



## **Testimony before Ohio Senate Government Oversight Committee**

Enact Ohio Saving Adolescents from Experimentation (SAFE) Act  
2nd Hearing, Proponent

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Good morning. My name is May Mailman. I am a resident of Shaker Heights and served recently as the Deputy Solicitor General and Director of the Tenth Amendment Center for the State of Ohio.

I am currently a senior fellow with the Independent Women's Law Center, the legal advocacy arm of Independent Women's Forum (IWF) and Independent Women's Voice (IWV).

IWF is a 501(c)(3) nonprofit organization founded by women to foster education and debate about liberty, personal responsibility, and the limited reach of government. IWV is a 501(c)(4) organization that fights for women by expanding support for policies that enhance freedom, opportunity, and well-being.

I previously served as a White House attorney and policy advisor from 2017 through 2021, where I focused on health care, immigration, education, and women's issues.

I am here today to urge you to protect women's sports in Ohio.

### **The Threat**

As Ms. Gaines has testified, trans-identified males are seeking spots in women's athletic competitions in different sports at every level of competition. But it is not only trans athletes who are seeking entry into

women's sports. In fact, in the United States today, high school boys who identify as boys are increasingly seeking spots on women's field hockey and volleyball teams when the schools offer no corresponding men's team.

Americans know instinctively that this is unfair.

Science tells us that, on average, male bodies have about a 10% athletic advantage over female bodies.<sup>1</sup> This male-female athletic gap is not simply the result of unequal opportunity. It is the result of biology.

And, while testosterone suppression will certainly impair a male's athletic performance, it cannot reduce male performance to normal female levels. Nor can it ever create the athletic disadvantages that female bodies have, including less pelvic joint rotation, menstrual cycles and potential pregnancies.

But allowing males to compete in women's sports doesn't just create unfair competition. It also limits opportunities for women to compete at all. That's because competitive sport is a zero sum game in which some athletes make the team and others do not. And in the world of competitive sport:

- if a biological male is offered a spot on a women's team with limited roster spots, a female athlete loses a roster spot;
- if a biological male is allowed to race in a women's event, a female athlete loses the opportunity to compete;
- if a biological male is allowed to take the field with a women's team, a female athlete loses playing time;
- and if a biological male is granted a women's athletic scholarship, a female athlete may lose a chance to attend the college of her dreams.

Claims to the contrary deny science and defy logic.

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<sup>1</sup> *Competition: Title IX, Male-Bodied Athletes, and the Threat to Women's Sports*, Independent Women's Forum at 25, <https://bit.ly/3OvkfVZ> (accessed Nov. 21, 2023)

## The Law

Until recently, one might have thought that state legislation protecting female athletes would be unnecessary. After all, Title IX of the Education Amendments of 1972 prohibits discrimination and unequal opportunity in all aspects of the educational experience, including sports.<sup>2</sup>

Importantly, Title IX recognizes that providing equal opportunity can require recognizing inherent differences between the sexes.<sup>3</sup> When introducing Title IX, Senator Birch Bayh explained that Title IX would not “mandate[ ] the desegregation of football fields.”<sup>4</sup> In recognition of the uniqueness of women and men when it comes to sports, Congress directed that Title IX’s implementing regulations must include “reasonable provisions considering the nature of particular sports.”<sup>5</sup>

That’s why, for 50 years, the Title IX athletics regulation has explicitly permitted sex-based teams “where selection for such teams is based upon competitive skill or the activity involved is a contact sport.”<sup>6</sup> And, the school must “provide equal athletic opportunity for members of both sexes.”<sup>7</sup>

This has benefitted the women who for so long were locked out of athletic opportunities. When Title IX was enacted, about 294,000 girls participated in high school sports each year— compared to over 3.6 million boys.<sup>8</sup> By 2018, over 3.4 million girls were playing high-school sports.<sup>9</sup>

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<sup>2</sup> Specifically, Title IX states: “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.

<sup>3</sup> See *United States v. Virginia*, 518 U.S. 515, 533 (1996) (Ginsburg, J.) (“Physical differences between men and women ... are enduring: ‘[T]he two sexes are not fungible; a community made up exclusively of one [sex] is different from a community composed of both.’”) (quoting *Ballard v. United States*, 329 U.S. 187, 193 (1946)).

<sup>4</sup> 117 Cong. Rec. 30399, 30407 (1971).

<sup>5</sup> Education Amendments of 1974, Pub. L. 93-380, 88 Stat. 484, 612 (1974).

<sup>6</sup> 34 CFR § 106.41(b).

<sup>7</sup> 34 CFR § 106.41(c).

<sup>8</sup> Women’s Sports Foundation, *50 Years of Title IX* (2022), <https://bit.ly/3V66cHW>.

<sup>9</sup> *Ibid.*; see also Nat’l Ctr. for Educ. Stat., *Fast Facts for Title IX*, <https://bit.ly/3npc1DR> (“The girls’ high school participation rate is greater than 11 times what it was when Title IX was passed, an increase of more than 1,000 percent.”).

Unfortunately, in April 2023, the Department of Education proposed a rule that, if adopted, would flip Title IX on its head. The proposed rule would modify the athletic regulation to require that schools let students compete on teams consistent with their gender identity unless a particular school can demonstrate, to the satisfaction of the Department of Education, that it would be unfair or unsafe to students on a particular team.<sup>10</sup> In other words, the proposed rule establishes a new default position that women's sports are for anyone who identifies as a woman.<sup>11</sup>

Let me be perfectly clear, ***the federal Department of Education's proposed rule is unlawful.*** And it will not survive legal challenge in court.<sup>12</sup>

The State of Ohio joined with 21 other states to argue the proposed rule “defies Title IX’s text, history, and purpose.” The comment letter says, “Instead of advancing the mission that Title IX started more than 50 years ago, the proposed rule would take a large leap toward erasing many women and girls from competitive sports.”

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<sup>10</sup> The proposed rule states: “If a [school] adopts or applies sex-related criteria that would limit or deny a student’s eligibility to participate on a male or female team consistent with their gender identity, such criteria must, for each sport, level of competition, and grade or education level: (i) Be substantially related to the achievement of an important educational objective; and (ii) Minimize harms to students whose opportunity to participate on a male or female team consistent with their gender identity would be limited or denied.” 88 Fed. Reg. at 22891.

<sup>11</sup> See Comment of Independent Women’s Law Center and Independent Women’s Forum regarding implications of the Department of Education’s proposed Title IX rule, *available at* <https://bit.ly/450dPDq>.

<sup>12</sup> The Department believes that the Supreme Court’s decision in *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), “leads to the conclusion that Title IX prohibits discrimination based on ... gender identity.” 86 Fed. Reg. 32637 (June 22, 2021). That is false. In *Bostock*, the Supreme Court held that Title VII of the Civil Rights Act prohibits employers from “fir[ing] someone simply for being ... transgender.” *Bostock*, 140 S. Ct. at 1753. But *Bostock* dealt only with hiring and firing in the employment context under Title VII. As the *Bostock* majority noted, “[a]n individual employee’s sex is not relevant to the selection, evaluation, or compensation of employees.” *Id.* at 1741 (internal quotation marks omitted). Athletics in education, however, are governed by a different statute: Title IX. And when it comes to athletics, sex is not only relevant: it is often dispositive. *Bostock*’s conclusion that employment discrimination against a trans-identified person “necessarily entails discrimination based on sex” under Title VII, is simply inapplicable to the athletics governed by Title IX, where males and females are not similarly situated. *Bostock*, 140 S. Ct. at 1740. See also *Kleczek v. Rhode Island Interscholastic League, Inc.*, 612 A.2d 734, 738 (R.I. 1992) (“Because of innate physiological differences, boys and girls are not similarly situated as they enter athletic competition.”).

Put simply, Title IX requires colleges and universities to provide equal opportunities to male and female athletes. Allowing males to take roster spots and opportunities from females violates this equal opportunity mandate.

The Biden administration has not demonstrated a willingness to enforce Title IX and opportunities for women. That gap demands that Ohio act and pass HB 68.

Thank you.