

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

A.M., by her mother and next friend, E.M.,)
)
 Plaintiff,)
)
 v.)
)
 INDIANAPOLIS PUBLIC SCHOOLS; SU-)
 PERINTENDENT, INDIANAPOLIS PUBLIC)
 SCHOOLS, in her official capacity,)
)
 Defendants.)
)
 v.)
)
 STATE OF INDIANA)
)
 Intervenor.)

Case No. 1:22-cv-1075-JMS-DLP

**STATE’S MEMORANDUM IN OPPOSITION TO
PLAINTIFF’S MOTION FOR PRELIMINARY INJUNCTION**

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INTRODUCTION

On the Golden Anniversary of Title IX, HEA 1041 provides a new safeguard for girls' equal opportunities in sports. Both Title IX and the Equal Protection Clause recognize that separation on the basis of sex is not only permissible but often required to provide both sexes with equal opportunities and to protect safety and privacy. HEA 1041 is fully consonant with both. It requires that only biological females may participate in sports designated for females, and it does so to ensure biological girls and women have the same opportunities in sports as biological boys and men, including with respect to safety.

A distinctive feature of Title IX is that it requires schools to provide equal opportunities to females in education, including sports. It prohibits schools from “exclud[ing]” females from sports, or “den[ying] [them] the benefits” of sports, “on the basis of sex.” 20 U.S.C. § 1681(a). By “sex,” Title IX means biological sex, not gender identity, which A.M.’s own expert explains, is a subjective sense of self. Title IX does not prohibit schools from separating athletes based on biological sex to preserve equal opportunities for both sexes, even if that is contrary to some students’ perceptions of their identity. As experts recognize, separating students based on biological sex is often necessary to preserve equal opportunities in sports for biological females. HEA 1041 is consistent with that longstanding recognition. Rewriting “sex” in Title IX to mean “gender identity” would put Title IX at war with itself and ultimately place schools in an untenable position.

HEA 1041 does not violate the Equal Protection Clause either. As even A.M.’s expert admits, gender identity and transgender status are neither obvious nor immutable characteristics. Transgender people are not part of a suspect or quasi-suspect class triggering heightened scrutiny. HEA 1041 must be upheld so long as there is a rational basis for excluding biological males from sports for biological females—which as Title IX itself recognizes, there surely is. Regardless, HEA

1041 is substantially related to the State’s important interests in maintaining separate sports opportunities for both sexes, protecting athletes’ safety, and maintaining the integrity of school sports. Moreover, an alternative that would require separating athletes based on individualized performance assessments would be very costly and require complex monitoring regimes. Neither IHSAA, which regulates high school sports in Indiana, nor IPS, A.M.’s school district, has ever established or maintained such a monitoring regime, even for performance-enhancing drugs. The lack of any meaningful standards among IHSAA and its member schools for determining when a transgender student could participate in girls’ sports is another justification for HEA 1041.

A.M.’s request for a preliminary injunction should be denied. Not only can A.M. not demonstrate a likelihood of success on the merits, but the balance of harms and public interest weigh against a preliminary injunction. Enjoining enforcement of HEA 1041 altogether would permit biological males who identify as women play on girls’ sports teams even if they have experienced puberty and are not taking any puberty blockers—an intervention even A.M.’s expert agrees is necessary. The Court should not reverse women’s progress in sports by opening women’s teams and leagues to athletes having inherent biological advantages over women.

BACKGROUND

I. Title IX Advances Women’s Equality in Athletics

Title IX of the Education Amendments Act, signed into law on June 23, 1972, marked a monumental shift in women’s equality in education. At the time, college student bodies and faculties were still majority male, and only a single-digit percentage of women over the age of 25 had completed a four-year college degree. 118 Cong. Rec. 5804–06 (1972) (higher education statistics in 1970). Nat’l Ctr. Educ. Stat., *120 Years of American Education: A Statistical Portrait*, at 18 (1993) (national education data from 1790–1990). Similarly problematic, the Office of Education

(housed within the Department of Interior) had entirely ignored discriminatory policies in elementary and secondary schools. 118 Cong. Rec. 5807 (1972) (Sen. Birch Bayh sharing that “the Office of Education does not even keep statistics on how many elementary and secondary schools—even public schools—are restricted in admissions to one sex.”). Through Title IX, Congress confronted “the simple, if unpleasant, truth . . . that we still do not have in law the essential guarantees of equal opportunity in education for men and women.” *Id.* at 5808. Congress therefore enacted guarantees into Title IX: “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance” 20 U.S.C. § 1681(a).

Members of Congress did not view Title IX as prohibiting schools from continuing the longstanding practice of having separate men’s and women’s sports teams. Senator Bayh explained that Title IX “permit[s] differential treatment by sex . . . where such treatment is absolutely necessary to the success of the program—such as . . . in sports facilities or other instances where personal privacy must be preserved.” 118 Cong. Rec. 5807 (1972). As one commentator observes, “most female athletes, and most people with an interest in providing real opportunities for female athletes, would hardly [have been] satisfied with [sex-neutral Title IX] compliance.” Sherman J. Clark, *The Mixed Messages of Title IX*, 34 U. Mich. J.L. Reform 1, 5–6 (2001).

Regulations implementing Title IX likewise recognize that divisions based on sex are permissible. Under Title IX, the regulations explain, schools must provide “equal opportunities” in athletics “for members of both sexes.” 34 C.F.R. § 106.41(c). Schools, however, may still “operate or sponsor separate teams for members of each sex where selection . . . is based upon competitive skill or the activity involved is a contact sport.” *Id.* § 106.41(b). In fact, an important consideration

in Title IX compliance is “[w]hether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes.” *Id.* § 106.41(c)(1).

Title IX marked a turning point for women’s opportunities in athletics. Whereas 3.6 million men participated in high school athletics before Title IX’s enactment, fewer than 300,000 women played on their schools’ sports teams. *45 Years of Title IX: The Status of Women in Intercollegiate Athletics*, Nat’l Coll. Athletic Ass’n 16 (2017), <https://www.ncaapublications.com/productdownloads/TitleIX-45.pdf>. Within Title IX’s first year, girls’ participation rose by 178%. Neil Paine, *What 50 Years of Title IX Has—and Hasn’t—Accomplished*, *FiveThirtyEight* (June 1, 2022), <https://fivethirtyeight.com/features/paine-title-ix/>.

II. IHSAA and IPS Policies Addressing Transgender Participation in Athletics

Categories for boys’ and girls’ sports have long existed. Ex. 1, Declaration of William Bock, III (“Bock Decl.”), ¶¶ 3.3, 4.1.3. In Indiana, the Indiana High School Athletic Association’s bylaws provide for sex-segregated sports. Ex. 2, Deposition of John Paul Neidig, 30(b)(6) IHSAA (“Neidig Dep.”), at 15:1–3. IHSAA currently recognizes ten boys’ sports and ten girls’ sports for state championships as well as two new emerging sports, boys’ volleyball and girls’ wrestling—the number is always equal, thanks to Title IX. *Id.* at 94:13–14. As IHSAA puts it, providing for single-sex sports and teams serves to “protect the integrity of girls’ ability to participate on a fair, balanced, equal playing field.” *Id.* at 24:22–25:1.

The rising visibility of transgender athletes has raised questions about the single-sex sports paradigm, Bock Decl. ¶¶ 7.1–7.3, and Indiana athletic programs have struggled to respond. ISHAA’s own efforts to address transgender participation illustrates the difficulties. In 2006, in response to burgeoning national concerns rather than any local demands, IHSAA first developed a policy to address transgender participation in IHSAA athletic programs. Neidig Dep. 34:2–20.

That policy restricted participation on a single-sex team or sport to members of that sex and required a surgical change of sex for a transgender person to participate in the sport or on the team aligned with the person's gender identification rather than birth sex. *Id.* at 35:20–36:2. In 2017, upon concluding that surgery was an unnecessarily high bar—particularly for young people who are prone to “chang[ing] their mind[s]” and “may go back . . . [and] change their identity or how they identify at some point,” *id.* at 37:13–21—IHSAA overhauled its policy to permit waivers on a case-by-case basis, *id.* at 36:21–37:3.

The 2017 waiver policy established two standards. For female-to-male transgender applicants, the policy requires “written affirmation(s) and/or documentation regarding all testosterone therapy and physiological testing, counseling, or other medical or psychological interventions related to Gender transition.” Ex. 3, IHSAA Gender Policy (“IHSAA Policy”), at 4. More is required for male-to-female transgender athletes. For them, an application “shall include” “written affirmation(s) and/or documentation regarding” “all physiological testing, counseling, or other medical or psychological interventions related to Gender transition, and all hormone treatment or Gender reassignment procedure(s)” and “the student’s physical (bone structure, muscle mass, and/or testosterone hormonal levels, etc.) and physiological condition, and how they relate to the physical and physiological condition of a genetic female of the same age group.” *Id.* at 3–4. Male-to-female applicants must also establish they have “completed a minimum of one (1) year of hormone treatment” or “undergone a medically confirmed gender reassignment procedure.” *Id.* at 5.

The policy’s written requirements may give the impression that IHSAA subjects applicants, especially male-to-female applicants, to thorough vetting to ensure that they will not have a biological “competitive advantage” over their peers. Neidig Dep. 37:2–3. Reality, however, is far different. IHSAA will not deny applicants who fail to undergo required physiological testing. *Id.*

at 51:9–17. IHSAA has *no* metrics or standards by which it compares an applicant’s physical and physiological condition to “the physical and physiological condition of a genetic female of the same age group.” *Id.* at 53:25–54:1, 56:13–14, 62:12–19 (“a standard has not been established” as to whether the applicant is compared to an average female athlete or an elite female athlete).

Standards for hormones like testosterone—a significant factor in athletic performance—also are missing. IHSAA “do[es] not have a level” it requires transgender athletes to meet. *Id.* at 55:24–56:1. And although IHSAA’s policy requires continued monitoring by a licensed physician of applicants undergoing hormonal treatment, IHSAA Policy at 5, the applicant need only update the committee “annually,” Neidig Dep. 63:25–64:3. IHSAA itself does not test testosterone levels at any point in this process. *See* IHSAA Policy at 3–5 (requiring the *student* to establish through documentation and testimony their “testosterone hormonal levels”); Neidig Dep. 64:4–7 (committee would not know if student stopped undergoing treatment unless told). There simply is no standard for granting a waiver; the “standard is reviewed [sic] each case independently.” *Id.* at 48:9–12. Ultimately, the decision as to whether a male-to-female transgender athlete may compete in girls’ sports rests on three people—the Commissioner, Board President, and counsel—none of whom are required to consult medical experts. *Id.* at 52:21–53:5, 58:10–15.

Indianapolis Public Schools’s approach to transgender athletes is no more stringent. For high-school sports programs, IPS follows IHSAA’s policy. Ex. 4, Deposition of Kim Kennedy and Darren Thomas, 30(b)(6) IPS (“IPS Dep.”), at 101:3–6. For elementary and middle-school sports programs, IPS has established its own policy for transgender participation in sports. *Id.* at 30:14–16. At bottom, IPS’s policy requires only one thing: self-identification as transgender. *Id.* at 102:12–20. Transgender students are permitted to “participate” in sports “consistent” with the

“gender identity” they and their families embrace. *Id.* No medical evaluations, no testosterone testing, and no puberty blockers are required by IPS’s policy.

III. HEA 1041’s Enactment

The Indiana General Assembly, with an eye toward ensuring competitive fairness and safety, enacted HEA 1041 over gubernatorial veto to shield women’s and girls’ sports from the risks posed by the insufficient policies of IHSAA and schools. HEA 1041 applies to sports and sports teams “organized, sanctioned, or sponsored” by public and private schools—and by athletic associations such as IHSAA—for interscholastic competition. 2022 Ind. Legis. Serv. 177-2022 (H.E.A. 1041), codified at Ind. Code § 20-33-13-1 (eff. July 1, 2022).

Under HEA 1041, a school or association must “expressly designate the athletic team or sport” as (1) a “male, men’s, or boys’ team or sport”; (2) a “female, women’s, or girls’ team or sport”; or (3) a “coeducational or mixed team or sport.” Ind. Code § 20-33-13-4. HEA 1041 leaves it to associations and schools to set eligibility criteria for boys’ and mixed teams and generally does so for girls’ sports as well. If a sport or team designated as female, women’s, or girls’, however, “[a] male, based on a student’s biological sex at birth in accordance with the student’s genetics and reproductive biology, may not participate.” *Id.*

IV. A.M. Challenges HEA 1041

Hours after HEA 1041’s enactment, A.M., a 10-year-old biological male who identifies as a girl, filed this suit against Indianapolis Public Schools and its Superintendent, alleging violations of Title IX and the Equal Protection Clause. ECF No. 1. According to the complaint, “because of HEA 1041, A.M. will not be able to play softball this year” on an IPS girls’ elementary softball team. *Id.* ¶ 58; *id.* ¶¶ 1, 68. IPS, however, denies “telling the family that the student . . . would not be able to play softball.” IPS Dep. 27:19–22; *see id.* at 27:5–19, 36:17–19. With this Court’s leave,

the State of Indiana intervened under 28 U.S.C. § 2403(b) and Federal Rules of Civil Procedure 5.1 and 24 to defend the legality of HEA 1041. ECF No. 18; ECF No. 27.

A. A.M.’s Motion for a Preliminary Injunction

Shortly after filing suit, A.M. moved for a preliminary injunction. ECF No. 8. In support, A.M. filed a declaration of Dr. James Fortenberry, a pediatrics doctor who works on “gender identity issues.” ECF No. 8-1 ¶¶ 2, 5. The declaration includes an attachment listing 36 publications. *Id.* at 49–51. As Fortenberry later admitted, however, it “d[oes]n’t cite every reference” he considered in arriving at his opinions. Ex. 5, Deposition of James D. Fortenberry, M.D., M.S. (“Fortenberry Dep.”), at 115:8–10; *see id.* at 78:2–10. Nor does the declaration disclose which sources Fortenberry is relying on to support a statement and, frequently, whether he is relying on any source at all. It mentions unspecified “[r]esearch” and “document[ation].” ECF No. 8-1 ¶¶ 28, 37.

Fortenberry’s declaration discusses gender identity, defined as “one’s sense of oneself as congruent with a particular gender,” and gender dysphoria, a condition in which “a transgender person experiences a constant sense of distress because of the incongruence between their experienced gender and their birth-assigned sex.” *Id.* ¶¶ 11, 17. To address gender dysphoria, Fortenberry opines, it is important for young people to socially transition. *Id.* ¶ 24. Social transition can include “participating in team sports with persons consistent with their gender identity.” *Id.* The declaration does not specify what, if any, studies support those conclusions.

The declaration also opines that, appropriately treated, transgender girls have “no competitive advantages in athletic participation compared to other girls.” *Id.* ¶ 40. It asserts that “the largest driver of average difference in athletic performance between sexes is the elevated levels of testosterone that occur with advanced puberty among people with testicles.” *Id.* ¶ 39. “Therefore,” the declaration states, “pre-pubertal transgender girls’ height, weight, lean body mass, and muscle

strength does not differ from that of other pre-pubertal girls,” and if transgender girls are treated with “puberty blockers,” they will have “none of the physical or competitive advantages traditionally associated with testosterone.” *Id.* ¶¶ 39, 41; *see id.* ¶ 40.

At his deposition, however, Fortenberry admitted that his opinions on transgender athletic performance were an “extrapolation.” Fortenberry Dep. 174:13; *see id.* at 173:12 (“I really have to extrapolate”); *id.* at 173:21–174:4 (admitting he had “no data” for how transgender athletes might perform if puberty blockers are started late). Fortenberry also admitted that he does not “assess athletic performance,” *id.* at 172:4, and does no “research on athletic performance,” *id.* at 17:18–19, 25:16–18. He could not name any of the “leading scholars and researchers in the area of prepuberal biological development and the differences in size, weight, strength, athletic ability, between boys and girls, prepuberty.” *Id.* at 25:19–24.

B. The State’s Contrary Expert Evidence

Several experts have submitted declarations in opposition to A.M.’s motion.

Dr. James Cantor, a neuroscientist and sex researcher and the director of the Toronto Sexuality Centre, addresses issues concerning gender dysphoria and mental health. In his view, the scientific literature concerning mental health outcomes in transgender populations does not support Fortenberry’s assertions. To start, Cantor explains, Fortenberry is mistaken that all cases of gender dysphoria represent the same phenomenon. Ex. 9, Declaration of James M. Cantor, PhD (“Cantor Decl.”), ¶ 32. In fact, “the clinical science has long and consistently demonstrated that gender dysphoric children (cases of *early-onset* gender dysphoria) do not represent the same phenomenon as adult gender dysphoria (cases of *late-onset* gender dysphoria),” and they “differ in

every known regard.” *Id.* ¶ 35. Indeed, a distinct *third* presentation of gender dysphoria has recently emerged “called adolescent-onset or ‘rapid-onset’ gender dysphoria.” *Id.* Because of these differences, studies of mental health in one category cannot be applied to another. *Id.* ¶ 38.

As for childhood-onset gender dysphoria—the relevant category here—“[a]mong prepubescent children who feel gender dysphoric, the majority cease to want to be the other gender over the course of puberty—ranging from 61–88% desistance across the large, prospective studies.” *Id.* ¶ 43. Furthermore, according to Cantor, there is also little evidence to support Fortenberry’s claim that social transition—which includes sports participation, Fortenberry Dep. 142:6–9—improves the mental health of gender dysphoric children. Cantor Decl. ¶ 74. Indeed, clinical guidelines from multiple professional associations require mental health issues be resolved *before* undergoing transition. *Id.* Fortenberry flips that requirement on its head by asserting that *transition* is necessary to resolve mental health issues. Fortenberry Dep. 153:5–16.

Fortenberry also points to increased rates of suicide among transgender children and adolescents and cited two studies in support of his assertion that social transition, particularly sports, is essential to their mental health. *Id.* at 153:18–22, 178:16–179:1. Cantor, however, explains that those studies were retrospective and failed to distinguish between “youth receiving medical treatment develop[ing] better mental health” and “children with superior mental health [being] permitted to go on to receive medical transition services.” Cantor Decl. ¶ 30.

Regarding suicidality, three recent systematic literature reviews found elevated rates for transgender individuals compared to the general population, but the “measures [were] so lacking in reliability that they produce every result from ‘rare’ to ‘almost everyone,’ [making] it . . . unclear which, if any of them, represents a valid conclusion. *Id.* ¶ 90. As to completed suicides, the “rates are elevated but are nonetheless rare” for post-transition individuals. *Id.* Indeed, “[s]uicide rates

remain[] elevated even after complete transition, as shown by a comprehensive review of 17 studies of suicidality in gender dysphoria.” *Id.* ¶ 93. As Cantor explains, “[h]owever plausible it might seem that failing to affirm transition causes suicidality, th[is] epidemiological evidence indicates that hypothesis to be incorrect.” *Id.*

Dr. Emma Hilton, a postdoctoral researcher in developmental biology with a focus on the study of sex differences in development and how they affect sporting performance, addresses performance gaps between males and females in sports. According to Hilton, performance gaps between males and females are detectable in almost all sports during childhood and cemented during puberty. Ex. 6, Declaration of Emma Hilton, PhD (“Hilton Decl.”), at 5 ¶ 2.1; *id.* at 11 ¶¶ 4.1–4.4. Physical differences between males and females—including males’ superior skeletal muscle metrics, which are detectable at birth, and more efficient cardiovascular systems, which are measurable at puberty—impart athletic advantage to males. *Id.* at 5 ¶ 2.1. Accordingly, Hilton explains, having certain female-only sports categories is required to protect fairness and often safety for female athletes. *Id.* at 5 ¶ 2.3.

Even before puberty, Hilton explains, some male physical advantages exist. *Id.* at 11 ¶ 4.3. In fact, males’ and females’ non-reproductive traits begin diverging *in utero* where males already have longer body lengths, larger skull diameters, larger abdominal circumferences, and higher estimated fetal weights. *Id.* at 7 ¶ 2.1. Throughout infant development, male averages are longer and heavier than female averages. *Id.* at 7 ¶ 2.2. At ages five and ten years old, males and females perform similarly in running and jumping events, but males simultaneously exhibit a clear advantage in throwing events. *Id.* at 11 ¶ 4.3. During and after puberty, male physical advantages are more significant and account for a “class-level advantage over females.” *Id.* at 11 ¶ 4.1. Because females generally begin puberty earlier, there is a small window when the differences between

males and females wane. *Id.* at 7 ¶ 2.2; *id.* at 11 ¶ 4.3. However, by fourteen years old, males surpass female height, *id.* at 7 ¶ 2.2, and by fifteen years old, males outperform females in all track and field disciplines. *Id.* at 11 ¶¶ 4.2, 4.3. In fact, males in the early stages of puberty can not only match but also exceed performances of elite adult females. *Id.* at 11 ¶ 4.2.

Testosterone suppression is insufficient to mitigate the large athletic performance gap between males and females. A study of transgender adult women following at least 12 months of testosterone suppression found that muscle mass and strength remain within “male range.” *Id.* at 20 ¶ 7.5. Furthermore, Hilton explains, testosterone suppression fails at reducing males’ superior skeletal metrics, like height and bone length, and bone mass. *Id.* at 19 ¶ 7.4. And studies of transgender girls with partially blocked puberty show that adult height remains closer to male than female averages, lean body mass in young adulthood remains higher than in reference females, and grip strength remains higher as well. *Id.* at 23 ¶ 7.10. Transgender girls and women retain features of male athletic advantage despite taking puberty blockers and suppressing testosterone. *Id.* at 23 ¶ 7.10. The available data “significantly undermine[s] the delivery of fairness and safety presumed by” testosterone suppression. *Id.* at 20 ¶ 7.6.

Dr. Tommy Lundberg, a lecturer in the Division of Clinical Physiology at Karolinska Institute in Stockholm, Sweden, also studies male advantage in athletics. Ex. 7, Declaration of Tommy Lundberg, PhD (“Lundberg Decl.”), ¶ 1.1. His research focuses on physiology with a special emphasis on exercise physiology. *Id.* ¶ 1.5. Lundberg concludes that categorizing by biological sex in school athletic competitions is feasible and defensible. *Id.* ¶ 2.5. According to Lundberg, biological males outperform comparable biological females in almost all sports and athletic competitions “primarily due to differences in male physiology compared to female physiology.” *Id.* ¶¶ 2.1, 5.1. Male and female “sex differences are observed in childhood, adolescence,

and adulthood.” *Id.* ¶ 5.12. In addition to fairness, these differences also implicate athlete safety, and categories divided by sex in “sports where collisions and combat may occur . . . protect athletes and reduce the risk of injury.” *Id.* ¶ 4.8.

Furthermore, although many sports governing bodies have required testosterone suppression for transgender women to compete, “there is currently no scientific evidence that suppression of testosterone in transgender girls/women who have undergone male puberty negates the athletic advantage that biological males have over females.” *Id.* ¶ 2.3. Lundberg reports that “the collective body of scientific evidence suggests that testosterone suppression is highly unlikely to reverse the athletic advantage of males over females.” *Id.* ¶ 9.10.

Critically, suppression of male puberty using puberty blockers in pre-pubertal and pubescent transgender individuals “has not yet been studied in terms of outcomes in strength, muscle mass, or other athletic indicators,” and requiring their use presents both practical and ethical problems in testing and implementation. *Id.* ¶¶ 2.4, 8.3–8.6. As a practical matter, testing and monitoring testosterone levels or evidence of puberty-suppressing medications would require significant effort and resources to achieve. *Id.* ¶ 8.5. As to ethics, some professional organizations, such as the National Board of Health and Welfare in Sweden, have concluded that the risks of puberty blockers and gender-affirming hormone treatments for those under 18 currently outweigh the potential benefits for the group as a whole. *Id.* ¶ 8.6.

William Bock, III, J.D., served as General Counsel for the United States Anti-Doping Agency (USADA) during 2007–2020, and served on other national and international anti-doping committees, panels, and task forces. Bock Decl. ¶ 1.1. His significant and focused experience in the areas of anti-doping—developing, drafting and applying anti-doping rules, leading anti-doping investigations, and developing, prosecuting, and defending anti-doping cases—relate to emerging

questions regarding transgender eligibility rules, namely how to define and maintain a level playing field, preserve the integrity of sport, and protect athlete health and safety. *Id.* ¶¶ 2.1–2.2. Achieving those goals requires significant investment of resources—an effective testing regime would require education, rigorous hormone monitoring, and regular drug testing, among other efforts. *Id.* ¶¶ 5.1.1, 6.2.4.

Bock concludes that, given international standards for preventing unfair competitive advantages, testing the testosterone levels of transgender girls and women is unlikely either to achieve a level playing field in girls’ and women’s sports or to prevent the safety risks to biological girls and women that arise when transgender girls and women compete in girls and women’s sports. *Id.* ¶¶ 6.2, 7.3, 7.4, 8.4, 9.2–9.5. Furthermore, drug testing and monitoring resources necessary to monitor hormone suppression for transgender athletes to ensure compliance—including regular, unannounced testing and sample analysis to monitor testosterone—are likely beyond the budgetary means and experience levels of high-school athletic associations like IHSAA. *Id.* ¶¶ 6.2.4.1–2, 9.2. Moreover, based on his experience with negative incentives created by insufficiently regulating doping in sports, he reports credible concerns that transgender eligibility in girls’ sports at the high school level may result in a decline in interest and participation in sport by girls and could lead to use of performance enhancing drugs by girls seeking a more level playing field. *Id.* ¶¶ 6.2.2.1–4, 6.2.3.1–4.

Nancy Hogshead-Makar, J.D., a former U.S. Olympic athlete, a Title IX and women’s sports advocate, and rape survivor, confirms the point made by Bock. Hogshead-Makar explains how Title IX and sex-segregated sports allowed her to achieve success in swimming. Ex. 8, Declaration of Nancy Hogshead-Makar, JD (“Hogshead-Makar Decl.”), at 5–6. She swam on the U.S.

National Team for nine years from 1976–84, the same years that East German swimmers dominated women’s competitions using anabolic steroids. *Id.* ¶ 33. Hogshead-Makar and her teammates “knew [the East German athletes] were doping and it bred disdain, a contempt for [their] competitors.” *Id.* ¶ 34. Hogshead-Makar attributes her four Olympic medals to the Soviet Union’s boycott of the 1984 Olympic Games, and it was “an enormous joy and relief to [Hogshead-Makar] and [her] peers” simply to know they had “a fair shot at winning.” *Id.* ¶ 36. After her swimming career, Hogshead-Makar served as an evaluator for USADA for missed and positive drug tests from 2003–14. *Id.* ¶ 39. She knows the substance rules for athletes and explains that strict rules and sanctions protect fairness in sport, which athletes value above privacy and convenience. *Id.* ¶ 40.

ARGUMENT

A.M.’s motion for a preliminary injunction should be denied. “A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that the injunction is in the public interest.” *Ill. Republican Party v. Pritzker*, 973 F.3d 760, 762 (7th Cir. 2020) (quoting *Winter v. Nat’l Res. Defense Council*, 555 U.S. 7, 20 (2008)). Here, A.M. is unlikely to succeed on the merits. Both Title IX and the Equal Protection Clause permit States to designate sports teams by biological sex to safeguard opportunities for girls in sports. HEA 1041 is wholly consistent with both. It promotes important state interests—ensuring fairness in sports, protecting female athletes from injury, and preserving the integrity of athletics. The other preliminary injunction factors likewise disfavor a preliminary injunction. Any demonstrated injury in this case is limited to A.M., who may have to pursue social transition through other activities while the case is being litigated. Conversely, enjoining enforcement of HEA 1041 would contravene the public interest in enforcement of enacted laws and permit biological males

with physiological advantages to play girls' sports, potentially putting the equal opportunities and physical safety of biological girls at risk.

**A.M. CANNOT DEMONSTRATE
A LIKELIHOOD OF SUCCESS ON THE MERITS**

- I. HEA 1041 Complies with Title IX, Safeguarding Athletics Opportunities for Women**
- A. Title IX both prohibits sex discrimination and requires equal opportunities regardless of sex, which is what HEA 1041 promotes**

Title IX, enacted as part of the Educational Amendments of 1972, provides that “[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). The ordinary meaning of “sex” when Title IX was enacted was biological sex, not gender identity. *See Adams v. Sch. Bd. of St. Johns Cnty.*, 3 F.4th 1299, 1322 (11th Cir.) (Pryor, C.J., dissenting) (collecting dictionary definitions from the time of enactment), *reh’g en banc granted*, 9 F.4th 1369 (11th Cir. 2021); *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 632–33 (4th Cir. 2020) (Niemeyer, J., dissenting) (same). The statutory context of Title IX confirms that its drafters understood sex as a binary concept. *See* 20 U.S.C. § 1681(a)(2) (describing how an institution may change “from . . . admit[ting] only students of one sex to . . . admit[ting] students of both sexes”); *id.* § 1681(a)(6)(B) (referring to “Men’s” and “Women’s” associations and organizations for “Boy[s]” and “Girls,” “the membership of which has traditionally been limited to persons of one sex”).

Although Title IX prohibits discrimination “on the basis of sex,” 20 U.S.C. § 1681(a), schools cannot blind themselves to students’ sex. Title IX also bars schools from “exclud[ing]” students “from participation in” activities and “den[ying]” them “benefits” “on the basis of sex.” *Id.* Honoring that guarantee of equal opportunity *requires* that girls have the same opportunities as

boys. Differences in male physiology create a significant advantage in athletics, such that “[d]uring and after puberty, the sex differences are so large that it would be highly unlikely that girls could win school competitions or gain equal opportunities if they competed against boys in sports where strength, stamina, and/or physique are important.” Lundberg Decl. ¶¶ 2.1, 5.12. As former Olympic athlete Nancy Hogshead-Makar observes, “[w]ithout formal sex-segregation in sports, I might have qualified for my high school team, but I would have never become an elite swimmer, much less earned a college scholarship or been inducted into a Hall of Fame.” Hogshead-Makar Decl. ¶ 25.

Department of Education regulations recognize that schools may separate students by sex in athletics. Under Title IX, its regulations explain, schools must provide “equal opportunities” in athletics “for members of both sexes.” 34 C.F.R. § 106.41(c). That mandate applies not only to sports teams but also to athletic scholarships: “To the extent that a recipient awards athletic scholarships or grants-in-aid, it must provide reasonable opportunities for such awards for members of each sex in proportion to the number of students of each sex participating in interscholastic or intercollegiate athletics.” *Id.* § 106.37(c). Agency regulations permit schools to “operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport,” so long as schools provide equal opportunities for both sexes. *Id.* § 106.41(b).

Invoking *Whitaker v. Kenosha Unified School District No. 1 Board of Education*, 858 F.3d 1034 (7th Cir. 2017), A.M. argues that “discrimination on the basis of a student’s transgender status constitutes discrimination ‘on the basis of sex,’ under Title IX.” ECF No. 24 at 17. But *Whitaker* is distinguishable, overtaken by precedent, and wrong. In *Whitaker*, the Seventh Circuit held that a transgender boy had a “better than negligible” chance of showing a sex-based bathroom

requirement constituted discrimination based on sex. 858 F.3d at 1046. As the Seventh Circuit has since recognized, however, *Whitaker* evaluated the merits of the plaintiff's claims under the wrong standard. See *Ill. Republican Party v. Pritzker*, 973 F.3d 760, 762 (7th Cir. 2020). It applied an ultra-lenient “better than negligible” standard—which the Supreme Court has expressly rejected. *Nken v. Holder*, 556 U.S. 418, 434 (2009). Under the proper standard, “a mere possibility of success is not enough.” *Ill. Republican Party*, 973 F.3d at 762. Instead, the plaintiff “must make a strong showing that she is likely to succeed on the merits.” *Id.*

Whitaker, moreover, failed to consider issues central to this case. It recognized that “sex” in Title IX carries a “narrow, traditional interpretation.” 858 F.3d at 1047 (quoting *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1085–86 (7th Cir. 1984)). But it never addressed the interplay between Title IX's ban on sex discrimination and its requirement that schools provide equal opportunities to girls. Nor did it address how schools must implement Title IX if allowing transgender girls—a category that includes students with the inherent physical advantages of biological men—to play girls' sports would “exclude[]” biological girls “from participation in” sports or “den[y]” them the “benefits” of sports. *Whitaker* focused solely on arguments about discrimination, largely relying on cases addressing a different federal statute, Title VII.

Neither Title VII nor the Title VII case that A.M. invokes, *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), supports A.M.'s position. As the Sixth Circuit recently observed, “Title VII differs from Title IX in important respects”; “it does not follow that principles announced in the Title VII context automatically apply in the Title IX context.” *Meriwether v. Hartop*, 992 F.3d 492, 510 n.4 (6th Cir. 2021).

Critical differences between Title VII and Title IX command respect. Title VII makes it “unlawful . . . for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.” 42 U.S.C. § 2000e-2(a)(1). As *Bostock* explained, that statutory language imposes a “but for” standard in employment cases. 140 S. Ct. at 1739. It does not merely provide that “there should be no ‘sex discrimination,’” which might imply “a focus on differential treatment between the two sexes as groups.” *Id.* at 1741. By contrast, Title IX focuses on equal treatment for “both sexes.” *E.g.*, 20 U.S.C. § 1681(a)(2). As explained above, it both forbids discrimination and requires that sexes have equal opportunities to participate in activities like athletics. That difference matters, which is why, in *Bostock*, the Supreme Court refused to “prejudge any . . . question” about what “other federal or state laws” addressing “sex discrimination” require. 140 S. Ct. at 1753.

Far from transgressing Title IX standards, HEA 1041 helps ensure compliance with them. HEA 1041 directly aligns with Title IX’s mandate that schools preserve equal opportunities for both sexes by requiring “designat[ion]” of athletic teams and sports as male, female, or co-ed and reserving participation in female-designated teams or sports for biological females. Ind. Code § 20-33-13-4(a), (b). HEA 1041 promotes the same goals as Title IX.

B. A.M. alleges discrimination based on “transgender” versus “cisgender” status, which Title IX does not govern

By its terms, HEA 1041 restricts “[a] male, based on a student’s biological sex at birth” from participating on a girls’ athletic sport or team. Ind. Code § 20-33-13-4(b). But A.M. is not claiming discrimination on account of being born male. Instead, A.M. claims discrimination based on an alleged status that Title IX does not govern—transgender and cisgender status.

1. Biologically, A.M. was indisputably born male. ECF No. 24 at 5, 11 (A.M.’s “birth-assigned sex was male”). A.M. asserts that the State has already “acknowledged” that “she is a girl.” *Id.* at 20. But a state trial-court order changing A.M.’s birth certificate does not indicate that “[t]he State of Indiana has recognized” that “A.M. is a girl.” *Id.* at 23. Indeed, the Indiana Court of Appeals recently held that Indiana law “*does not* grant courts of this state the authority to order a change of a gender marker on a birth certificate.” *In re the Change of Gender of O.J.G.S.*, 187 N.E.3d 324, 325 (Ind. Ct. App. 2022) (emphasis added) (discussing Indiana Code Section 16-37-2-10). Regardless, documenting a change on A.M.’s birth certificate does not change A.M.’s biological sex at birth, which is HEA 1041’s only concern. Ind. Code § 20-33-13-4(b) (“A male, based on a student’s biological sex at birth . . .”). Even IHSAA’s Gender Policy insists on using the original birth record when a court has ordered a gender-marker change. IHSAA Gender Policy at 1 (“Birth Gender can be established through the Gender Marker contained on the Original Birth Certificate.”).

That leaves A.M. with a claim of discrimination based on gender identity: According to A.M., “A.M.[,] a transgender girl, is being treated differently than her cisgender girl classmates.” ECF No. 24 at 20. As explained above, however, Title IX does not address gender identity. It addresses sex, meaning biological sex. And A.M. cannot claim that HEA 1041 requires a student born biologically male to be treated differently from other biological males.

2. A.M. seems to contend that, under Title IX, participation in girls’ sports should be determined not by biological sex but by self-identification and perhaps testosterone levels and athletic skill. *See* ECF No. 24 at 20. That argument does not comport with law or fact.

First, Title IX concerns an objectively verifiable characteristic—sex. Gender identity is entirely different. It is a “subjective experience,” Cantor Decl. ¶ 19, that a person must “tell you,”

Fortenberry Dep. 54:24–55:2. Unlike biological sex, gender identity can—and frequently does—change over time. Cantor Decl. ¶ 43 (the “majority” of “prepubescent children who feel gender dysphoric . . . cease to want to be the other gender over the course of puberty”); *see* Fortenberry Dep. 95:11–18 (agreeing that “a cisgender person [can] become transgender” and “a transgender person become cisgender”). Self-identification of a changing experience is no standard at all.

Second, Title IX governs discrimination and equal opportunities for males and females, not high and low testosterone individuals, however that might be defined. Medical interventions like puberty blockers and hormone treatments do not negate the testosterone and other physiological advantages of biological males that start even before puberty. Hilton Decl. at 11 ¶ 4.1; *id.* at 24 ¶ 8.2; Lundberg Decl. ¶ 9.10. Indeed, many male physical attributes that are unaffected by such interventions yield athletic advantages for boys and create safety risks for girls—and start before puberty. Hilton Decl. at 11 ¶ 4.1; *id.* at 20 ¶¶ 7.5–7.6.

Third, A.M.’s individual athletic performance says nothing about Title IX. ECF No. 24 at 20 (“[A.M.] is not particularly accomplished at the sport.”). One athlete’s ability does not implicate the permissibility under Title IX of enforcing sports categories based on biological sex. Otherwise, the question would become whether “equal opportunities” are truly available to athletes of varying abilities of the same sex. Title IX does not require such minute assessments. Congress identified a *problem* defined by biological sex and prescribed a *solution* defined by biological sex.

C. A.M.’s argument places schools in an untenable position under Title IX

Title IX requires schools to create equal opportunities for girls in athletics. Access of biological males to girls’ sports threatens those opportunities and places Title IX in tension with itself. Title IX cannot both require schools to ensure equal opportunities to females, yet also prohibit enforcement of female-only categories.

If not already obvious, inherent differences between the two sexes underlie the conundrum for schools. With adults, “the performance advantage of men over women is typically 10–50% depending on the sport” owing to muscle mass, strength, and cardiac output. Lundberg Decl. ¶ 5.1. And the “average sex differences in athletic performance are accentuated during puberty,” leading to “many male junior athletes outperform adult female elite athletes by the age of 14–15.” *Id.* ¶¶ 5.3–5.4. Even before puberty, “performance differences [between males and females] are not negligible.” *Id.* ¶ 5.5. Studies of school-age children demonstrate that males are consistently faster and stronger than females of the same age. *Id.* ¶¶ 85.6–5.9; Hilton Decl. ¶ 4.3. So while a “smaller” difference in athletic performance exists between the sexes before puberty, it still exists, and “[d]uring and after puberty, sex differences are so large that it would be highly unlikely that girls could win school competitions if they competed against boys.” Lundberg Decl. ¶ 5.12.

Critically, HEA 1047 covers all sports—elementary school, middle school, and high school. And it applies not only to A.M., but also to transgender girls who, as part of social transition, seek to participate in girls’ sports *without* taking puberty blockers, or who do so only well after puberty has created irreversible physical advantages. Facial invalidation of HEA 1041 under Title IX would allow disruption of girls’ sports in all such cases, not just elementary girls’ softball.

II. HEA 1041 Does Not Violate the Equal Protection Clause

A. Rational basis applies

A.M. argues that HEA 1041 targets only transgender girls, rather than *all* biological males, from participating in girls’ sports and that doing so is unlawful because transgender status is a quasi-suspect class under the Equal Protection Clause. ECF No. 24 at 25.

No decision by the U.S. Supreme Court or the Seventh Circuit has recognized transgender status as a quasi-suspect classification. The Supreme Court has recognized only sex, *Craig v. Boren*, 429 U.S. 190, 197 (1976), and illegitimacy, *Matthews v. Lucas*, 427 U.S. 495, 505–06

(1976), as quasi-suspect classes protected by heightened scrutiny. It has repeatedly declined to create more, even for mental disability, *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 441–42 (1985), age, *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 313 (1976), and sexual orientation, *Romer v. Evans*, 517 U.S. 620, 640 (1996) (Scalia, J., dissenting) (pointing out that the majority used rational basis). And contrary to A.M.’s suggestion, ECF No. 24 at 22–24, *Whitaker v. Kenosha Unified School District No. 1 Board of Education*, 858 F.3d 1034 (7th Cir. 2017), expressly declined to decide whether “transgender status” is a suspect or quasi-suspect class “per se entitled to heightened scrutiny,” *id.* at 1051.

Transgender status cannot satisfy the criteria necessary for protected classification. In fact, while Fortenberry focuses his testimony on “gender identity,” which he defines as a “sense of oneself,” ECF No. 8-1 ¶ 11, Cantor explains it is “not at all clear on what basis Dr. Fortenberry asserts gender identity to be a well-established concept, either in medicine” or any other scientific field, Cantor Decl. ¶ 19.

A.M. claims that transgender people have historically been subjected to discrimination, ECF No. 24 at 25–26, but neither specifies that discrimination nor alleges that it has occurred in sports. A claim that transgender individuals have historically been discriminated against in sports implies that they have been targeted to prevent them from participating on the team that matches their self-identified gender. But the long-standing rationale for separate men’s and women’s teams has nothing to do with gender identity; it reflects that separation is necessary to ensure competitive opportunities for women. *See* Lundberg Decl. ¶ 4.2–4.6 (stating women would lack equal opportunities if forced to compete with biological men); Hilton Decl. at 11 ¶ 4.1 (describing a “class-level” advantage by male over female athletes). Transgender status is not the historical target of

sex-segregated sports. Instead, the target is the inherent sex-based differences that give advantages to biological males.

Furthermore, protected classifications, such sex, race, and national origin, reflect “immutable characteristic[s] determined solely by the accident of birth.” *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973). Transgender people cannot similarly be defined as a discrete group by an obvious, immutable, or distinguishing characteristic. Transgender status is neither obvious nor immutable. It is impossible to know someone’s gender identity unless they tell you; it is a “subjective experience,” that cannot be falsified by objective evidence. Cantor Decl. ¶ 19. Fortenberry agrees. He indicated several times that the only way to identify an individual as transgender or “gender incongruent” is to ask. Fortenberry Dep. 53:17–55:6, 77:3–4. “So that if you want to complete an understanding of whether someone’s a man or a woman or male or female, ultimately they have to tell you.” *Id.* at 54:24–55:2. Transgender status, thus, is not *obvious*.

Transgender status is also unlike sex and race as immutable characteristics because it is amenable to change. Thus, “[g]ender identity is unlike sexual orientation, which is associated with objectively ascertained evidence, including brain anatomy.” Cantor Decl. ¶ 19. As Cantor explains, of the eleven studies following the outcomes of children experiencing gender dysphoria, “every study without exception” has concluded that “the majority cease to want to be the other gender over the course of puberty.” *Id.* ¶ 43. Cantor explained three categories of gender dysphoria, distinguishable by the time of onset—childhood, adolescent, and adult, which itself implies mutability. *Id.* ¶ 35. And Fortenberry stated that gender dysphoria or incongruence, on average, does not begin until several years into a child’s development, Fortenberry Dep. 111:15–18, and does not

always continue into adulthood, *id.* at 120:5–19. Fortenberry expressly admitted both that a cisgender person can become transgender, and that a transgender person can become cisgender. *Id.* at 95:11–24.

Treating transgender status as an immutable characteristic would be in severe tension with decisions recognizing the immutability of *sex*. See, e.g., *Frontiero*, 411 U.S. at 688 (“classifications based upon sex . . . are inherently suspect”); *United States v. Virginia*, 518 U.S. 515, 532–34 (1996) (acknowledging “‘inherent differences’ between men and women”); *City of Los Angeles, Dept. of Water & Power v. Manhart*, 435 U.S. 702, 727 (1978) (Burger, C.J., concurring) (stating sex is “the one acknowledged immutable difference between men and women”). Transgender status is the internal rejection of an individual’s innate, biological sex. Proclaiming that transgender status is immutable would, therefore, declare biological sex to be either non-existent or mutable. Although A.M.’s “sex assigned at birth was male,” A.M. now claims to be “a girl” and “not a boy,” *i.e.*, A.M. does not claim to be *both* a boy *and* a transgender girl. ECF No. 24 at 13, 20.

Transgender individuals are also not a politically powerless minority “in the sense that they have no ability to attract the attention of lawmakers.” *Cleburne*, 473 U.S. at 445. President Biden has already issued four executive orders intended to advance the rights of and prevent discrimination against transgender individuals, including one this month. Exec. Order. No. 13,988, 86 Fed. Reg. 7,023 (Jan. 20, 2021); Exec. Order No. 14,020, 86 Fed. Reg. 13,797 (March 8, 2021); Exec. Order No. 14,021, 86 Fed. Reg. 13,803 (March 8, 2021); *Executive Order on Advancing Equality for Lesbian, Gay, Bisexual, Transgender, Queer, and Intersex Individuals*, The White House (June 15, 2022), <https://www.whitehouse.gov/briefing-room/presidential-actions/2022/06/15/executive-order-on-advancing-equality-for-lesbian-gay-bisexual-transgender-queer-and-intersex-individuals/>. And many state legislatures have been receptive to transgender policy goals. As of 2020,

twenty-three states expressly prohibit employment discrimination based on gender identity, twenty-three expressly prohibit housing discrimination, twenty-two expressly prohibit discrimination in public accommodations, and twenty-six expressly prohibit certain insurance exclusions for transgender healthcare. *2020 State Equality Index*, Hum. Rts. Campaign Found. (2020), <https://hrc-prod-requests.s3-us-west-2.amazonaws.com/HRC-SEI20-report-Update-022321-FInal.pdf>. An abundance of national advocacy groups support transgender individuals. *Transgender Resources*, ABA, https://www.americanbar.org/groups/diversity/sexual_orientation/resources/transgender-rights/. Transgender status thus does not meet many indicia of a quasi-suspect class.

B. Multiple “exceedingly persuasive justifications” justify HEA 1041 regardless

Regardless of the standard, the State has multiple “exceedingly persuasive justification[s]” that are “substantially related” to HEA 1041’s requirement. *Virginia*, 518 U.S. at 533–34.

1. To start, the State has an important interest in fostering separate athletic opportunities for both sexes. Categorizing sports by sex “control[s] for baseline physiological differences” that affect results or outcomes independently of the characteristics sporting competition seeks to reward—a package of talent, strategy, training, and dedication. Hilton Decl. at 15 ¶ 5.2. Accordingly, sex categorization promotes fairness and encourages participation by female athletes who stand at a disadvantage to male athletes. *Id.* at 15 ¶¶ 5.1, 5.5. It further safeguards female opportunities to participate in sports by preventing “a biological male that plays on a female team [from] displac[ing] a student from participation.” Neidig Dep. 44:20–45:3.

The advantage of biological males over biological females is well documented and accepted. Even before puberty, “performance differences [between males and females] are not negligible.” Lundberg Decl. ¶ 5.5. Physical fitness studies of school-age children demonstrate that males are consistently faster and stronger than females of the same age. *Id.* ¶ 5.6–5.11. A study by

Dr. David Handelsman—a reputable expert on whose work even A.M.’s expert invokes, Fortenberry Dep. 169:10–15, 170:16–20—“showed that sex differences in athletic performance, although small, were generally measurable before puberty and grew substantially by age 12 and reached a plateau in the late teens.” Lundberg Decl. ¶ 5.11. For instance, “male advantage in throwing events is clearly-evident at . . . pre-pubertal ages.” Hilton Decl. at 11 ¶ 4.3.

The “average sex differences in athletic performance are accentuated during puberty, when circulating testosterone concentrations increase in males, resulting in circulating testosterone 15–20 times higher than in children or females of any age.” Lundberg Decl. ¶ 5.4. Indeed, “many male junior athletes outperform adult female elite athletes by the age of 14–15, demonstrating that many adolescent elite male athletes are better than adult female elite athletes within a few years of the onset of puberty.” *Id.* ¶ 5.3. Accordingly, categorizing sports by sex serves an important interest in ensuring fairness and protecting girls from injury. *Id.* ¶¶ 4.6, 4.8.

Fortenberry agreed that, starting at around age 12, significant physical differences between males and females justify separate sports categories. Fortenberry Dep. 177:22–178:6. But he contends that transgender girls who start puberty blockers will have no athletic advantages over biological girls. Dkt. 8-1 ¶ 40; *see id.* ¶¶ 39, 41.

Those opinions should be disregarded, however. Fortenberry holds no professional education, training, or credentials in athletic performance or sports medicine; Fortenberry Dep. 10:14–16:2, 176:22–23; he does not “assess athletic performance,” *id.* at 172:4; and does no “research on athletic performance,” *id.* at 17:18–20. When asked what besides testosterone “can contribute to the differences in athletic performance,” Fortenberry responded with a tautology: “[o]ther than the ones that make some people just better than others.” *Id.* at 171:23–172:1. And when asked what

“primary physical measures that [he] would rely on in assessing athletic performance,” he identified none. *Id.* at 172:2–5. Not only that, but to support his opinions that transgender girls on puberty blockers have “no competitive advantages in athletic participation compared to” non-transgender girls, Dkt. 8-1 ¶ 40, Fortenberry could not muster any studies or data supporting his conclusion. To get there, he admitted, “I really have to extrapolate” from the assumption that prepubescent athletes are “not different” and that heightened testosterone production “is blocked.” Fortenberry Dep. 173:6–16; *see id.* 174:7–17 (admitting ¶ 41 of his declaration is “extrapolation”).

Fortenberry, however, lacked sufficient facts or data for his baseline assumption that prepubescent boys and girls perform the same in sports. Although Fortenberry claimed that “a Tønnessen paper” supported his assumption—a paper not disclosed in his report, Fortenberry Dep. 172:14–173:5—a Tønnessen paper actually found performance differences in 11-year-old boys and girls (the youngest age studied), Lundberg Decl. ¶ 5.8. And other studies have found differences in athletic performance at even younger ages. *See id.* ¶¶ 5.6-5.7, 5.9-5.11.

Whether Fortenberry was even aware of those studies is far from clear. Despite professing an “inten[t]” to be educated about differences between prepubertal boys and girls in athletic ability, he could not name any of the “leading scholars and researchers” who study those differences. Fortenberry Dep. 25:19-26:3. Moreover, even Fortenberry agreed that his “extrapolation” might be fallible if puberty blockers are started late. That is “an unknown space” for which there is “no data,” he admitted. *Id.* at 173:21–174:4.

2. Equally important is the State’s important interest in the safety of student athletes. This important interest underlies other state laws concerning athlete safety, such as concussions in sport. Sports create risks to both male and female athletes, but uniquely so for female athletes. Lundberg Decl. ¶ 4.8. For example, “[e]merging research shows that compared with males, female

rugby players appear more susceptible to concussive injuries, with more severe outcomes.” Hilton Decl. 13–14 ¶ 4.6. That increased susceptibility has been attributed to differences in female physiology and brain development. *Id.* Fortenberry agreed that “[t]here does appear to be an increased risk for some . . . long-term consequences for girls with repeated mild traumatic brain injury or concussion,” and those consequences include “[c]hanges in memory,” “[c]hronic headaches,” and “fatigue.” Fortenberry Dep. 26:15–18, 27:3–12.

Both common sense and research studies show that males during and after puberty are significantly larger, faster, and stronger than females of the same ages, creating safety risks to female athletes competing with and against male athletes in “sports where collisions and combat may occur.” Lundberg Decl. ¶ 4.8. The physical differences between males and females have led World Rugby to exclude transgender women from participation in international women’s rugby to protect players’ welfare. *Id.* ¶ 6.5. Again, physical differences also exist between pre-pubertal males and females. *Id.* ¶¶ 5.6–5.9. The State is justified in protecting female athletes from injury by reserving female sports for biological female athletes only.

3. The State also has an important interest in maintaining the integrity of sports. Allowing athletes with unfair advantage to compete threatens the integrity of the sport. In cycling, athletes left the professional ranks after they recognized they did not have a reasonable chance of success when competing with athletes who doped. Bock Decl. ¶ 6.2.2.1. For Hogshead-Makar, doping in swimming affected competitors’ perceptions of the sport. Knowing that other athletes had an unfair advantage through anabolic steroids “bred disdain, a contempt for [her] competitors” because their actions negated “a fair shot at winning.” Hogshead-Makar Decl. ¶¶ 34, 36. The result is “athletes’ loss of faith in sport governance and in many cases a desperate effort by athletes, and sometimes their coaches, to cheat to reset the competitive balance.” Bock Decl. ¶ 6.2.3.3.

Rules regarding eligibility can protect against these issues if adequately and uniformly enforced. *Id.* ¶¶ 3.1–3.4. Maintaining the biological male-female categories is one easy way. An alternative would require separating players based on individualized assessments of secondary sex characteristics or testing hormone levels—and relying on the IHSAA and individual schools to implement such rules. Doing so would require an entirely new, costly, and complex regulatory regime. *Id.* ¶ 6.2.4.1–6.2.4.3. IHSAA avoids regulating performance-enhancing substances altogether, Neidig Dep. 88:18–21, and high schools generally fail to implement “successful and robust anti-doping programs,” Bock Decl. ¶ 6.2.4.3.

IHSAA does set rules regarding transgender participation in sports, but the current IHSAA rules impose no defined metrics for comparing transgender girls to biological girls for purposes of discerning an unfair advantage, much less ensure proper ongoing physiological testing. Neidig Dep. 57:12–21. It requires only one year of hormone treatment (or medical reassignment surgery), but otherwise leaves it to the IHSAA Commissioner to decide based on all circumstances whether to issue a waiver in a particular case. *Id.* at 58:10–15 (only “counsel, [the Commissioner], and [the] board president” review gender policy waiver requests); *id.* at 55:24–56:1 (IHSAA “do[es] not have a level” required for testosterone); *id.* at 56:13–14 (no metrics for testing muscle mass).

With that regulatory void as a starting point, HEA 1041 serves the State’s important interests in protecting the integrity of sports and encouraging female participation by implementing a workable rule against male participation in female sports. “Physical differences between men and women . . . are enduring.” *Virginia*, 518 U.S. at 533 (citing *Ballard v. United States*, 329 U.S. 187, 193 (1946)). HEA 1041 recognizes those differences and permissibly seeks to preserve the fairness, safety, and integrity of girls’ sports in Indiana—all of which are important state interests.

C. A.M. does not present a valid as-applied challenge

A.M. argues that the Court should “enjoin[] HEA 1041,” either entirely or as applied. ECF No. 24 at 31. But “no court may ‘lawfully enjoin the world at large’ or purport to enjoin challenged laws themselves.” *Whole Women’s Health v. Jackson*, 142 S. Ct. 522, 535 (2021) (internal citations omitted). At most, only the IPS defendants may be enjoined. And A.M. alleges nothing that would justify an analysis “as-applied to a plaintiff’s specific activities.” *Surita v. Hyde*, 665 F.3d 860, 875 (7th Cir. 2011). The important consideration is not the label plaintiff uses, but whether the claim and requested relief are limited by virtue of the plaintiff’s particular circumstances. *See John Doe v. Reed*, 561 U.S. 186, 194 (2010). When the claim and relief extend more broadly, the claim is facial. *Id.* (“The claim is ‘facial’ in that it is not limited to plaintiffs’ particular case, but challenges application of the law more broadly to all referendum petitions.”).

A.M. does not allege a particular vulnerability to HEA 1041 different from other transgender girls affected by the law. Quite the opposite; A.M. alleges that “HEA 1041 denies A.M. and *all* transgender girls the ability to participate in the same sports as other girls solely because they are transgender” and “discriminat[es] against A.M. and *all* transgender female-students.” ECF No. 1 ¶ 13 (emphasis added). The complaint also states that HEA 1041 subjects A.M. to different treatment “because of the incongruence between her gender identity and her sex assigned at birth,” *id.* ¶ 12, a claim that could be made by any transgender girl affected by HEA 1041. Indeed, A.M. asks this Court to (1) “declare that HEA 1041, as enforced by defendants, violates both Title IX and equal protection” and (2) to “enter a preliminary injunction, later permanent, enjoining HEA 1041.” *Id.* ¶ 73. Those are facial remedies, not as-applied ones.

A.M.’s as-applied theory has nothing to do with any particular vulnerabilities but instead to do with the strength of the State’s rationale. The theory seems to be that, even if the State has

legitimate interests in preventing some transgender girls from competing on girls' sports teams, that interest does not extend to ten-year-old transgender girls participating in elementary sports. This is an overbreadth or "narrow tailoring" facial argument, not an as-applied argument. And with intermediate scrutiny, the State is not required to demonstrate that legislation concretely advances important objectives with *every* person it affects, or else afford exemptions where the benefits are more abstract. *Nguyen v. INS*, 533 U.S. 53, 70 (2001) ("None of our gender-based classification equal protection cases have required that the statute under consideration must be capable of achieving its ultimate objective in every instance.").

On this point, in any event, A.M. supplies no specific comparisons of size, weight, speed strength, agility, or other data with biological girls. And Fortenberry denied knowing how A.M. stacked up even among boys the same age, let alone girls. Fortenberry Dep. 72:17–15, 172:6–8.

Furthermore, researchers know that puberty blockers do not "completely block the entirety of male puberty" after the onset of puberty. Hilton Decl. at 17 ¶ 6.3. And when a transgender girl discontinues the use of puberty blockers, male puberty will resume. Lundberg Decl. ¶ 8.2. In fact, Fortenberry professes that, at some point, a transgender girl will decide to "introduc[e] . . . puberty." Fortenberry Dep. 64:23–65:3. Whether that is male puberty or female puberty (via hormone treatments) depends on the patient's decision. *Id.* 66:3–18. Even if the decision is to proceed with female puberty, a span of time will separate puberty blockers from hormone infusions. *Id.* Plainly, physiological changes are likely to accompany each of these stages, so A.M.'s physiological status will not be static, which underscores the need for a general rule covering school sports at all ages.

Such common-sense limits underscore why A.M. cannot use an as-applied challenge as a general equity tool to adjust outcomes for individual cases. Regardless of whether A.M. will experience the athletic benefits of testosterone, and regardless of A.M.'s personal athletic ability,

A.M. cannot demand personalized relief from HEA 1041. Otherwise, *anybody* who claims to be a poor athlete with low testosterone could make out an as-applied equal protection challenge to single-sex sports rules. An as-applied challenge can succeed only if the plaintiff shows that the law in question violates the Constitution “in discrete and well-defined instances.” *Gonzales v. Carhart*, 550 U.S. 124, 167 (2007). A.M. provides no such “discrete and well-defined” grounds for as-applied relief, and instead invokes grounds generally applicable, at least, to transgender girls of certain ages or on puberty blockers. That is really a facial overbreadth challenge that must fail under Supreme Court doctrine, and in all events is too broad a classification for an as-applied challenge.

PLAINTIFF HAS NOT DEMONSTRATED IRREPARABLE HARM

To prevail on a motion for a preliminary injunction, A.M. must establish that the denial of such an injunction will result in irreparable harm. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). A.M. allegedly “faces the grievous harm of having her social transition disrupted as well as being ‘outed’ as a transgender girl” and that “[h]er mental health is dependent on the world accepting her as . . . a 10-year-old girl.” ECF No. 24 at 28. No doubt A.M. faces challenging daily obstacles, and no one would want to force A.M. to take unreasonable risks, mentally or otherwise. But the claim is really about activities that enable social transition, of which there are many. Even Fortenberry admitted that he was “not sure that it matters whether it’s a girl sport or not, but that girls are playing together” that provides social transition benefits for transgender girls. Fortenberry Dep. 151:19–21.

Furthermore, Cantor testified that “there is little evidence that transition improves the mental well-being of children.” Cantor Decl. ¶ 74. Indeed, there are “no . . . studies . . . published regarding affirmation-on-demand with children.” *Id.* ¶ 100. And while Fortenberry claims social

transition benefits transgender youth, two of his sources—Russell and Toomey, Fortenberry Dep. 153:5–23—confuse correlation with causation, Cantor Decl. ¶ 30. And his other three sources are not “treatment studies at all.” *Id.* ¶ 31. Fortenberry ignored “more advanced studies” with contrary findings, such as a study showing “social support”—not “transition”—to decrease suicidality. *Id.* ¶¶ 30, 89; *see id.* ¶¶ 83–91. The evidence of irreparable harm is lacking.

**PUBLIC POLICY AND THE BALANCE OF EQUITIES
FAVOR THE STATE AND DEFENDANTS**

Equity is about balancing competing interests, and when the party opposing a motion for preliminary injunction is a political branch of government, the restraint for issuing an injunction is particularly high due to public policy considerations, as “the court must consider that all judicial interference with a public program has the cost of diminishing the scope of democratic governance.” *Ill. Bell Tel. Co. v. WorldCom Tech., Inc.*, 157 F.3d 500, 503 (7th Cir. 1998).

An injunction here would not only inflict harm to the governance process it could also facilitate harm to others, especially if the injunction reaches beyond A.M. alone. IPS permits biological males who identify as transgender to play on middle school and elementary girls’ sports teams, IPS Dep. 102:12–20, without conducting physical assessments or requiring puberty blockers—a medical intervention that even A.M.’s expert regards as important for negating biological advantages, ECF No. 8-1 ¶ 39. Broadly enjoining HEA 1041 could force biological girls to compete against students who identify as girls but retain all the biological advantages of boys. Public-policy considerations and the balance of equities counsel against that outcome.

CONCLUSION

The Court should deny the Motion for Preliminary Injunction.

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