UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
FORT LAUDERDALE DIVISION

CASE NO. 0:21-cv-61344-RKA

D.N., by next friends, JESSICA N., mother, and GARY N., father,

Plaintiff,

v.

GOVERNOR RONALD DESANTIS, in his official capacity as Governor of Florida; FLORIDA HIGH SCHOOL ATHLETIC ASSOCIATION; BROWARD COUNTY SCHOOL BOARD; SUPERINTENDENT ROBERT RUNCIE, in his official capacity as Superintendent of Broward County Public Schools; FLORIDA STATE BOARD OF EDUCATION; and COMMISSIONER RICHARD CORCORAN, in his official capacity as Commissioner of Education,,

Defendants.

[PROPOSED] BRIEF OF 22 STATES AS *AMICI CURIAE* IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

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*Motion to Appear Pro Hac Vice pending

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INTEREST AND IDENTITY OF *AMICI CURIAE*

The States of Alabama, Alaska, Arkansas, Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, and West Virginia (the "*Amici* States") submit this brief in support of Florida's motion to dismiss. Many of the *Amici* States have encountered claims substantively similar to those D.N. pushes here. The States explain the proper legal framework to apply, which dispositively resolves D.N.'s claims at the pleadings stage.

The key to understanding D.N.'s Equal Protection claim is that it is not an Equal Protection claim at all. In a traditional Equal Protection challenge, a plaintiff seeks to bar the government from using a protected characteristic to assign benefits or burdens, and the government's use of the characteristic is unconstitutional if it does not pass heightened scrutiny. For example, the Virginia Military Institute could not justify basing its admissions decisions on sex, and Oliver Brown helped end the policy of racial segregation in Topeka schools.

But in an increasing number of challenges to single-sex sports teams or bathrooms, plaintiffs are *not* seeking the end of sex segregation. Instead, they *want* sex segregation. Indeed, the relief they request typically depends on sex segregation and presumes its propriety. What they demand is access to the sex-based benefit too.

Far from traditional Equal Protection challenges to discrimination, these are underinclusiveness challenges that argue that a benefit should be extended further by broadening the protected class—here, by redefining "girls" to include some biological males. In other words, D.N. and Florida agree that it is constitutional to offer biological females the sex-based benefit of a girls' soccer team; D.N. just wants that benefit too. But a claim that a sex-based program does not extend far enough warrants only rational basis review.

Thus, while a challenge to having a separate soccer team for girls can trigger heightened scrutiny, a complaint merely about how the State defines "girls" does not. Here, D.N. does not argue that the Constitution demands that all middle schoolers, regardless of sex, must try out for one soccer team; D.N. instead argues that the State cannot limit its definition of "sex" based on biology. In this way, D.N. seeks access to a sex-based benefit. But Florida's decision to limit that benefit to biological females is rational and thus plainly constitutional.

When federal courts have mistakenly applied heightened scrutiny to these kinds of claims, they have forced States and local governments to engage in protracted litigation and even enlist the help of biologists and other experts just to defend the basic proposition that sex classifications depend on biology. Federal law does not compel this outcome. *Amici* States thus have a strong interest in ensuring that federal law continues to permit a definition of sex that accords with biology and allows States to protect the health, safety, welfare, and privacy of all students. Accordingly, *Amici* States respectfully request that the Court grant Defendants' Motion to Dismiss and in doing so make clear that D.N.'s challenge triggers only rational basis review.

INTRODUCTION

There's something strange about D.N.'s reading of the Equal Protection Clause. Female applicants to Virginia Military Institute did not seek to maintain VMI's segregation but assert they were really men whom VMI unconstitutionally misclassified and rejected. Nor did Oliver Brown ask the Supreme Court to bless separate-but-equal schooling so long as the Board of Education of Topeka would classify him as white. But Plaintiff D.N., also traveling under the banner of Equal Protection, asks this Court to ensure that Florida continues to segregate public interscholastic sports teams on the basis of sex. D.N. just wants Florida to segregate differently.

This is not a sex-discrimination challenge. Far from demanding all sports go coed, D.N. wants to take advantage of sex-segregated sports. This is an underinclusiveness challenge. D.N. asks this Court to compel Florida to continue segregating on the basis of sex, but to define "girls" broadly enough to include some biological males. That is, D.N. seeks the sex-segregated regime's benefits by challenging the contours of the segregation. While a government's decision to separate males and females for the benefit of women's sports warrants heightened scrutiny, the government's decision to follow the understanding of sex that has endured for millennia does not. The key to properly analyzing these claims is thus to recognize that courts have dealt (and dispatched) with them before—primarily in the racial-affirmative-action context.

Yet courts continue to apply heightened scrutiny to underinclusiveness claims like D.N.'s. The confusion is understandable; claims like D.N.'s are novel challenges to well-settled understandings of sex. But the costs of continued confusion are high. The misapplied intermediate scrutiny framework has forced many state and local governments to wade through years of litigation and employ costly experts to justify decisions as basic of giving a "Female" designation on a driver's license only to females or making a girls' sports team available only to girls. Moreover, compelling States to define sex according to gender identity would jeopardize States' ability to

enforce coherent sex-conscious policies. It may even force them to resort to sex stereotyping as they search to define "boy" and "girl" beyond biology. The Constitution compels none of this. This Court should say so, and help establish a coherent legal framework for the increasingly popular sort of claims D.N. brings here.

ARGUMENT

I. The Federal Constitution Does Not Compel Florida To Classify Biological Males As Girls.

A. D.N.'s Constitutional Claim Is an Underinclusiveness Challenge.

The Fairness in Women's Sports Act seeks to "provide [female athletes] with opportunities to obtain recognition and accolades, college scholarships, and the numerous other long-term benefits that result from participating and competing in athletic endeavors." Fla. Stat. §1006.205(2)(a). To achieve this goal, the law "requir[es] the designation of separate sex-specific athletic teams or sports," *id.* at §(2)(b), and thus calls for public schools' interscholastic sports teams "to be expressly designated" for either "[m]ales, men, or boys," "[f]emales, women, or girls," or "[c]oed or mixed" teams. *Id.* §(3)(a). The baseline for these distinctions is "the biological sex at birth of team members." *Id.* "Athletic teams or sports designated for males" are open to all sexes, but to provide "fairness for women in athletic opportunities" the law requires that teams or sports "designated for females, women, or girls may not be open to students of the male sex." *Id.* at 2(b), 3(b)-(c).

D.N. does not argue that Florida's decision to segregate interscholastic sports teams on the basis of sex violates the Equal Protection Clause. There is no demand that all sports teams be made coed. Just the opposite. D.N. *wants* Florida to continue segregating sports teams by sex, asking this Court to enjoin any law that "would preclude Plaintiff from participation in any girls' sports

team." DE1:19.[1] D.N. cannot play on a "girls' sports team" unless Florida segregates its sports teams by sex; continued sex segregation is integral to the relief D.N. demands. *Id*. D.N. therefore seeks to compel the State to continue segregating—just to adjust the contours of its segregation. All in the name of Equal Protection.

This should give the Court pause. Asking a federal court to compel segregation along protected characteristics is unusual. Doing so under the Equal Protection Clause is bizarre. When the United States sued on behalf of high-school girls seeking admission to VMI, the government argued that the institution's "exclusively male admission policy violated the Equal Protection Clause of the Fourteenth Amendment," *United States v. Virginia*, 518 U.S. 515, 523 (1996), not that female applicants were in fact males who should be able to avail themselves of an otherwise salutary sex-segregated admissions process. And Oliver Brown was not trying to take advantage of separate-but-equal schooling on the theory that the Board of Education of Topeka should have classified him as white. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954). When black students were "denied admission to schools attended by white children under laws requiring or permitting segregation according to race," *id.* at 487-88, the problem was not that the Board had separated Topeka's races too finely; the problem was that the Board had separated races at all. In canonical Equal Protection cases, segregation provides the cause of action. But here, according to D.N.'s complaint, segregation provides the remedy. *See* DE1:19.

Which reveals the truth about D.N.'s claim. Contrary to D.N.'s framing, D.N.'s grievance is emphatically *not* that SB 1028 "discriminates on the basis of sex." *Id.* at 2. The relief D.N. seeks—to "participat[e] in any *girls'* sports team," *id.* at 19 (emphasis added)—gives the game

[1] "DE" refers to docket entries in this case. Pin cites follow the colon and accord with CM/ECF pagination.

away. D.N. is not asking this Court to require that every interscholastic sports team in Florida go coed. Rather, D.N.'s grievance is that that by defining "[f]emales, women, or girls" by "biological sex at birth," Fla. Stat. §1006.205(3)(a), the class benefiting from the Fairness in Women's Sports Act (*i.e.*, "females, women, or girls") is unlawfully narrow. "Athletic teams or sports designated for females, women, or girls," *id.* §3(c), D.N. contends, should include "transgender girls," DE1:17—that is, biological males. So D.N. wants Florida to continue segregating boys' and girls' sports, but to define the class benefiting from the segregation more broadly.

D.N.'s claim thus reduces to a textbook underinclusiveness challenge: D.N. likes the law's sex-segregation regime and simply seeks inclusion among its beneficiaries. Such challenges warrant only rational basis review. And SB 1028 easily passes muster.

B. While a Challenge to Sex Discrimination Itself Warrants Heightened Scrutiny, an Underinclusiveness Challenge to the Contours of Florida's Sex Classifications Does Not.

The Equal Protection Clause of the Fourteenth Amendment prohibits a State from "deny[ing] to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, §1. The Supreme Court has explained that laws "provid[ing] that different treatment be accorded to [individuals] on the basis of their sex" warrant heightened scrutiny. *Reed v. Reed*, 404 U.S. 71, 75 (1971). And when litigants decide to challenge and eliminate "official action that closes a door or denies opportunity to women (or to men)," heightened scrutiny applies. *Virginia*, 518 U.S. at 532-33.

But "[t]he prohibition of the Equal Protection Clause goes no further than the invidious discrimination," *Williamson v. Lee Optical Co.*, 348 U.S. 483, 489 (1955), and "[a] statute is not invalid under the Constitution because it might have gone farther than it did," *Roschen v. Ward*, 279 U.S. 337, 339 (1929). Rather, "reform may take one step at a time"; "[t]he legislature may select one phase of one field and apply a remedy there, neglecting the others." *Williamson*, 348

U.S. at 489; *accord, e.g.*, *Katzenbach v. Morgan*, 384 U.S. 641, 656-57 (1966) (rational basis where Congress extended benefit to citizens educated in "American-flag schools" in Puerto Rico but did "not extend[] the relief … to those educated in non-American-flag schools"); *Peightal v. Metro. Dade Cnty.*, 940 F.2d 1394, 1409 (11th Cir. 1991) ("The Equal Protection Clause does not require a state actor to grant preference to all ethnic groups solely because it grants preference to one or more groups.").

So even assuming the Florida Legislature might have been able to craft a statute that permitted D.N. or other transgender girls to play on girls' sports teams while simultaneously "maintain[ing] opportunities for female athletes," Fla. Stat. §1006.205(2)(a)—which is unlikely—the statute would still stand. That a group of biological males might also seek the benefit of playing female-only sports does not render the law unconstitutional, for "[t]he state was not bound to deal alike with all these classes, or to strike at all evils at the same time or in the same way." *Semler v. Oregon State Bd. of Dental Examiners*, 294 U.S. 608, 610 (1935). Thus, while the State's decision to segregate sports teams by sex in the first instance warrants heightened scrutiny, *see, e.g., Virginia*, 518 U.S. at 532-33, the sex classification that informs how far SB 1028 "extend[s] … relief," *Katzenbach*, 384 U.S. at 656-57, does not.

Similar claims are legion in the racial-affirmative-action context, and their dispositions underscore why challenges to classification—rather than to discrimination itself—warrant only rational basis review. Fundamentally, where a court "is not asked to pass on the constitutionality of [an affirmative-action] program or of the racial preference itself," but is asked instead "to examine the parameters of the beneficiary class," the court engages in "a traditional 'rational basis' inquiry as applied to social welfare legislation." *Hoohuli v. Ariyoshi*, 631 F. Supp. 1153, 1159 (D. Haw. 1986). So where, as here, plaintiffs seek to avail themselves of a sex-segregated program by

broadening the "parameters of the beneficiary class," *id.*, the government's decision not to calibrate the class to plaintiffs' preferences does not warrant heightened scrutiny. *See id.* at 1160-61 (rejecting plaintiff's Equal Protection claim because government's "definition of 'Hawaiian' … ha[d] a rational basis").

The Second Circuit explicated this principle in *Jana-Rock Construction, Inc. v. New York Department of Economic Development*. 438 F.3d 195 (2d Cir. 2006). The case involved "New York's 'affirmative action' statute for minority-owned businesses," which extended to "Hispanics" but did "not include in its definition of 'Hispanic' people of Spanish or Portuguese descent." *Id.* Plaintiff Rocco Luiere owned a construction company and was "the son of a Spanish mother whose parents were born in Spain," but he was not considered Hispanic for purposes of the New York program. *Id.* at 199. (This despite Luiere's sworn affidavit stating, "I am a Hispanic from Spain." *Id.* at 203.) Like the plaintiff in *Hoohuli*, Luiere did not "challenge the constitutional propriety of New York's race-based affirmative action program," but only the State's decision not to classify him as Hispanic for purposes of the program. *Id.* at 200, 205.

On its way to rejecting Luiere's claim, the Second Circuit confirmed that "[t]he purpose of [heightened scrutiny] is to ensure that the government's choice to use racial classifications is justified, not to ensure that the contours of the specific racial classification that the government chooses to use are in every particular correct." *Id.* at 210. And because "[i]t [was] uncontested by the parties" that New York's affirmative-action program satisfied strict scrutiny—just as it is uncontested here that sex-segregated sports satisfy heightened scrutiny—a heightened level of review retained "little utility in supervising the government's definition of its chosen categories." *Id.* So the Second Circuit "evaluate[d] the plaintiff's underinclusiveness claim using rational basis review" and duly rejected it. *Id.* at 212.

Consider also the case of Ralph Taylor. In August 2010, Taylor "received results from a genetic ancestry test that estimated that he was 90% European, 6% Indigenous American, and 4% Sub-Saharan African." *Orion Ins. Grp. v. Washington State Off. of Minority & Women's Bus. Enterprises*, 2017 WL 3387344, at *2 (W.D. Wash. Aug. 7, 2017), *aff'd sub nom. Orion Ins. Grp. v. Washington's Off. of Minority & Women's Bus. Enterprises*, 754 F. App'x 556 (9th Cir. 2018). This was big news for a man who "grew up thinking of himself as Caucasian." *Id.* Once Taylor "realized he had Black ancestry, he 'embraced his Black culture.'" *Id.* He "joined the NAACP" and began to "take[] great interest in Black social causes." *Id.* at *3. Taylor even "subscribed to Ebony magazine." *Id.* at *3. Finally, Taylor classified himself as "Black" and applied for special benefits under State and federal affirmative-action programs. *Id.* at *2-3.

But the programs' managers weren't convinced. They rejected Taylor's proposed racial classification and denied his application. So Taylor brought suit alleging, among other things, that the State and federal governments' restrictive definition of "Black" violated his constitutional and statutory rights. *Id.* at *4. He advocated an expansive definition of "Black," asserting he fit into the category because "Black Americans are defined to include persons with 'origins' in the Black racial groups in Africa" and his genetic testing revealed he had African ancestry. *Id.* at *11. The court summarily dispatched with Taylor's claim. *Id.* Rather than apply heightened scrutiny and force the State to justify its definition of "Black," the court applied rational basis review and rejected Taylor's claim accordingly. *Id.* at *13 ("Both the State and Federal Defendants offered rational explanations for the denial of the application.").

The relief D.N. seeks ("participation in any girls' sports team in Florida," DE1:19) presumes the constitutionality of sex-segregated sports teams, in turn requiring D.N. to challenge the lawfulness of "designat[ing]" an "[a]thletic team" for "girls" "based on the biological sex at birth

of team members." Fla. Stat. §1006.205(3)(a), (c). This is a challenge to the "contours," *Jana-Rock*, 438 F.3d at 210, "parameters," *Hoohuli*, 631 F. Supp. at 1159, or "narrower definition," *Orion*, 2017 WL 3387344 at *11, along which SB 1028 discriminates, not a challenge to discrimination itself. D.N. thus follows in the footsteps of Rocco Luiere and Ralph Taylor, not in those of the female VMI applicant and Oliver Brown.

Just as Luiere and Taylor sought to benefit from racially discriminatory regimes but contested how the races were defined, D.N. endorses sex-segregated sports teams and only challenges Florida's decision to "base[]" its definition of "girls" on "biological sex" rather than gender identity. Fla. Stat. §1006.205(3)(a). But because the "purpose" of heightened scrutiny "is to ensure that the government's choice to use [protected] classifications is justified," not to police the classifications' "contours," *Jana-Rock*, 438 F.3d at 210, the "contours" attendant to Florida's sex-segregated sports teams warrant only rational basis review. *Cf. Hoohuli*, 631 F. Supp. at 1159 n.23 ("The mere mention of the term 'race' does not automatically invoke the 'strict scrutiny' standard.").

While the Eleventh Circuit recently applied intermediate scrutiny in *Adams v. School Board of St. Johns County*, 57 F.4th 791, 800 (11th Cir. 2022) (*Adams III*), that is because the Court analyzed only the question whether "the School District's policy of assigning bathrooms based on sex violate[d] the Equal Protection Clause," *id.* at 799. That is not the question D.N. presents to this Court. As noted above, the relief D.N. seeks (injunction of any law "preclude[ing] Plaintiff from participation in any girls' sports team," DE1:19) is incompatible with a straightforward challenge to "assigning [sports teams] based on sex." *Id.* Instead, D.N. brings this suit on the theory that SB 1028's "[a]thletic teams or sports designated for females, women, or girls" are unconstitutionally underinclusive, and that the Constitution compels Florida to broaden its definition of "[f]emales, women, and girls" beyond "biological sex at birth." Fla. Stat. §1006.205(3)(a).

This is precisely the theory that *Adams* left unaddressed. As the majority explained, "this case has never been about" "the means by which the School Board determines biological sex upon a student's entrance into the School District." *Adams*, 57 F.4th at 799 n.2. The lead dissent even accused the majority of declining to address "the true nature of Adams's challenge," which, by the dissent's lights, revolved around the school board's "discriminatory notion[] of what 'sex' means." *Id.* at 32 (Jill Pryor, J., dissenting). But the dissent failed to recognize that "the true nature" of a lawsuit in which a plaintiff seeks to impose sex segregation along a different understanding of "what 'sex' means" (*id.*) reduces to an underinclusiveness claim, just like D.N.'s, and thus warrants only rational basis review. *See supra* §I.A. Chief Judge Pryor made a similar point in his dissent from the second panel opinion in *Adams*, explaining that had Adams's challenge been to how the school board defined sex, rational basis would have applied because "the mere act of determining an individual's sex, using the same rubric for both sexes, does not treat anyone differently on the basis of sex." *Adams v. Sch. Bd. of St. Johns Cnty.*, 3 F.4th 1299, 1326 (11th Cir. 2021); *accord F.S. Royster Guano Co. v. Commonwealth of Virginia*, 253 U.S. 412, 415 (1920) ("[T]he 'equal protection of the laws' required by the Fourteenth Amendment does not prevent the states from resorting to classification for the purposes of legislation.").

Indeed, the dissent's attempt to justify heightened scrutiny for a challenge to "what 'sex' means" ably demonstrates the impropriety of doing so. *Adams III*, 57 F.4th at 833 (Jill Pryor, J., dissenting). The dissent first asserted that heightened scrutiny applies "under the logic of *Bostock*." *Id*. But, as the en banc majority explained, the *Bostock* Court "held that 'discrimination based on homosexuality or transgender status necessarily entails discrimination based on sex,'" which "[was] not in question in [Adams's] appeal." *Id.* at 808-09 (quoting *Bostock v. Clayton Cty*., 140 S. Ct. 1731, 1747 (2020)). Like D.N.'s complaint, Adams's appeal "center[ed] on the converse of

that statement—whether discrimination based on biological sex necessarily entails discrimination based on transgender status." *Id.* at 809. The answer to that question is clear: "It does not." *Id.* So much for "the logic of *Bostock*." *Id.* at 833 (Jill Pryor, J., dissenting).

The lead dissent's only other theory of heightened scrutiny rests on the assertion that "[w]hen a state statute or policy makes a classification based on a 'quasi-suspect class,' courts apply heightened scrutiny as [they] would for a sex-based classification." *Id.* at 848 (citing *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440-42 (1985)). But the majority was correct to express "grave 'doubt' that transgender persons constitute a quasi-suspect class." *Id.* at 803 n.5. Such a claim is implausible given that the Supreme Court has held that even the mentally disabled—who had been "subjected to … grotesque mistreatment," including compulsory sterilization in at least 32 states, *Cleburne Living Ctr. v. Cleburne*, 726 F.2d 191, 197 (5th Cir. 1984), *aff'd in part and vacated in part*, 473 U.S. 432 (1985), and suffered "[a] regime of state-mandated segregation and degradation" that "in its virulence and bigotry rivaled, and indeed paralleled, the worst excesses of Jim Crow," *Cleburne*, 473 U.S. at 462 (Marshall, J., concurring in part)—did not constitute a quasi-suspect class. Moreover, SB 1028 says nothing about transgenderism, and certainly does not "make[] a classification based on" transgender status. *Adams III*, 57 F.4th at 848 (Jill Pryor, J., dissenting). It simply designates teams and sports for "males" or "females" and "base[s]" those distinctions "on the biological sex at birth of team members." Fla. Stat. §1006.205(3)(a)-(c).

If the dissent's reframing of Adams's claim were correct, then the Court would have applied rational basis and Adams's lawsuit would have failed at the pleadings stage. Just as D.N.'s does here.

C. Classifying Males and Females by Biological Sex Is Rational.

The only way D.N. might attack Florida's rational basis would be through a plausible allegation that Florida "inten[ds] to harm" transgender individuals by enforcing a biological definition

of sex. *Jana-Rock*, 438 F.3d at 211; *see also, e.g.*, *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977) ("Proof of ... discriminatory intent or purpose is required to show a violation of the Equal Protection Clause."); *Jones v. Governor of Fla.*, 975 F.3d 1016, 1034 (11th Cir. 2020) (en banc) ("[T]he Supreme Court hardly ever strikes down a policy as illegitimate under rational basis scrutiny. In the rare instances when it has done so, a common thread has been that the laws at issue lack any purpose other than a bare desire to harm a politically unpopular group.") (quotation marks omitted).

But D.N. has failed to make any such allegation. D.N. obliquely refers to "discrimination on the basis of sex and transgender status." DE1:2.[2] It is well settled, however, that "a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). And, in any event, nothing in D.N.'s complaint suggests that "invidious gender-based discrimination" pervaded Florida's decision to classify sex according to biology, *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 274 (1979), let alone "that [SB 1028] lack[s] any purpose other than a bare desire to harm" transgender individuals, *Jones*, 975 F.3d at 1034.

Moreover, though the Supreme Court's imprimatur is unnecessary to make the point, the high Court has always taken this biological baseline for granted. *See, e.g., Virginia*, 518 U.S. at 533 ("Physical differences between men and women, however, are enduring"); *Frontiero v. Rich-*

[2] D.N. also complains that "Governor DeSantis's remarks" after signing SB 1028 into law "fail[ed] to acknowledge the complexity of biology, as it relates to sex and gender identity," and that the claim, "[m]en are stronger [than women]," runs "counter to scientific research and evidence." *Id.* at 10-11. *But see Adams III*, 57 F.4th at 819, (Lagoa, J., concurring) ("[I]n comparison to biological females, biological males have: 'greater lean body mass,' *i.e.*, 'more skeletal muscle and less fat'; 'larger hearts,' 'both in absolute terms and scaled to lean body mass'; 'higher cardiac outputs'; 'larger hemoglobin mass'; larger maximal oxygen consumption (VO2 max), 'both in absolute terms and scaled to lean body mass'; 'greater glycogen utilization'; 'higher anaerobic capacity'; and 'different economy of motion.'").

ardson, 411 U.S. 677, 686 (1973) (plurality op.) ("[S]ex … is an immutable characteristic determined solely by the accident of birth."); *Bostock*, 140 S. Ct. at 1739 (proceeding "on the assumption that 'sex' ... refer[s] only to biological distinctions between male and female"). That should be enough. *See, e.g.*, *F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313-14 (1993) ("Where there are plausible reasons for Congress' action, our inquiry is at an end.") (quotation marks omitted).

Just as Luiere could "point to nothing in the history of Article 15-A and its enforcement or the sequence of events leading up to its enactment that would support an inference of anti-Spanish animus," *Jana-Rock*, 438 F.3d at 212, D.N. is equally unable to allege that SB 1028 deliberately discriminates against transgender individuals merely by enforcing the same understanding of sex that the Supreme Court has always upheld. The absence of any "[f]actual allegations" detailing discriminatory intent that could "raise a right to relief above the speculative level" dooms D.N.'s claim. *Twombly*, 550 U.S. at 555.

II. Defining Sex Based On Biology Does Not Violate Title IX.

D.N. also asserts that "[b]ecause [SB 1028] contains a definition of sex that directly contradicts federal law, and segregates transgender girls based solely on their status as transgender girls or women, it violates Title IX." DE1:16. *Adams III* makes quick work of this argument.

First, by "bas[ing]" sex on "biological sex at birth," Fla. Stat. §1006.205(3)(a), the statute does not "directly contradict[] federal law," DE1:16. To the contrary, "[r]eputable dictionary definitions of 'sex' from the time of Title IX's enactment show that when Congress prohibited discrimination on the basis of 'sex' in education, it meant biological sex, *i.e.*, discrimination between males and females." *Adams III*, 57 F.4th at 812 (collecting dictionary definitions). That definition was unambiguous. *See id.* at 813 ("If sex were ambiguous, it is difficult to fathom why the drafters

of Title IX went through the trouble of providing an express carve-out for sex-separated living facilities, as part of the overall statutory scheme.").

And if the relevant dictionaries and logical implications of Title IX's implementing regulations left any doubt about the proper definition of "sex," the Spending Clause resolves it. "Under the Spending Clause's required clear-statement rule," D.N.'s contention that "sex" includes transgender status "would only violate Title IX if the meaning of 'sex' unambiguously meant something other than biological sex, thereby providing the notice to the [Florida Legislature] that its understanding of the word 'sex' was incorrect." *Id.* at 816. But "it does not." *Id.* "Absent a clear statement from Congress, such a reading of Title IX would offend first principles of statutory interpretation and judicial restraint." *Id.* at 817.

D.N.'s second assertion fares no better; SB 1028 plainly does not "segregate[] transgender girls based solely on their status as transgender girls or women." DE1:16. The statute never once mentions "transgender girls" and is facially agnostic to "their status." *Id.* So D.N.'s argument relies on the proposition that segregating sports according to "biological sex at birth," Fla. Stat. §1006.205(3)(a), necessarily targets "transgender girls based solely on their status as transgender girls," DE1:16. But the conclusion does not follow from the premise. Confronting a similar line of reasoning, the *Adams III* Court was unequivocal: "[A] policy can lawfully classify on the basis of biological sex without unlawfully discriminating on the basis of transgender status." 57 F.4th at 809.

Just so here. Indeed, presuming anti-transgender discrimination wherever an entity enforces biological sex classifications would call into question Title IX itself. After all, the statute

adopts biology-based sex classifications and insulates from liability various forms of sex segregation—including "separate teams for members of each sex." 34 C.F.R. §106.41(b); *see also id.* §§106.32 (housing), 106.33 (facilities).

III. Forcing States To Classify "Sex" On The Basis Of "Gender Identity" Would Render Many Sex-Conscious Laws Unworkable.

A moment's reflection on the implications of D.N.'s position reveals the problems it invites. Start with defining "girls" and "boys" based on an individual's averred "gender identity." DE1:5. While reproductive biology offers a stable, objective definition of "sex," the concept of "gender identity" is fluid, subjective, and resists coherent line-drawing. Indeed, the American Psychological Association (APA) notes that "gender identity is internal," so "a person's gender identity is not necessarily visible to others." Am. Psych. Ass'n, *Guidelines for Psychological Practice with Transgender and Gender Nonconforming People*, 70 AM. PSYCHOLOGIST 862 (Dec. 2015), *available at* https://www.apa.org/practice/guidelines/transgender.pdf (hereafter "APA Guidelines"); *see also id.* at 836 (asserting some individuals "experience their gender identity as fluid").

And according to the American Academy of Pediatrics (AAP), "gender identity can be fluid, shifting in different contexts." Jason Rafferty, *Policy Statement, Am. Academy of Pediatrics, Ensuring Comprehensive Care & Support for Transgender & Gender-Diverse Children & Adolescents*, 142 Pediatrics no. 4 at 2 (Oct. 2018), *available at* https://perma.cc/EE6U-PN66 (hereafter "AAP Statement"). There are also those who seek to "redefine gender" or who "decline to define themselves as gendered altogether"—who "think of themselves as both man and woman (bi-gender, pangender, androgyne); neither man nor woman (genderless, gender neutral, neutrois, agender); moving between genders (genderfluid); or embodying a third gender." APA Guidelines at 862. No State can coherently classify men and women based on private, "internal," "fluid" feelings that might not even be "visible to others."

But it gets worse. Attempting to define a "transgender" class is a fool's errand. As the AAP points out, "transgender" is "not [a] diagnos[i]s," but a "personal" and "dynamic way[] of describing one's own gender experience." AAP Statement at 3. And while some guidelines note that not all "gender diverse" people identify as "transgender," AAP Statement at 2, others use "transgender" as "an umbrella term" that includes "a diverse group of individuals." Wylie C. Hembree et al., *Endocrine Treatment of Gender-Dysphoric/Gender-Incongruent Persons: An Endocrine Society Clinical Practice Guidelines*, 102 J. CLINICAL ENDOCRINOLOGY & METABOLISM 3869 (Nov. 2017) (hereafter "Endocrine Society Guidelines"); *see also* World Professional Ass'n for Transgender Health (WPATH), *Standards of Care for the Health of Transsexual, Transgender, and Gender-Conforming People* 97 (7th Version) (2012) (hereafter "WPATH Guidelines"). Depending on who you ask, the term covers people who identify with any of the following gender identities: "boygirl," "girlboy," "genderqueer," "eunuch," "bigender," "pangender," "androgyne," "genderless," "gender neutral," "neutrois," "agender," "genderfluid," and "third gender," and many others. WPATH Guidelines at 96; APA Guidelines at 862; Endocrine Society Guidelines at 3875. States forced to define sex according to subjective perceptions lose the ability to meaningfully distinguish between males and females. Even if "gender identity is a core part of [a person's] self-concept" and "must be respected," DE1:5, "respect[ing] transgender individuals' "self-concept" does not require that States reduce their definitions of sex to incoherence. *Cf. Orion*, 2017 WL 3387344, at *11 (rejecting expansion of "Black" that would render classification "devoid of any distinction" and thus "strip the provision of all exclusionary meaning").

It is no answer to claim that D.N. is "on estrogen" and thus has the "development … of a girl," in turn producing "no competitive advantage" over biological females. DE1:7. States are not required to tailor laws (let alone the contours of the terms informing the law's application) to every

individual's unique circumstances. *See, e.g.*, *Heller v. Doe*, 509 U.S. 312, 321 (1993) ("A classification does not fail rational-basis review because it is not made with mathematical nicety or because in practice it results in some inequality.") (internal citations, quotation marks omitted). Worse, D.N.'s "competitive advantage" carveout to Florida's definition of sex rests on the assumption that D.N. fits in better with biological females because D.N. is not a superior athlete and has "exhibited behavior that traditionally is associated with being a girl" like "wearing clothes and colors (pink) that girls wore." DE1:6. But defining sex in terms of athletic performance and "behavior that traditionally is associated with being a girl" would push Florida to "presume that men and women's appearance and behavior will be determined by their sex," which may in turn "embody 'the very stereotype the law condemns.'" *Glenn v. Brumby*, 663 F.3d 1312, 1320 (11th Cir. 2011) (quoting *J.E.B. v. Alabama*, 511 U.S. 127, 138 (1994)).

Indeed, defining sex according to gender identity would place Florida in the perilous position of having to classify its sports teams based on whoever "'walk[s] more femininely, talk[s] more femininely, dress[es] more femininely, wear[s] make-up, ha[s] her hair styled, and wear[s] jewelry.'" *Price Waterhouse v. Hopkins*, 490 U.S. 228, 235 (1989) (plurality op.). Can it really be that federal law permits D.N. to play on a girls' team so long as a State (or federal court) decides that D.N. runs or throws "like a girl"? Should a child's sex be determined by the number of pullups she or he can complete? Must States define sex based on "fixed notions" about the "abilities of males and females"? *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 725 (1982). Of course not. States need not define sex based on sex stereotypes. Defining sex based on sex will do.

CONCLUSION

This case is about whether States may objectively classify "[f]emales, women, or girls" "based on" their "biological sex at birth." Fla. Stat. §1006.205(3)(a). Because no federal law

compels otherwise, the answer is yes. *Amici* States therefore respectfully request that the Court grant Defendants' Motion to Dismiss.

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Respectfully submitted,

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