ALLIANCE DEFENDING FREEDOM
FOR FAITH. FOR JUSTICE.

By way of introduction, Alliance Defending Freedom has for years been standing with female athletes who have been deprived of equal athletic opportunities because of policies that allow men to compete on women's teams. We filed the first women's sports case in 2020. We routinely provide our legal expertise on the issue to lawmakers across the country as they pass legislation to safeguard fairness for women and girls in their states.

Maine LD 868 is consistent with both the U.S. Constitution and federal law, including Title IX. Federal courts have long recognized that it is constitutional to provide separate programs based on biological sex—including sports teams, locker rooms, or even single-sex schools.

Federal courts recognize that there are differences between the two sexes that justify having separate athletic teams for women and men.

There are "'[i]nherent differences' between men and women," and that these differences "remain cause for celebration, but not for denigration of the members of either sex or for artificial constraints on an individual's opportunity." *United States v. Virginia*, 518 U.S. 515, 533 (1996). Courts have recognized that the inherent, physiological differences between males and females result in different athletic capabilities. *See, e.g., 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."); *Petrie v. Ill. High Sch. Ass'n,* 394 N.E.2d 855, 861 (Ill. App. Ct. 1979) (noting that "high school boys [generally possess physiological advantages over] their girl counterparts" and that those advantages give them an unfair lead over girls in almost all sports like "high school track").

In the Supreme Court's decision in the Virginia Military Institute (VMI) case, Justice Ginsburg wrote that once women were admitted to VMI, female students would "undoubtedly require" separate physical fitness standards, precisely because of the "physiological differences between male and female individuals." *United States v. Virginia,* 518 U.S. 515, 533, 550 n. 19 (1996). It is for just this same reason that men and women "undoubtedly require" separate physical competitions—which is to say, athletics.

Title IX requires schools and colleges to provide female athletes with equal treatment and equal access to the benefits and opportunities that flow from sports.

Equal treatment requires equal "opportunities to engage in . . . post-season competition." *McCormick v. School District of Mamaroneck,* 370 F.3d 275, 289 (2d

Cir. 2004) (quoting 44 Fed.Reg. at 71,416). But when girls are excluded from post-season and State-level competition because a male has occupied one of their limited qualifying slots—while of course males also occupy all such slots in the boys' division—then female athletes are not receiving equal opportunities to participate in post-season competition.

Equal treatment also requires that the sports program must provide girls an equal "quality of competition." But when even the fastest girls in the state must step to the starting line knowing that "I can't win," this is a frankly degraded, illusory, and unequal quality of competition.

And for all girls—confronted with male competitors whose participation imposes a "ceiling . . . [girls] cannot break through no matter how hard they strive," *McCormick*, 370 F.3d at 295—their training, striving, and competing without even a hope of recognition as a champion is a decidedly second-class "quality of competition."

Equal treatment requires female athletes to have equal opportunities for "publicity" under 34 C.F.R. § 106.41(c)(10). If girls are excluded from championship competitions, this is likely to reduce their visibility to college coaches who "do their recruiting at the high level club tournaments. . . ." *McCormick*, 370 F.3d at 282.

The simple truth is that because of the unalterable facts of human physiology, in track and field, as in many sports, the only way to provide "equal treatment" for girls—those born with XX chromosomes—and competitive opportunities and experiences that are equal in "kind" and in "quality," is the traditional way: competitions and records separated by sex. "[A]n institution would not be effectively accommodating the interests and abilities of women if it abolished all of its women's teams and opened up its men's teams to women, but only a few women were able to qualify for the men's team." 40 Fed.Reg. 52656.5. Schools "must" provide separate competitive opportunities where "[m]embers of the excluded sex do not possess sufficient skill to be selected for a single integrated team, or to compete actively on such a team if selected." 44 Fed.Reg. at 71,418.

Federal courts recognize that maintaining separate teams for female athletes is necessary to accomplish the purpose and goals of Title IX.

As Justice Stevens of the U.S. Supreme Court explained, without separate athletic teams for males and females, "there would be a substantial risk that boys would dominate the girls' programs and deny them an equal opportunity to compete in interscholastic events." *O'Connor v. Bd. of Educ. of Sch. Dist. 23*, 449 U.S. 1301, 1307 (1980) (Stevens, J., in chambers).

"[I]f positions on the field hockey team were open to girls and boys, 'eventually boys would dominate, eliminating the opportunities of females." *Williams v School District of Bethlehem,* 998 F.2d 168, 178 (3d Cir. 1993).

"It takes little imagination to realize that were play and competition not separated by sex, the great bulk of the females would quickly be eliminated from participation and denied any meaningful opportunity for athletic involvement." *Cape v. Tenn. Secondary Sch. Athletic Ass'n.*, 563 F.2d 793, 795 (6th Cir. 1977).

The Ninth Circuit, ruling against a boy's challenge to a high school policy excluding males from participating on the girls' volleyball team, affirmed that the exclusion of boys was necessary to secure equal opportunity and treatment for female athletes. *Clark v. Ariz. Interscholastic Ass'n.*, 695 F.2d 1126 (9th Cir. 1982). It found it a "physiological fact" to reveal that "males would have an undue advantage competing against women," and that the record evidence in that case was clear that "due to average physiological differences, males would displace females to a substantial extent if they were allowed to compete for positions" on the women's team. *Id*. at 1131. The result would be that "athletic opportunities for women would be diminished." *Id*.

In *McCormick v. School District of Mamaroneck,* 370 F.3d 275, 295 (2d Cir. 2004), the Second Circuit rejected as inconsistent with Title IX a scheduling policy that had the effect of foreclosing girls from achieving state-level championships and recognition, observing that this "places a ceiling on the possible achievement of the female soccer players that they cannot break through no matter how hard they strive. The boys are subject to no such ceiling. Treating girls differently regarding a matter so fundamental to the experience of sports—the chance to be champions—is inconsistent with Title IX's mandate of equal opportunity for both sexes." As the court declaimed elsewhere, "[w]e are unpersuaded by the School Districts' attempt to downplay the significance of the opportunity that they are denying their female athletes but affording their male athletes—the chance to be State champions." *Id.* at 279 (emphasis added). Instead, the court found that denying the high school girls "treatment equal to boys in a matter so fundamental to the experience of sports denies equality of athletic opportunity to the female students." *Id.*

Or as Judge Lagoa explained in a recent decision out of the Eleventh Circuit Court of Appeals, "commingling of the biological sexes in the female athletics arena would significantly undermine the benefits" that separate sports teams "afford[] to female student athletes." *Adams ex rel. Kasper v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 819 (11th Cir. 2022) (Lagoa, J., specially concurring).

And earlier this year, a federal district court in Kentucky issued a decision Thursday in *State of Tennessee v. Cardona* that blocked the Biden administration's unlawful attempt to change the meaning of "sex" in Title IX—a federal law designed to create equal opportunities for women in education and athletics—to include "gender identity." The district court ruling applied nationwide and to every part of the Biden Title IX rule, meaning the rule is completely invalidated, and the U.S. Department of Education is unable to enforce it—anywhere. "[W]hen Title IX is viewed in its entirety, it is abundantly clear that discrimination on the basis of sex means discrimination on the basis of being a male

or female," the court wrote in its opinion. *Tennessee v. Cardona*, 2025 WL 63795, at *3 (E.D. Ky. Jan. 9, 2025), *as amended* (Jan. 10, 2025). "As this Court and others have explained, expanding the meaning of 'on the basis of sex' to include 'gender identity' turns Title IX on its head." *Id.* "Title IX," the court continued, allows "males and females to be separated based on the enduring physical differences between the sexes." *Id.*