No. 25-2899

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

FEMALE ATHLETES UNITED,

Plaintiff-Appellant,

v.

KEITH ELLISON, in his official capacity as Attorney General of Minnesota; REBECCA LUCERO, in her official capacity as Commissioner of the Minnesota Commission on Civil Rights; ERICH MARTENS, in his official capacity as Executive Director of the Minnesota State High School League; WILLIE JETT, in his official capacity as the Minnesota Commissioner of Education; INDEPENDENT SCHOOL DISTRICT NO. 11 SCHOOL BOARD; INDEPENDENT SCHOOL DISTRICT NO. 192 SCHOOL BOARD; AND INDEPENDENT SCHOOL DISTRICT NO. 279 SCHOOL BOARD,

Defendants-Appellees.

On Appeal from the United States District Court
for the District of Minnesota
Case No. 0:25-cv-02151-ECT-DLM

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF FEMALE ATHLETES UNITED'S MOTION FOR AN INJUNCTION PENDING APPEAL

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CORPORATE DISCLOSURE STATEMENT

The undersigned counsel confirms that neither the Independent Council on Women's Sport (ICONS), nor any of its members has a parent corporation and no publicly held corporation owns 10% or more of the stock of ICONS of any of its members.

Pursuant to Federal Rule of Appellate Procedure 29, *Amicus,* the Independent Council on Women's Sports (ICONS), moves this Court for leave to file the attached brief of *amicus curiae* in support of Plaintiff-Appellant's Motion for Injunction Pending Appeal. *Amicus* sought consent to the filing of this *amicus* brief through sending an email to Counsel of Record on October 3, 2025, requesting consent. Plaintiff-Appellant consents to this brief's filing. Defendant-Appellee School District No. 279 objected to the proposed *amicus* brief. Counsel for the remaining Defendants did not respond to *amicus*' inquiry. Accordingly, all parties have not consented to *amicus*' motion.

IDENTITY AND INTEREST OF AMICUS CURIAE

Amicus is the Independent Council on Women's Sport (ICONS) a 501(c)(3) organization and advocacy group that supports a network of current and former high school, collegiate and professional women athletes who seek to preserve women's sport for women.

ICONS was co-founded by Marshi Smith, a swim team captain at the University of Arizona in Tucson. Her achievements include securing NCAA and PAC-10 championship titles in the 100y backstroke in 2005, along with fifteen All-American awards. Recognized for her excellence,

Marshi was inducted into the University of Arizona's Sports Hall of Fame in 2011.

ICONS co-founder Kim Jones played tennis at Stanford University where she earned All-American status in both singles and doubles. She was a 3x NCAA Runner Up, NCAA doubles semi-finalist and an individual finalist at the Singles NCAA National Indoors. Kim earned multiple Indoor Pac10 titles in singles and doubles and National Indoor team titles. She represented the United States at the World University Games with a 5th place finish.

In 2022 Marshi and Kim were introduced by Riley Gaines, then a University of Kentucky swimmer who that year competed against and tied a trans-identifying male athlete in the NCAA women's swimming championships and who, along with hundreds of other female swimmers, was required by the NCAA to share a locker room with this man at the women's swimming national championship. Marshi and Kim recognized that an organization supporting girls and young women who were being deprived of opportunities in sport by men was needed. Accordingly, they founded ICONS in 2022.

ICONS seeks for today's girls and young women the same opportunities in sport to compete safely and with dignity on a level playing field, to develop character qualities through fair athletic competition, and for young women to be able to enjoy the fruits of their efforts invested in scholastic sport just as ICONS' founders experienced.

ICONS approaches its mission with urgency. Given their personal experience of playing sports in high school and college, ICONS' founders are aware that sport seasons are short and eligibility in high school and college sports is limited to four years, making the window of opportunity for women to excel in scholastic sport exceedingly narrow. Therefore, missed opportunities for girls to compete and win or to earn a scholarship can have lifelong detrimental ramifications that cannot be recaptured.

For more than four years since its' creation in 2022 ICONS has supported hundreds of women at all levels of sport who have been injured by men competing in women's sports. These experiences have led ICONS to become intimately familiar with how scholastic sports are organized at the high school and collegiate levels and with how Title IX and the Title IX athletics regulation apply in these contexts. As a result of this expertise developed in helping young women protect their Title IX rights

in scholastic sports, ICONS has developed expertise in drafting and applying sport rules and has assisted high school, college and international sport governing bodies with the development of rules that protect women. ICONS has also filed more than a dozen *amicus* briefs in relevant cases at the U.S. Supreme Court and/or in state and federal appellate courts throughout the United States.

DESIRABILITY AND RELEVANCE OF BRIEF

For the reasons explained above, ICONS has substantial experience with the history of Title IX and the Title IX athletics regulation and how Title IX and the Title IX athletics regulation apply in the context of scholastic sports. ICONS has filed several *amicus* briefs with the U.S. Supreme Court on these and related issues, including most recently on September 19, 2025, in *Little v. Hecox*, No. 24-38 (cert. granted, case pending) and *West Virginia v. B.P.J.*, No. 24-43 (cert. granted, case pending), two cases involving the application of Title IX and the athletics regulation to high school and college sports. ICONS' *amicus* brief in *United States v. Skrmetti*, 605 U.S. ___, 145 S.Ct. 1816, 222 L.Ed.3d 136 (June 18, 2025), was referenced by Justice Kavanaugh in his questioning during oral argument in that case.

Operating from this background of extensive experience in women's scholastic sports and with the Title IX athletics regulation, ICONS has appended to this motion an *amicus* brief of 2600 words focusing on application of the Title IX athletics regulation to this case. ICONS' proposed *amicus* brief explains that the Title IX athletics regulation takes biology into account and how this understanding is critical for the legal analysis in this case. ICONS' brief also explains how the scholastic sports context of this case and the Title IX athletics regulation distinguish this case from the Title VII employment context at issue in *Bostock v. Clayton Cnty., Ga.*, 590 U.S. 644 (2020). Biology (i.e., male vs. female differences) is largely irrelevant in most employment contexts, but biology is highly relevant in sports.

Proposed *amicus*, ICONS, therefore, submits that its specialized knowledge, experience, and background with scholastic sports and the Title IX athletics regulation has permitted it to draft a concise amicus brief that adds relevant information to the analysis to be undertaken by this Court and provides practical context for the Court to consider alongside the parties' briefing, as well as highlighting the broader implications of the decision before the Court.

CONCLUSION

For the foregoing reasons, the Independent Council on Women's Sport respectfully requests that its motion to file the attached *amicus* brief be granted.

Dated: October 13, 2025

Respectfully submitted,

s/William Bock III

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CERTIFICATE OF COMPLIANCE

This motion complies with the word limit of Fed. R. App. P. 27(d)(2)(A) because it contains 996 words, excluding parts exempted by Fed. R. App. P. 32(f).

This motion complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in Word 365 using a proportionally spaced typeface, 14-point Century Schoolbook.

Dated: October 13, 2025

s/William Bock III
William Bock III
Counsel for Amicus Curiae

CERTIFICATE OF SERVICE

I hereby certify that on October 13, 2025, I electronically filed the foregoing motion with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users, and that service will be accomplished by that system.

s/ William Bock III
William Bock III
Counsel for Amicus Curiae

ATTACHMENT A

No. 25-2899

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Plaintiff-Appellant,

v.

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Defendants-Appellees.

On Appeal from the United States District Court
for the District of Minnesota
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BRIEF OF THE INDEPENDENT COUNCIL ON WOMEN'S SPORTS AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFF-APPELLANT AND FOR APPROVAL OF APPELLANT'S MOTION FOR INJUNCTION PENDING APPEAL

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INTEREST OF AMICUS CURIAE[1]

Amicus is the Independent Council on Women's Sports a 501(c)(3) organization and advocacy group that supports a network of women athletes who seek to preserve women's sport for women.

[1] App.R. 29(E) statement: No party's counsel authored any of this brief; *amicus* alone funded its preparation and submission.

SUMMARY OF ARGUMENT

The Title IX athletics regulation was meant to ensure that women have access to the same experience on the athletic field and in the locker room as men in a context that's fair and respects women's dignity and privacy. Due to enormous, documented, performance advantages of males in sport, Title IX's equal opportunity mandate is correctly interpreted to bar males from competing on *sex-separated* women's sports teams at federally funded schools.

ARGUMENT

I. Title IX's Athletics Regulation Presumes Sex-Separation in Sports to Protect Women and Afford Them Equal Opportunities to Men

A. Adoption of Javits Amendment

On August 21, 1974, Congress passed the Javits Amendment which required DEW, the predecessor federal enforcer of Title IX, to "prepare and publish . . . proposed regulations . . . relating to the prohibition of sex discrimination in federally assisted education programs which shall include with respect to intercollegiate athletic activities reasonable provisions considering the nature of particular sports." Pub. L. No. 93-380, Title VII, Part D, § 844, 88 Stat. 612 (1974).

B. Title IX Athletics Regulation

The Title IX athletics regulation makes sex-separated but comparable sports teams the presumptive method of choice under Title IX to create the conditions for women's equal opportunities in sport, specifying that, "a recipient may 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." 34 C.F.R. § 106.41(b). Thus, Title IX did not do away with or discourage sex-separated women's sports teams. To the contrary, the athletics regulation embraces sex-separated women's teams as the favored method for advancing women's equal opportunities in scholastic sports.

The athletics regulation also sets forth ten factors to consider when evaluating whether a recipient of federal funding is providing "equal athletic opportunity for members of both sexes":

> (1) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes;
>
> (2) The provision of equipment and supplies;
>
> (3) Scheduling of games and practice time;
>
> (4) Travel and per diem allowance;
>
> (5) Opportunity to receive coaching and academic tutoring;

(6) Assignment and compensation of coaches and tutors;

(7) Provision of locker rooms, practice and competitive facilities;

(8) Provision of medical and training facilities and services;

(9) Provision of housing and dining facilities and services;

(10) Publicity.

34 C.F.R. § 106.41(c) (emphasis added). Each of these equal opportunity factors is not only fully compatible with sex-separated women's teams; they presume sex-separation. By mandating comparisons between what a school's women's team receives with what the comparable men's team receives, the regulation presumes men's and women's teams will be separated.

II. The Athletics Regulation Requires Sex-Separation Where Necessary to Protect Equal Opportunities for Women

Title IX "prohibits sex discrimination by recipients of federal education funding," *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 173 (2005), and equalizes opportunities for women by extending its protections based on "sex." 20 U.S.C. § 1681(a). The Court recognized a private right of action under Title IX for women denied equal opportunities in *Cannon v. Univ. of Chicago*, 441 U.S. 677, 717 (1979).

In *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 641 (1999), the Court held that a school board could be "liable for its own decision to remain idle in the face of known student-on-student harassment in its schools." However, although *Davis* dealt with sexual harassment, the *Davis* Court emphasized that the gravamen of a deliberate indifference claim is not sexual harassment itself, but the "deprivation of access to school resources" or "deni[al of] equal access to an institution's resources and opportunities." *Id.* at 650-51. The Court explained its *focus on the denial of equal access to an institution's resources and opportunities* by posing the following non-sexual harassment hypothetical that the Court made clear would result in liability under Title IX:

> Consider, for example, a case in which male students physically threaten their female peers every day, successfully preventing the female students from using a particular school resource—*an athletic field* or a computer lab, *for instance.* District administrators are well aware of the daily ritual, yet they deliberately ignore requests for aid from the female students wishing to use the resource. The district's knowing refusal to take any action in response to such behavior would fly in the face of Title IX's core principles, and such deliberate indifference may appropriately be subject to claims for monetary damages. It is not necessary, however, to show physical exclusion to demonstrate that students have been deprived by the actions of another student or students of an educational opportunity on the basis of sex. Rather, a plaintiff must establish sexual harassment of students that is so severe, pervasive, and objectively offensive, and *that so*

> *undermines and detracts from the victims' educational experience, that the victim-students are effectively denied equal access to an institution's resources and opportunities.*

Id. at 650–51 (emphasis added).

Thus, the *Davis* Court made clear that the essence of a Title IX deliberate indifference claim is denial of "equal access to an institution's resources and opportunities." Such a denial of resources and opportunities is exactly what happens when scholastic sports officials ignore the deprivation of equal opportunities in women's sport and loss of equal access to school resources in women's locker rooms and showers that occurs when males are authorized to take women's places on sports teams and enter their private spaces.

Title IX protects women "from being 'excluded from participation in' or 'denied the benefits of' any 'education program or activity.'" *Davis*, 526 U.S. at 650 (quoting 20 U.S.C. § 1681(a)). A sex-separated scholastic sports team and sex-separated showers and locker rooms used by the members of that team certainly constitute the benefits of an education program or activity. For women to have "equal opportunity" in athletic competition, "relevant differences cannot be ignored." *Yellow Springs Exempted Vill. Sch. Dist. Bd. of Educ. v. Ohio High Sch. Athletic Ass'n*, 647 F.2d 651, 657 (6th Cir. 1981); *see also* 117 Cong. Rec. 30, 407 (1971)

(statement of Sen. Bayh) (noting Title IX would not require co-ed sports teams or locker rooms). One of the Court's staunchest advocates for women recognized that "[p]hysical differences" between the sexes are "enduring." *United States v. Virginia*, 518 U.S. 515, 533, (1996). Addressing such physical differences and ensuring that they do not impede women's equal opportunities and benefits is the whole reason for the accepted norm of sex-separated women's athletic teams and facilities furthered by the athletics regulation.

"[T]he mere opportunity for girls to try out" for a team is not enough if they cannot realistically make the roster because of competition from men. *Williams v. Sch. Dist. of Bethlehem, Pa.*, 998 F.2d 168, 175 (3d Cir. 1993). Nor is being on a team enough if women cannot win scholarships or "enjoy the thrill of victory" in historically male-dominated sports. *See Neal v. Bd. of Trs. of Cal. State Univs.*, 198 F.3d 763, 773 (9th Cir. 1999); *accord Adams by & through Kasper v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 820 (11th Cir. 2022) (Lagoa, J., specially concurring). Similarly, access to a shower, restroom, or locker rooms is not sufficient when a woman is denied enjoyment of that resource because her privacy has been violated.

As explained above, the Title IX athletics regulation makes clear that equal opportunity for women is typically achieved by excluding men from women's sports. "In fact, the Title IX framework effectively requires a recipient to maintain separate sports teams." *Soule v. Connecticut Ass'n of Sch., Inc.*, 90 F.4th 34, 63 (2d Cir. 2023) (Menashi, J. and Park, J., concurring). In many cases equal opportunity for women vis-à-vis men may not be achievable in any other way. *Neal*, 198 F.3d at 769 ("Title IX permits a university to diminish athletic opportunities available to men so as to bring them into line with the lower athletic opportunities available to women."); *Williams*, 998 F.2d at 175 (Title IX requires "equalizing the numbers of sports teams offered for boys and girls."); *Clark, By & Through Clark v. Arizona Interscholastic Ass'n,* 695 F.2d 1126, 1131 (9th Cir. 1982) (approving exclusion of males from Arizona high school volleyball).

Biology matters. Males enjoy significant athletic performance advantages rooted in male biology. Therefore, when administrators decide to separate teams by sex due to enduring physical differences (*i.e.*, male advantages in size, strength, speed and performance) that separation must be maintained, at least until some other paradigm for

protecting women's equal opportunities has been implemented. Covered programs cannot selectively revert to co-ed teams on a case-by-case basis because that will necessarily deprive women of equal opportunities because they cannot easily move to a men's team.

The athletics regulation not only *permits* sex-based distinctions but *requires* them where necessary to ensure equal opportunity. Thus, where sex-separation in scholastic sports exists to protect women's opportunities and access to resources, Title IX prohibits covered entities from giving those opportunities and resources to men by allowing a man to compete on a women's team.

III. A Policy Permitting Men to Participate on a Women's Team Contrary to the Sex-Separation Model Constitutes Programmatic Discrimination

Since 1972 high schools, colleges and universities have operationalized Title IX's plain and unambiguous equal opportunity mandate by creating sex-separated teams in virtually all high school and college sports. Publicly available EADA data compiled by the U.S. Department of Education confirms this. *See, e.g.,* https://ope.ed.gov/athletics/#/. Having separated women's sports by sex to comply with Title IX, a federally funded school must maintain that

sex-separation so long as sex-separation continues to be the method the school employs to equalize resources and opportunities in sports.

Based on early Title IX guidance documents some courts said that a Title IX claim can be established through proof of programmatic discrimination throughout a school's athletic program. *See*, *e.g.*, *Cohen v. Brown University,* 101 F.3d 155, 161-64 (1st Cir. 1996); *Cohen v. Brown Univ.*, 809 F. Supp. 978, 991-92 (D.R.I. 1992), *aff'd*, 991 F.2d 888 (1st Cir. 1993). While this is one way to prove a Title IX violation, as the Supreme Court's precedents make clear, it is not the only way to do so.

As the Court held in *Cannon* and *Davis,* purposeful deprivation of a woman's access to educational opportunities or resources about which the covered entity is aware and could prevent is actionable discrimination under Title IX. Thus, an entity's policy of putting a man on the women's team or in the women's locker room thereby depriving women of opportunities and resources states an actionable Title IX claim.

When a covered entity fields sex-separated teams but then grants exceptions for individuals to join a team of the opposite sex and a man deprives women of resources by joining a women's team no sort of program-wide assessment or analysis of the extent of the harm is

necessary. A woman who alleges she has been harmed through lost opportunities or access to resources may proceed with her individual claim without alleging programmatic harm. Nevertheless, even if for some reason women were required to prove that the loss of access they suffer under a transgender eligibility policy that opens women's sports teams to men constitutes a pervasive or programmatic loss of opportunities for women, it is apparent that they can do so in this case.

For instance, the Second Circuit has held, a significant disparity in a single program component in an athletics department "can alone constitute a Title IX violation if it is substantial enough in and of itself to deny equality of athletic opportunity to students of one sex at a school." *McCormick ex rel. McCormick v. Sch. Dist. of Mamaroneck*, 370 F.3d 275, 293 (2d Cir. 2004). A denial of equal athletic opportunity can "result from a significant disparity in a single sport." *Id.* at 296 (finding Title IX violation based on a scheduling disparity solely in girls' soccer); *see* 44 Fed. Reg. 71413, 71414-17 (finding of ineffective accommodation need not be made on a program-wide basis but can be limited to *"disparities in* benefits, *treatment,* services, *or opportunities in individual segments of the program*[.]").

If programmatic review is necessary then, as *McCormick* indicates, programmatic harm occurs when women are denied access to resources or competitions, or lose, for example placements, or a starting role or other similar opportunity in women's sports due to an institutional policy or decision. *McCormick* suggests that discriminatory *policies* constitute programmatic harm *per se*. It is impermissible to subject girls to a glass ceiling on potential athletic attainment when "boys are subject to no such ceiling." *McCormick,* 370 F.3d at 295. It is unlawful to "send[] a message to ... girls ... that they are not expected to succeed and that the school does not value their athletic abilities as much as it values the abilities of the boys." *Id*. But allowing men in women's sports does just that. Title IX violations occur when a male athlete is put in a position where officials know he will take resources or opportunities from women.

IV. Title IX's Athletics Regulation Presumes That Biology Matters, and Title VII Does Not

The unique way in which sports opportunities and resources are allocated and equalized under the athletics regulation, *i.e.,* through sex-separation, is also why the Court's reasoning in *Bostock v. Clayton Cnty., Ga.,* 590 U.S. 644, 655 (2020), for resolving discrimination in employment is fundamentally incompatible with the scholastic sports context. *Bostock*

adopted the "change one thing at a time and see if the outcome changes" approach to determining whether a person's sex was a "but-for cause" of an employment action. *Bostock*, 590 U.S. at 656. This approach presumes that biology (*i.e.,* male vs. female differences) is largely irrelevant in most employment contexts. But biology is highly relevant in sports. "Congress itself recognized that addressing discrimination in athletics presented a unique set of problems not raised in areas such as employment and academics. *See, e.g.,* Sex Discrim. Regs., Subcomm. Hrg. on Post Secondary Educ. of the Comm. on Educ. and Labor, 94th Cong. 1st Sess. at 46, 54, 125, 129, 152, 177, 299-300 (1975); 118 Cong.Rec. 5,807 (1972) (Sen. Bayh); 117 Cong.Rec. 30,407 (1971) (same)." *Kelley v. Bd. of Trs.,* 35 F.3d 265, 270 (7th Cir. 1994).

Regrettably, the court below misapplied the Title IX athletics regulation to require the very thing Title IX prohibits: men taking women's opportunities and invading their private spaces. Applying sex-neutrality in competitive sports and/or locker room cases makes no sense because the Title IX athletics regulation itself presumes transcendent biological differences. *Bostock*'s Title VII approach to the employment world, where sex differences *should not matter*, simply does not account

for the unique way in which Title IX sex-separation achieves equal opportunity for women on the athletic field and in the locker room and showers where sex differences *do matter*.

Title IX and its athletics regulation forbid a man from depriving women of, or diverting to a man, equal opportunity in sport, including placements, awards, publicity, scholarships, locker room access and privacy. They require covered entities to "level the proverbial playing field" between men and women through sex-separation, *Neal*, 198 F.3d at 769, and having done so, they may not purposefully unlevel it to favor a man.

CONCLUSION

The Appellants' motion for an injunction pending appeal should be granted.

Dated: October 13, 2025

Respectfully submitted,

s/William Bock III

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Dated: October 13, 2025

s/ William Bock III
William Bock III
Counsel for Amicus Curiae

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I hereby certify that on October 13, 2025, I electronically filed the foregoing *Brief of the Independent Council on Women's Sports as Amicus Curiae in Support of Plaintiff-Appellant and For Approval of Appellant's Motion for Injunction Pending Appeal* with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users, and that service will be accomplished by that system.

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William Bock III
Counsel for Amicus Curiae