21-1365

IN THE

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,

—against—

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,

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

Intervenor-Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF OF *AMICUS CURIAE* interACT: ADVOCATES FOR INTERSEX YOUTH IN SUPPORT OF DEFENDANTS-APPELLEES AND AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amicus curiae* states as follows:

interACT: Advocates for Intersex Youth is a nonprofit organization. It has no parent corporation and no corporation or publicly held entity owns 10% or more of its stock.

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INTRODUCTION AND INTEREST OF *AMICUS CURIAE*

Amicus interACT: Advocates for Intersex Youth files this brief in support of Defendants-Appellees.[1]

interACT is a nonprofit organization that employs legal and policy advocacy to protect the rights of children born with variations in their sex characteristics, often called "intersex." It is the largest and oldest organization in the country exclusively dedicated to this purpose. Founded in 2006 as Advocates for Informed Choice, its mission initially focused on ending harmful, nonconsensual medical interventions on intersex children. Since then, interACT has expanded its mission to include awareness-raising to end the stigma faced by intersex youth and supporting intersex young people advocating on their own behalf.

Defendants successfully demonstrated below that Plaintiffs' proposed construction of Title IX unconstitutionally discriminates on the basis of sex and transgender status. *Amicus* is uniquely well-situated to explain why this is so. Like Intervenor-Defendants Andraya Yearwood and Terry Miller, who are transgender, the intersex youth for whom *amicus* advocates would be direct victims if the Court grants Plaintiffs the relief they seek, subjected to discriminatory and humiliating

[1] *Amicus* certifies that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus*, its employees, or its counsel made a monetary contribution to the preparation or submission of this brief. All parties have consented to the filing of this brief.

treatment by virtue of their natural bodily variations. *Amicus* has a strong interest in ensuring that Plaintiffs' inaccurate and stereotyped assumptions about "inherent and biologically dictated differences between the sexes" are not enshrined in law, where they would demean intersex students by eliding their very existence.

The balance of this brief is divided into three parts. In Part I, *amicus* discusses the broad spectrum of natural intersex variations, which do not fit the "biological male"/"biological female" binary upon which Plaintiffs' proposed construction of Title IX is premised. In Part II, *amicus* explains how intersex people suffer from severe mistreatment and discrimination as a result of their natural variations, including coercive medical interventions that human rights organizations have deemed a form of torture. Finally, in Part III, *amicus* explains how Plaintiffs' requested relief would codify discrimination against intersex students in Connecticut based on their sex, in violation of both the Equal Protection Clause and Title IX itself.

Amicus urges the Court to affirm.

ARGUMENT

I. INTERSEX PEOPLE'S BODIES DO NOT FIT PLAINTIFFS' "MALE"/"FEMALE" BINARY

Plaintiffs base their entire statutory interpretation on the supposed existence of a stark divide between "biological males" and "biological females"—one they

claim is dictated by "[b]iological science and the bright-line physiological differences between male and female bodies." Appellants' Br. 50. That is simply not so.

Each year, an estimated 2% of all babies are born intersex.[2] "Intersex" is an umbrella term describing a wide range of natural variations in physical traits—including external genitals, internal sex organs, chromosomes, and hormone function—that do not fit typical binary notions of male and female bodies. This incidence rate is similar to the percentage of the U.S. population that is Jewish (about 1.9%) or Mormon (about 1.6%).[3]

Intersex traits originate from variations in embryonic development. A fertilized egg usually (but not always) has two sex chromosomes: XX or XY. At first, XX and XY embryos look the same, but they later develop in different ways depending on genetic and hormonal factors. In male-typical development, the gonads become testes; the Müllerian ducts regress; the genital tubercle becomes a penis; and the labioscrotal folds fuse and form a scrotum. In female-typical development, the gonads become ovaries; the Müllerian ducts develop into the fallopian tubes, uterus, and upper vagina; the genital tubercle becomes a clitoris; and the labioscrotal folds

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[2] Anne Fausto-Sterling, SEXING THE BODY: GENDER POLITICS AND THE CONSTRUCTION OF SEXUALITY 51 (2000); Melanie Blackless et al., *How Sexually Dimorphic Are We? Review and Synthesis*, 12 Am. J. Human Biol. 151 (2000).

[3] Pew Research Center, Religious Landscape Study, https://www.pewforum.org/religious-landscape-study/ (visited Dec. 11, 2020).

develop into the outer labia. Later, at puberty, hormones secreted by the testes or ovaries cause expression of male-typical or female-typical secondary sex characteristics, such as breast development, body hair, musculature, and depth of voice.[4]

There are many ways in which this "typical" process can vary.[5] Such variations may present at different ages. For example, variations in external genitalia may mean a child's intersex status is recognized at birth, but variations in internal organs or sex chromosomes may not become apparent until puberty or later.[6]

If their variation is not obvious at birth, intersex babies are usually "assigned" a binary (male/female) sex in the same way non-intersex babies are: based on a quick judgment of their external anatomical appearance. If their variation is noted, the initial sex assignment is usually made based on some combination of their genitalia, internal organs, and chromosomes.[7] This is a largely subjective process, and experts

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[4] I.A. Hughes et al., *Consensus Statement on Management of Intersex Disorders*, 118 Pediatrics 488, 491 (2006); Bruce E. Wilson & William G. Reiner, *Management of Intersex: A Shifting Paradigm*, in INTERSEX IN THE AGE OF ETHICS 119 (1999); *SRY gene*, National Institutes of Health, https://ghr.nlm.nih.gov/gene/SRY.

[5] Hughes, *supra* note 4, at 488; Laura Hermer, *Paradigms Revised: Intersex Children, Bioethics & The Law*, 11 Ann. Health L. 195, 204 (2002); Carla Murphy et al., *Ambiguous Genitalia in the Newborn: An Overview and Teaching Tool*, 24 J. Pediatric Adolescent Gynecology 236, 236-37 (2011).

[6] *Clinical Guidelines for the Management of Disorders of Sexual Development in Childhood* 2-5 (2006), Consortium on the Management of Disorders of Sex Development, https://goo.gl/bKQcES (hereinafter "Clinical Guidelines").

[7] Hughes, *supra* note 4, at 491. The emphasis on which characteristic should prevail

may disagree on the "correct" sex to assign.[8] Often, children discovered to be intersex in infancy may be subjected to nonconsensual, harmful, and irreversible surgical procedures in an attempt to erase their intersex differences.[9] *See* Point II, *infra*.

Some intersex people continue to identify with their originally assigned binary sex throughout their lives, but others do not.[10] For many well-known intersex variations, 5% to 29% do not identify with their originally assigned sex.[11] For certain

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in determining a person's sex has changed over time. For a history of intersex management, *see generally* Elizabeth Reis, BODIES IN DOUBT: AN AMERICAN HISTORY OF INTERSEX (2009).

[8] *See, e.g.*, Anne Tamar-Mattis, Report to the Inter-American Commission on Human Rights: Medical Treatment of People with Intersex Conditions as a Human Rights Violation, Advocates for Informed Choice (March 2013) at 5, https://goo.gl/Nf7Xt7, ("There is still controversy and uncertainty about gender assignment in [cases of partial AIS], and it can go either way, depending largely on the doctor's judgment."); David A. Diamond et al., *Gender Assignment for Newborns with 46XY Cloacal Exstrophy: A 6-Year Followup Survey of Pediatric Urologists*, 186 J. Urol. 1642, 1643 (2011) (reporting that only 79 percent of surveyed clinicians agreed on a male gender assignment in 46XY cloacal exstrophy).

[9] Jeremy Toler, *Medical and Surgical Intervention of Patients with Differences in Sex Development* 1, Gay & Les. Med. Ass'n (Oct. 3, 2016); Katrina Karkazis, FIXING SEX: INTERSEX, MEDICAL AUTHORITY, AND LIVED EXPERIENCE 57-58, 60-61 (2008); Martin Kaefer & Richard C. Rink, *Treatment of the Enlarged Clitoris*, Frontiers in Pediatrics (Aug. 2017); Jennifer Yang, et al., *Nerve Sparing Ventral Clitoroplasty: Analysis of Clitoral Sensitivity and Viability*, J. UROL., Vol. 178, 1598-1601 (Oct. 2007); Sarah Creighton, et al., *Timing and Nature of Reconstructive Surgery for Disorders of Sex Development – Introduction*, J. PEDIATRIC UROL. 602 (2012).

[10] interACT, *Understanding Intersex and Transgender Communities* at 1, interACT, https://goo.gl/CY53ZZ.

[11] Julie A. Greenberg, INTERSEXUALITY AND THE LAW 20 (2012); Hughes et al., *supra* note 4, at 491; P.S. Furtado et al., *Gender Dysphoria Associated with Disorders of Sex Development*, 9 Nat. Rev. Urol. 620 (Nov. 2012) (reporting average rates of

variations, this rate can reach higher than 60%.[12]

The (now-defunct) Intersex Society of North America ("ISNA") recognized approximately twenty different intersex variations,[13] including:

a. ***Congenital Adrenal Hyperplasia (CAH)*:** In CAH, a variant form of an enzyme leads to heightened production of androgenic hormones *in utero*. This can cause varying degrees of "masculinization" of physical characteristics in individuals with XX chromosomes. Someone with CAH may have female-typical internal organs and external genital differences, such as an enlarged clitoris and/or the lack of a vaginal opening. CAH can also cause development of male-typical secondary sex characteristics like facial and body hair, a deep voice, and prominent muscles.[14]

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gender dysphoria at 5% for Complete Androgen Insensitivity Syndrome, 10% for Congenital Adrenal Hyperplasia, 12.5% for Ovotesticular DSD, 20% for Partial Androgen Insensitivity Syndrome, and 29% for Mixed Gonadal Dysgenesis).

[12] P.S. Furtado et al., *Gender Dysphoria Associated with Disorders of Sex Development*, 9 Nat. Rev. Urol. 620 (Nov. 2012) (reporting average rates of gender dysphoria at 57% for 17-beta-HSD3 deficiency and 63% for 5-alpha-RD2 deficiency).

[13] Clinical Guidelines, *supra* note 6, at 5-7.

[14] Walter L. Miller & Selma Feldman Witchel, *Prenatal Treatment of Congenital Adrenal Hyperplasia: Risks Outweigh Benefits,* 208 Am. J. Obstetrics & Gynaecology 354, 354 (2013); Phyllis W. Speiser, et al., *Congenital Adrenal Hyperplasia Due to Steroid 21-Hydroxylase Deficiency: An Endocrine Society Clinical Practice Guideline*, 95 J. Clin. Endocrinology & Metabolism 4133-60 (2010); Blackless et al., *supra* note 2, at 154-55; *Congenital Adrenal Hyperplasia (CAH)*, ISNA, https://goo.gl/8Ki1FH; Fausto-Sterling, *supra* note 2, at 51-53 & tbl. 3.2; Clinical Guidelines, *supra* note 6, at 6.

b. ***5-Alpha Reductase Deficiency (5-ARD)*:** People with 5-ARD have XY chromosomes and testes, but their bodies produce lower-than-typical levels of the hormone dihydrotestosterone (DHT), which impacts formation of the external genitalia. Many are born with external genitalia that appear typically female. In other cases, they are neither male-typical nor female-typical. Still others have genitalia that appear predominantly male, often with a small penis (micropenis) and the urethral opening on the underside of the penis (hypospadias). During puberty, people with 5-ARD develop some typically male secondary sex characteristics, such as increased musculature and a deep voice, but do not develop much facial or body hair. Children with 5-ARD are often raised as girls. However, about half have a male gender identity and live as male beginning in adolescence or early adulthood.[15]

c. ***Androgen Insensitivity Syndrome (AIS)*:** People with AIS have XY chromosomes and testes, but their cells have a reduced or absent response to testosterone and other androgens. As a result, they do not form typically male genitalia. In "complete" AIS, babies are usually born with a typical vaginal opening and clitoris, and their variation is ordinarily not suspected until puberty, when they will develop breasts but will not begin menstruation

[15] Hermer, *supra* note 5, at 207.

(as they have no uterus or ovaries). In "partial" AIS, the body's cells have some (limited) response to androgens, and as a result, the external genitalia usually fall somewhere between typically male and typically female. For this reason, partial AIS is often discovered earlier. While individuals with complete AIS often have a female gender identity, individuals with partial AIS are divided between female and male gender identity.[16]

d. ***Swyer Syndrome*:** In this variation, an XY child is born with "gonadal streaks" (minimally developed gonadal tissue) instead of testes or ovaries. Externally, a child with Swyer syndrome usually appears female-typical; however, because streak gonads do not produce the sex hormones that bring about puberty, the child will not develop most secondary sex characteristics without hormone treatment.[17]

e. ***Kallmann Syndrome*:** This variation occurs in both XX and XY children, characterized by delayed or absent puberty and an impaired sense of smell.

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[16] Blackless et al., *supra* note 2 at 153; Fausto-Sterling, *supra* note 2, at 52; Hughes, *supra* note 4, at 491; *Androgen Insensitivity Syndrome*, ISNA, https://goo.gl/GJziJL.

[17] L. Michala, et al., *Swyer syndrome: presentation and outcomes*, 115 BJOG 115(6):737-41 (2008); Georgiann Davis, CONTESTING INTERSEX: THE DUBIOUS DIAGNOSIS 2 (2015); Fausto-Sterling, *supra* note 2, at 52 & tbl. 3.1; Julie A. Greenberg, *Defining Male and Female: Intersexuality and the Collision Between Law and Biology*, 41 Ariz. L. Rev. 265, 284 (1999).

It is a form of hypogonadotropic hypogonadism, or absence of certain hormones that direct sexual development. XY children with Kallmann syndrome often have a small penis (micropenis) and undescended testes. At puberty, most affected individuals do not develop typical secondary sex characteristics, such as facial hair and deepening of the voice in XY adolescents, or menstruation and breast development in XX adolescents.

f. ***Klinefelter Syndrome*:** A child with Klinefelter syndrome has XXY chromosomes, as opposed to the typical patterns XX or XY. This occurs when one parent's sperm or egg has an extra X chromosome from atypical cell division. The testes and penis may be smaller than typical. Klinefelter syndrome occurs in about 1 in 1,000 children, and is not ordinarily diagnosed before puberty.[18]

g. ***Turner Syndrome*:** A child with Turner syndrome has the chromosome pattern X (also referred to as XO), instead of XX or XY. This occurs when one parent's sperm or egg is lacking an X chromosome due to atypical cell division. Children with Turner syndrome may have underdeveloped ovaries; their external genitalia generally appear female-typical. They generally will

[18] Blackless et al., *supra* note 2, at 152; Greenberg, *supra* note 17, at 283; Albert de la Chapelle, *The Use and Misuse of Sex Chromatin Screening for Gender Identification of Female Athletes*, 256 J. Am. Med. Ass'n 1920, 1922 (1986).

not develop menstrual periods or breasts without hormone treatment. Turner syndrome affects between 1 in 2,500 and 1 in 5,000 newborns.[19]

h. ***Persistent Müllerian Duct Syndrome (PMDS)*:** Persons with PMDS have XY chromosomes and male-typical reproductive organs and external genitalia, and also have some component(s) of a female-typical reproductive tract, such as a uterus, fallopian tubes, and/or upper vaginal canal. PMDS occurs when the Müllerian ducts—internal structures that ordinarily break down in an XY fetus—remain and develop as they would in an XX fetus. PMDS is ordinarily not diagnosed at birth, and individuals with this variation often have a male gender identity.[20]

i. ***Ovotestes*:** Ovotestes are gonads that contain both ovarian and testicular tissue. People with ovotestes are predominantly XX, but some are XY or have different chromosomal patterns in different cells (*see* "Mosaicism," *infra*). Some people with ovotestes have external genitalia that look typically

[19] Kutluk Oktay, et al., *Fertility Preservation in Women with Turner Syndrome: A Comprehensive Review and Practical Guidelines*, 29 J. Pediatric & Adolescent Gynecology 29(5):409-16 (2016); Blackless et al., *supra* note 2, at 152; Greenberg, *supra* note 17, at 284.

[20] Greenberg, *supra* note 17, at 285.

male; others have external genitalia that look typically female; and still others have genitalia that do not look typically male or female.[21]

j. ***Mosaicism*:** As a result of atypical cell division in early embryonic development, some people have a mosaic karyotype—*i.e.*, their sex-chromosome pattern varies from cell to cell. A person with mosaicism may have an XX chromosomal pattern in some cells and an XY pattern in others, or combinations that include the other patterns discussed above (*e.g.*, XO or XXY).[22]

II. INTERSEX PEOPLE EXPERIENCE SEVERE MISTREATMENT AND DISCRIMINATION

Intersex people in the United States often suffer from severe mistreatment and discrimination. In light of this mistreatment, the Court must assess the impact Plaintiffs' proposed construction of Title IX will have on intersex students.

Since the 1960s, intersex children have often been subjected to nonconsensual surgical intervention, including the mutilation and removal of internal and external sex organs (*e.g.*, clitoral reductions, vaginoplasties, and gonadectomies).[23] Almost

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[21] Hughes, *supra* note 4, at 492; Fausto-Sterling, *supra* note 2, at 21.

[22] Wilson & Reiner, *supra* note 4, at 122; Clinical Guidelines, *supra* note 6, at 7; L. Sax, *How Common is Intersex? A Response to Anne Fausto-Sterling*, 39 J. Sex. Res. 174, 175 (2002).

[23] Toler, *supra*, note 9, at 1; Katrina Karkazis, *supra*, note 9 at 57–58, 60–61 (2008); Martin Kaefer & Richard C. Rink, *Treatment of the Enlarged Clitoris*, Frontiers in Pediatrics (August 2017); Jennifer Yang, et al., *Nerve Sparing Ventral Clitoroplasty: Analysis of Clitoral Sensitivity and Viability*, J. Urol., Vol. 178, 1598-1601 (October

always, these surgeries are performed not for any valid medical reason, but solely to make children's bodies conform to binary sex stereotypes.[24] These surgeries are commonly performed when the child is too young to understand what is taking place, let alone provide informed consent—often before age two.[25]

The consequences are dire and permanent. The child may be rendered sterile; may suffer a lifelong diminution or loss of sexual sensation and function; and may experience scarring and incontinence.[26] Children who undergo these procedures are

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2007); Sarah Creighton, et al., *Timing and Nature of Reconstructive Surgery for Disorders of Sex Development – Introduction*, J. PEDIATRIC UROL. 602 (2012).

[24] Toler, *supra*, note 9, at 1; Tamar-Mattis, *supra* note 8, at 2–3, 9; Hermer, *supra* note 5, at 207.

[25] Karkazis, *supra*, note 9, at 57–58; Tamar-Mattis, *supra* note 8, at 2; Daniela Truffer, "It's a Human Rights Issue!" *in* VOICES: PERSONAL STORIES FROM THE PAGES OF NIB – NORMALIZING INTERSEX 26–29 (James M. DuBois & Ana S. Iltis, eds., 2016) (describing a gonadectomy performed at 2 months of age); Lily C. Wang & Dix P. Poppas, *Surgical Outcomes and Complications of Reconstructive Surgery in the Female Congenital Adrenal Hyperplasia Patient: What Every Endocrinologist Should Know*, J. Steroid Biochem. & Molecular Biol. (2016):137-144; Natalie Nokoff, et al., *Prospective Assessment of Cosmesis Before and After Genital Surgery*, 13 J. Pediatric Urol. (2017): 28.e1-28.e6.

[26] Toler, *supra* note 9, at 1; *Recommendations from interACT: Advocates for Intersex Youth Regarding the List of Issues for the United States for the 59th Session of the Committee Against Torture* at 2, interACT (June 2016); Tamar-Mattis, *supra* note 8, at 3–5; Peter Lee et al., *Review of Recent Outcome Data of Disorders of Sex Development (DSD): Emphasis on Surgical and Sexual Outcomes*, 8 J. Pediatric Urol. 611 (Dec. 2012); Sarah Creighton et al., *Objective Cosmetic and Anatomical Outcomes at Adolescence of Feminising Surgery for Ambiguous Genitalia Done in Childhood*, 358 Lancet 124 (2001); *"I Want To Be Like Nature Made Me": Medically Unnecessary Surgeries on Intersex Children in the U.S.* 58, Human Rights Watch & interACT (2017), https://bit.ly/2Y1N6DZ.

often subjected to repeated examination, catheterization, manipulation, and photography of their genitals, which they may experience as shameful and exploitative.[27] The pain and suffering experienced by children subjected to these procedures is comparable to that of child survivors of rape or sexual abuse.[28] There is no persuasive evidence that these surgeries provide any benefit to the child when performed without individual consent.[29]

Today, these surgeries are widely condemned by the intersex community, and have been decried as a form of torture by human rights groups including the United Nations, the World Health Organization, and Amnesty International.[30] Fortunately,

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[27] Hughes, *supra* note 4 at 493; *Recommendations from interACT*, *supra* note 26, at 2, 5-6, 12; Tamar-Mattis, *supra* note 8 at 2, 5-6, 12; Konrad Blair, "When Doctors Get it Wrong," in VOICES, supra note 25 at 5-7; Laura Inter, "Finding my Compass," in VOICES, supra note 25 at 10-13.

[28] *A Human Rights Investigation into the Medical "Normalization" of Intersex People* 17-18, S.F. Human Rights Comm'n (2005), https://goo.gl/trBnGT; Tamara Alexander, *The Medical Management of Intersexed Children: An Analogue for Childhood Sexual Abuse*, ISNA (1997), https://goo.gl/fy9jae; Karsten Schützmann, et al., *Psychological Distress, Self-Harming Behavior, and Suicidal Tendencies in Adults with Disorders of Sex Development*, Arch. Sex. Behav. (2009): 16-33.

[29] Sarah Creighton et al., *Timing and Nature of Reconstructive Surgery for Disorders of Sex Development — Introduction*, 8 J. Pediatric Urol. 602 (2012); Hughes, *supra* note 4, at 493; S.F. Human Rights Comm'n, *supra* note 28, at 19; Toler, *supra* note 9, at 1; Tamar-Mattis, *supra* note 8, at 3.

[30] Juan E. Méndez, *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, ¶ 77, UN Doc. A/HRC/22/53 (Feb. 1, 2013); Toler, *supra* note 9, at 1; *Eliminating forced, coercive and otherwise involuntary sterilization: An interagency statement*, World Health Organization, et

an increasing number of parents are delaying irreversible decisions about surgery so that their children can participate in those decisions themselves when they are older. And recently, major hospital systems and individual pediatric hospitals have begun announcing that they will no longer perform certain "normalizing" surgeries on intersex children too young to consent.[31] Yet families continue to have unnecessary genital surgery pressed upon their intersex children.[32]

The mistreatment of intersex people does not end with childhood surgery. They may be denied medical treatment in adulthood by physicians who are unfamiliar with or who stigmatize intersex variations.[33] Even when doctors are willing and able to treat them, some intersex people report trauma and fear of doctors that causes

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al. (2014), https://goo.gl/nzXm6f; *Policy Statement on the Rights of Intersex Individuals*, Amnesty International (2013); *Recommendations from interACT*, *supra* note 26, at 1; Tamar-Mattis, *supra* note 8, at 7-9, https://goo.gl/Nf7Xt7.

[31] Shefali Luthra, *Boston Children's Hospital will no longer perform two types of intersex surgery on children*, USA Today, Oct. 22, 2020, https://www.usatoday.com/story/news/health/2020/10/22/intersex-surgery-boston-childrens-hospitals-decision-watershed-moment-rights/3721096001/; *Intersex Care at Lurie Children's and Our Sex Development Clinic*, July 28, 2020, https://www.luriechildrens.org/en/blog/intersex-care-at-lurie-childrens-and-our-sex-development-clinic/.

[32] Toler, *supra* note 9, at 1; Eric Lohman and Stephani Lohman, RAISING ROSIE: OUR STORY OF PARENTING AN INTERSEX CHILD (UBCPress 2018).

[33] Tamar-Mattis, *supra* note 8, at 2, 7; *Fact Sheet: Intersex* at 2, Free & Equal: United Nations for LGBT Equality (2015), https://www.unfe.org/system/unfe-65-Intersex_Factsheet_ENGLISH.pdf.

them to avoid necessary care.[34] Intersex people may be denied identification documents, such as passports, impeding their ability to travel or participate in civil society. *See, e.g.*, *Zzyym v. Pompeo*, 958 F.3d 1014, 1018 (10th Cir. 2020) (finding the State Department's denial of a U.S. passport to an intersex person "arbitrary and capricious"). They also experience discrimination in education, public services, employment, and—relevant here—sports.[35]

III. PLAINTIFFS' PROPOSED CONSTRUCTION OF TITLE IX DISCRIMINATES AGAINST INTERSEX STUDENTS

A. Plaintiffs' Scientifically Inaccurate Conception Of "Biological Males" Excludes Students With Intersex Variations

Plaintiffs argue that allowing "biological males" and "male-bodied athletes" to participate in girls' sports violates Title IX. Br. 12; JA261. Plaintiffs never bother to define these key terms, however—they merely take for granted that there are "bright-line physiological differences between male and female bodies" that are too obvious to require explanation. Br. at 50. As explained above, that assumption is inaccurate. Unsurprisingly, Plaintiffs offer no explanation of how their interpretation would apply to the thousands of intersex students who live in Connecticut.

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[34] S.F. Human Rights Comm'n, *supra* note 28, at 23; Tamar-Mattis, *supra* note 8, at 12; Davis, *supra note* 17, at 109-10 (quoting an intersex adult: "I don't like doctors. I don't go to the doctor very often. I don't trust doctors. That's a very triggering environment for me.").

[35] *Fact Sheet: Intersex*, *supra* note 33, at 1.

For example, consider "Jane," a hypothetical student with complete AIS. *Supra* at 7-8. Jane was assigned female sex at birth and has always identified as a girl. Jane has typically female external genitalia and secondary sex characteristics, such as breasts, and also has internal testes and an XY chromosome pattern. Can Jane continue to participate in girls' sports if the Court adopts Plaintiffs' framework? Her external "physiology" is female-typical, but her internal physiology and genetic makeup would be considered primarily male-typical. And while her endogenous testosterone levels are in the male-typical range, her body's cells cannot detect or respond to testosterone—so functionally speaking, it is as if she has none. If the Court sides with Plaintiffs, what is Jane to do if she wishes to play school sports?

Now consider "Frank," a student with CAH. *Supra* at 6. Frank was assigned male sex at birth and has always identified as a boy. He has external genitalia that are neither male-typical nor female-typical (*e.g.*, an enlarged clitoris and no vaginal opening). He has male-typical secondary sex characteristics, such as a deep voice, body hair, and developed muscles. But he has internal organs and genetics that would be considered female-typical, such as a uterus, ovaries, and an XX chromosomal pattern. And his endogenous testosterone levels are not known, because he has received hormone treatment for years, and he cannot safely stop the treatment to measure his "but-for" testosterone levels. If Plaintiffs prevail, what is Frank to do if he wishes to play school sports?

Finally, consider "Kelly," a student with ovotestes and mosaicism. *Supra* at 10-11. Their external genitalia are neither male-typical nor female-typical, and their gonads contain both testicular and ovarian tissue. They have certain sex characteristics that are female-typical (*e.g.*, some breast development) but others that are male-typical (*e.g.*, some body hair). Chromosomally, some of their cells are XX and others are XY. And their endogenous testosterone levels lie in the overlapping range that could be low for a typical male or high for a typical female.[36] Under Plaintiffs' statutory interpretation, what is Kelly to do if they wish to play school sports?

Plaintiffs provide no answer—because they cannot provide one. Rather, they simply *assume* that concepts such as genetic makeup, physiology, and hormone levels are binary, and that they always point in the same direction. As *amicus* has shown, this assumption is false. Because Plaintiffs' statutory interpretation is premised on undefined and inaccurate assumptions, it places students like Jane, Frank, and Kelly in an untenable bind, likely prohibiting them from playing school sports at all. *See Hecox v. Little*, 479 F. Supp. 3d 930, 977 (D. Idaho 2020) (forcing transgender girls to "[p]articipat[e] in sports on teams that contradict [their] gender

[36] *See* Nicola Davis, *Testosterone limits for female athletes not backed by science, say academics*, THE GUARDIAN, Mar. 20, 2019, https://www.theguardian.com/sport/2019/mar/20/testosterone-limits-for-female-athletes-not-backed-by-science-say-academics (noting that "there can be overlap between blood levels of testosterone in some men and women," and that there are "no clear lines in the sand about what a 'male' or 'female' level of testosterone [is]").

identity" would "entirely eliminate[] their opportunity to participate in school sports"). This is not just unfair; it violates the Equal Protection Clause and Title IX itself, because it excludes such students from school programs based on their sex-related anatomical and physiological traits and the fact that their bodies do not conform to Plaintiffs' stereotyped, binary notion of "sex." *See Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1741 (2020); 20 U.S.C. § 1681(a).[37]

As *amicus* has shown, any attempt to police participation in sex-segregated athletic activities on the basis of particular anatomical, physiological, or genetic traits is doomed to fail, because—contrary to Plaintiffs' assumptions—so-called "biological sex" is not binary and cannot be assessed in a purely objective manner. *See Zzyym*, 958 F.3d at 1024-25 (noting that "[the intersex plaintiff's] experience illustrates the inevitable inaccuracies of a binary sex policy"). As long as there are sex-segregated sports teams, the only workable way to regulate their membership—and the only way that does not exclude and stigmatize intersex students—is on the basis of the student's own deeply held gender identity. *See* Appellees' Br. 3 (noting Appellee schools' policy of permitting students to compete on teams based on their

[37] Plaintiffs may attempt to brush the existence of intersex variations aside as a "rare" phenomenon that can simply be ignored. As discussed above, that is untrue: intersex people are a minority, of course, but they are a significant one, on the order of 2% of the population. *Supra* at 3. In any event, there is no *de minimis* exception to the Equal Protection Clause or Title IX that permits discrimination against a disfavored group if its membership is small enough.

"gender identification … [in] daily life activities in the school and community"). This is precisely how sex-separated scholastic sports are regulated across the country without any detriment to girls' and women's sports programs. *See* Appellee-Intervenors' Br. 9-10.

B. Any Attempt to Enforce Plaintiffs' Proposed Construction of Title IX Will Inflict Severe Trauma On Students, Especially Intersex Students

Plaintiffs offer no explanation of how schools would enforce their preferred construction of Title IX. That is a telling omission. In fact, enforcement would require Connecticut schools to conduct invasive sex verification inspections of their students to remain in compliance with the statute. This would inflict severe and unacceptable trauma on student athletes, especially those who are intersex.

An Idaho law banning transgender girls and women from participating in girls' and women's sports, which has since been enjoined, provides a cautionary tale of the Orwellian "sex verification" regimes that must be instituted to enforce such a legal framework. *See Hecox*, 479 F. Supp. 3d at 948-49. Under the Idaho law, anyone—a teammate, a parent, a school bully, a rival team member, or just a local busybody—was permitted to "dispute" a student's sex. Accused students were required to submit to an invasive battery of tests, including examination of their genitalia, extraction and testing of their personal genetic material, and/or blood testing to gauge hormone levels. *See id.*

Such indignities would be difficult for any student to endure. The International Olympic Committee and International Amateur Athletics Federation abandoned nude inspections and genital examinations as "demeaning" and "[un]dignified" as early as 1968.[38] And the U.S. Supreme Court has held that far lesser impositions on students' modesty violate "reasonable societal expectations of personal privacy." *Safford Unified Sch. Dist. v. Redding*, 557 U.S. 364, 369, 374-75 (2009) (finding that school officials violated an adolescent student's constitutional rights by forcing her to "'pull out' her bra and the elastic band of her underpants").

For intersex students, however, these bodily invasions pose a threat of a different order. As discussed above, intersex students may suffer from trauma, depression, or suicidality as a result of years of forced medical examination of their genitals, as well as nonconsensual surgeries that are widely deemed a form of torture. For students who have suffered these traumas for much of their lives, being subjected to scholastic sex verification inspections would be truly horrendous.

Consider, in addition, that not all intersex variations are diagnosed at birth or in early childhood. Some people do not learn that they are intersex until late puberty or even adulthood (*e.g.*, when they cannot conceive). Imagine the experience of a

[38] Louis J. Elsas, et al. *Gender verification of female athletes*, Genet. In Med., 2000:2(4), 247-54 at 253.

student athlete who learns of their intersex status for the first time in a school-imposed "sex verification" inspection. The student could suffer deep psychological harm—or worse—from such an experience. That goes double if they are then "outed" to their family, teammates, and/or community, losing the opportunity to privately process their own medical information without facing scrutiny or stigma.

The Court need not take *amicus*'s word for it. Sex-verification procedures in athletics have a documented history of inflicting significant emotional trauma on intersex athletes.[39] Indeed, an empirical study found that the emotional pain caused by these procedures is comparable to that from sexual abuse.[40] The results of such tests are routinely leaked to the public, compounding the athletes' trauma.[41]

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[39] *See* Claudia Wiesemann, *Is There A Right Not to Know One's Sex? The Ethics of 'Gender Verification' in Women's Sports Competition*, 1–3 J. Med. Ethics (2010); Erin E. Buzuvis, *Transsexual and Intersex Athletes, in* SEXUAL MINORITIES IN SPORTS: PREJUDICE AT PLAY 59–67 (Melanie L. Sartore-Baldwin, ed. 2013); Robert Ritchie *et al.*, *Intersex and the Olympic Games*, J. Royal Soc. Med. 2008 Aug 1; 101(8): 395-399.

[40] Karsten Schützmann et al., *Psychological Distress, Self-Harming Behavior, and Suicidal Tendencies in Adults with Disorders of Sex Development*, Arch. Sex. Behav. (2009):16-33

[41] Human Rights Watch, *They're Chasing Us Away from Sport": Human Rights Violations in Sex Testing of Elite Women Athletes* at 7, 46-48, Dec. 4, 2020, https://www.hrw.org/sites/default/files/media_2020/ 12/lgbt_athletes1120_web.pdf (quoting Associated Press, *Caster Semenya's Comeback Statement in Full*, The Guardian, Mar. 30, 2010).

For example, in 2001, Pratima Gaonkar, an 18-year-old female sprinter, died by suicide after sex testing revealed her intersex status to her and her community, leading to "description[s] of her private parts … [on] the front pages of [local] newspapers."[42] In 2006, Santhi Soundarajan, a 25-year-old female runner, attempted suicide after learning of her intersex variation through a failed "gender test" and being publicly stripped of her medals, likening the experience to "mental torture."[43] More recently, intersex runner Caster Semenya explained: "I have been subjected to unwarranted and invasive scrutiny of the most intimate and private details of my being … [which has] infringed … my rights to dignity and privacy."[44]

As if that weren't enough, sex-verification regimes in sport have led to "a number of" intersex athletes being "forced or coerced" into risky and medically unwarranted "treatment[s]" such as "gonadectomy (removal of reproductive organs) and partial clitoridectomy (a form of female genital mutilation)."[45] As described

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[42] Nihal Koshie, *The rising star who ended her life much before Dutee Chand challenged the rules*, Indian Express, Sept. 9, 2018, https://indianexpress.com/article/sports/sport-others/the-girl-before-dutee-chand-pratima-gaonkar-5346699/.

[43] Harmeet Shah Singh, *India athlete makes plea for Semenya*, CNN, Sept. 14, 2009, http://www.cnn.com/2009/WORLD/asiapcf/09/14/Semenya.India.Athlete/.

[44] Human Rights Watch, *supra* note 41, at 7 (quoting Associated Press, *Caster Semenya's Comeback Statement in Full*, The Guardian, Mar. 30, 2010).

[45] U.N. GEN. ASSEMBLY, HUM. RTS. COUNCIL, 32 Sess. *Report of The Special Rapporteur on The Right of Everyone to The Enjoyment of The Highest Attainable Standard Of Physical And Mental Health*, 14 (2016); *see also* Human Rights Watch, *supra* note 41, at 27, 44-45.

above, such surgeries are almost always medically unnecessary and can have horrific lifelong consequences, including incontinence, sterility, and sexual dysfunction. Pressuring someone into such surgical procedures is therefore deeply unethical.

To give just one example, Annet Negesa, an intersex runner and former Olympic hopeful, was born with female-typical external genitalia and internal testes. Negesa was advised to undergo a medically unnecessary gonadectomy to qualify for competition as a female, the sex she has always lived and identified as. As a result of the procedure, Negesa suffered career-ending physical pain and depression.[46] If Plaintiffs prevail, young intersex athletes in Connecticut may feel the same pressure to make unwanted modifications to their bodies in order to compete, with the same tragic consequences.

C. Plaintiffs' Proposed Discriminatory Treatment Of Intersex Student Athletes Has No Justification

Because Plaintiffs' proposed construction of Title IX discriminates against intersex students on the basis of their sex characteristics, it would violate the Equal Protection Clause unless (1) there is an "exceedingly persuasive justification" for that discrimination and (2) "the discriminatory means employed are substantially related to the achievement" of that objective. *United States v. Virginia*, 518 U.S.

[46] Geneva Abdul, *This Intersex Runner Had Surgery to Compete. It Has Not Gone Well*, N.Y. Times (Dec. 16, 2019) https://www.nytimes.com/2019/12/16/sports/intersex-runner-surgery-track-and-field.html.

515, 531-33 (1996). Plaintiffs have made neither showing. Indeed, their vision of Title IX cannot pass muster under *any* standard of review.

Plaintiffs' purported justification for the relief they seek is to ensure them a "fair chance" when competing in girls' and women's sports. Br. 15. But the record is devoid of evidence that the presence of intersex students (or transgender students, for that matter) on girls' and women's scholastic sports teams has ever denied participants a "fair chance." That is hardly surprising, as researchers have found "no evidence that female athletes with [intersex variations] have displayed any sports-relevant physical attributes which have not been seen in … female athletes" without intersex variations.[47] Recently, the United Nations Human Rights Council noted "the absence of legitimate and justifiable evidence" supporting sex-verification regimes in sport, and the lack of any "clear relationship of proportionality between the aim of the regulations and the proposed measures and their impact."[48]

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[47] Ritchie et al., *supra* note 39, at 598; *see also* Katrina Karkazis and Rebecca M. Jordan-Young, *The Myth of Testosterone*, N.Y. Times, May 3, 2019, https://www.nytimes.com/2019/05/03/opinion/testosterone-caster-semenya.html

[48] United Nations Human Rights Council, *Elimination of Discrimination Against Women and Girls in Sport* (Resolution 40/5), May 5, 2019, *quoted in* Rachel McKinnon, *Participation in sport is a human right, even for trans women*, Sports Integrity Initiative, June 17, 2019, https://www.sportsintegrityinitiative.com/participation-in-sport-is-a-human-right-even-for-trans-women/.

But even assuming, *arguendo*, that some intersex variations confer an "advantage" on athletes who would compete as girls and women, that would not justify the severe discrimination and inevitable indignities that Plaintiffs' proposed construction of Title IX would impose on intersex students. After all, sports has never been, and cannot ever be, a completely "level playing field." In particular, many elite athletes are genetically, anatomically, and physiologically blessed in ways that average people—or even other accomplished athletes—are not.

Consider Michael Phelps, the most-decorated Olympic athlete of all time. He boasts an unrivaled wingspan and "flipper"-like legs and feet, and his body "produces half the lactic acid of his competitors."[49] How is that "fair" to the many other swimmers who cannot hope to equal Phelps's achievements with any amount of training? Likewise, consider cross-country skier and seven-time Olympic medalist Eero Mäntyranta, who was born with a genetic mutation that lets his blood carry 50% more oxygen than his competitors'. As one writer asked, "[w]hat does 'a level playing field' mean for skiers who trained just as hard as Mäntyranta but were left behind him, gasping for air as he won the Olympic 15K race by 40 seconds, a margin never equaled at the Games before or since?"[50]

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[49] Colleen De Bellefonds, *Why Michael Phelps Has the Perfect Body for Swimming*, Biography.com (June 26, 2019) https://www.biography.com/news/michael-phelp-perfect-body-swimming.

[50] David Epstein, *Magic Blood and Carbon-Fiber Legs at the Brave New Olympics*,

Tellingly, Plaintiffs do not call for genetic anomalies like Phelps and Mänty-ranta to be excluded from competition in order to provide Plaintiffs "their fair chance to be champions." Br. 15. Instead, they single out just one category of physical differences as posing a threat to "fairness" in sports: those with a connection to sex. And any attempt to police those singled-out differences would inevitably result in a draconian regime of discrimination and humiliation.

Plaintiffs' proposed method for ensuring "fair competition" is therefore vastly underinclusive. That "[u]nderinclusiveness raises serious doubts about whether" Plaintiffs are "in fact pursuing the interest [they] invoke[]." *Brown v. Entm't Merchants Ass'n*, 564 U.S. 786, 802 (2011). Indeed, Plaintiffs' laser-like focus on students' genitalia, sex chromosomes, and hormones, to the exclusion of all else, reveals their lawsuit for what it truly is: an irrational expression of animus against students who do not fit Plaintiffs' stereotyped and scientifically inaccurate notions of sex. The regime they advocate would be invalid under any standard of review.

Scientific American, Aug. 5, 2016, https://www.scientificamerican.com/article/magic-blood-and-carbon-fiber-legs-at-the-brave-new-olympics/; Ruth McKernan, *A skier with gold medals in his blood*, The Independent, Aug. 1, 1993, https://www.independent.co.uk/news/science/science-a-skier-with-gold-medals-in-his-blood-in-endurance-sports-a-plentiful-supply-of-oxygen-to-the-muscles-is-vital-to-success-ruth-mckernan-on-a-family-blessed-by-a-mutant-gene-1458723.html

CONCLUSION

This has been framed primarily as a case about transgender athletes. But the Court's decision will also profoundly affect thousands of intersex persons in Connecticut. Their dignity and humanity must not be overlooked. The District Court's judgment should be affirmed.

Dated: New York, New York
October 14, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify, pursuant to Fed. R. App. P. 32(g), that the attached brief is proportionally spaced; complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B).; and contains 6,413 words (excluding portions exempted by Fed. R. App. P. 32(f), as counted by Microsoft Office Word 2019, which was used to produce this brief.

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CERTIFICATE OF SERVICE

I hereby certify that on October 14, 2021 I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

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