

21-1365

United States Court of Appeals for the Second Circuit

SELINA SOULE, a minor, by Bianca Stanescu, her mother,
CHELSEA MITCHELL, a minor, by Christina Mitchell, her mother,
ALANNA SMITH, a minor, by Cheryl Radachowsky, her mother,
ASHLEY NICOLETTI, a minor, by Jennifer Nicoletti, her mother,

Plaintiffs-Appellants,

v.

CONNECTICUT ASSOCIATION OF SCHOOLS, INC, DBA CONNECTICUT
INTERSCHOLASTIC ATHLETIC CONFERENCE, BLOOMFIELD PUBLIC
SCHOOLS BOARD OF EDUCATION, CROMWELL PUBLIC SCHOOLS BOARD
OF EDUCATION, GLASTONBURY PUBLIC SCHOOLS BOARD OF EDUCATION,
CANTON PUBLIC SCHOOLS BOARD OF EDUCATION, DANBURY PUBLIC
SCHOOLS BOARD OF EDUCATION,

Defendants-Appellees.

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On Appeal from the United States District Court
for the District of Connecticut

BRIEF FOR AMICI STATES

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ANDRAYA YEARWOOD, THANIA EDWARDS, on behalf of her daughter T.M.,
COMMISSION ON HUMAN RIGHTS AND OPPORTUNITIES,

Defendants-Appellees.

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INTERESTS OF AMICI CURIAE¹

Pursuant to Federal Rule of Appellate Procedure 29, the States of New York, California, Colorado, Delaware, Hawai'i, Illinois, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Jersey, New Mexico, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, and Washington, and the District of Columbia, file this brief in support of intervenor-defendants-appellees Andraya Yearwood and Terry Miller. This lawsuit concerns policies implemented by the Connecticut Interscholastic Athletic Conference (CIAC) that allow for transgender students such as Yearwood and Miller to participate in gender-segregated sports according to their gender identity. Plaintiffs claim that such policies violate Title IX of the Education Amendments of 1972 and discriminate against cisgender (i.e., non-transgender) female students. That argument has no basis in the statutory text, and if accepted, would undermine the amici States' efforts to create inclusive school communities.

¹ No counsel for a party authored this brief in whole or in part, and no person other than amici made a monetary contribution intended to fund the brief's preparation or submission.

Amici States strongly support the right of transgender people to live with dignity, be free from discrimination, and have equal access to education, government-sponsored opportunities, and other incidents of life, including student athletic programs. Discrimination and exclusion on the basis of transgender status cause tangible economic, educational, emotional, and health harms.

To prevent these injuries, many of the amici States have adopted policies aimed at combatting discrimination against transgender people and facilitating environments that include them. Amici submit this brief to describe their experiences with administering such policies—including policies permitting transgender students to participate in gender-segregated athletic programs on an equal basis with other students. As amici's experiences show, allowing transgender female students to participate in women's sports does not compromise fairness or reduce opportunities for cisgender female athletes. Thus, if this Court does not affirm the dismissal of plaintiffs' complaint based on the bars to justiciability

identified by the district court,² the Court should affirm on the grounds that plaintiffs have failed to state a valid claim.

ARGUMENT

POINT I

POLICIES THAT STRIVE TO INCLUDE TRANSGENDER PEOPLE CONFER SIGNIFICANT INDIVIDUAL AND SOCIETAL BENEFITS

About 1.5 million people in the United States—including approximately 150,000 teenagers³—identify as transgender.⁴ Transgender people have been part of cultures worldwide from “antiquity to the present day,”⁵ and they serve our communities in myriad ways, including as students, teachers, essential workers, firefighters, police officers,

² The district court and defendants have explained why plaintiffs’ claims are moot. (See Joint Appendix (J.A.) 265-275.) See, e.g., Br. for Defs.-Appellees at 13-24. Amici agree with that analysis.

³ Jody L. Herman et al., *Age of Individuals Who Identify as Transgender in the United States* 2 (Williams Inst. Jan. 2017) (internet). (For authorities available on the internet, full URLs appear in the Table of Authorities. All URLs were last visited on October 14, 2021.)

⁴ Kerith J. Conron, *LGBT Youth Population in the United States* 1 (Williams Inst. Sept. 2020) (internet).

⁵ American Psychol. Ass’n, *Answers to Your Questions About Transgender People, Gender Identity, and Gender Expression* 1 (3d ed. 2014) (internet).

lawyers, nurses, and doctors. Being transgender does not inhibit a person's ability to contribute to society.

Unfortunately, transgender individuals often experience severe discrimination that limits their ability to realize their potential. To combat such discrimination, States began providing civil rights protections for transgender people nearly a quarter century ago. Today, at least twenty-two States and the District of Columbia,⁶ and at least 330 local

⁶ **California:** Cal. Civ. Code § 51(b), (e)(5) (public accommodations); Cal. Educ. Code §§ 220 (education), 221.5(f) (education and school athletic participation); Cal. Gov't Code §§ 12926(o), (r)(2), 12940(a), 12949 (employment); *id.* § 12955 (housing); Cal. Penal Code §§ 422.55, 422.56(c) (hate crimes). **Colorado:** Colo. Rev. Stat. § 24-34-301(7) (definition); *id.* § 24-34-402 (employment); *id.* § 24-34-502 (housing); *id.* § 24-34-601 (public accommodations). **Connecticut:** Conn. Gen. Stat. § 10-15c (schools); *id.* § 46a-51(21) (definition); *id.* § 46a-60 (employment); *id.* § 46a-64 (public accommodations); *id.* § 46a-64c (housing). **Delaware:** Del. Code Ann. tit. 6, § 4501 (public accommodations); *id.* tit. 6, § 4603(b) (housing); *id.* tit. 19, § 711 (employment). **Hawai'i:** Haw. Rev. Stat. § 489-2 (definition); *id.* § 489-3 (public accommodations); *id.* § 515-2 (definition); *id.* § 515-3 (housing). **Illinois:** 775 Ill. Comp. Stat. 5/1-102(A) (housing, employment, access to financial credit, public accommodations); *id.* 5/1-103(O-1) (definition). **Iowa:** Iowa Code § 216.2(10) (definition); *id.* § 216.6 (employment); *id.* § 216.7 (public accommodations); *id.* § 216.8 (housing); *id.* § 216.9 (education). **Kansas:** Kansas Hum. Rights Comm'n, *Kansas Human Rights Commission Concurs with the U.S. Supreme Court's Bostock Decision* (Aug. 21, 2020) (internet) (advising that Kansas laws prohibiting discrimination based on "sex" in "employment, housing, and public accommodation" contexts "are inclusive of LGBTQ and all derivatives of 'sex'"). **Maine:** Me. Rev. Stat. Ann. tit. 5, § 4553(9-C) (definition);

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id. § 4571 (employment); *id.* § 4581 (housing); *id.* § 4591 (public accommodations); *id.* § 4601 (education). **Maryland:** Md. Code Ann., State Gov't § 20-304 (public accommodations); *id.* § 20-606 (employment); *id.* § 20-705 (housing). **Massachusetts:** Mass. Gen. Laws ch. 4, § 7, fifty-ninth (definition); *id.* ch. 76, § 5 (education); *id.* ch. 151B, § 4 (employment, housing, credit); *id.* ch. 272, §§ 92A, 98 (public accommodations) (as amended by Ch. 134, 2016 Mass. Acts). **Minnesota:** Minn. Stat. § 363A.03(44) (definition); *id.* § 363A.08 (employment); *id.* § 363A.09 (housing); *id.* § 363A.11 (public accommodations); *id.* § 363A.13 (education). **Nevada:** Nev. Rev. Stat. §§ 118.075, 118.100 (housing); *id.* §§ 613.310(4), 613.330 (employment); *id.* §§ 651.050(2), 651.070 (public accommodations). **New Hampshire:** N.H. Rev. Stat. Ann. § 354-A:2(XIV-e) (definition); *id.* § 354-A:6 (employment); *id.* § 354-A:8 (housing); *id.* § 354-A:16 (public accommodations); *id.* § 354-A:27 (education). **New Jersey:** N.J. Stat. Ann. § 10:5-5(rr) (definition); *id.* § 10:5-12(f) (public accommodations, housing, employment); *id.* § 18A:36-41 (directing issuance of guidance to school districts permitting transgender students “to participate in gender-segregated school activities in accordance with the student’s gender identity”). **New Mexico:** N.M. Stat. Ann. § 28-1-2(Q) (definition); *id.* § 28-1-7(A) (employment); *id.* § 28-1-7(F) (public accommodations); *id.* § 28-1-7(G) (housing). **New York:** N.Y. Exec. Law § 291 (education, employment, public accommodations, housing); 9 N.Y.C.R.R. § 466.13 (interpreting the N.Y. Exec. Law § 296 (Human Rights Law) definition of “sex” to include gender identity). **Oregon:** Or. Rev. Stat. § 174.100(4) (definition); *id.* § 659.850 (education); *id.* § 659A.006 (employment, housing, public accommodations). **Rhode Island:** 11 R.I. Gen. Laws § 11-24-2 (public accommodations); 28 R.I. Gen. Laws §§ 28-5-6(11), 28-5-7 (employment); 34 R.I. Gen. Laws §§ 34-37-3(9), 34-37-4 (housing). **Utah:** Utah Code Ann. § 34A-5-106 (employment); *id.* § 57-21-5 (housing). **Vermont:** Vt. Stat. Ann. tit. 1, § 144 (definition); *id.* tit. 9, § 4502 (public accommodations); *id.* tit. 9, § 4503 (housing); *id.* tit. 21, § 495 (employment). **Washington:** Wash. Rev. Code Ann. § 28A.642.010 (education); *id.* § 49.60.040(27) (definition); *id.* § 49.60.180 (employment); *id.* § 49.60.215 (public accommodations); *id.* § 49.60.222 (housing). **District of Columbia:** D.C. Code § 2-1401.02(12A)

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governments,⁷ offer express protections against discrimination based on gender identity in areas such as education, housing, public accommodations, and employment.⁸

In addition, some of amici States have enacted court rules to ensure that transgender individuals are treated with respect and dignity when participating in court proceedings.⁹ Contrary to plaintiffs' suggestion (Br. for Appellants (Br.) at 48-51), amici's experiences in administering these rules and promoting inclusive courts are that confidence in the judicial system benefits that system as a whole when judges and attorneys treat

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

⁷ Movement Advancement Project, *Local Nondiscrimination Ordinances* (internet).

⁸ The U.S. Supreme Court has confirmed that longstanding federal law similarly prohibits employment discrimination based on gender identity. *See Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1742-43 (2020).

⁹ *See, e.g., California*: Cal. Civ. Jury Instructions No. 118 (2021) (“attorneys and courts should take affirmative steps to ensure that they are using correct personal pronouns” for transgender individuals); Cal. Crim. Jury Instructions, at xxv (2021) (same). **New Jersey**: N.J. Code of Judicial Conduct R. 3.6 (judges “shall not discriminate because of . . . gender identity or expression”). **New York**: N.Y. Rules of Judicial Conduct (22 N.Y.C.R.R.) § 100.3(B)(4)-(5) (prohibiting gender identity discrimination by judges and obliging judges to “require lawyers in proceedings before the judge to refrain from manifesting, by words or conduct, bias or prejudice based upon . . . gender identity”).

transgender individuals with respect, including addressing them by their preferred pronouns.

The experiences of amici States and other jurisdictions show that policies and practices that facilitate participation of transgender people—including policies permitting young people to participate in the single-sex sports teams consistent with their gender identity—promote inclusive community, workplace, and school environments that benefit all.

A. Transgender Youth Face Pervasive and Harmful Discrimination That Causes Them Serious Health and Academic Harms.

Transgender youth experience levels of discrimination, violence, and harassment that exceed those experienced by their cisgender counterparts.¹⁰ In the 2015 U.S. Transgender Survey (USTS), the largest survey of transgender people to date, 77% of respondents who were known or perceived as transgender in grades K-12 reported negative experiences

¹⁰ Joseph G. Kosciw et al., *The 2019 National School Climate Survey: The Experiences of Lesbian, Gay, Bisexual, Transgender, and Queer Youth in Our Nation's Schools* xxvii, 93 (GLSEN 2020) (internet); see also Emily A. Greytak et al., *Harsh Realities: The Experiences of Transgender Youth in Our Nation's Schools* xi (GLSEN 2009) (internet).

at school, including being harassed or attacked.¹¹ More than half of transgender students (54%) reported verbal harassment, almost a quarter (24%) reported suffering a physical attack, and more than one eighth (13%) reported being sexually assaulted.¹² Another 2015 survey showed that three-fourths of transgender students felt unsafe at school because of their gender expression.¹³ More than a quarter of transgender respondents to a survey of LGBTQ teenagers in December 2016 and January 2017 reported being bullied or harassed within the past thirty days.¹⁴ Given the hostile climate transgender students face, it is not surprising that transgender students surveyed in 2019 reported feeling less connected to their school, and less of a sense of belonging, than other students.¹⁵

¹¹ Sandy E. James et al., *The Report of the 2015 U.S. Transgender Survey* 131-35 (Nat'l Ctr. for Transgender Equal. Dec. 2016) (internet).

¹² *Id.* at 132-33.

¹³ Joseph G. Kosciw et al., *The 2015 National School Climate Survey: The Experiences of Lesbian, Gay, Bisexual, Transgender, and Queer Youth in Our Nation's Schools* 84-85 (GLSEN 2016) (internet).

¹⁴ Human Rts. Campaign Found., *Human Rights Campaign Post-Election Survey of Youth* 8 (2017) (internet).

¹⁵ Kosciw et al., *The 2019 National School Climate Survey*, *supra*, at 95.

Discrimination against transgender youth can have serious health and academic consequences. LGBTQ students who experienced discriminatory policies or practices in school were found to have lower self-esteem and higher levels of depression than students who had not encountered such discrimination.¹⁶ Respondents to the 2015 USTS who reported negative experiences in grades K-12 were more likely than other respondents to be under serious psychological distress, to have experienced homelessness, and to have attempted suicide.¹⁷ Transgender people attempt suicide at a rate nearly nine times that of the general population.¹⁸

Discrimination in school settings also negatively affects educational outcomes. A 2019 survey showed that LGBTQ students who had experienced discriminatory policies and practices had lower levels of educational achievement, lower grade point averages, and lower levels of educational aspiration than other students.¹⁹ Discriminatory school climates have

¹⁶ *Id.* at 52, 54.

¹⁷ James et al., *2015 U.S. Transgender Survey*, *supra*, at 132.

¹⁸ *Id.* at 114.

¹⁹ Kosciw et al., *The 2019 National School Climate Survey*, *supra*, at 45, 48; *see also* Greytak et al., *Harsh Realities*, *supra*, at 25, 27 fig. 15 (showing that more-frequently harassed transgender students had significantly lower grade point averages than other transgender students).

also been found to exacerbate absenteeism: “LGBTQ students were almost three times as likely to have missed school in the past month because they felt unsafe or uncomfortable if they had experienced LGBTQ-related discrimination in their school (44.1% vs. 16.4%).”²⁰

B. Allowing Transgender Students to Live Consistently with Their Gender Identity Yields Benefits for Those Students and for Society.

Policies that allow transgender students to access facilities and activities consistent with their gender identity create school climates that enhance students’ well-being and facilitate their ability to learn.²¹ For example, transgender students permitted to live consistently with their gender identity have mental health outcomes comparable to their cis-gender peers.²² These benefits redound to society as a whole because

²⁰ Kosciw et al., *The 2019 National School Climate Survey*, *supra*, at 49.

²¹ See, e.g., Br. of Amici Curiae Sch. Adm’rs from Thirty-One States and D.C. in Supp. of Resp’t (“Br. of Amici Curiae Sch. Adm’rs”) at 3-4, *Gloucester Cnty. Sch. Bd. v. G.G.*, 137 S. Ct. 1239 (2017) (No. 16-273), 2017 WL 930055.

²² See Kristina R. Olson et al., *Mental Health of Transgender Children Who Are Supported in Their Identities*, *Pediatrics*, Mar. 2016, at 5-7 (internet); Br. of Amici Curiae Sch. Adm’rs at 4, *Gloucester Cnty. Sch. Bd.*, 137 S. Ct. 1239 (No. 16-273), 2017 WL 930055.

education advances not only the private interests of students, but also prepares them to contribute to society—socially, culturally, and economically. *See, e.g., Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954).

A number of the amici States have thus enacted laws or issued guidances to ensure equal opportunities for transgender students—including with regard to school activities and sports programs.²³ For example, both California and Massachusetts have long mandated that transgender students be permitted to participate in school programs and activities—including sports—consistent with their gender identity. *See* Cal. Educ. Code § 221.5(f) (2013); Mass. Gen. Laws ch. 76, § 5 (2012);

²³ **Connecticut:** Conn. Gen. Stat. § 10-15c (prohibiting discrimination on basis of gender identity in student access to public school activities and programs). **Minnesota:** Minnesota Dep’t of Educ., *A Toolkit for Ensuring Safe and Supportive Schools for Transgender and Gender Nonconforming Students* 8 (Sept. 25, 2017) (internet) (same). **New Jersey:** New Jersey Dep’t of Educ., *Transgender Student Guidance for School Districts* 6 (internet) (same, as to “gender-segregated classes or athletic activities, including intramural and interscholastic athletics”). **Washington:** Wash. Rev. Code Ann. § 28A.642.010 (prohibiting discrimination based on gender identity in public schools); Washington Off. of Superintendent of Pub. Instruction, *Gender-Inclusive Schools* (internet) (transgender students must be permitted to participate in “physical education and athletics” consistent with their gender identity). **District of Columbia:** D.C. Code § 2-1402.41 (prohibiting gender identity discrimination by educational institutions).

603 Mass. Code Regs. 26.06(5). Likewise, New York law expressly prohibits discrimination and harassment of students “on school property or at a school function” on the basis of gender identity, N.Y. Educ. Law §§ 11(6), 12(1), and the New York State Education Department has made clear that transgender students should be allowed to access school facilities, and participate in activities, consistent with their gender identity, New York State Educ. Dep’t, *Guidance to School Districts for Creating a Safe and Supportive School Environment For Transgender and Gender Nonconforming Students* 9-11 (July 2015) (internet).

Athletic participation has been linked to academic achievement and improved academic performance.²⁴ Participants in interscholastic sports “have higher grades, spend more time on homework, have higher educational aspirations, and are more likely to attend college than are their

²⁴ Alison R. Snyder et al., *Health-Related Quality of Life Differs Between Adolescent Athletes and Adolescent Nonathletes*, 19 J. of Sport Rehab. 237, 238 (2010) (internet); Kelly P. Troutman & Mikaela J. Dufur, *From High School Jocks to College Grads: Assessing the Long-Term Effects of High School Sport Participation on Females’ Educational Attainment*, 38 Youth & Soc’y 443, 444 (2007) (internet).

counterparts.”²⁵ Young women who participate in high school athletics, in particular, are more likely on average to complete college.²⁶

There are also many health benefits to sports participation. Regular physical activity “decreases the risk of developing diabetes, hypertension, cancer, and obesity, as well as cardiovascular and bone and joint diseases.”²⁷ Sports participation can also have a positive effect on self-esteem and mental health.²⁸ And all students stand to benefit from an inclusive, supportive environment.²⁹ This is especially true of sports, given the importance of teamwork and cooperation in athletic competition. The United Nations has recognized the integral role that sports play in the

²⁵ Troutman & Dufur, *supra*, at 444.

²⁶ *Id.* at 454.

²⁷ Snyder et al., *supra*, at 237-38; *see also* Troutman & Dufur, *supra*, at 444.

²⁸ Richard Bailey, *Physical Education and Sport in Schools: A Review of Benefits and Outcomes*, 76 J. of Sch. Health 397, 398 (2006) (internet); Snyder et al., *supra*, at 238, 244.

²⁹ *See* Br. of Amici Curiae Sch. Adm’rs at 2, *Gloucester Cnty. Sch. Bd.*, 137 S. Ct. 1239 (No. 16-273), 2017 WL 930055 (“[I]nclusive policies not only fully support the reality of transgender students’ circumstances, but also foster a safer and more welcoming learning environment for all students.”).

“promotion of tolerance and respect” and “the empowerment of women and of young people, individuals and communities.”³⁰

In sum, in the amici States’ experiences, allowing transgender students to participate in athletic activities consistent with their gender identity confers broad benefits.

POINT II

TITLE IX DOES NOT BAR TRANSGENDER FEMALE STUDENTS FROM PARTICIPATING IN GENDER-SEGREGATED SPORTS ACCORDING TO THEIR GENDER IDENTITY

Under Title IX, “[n]o person in the United States shall, *on the basis of sex*, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.” 20 U.S.C. § 1681(a) (emphasis added). Title IX’s implementing regulations confirm that Title IX’s nondiscrimination mandate applies to “interscholastic, intercollegiate, club or intramural athletics offered by a recipient” and permits gender-segregated teams. 34 C.F.R. § 106.41(a), (b) (2021); 28 C.F.R. § 54.450(a), (b) (2021).

³⁰ G.A. Res. 70/1, ¶ 37 (Sept. 25, 2015).

A. Title IX’s Statutory Language Does Not Require the Exclusion of Transgender Students from Gender-Segregated Sports Teams.

As a threshold matter, plaintiffs fail to establish that—by virtue of competing in athletic competitions with transgender girls as well as cisgender girls—they have been discriminated against *on the basis of sex* (see Br. at 29), as is required to state a Title IX claim, *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 616 (4th Cir. 2020). Neither the text of Title IX nor its implementing regulations dictate that recipients of federal funds must assign transgender students to sports teams, or any other gender-segregated program or activity, based on their sex assigned at birth.

Plaintiffs’ argument also lacks support in the caselaw construing Title IX and analogous statutes. Courts have rejected arguments, similar to those raised here, that transgender students’ use of sex-segregated spaces that align with their gender identity somehow violates cisgender students’ Title IX rights. See *Parents for Privacy v. Barr*, 949 F.3d 1210, 1228-29 (9th Cir.), *cert. denied*, 141 S. Ct. 894 (2020); *Doe ex rel. Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518, 534-35 (3d Cir. 2018), *cert. denied*, 139 S. Ct. 2636 (2019). Indeed, some courts have concluded that

Title IX not only permits—but requires—providing transgender students with sex-segregated spaces that align with their gender identity. *See Grimm*, 972 F.3d at 616-19; *Whitaker ex rel. Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1046-51 (7th Cir. 2017); *Dodds v. U.S. Dep’t of Educ.*, 845 F.3d 217, 221-22 (6th Cir. 2016). These decisions are consistent with the Supreme Court’s construction of Title VII of the Civil Rights Act of 1964 in *Bostock*, which did not limit the statutory phrase “on the basis of sex” to sex assigned at birth. *See* 140 S. Ct. at 1746-47.

These principles require the dismissal of plaintiffs’ claims here. CIAC has adopted a policy providing that a transgender girl may join a girls’ sports team if she is recognized as a girl “in current school records and daily life activities in the school.” (J.A. 149.) The text of Title IX and its implementing regulations do not prohibit CIAC from treating transgender students consistently with their gender identity in athletics and other school activities. And unanimous appellate precedent confirms that transgender students’ participation in school activities and programs in accordance with their gender identity, as provided by the CIAC policy, is consistent with the obligations imposed by Title IX. *See Grimm*, 972 F.3d

at 616-19; *Parents for Privacy*, 949 F.3d at 1228-29; *Boyertown*, 897 F.3d at 534-35; *Whitaker*, 858 F.3d at 1046-50; *Dodds*, 845 F.3d at 221-22. Contrary to plaintiffs' claims, nothing in Title IX compels CIAC to exclude transgender girls from athletic teams that align with their gender identity. *See Bostock*, 140 S. Ct. at 1750.

B. The Participation of Transgender Students in Athletic Events Does Not Deprive Cisgender Students of Equal Treatment or Effective Accommodation under Title IX.

Even if plaintiffs could show that Title IX's reference to discrimination "on the basis of sex" encompasses only the sex assigned to a person at birth, plaintiffs would still fail to establish a viable Title IX claim. Plaintiffs have not plausibly alleged that the participation of Yearwood and Miller on other schools' track teams violates plaintiffs' entitlement to equal treatment and effective accommodation under Title IX. *See Biediger v. Quinnipiac Univ.*, 691 F.3d 85, 92 (2d Cir. 2012). As the experiences of amici States show, allowing transgender girls to participate on sports teams aligned with their gender identity does not substantially displace athletic opportunities for cisgender girls.

A Title IX equal treatment claim looks at whether the “athletic benefits and opportunities provided male and female athletes” are equivalent in terms of availability, quality, and kind. *Mansourian v. Regents of the Univ. of Cal.*, 602 F.3d 957, 964-65 (9th Cir. 2010) (quotation marks omitted). An effective accommodation claim looks at “[w]hether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes.” 34 C.F.R. § 106.41(c)(1). In reviewing such a claim, courts look at a school’s entire athletic program as a whole to ensure equal participation opportunities. *See Biediger*, 691 F.3d at 92-93.

Here, plaintiffs fail to state either type of Title IX claim. Plaintiffs acknowledge that they participated on girls’ track teams and competed in numerous meets. And their complaint contradicts any claim that they “do not possess sufficient skill . . . to compete actively” in athletic events that include two transgender girls. Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,413, 71,418 (Dec. 11, 1979). As plaintiffs describe, they are successful athletes; they have won awards in multiple events and in some instances they have placed higher than Yearwood and Miller

in events in which they directly competed with Yearwood and Miller.³¹ More generally, it is implausible to suggest that “one half of one percent of the population (transgender women) could” substantially displace roughly half the population (cisgender women) on high school athletic teams. *Hecox v. Little*, 479 F. Supp. 3d 930, 977 (D. Idaho 2020).

The experiences of the amici States confirm that permitting transgender students like Yearwood and Miller to participate in women’s sports will not compromise fairness or reduce opportunities for cisgender athletes. Interscholastic sports organizations, local school districts, and individual colleges and universities in the amici States have adopted policies to ensure that transgender students will have equal access to sports participation—and these policies have not resulted in fewer opportunities for cisgender students.³²

³¹ Plaintiffs have also failed to allege that they are treated differently from cisgender boys (or transgender girls) in terms of the provision of equipment and supplies, coaching opportunities, locker room facilities, or scheduling of games and practice time. *See* 34 C.F.R. § 106.41(c); *Biediger*, 691 F.3d at 92; *McCormick ex rel. McCormick v. School Dist. of Mamareoneck*, 370 F.3d 275, 291 (2d Cir. 2004).

³² *See, e.g., California: California Interscholastic Fed’n, Constitution & Bylaws 2021-22*, at 96 (internet) (transgender students must be afforded opportunity to participate in sports in manner consistent with

(continued on the next page)

For example, since 2009, the New Jersey State Interscholastic Athletic Association, a voluntary organization that administers interscholastic athletics in the State, has permitted transgender students to participate in gender-segregated competitive sports consistent with their

their gender identity); Fresno Unified Sch. Dist., *Fresno Unified Administrative Regulation (AR) 5145.3: Nondiscrimination/Harassment* 6 (Dec. 9, 2019) (internet) (same). **Colorado:** Colorado High Sch. Activities Ass'n, *CHSAA Transgender Inclusion Bylaw & Policy 2* (internet) (same). **Maryland:** Maryland Pub. Secondary Schs. Athletic Ass'n, *MPSSAA Guidance for Participation of Transgender Youth in Interscholastic Athletics* 1-2 (Aug. 2016) (internet) (same, for interscholastic sports); **Massachusetts:** Massachusetts Interscholastic Athletic Ass'n, *Rules and Regulations Governing Athletics: A Handbook for Principals and Athletic Directors* 41 (internet) (same). **Minnesota:** Minnesota State High Sch. League, *Official Handbook, 300.00: Administration of Student Eligibility Bylaws* 51 (internet) (same); University of Minn., *Equity and Access: Gender Identity, Gender Expression, Names and Pronouns* (internet) (same, for all university programs and activities). **Nevada:** Nevada Interscholastic Activities Ass'n, *NIAA Transgender Participation Position Statement and Policy* (Apr. 6, 2016) (internet) (same, for "gender specific sports team[s]"). **New York:** New York State Pub. High Sch. Athletic Ass'n, *NYSPHSAA Handbook* 49-50 (Sept. 10, 2021) (internet) (equal participation by transgender students in all interscholastic sports activities consistent with their gender identity). **Oregon:** Oregon Sch. Activities Ass'n, *OSAA 2021-22 Handbook*, Exec. Bd. Policy No. 40 (internet). **Rhode Island:** Rhode Island Interscholastic League, *Rules and Regulations, Article 3* (Sept. 28, 2020) (internet) (same). **Washington:** Washington Interscholastic Activities Ass'n, *2021-2022 Handbook* 36 (Sept. 8, 2021) (internet) (same).

gender identity.³³ The Albuquerque School District—the largest school district in New Mexico—mandates that transgender students have equal access to recreational and competitive sports programs “in a manner consistent with their gender identity.”³⁴ And the Los Angeles Unified School District, one of the largest school districts in the country, has implemented a transgender-inclusive sports policy for many years “without problems.”³⁵ As a school district official in Los Angeles has reported, the district’s policy has led to a positive “transformation” in their schools: an experience that “stands in stark contrast” to “expressed concerns that students will abuse the policy.”³⁶

Further, as permitted by National Collegiate Athletic Association policies, transgender students in the amici States have been competing in intercollegiate sports teams consistent with their gender identity for

³³ New Jersey State Interscholastic Athletic Ass’n, *NJSIAA & NJSCA Coaches Handbook: 2020-2021*, at 28-30 (internet).

³⁴ Albuquerque Pub. Schs., *Non-Discrimination for Students: Gender Identity and Expression* (May 2016) (internet).

³⁵ Patrick McGreevy, *California Transgender Students Given Access to Opposite-Sex Programs*, L.A. Times (Aug. 12, 2013) (internet).

³⁶ Judy Chiasson, *Success and Opportunity for Transgender Students*, HuffPost (updated Feb. 2, 2016) (internet).

nearly a decade.³⁷ Notwithstanding this lengthy history, amici States are not aware of evidence that transgender athletes have dominated any sport or competition, or have caused scholarship opportunities to be unfairly denied to cisgender competitors.

In sum, concerns about compromising fair competition and “rob[bing] female athletes of the recognition they deserve” (Br. at 13), rest on baseless assumptions and generalizations concerning the participation of transgender female athletes in gender-segregated sports and are inconsistent with the experiences of the amici States.³⁸

³⁷ National Collegiate Athletic Ass’n, *NCAA Inclusion of Transgender Student-Athletes* 13 (Aug. 2011) (internet).

³⁸ *See also id.* at 7-8 (explaining that assumptions that transgender women will have an “unfair advantage when competing against non-transgender women” are “not well founded”).

CONCLUSION

This Court should affirm the judgment dismissing plaintiffs' complaint.

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October 14, 2021

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a) of the Federal Rules of Appellate Procedure, Kelly Cheung, an employee in the Office of the Attorney General of the State of New York, hereby certifies that according to the word count feature of the word processing program used to prepare this brief, the brief contains 4,537 words and complies with the typeface requirements and length limits of Rules 29 and 32(a)(5)-(7) and Local Rules 29.1 and 32.1.

/s/ Kelly Cheung