



# HOUSE OF REPRESENTATIVES

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Sponsor Testimony LD 868, May 8, 2025

### **An Act to Ensure Equity and Safety in Athletics, Restrooms, Changing Rooms, and Housing at Elementary, Secondary and Postsecondary Schools**

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Sen. Carney, Rep. Kuhn, and fellow esteemed members of the Judiciary Committee,

My name is Elizabeth Caruso, and I live in Caratunk and represent House District 72.

It is my honor to present LD 868, "An Act to Ensure Equity and Safety in Athletics, Restrooms, Changing Rooms, and Housing at Elementary, Secondary and Postsecondary Schools," which I believe is a path forward for all Maine students to play sports safely and fairly.

I stand before you today for many reasons. First, I care passionately about all children. Secondly, I am passionate about school sports as it was a huge part of my life.

As a competitive high school and college athlete, I believe the benefits of competitive and team sports are endless. These benefits can last a lifetime and build up a person's confidence, strength, courage, determination, and healthy lifestyles. Those years and experiences are still one of the greatest pillars of my life, anchors in my character, and certainly how I can stand before you today. And for those who compete at the highest levels, sports may provide the only opportunity they have for higher education and degrees. I believe everyone should have these opportunities, and we need to make sure that Maine children can compete in a safe, fair, just, and orderly manner. And the best way to accomplish this is to maintain separate teams for girls and boys based on biological sex.

This is not a political issue. It's not a partisan topic as numerous polls have shown that 79-82% of Americans across the board want fairness and safety in athletics. A recent NYT poll revealed that 79% of Americans, 94% of republicans, 67% of democrats, and 64% of independents, believe men should not compete in women's sports. <sup>1</sup>

The heart behind this bill is to provide safety, privacy, and a fair playing field where all students have the opportunity to participate in sports. All students absolutely deserve our respect and dignity.

I believe it is widely understood that our youth are going through many challenges – emotionally, physically, and physiologically. I believe that Maine can provide compassion, help, safety, and support for our students, including those struggling with their sex, while still preserving privacy and athletic opportunities for our girls. My testimony, and those that follow, will show that athletic potential depends on biology, not identity.

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<sup>1</sup> <https://www.ipsos.com/sites/default/files/ct/news/documents/2025-01/NYT%20Ipsos%20Poll%20Topline%2001.19.2025.pdf>



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The State of Maine has a duty to safeguard the privacy and safety of all students, and Maine should never compromise this duty through policies that allow males to compete on girl's teams or access girls' private spaces.

LD 868 is about FAIRNESS, OPPORTUNITIES, SAFETY, and PRIVACY.

LD 868 has been vetted and enacted in whole or part in 26 states to date.

LD 868 provides clear guidelines and structure for students and schools.

I believe LD 868 is the path forward for Maine. It's a Win-Win for all Mainers because every student athlete will feel seen, safe, and can play on a level field.

My testimony includes:

- A. Current Maine Policy
- B. Privacy and Safety
- C. Loss of Athletic Opportunities and Fairness
- D. Fair Standing in College Recruitment or Placement
- E. Compromising Women's/Girls' Safety
- F. LD 868 Summary
- G. Proposed Amendment
- H. Supportive data and law decisions

## **A. Current Maine Policy**

Current Maine policy has no clear boundaries or structure for the current situations which schools and student athletes are finding themselves in, allowing for biological males who identify as female to play on girls and women's teams and use girls/women's private spaces such as locker rooms, bathrooms, and changing rooms. You will hear that this has happened and is happening in elementary school PE classes as well as competitive sports.

Gender identity may be neutral in many areas of school life, but when it comes to sports and private spaces, terminology matters.

By denying biological reality and ignoring Title IX <sup>2</sup> protections, Maine's current policies have created chaos and denial of equal athletic opportunities to our daughters and grand-daughters. The reality is **girls' sports will no longer be sustainable without critical legislation.**

As soon as one male is given a place on a female team, it's no longer a female team. And there is nothing holding back every position on a girls' team from being taken by boys. As soon as a male can use a girls' bathroom and change his clothes in a girls' locker room, it's no longer a girls' bathroom or locker room. Her safety and the privacy of her own body has been compromised. The sole purpose for designated restrooms and locker rooms has always been privacy.

Current policy centers on the interests of males and advantages males at the expense of girls. It reduces girls to spectators in their own sports as males capture championships and take spots on the podium that rightfully belong to female athletes.

Overall, the current policy allowing males in female' sports and spaces was adopted **without the input of female athletes and advocates for the female sporting category.**

**Bottom line: There can be no equal athletic opportunities without single-sex sports.**

## **B. Privacy & Safety**

Gaining access to women's teams and women's private spaces is a huge setback for girls and women and defeats the goal of Title IX and the history of separate restrooms, locker rooms, and housing for women and men. With regards to our designated restrooms and locker rooms, Maine girls should not be forced to give up their privacy and feeling of safety when they go to school. You will hear from Maine girls today that that is exactly what has happened.

Around the country, female athletes have been forced by school policy to share locker rooms and undress in front of males. For example, a PA college female athlete, a sexual assault survivor, was traumatized to have to undress and to see a naked, fully intact male in her locker room. The school employees dismissed the concerns of the female athletes by attempting to "re-educate" the athletes to lower their guard and become more comfortable sharing previously sex-separate spaces with members of the opposite sex.

I don't know of any parent who would force their daughter to strip or expose herself to a male against her will. Or force their daughter to be exposed to a male against her will. Surely, the Maine government shouldn't either. I have heard from plenty of parents who agree.

I know this committee hears enough about the horrors of sexual assault victims and how prevalent crimes are against our youth. The state of Maine should never have policies which could further traumatize our youth—

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<sup>2</sup> <https://www.ed.gov/laws-and-policy/civil-rights-laws/title-ix-and-sex-discrimination>

including girls who may have been victims of sexual assault or trafficking—or create an open door of opportunities for new harm.

This bill provides solutions that accommodate the needs of all students. It maintains separate private spaces for boys and girls. And it also allows for schools to accommodate, with a single-user option, any student who, for whatever reason, is uncomfortable using changing facilities of their sex.

### **C. Loss of Athletic Opportunities and Fairness**

Title IX was designed to stop discrimination and create equal athletic opportunities for women. Allowing males to compete in women's sports reverses nearly 50 years of advances for women.

A few claim this is a tiny issue that hardly ever occurs, but the reality is worldwide, males are taking trophies, playing time, and opportunities from women and girls every day.

Male athletes have won more than 4,161+ victories and over 6,956+ top-three finishes in female competitions, impacting more than 13,217+ competitions.<sup>3</sup>

Across Maine, males are taking spots on female teams, capturing championships and accolades from deserving young women, and entering into girls' private spaces. We've all heard of the 2 males who recently have dominated certain competitions, but there are males in many more sports' competitions as well as in school PE locker rooms. I am not here to focus on individuals or to debate any specific circumstances because, as a lawmaker, we must focus on policy and legislation that is in the best interest of ALL students in Maine—and that protects fairness, privacy, and safety for every student on and off the field.

Concerning biological differences with regards to athletic abilities, I've included an excerpt from an article in the National Review titled "Biological Differences between Men and Women Matter in Sports"

**"The sex-based anatomical and physiological differences between males and females give males athletic advantages when compared to similarly aged, gifted, and trained females — no matter the age range. Records from USA Track & Field show in the eight-and-under age group and the nine-to-ten-year-old age group, boys run faster, jump longer, and throw farther than similarly aged girls in every event. Evaluations of fitness testing from around the world in children as young as three years old show that boys perform better than girls of the same age on tests of throwing, muscular strength, muscular endurance, and aerobic fitness. Prepubertal sex-based differences are smaller than the differences after puberty but are still meaningful in competition.**

Puberty magnifies the sex-based differences in performance, with teenage boys and adult men outperforming girls and women by 10–15 percent in running, 15–20 percent in jumping, and 30–60 percent in strength. None of this is owing to better training, nutrition, coaching, or motivation. Males have inherent biological advantages, such as taller body height, more lean body mass, more muscle mass, greater muscle strength, larger hearts and lungs, higher maximal oxygen consumption, and stronger bones than similarly aged, gifted, and trained females.

**Even after a male has undergone hormone therapy, research shows that, while those biological advantages decrease, they are still far more prominent than similarly aged and trained women. Men have 30–60 percent higher muscle strength than women, and undergoing testosterone suppression decreases that strength by only 0–9 percent — a far cry from an even playing field for even the strongest female athletes.\***

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<sup>3</sup> [https://hecheated.org/Totals\\_results\\_2020s.html](https://hecheated.org/Totals_results_2020s.html)

Yes, some women are taller than some men. Some women are stronger and can run faster than some men. But the tallest women are shorter than the tallest men, the most muscular men have significantly more muscle mass than the most muscular women, the strongest men are much stronger than the strongest women, and the fastest men are much faster than the fastest women. When comparing similarly aged, gifted, and trained males and females, the males' inherent biological advantages tip the playing field unalterably in their favor.

A person cannot have a blood test, CT scan, MRI, genetic screening, or any other standard or specialized laboratory test to determine a transgender identity. Therefore, if a male identifies as a girl or woman, biological sex is still present, and it is reasonable to conclude that he still has inherent male athletic advantages. Based on information in four different scholarly review papers by four different groups of scholars; separate reviews conducted by World Rugby, FINA, World Athletics, and the Sports Councils of the United Kingdom; and 27 peer-reviewed primary-research papers from many different research groups around the world, the current evidence indicates that identifying as transgender — with or without the use of puberty blockers, testosterone suppression, and/or cross-sex hormones — does not erase the inherent male athletic advantages.”<sup>4</sup>

Example: The case of CeCe Telfer NCAA athlete

CeCe Telfer demonstrates how transition treatments do not negate the physiological and athletic performance differences between men and women. When racing as a male athlete in 2016-17, then-Craig Telfer failed to qualify for National Championships, ranking only 443<sup>rd</sup> nationally in the 400m hurdles. In 2019, when racing as a female, Telfer was the National Champion in the 400 meter hurdles event, and placed third in the nation in the 110 meter hurdles. CeCe actually improved in several track and field events after a year of testosterone suppression. Generally, female athletes have little hope of winning against biological males.

#### **D. Fair Standing in College Recruiting/Placement**

Competitive sports are just that—they're hard and take years of work, sweat, and determination (and often a lot of their parents' time and money) to fully develop those high-tier skills and abilities that are necessary to receive that scholarship or college recruitment. Whether it's middle school, junior high, high school, or college — high level competitions begin early on...meaning that every placement a girl holds in a Jr high or high school competition's standing has long-term implications for that athlete's progression to higher education opportunities.

**NCAA's latest policy states “A student-athlete assigned male at birth may not compete on a women's team”.** This is a critical fact for Maine's highest-level athletes competing against other state athletes for recruitment. We need to make sure that our elementary and secondary scholastic competitions are consistent and preparatory for our Maine girls to have proper standing when applying for and getting recruiters' attention for their best college opportunities and scholarships. Keep in mind, a sports scholarship may be the only avenue a Maine girl has to be able to afford attending a top college.

When Maine girls are seeking recruitment for US colleges, they are of course competing against female athletes from other states. Many recruiters won't even look at an athlete below 1<sup>st</sup> place, and they won't realize that a male actually took first place. So, our girls who lose standing when a male takes her place are at an immediate disadvantage for college recruitment.

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<sup>4</sup> [Biological Differences between Men and Women Matter in Sports | National Review](#)

And that can also impact access to scholarships that could make the difference between a girl achieving her dream of attending college and competing in sports. This bill would help ensure that financial resources for college are not stolen away from deserving young women.

NCAA further stated:

**“We strongly believe that clear, consistent and uniform eligibility standards would best serve today's student-athletes instead of a patchwork of conflicting state laws and court decisions. To that end, President Trump's order provides a clear, national standard.”**

LD 868 aligns with clear directives from the federal government regarding the importance of protecting fairness and privacy for women and girls.

**Fortunately, LD 868's protections for fairness in sports is based on language that has been enacted in 26 other states!** (map attached)

### **E. Current Maine Policy Compromises Girls/Women's Safety**

In 2024, a United Nations General Assembly report<sup>5</sup> titled “Violence against women and girls, its causes and consequences” found that 1) females are more likely to sustain injuries when playing against males citing instances of broken bones, concussions, knocked-out teeth, skull fractures, and brain damage in volleyball, basketball and soccer, and that 2) men are taking awards and trophies, roster spots, playing time, resources, and opportunities from women every day.

Introduction: 2. Nevertheless, participation in sports with safety, equality and dignity remains challenging for women and girls, as they continue to face sex and gender-based discrimination, compounded by discrimination on other grounds, for which there continues to be widespread impunity.<sup>6</sup>

7. Female athletes are also more vulnerable to sustaining serious physical injuries when female-only sports spaces are opened to males, as documented in disciplines such as volleyball, basketball and soccer. .... According to scientific studies, males have certain performance advantages in sports. One study asserts that, even in non-elite sport, “the least powerful man produced more power than the most powerful woman” and states that, where men and women have roughly the same levels of fitness, males' average punching power has been measured as 162 per cent greater than females.<sup>7</sup>

#### **C. Opportunity for fair and safe competition <sup>8</sup>**

11. Policies implemented by International Federations, national governing bodies, along with national legislation of some countries, allow males who identify as women to compete in female sports categories. In other cases, this practice is not explicitly prohibited and is thus tolerated in practice. The replacement of the female sports category with a mixed sex category has resulted in an increasing number of female athletes losing opportunities including medals when competing against males. According to information received, by March 2024, over 600 female athletes in more than 400 competitions have lost more than 890 medals in 29 different sports.

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<sup>5</sup> <https://documents.un.org/doc/undoc/gen/n24/249/94/pdf/n2424994.pdf>

<sup>6</sup> <https://documents.un.org/doc/undoc/gen/n24/249/94/pdf/n2424994.pdf> p.3

<sup>7</sup> Emma N. Hilton and Tommy R. Lundberg, “Transgender women in the female category of sport: perspectives on testosterone suppression and performance advantage”, Sports Medicine, vol. 51 (2021)

<sup>8</sup> <https://documents.un.org/doc/undoc/gen/n24/249/94/pdf/n2424994.pdf> p.5

12. Male athletes have specific attributes considered advantageous in certain sports, such as strength and testosterone levels which are higher than the average range for females even before puberty,<sup>9</sup> thereby resulting in the loss of fair opportunity. Some sports federations mandate testosterone suppression for athletes to qualify into female categories of elite sports. However, pharmaceutical testosterone suppression for genetically male athletes - and irrespective of how they identify - will not eliminate the set of comparative performance advantage they have already acquired.<sup>10</sup> This approach may not only harm the health of the athlete concerned, but also fails to achieve its stated objective. Therefore, the testosterone levels deemed acceptable by any sporting body are at best not evidence-based, arbitrary, and asymmetrically favor males. Females are usually tested randomly to ensure they are not using performance enhancing drugs, while males are often not monitored to ensure they are taking testosterone suppression drugs. To avoid the loss of a fair opportunity, males must not compete in the female categories of sport.

There are some that argue that a male who undergoes surgery has no biological advantage. However, an individual's sex is written into every part of their body including the size and strength of their heart, lungs, lung capacity, muscles, bones and stature. The undeniable physical difference between a man and woman is itself an undeniable safety risk.

## **F. LD 868 treats all athletes the same.**

1. **Provides a clear eligibility standard based exclusively on sex\* to determine who can compete on female teams.** (Sec. 1 Definitions; Sec. 2 Designation of athletic teams)

Sports have always been organized through eligibility criteria based on age, weight, and/or sex. For example, in wrestling, an 180lb athlete doesn't compete against a 120lb athlete. An 18yo high schooler doesn't compete against a 12yo junior high student. Men/boys don't compete against women/girls (unless it's co-ed or mixed) due to physical advantages.

*\*Sex is found on doctor's sports form. Schools already require students to complete a sports physical prior to competing in sports. Those sports physicals include a determination of a student's sex by the student's personal physician. Schools can simply rely on the sex listed on these forms, just as they rely on the other information on the forms to demonstrate a student's fitness and eligibility to compete.*

2. **Covers every athlete— grade school through college.**

Every girl, no matter her age, deserves a fair and safe playing field. The athletic performance gap between males and females emerges even at young ages. And that gap continues to grow through college.

3. **Protects schools and colleges that follow the law from retaliation (Sec. 3)**

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<sup>9</sup> "Boys demonstrate, on the average, greater strength than girls at all ages. Sex differences throughout childhood are consistent, although small." as cited in Human Growth, F. Falkner et al., 1978, p. 286.

<sup>10</sup> T. R. Lundberg et al. (2024), The International Olympic Committee framework on fairness, inclusion and nondiscrimination on the basis of gender identity and sex variations does not protect fairness for female athletes, Scandinavian Journal of Medicine and Science in Sports, 34(3).

**4. Provides a legal remedy for girls and women who are harmed by violations of the law (such as a court order requiring the school to follow the law). (Sec. 5)**

**5. Provides for new accommodations**

Designations under the law are male, female, or coed/mixed. Maine institutions or associations can create a separate standing, league, category to allow for fair competition and for the purposes of listing competitive results in a just and fair manner. (i.e. 8-person boy soccer, 8-person girl soccer) Let all the kids run, jump, swim, but fairly separate the scores in proper standings.

### **LD 868 Brings Maine Into Compliance!**

LD 868 will eliminate the chaos that Maine current policy has inflicted in our school districts, school boards, and school budgets. LD 868 will bring Maine into alignment with:

- Title IX,
- Federal anti-discrimination laws,
- the NCAA policy that only females play on female teams,
- President Trump's Executive Order, Keeping Men Out of Women's Sports,
- and possibly the Olympics will follow.

### **Maine can do and must do better for our athletes.**

In summary, LD 868 will stop male athletes from taking medals, podiums, rosters, scholarships, and educational opportunities from our girls. LD 868 will stop Maine from forcing its girls to undress in front of a male or be present with an undressed male in designated female private spaces. A girl's ability to win a female competition should never be hopeless due to state policy. All of this is not just unfair, it is discriminatory.

Maine shouldn't wait until after this is a more prevalent and widespread occurrence. As lawmakers, we have the opportunity to place guardrails and a commonsense structure now. We must give clear and concise guidance to our schools and athletic associations so there is no ambiguity or fear of misstep.

Likewise, we need to be proactive and clear for our students. I recognize that our youth are going through many changes – emotionally, physically, and physiologically. We can provide compassion, help, safety, and support for all students, including those struggling with their sex, while still preserving privacy and safety for our girls. The reality is that athletic potential depends on biology, not identity.

**This path forward ensures that all Mainers are protected and accommodated, and that fairness, opportunities, privacy and safety are preserved for Maine athletes on & off the field.**

All of Maine's athletes should be given athletic opportunities without endangering the physical or psychological well-being and educational opportunities of Maine's girls and women. LD 868 accommodates this.

Thank you for your attention and careful consideration of this critical and vetted legislation.

**G. Proposed amendment**

\*\*\*\*\*SPONSOR AMENDMENT\*\*\*\*\*

4(D)(5) “To provide coaching or athletic training during athletic events

## H. Further supporting data and law decisions

- NYT/Ipsos Survey

### **TOPLINE & METHODOLOGY**

Q32. Thinking about transgender female athletes — meaning athletes who were male at birth but who currently identify as female — do you think they should or should not be allowed to compete in women's sports?

	<b>Total (N=2,128)</b>	<b>Republican/Lean Republican (N=1,022)</b>	<b>Democrat/Lean Democrat (N=1,025)</b>	<b>Independent/ Something else (N=81)</b>
Should be allowed to compete in women's sports	18%	5%	31%	10%
Should not be allowed to compete in women's sports	79%	94%	67%	64%
Refused	4%	1%	3%	26%

<https://www.ipsos.com/sites/default/files/ct/news/documents/2025-01/NYT%20Ipsos%20Poll%20Topline%2001.19.2025.pdf>

- <https://www.ed.gov/laws-and-policy/civil-rights-laws/title-ix-and-sex-discrimination>

## Title IX and Sex Discrimination

Title IX prohibits sex-based discrimination in education programs and activities that receive federal financial assistance.

Title IX of the Education Amendments of 1972 prohibits discrimination based on sex in education programs and activities that receive federal financial assistance. 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[.]" All federal agencies that provide grants of financial assistance are required to enforce Title IX's nondiscrimination mandate. ED gives grants of financial assistance to schools and colleges and to certain other entities, including vocational rehabilitation programs and libraries.

Examples of the types of discrimination that are covered under Title IX include but are not limited to: sex-based harassment; sexual violence; pregnancy discrimination; the failure to provide equal athletic opportunity; sex-based discrimination in a school's science, technology, engineering, and math (STEM) courses and programs; discriminatory application of dress code policies and/or enforcement; and retaliation.

- [Transgender Women in the Female Category of Sport: Perspectives on Testosterone Suppression and Performance Advantage | Sports Medicine](https://link.springer.com/article/10.1007/s40279-020-01389-3)  
<https://link.springer.com/article/10.1007/s40279-020-01389-3>

## Case Law in support of the proposed legislation

- Third Circuit (Delaware, New Jersey, Pennsylvania):  
“[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).
- Sixth Circuit (Kentucky, Michigan, Ohio, Tennessee):  
“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).
- Ninth Circuit (Alaska, Arizona, Hawaii, Idaho, Montana, Nevada, Oregon, Washington):  
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.*
- Second Circuit (Connecticut, New York, Vermont):  
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.*

### Detailed Discussion of Why Women’s Sports Legislation is Constitutional:

The Equal Protection Clause to the Fourteenth Amendment “command[s] that no State deny the equal protection of the laws to any person within its jurisdiction.” *Reed v. Reed*, 404 U.S. 71, 74 (1971). But the Supreme Court “has consistently recognized that the Fourteenth Amendment does not deny to States the power to treat different classes of persons in different ways.” *Id.* at 75 (emphasis added). And sex-based classifications are constitutional where they “realistically reflect[ ] the fact that the sexes are not similarly situated in certain circumstances.” *Clark*, 695 F.2d at 1129. Specifically, the Supreme Court recognizes that “[p]hysical” and “[i]nherent differences’ between men and women” exist and that those differences are “enduring.” *United States v. Virginia*, 518 U.S. 515, 533 (1996). So once the state demonstrates that a sex-based classification based on those differences (1) “serve[s] important governmental objectives,” and (2) is “substantially related to achievement of those objectives,” *Craig v. Boren*, 429 U.S. 190, 197 (1976), the state has carried its “burden of showing an exceedingly persuasive justification for [the] classification,” *Mississippi University for Women v. Hogan*, 458 U.S. 718, 724 (1982) (cleaned up).

Based on this, federal courts have held that “redressing past discrimination against women in athletics and promoting equality of athletic opportunity between the sexes” is a “legitimate and important governmental interest.” *Clark*, 695 F.2d at 1131.

In *Clark*, the U.S. Court of Appeals for the Ninth Circuit reviewed an appeal brought by male high school athletes who had been kept off the girls’ volleyball teams despite the boys’ prior success on national championship teams. *Id.* at 1127. The schools did not have boys’ volleyball teams. *Id.* And a policy “preclude[d] boys from playing on [the] girls’ teams.” *Id.* The boys sued, arguing that “precluding [them] from playing on girls’ interscholastic volleyball teams . . . violate[d] the equal protection clause.” *Id.*

The Court asked “whether the exclusion of boys is substantially related to [that] interest,” or “whether any real differences exist between boys and girls which justify the exclusion,” meaning “differences which would prevent realization of the goal if the exclusion were not allowed.” *Id.*

The Court found that there are. “[D]ue to average physiological differences, males would displace females to a substantial extent if they were allowed to compete for positions on the volleyball team.” *Id.* The parties had stipulated that, “[g]enerally, high school males are taller, can jump higher and are stronger than high school females.” *Id.* at 1127. This left “no question . . . that boys [would] on average be potentially better volleyball players than girls.” *Id.* (emphasis added). *Accord Petrie*, 394 N.E.2d at 863 (“Both because of past disparity of opportunity and because of innate differences, boys and girls are not similarly situated as they enter into most athletic endeavors.”).

Under intermediate scrutiny, this was enough. The Supreme Court has repeatedly allowed recognition of “these average real differences between the sexes.” *Id.* at 1131. And because the challenged policy “simply recogniz[ed] the physiological fact that males would have an undue advantage competing against women for positions on the volleyball team,” there was “clearly a substantial relationship between the exclusion of males from the team and the goal of redressing past discrimination and providing equal opportunities for women.” *Id.*