **Maryland:** Maryland Pub. Secondary Schs. Athletic Ass’n, *MPSSAA Guidance for Participation of Transgender Youth in Interscholastic Athletics* pp. 1-2 (Aug. 2016) ([internet](#)) (same, for interscholastic sports); **Massachusetts:** Massachusetts Interscholastic Athletic Ass’n, *Rules and Regulations Governing Athletics: A Handbook for Principals and Athletic Directors* 41 ([internet](#)) (same). **Minnesota:** Minnesota State High Sch. League, *Official Handbook, 300.00: Administration of Student Eligibility Bylaws* 61 ([internet](#)) (same); University of Minn., *Equity and Access: Gender Identity, Gender Expression, Names and Pronouns* ([internet](#)) (same, for all university programs and activities). **Nevada:** Nevada Interscholastic Activities Ass’n, *NIAA Transgender Participation Position Statement and Policy* (Apr. 6, 2016) ([internet](#)) (same, for “gender specific sports team[s]”). **New York:** New York State Pub. High Sch. Athletic Ass’n, *NYSPHSAA Handbook* 48-50 (Feb. 15, 2022) ([internet](#)) (equal participation by transgender students in all interscholastic sports activities consistent with their gender identity). **Oregon:** Oregon Sch. Activities Ass’n, *2022-2023 Oregon Sch. Activities Association Handbook* 79-81 ([internet](#)) (same). **Rhode Island:** Rhode Island Interscholastic League, *Rules and Regulations, Article 3* (June 21, 2022) ([internet](#)) (same). **Washington:** Washington Interscholastic Activities Ass’n, *WIAA Handbook 2022-23* 35 (Oct. 26, 2022) ([internet](#)) (same).

³⁴ New Jersey State Interscholastic Athletic Ass’n, *NJSIAA & NJSCA Coaches Handbook: 2020-2021*, at 28-30 ([internet](#)).

³⁵ See Albuquerque Pub. Schs., *Non-Discrimination for Students: Gender Identity and Expression* (May 2016) ([internet](#)).

school districts in the country, has implemented a transgender-inclusive sports policy for many years “without problems.”³⁶ As a school district official in Los Angeles has reported, the district’s policy has led to a positive “transformation” in the district’s schools: an experience that “stands in stark contrast” to “expressed concerns that students will abuse the policy.”³⁷ 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 fact, Indiana’s experience is not to the contrary. Prior to the enactment of the statute at issue, the Indiana High School Athletic Association (IHSAA) also had policies in place to ensure that transgender students could participate in school athletic programs consistent with their gender identity while ensuring fairness to all. *See A.M.*, 2022 WL 2951430, at *8. For instance, transgender students were required to show that their gender identity “is sincere and not motivated by an improper purpose” and that they have consistently exhibited the gender identification and gender expression of that gender. (State’s

³⁶ *See* Patrick McGreevy, *California Transgender Students Given Access to Opposite-Sex Programs*, L.A. Times (Aug. 12, 2013) ([internet](#)).

³⁷ *See* Judy Chiasson, *Success and Opportunity for Transgender Students*, Huff-Post (updated Feb. 2, 2016) ([internet](#)).

Mem. in Opp'n to Pl.'s Mot. for Prelim. Inj. (State's Mem.), Ex. 3, IHSAA, *Gender Policy* § D(2)(b)(1)-(2), Dist. Ct. ECF No. 36-3.³⁸)

Indiana's claim (*see* Br. at 39) that an injunction against enforcement of § 20-33-13-4 will result in males dominating female sports simply by declaring themselves female is sheer speculation unmoored from any actual evidence that such a problem existed, *see Whitaker*, 858 F.3d at 1052 (invalidating transgender bathroom policy where privacy concerns advanced in support of policy were "based upon sheer conjecture and abstraction"); *A.M.*, 2022 WL 2951430, at *12. Indeed, Indiana's governor conducted a thorough review and 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 IHSAA policies.³⁹ And there is no showing in the record here that A.M.'s participation on the girls' softball team is unfair to cisgender girls: there is no evidence that other girls complained about A.M. possessing an athletic advantage, and "[i]n fact, she was one of the weaker athletes on the team." *A.M.*, 2022 WL 2951430, at *6, *12.

³⁸ The IHSAA policies, which would not govern A.M. since she is in fifth grade, also required one year of hormone treatment or gender reassignment surgery for transgender females. (*See* State's Mem., Ex. 3, IHSAA, *Gender Policy* § D(2)(b)(6).)

³⁹ Letter from Eric J. Holcomb, Governor, to Todd Huston, Speaker, H.R., at pp. 1-2 (Mar. 21, 2022) ([internet](#)).

Contrary to Indiana’s contentions (*see, e.g.*, Br. at 2, 30-31, 36-37), precedents interpreting Title IX’s application to transgender student bathroom access policies apply here. In attempting to distinguish *Whitaker*, Indiana relies on Title IX implementing regulations that permit sex-segregated physical education classes and sports teams. *See* 34 C.F.R. §§ 106.34, 106.41. But those regulations are not meaningfully different from the implementing regulations governing bathroom facilities considered in *Whitaker*. *See supra* at 15-17. In fact, like athletics, Title IX’s implementing regulations permit sex-segregated “toilet, locker room, and shower facilities.” 34 C.F.R. § 106.33. As explained above (*see supra* at 18), appellate courts have uniformly rejected arguments that Title IX’s regulations require segregation of bathrooms based on sex assigned at birth. Neither the text of Title IX nor its implementing regulations suggest a contrary result in the athletics context.⁴⁰ Title IX prohibits discrimination against students

⁴⁰ Indiana’s amici argue (*see, e.g.*, Br. of Ala. & 18 Other States at 20-21) that Indiana is simply defining the contours of a protected class and may permissibly delineate the scope of “lawful sex segregation” in school athletics. But amici offer no support for the proposition that Indiana may define the contours of federal anti-discrimination law, let alone do so in a manner that is inconsistent with decisions of the Supreme Court in *Bostock* and this Court in *Whitaker*. In any event, there is no merit to amici’s claim (*see, e.g., id.* at 7) that Indiana is neutrally defining and applying to all students the term “sex” based on “reproductive biology.” Indiana’s statute applies only to transgender girls, i.e., students born with male reproductive biology who want to participate in female sports, but does not apply to transgender boys, i.e., students born with female reproductive biology who want to participate in male sports. *See* Ind. Code Ann. § 20-33-13-4. Indiana’s statute thus unlawfully discriminates on the basis of sex even as Indiana has purportedly tried to redefine that term.

based on transgender status, regardless of whether they are in a classroom, bathroom, or on a sports field.

For similar reasons, § 20-33-13-4 contravenes the Equal Protection Clause. The Supreme Court has long made clear that equal protection prohibits government policies that serve only to express “negative attitudes” “or fear” toward people viewed as “different.” *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448 (1985); *see also Nguyen v. Immigration & Naturalization Serv.*, 533 U.S. 53, 68 (2001) (the Equal Protection Clause bars a decision built on stereotypes and a “frame of mind resulting from irrational or uncritical analysis”). Section 20-33-13-4 falls squarely into this category. The law’s categorical prohibition on the participation of transgender female students in school-sponsored female-only sports activities, without regard to any supposed competitive advantages that they might have, serves only to stigmatize and exclude transgender students, and furthers no legitimate governmental interests in promoting equity in sports.

As explained above, the experiences of the amici States with inclusive and equitable school athletics policies show that such policies will not compromise fairness or reduce opportunities for cisgender athletes (see *supra* at 19-21) and confirm the district court’s conclusion that there is no evidence that any concrete harm will result from permitting transgender students like A.M. to participate in female athletics. *See A.M.*, 2022 WL 2951430, at *12.

In contrast, the evidentiary record here shows that the harm the law causes to transgender students generally and to A.M. specifically is real. A.M.'s gender dysphoria has caused her to be suicidal, depressed, anxious, and angry. Barring A.M. from the girls' softball team will have the effect of "out[ing]" her to her classmates as someone who is not 'really' a girl" and will have a traumatic effect that undermines her social transition, exacerbating her harmful symptoms of gender dysphoria. *Id.* Under well-established constitutional analysis, such discrimination cannot withstand any level of equal protection scrutiny.

CONCLUSION

This Court should affirm the decision below.

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Respectfully submitted,

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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 6,093 words and complies with the typeface requirements and length limits of Rules 29 and 32(a)(5)-(7) and the corresponding local rules.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was filed electronically with the Court's CM-ECF system on November 10, 2022. Service will be effectuated by the Court's electronic notification system upon all parties and counsel of record.

Dated: New York, New York
November 10, 2022

/s/ Mark S. Grube