

Case No. 24-3097

**In the United States Court of Appeals
for the Tenth Circuit**

STATE OF KANSAS, et al.,

Plaintiffs-Appellees,

v.

UNITED STATES DEPARTMENT OF EDUCATION, et al.,

Defendants-Appellants.

*Appeal from a Decision of the United States District Court for the District of Kansas - Topeka
Case No. 5:24-CV-04041-JWB-ADM · Honorable John W. Broomes, Trial Judge*

BRIEF OF ADVANCING AFA ACTION; AMAC ACTION; AMERICAN ASSOCIATION OF SENIOR CITIZENS; AMERICAN HINDU COALITION; AMERICAN PRINCIPLES PROJECT; AMERICAN VALUES; ASSOCIATION OF MATURE AMERICAN CITIZENS; SHAWNNA BOLICK, ARIZONA STATE SENATOR, DISTRICT 2; CATHOLICS COUNT; CENTER FOR POLITICAL RENEWAL; CENTER FOR URBAN RENEWAL AND EDUCATION (CURE); COALITION FOR JEWISH VALUES; EAGLE FORUM; FAMILY INSTITUTE OF CONNECTICUT; CHARLIE GEROW; GRASSROOTS AMERICA - WE THE PEOPLE PAC; JAY D. HOMNICK, SENIOR FELLOW, PROJECT SENTINEL; IDAHO FREEDOM ACTION; IDAHO FREEDOM FOUNDATION; INTERNATIONAL CONFERENCE OF EVANGELICAL CHAPLAIN ENDORSERS; JCCWATCH.ORG; TIM JONES, FORMER. SPEAKER, MISSOURI HOUSE, CHAIRMAN, MISSOURI CENTER-RIGHT COALITION; GERARD KASSAR, STATE CHAIRMAN, NYS CONSERVATIVE PARTY; LAND CENTER FOR CULTURAL ENGAGEMENT; MARYLAND FAMILY INSTITUTE; MEN AND WOMEN FOR A REPRESENTATIVE DEMOCRACY IN AMERICA, INC.; NATIONAL APOSTOLIC CHRISTIAN LEADERSHIP CONFERENCE; NATIONAL CENTER FOR PUBLIC POLICY RESEARCH; NATIONAL ORGANIZATION FOR MARRIAGE; NATIONAL RELIGIOUS BROADCASTERS; NEW JERSEY FAMILY FOUNDATION; NORTH CAROLINA VALUES COALITION; ORTHODOX JEWISH CHAMBER OF COMMERCE; MELISSA ORTIZ, PRINCIPAL & FOUNDER, CAPABILITY CONSULTING; PENNSYLVANIA EAGLE FORUM; PROJECT 21 BLACK LEADERSHIP NETWORK; RIO GRANDE FOUNDATION; ROUGHRIDER INSTITUTE; 60 PLUS ASSOCIATION; PAUL STAM, FORMER SPEAKER PRO TEMPORE, NORTH CAROLINA HOUSE OF REPRESENTATIVES; STAND FOR GEORGIA VALUES ACTION; STUDENTS FOR LIFE ACTION; STUDENTS FOR LIFE OF AMERICA; TEA PARTY PATRIOTS ACTION, INC.; THE FAMILY FOUNDATION (VIRGINIA); WISCONSIN FAMILY ACTION, INC.; WOMEN FOR DEMOCRACY IN AMERICA, INC.; AND YOUNG CONSERVATIVES OF TEXAS AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLEES FOR AFFIRMANCE

J. MARC WHEAT, ESQ. (*Counsel of Record*)
TIMOTHY HARPER, ESQ.
ADVANCING AMERICAN FREEDOM, INC.
801 Pennsylvania Avenue, N.W., Suite 930
Washington, District of Columbia 20004
(202) 780-4848 Telephone
mwheat@advancingamericanfreedom.com
timothy@advancingamericanfreedom.com

Counsel for Amicus Curiae



CORPORATE DISCLOSURE STATEMENT

The amici curiae Advancing American Freedom, Inc.; AFA Action; AMAC Action; American Association of Senior Citizens; American Hindu Coalition; American Principles Project; American Values; Association of Mature American Citizens; Shawna Bolick, Arizona State Senator, District 2; Catholics Count; Center for Political Renewal; Center for Urban Renewal and Education (CURE); Coalition for Jewish Values; Eagle Forum; Family Institute of Connecticut; Charlie Gerow; Grassroots America - We the People PAC; Jay D. Homnick, Senior Fellow, Project Sentinel; Idaho Freedom Action; Idaho Freedom Foundation; International Conference of Evangelical Chaplain Endorsers; JCCWatch.org; Tim Jones, Former Speaker, Missouri House, Chairman, Missouri Center-Right Coalition; Gerard Kassar, State Chairman, NYS Conservative Party; Land Center for Cultural Engagement; Maryland Family Institute; Men and Women for a Representative Democracy in America, Inc.; National Apostolic Christian Leadership Conference; National Center for Public Policy Research; National Organization for Marriage; National Religious Broadcasters; New Jersey Family Foundation; North Carolina Values Coalition; Orthodox Jewish Chamber of Commerce; Melissa Ortiz, Principal & Founder, Capability Consulting; Pennsylvania Eagle Forum; Project 21 Black Leadership Network; Rio Grande Foundation; Roughrider Institute; 60 Plus Association; Paul Stam, Former Speaker Pro Tempore, North Carolina House of

Representatives; Stand for Georgia Values Action; Students for Life Action; Students for Life of America; Tea Party Patriots Action, Inc.; The Family Foundation (Virginia); Wisconsin Family Action, Inc.; Women for Democracy in America, Inc.; and Young Conservatives of Texas are nonprofit corporations. They do not issue stock and are neither owned by nor are the owners of any other corporate entity, in part or in whole. They have no parent companies, subsidiaries, affiliates, or members that have issued shares or debt securities to the public. The corporations are operated by volunteer boards of directors.

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	v
STATEMENT OF INTEREST OF AMICI.....	1
INTRODUCTION AND SUMMARY OF THE ARGUMENT.....	3
ARGUMENT.....	5
I. The Department’s Rule Restricts the Liberty of the Many in Favor of a False View of Reality to the Supposed Benefit of the Few, Creating a Pervasive Fear of Crossing an Ever-Moving Line.....	5
II. The Historical Data Makes Clear that if Women and Girls are to Have Meaningful Opportunities for Athletic Excellence, Girls’ and Women’s Sports Must be Preserved for Girls and Women Only.....	10
A. <i>Thousands of men have exceeded the women’s world record in a sample of running events.....</i>	11
B. <i>The best boy swimmers in the world become competitive with the best women swimmers in the world when the boys hit puberty.....</i>	15
III. The Use of Puberty Blockers to Address Gender Dysphoria in Young People Will Rightly be Remembered Alongside Other Forms of Harm to Children.....	19
A. <i>Throughout history, children’s bodies have been subjected to various horrors.....</i>	19
B. <i>The administration of puberty blockers to healthy children to prevent natural and normal puberty is an unproven practice with the potential to cause serious harm.....</i>	23

CONCLUSION29
CERTIFICATE OF COMPLIANCE30
CERTIFICATE OF DIGITAL SUBMISSION31
CERTIFICATE OF SERVICE32

TABLE OF AUTHORITIES

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Bostock v. Clayton County,
 140 S. Ct. 1731 (2020).....5, 6

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18 U.S.C. § 116.....22

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STATEMENT OF INTEREST OF AMICI

Advancing American Freedom (AAF) is a nonprofit organization that promotes and defends policies that elevate traditional American values, including equal treatment before the law.¹ AAF “will continue to serve as a beacon for conservative ideas, a reminder to all branches of government of their responsibilities to the nation”² and believes that the differences between men and women, one of the beauties of the human experience, are real, and manifest themselves in physiological differences that demand that women and girls have athletic opportunities from which men are categorically excluded. AAF submits this amicus curiae brief on behalf of its 3,636 members living in Plaintiff-Appellee states and 8,400 members living in the Tenth Circuit.

Amici AFA Action; AMAC Action; American Association of Senior Citizens; American Hindu Coalition; American Principles Project; American Values; Association of Mature American Citizens; Shawna Bolick, Arizona State Senator, District 2; Catholics Count; Center for Political Renewal; Center for Urban Renewal and Education (CURE); Coalition for Jewish Values; Eagle Forum; Family Institute

¹ No counsel for a party authored this brief in whole or in part. No person other than Amicus Curiae and its counsel made any monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this amicus brief.

² Edwin J. Feulner, Jr, *Conservatives Stalk the House: The Story of the Republican Study Committee*, 212 (Green Hill Publishers, Inc. 1983).

of Connecticut; Charlie Gerow; Grassroots America - We the People PAC; Jay D. Homnick, Senior Fellow, Project Sentinel; Idaho Freedom Action; Idaho Freedom Foundation; International Conference of Evangelical Chaplain Endorsers; JCCWatch.org; Tim Jones, Former. Speaker, Missouri House, Chairman, Missouri Center-Right Coalition; Gerard Kassar, State Chairman, NYS Conservative Party; Land Center for Cultural Engagement; Maryland Family Institute; Men and Women for a Representative Democracy in America, Inc.; National Apostolic Christian Leadership Conference; National Center for Public Policy Research; National Organization for Marriage; National Religious Broadcasters; New Jersey Family Foundation; North Carolina Values Coalition; Orthodox Jewish Chamber of Commerce; Melissa Ortiz, Principal & Founder, Capability Consulting; Pennsylvania Eagle Forum; Project 21 Black Leadership Network; Rio Grande Foundation; Roughrider Institute; 60 Plus Association; Paul Stam, Former Speaker Pro Tempore, North Carolina House of Representatives; Stand for Georgia Values Action; Students for Life Action; Students for Life of America; Tea Party Patriots Action, Inc.; The Family Foundation (Virginia); Wisconsin Family Action, Inc.; Women for Democracy in America, Inc.; and Young Conservatives of Texas believe in the importance of protecting the privacy, safety, dignity, and opportunity of all people.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

According to District Court Judge Danny Reeves, writing in his opinion in another case challenging the Title IX rule at issue here, and according to virtually everyone in history until very recently, “There are two sexes: male and female.” *Tennessee v. Cardona*, No. 2: 24-072-DCR at 1 (E.D. Ky. June 17, 2024). The central question in this case, and in many others currently working their way through the courts, is whether the federal government, in this case the federal bureaucracy rather than elected officials, can impose on the whole nation a vision of reality that rejects this basic fact.³ That distorted vision depends on the assumption that men and women are fundamentally interchangeable and indistinguishable. Girls and women are the first and most profound victims of this attempted reconstitution of reality.⁴ While women’s loss of private spaces is perhaps the most obvious of the many harms

³ To avoid confusion and in an effort to be faithful to reality, this brief uses pronouns that correspond to the referent person’s biological sex.

⁴ This is the case despite the fact that the ideas behind this movement arose in part from authors like Shulamith Firestone. As Carl Trueman explains, “her philosophy ultimately dissolves the human being to a disembodied will limited only by the technological tools available to it. The problem with such a view is that it is ultimately dehumanizing in its rejection of any notion of natural limits, limits that it typically treats as problems to be overcome.” Carl R. Trueman, *Shulamith Firestone Was a Prophet*, *First Things* (July 25, 2024) <https://www.firstthings.com/web-exclusives/2024/07/shulamith-firestone-was-a-prophet>. After all, “Firestone’s argument was for a cybernetic feminist revolution involving the subversion of work, family structure, gender, and sexuality.” Susanna Paasonen, *From Cybernation to Feminization: Firestone and Cyberfeminism*, in *Further Adventures of the Dialectic of Sex*, 61, 66 (Mandy Merck and Stella Sandford, eds. 2010).

women experience when language is the plaything of the powerful, the harm to women and girls in sports is perhaps the most visible.

Sports are to gender theory what the child is to the emperor's new clothes. Whatever one thinks about "gender,"⁵ the physical differences between the sexes inevitably shine through on the playing field, giving the lie to the assumption necessary to the whole gender agenda: that men and women are interchangeable. Perhaps that is why the new Department of Education (the "Department") rule rewriting sex discrimination under Title IX to include gender identity, among other things, claims not to apply to sports. Nondiscrimination on the Basis of Sex in Educ. Programs or Activities Receiving Fed. Fin. Assistance, 89 Fed. Reg. 33,474 (Apr. 29, 2024) (the "Rule"). Courts should review that claim with skepticism. If Title IX's language is to be rewritten, it cannot be done selectively.

The Rule at issue here risks chilling speech. For example, it is not clear whether this brief could be presented in a classroom without its presenter risking being accused of creating an exclusionary environment. After all, this brief presents data demonstrating irrefutably that there are fundamental physiological differences

⁵ A word that used to refer only to a grammatical concept. "[G]ender, n., is a grammatical term only. To talk of persons or creatures of the masculine or feminine g., meaning of the male or female sex, is either jocularly (permissible or not according to context) or a blunder." Henry Watson Fowler, *A Dictionary of Modern English Usage* 49 (Oxford University Press, 1st ed. 2002) (1926).

between men and women. Finally, doctors and parents are, shockingly, using puberty blockers that prevent the natural and healthy development of their children in order to mitigate the effects of the natural and healthy developmental process. These dangers lurk behind the Rule at issue in this case. If schools are forced to adopt language and structures that support a falsehood, the harms to women and children will only expand.

ARGUMENT

I. The Department’s Rule Restricts the Liberty of the Many in Favor of a False View of Reality to the Supposed Benefit of the Few, Creating a Pervasive Fear of Crossing an Ever-Moving Line.

In *Bostock v. Clayton County*, the Supreme Court rested its decision on the false assumption that “it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex.” 140 S. Ct. 1731, 1741 (2020). The Court explicitly limited its reasoning to Title VII employment decisions. *Id.* at 1753. Nonetheless, the Department of Education notes that “lower courts have applied [Bostock’s] reasoning to Title IX” and, without congressional authority, that the “rulemaking process has afforded recipients notice and opportunity to comment, as well as the opportunity to decline Federal funding.” Nondiscrimination on the Basis of Sex in Educ. Programs or Activities Receiving Fed. Fin. Assistance, 89 Fed. Reg. at 33542. Of course, an opportunity to comment is of very limited value when the Department is advancing an ideological agenda

without sanction of law as it is here. Similarly, the suggestion that schools could stop taking federal funding, regrettably, is not practical for most schools. In truth, the Department here seeks to expand the reasoning of a mistaken but explicitly limited Supreme Court ruling.

In his dissent in *Bostock*, Justice Alito expressed his concern that the Court's decision there would "pressure employers to suppress any statements by employees expressing disapproval of same-sex relationships and sex reassignment procedures," because those employers "will fear that allowing employees to express their religious views on these subjects may give rise to Title VII harassment claims." *Bostock*, 140 S. Ct. at 1782 (Alito, J., dissenting). Of course, criticism of many issues related to the gender debate are not necessarily religious in nature. Regardless, Justice Alito's concern is both justified and applies equally to the Department's new Title IX rewrite.

While the Department claims that its "Title IX regulations are not to be interpreted to impinge upon rights protected under the First Amendment," it also approvingly cites language from the Ninth Circuit that suggests that schools would be allowed to restrict speech. *Nondiscrimination on the Basis of Sex in Educ. Programs or Activities Receiving Fed. Fin. Assistance*, 89 Fed. Reg. at 33597, 33504 (quoting *Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166, 1185 (9th Cir. 2006) ("[A]lthough *Tinker* does not allow schools to restrict the non-invasive, non-

disruptive expression of political viewpoints, it does permit school authorities to restrict ‘one particular opinion’ if the expression would ‘impinge upon the rights of other students’ or substantially disrupt school activities.’”). This suggests that the Department thinks it may be appropriate for schools to limit or compel speech where the school determines failing to do so would constitute sex-based harassment, as aggressively defined by the Department.⁶

For example, the Department notes that “[m]any commenters . . . believe that misgendering is one form of sex-based harassment.” Nondiscrimination on the Basis of Sex in Educ. Programs or Activities Receiving Fed. Fin. Assistance, 89 Fed. Reg. at 33516. The Department claims that “whether verbal conduct constitutes sex-based harassment is necessarily fact specific.” *Id.* Even assuming that turns out to be true in practice, speech could easily be chilled as students self-censor or give in to compelled speech to avoid being harassed by classmates or their school’s Title IX compliance officers.

More broadly, claimed concern about “harm” is often used to justify efforts to silence or compel speech depending on the preferred outcome of bureaucratic diktat.⁷ Thus, students on campus, for example, might face reprisals for using

⁶ The Department repeatedly refuses to address specific concerns like whether using pronouns according to biology could constitute sex-based harassment.

⁷ See, e.g., Samuel Spencer, *Using Elliot Page’s ‘Deadname’ is a Problem—Here’s Why*, Newsweek (Dec. 02, 2022 7:19 AM) <https://www.newsweek.com/elliott-page->

pronouns consistent with biology, accidentally or otherwise using a previous name for someone who self-identifies as transgender (so-called “deadnaming”), or for making statements like that of Judge Reeves, that there are only two sexes. In other words, members of the school community will be forced to pretend not to notice reality.⁸

These speech restrictions and the attendant danger of violating them are reminiscent of George Orwell’s *1984*. Towards the end of the story, Winston, while being tortured, is allowed to briefly see a photo before it is “memory holed.” “It exists,” Winston exclaims.⁹ O’Brien, his torturer, responds, “It does not exist. It never existed.”¹⁰ Winston retorts, “But it did exist! It does exist. In memory. I remember it. You remember it.”¹¹ When O’Brien denies remembering the photo he had moments before destroyed, “Winston's heart sank,” because it seemed to him in that moment that:

deadname-birth-name-1551714. See, also, Jennifer Bauwens et al., *The Trans Youth Phenomenon: Critiques and Hard Questions*, CURE available at <https://downloads.frc.org/EF/EF23I36.pdf>.

⁸ “I am not a critic of the West. I am a critic of the weakness of the West. I am a critic of a fact which we can't comprehend: how one can lose one's spiritual strength, one's will power and, possessing freedom, not value it, not be willing to make sacrifices for it.” *An Interview With Aleksandr Solzhenitsyn*, Carnegie Council in Ethics and International Affairs, <https://www.carnegiecouncil.org/media/series/100-for-100/an-interview-with-aleksandr-solzhenitsyn> (last visited Aug. 29, 2024).

⁹ George Orwell, *1984* 247 (Signet Classics, pub. n.d.) (1949).

¹⁰ *Id.*

¹¹ *Id.*

[I]t was perfectly possible that O'Brien had really forgotten the photograph. And if so, then already he would have forgotten his denial of remembering it, and forgotten the act of forgetting. How could one be sure that it was simple trickery? Perhaps that lunatic dislocation in the mind could really happen: that was the thought that defeated him.¹²

O'Brien asks Winston to repeat the relevant party slogan. "Who controls the past controls the future: who controls the present controls the past."¹³

Earlier in the novel, Winston had written in his diary, "Freedom is the freedom to say that two plus two make four."¹⁴ O'Brien holds up four fingers and asks Winston how many. After Winston answers, O'Brien asks, "And if the party says that it is not four but five—then how many?" Winston's answer of "[f]our" earns him a shock. The torture goes on. Eventually, Winston claims to see five fingers.¹⁵ O'Brien chastises him for lying.¹⁶ Winston is not allowed relief until, being asked again, he responds, "I don't know. I don't know. You will kill me if you do that again. Four, five, six—in all honesty I don't know."¹⁷ As O'Brien had earlier explained, "It is not easy to become sane."¹⁸ It is hard to convince yourself not to believe your own eyes.

¹² *Id.*

¹³ *Id.* at 248.

¹⁴ *Id.* at 249.

¹⁵ *Id.* at 250.

¹⁶ *Id.*

¹⁷ *Id.* at 252.

¹⁸ *Id.* at 251.

Athletic competition is like a man holding up four fingers. When told to affirm that a man can become a woman or vice versa, a person watching a mediocre male swimmer win a woman's race might exclaim, "How can I help seeing what is in front of my eyes."¹⁹

II. The Historical Data Makes Clear that if Women and Girls are to Have Meaningful Opportunities for Athletic Excellence, Girls' and Women's Sports Must be Preserved for Girls and Women Only.

Female-only sports provide women with opportunities they would not otherwise have. The biological differences between men and women are real and have significant consequences for athletic performance. If women and girls are to have the opportunity to compete and excel in fair competition, males must be excluded from women's and girls' sports. In many sports, measuring the differences between the two sexes would be difficult. In sports that are measured in time, however, the comparison of men and women is revealing. The data is presented below to be remembered before it is taken down and memory-holed.

The potential impact of the Title IX rule on women's sports is startling. As is explained by the Plaintiff-Appellee's brief in another case challenging this Title IX rule:

While the Department says it "does not implicate" athletics, DOE Br. 26 n.3, the Rule inevitably affects athletics regardless of the exemption in § 106.31(a)(2). First, § 106.10 redefines sex discrimination generally. Second, § 106.11 says this new definition "applies ... to all sex

¹⁹ *Id.* at 250.

discrimination occurring under a recipient’s education program or activity” (emphasis added). That includes athletics. 89 Fed. Reg. at 33,528 (interpreting “‘program or activity’ broadly ...”). Third, § 106.31(a)(1) repeats that § 106.10 covers “other education program[s] or activit[ies]....” Again, that includes athletics. Fourth, § 106.31(a)(2) only exempts § 106.41(b); it does not exempt § 106.41(a), which bans sex discrimination “in any interscholastic, intercollegiate, club or intramural athletics....” And § 106.31(a)(2) doesn’t limit § 106.10 or § 106.11’s broad scope covering athletics. See DOE Br. 26 n.4. The result: § 106.10’s redefinition of sex discrimination applies to educational programs generally via § 106.11, and specifically to sports through § 106.41(a).

Brief of Intervenors-Appellees at 37-38 (Aug. 26, 2024), *Tennessee v. Cardona*, No. 24-558 (6th Cir.) (alterations in original). Last year, the government argued in an amicus brief that a West Virginia law violated Title IX because it prohibited males who identify as females from participating in girls and women’s school sports. Brief of United States as amicus curiae at 12, *B.P.J. v. West Virginia State Bd. of Ed.*, Nos. 23-1078(L), 23-1130 (6th Cir. April 16, 2022).. The destruction of the distinction between men and women in sports would represent a significant loss of opportunity for women and girls around the country, directly contrary to the purpose of Title IX. The facts make that abundantly clear.

A. Thousands of men have exceeded the women’s world record in a sample of running events.

Martia Koch of East Germany set the women’s 400 meter world record in 1985, running the single-lap race in 47.60 seconds.²⁰ More than 3,800 different men

²⁰ See 400 Metres Women, World Athletics, <https://worldathletics.org/records/all->

have run the 400 meters in 46.50 seconds or faster, over a second faster than the women's world record.²¹ Counting every time a man has run a particular time, men have run the 400 meter as fast or faster than 45.50, more than two seconds faster than the women's record, at least 8,800 times.²² The American high school boys' record in the 400 meters is 44.59 seconds, and the 10 fastest high school boy's 400 meter times are all faster than the women's 400 meter world record.²³

Similarly, Gudaf Tsegay of Ethiopia set the women's outdoor track 5,000 meter record in 2023, covering the distance in 14:00.21.²⁴ This time has likely been

time-toplists/sprints/400-metres/all/women/senior?regionType=world&timing=electronic&page=1&bestResultsOnly=true&firstDay=1899-12-31&lastDay=2024-08-11&maxResultsByCountry=all&eventId=10229511&ageCategory=senior.

²¹ See 400 Meters Men, World Athletics, <https://worldathletics.org/records/all-time-toplists/sprints/400-metres/all/men/senior?regionType=world&timing=electronic&page=40&bestResultsOnly=true&firstDay=1899-12-31&lastDay=2024-08-11&maxResultsByCountry=all&eventId=10229631&ageCategory=senior>.

²² 400 Metres Men, World Athletics, <https://worldathletics.org/records/all-time-toplists/sprints/400-metres/all/men/senior?regionType=world&timing=electronic&page=1&bestResultsOnly=false&firstDay=1899-12-31&lastDay=2024-08-11&maxResultsByCountry=all&eventId=10229631&ageCategory=senior>.

²³ High School All-Time top 10s-Boys, Track and Field News (records up to date as of July 10, 2024) <https://trackandfieldnews.com/tfn-lists/high-school-all-time-top-10s-boys/#400>.

²⁴ See 5000 Metres Women, World Athletics, <https://worldathletics.org/records/all-time-toplists/middlelong/5000-metres/all/women/senior?regionType=world&page=1&bestResultsOnly=false&firstDay=1899-12-31&lastDay=2024-08-11&maxResultsByCountry=all&eventId=10229514&ageCategory=senior>.

exceeded by more than 6,000 different men.²⁵ Further, men have run the 5,000 meters in 13:30 or less at least 9,233 times.²⁶ The American high school boys' record for the 5,000 meters is 13:25.86, and at least the top 10 high school boys' times exceed the women's world record.²⁷

The numbers for the marathon likewise demonstrate the need for women's sports. Tigst Assefa of Ethiopia set the women's marathon world record in 2023, running the 26.2 miles in 2:11:53.²⁸ Men have matched or exceeded that record at least 8,800 times²⁹ and at least 2,500 different men have matched or exceeded her

²⁵ See 5000 Metres Men, World Athletics, <https://worldathletics.org/records/all-time-toplists/middlelong/5000-metres/all/men/senior?regionType=world&page=60&bestResultsOnly=true&firstDay=1899-12-31&lastDay=2024-08-11&maxResultsByCountry=all&eventId=10229609&ageCategory=senior>.

²⁶ See 5000 Metres Men, World Athletics, <https://worldathletics.org/records/all-time-toplists/middlelong/5000-metres/all/men/senior?regionType=world&page=93&bestResultsOnly=false&firstDay=1899-12-31&lastDay=2024-08-11&maxResultsByCountry=all&eventId=10229609&ageCategory=senior>.

²⁷ High School All-Time Top 10s-Boys, Track and Field News (records up to date as of July 10, 2024) <https://trackandfieldnews.com/tfn-lists/high-school-all-time-top-10s-boys/#1500>.

²⁸ Marathon Women, World Athletics, <https://worldathletics.org/records/all-time-toplists/road-running/marathon/all/women/senior?regionType=world&page=1&bestResultsOnly=true&firstDay=1899-12-31&lastDay=2024-08-11&maxResultsByCountry=all&eventId=10229534&ageCategory=senior>.

²⁹ See 5000 Metres Men, World Athletics, <https://worldathletics.org/records/all-time-toplists/road-running/marathon/all/men/senior?regionType=world&page=89&bestResultsOnly=false&firstDay=1899-12-27&lastDay=2024-07-25&maxResultsByCountry=all&eventId=10229634&ageCategory=senior>.

time.³⁰ Assefa is the only woman to ever break 2:12 in the marathon, with the second fastest marathon ever run by a woman being Sifan Hassan's 2:13:44.³¹ On the other hand, men have broken 2:12:00 well over 9,000 times,³² with more than 4,000 different men having matched or exceeded the second fastest marathon ever run by a woman.³³

The women who run competitively at the international level are incredibly fast athletes who would leave the average person, male or female, in the dust. But all it would take for these elite women to lose out on opportunities is for one of the

³⁰ See Marathon Men, World Athletics, <https://worldathletics.org/records/all-time-toplists/road-running/marathon/all/men/senior?regionType=world&page=26&bestResultsOnly=true&firstDay=1899-12-28&lastDay=2024-07-26&maxResultsByCountry=all&eventId=10229634&ageCategory=senior>.

³¹ Marathon Women, World Athletics, <https://worldathletics.org/records/all-time-toplists/road-running/marathon/all/women/senior?regionType=world&page=1&bestResultsOnly=true&firstDay=1899-12-27&lastDay=2024-07-25&maxResultsByCountry=all&eventId=10229534&ageCategory=senior>.

³² See Marathon Men, World Athletics, <https://worldathletics.org/records/all-time-toplists/road-running/marathon/all/men/senior?regionType=world&page=93&bestResultsOnly=false&firstDay=1899-12-27&lastDay=2024-07-25&maxResultsByCountry=all&eventId=10229634&ageCategory=senior>.

³³ See Marathon Men, World Athletics, <https://worldathletics.org/records/all-time-toplists/road-running/marathon/all/men/senior?regionType=world&page=41&bestResultsOnly=true&firstDay=1899-12-27&lastDay=2024-07-25&maxResultsByCountry=all&eventId=10229634&ageCategory=senior>.

thousands of men who are faster than them to begin competing as a woman. The numbers in swimming discussed below follow the same pattern.

B. The best boy swimmers in the world become competitive with the best women swimmers in the world when the boys hit puberty.

Virtually every swimming National Age Group (NAG) 13–14-year-old boys’ long course meters (“LCM”) record is faster than the women’s world records in the same events.³⁴ United States age group swimming is split into five age group categories: 10 and under, 11-12, 13-14, 15-16, and 17-18. Each age group has its own records for each swimming event, including short course yards (“SCY”) and LCM.³⁵ In the 13-14 age group, every LCM age group record is faster than the women’s overall world record. In the 50 meter-freestyle, Thomas Heilman’s boy’s 13-14 NAG record is 22.95, set in 2021.³⁶ The women’s world record in the same event was set by Sarah Sjostrom’s in 2023 at 23.61.³⁷

³⁴ National Age Group Records LCM 13-14, USA Swimming, <https://www.usaswimming.org/times/popular-resources/national-age-group-records/lcm/13-14>. Even the existence of age groups indicates the importance of creating space for fair competition. Eleven- and twelve-year-old boys should not be competing against fifteen- and sixteen-year-old boys.

³⁵ SCY races are held in 25-yard-long pools. LCM races are those that take place in Olympic sized (50 meter) pools.

³⁶ USA Swimming, *supra* note 33.

³⁷ Women Freestyle World Records, World Aquatics, <https://www.worldaquatics.com/swimming/records?recordCode=WR&eventTypeId=®ion=&countryId=&gender=F&pool=LCM>.

In the 200 meter individual medley, a race in which the athlete swims 50 meters of each stroke (butterfly, backstroke, breaststroke and freestyle), Shareef Elaydi's boy's 13-14 NAG 200 meter-individual-medley record is 2:03.73.³⁸ Katinka 'Iron Lady' Hosszú's women's world record in this event is 2:06.12, set at the World Championships in 2015.³⁹

Katie Ledecky, widely considered the greatest women's swimmer of all time, has two world records: the 800 meter freestyle and the 1,500 meter freestyle. Luka Mijatovic's boy's 13-14 NAG 800 meter freestyle record is 7:59.64,⁴⁰ compared to Ledecky's 8:04.97 in the same event.⁴¹ Ledecky's 1,500 meter freestyle world record is the one exception to the rule that the 13-14 boys exceed the women's world record times. Nonetheless, Ledecky's world record of 15:20.48⁴² is slower than the 15-16 boy's record.⁴³ Further, Mijatovic's 1,500 meter freestyle 13-14 record of 15:26.73⁴⁴ is faster than any woman's time except Ledecky's.⁴⁵

³⁸ USA Swimming, *supra* note 33.

³⁹ World Aquatics, *supra* note 36.

⁴⁰ USA Swimming, *supra* note 32.

⁴¹ World Aquatics, *supra* note 36.

⁴² *Id.*

⁴³ USA Swimming, *supra* note 32.

⁴⁴ *Id.*

⁴⁵ Ledecky holds the twenty fastest women's 1,500 meter LCM times in history. The fastest time of the second fastest woman ever, Lotte Friis, is 15:38.88. Anya Pelshaw, *Katie Ledecky Now Holds Top 20 Performances All-Time in Women's 1500 Freestyle After 15:30.02*, SwimSwam (July 31, 2024). Mijatovic's 13-14 record is also faster than Ledecky's 15:30.02 Olympic record set in Paris this year. *See id.*

By the time male swimmers have reached physical maturity, a mediocre male swimmer can make himself highly competitive by swimming against women. Such a situation is not hypothetical. In the 2021 season for National Collegiate Athletic Association (NCAA) swimming, University of Pennsylvania swimmer Will Thomas was ranked 554th in the NCAA, all divisions, in the men’s 200 meter freestyle.⁴⁶ The next year, Lia Thomas (the same person, now swimming in women’s races) finished 5th in the nation in the women’s 200 meter freestyle,⁴⁷ famously being given the nod by the NCAA over Riley Gaines, with whom he tied in that race.⁴⁸ Somewhat less dramatically, but even more tragically for the women he competed against, Thomas was ranked 65th nationally in the 500 meter freestyle when swimming against men, but “won” the NCAA women’s title in 2022 at that same distance,⁴⁹ depriving Emma Weyant of the University of Virginia, the fastest woman in that race and now two-time Olympian, of the top trophy.⁵⁰

⁴⁶ John Lohn, *A Look at the Numbers and Times: No Denying the Advantages of Thomas*, *Swimming World* (April 5, 2022 9:05AM).

⁴⁷ *Id.*

⁴⁸ Riley Gaines, *Testimony Before the House Subcommittee on Health Care and Financial Services: “The Importance of Protecting Female Athletics and Title IX”*, *Independent Women’s Voice* (Dec. 5, 2023) <https://oversight.house.gov/wp-content/uploads/2023/12/Testimony-Gaines.pdf>.

⁴⁹ *Id.*

⁵⁰ See, James Sutherland, *2022 Women’s NCAA Championships: Results & Records Summary*, *SwimSwam* (March 22, 2022).

In every sport, both men's and women's records are broken as training techniques and other technologies improve. But the disparity between men's and women's times remains. Gretchen Walsh's 50 meter freestyle NCAA record from March 21, 2024, would have been the Men's NCAA record in 1970. In 1970, the men's 50 meter freestyle NCAA record for collegiate swimming was clocked at 20.5 seconds by David Edgar,⁵¹ one of the greatest short course swimmers of the 1970s. As of March 2024, Gretchen Walsh holds the women's 50 meter freestyle NCAA Division I record of 20.37 seconds, which was also an American record.⁵² Walsh is also the only woman to ever break 20 seconds in the 50 meter freestyle, which she did at the 2024 ACC Championship swim meet when she swam a 19.95 second split in a relay.⁵³ Although she is the fastest woman in sprinting history, her current NCAA record of 20.37 seconds would only exceed the men's record from over 50 years ago.

While the objective measurements of performance used in sports like running and swimming facilitate direct comparisons, the physical advantage men enjoy is

⁵¹ William F. Reed, *Fastest Man Afloat*, Sports Illustrated (Mar. 1, 1971) <https://vault.si.com/vault/1971/03/01/fastest-man-afloat>.

⁵² Dan D'Addona, *Gretchen Walsh Lowers NCAA 50 Free Record: 'She is Doing Things No One Has Ever Done'*, Swimming World (Mar. 21, 2024).

⁵³ Nick Pecoraro, *Race Video: Gretchen Walsh Splits 19.95 in the 50 Free, First Woman to Break 20 Seconds*, SwimSwam (Feb. 21, 2024) <https://swimswam.com/race-video-gretchen-walsh-splits-19-95-in-the-50-free-first-woman-to-break-20-seconds%f0%9f%a4%af/>.

relevant in every athletic competition. If women are not to be denied opportunities for achievement, biological males must be kept out of women's sports.

III. The Use of Puberty Blockers to Address Gender Dysphoria in Young People Will Rightly be Remembered Alongside Other Forms of Harm to Children.

Causing children physical harm is an evil present in every society. Even more tragically, different forms of harm have been considered socially acceptable and even obligatory in many societies. In America, such harm is, rightly, nearly universally criminalized. However, one form of such harm, the chemical or surgical manipulation of children in response to alleged gender dysphoria, is not only accepted by many, but has been used to justify allowing boys to compete against girls. While the Department's Title IX regulation does not directly address this issue, it is almost inevitable to intersect in practice as schools are forced to navigate gender issues in sports. Puberty blockers may also be seen as a way of mitigating the concerns about men in women's sports discussed above. For the reasons discussed below, they are no solution.

A. Throughout history, children's bodies have been subjected to various horrors.

Throughout human history, for a variety of reasons, many different peoples have treated children and their bodies with brutality. For example, different societies

throughout history have engaged in child sacrifice and child abandonment.⁵⁴ Different societies have also engaged in many forms of non-lethal, physical child abuse. Nor are these practices confined to the distant past. A Chinese man named Sun Yaoting who died in 1996, known as the last eunuch of China after the book that documents his story, suffered the eunuch-making procedure as a child at the hands of his father.⁵⁵ Yaoting convinced his father to perform the procedure with the hope of ultimately gaining influence in the emperor's palace and then using that influence to exact revenge on a local landlord who had wronged his family.⁵⁶

In Europe, castrati were singers who had been castrated before puberty, and thus who had unique and sought-after voices. Poor Italian families would choose this path as both an immediate financial relief—the boys were sent away from the family and thus no longer needed to be fed—and as a path to future financial success.⁵⁷ In the late nineteenth century, “violent diatribes were uttered against a custom which had ‘dishonored’, it was thought, the two previous centuries . . . In future no anathema was too strong for the condemnation of this ‘barbarous’ custom which

⁵⁴ See, e.g., *Ancient Carthaginians Really Did Sacrifice Their Children*, University of Oxford (Jan 23, 2014) <https://www.ox.ac.uk/news/2014-01-23-ancient-carthaginians-really-did-sacrifice-their-children>.

⁵⁵ Yinghua Jia, *The Last Eunuch of China: The Life of Sun Yaoting* 12, 14 (Sun Haichen trans. 2008) <https://archive.org/details/lasteunuchofchin0000jiay/mode/2up>.

⁵⁶ *Id.* at 10-12.

⁵⁷ Alanna Skuse, *Surgery and Selfhood in Early Modern England* 17 (Cambridge University Press 2021).

outraged ‘morality, humanity, and nature.’”⁵⁸ Finally, in 1902, Pope Leo XIII “banished castrati from the Sistine Chapel for ever.”⁵⁹

For a thousand years in China, girls had their feet bound, a brutal process that forced their feet to be as small as possible and into the desired shape.⁶⁰ “Once the foot had been crushed and bound, the shape could not be reversed without a woman undergoing the same pain all over again.”⁶¹

Female genital mutilation (“FGM”), or female circumcision, remains a common practice in some countries today as well as among some immigrant groups in the West, and “[o]ver 100 million women and young girls living today have experienced some form of FGM with millions more being affected annually.”⁶² According to the Office of Women’s Health within the U.S. Department of Health and Human Services, FGM poses serious medical risks in both the short and long terms.⁶³ According to Congress, “[FGM] is recognized internationally as a human

⁵⁸ Patrick Barbier, *The World of the Castrati* 236 (Margaret Crosland trans. 1996).

⁵⁹ *Id.* at 126.

⁶⁰ Amanda Foreman, *Why Footbinding Persisted in China for a Millennium*, Smithsonian Magazine (Feb. 2015) <https://www.smithsonianmag.com/history/why-footbinding-persisted-china-millennium-180953971/>.

⁶¹ *Id.*

⁶² Jewel Llamas, *Female Circumcision: The History, the Current Prevalence, and the Approach to a Patient* at 1 (April 2017) <https://med.virginia.edu/family-medicine/wp-content/uploads/sites/285/2017/01/Llamas-Paper.pdf>.

⁶³ Fact Sheet on Female Genital Mutilation or Cutting, Office of Women’s Health, Department of Health and Human Services, <https://owh-wh-d9-dev.s3.amazonaws.com/s3fs-public/documents/fact-sheet-fgmc.pdf>.

rights violation and a form of child abuse, gender discrimination, and violence against women and girls.”⁶⁴

What people in a society find acceptable changes over time and from place to place, sometimes for the better but sometimes for the worse. Carthage was a city-state located in modern Tunisia that existed from about 800 BC until 146 BC.⁶⁵ An article published in the journal *Antiquity* in 2013 argued that, despite claims in the preceding decades, the Carthaginians really had engaged in child sacrifice, as the Romans and Greeks had alleged.⁶⁶

Dr. Josephine Quinn of Oxford University, one of the study’s authors, explained at the time that the view that was increasingly common in the 20th century, that the Greek and Roman claims about Carthaginian child sacrifice were ““racist propaganda,”” is an anachronistic judgment.⁶⁷ Dr. Quinn said, “We think of it as a slander because we view it in our own terms. But people looked at it differently 2,500 years ago . . . We should not imagine that ancient people thought like us and were horrified by the same things.”⁶⁸ The history of the twentieth century should disabuse us of the assumption that human nature has changed such that these ancient horrors are no longer possible.

⁶⁴ 18 U.S.C. § 116 note.

⁶⁵ *Ancient Carthaginians Really Did Sacrifice Their Children supra* note 53.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

In fact, certain horrors of the past are resurfacing today under the guise of care.

B. The administration of puberty blockers to healthy children to prevent natural and normal puberty is an unproven practice with the potential to cause serious harm.

Puberty blockers have been approved by the FDA for treating precocious puberty, the condition in which children begin puberty earlier than is normal or healthy. They are used in such cases to delay puberty until the normal age at which puberty should begin. However, they are being prescribed to arrest the natural pubertal process not because that process has begun too early or to address some other physical malady, but to address gender dysphoria in young people.

As is explained in the Cass Review, a review of gender medicine conducted in Great Britain by Dr. Hilary Cass, the safety of puberty blockers as a temporary fix for gender dysphoria cannot be extrapolated from their safety as a treatment for precocious puberty.⁶⁹ When used to delay natural puberty, puberty blockers “are

⁶⁹ Dr. Hillary Cass, *Independent Review of Gender Identity Services for Children and Young People* 174. The full report is available for download at <https://cass.independent-review.uk/home/publications/final-report/>. The evidence that the science behind “trans medicine” is unreliable has continued to come in. *Research Into Trans Medicine has Been Manipulated*, *The Economist* (July 27, 2024) <https://tinyurl.com/46esdsr6>. Yet the Federal Government may be acting to cover up the data that would expose that lack of evidence in America. As Leor Sapir explains, the Department of Justice (DOJ) may be trying “to halt release of more information in the Alabama case, as that material could further expose [the World Professional Association for Transgender Health (WPATH)] and shed more light on how HHS and other executive-branch officials misled the American public about

blocking the normal rise in hormones that should be occurring into teenage years, and which is essential for psychosexual and other developmental processes.”⁷⁰

Several justifications have been offered for administering puberty blockers to physically healthy children.⁷¹ As the information reviewed by the Cass report shows, the data supporting these justifications ranges from inconclusive to nonexistent.

First, puberty blockers may be intended to help those taking them “pass” as the opposite sex when they are adults. The Cass Review notes that “since most young people are not starting puberty blockers until the age of 15 and above, it is unclear

youth gender transition.” Leor Sapir, *What Does the DOJ Not Want Americans to Know?*, City Journal (July 12, 2024) <https://www.city-journal.org/article/what-does-the-doj-not-want-americans-to-know>.

⁷⁰ *Id.*

⁷¹ If doctors who prescribe puberty blockers to address gender incongruence are confident that there are no unreasonable dangers associated with administering puberty blockers to physically healthy children and adolescents, would such doctors be willing to sign a waiver of the statute of limitations, giving themselves some skin in the game for the risk of future harm to the young people they profess to help? After all, as even one critic of the Cass Review has noted, so-called “gender-affirming medical care for adolescents” is “a particularly fraught and contested area of medicine.” Lydia Polgreen, *The Strange Report Feuling the War on Trans Kids*, The New York Times (Aug. 13, 2024) <https://www.nytimes.com/2024/08/13/opinion/cass-report-trans-kids.html>.

Polgreen’s New York Times article has been criticized for “studiously avoid[ing] handling any uncomfortable realities, like what the medical ‘autonomy’ she advocates actually entails or what patients are being asked to consent to: sterility, the loss of sexual pleasure, and life as a guinea pig in an unregulated medical experiment.” Eliza Mondgreen, *NYT Columnist Refuses to Accept Cass Review Findings*, UnHerd (Aug. 14, 2024 1:00 PM) <https://unherd.com/newsroom/nyt-columnist-refuses-to-accept-cass-review-findings/>.

how helpful they might be” for allowing those on them to “pass” later on in life.⁷² Further, since a desire to “pass” depends on the continued experience of gender dysphoria, and because the prevalence of its persistence appears to be greatly increased by the administration of puberty blockers, even if puberty blockers did help adults with gender dysphoria “pass,” that would not indicate that the administration of puberty blockers had been acceptable.

Second, puberty blockers are presented as giving children more time to consider whether they want to continue gender transition. That claim grows out of Dutch research, the reliability of which has been seriously challenged.⁷³ Some studies have found that over 90% of those who begin taking puberty blockers will eventually take cross-sex hormones.⁷⁴ While advocates of this approach may suggest that this merely indicates accuracy in the initial diagnosis of gender dysphoria, they have the burden to show that that is in fact the best explanation for the high rate of persistence.

As the Cass Review explains, “A formal diagnosis of gender dysphoria is frequently cited as a prerequisite for accessing hormone treatment. However, it is

⁷² Cass *supra* note 68 at 177.

⁷³ E. Abbruzzese, Stephen B. Levine, Julia W. Mason, *The Myth of “Reliable Research” in Pediatric Gender Medicine: A Critical Evaluation of the Dutch Studies—and Research That Has Followed*, 49 *Journal of Sex and Marital Therapy* 673 (2023).

⁷⁴ *Id.* at 176.

not reliably predictive of whether that young person will have longstanding gender incongruence in the future, or whether medical intervention will be the best option for them.”⁷⁵ It is at least as plausible, if not significantly more so, that suppressing natural puberty locks in discomfort with gender that may have otherwise subsided with time. As the Cass Review concludes, the “data suggest that puberty blockers are not buying time to think, given that the vast majority of those who start puberty suppression continue to masculinising/feminising hormones, particularly if they start earlier in puberty.”⁷⁶ The question, of course, is whether without this intervention, the person’s gender dysphoria would have persisted after natural puberty.

Third, puberty blockers are supposed to provide psychological and mental health benefits. However, the Cass Review found that the data to support this supposition are mixed and inconclusive.⁷⁷ Further, the Cass Review suggests that the results may have been impacted by the lack of a randomized control and a “strong belief that the treatment is effective.”⁷⁸

These supposed benefits are offset by several risks. First, as the Cass Review notes, the administration of puberty blockers may alter “the trajectory of development of sexual and gender identity.”⁷⁹ Sadly, puberty blockers may well

⁷⁵ *Id.* at 193.

⁷⁶ *Id.*

⁷⁷ *See id.* at 176-77.

⁷⁸ *Id.* at 177.

⁷⁹ *Id.* at 178.

prevent a natural resolution of young people's gender identity issues. By preventing the natural pubertal process, young people may well be locked into their mental state rather than developing out of it. Further, even if used as intended, cross-sex hormones may lead to sexual dysfunction and, by biological necessity, to sterility.⁸⁰ It is increasingly clear that starting kids on puberty blockers constitutes not a singular intervention, but rather starting them down an unproven path with a high risk of harm.

Second, puberty blockers may well hinder neurocognitive development. As the Cass Review explains:

[A]dolescent sex hormone surges may trigger the opening of a critical period for experience-dependent rewiring of neural circuits underlying executive function (i.e. maturation of the part of the brain concerned with planning, decision making and judgement). If this is the case, *brain maturation may be temporarily or permanently disrupted by the use of puberty blockers, which could have a significant impact on the young person's ability to make complex risk-laden decisions, as well as having possible longer-term neuropsychological consequences.*⁸¹

The research on this issue is, at best, inconclusive. One study found no cognitive difference between those adolescents given puberty blockers for less than

⁸⁰ And, as Dr. Marci Bowers, president of the WPATH said, the administration of puberty blockers before a certain stage of pubertal development leads to sexual dysfunction. Hannah Grossman, *Influential Trans Care Doctor Once Warned Puberty Blockers Could Cause Permanent Sexual Dysfunction*, Fox News (May 23, 2022 4:24 AM) <https://www.foxnews.com/media/influential-trans-care-doctor-once-warned-puberty-blockers-could-cause-permanent-sexual-dysfunction>.

⁸¹ Cass, *supra* note 68 at 178 (emphasis added).

a year and those not given puberty blockers at all, “but found worse executive functioning in those treated for more than one year compared to those not treated.”⁸² Common sense suggests that delaying puberty, one of the most important physiological and psychological developmental milestones in a person’s life, would have lifelong impacts.

Next, the Cass Review argues that, “[i]f puberty suppression is started too early in birth-registered males it can make subsequent vaginoplasty (creation of a vagina and vulva) more difficult due to *inadequate penile development*.”⁸³ Puberty blockers can prevent a child’s sexual development such that, as an adult, he will not have properly developed genitalia.⁸⁴ Such destruction of young bodies is not unlike those mutilations discussed above of young boys’ and girls’ bodies now rightly seen as barbaric relics.

For all of these reasons, that some boys have been given puberty blockers is no excuse for allowing those children to participate in female sports. That one child is being harmed is no reason to harm others. The Title IX Rule at issue here makes

⁸² *Id.*

⁸³ *Id.* (emphasis added).

⁸⁴ That these interventions could permanently close doors the importance of which the child or adolescent in question could not possibly understand at his age is not the exercise of autonomy, but its destruction. *See, generally*, Moti Gorin, *What is the Aim of Pediatric “Gender-Affirming” Care?*, 54 *Hastings Center Report* 15 (2024).

that harm even more likely. America needs the Biden-Harris Title IX mutations like a fish needs a bicycle.

CONCLUSION

For the forgoing reasons, this Court should rule for Plaintiffs-Appellees.

Respectfully submitted,

/s/ J. Marc Wheat

J. MARC WHEAT

Counsel of Record

ADVANCING AMERICAN FREEDOM, INC.

801 Pennsylvania Avenue, N.W.

Suite 930

Washington, D.C. 20004

(202) 780-4848

MWheat@advancingamericanfreedom.com

Counsel for Amici Curiae

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I certify that this brief complies with the type-volume limitation set forth in Circuit Rule 32-1(a) and Federal Rules of Appellate Procedure 32(a)(5)(A). This brief uses a proportional typeface and 14-point font, and contains 6,500 words.

Respectfully submitted,

/s/ J. Marc Wheat

J. MARC WHEAT

Counsel of Record

ADVANCING AMERICAN FREEDOM, INC.

801 Pennsylvania Avenue, N.W.

Suite 930

Washington, D.C. 20004

(202) 780-4848

MWheat@advancingamericanfreedom.com

Counsel for Amici Curiae

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Respectfully submitted,

/s/ J. Marc Wheat

J. MARC WHEAT

Counsel of Record

ADVANCING AMERICAN FREEDOM, INC.

801 Pennsylvania Avenue, N.W.

Suite 930

Washington, D.C. 20004

(202) 780-4848

MWheat@advancingamericanfreedom.com

Counsel for Amici Curiae

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Respectfully submitted,

/s/ J. Marc Wheat

J. MARC WHEAT

Counsel of Record

ADVANCING AMERICAN FREEDOM, INC.

801 Pennsylvania Avenue, N.W.

Suite 930

Washington, D.C. 20004

(202) 780-4848

MWheat@advancingamericanfreedom.com

Counsel for Amici Curiae