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Good morning. My name is Sarah Parshall Perry, and I am Senior Legal Fellow in the Meese Center for Legal & Judicial Studies at the Heritage Foundation in Washington, D.C.¹ I am also former senior counsel to the Assistant Secretary for Civil Rights at the Department of Education. Thank you for giving me the opportunity to appear before you today to offer my views on the proposed Fairness in Women's Sports Act, HB 2238, which would require interscholastic, intercollegiate, intramural, and club athletic teams or sports sponsored by public educational entities² to be expressly designated based on biological sex. I commend the Committee for holding a hearing on this important topic.

As a former varsity softball player, I enjoyed the protections of Title IX of the Education Amendments of 1972, a federal law that prohibits sex discrimination in education programs or activities receiving federal financial assistance.³ These are protections my 16-year-old daughter now enjoys on her varsity high school volleyball team. The issue we gather to discuss today is very close to my heart.

Today's hearing is about fairness. It's about equality. The participation of biological boys in girls' sports is, by its very definition, unfair and unequal. The young women of Kansas stand on the precipice of losing what they have worked so hard to achieve.

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² HB 2238 would also include any school or private postsecondary educational institution whose students or teams compete against a public educational entity.

³ Title IX of the Education Amendments of 1972 can be found at 20 U.S.C. § 1681 et seq., Pub. L. 92-318, as amended by section 3 of Pub. L. 93-568, 88 Stat. 1855. It states: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."

HB 2238 builds upon the foundation of Title IX. It is one of several similar bills that have been introduced in state legislatures across the country. These bills are not motivated by animus or bigotry against the transgender community, but by the absolute necessity of ensuring the continued equality of girls and women within education. The current un-level playing field has once again made women the target of discrimination. Without the assurances of this law, and in view of the expansive proposed rulemaking on Title IX currently underway at the U.S. Department of Education,⁴ this state's interscholastic athletic policies stand to very quickly become regressive.

In 1971, a Connecticut judge proclaimed: "Athletic competition builds character in our boys. We do not need that kind of character in our girls." It was comments like these that helped fuel the groundswell of support for the protection of women's educational opportunities during the waning days of the sexual revolution. It took a House and Senate Conference Committee several months to work through the more than 250 differences between the House and Senate versions of education bills until Title IX and the provision against sex discrimination was born. Congress had ample opportunity to expand the provision against sex discrimination to include gender identity or transgender status, but chose not to do so.⁵

Title IX filled the gap left by Title VII of the 1964 Civil Rights Act, which protects against sex discrimination in employment but otherwise excludes educational settings, as well as the gap left by Title VI, which prohibits discrimination on the basis of race, color, and national origin within programs receiving federal funding—but is silent on sex discrimination. These gaps necessitated a statutory remedy to address the vast educational disparities women and girls experienced in relation to boys and men before Title IX's passage. In high school athletics alone, the rate of girls' participation in 2016 was more than 10 times what it was prior to Title IX's passage—representing an increase of over 1,000 percent.⁶ One study demonstrated that 94% of senior female executives have played competitive scholastic sports.⁷ Title IX has successfully changed the lives of girls and young women in America by broadening their educational horizons, which in turn, has set them up for career success in later life.

⁴ Laura Meckler, "New Title IX Rules Set to Assert Rights of Transgender Students," *Wash. Post* (Mar. 30, 2022), <https://www.washingtonpost.com/education/2022/03/30/transgender-discrimination-title-ix-rule-students/>.

⁵ Title IX's origins lay incontrovertibly in the women's movement, as evidenced by the extensive congressional record indicating its mission to equalize educational opportunities for women. See, *Celebrating the 25th Anniversary of Title IX*, 143 Cong. Rec. 4218 (1997): "The House Education and Labor Committee had a large body of evidence of discrimination against girls and women in our education system. Since I came to the Congress and the committee in 1965 the committee had been involved in hearings related to equal educational opportunities for girls and women. We scrutinized textbooks which only portrayed successful men, admissions policies which excluded women from graduate and professional schools, and vocational education courses."

⁶ Dr. Amy S. Wilson, National Collegiate Athletic Association, *45 Years of Title IX: The Status of Women's Intercollegiate Athletics* (2017), available at: https://www.ncaa.org/sites/default/files/TitleIX45-295-FINAL_WEB.pdf.

⁷ *Why Female Athletes Make Winning Entrepreneurs*, ESPN-W and EY (2017), https://assets.ey.com/content/dam/ey-sites/ey-com/en_gl/topics/entrepreneurship/ey-why-female-athletes-make-winning-entrepreneurs.pdf.

In the end, this is about so much more than sports.

Title IX and its implementing regulations contain a set of limited, sex-affirmative exceptions. These exceptions permit schools to take sex into account to address imbalances in admissions, academic programming, and sports. A sex binary—male v. female—is the foundation upon which the entire statute’s operation rests. Title IX’s use of the words “both” and “either” to address educational disparities within its regulations reinforces the understanding that there are only two sexes, and that the opportunities for both must be equal under the law.⁸

Title IX requires educators to see women as they see men. And it ensures that girls and women, at long last, can finally experience sex equality in their educational pursuits.

But this state’s Democratic governor, Laura Kelly has already vetoed this bill’s predecessor not once – but twice. Considering the Biden Administration’s impending rule on Title IX which will perpetuate the very discrimination that Title IX was passed to prevent⁹, this state—and indeed, this chamber—has a critical opportunity to secure the hard-fought equality of girls and women in Kansas.

Some athletic associations—at both the secondary or postsecondary level, and within the context of certain NCAA sports—permit transgender athletes (biological males) to participate on girls’ teams if they have had one year or more of testosterone suppression therapy. This is a laughably inadequate attempt to fundamentally change decades-long precedent on sex-segregated interscholastic athletics.

Let me be clear, one year of testosterone suppression therapy does nothing to change in any meaningful way the faster muscle twitch response, greater bone density, greater muscle mass, and higher lung capacity that biological boys possess when compared to girls. Such biological distinctions, which give biological males a decided, if not overwhelming,

⁸ Critics may proffer *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020) and the Supreme Court’s expansion of “sex discrimination” within the scope of employment discrimination under Title VII of the Civil Rights Act of 1964 to include discrimination on the basis of sexual orientation and transgender status as a reason to similarly expand Title IX’s prohibition against sex discrimination to transgender status. However, in his opinion for the majority in *Bostock*, Supreme Court Justice Neil Gorsuch began: “We proceed on the assumption that ‘sex’ signified what the employers suggest, referring only to biological distinctions between male and female.” *Bostock* at 1739. From there, the Court noted, “An individual’s homosexuality or transgender status is not relevant to employment decisions. That’s because it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex.” *Id.* at 1741. The Court’s Title VII precedent supports the proposition that relying at least in part on an individual’s biological sex (as with the case of sexual orientation or transgender status) is prohibited within an employment setting. However, unlike Title VII, which is a sex-“prohibitive” anti-discrimination law, Title IX differs significantly in its text, purpose, operation, and in certain of its applications including athletics, and is “sex-affirmative,” requiring consideration of a student’s biological sex.

⁹ The Biden Administration has repeatedly emphasized its commitment to “combatting” what it calls “legislative attacks on transgender kids at the state level.” See White House, Fact Sheet: Biden–Harris Administration Advances Equality and Visibility for Transgender Americans (Mar. 31, 2022), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/06/30/fact-sheet-biden-harris-administration-advances-equality-for-transgender-americans/>.

advantage over females in athletic competition, cannot be suppressed, period. In a study¹⁰ by two Duke University Law School professors, comparing Olympic champion sprinter Allyson Felix's 400 meters lifetime best of 49.26 to that of men and boys around the world, the pubescent and adult males of all ages outperformed her more than 15,000 times in 2017 alone. To envision these competitive advantages in real time, we need look no further than "Lia" (formerly Will) Thomas who last year clinched the 500-meter freestyle NCAA swimming championship for the women's team at the University of Pennsylvania. During his two years of competing on the men's swimming team, Will Thomas had been a less-than-average swimmer.¹¹

As stated in the Preamble to the Title IX Final Rule, published by the Department of Education on May 19, 2020:¹²

In promulgating regulations to implement Title IX, the Department expressly acknowledged physiological differences between the male and female sexes. For example, the Department's justification for not allowing schools to use "a single standard of measuring skill or progress in physical education classes . . . [if doing so] has an adverse effect on members of one sex" was that "if progress is measured by determining whether an individual can perform twenty-five pushups, the standard may be virtually out-of-reach for many more women than men because of the difference in strength between average persons of each sex."

These biological distinctions provide the imperative for HB 2238 and offer a compelling argument in favor of its passage by this chamber. It would be ironic and wrong to enable biological males who declare themselves to be women based on their own sense of a wholly subjective, malleable, and evolving gender identity to obtain an unfair and discriminatory advantage over biological women whose immutable, unchanging sex has been recognized for decades as worthy of protection under well-established federal law.

A 2021 Politico and Morning Consult poll¹³ found that 53 percent of Americans support a ban on transgender athletes competing in women's sports. A 2021 Harvard Harris¹⁴ poll

¹⁰ Doriane Lambelet Coleman and Wickliffe Shreve, *Comparing Athletic Performances: The Best Elite Women to Boys and Men*, DUKE CTR. FOR SPORTS LAW & POL'Y (2018), available at <https://law.duke.edu/sites/default/files/centers/sportslaw/comparingathleticperformances.pdf>.

¹¹ Associated Press, "Penn Swimmer Lia Thomas Becomes First Trans Athlete to Win Division I National Title," *Sports Illustrated*, March 17, 2022, available at: <https://www.si.com/college/2022/03/17/lia-thomas-first-trans-athlete-national-championship-swimmer>. See also, Hank Berrian, "'Her Rankings ... Have Bounced From #462 As A Male To #1 As A Female': 16 Lia Thomas Teammates Sign Letter Asking Penn Not To Sue NCAA, Bar Thomas From Competing," *Daily Wire*, February 24, 2022, available at <https://www.dailywire.com/news/her-rankings-have-bounced-from-462-as-a-male-to-1-as-a-female-16-lia-thomas-teammates-sign-letter-asking-penn-not-to-sue-ncaa-bar-thomas-from-competing>.

¹² U.S. Dep't of Educ., Office for Civil Rights, *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, Final Rule, 85 Fed. Reg. 30,178 (May 19, 2020).

¹³ Morning Consult & Politico, *National Tracking Poll No. 210,332*, March 06-08, 2021, available at <https://www.politico.com/f/?id=00000178-1a7a-d750-a77a-3efba0ac0000>.

¹⁴ Monthly Harvard-Harris Poll, February 23-25, 2021, available at https://harvardharrispoll.com/wp-content/uploads/2021/03/February2021_HHP_Topline_RV.pdf.

found that 55 percent of Americans oppose Presidents Biden’s executive order allowing boys to compete in girls’ sports at schools. Even more recently, a 2022 Washington Post poll found that 55 percent of Americans are opposed to allowing biological men and boys to compete with women and girls in high school sports, and 58 percent opposed to it for college and professional sports.¹⁵ The same poll found that more than two-thirds of Americans (68 percent) say that boys identifying as girls would have a competitive advantage over other girls if they were allowed to compete with them in youth sports.

Caitlyn Jenner is a biological male and a celebrated former Olympian (a gold medal decathlete, in fact) who competed in track and field under the name “Bruce Jenner.” Though Caitlyn came out as transgender in 2015 and identifies as a woman, the former athlete recently spoke out¹⁶ against allowing transgender athletes who were born male to compete on girls’ sports teams. The weight of public sentiment is behind the passage of this bill.

Transgender students are entitled to enjoy all aspects of American education in the same way as students of every race, sex, creed, national origin, and religion. This is the guarantee ensured by federal law.

But they do not belong in spaces where the law has spoken unambiguously on distinct, long-standing, sex-specific protections for women and girls within the field of competitive sports. HB 2238 accounts for athletic opportunities sought by transgender athletes through recognition of co-ed sports teams.

While critics have sent up a hue and cry of bigotry and hatred in painting this legislation as discriminatory, they misconstrue dissent about biology and matters of public concern as hatred. I urge this chamber not to fall victim to the increasingly strong grasp of cancel culture and the woke zeitgeist. Disagreement is not bigotry, especially when it will deprive biological females of the opportunity to excel in sports, and the confidence and life-changing experiences that come with that competition. Recognizing settled physiological distinctions—as they have been from time immemorial—does not amount to discriminatory conduct.

The entire cannon of American civil rights law exists to protect the interests of all Americans, not elevate certain Americans to a superior, privileged positions over others. HB 2238 is the paradigmatic example of a level playing field—where boys and girls are given equal educational opportunities in all aspects of learning, including sports. To open women’s sports in Kansas to biological males will destroy educational athletic

¹⁵ Tara Bahrapour, Scott Clement, and Emily Guskin, “Most Americans oppose trans athletes in female sports, poll finds,” Washington Post, July 22, 2022, available at <https://www.washingtonpost.com/dc-md-va/2022/06/13/washington-post-umd-poll-most-americans-oppose-transgender-athletes-female-sports/>.

¹⁶ Adam Shaw and Brooke Singman, “Caitlyn Jenner Opposes Boys Who Are Trans Playing Sports on Girls’ Teams in School, Says It Is Unfair,” May 2, 2021, Fox News, available at <https://www.foxnews.com/politics/caitlyn-jenner-opposes-transgender-sports-girl-teams>.

opportunities and guarantee unfair outcomes. HB 2238 is a commonsense bill with commonsense language and a commonsense application.

Failure to pass this bill can, in my view, be properly labelled as misogyny. Womanhood cannot be achieved by puberty blockers, long hair, surgical intervention, lipstick, or the right athletic training. It is an immutable, biological, chromosomal reality that cannot be overcome and is deserving of the continued protection that HB 2238 provides. If a few months of hormone suppression and a self-declaration of womanhood are enough to allow a biological male to compete as a woman, what, after all, was the women's liberation movement for?

The principles of fundamental fairness and equal opportunity embodied in HB 2238 must prevail over arguments for the inclusion of males as females. They must, if girls' sports are to continue to exist at all.

Thank you for the opportunity to submit this testimony.