

No. 24-449

IN THE
Supreme Court of the United States

WARREN PETERSEN, President of the
Arizona Senate, *et al.*,
Petitioners,
v.

JANE DOE, by Next Friends and Parents
HELEN DOE and JAMES DOE, *et al.*
Respondents.

**On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit**

**BRIEF OF *AMICUS CURIAE*
INDEPENDENT COUNCIL ON WOMEN'S
SPORTS AND 135 FEMALE ATHLETES,
COACHES, SPORTS OFFICIALS, AND
PARENTS OF FEMALE ATHLETES
IN SUPPORT OF PETITIONERS**

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INTEREST OF AMICUS CURIAE¹

Amici curiae are the Independent Council on Women's Sport (ICONS) and its members and 135 female² athletes, parents of female athletes, coaches and sports officials.³ **ICONS** is a network and advocacy group of current and former collegiate and professional women athletes, their families and supporters who agree with former Justice Ginsberg that “[p]hysical differences between men and women . . . are enduring [and that] [i]nherent differences between men and women . . . remain cause for celebration[.]” *United States v. Virginia*, 518 U.S. 515, 533, 116 S. Ct. 2264, 2276, 135 L. Ed. 2d 735 (1996) (“*VMI*”) (cleaned up; citations omitted).

Individual *amici* hail from all levels of sport, from high school to college, and from professional to Olympic sport, and include: **Martina Navratilova**, 59x Grand Slam Champion in Tennis; **Donna de Varona**, Olympic Gold Medalist in Swimming, world record holder, Olympic broadcaster and long-time Title IX advocate; **Laura Wilkinson**, Olympic and World Champion in Diving and parent; **Summer**

¹ Rule 37 statement: No party's counsel authored any of this brief; *amici* alone funded its preparation and submission. *See* Sup. Ct. R. 37.6.

² As used herein the terms “female” “male” “woman” “man” “women” “men” and “girls” and “boys” are used to refer to members of the female or male sex without regard to gender identification.

³ Individual athletes, coaches, and family members are identified in **Attachment A** to this Brief.

Sanders, Olympic Gold Medalist; **Jill Sterkel**, Olympic Swimmer, world record holder, and University of Texas head swim coach; **Kylee Alons**, 2-time NCAA national champion in Swimming, 31x All-American, competitor against a male athlete in a NCAA women's national championship; **Grace Countie**, 22x All-American in Swimming and competitor against a male athlete in a NCAA women's national championship; **Riley Gaines**, 12x All-American in Swimming, competitor against a male athlete in a NCAA women's national championship; **Reka Gyorgy**, Olympian and All-American in Swimming, competitor against a male athlete in a NCAA women's national championship; **Kaitlynn Wheeler**, All-American in Swimming, competitor against a male athlete in a NCAA women's national championship; **Brooke Slusser**, currently co-captain on NCAA Division I San Jose State University women's Volleyball team on which a male is a team member; **Jennifer Sees**, NCAA Track & Field athlete, high school track coach, and parent of NCAA Soccer player; **Pam Etem**, Olympic Rower; **Madisan Debos**, NCAA Track & Field athlete; **Evie Edwards**, Cyclist, mother of an elementary-age female Cyclist; and numerous other NCAA, Olympic, and Paralympic female athletes, coaches, parents and sport officials.

Reflecting their experience, *amici* have an interest in the preservation of women's only sports teams and the female category in sport.

SUMMARY OF ARGUMENT

Recognizing biological differences between the sexes and protecting women's spaces from male intrusion are foundational for women to succeed in sports and in life.

It is the experience of *amici* that legal protections giving women the opportunity to take part in and succeed in sport are essential to the advancement of women and depend on the law's basic ability to distinguish between women and men and upon courts' capacity to evaluate, compare, and equalize the opportunities of the former in comparison to those of the latter.

Harm brought about by the federal courts constitutionalizing *Bostock v. Clayton County* has been (and will continue to be) dramatic and far reaching. Here, *amici* explain how the impact of constitutionalizing gender identity as an extension of *Bostock* is opening women's sports and safe spaces to biological males, and gutting Title IX's longstanding protections for women, making it crucial for this Court to grant the requested writ of certiorari and review the decision of the U.S. Court of Appeals for the Ninth Circuit.

ARGUMENT

I. Since 2020 There Has Developed a Reoccurring Pattern of Cases in Which Federal Courts Have Regularly Substituted Their Judgment for that of State Legislatures on Matters of Sport Eligibility

In this case and in others like it, including *Little v. Hecox*, No. 24-38 and *West Virginia v. B.P.J.*, No. 24-43, in which petitions for writs of certiorari are currently pending, the Fourth and Ninth Circuits and numerous federal district courts have constitutionalized gender identity by extending this Court's decision in *Bostock v. Clayton County* to Equal Protection Clause analysis and to the application of Title IX of the Education Amendments of 1972, 20 U.S.C. 1681, *et seq.*

During the last five years there have been at least five federal district court decisions and three federal Court of Appeals decisions applying *Bostock* and rendering unenforceable state laws intended to protect women's sport. To date, only a single federal district court has upheld such a law. *See D.N. by Jessica N. v. DeSantis*, 701 F. Supp. 3d 1244 (S.D. Fla. 2023); *D.N., by her next friends, JESSICA N., mother, & GARY N., father, Plaintiff, v. GOVERNOR RONALD DESANTIS, in his official capacity as Governor of Fla., et al., Defendants.*, No. 21-CV-61344, 2024 WL 5165857, (S.D. Fla. Dec. 19, 2024)

The instant case followed a now familiar fact pattern. It began as a lawsuit challenging an Arizona state law meant to reserve the girls' category of scholastic sports for girls-only. Plaintiffs are biological boys diagnosed with gender dysphoria who have been taking puberty blockers since puberty (or before) and want to play on one or more girls' teams.⁴

As in other similar cases, Plaintiffs are represented by attorneys from one or more large national law firms (in this case Debevoise & Plimpton LLP and Osborn Maledon PA) and a transgender advocacy organization (in this case the National

⁴ Recent federal court cases in which plaintiffs are trans-identifying boys who want to play on a school's girls' team and have taken puberty blockers since at or before puberty include *Tirrell v. Edelblut*, No. 24-CV-251-LM-TSM, 2024 WL 3898544, at *2 (D.N.H. Aug. 22, 2024) (fifteen-year-old trans-identifying boy who began puberty blockers around age thirteen); *Doe v. Hanover Cnty. Sch. Bd.*, No. 3:24CV493, 2024 WL 3850810, at *2, 13 (E.D. Va. Aug. 16, 2024) (eleven-year-old trans-identifying boy on puberty blockers); *Doe v. Horne*, 683 F. Supp. 3d 950, 958 (D. Ariz. 2023), *aff'd*, 115 F.4th 1083 (9th Cir. 2024) (eleven-year-old and fifteen-year-old trans-identifying boys on puberty blockers); *A.M. by E.M. v. Indianapolis Pub. Sch.*, 617 F. Supp. 3d 950, 955 (S.D. Ind. 2022) (ten-year-old trans-identifying boy taking puberty blockers); and *B. P. J. v. W. Virginia State Bd. of Educ.*, 550 F. Supp. 3d 347, 351 (S.D.W. Va. 2021) (eleven-year-old trans-identifying boy on puberty blockers).

Center for Lesbian Rights).⁵

Plaintiffs brought an “as applied” challenge⁶ to the Arizona sports eligibility law and sought a preliminary injunction, arguing that it was important to their health and wellbeing that they be able to play on the girls’ team in the upcoming season⁷ otherwise

⁵ Cases in which the Plaintiffs are represented by national firms and/or a transgender advocacy organization include *Tirrell*, 2024 WL 3898544, at *1 (represented by Goodwin Procter LLP, ACLU and GLBTQ Legal Advocates & Defenders); *Doe v. Hanover*, 2024 WL 3850810, at *1 (represented by Wilmer Cutler Pickering Hale & Dorr LLP and ACLU); *Doe v. Horne*, 683 F. Supp. 3d at 955 (Debevoise & Plimpton LLP, Osborn Maledon PA and National Center for Lesbian Rights); *B. P. J.*, 550 F. Supp. at 350 (Cooley, ACLU, Lambda Legal); *A.M. by E.M.*, 617 F. Supp. 3d at 954 (ACLU); and *Hecox v. Little*, 479 F. Supp. 3d 930, 943 (D. Idaho 2020) (Cooley, ACLU).

⁶ For cases involving “as applied” challenges, *see, e.g.*, *Tirrell*, 2024 WL 3898544, at *4; *Doe v. Hanover*, 2024 WL 3850810, at *8, 9; *Doe v. Horne*, 683 F. Supp. 3d at 956; *B. P. J.*, 550 F. Supp. 3d at 355; *Hecox*, 479 F. Supp. 3d at 971.

⁷ For cases seeking emergency relief to play in the upcoming season, *see, e.g.*, *Tirrell*, 2024 WL 3898544, at *5; *Doe v. Hanover*, 2024 WL 3850810, at *6; *Doe v. Horne*, 683 F. Supp. 3d at 956; *B. P. J.*, 550 F. Supp. 3d at 351; *A.M. by E.M.*, 617 F. Supp. 3d at 969; *Hecox*, 479 F. Supp. 3d at 972.

they were at risk of adverse mental health impacts.⁸ Plaintiffs took the position that they did not have a significant performance advantage over girls competing in their sport because of their use of puberty blockers and/or cross-sex hormones which they say eliminate sport performance advantages possessed by boys. Although the Plaintiffs' claims regarding lack of competitive harm were hotly contested and at odds with legislative findings, the district court and Court of Appeals preferred Plaintiffs' evidence over legislative findings and evidence from Defendants' experts.⁹

⁸ For cases in which a risk of suicide is referenced, see, e.g., *Tirrell*, 2024 WL 3898544, at *2; *Doe v. Hanover*, 2024 WL 3850810, at *10; *Doe v. Horne*, 683 F. Supp. 3d at 957; *Hecox*, 479 F. Supp. 3d 930, 945-46

⁹ Cases in which the plaintiffs' claims have been that they lack a sport performance advantage over girls or that it is necessary for the state to specifically prove that for a trans-identifying boy to be kept off a girls' team the state must prove that particular boy has a performance advantage over girls include *Tirrell*, 2024 WL 3898544, at *2 ("Before puberty, there are no significant differences in athletic performance between boys and girls. . . A transgender girl who does not experience male puberty and who receives hormone therapy to induce female puberty will not have an athletic advantage over other girls as a result of being born with a male anatomy."); *Doe v. Hanover*, 2024 WL 3850810, at *9 ("this treatment, which prevents endogenous puberty and therefore any physiological changes caused by increased

In this case, like similar cases, the district court (1) preferred expert testimony from Plaintiffs' experts over the rationale for the state law advanced by the legislature, in spite of the fact that those defending the law adduced competing expert testimony concluding that boys retain male performance advantages in sport even after taking puberty blockers and/or cross-sex hormones,¹⁰ (2) concluded that because only a

testosterone circulation, prevents her from developing any physiological advantage over other girl athletes") at *13 ("A denial of her application to compete without *any* inquiry into her athletic capacity or competitive advantage would seem to spurn rather than to advance the Policy's stated goal of ensuring 'fairness in competition *for all participants.*'"); *Doe v. Horne*, 683 F. Supp. 3d at 964 ("Transgender girls who have not undergone male puberty do not have an athletic advantage over other girls."); *Hecox*, 479 F. Supp. 3d at 976 ("While the Court recognizes and accepts the principals outlined in *Clark*, *Clark's* holding regarding general sex separation in sport, as well as the justifications for such separation, do not appear to be implicated by allowing transgender women to participate on women's teams."), 978 ("it is not clear that transgender women who suppress their testosterone have significant physiological advantages over cisgender women.").

¹⁰ For cases in which the district court has rejected or disregarded expert evidence of male performance advantages, *see, e.g., Doe v. Horne*, 683 F. Supp. 3d at 966 ("There is no basis for these experts to attribute those small differences to physiology or anatomy

small portion of the population is transgender, allowing boys to compete on women's teams does not substantially displace female athletes,¹¹ and (3)

instead of to other factors such as greater societal encouragement of athleticism in boys, greater opportunities for boys to play sports, or differences in the preferences of the boys and girls surveyed.”); *A.M. by E.M.*, 617 F. Supp. 3d at 957-59 (excluding expert testimony); *B. P. J.*, 550 F. Supp. 3d at 355; *Hecox*, 479 F. Supp. 3d at 979 (“Plaintiffs have also presented compelling evidence that equality in sports is not jeopardized by allowing transgender women who have suppressed their testosterone for one year to compete on women's teams. Plaintiffs’ medical expert, Dr. Joshua Safer, suggests that physiological advantages are not present when a transgender woman undergoes hormone therapy and testosterone suppression.”).

¹¹ For cases in which the district court relies upon the number of transgender children playing sports, *see, e.g., Doe v. Horne*, 683 F. Supp. 3d at 961 (“not a substantial number”); *B. P. J.*, 550 F. Supp. 3d at 356 (0.7% of youth population); *Hecox v. Little*, 479 F. Supp. 3d at 977–78 (“Although the ratio of males to females is roughly one to one, less than one percent of the population is transgender. Dkt. 22-1, at 22. Presumably, this means approximately one half of one percent of the population is made up of transgender females. It is inapposite to compare the potential displacement allowing approximately half of the population (cisgender men) to compete with cisgender women, with any potential displacement one half of one percent of the population (transgender

opined that policies of the NCAA and/or IOC which permit males on females' sports teams weigh in favor of the Plaintiffs' participation.¹² *Amici* submit that every one of these findings by the federal courts in these cases are contrary to law and science.

In this case and all cases to date where state laws regarding sport eligibility have been overturned the district court has purported to rely upon this

women) could cause cisgender women. It appears untenable that allowing transgender women to compete on women's teams would substantially displace female athletes.”).

¹² For cases in which the district court relies upon the policies of the NCAA or IOC, *see, e.g., Doe v. Horne*, 683 F. Supp. 3d at 965 (“A categorical bar to girls and women who are transgender stands in “stark contrast to the policies of elite athletic bodies that regulate sports both nationally and globally—including the National Collegiate Athletic Association (“NCAA”) and the International Olympic Committee (“IOC”)—which allow transgender women to participate on female sports teams once certain specific criteria are met,” primarily specified levels of circulating testosterone.”); *Hecox*, 479 F. Supp. 3d at 944 (“This categorical bar to girls and women who are transgender stands in stark contrast to the policies of elite athletic bodies that regulate sports both nationally and globally—including the National Collegiate Athletic Association (“NCAA”) and the International Olympic Committee (“IOC”)—which allow transgender women to participate on female sports teams once certain specific criteria are met.”),

Court's holding in *Bostock v. Clayton County, Georgia*, 590 U.S. 644 (2020), to find the state law violates Equal Protection and/or Title IX.¹³

On appeal in this case and similar cases the Court of Appeals upheld the district court's factual findings, relying upon *Bostock*, while, like the district court, referencing the policies of the NCAA and IOC.¹⁴

As indicated by the pattern in this case and many others, federal courts are likely to continue to

¹³ *Tirrell*, 2024 WL 3898544, at *5; *Doe v. Horne*, 115 F.4th 1083, 1107 (9th Cir. 2024); *Hecox v. Little*, 104 F.4th 1061, 1080 (9th Cir. 2024), as amended (June 14, 2024); *B.P.J. by Jackson v. W. Virginia State Bd. of Educ.*, 98 F.4th 542, 563-64 (4th Cir. 2024); *Doe v. Hanover Cnty*, 2024 WL 3850810, at *6, n.7; *Doe v. Horne*, 683 F. Supp. 3d at 974; *A.M. by E.M.*, 617 F. Supp. 3d at 964-66; *B. P. J.*, 550 F. Supp. 3d at 356-57; *Hecox*, 479 F. Supp. 3d at 962, 974, 984.

¹⁴ For Court of Appeals decisions relying upon the alleged expertise of the NCAA and/or IOC, *see, e.g.*, *Doe v. Horne*, 115 F.4th at 1094 (“Under current NCAA policy, for example, transgender women are permitted to compete in women's sports when they meet sport-specific standards for documented testosterone levels.”); *Hecox v. Little*, 104 F.4th at 1068, 1070 (“Elite athletic regulatory bodies, including the National Collegiate Athletic Association (NCAA) and the International Olympic Committee (IOC), also had policies allowing transgender women athletes to compete if they met certain criteria.”).

substitute their judgment for that of state legislatures and rely upon an incorrect understanding of *Bostock* to prevent the enforcement of state laws meant to prevent women's sports opportunities from being usurped by male competitors.

II. Deference Being Extended by Federal Courts to NCAA and IOC Policies is Misplaced

Congress passed Title IX in 1972 to help women close the gap with men in educational opportunities for “women.” *Cohen v. Brown Univ.*, 101 F.3d 155, 165 (1st Cir. 1996) (*Cohen II*). Improving opportunities for girls and women in high school and college sports was a key motivator for the law, and the means used to improve sports opportunities for women was to require that women had, in comparison to men, equal opportunities and resources to compete in sex-separated sport.¹⁵ By many measures Title IX has been successful. In 1972, only 7% of high-school varsity athletes were women; in 2018, it was 43%.¹⁶

¹⁵ See, e.g., Coleman, D.L., Joyner, M.J., Lopiano, D., *Re-Affirming the Value of the Sports Exception to Title IX's General Non-Discrimination Rule*, DUKE JOURNAL OF GENDER LAW & POLICY, Vol. 27:69 at 77-87 (2020).

¹⁶ Women's Sports Found., *50 Years of Title IX* at 12 (May 2022), <https://perma.cc/TN74-PJ4S>.

A. The NCAA Transgender Eligibility Policies Are Based on Ideology and Not Science or Reasonable Sport Management Practices

However, for nearly a decade and a half the National Collegiate Athletic Association (NCAA) and state high school athletic associations have been working at cross purposes to Title IX, diminishing opportunities for women in sport by adopting, promulgating, and tenaciously defending, eligibility rules which permit trans-identifying males to compete in women's sports in derogation of the equal opportunities in sex-separated sport model introduced by Title IX.

In October 2009 the National Center for Lesbian Rights and the Women's Sports Foundation, brought together leaders from the NCAA and the Federation of State High School Associations (NFHS)¹⁷ to develop a report and policy recommendations to make transgender student-athletes eligible to participate in school-based sports programs in the sex category of the transgender athlete's choosing. This group adopted a 55-page report in October 2010 called "It Takes A Team!"¹⁸

¹⁷ The National Federation of State High School Associations (NFHS), which like the NCAA is based in Indianapolis, Indiana, is the national association for state high school athletic associations.

¹⁸ It Takes A Team! Report, *available at*: <https://www.nclrights.org/wp->

which was repurposed by the NCAA Office of Inclusion and labeled the *NCAA Transgender Handbook*. The Handbook, principally authored by Dr. Pat Griffin, Former Director, It Takes A Team! Education Campaign for Lesbian, Gay, Bisexual and Transgender Issues in Sport, Women's Sports Foundation and Helen J. Carroll, Sports Project Director, National Center for Lesbian Rights, remains a part of the NCAA's transgender eligibility policies to this day.¹⁹

At the same time, the NCAA put forward its 2010 NCAA Policy on Transgender Student-Athlete Participation which permitted a male student-athlete to play on a women's team if they had undergone "one calendar year of testosterone suppression treatment."²⁰ With only slight variation this remains the NCAA's policy. The 2010 NCAA Policy on Transgender Student-Athlete Participation was not founded upon any empirical research but it nonetheless kickstarted a nationwide trend of high school athletic associations adopting similar policies.

content/uploads/2013/07/TransgenderStudentAthlete
Report.pdf

¹⁹ *NCAA Transgender Handbook*, available at:

[https://ncaaorg.s3.amazonaws.com/inclusion/lgbtq/IN
C_TransgenderHandbook.pdf](https://ncaaorg.s3.amazonaws.com/inclusion/lgbtq/IN_C_TransgenderHandbook.pdf).

²⁰ 2010 NCAA Policy on Transgender Student-Athlete Participation, available at:

[https://ncaaorg.s3.amazonaws.com/inclusion/lgbtq/IN
C_TransgenderStudentAthleteParticipationPolicy.pdf](https://ncaaorg.s3.amazonaws.com/inclusion/lgbtq/IN_C_TransgenderStudentAthleteParticipationPolicy.pdf)

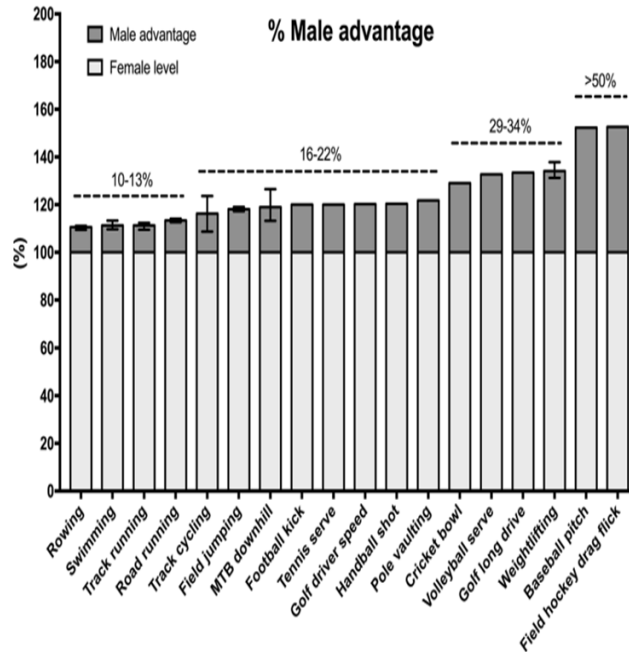
B. Discriminatory Impacts of the NCAA's Current Transgender Eligibility Policies

However, the premise of the NCAA's Transgender Eligibility Policies, that men can equally, fairly, and lawfully compete in women's sports through testosterone suppression, is flawed.

1. The Male-Female Sport Performance Gap

Developmental biologist Dr. Emma N. Hilton and sport physiologist Dr. Tommy R. Lundberg report that “the performance gap between males and females . . . often amounts to 10 – 50% depending on sport.” Hilton, E.N., Lundberg, T.R., “Transgender Women in the Female Category of Sport: Perspectives on Testosterone Suppression and Performance Advantage,” *Sports Medicine* (2021) 51:199-214, p. 199. Hilton and Lundberg note that the sport performance gap between men and women is not limited to certain sports but applies generally to most skills necessary for success in sport. *Id.* Here is a chart that illustrates male sport performance advantages across a wide group of discrete sport skills:

Fig. 1 The male performance advantage over females across various selected sporting disciplines. The female level is set to 100%. In sport events with multiple disciplines, the male value has been averaged across disciplines, and the error bars represent the range of the advantage. The metrics were compiled from publicly available sports federation databases and/or tournament/competition records. *MTB* mountain bike



Reproduced from: Hilton, E.N., Lundberg, T., “Transgender Women in the Female Category of Sport: Perspectives on Testosterone Suppression and Performance Advantage,” *Sports Medicine*, (2021) 51:199-214, p. 202, Fig. 1.

The source of male athletic performance advantages over women (sometimes described as the “Male-Female Sport Performance Gap”) is attributed by many scientists to genetic differences between males and females and the effects higher levels of testosterone have on the male body throughout male development. The developmental and physiological effects brought about by genetic differences between males and females and higher levels of circulating testosterone in males begin well before puberty.

In the womb and in the 6-9 month “mini puberty” phase immediately post birth natal males experience endogenous synthesis and secretion of higher levels of testosterone than natal females, triggering differentiation in male body structure beginning even before birth. The result is “is a clear sex difference in both muscle mass and strength even adjusting for sex differences in height and weight. On average women have 50% to 60% of men’s upper arm muscle cross-sectional area and 65% to 75% of men’s thigh muscle cross-sectional area, and women have 50% to 60% of men’s upper limb strength and 60% to 80% of men’s leg strength. Young men have on average a skeletal muscle mass of >12 kg greater than age-matched women at any given body weight.”²¹ The impact of these differences is “an obvious performance enhancing effect, in particular in sports that depend on strength and (explosive) power, such as track and field events.” *Id.* Also, “levels of circulating hemoglobin are androgen-dependent and consequently higher in men than in women by 12%[.]” *Id.* Increased levels of hemoglobin are due to the fact that, “[t]estosterone increases secretion of and sensitivity to erythropoietin, the main trophic hormone for erythrocyte production and thereby hemoglobin synthesis[.]” *Id.* These effects from testosterone and erythropoietin “[i]ncreas[e] the amount of hemoglobin in the blood [with] the biological effect of increasing oxygen transport from lungs to

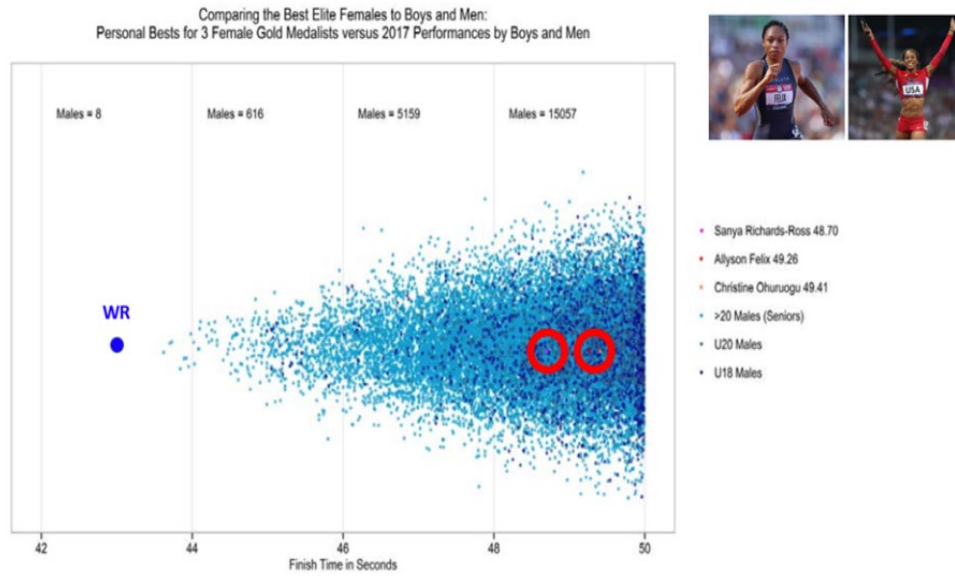
²¹Handelsman, D.J., Hirschberg, A.L., Bermon, S., “Circulating Testosterone as the Hormonal Basis of Sex Differences in Athletic Performance,” *Endocr. Rev.* 2018 Oct; 39(5): 803-829.

tissues, where the increased availability of oxygen enhances aerobic energy expenditure. This is exploited to its greatest effect in endurance sports. . . It may be estimated that as a result the average maximal oxygen transfer will be ~10% greater in men than in women, which has a direct impact on their respective athletic capacities.” *Id.*

Further, due to the impacts of testosterone, and perhaps other factors, on male development, “on average men are 7% to 8% taller with longer, denser, and stronger bones, whereas women have shorter humerus and femur cross-sectional areas being 65% to 75% and 85%, respectively, those of men.” *Id.* The athletic advantages conferred by men’s larger and stronger bones includes, “greater leverage for muscular limb power exerted in jumping, throwing, or other explosive power activities” and greater male protection from stress fractures. *Id.* Additionally, there is a sex difference in pulmonary function which “may be largely explained by the androgen-sensitive difference in height, which is a strong predictor of lung capacity and function.” *Id.*

A point of comparison that helps put the Male-Female Sport Performance Gap in perspective is to understand that every women’s world record in every track and field event is bested every year by dozens, and in many cases hundreds, of high school age males. The following chart illustrates the performance gap by comparing the times of three 400m female Olympic gold medalists to thousands of males in 2017:

Performance gap in elite sports



Above chart used with permission from Ross Tucker and derived from: Coleman, D.L., Joyner, M.J., Lopiano, D., “Re-Affirming the Value of the Sports Exception to Title IX’s General Non-Discrimination Rule,” *Duke Journal of Gender Law & Policy*, Vol. 27:69-134, p. 89.

As demonstrated in the chart, in a single year tens of thousands of males outperformed the best female 400m runners in the world. Here is a table which shows that high school boys ages 14-15 have eclipsed many women’s world records by large margins:

Table 3 Selected junior male records in comparison with adult elite female records

Event	Schoolboy male record	Elite female (adult) record
100 m	10.20 (age 15)	10.49
800 m	1:51.23 (age 14)	1:53.28
1500 m	3:48.37 (age 14)	3:50.07
Long jump	7.85 m (age 15)	7.52 m
Discus throw	77.68 m (age 15)	76.80 m

M meters

Time format: minutes:seconds.hundredths of a second

Reproduced from: Hilton, E.N., Lundberg, T., “Transgender Women in the Female Category of Sport: Perspectives on Testosterone Suppression and Performance Advantage,” *Sports Medicine*, (2021) 51:199-214, p. 204, Table 3.

These examples reflect that the plain language of Title IX which speaks in terms of binary, biological sex (i.e., male and female) is supported by science. There are relevant and large differences between the sexes in terms of athletic and physical capacity and this translates into a large Male-Female Sport Performance Gap. Thus, in terms of fairness and equality for women competing in collegiate sport, the eligibility line of “biological sex” drawn by Title IX is the appropriate dividing line to ensure equal athletic opportunities for women. Deviation from the biological

line drawn by Title IX harms women and deprives them of equal opportunities to men by making them compete against men, which reduces women's sport opportunities, is not fair, and in many cases can be unsafe.

2. Testosterone Suppression Does Not Bridge the Male-Female Sport Performance Gap

Despite the science-backed dividing line for eligibility in women's sport provided by Title IX, which is sex alone, the NCAA has chosen to define eligibility in women's collegiate sport in terms of testosterone suppression by allowing men to compete as women by suppressing testosterone to a certain level that is still above the female range. In other words, the NCAA gives men who wish to compete against women the option to suppress testosterone to a level that is still above the highest level a female can produce without doping.

The NCAA Transgender Eligibility Policies require only a year of testosterone suppression before a man may compete against women. However, peer reviewed scientific research papers confirm testosterone suppression does not bridge the Male-Female Sport Performance Gap. In one peer reviewed article researchers studied the effects of a year of hormone suppression on males and found that while males on hormone suppression experienced some reduction in muscle mass, they "generally maintained

their strength levels.”²²

In another report, researchers Hilton and Lundberg concluded “that under testosterone suppression regimes typically used in clinical settings, and which comfortably exceed the requirements of sports federations for inclusion of transgender women in female sports categories by reducing testosterone levels to well below the upper tolerated limit, evidence for loss of the male performance advantage, established by testosterone at puberty and translating in elite athletes to a 10–50% performance advantage, is lacking.”²³

Hilton and Lundberg continued:

Rather, the data show that strength, lean body mass, muscle size and bone density are only trivially affected. The reductions observed in muscle mass, size, and strength are very small compared to the baseline differences between males and females in these variables, and thus,

²² Wiik, Anna, et al., “Muscle Strength, Size, and Composition Following 12 Months of Gender-affirming Treatment in Transgender Individuals,” *J Clin Endocrinol Metab*, March 2020, 105(3):e805–e813, available at: <https://academic.oup.com/jcem>.

²³ Hilton, E.N., Lundberg, T., “Transgender Women in the Female Category of Sport: Perspectives on Testosterone Suppression and Performance Advantage,” *Sports Medicine*, (2021) 51:199-214, p. 211.

there are major performance and safety implications in sports where these attributes are competitively significant. These data significantly undermine the delivery of fairness and safety presumed by the criteria set out in transgender inclusion policies, particularly given the stated prioritization of fairness as an overriding objective (for the IOC). If those policies are intended to preserve fairness, inclusion and the safety of biologically female athletes, sporting organizations may need to reassess their policies regarding inclusion of transgender women.

Peer reviewed scientific studies confirm testosterone suppression does relatively little to mitigate the strength, speed, size, power and other athletically relevant differences between men and women (i.e., the Male-Female Sport Performance Gap). A review published in April 2023 reported there have been a total of 19 published peer reviewed research reports on the effects of testosterone suppression (as part of gender affirming hormone treatment or “GAHT”) on performance. “Collectively, the existing research indicates that while GAHT affects biology, the changes it creates are minimal compared to the initial biological differences between typical males and typical females, which means that both biological attributes and performance differences are retained even after years of GAHT.” *Id.* “In spite of testosterone suppression in transwomen reducing circulating hemoglobin concentration to the levels of

reference women, all of these reviews came to the conclusion that even after 3 years of testosterone suppression there are still lasting male athletic advantages in transwomen.” *Id.* Thus, while testosterone suppression is the backbone of the NCAA’s Transgender Eligibility Policies and a basis upon which the NCAA authorizes men to compete in women’s sports after only a year of testosterone suppression, the NCAA’s reliance upon testosterone suppression is not supported by reliable scientific data. Nor has the NCAA ever published any data or studies supporting its testosterone suppression policy.

3. The NCAA’s Transgender Eligibility Policies Allow Men to Compete Against Women While Retaining Higher Levels of Testosterone Than Women

The ranges of testosterone produced by men and women do not overlap. Men produce far more testosterone than women and there is a significant gap between the upper end of the testosterone range for women and the lower end of the testosterone range for men. A 2018 meta-analysis established that in healthy individuals there is “a clear bimodal distribution of testosterone levels, with the lower end of the male range being four- to five-fold higher than the upper end of the female range (males 8.8-30.9 nmol/L, females 0.4-2.0 nmol/L).” Clark RV, Wald JA, Swerdloff RS, et al., “Large divergence in testosterone concentrations between men and women: Frame of reference for elite athletes in sex-specific competition in sports, a narrative review.” *Clin. Endocrinol.* (Oxf).

2019; 90:15–22. <https://doi.org/10.1111/cen.13840>.

Currently, in 19 out of 25 women’s sports the NCAA only requires men who want to compete against women to show testosterone suppression to a level of less than 10 nanomoles per liter (<10 nmol/L). The <10 nmol/L testosterone threshold used by the NCAA for granting eligibility to men to compete against women in most NCAA sports is five times higher than the upper end of the female testosterone range, twenty-five times higher than the testosterone level of females at the lower end of the female range, and includes testosterone levels that are within the normal male range of 8.8 nmol/L to 30.9 nmol/L.

Importantly, the female range of 0.4 nmol/L to 2.0 nmol/L includes elite female athletes. This means that even after “suppression” men are allowed to compete in the women’s category with testosterone levels far higher than any female athlete could ever achieve without doping. Moreover, under current NCAA rules, some men (those falling within the lower end of the normal male testosterone range (i.e., between 8.8 to 10.0 nmol/L or so) could compete in NCAA women’s sports without substantially reducing their testosterone level at all.

These facts confirm the NCAA’s policy disparately impacts women. *Amici* do not concede that rules that permit a man to compete in women’s scholastic sports through engaging in any level of testosterone suppression can pass muster under Title IX. But, even were it to be found that relying upon male testosterone suppression to permit men to access

women's sports and sports teams could preserve equal opportunities for women in sports, the NCAA's current eligibility rules would still fail under Title IX because the policies provide a testosterone advantage to men that women cannot replicate without doping.

In addition, as explained below, the <10 nmol/L testosterone suppression level, which is a central feature of the current NCAA Transgender Eligibility Policies was formally dispensed with years ago by the International Olympic Committee (IOC).

4. The 2015 IOC Consensus Statement, Still Relied on by the NCAA, Was Withdrawn by the IOC in 2021

Current NCAA Transgender Eligibility Policies stem from changes made by the NCAA in 2022 to take what the NCAA calls a "sport-by-sport approach" that supposedly "aligns transgender student-athlete participation with the Olympic Movement."²⁴ Specifically, the NCAA states that "the updated NCAA policy calls for transgender student-athlete participation for each sport to be determined by the policy for the national governing body ["NGB"] of that sport. If there is no NGB policy for a sport, it would then be determined by the policy for that sport's international federation. If there is no international federation policy, it would be determined by policy criteria previously established by the International

²⁴ <https://www.ncaa.org/sports/2022/1/27/transgender-participation-policy.aspx>

Olympic Committee.”²⁵

Most of the NCAA’s testosterone suppression thresholds, i.e., those currently applied in 19 out of 25 women’s sports, are set at 10 nmol/L of serum testosterone. The NCAA’s claim that the <10 nmol/L suppression level is sourced from current Olympic Movement policies is inaccurate. Rather, the level of <10 nmol/L used by the NCAA in most women’s sports is derived from an outdated, non-peer reviewed, two-and-a-half-page statement issued by the participants in an IOC-organized meeting in 2015 which included four lawyers, multiple IOC employees, four IOC Medical & Scientific Commission members and ten academicians.²⁶

The document relied on by the NCAA is headlined IOC Consensus Meeting on Sex Reassignment and Hyperandrogenism November 2015 (the “2015 IOC Consensus Statement”). *Id.* The first page of the 2015 IOC Consensus Statement merely lists the participants in the meeting. *Id.* The portion of the document dealing with transgender eligibility is a one-page outline of concepts for consideration by sports organizations with no references to scientific literature, studies, data, or

²⁵ <https://www.ncaa.org/sports/2022/1/27/transgender-participation-policy.aspx>

²⁶

https://stillmed.olympic.org/Documents/Commissions_PDFfiles/Medical_commission/2015-11_ioc_consensus_meeting_on_sex_reassignment_and_hyperandrogenism-en.pdf

testing. *Id.*

Moreover, the 2015 IOC Consensus Statement was in fact replaced by the IOC on November 16, 2021. On that date, the IOC transferred full responsibility for developing transgender eligibility rules to its member international sport federations and expressly “replac[ed] . . . previous IOC statements on this matter, including the 2015 Consensus Statement.”²⁷

Therefore, in 2022 when the NCAA first claimed to apply Olympic Movement policies to NCAA women’s sports and at that time relied upon the 2015 IOC Consensus Statement to implement a <10 nmol/L testosterone suppression level for all NCAA women’s sports, the NCAA was applying an outmoded, previously replaced, no longer operative, and withdrawn, IOC recommendation. As noted above, one of the problems with the nearly decade-old 2015 IOC Consensus Statement and its <10 nmol/L testosterone suppression level is that it discriminates against women by allowing men to compete on women’s teams with a testosterone level that is five times higher than the highest recorded testosterone level for elite female athletes. These facts are indicative of a NCAA policy driven by ideology rather than science.

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<https://stillmed.olympics.com/media/Documents/Beyond-the-Games/Human-Rights/IOC-Framework-Fairness-Inclusion-Non-discrimination-2021.pdf>

III. The Misapplication of *Bostock* is Not Just Impacting Elementary School, Middle School and High School Sports, it is Impacting College Sports Nationwide

Although the NCAA's ideologically driven Transgender Eligibility Policies appear to be largely responsible for the misguided belief of federal courts that males who suppress testosterone can fairly compete in women's sport, NCAA President Charlie Baker recently told the Senate Judiciary Committee that the federal court decisions are now allegedly an impediment to the NCAA changing its policies and keeping men out of women's college sports.²⁸

Thus, according to the testimony of the NCAA President, the NCAA has also bought into the constitutionalizing of *Bostock*. Therefore, the nationwide impact of the NCAA's rules (which its President claims are being kept in place by these federal court decisions) is another reason this Court should grant a writ of certiorari and reverse the decision of the Ninth Circuit in this case.

CONCLUSION

For the reasons stated above, ICONS and its members and 135 female athletes, parents of female

²⁸ See

https://www.realclearpolitics.com/video/2024/12/18/see_n_josh_hawley_grills_ncaa_president_you_wont_defend_transgender_athletes_policy_because_its_indefensible.html.

athletes, coaches and sports officials respectfully submit that this case presents a critical legal question with far-reaching consequences, directly impacting all levels of women's sport in the United States. *Amici curiae* strongly believe that the Supreme Court should review this case to provide much-needed clarity on the important issue of whether this Court's decision in *Bostock* controls analysis of Equal Protection and Title IX questions in women's sports cases and whether laws protecting women's sports from male competitors are entitled to substantial deference. WHEREFORE, for the foregoing reasons, *amici curiae* respectfully request that this Court grant the petition for certiorari.

Respectfully submitted,

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Independent Council on Women's Sport and its
members and 135 female athletes, parents of female
athletes, coaches and sports officials

December 23, 2024

APPENDIX

APPENDIX TABLE OF CONTENTS

List of *Amici Curiae*A-1

Brianna Alexander*³⁸

Cyclist

Catrina Allen*

World Champion –Professional Disc Golf

Taylor Allen

West Virginia High School Athlete – Basketball and Track

Kylee Alons*

31-time All-American, 5-time ACC Champion, Olympic Trials Semi-Finalist, and 2-time NCAA Champion – North Carolina State University

Diana Anglin-Miller

NCAA Champion and Cheerleading Gym Owner, Coach, and Judge

Hannah Arensman*

Professional Cyclist

Allison Arensman*

Professional Cyclist

Sarah Powers Barnhard

Professional Volleyball Player, Current Coach

Cindy Bater

³⁸ * An asterisk by a name indicates that the athlete has personally faced a male in sports competition, played on the same team as a male, or is closely related to a woman who has personally faced this.

Rowing National Team Athlete, Coach, and Educator

Lauren Belden*

High School Cross-Country and Track Athlete

Russell Belden*

Father of a High School Cross-Country and Track Athlete

Katie Blankinship*

NCAA Swimming Athlete – Roanoke College

Marianne Bosco*

Fencing Athlete

Bonnie Brandon

6x All-American Swimmer, University of Arizona

Carol Brown

U.S. Women's Olympic Rowing Team 1976, 1980, 1984

Mariah Burton Nelson

Former Professional Women's Basketball Player

Monika Burzynska*

NCAA Swimmer, Penn Athlete

Frank Busch

Former National Team Director of USA Swimming (5-time Olympic Coach)

Paula A. Cabot

Former Director of Education & Research, Women's Sports Foundation; Rugby Player

Tom Coffey

*Former AAU Women and Girls Track Coach and
California Interscholastic Track Coach*

Kathy Smith Connor*

*U.S. National Team Member and Mother of Daughter
who Competed in the 2022 NCAA Swim
Championships*

Grace Countie*

*22 time All-American, 12x first-team All-American, 6-
time UNC School Record Holder, Olympic Trial
Semifinalist – University of North Carolina*

Catherine Curtis

Archery Coach

Madisan Debos*

NCAA Track Athlete

Courtney DeSoto*

Mother of a Female High School Track Athlete

Donna de Varona

Olympic Gold Medalist, World Record Holder

Jade Dickens

USA Powerlifting Athlete

Sonni Dyer

*Division I Collegiate Head Coach & Director of
Triathlon, Queens University*

*6x Women's D2 Triathlon National Champs, 2x
Women's D1 Triathlon Runner-Up, 3x Olympic Alumni*

Ellie Eades

NCAA Tennis Athlete – University of Kentucky

Evie Edwards*

Cyclist, Mother of Elementary Age Female Cyclist

Stephanie Elkins

Olympian – Swimming

Ainsley Erzen

*NCAA Soccer and Track & Field Athlete, Member 2024
NCAA Division I Indoor Track and Field
Championship Winning Team – University of
Arkansas*

Patricia Spratlen Etem

U.S. Women's Olympic Rowing Team 1980, 1984

Ellis Fox

*NCAA Swimming and Diving Athlete – Texas A&M
University*

Kelly Funderburk

Olympian – Artistic Gymnastics

Tom Funderburk

NCAA Champion – Men's Golf, Husband of Female Olympian

Dianna (DeeDee) Fussner*

Pro Masters Disc Golf

Riley Gaines*

12-time All-American Swimming, tied Lia Thomas in the 200 free at the 2022 NCAA Swimming & Diving Championships

Lori Garrison

NCAA athlete – Softball

Shawna Glazier*

Cyclist, Triathlete

Pamela Behrens Golding

Olympian

Annie Grevers

U.S. National Team – Swimming

Bruce M. Guthrie

US Speedskating Level 2 Coach, Co-Founder, Coach, The Whatcom Speed Skating Club, 2024 Long Track Ice Speed Skating National Champion, Men's 60-64 Age Category

Reka Gyorgy*

Olympian – Swimming, missed finals by one placement at NCAA Swim Championships in the 500 free where Lia Thomas won first place

Jan Harville

*Olympian, Olympic Coach, Former NCAA Head Coach
– Rowing*

Rena Hedeman*

Mother of Female Rowing Athlete

Destani Hobbs

*Former USA Weightlifting Level 1 Coach and USA
Weightlifting Affiliated Member/Athlete*

Nancy Hogshead

Olympic Gold Medalist

Sarah Hokom*

World Champion – Professional Disc Golf

Ceci Hopp St. Geme

National Team – Track; NCAA Champion 3000m

Vicki Huber-Rudawsky

*2x Olympian, 8x NCAA Champion, Track and Cross-
Country*

Jen Hucke

2x NCAA Champion in Volleyball, Stanford

Patti Hupp

*USATF Level 2 Certified Track and Field Coach,
USTFCCA Technical Certified Coach, ALTIS Certified
Coach*

Jarrod Jacobi*

Father of a Current High School Female Ski Athlete

Rhi Jeffrey

Olympic Gold Medalist – Swimming

Lacey John

Olympic Silver Medalist, NCAA Woman of the Year

Raime Jones*

NCAA athlete – Swimming, lost a finals spot in Ivy League Championships to Lia Thomas

Scott Jones*

Father of Female NCAA Athlete

Margot Kackzorowski*

Current NCAA Swimmer, University of Pennsylvania Athlete

Samantha Keddington*

Former Professional Disc Golf Athlete, missed payout qualification by one placement won by a male, Current Coach

Danielle Keen*

Professional Disc Golf

Ronda Key*

Disc Golf Athlete

Alexandra Kleinfehn

USA Powerlifting Athlete

Holly Kruchoski*

Cyclist

Jess Kruchoski*

Husband of Female Athlete who competed against a male

Jocelyne Lamoureux-Davidson

Olympic Gold Medalist – Hockey

Monique Lamoureux-Morando

Olympic Gold Medalist – Hockey

Lisa Larsen-Rainsberger

1985 Boston Marathon Champion, Former 5 Mile, 15k, 10 Mile, 30k American Record Holder

Donna Lopiano

6x National Champion, Former AD University of Texas

Valerie McClain

U.S. Women's Olympic Rowing Team 1980, 1984

Riona C. McCormick

Current Rowing Athlete

Nanea Merryman*

NCAA Volleyball Athlete – Cedarville University

Cynthia Millen

Former NCAA Swim Official, Former USA Swimming National Official, Former International Paralympic Swim Official

Lauren Miller*

Current Professional Women's Golfer, Former Collegiate Golfer

Cynthia Monteleone*

Masters Track Athlete, Mother of Female Track Athlete, both of whom competed against male athletes

Julianna Morrow*

NCAA Swimming Athlete – Roanoke College

Lily Mullens*

NCAA Swimming Athlete – Roanoke College

Linda Muri

Rowing, 3x World Champion, 17x National Champion, Holder World Best Time, Collegiate National Champion and World Champion Coach

Martina Navratilova

59x Grand Slam Tennis Champion

Sarita Nori*

Mother of Female Rowing Athlete

Mary I. O'Connor

U.S. Women's Olympic Rowing Team 1980

Keri Phebus Olson

NCAA Champion – Tennis, Mother of Female Athlete

Jan Palchikoff

U.S. Women's Olympic Rowing Team 1976,1980

Connie Paraskevin

USA Olympian – Speed Skating and Track Cycling

Abigail Pearson*

Mother of two Female Athletes who have been forced to compete against males

Kate Pearson*

NCAA Swimming Athlete – Roanoke College

Macy Petty*

NCAA athlete – Volleyball

Mary T. Plant

*Olympic Gold Medalist and World Record Holder
Swimming*

Lori Post*

Mother of NCAA Female Swimmer who competed against Lia Thomas

Susanna Price*

NCAA Swimming Athlete – Roanoke College

Dennis Pursley

*5x Olympic Coach, American Swimming Coaches
Association Hall of Fame*

Joy Rako*

Former NCAA Division III Track and Field Athlete

Lynn Silliman Reed

1976 Olympic Bronze Medalist – Rowing

Kelly Rickon Mitchell

1980 & 1984 Olympic Rowing Athlete

Genoa Rossi

Current NCAA Water Polo Athlete, U.S. Jr. National Team

Kim McGinnis Russell

International Lacrosse Coach, USVI Women's National Team

Linnea Saltz*

NCAA Track and Field Runner, 3x Big Sky Conference Champion

Summer Sanders

Olympic Gold Medalist

Alison Santa Ana

Mother of High School Softball and Cross-Country Athlete

Cris Santa Ana

Father of High School Softball and Cross-Country Athlete

Samantha Santa Ana

High School Softball and Cross-Country Athlete

Carter Satterfield*

NCAA Swimming Athlete – Roanoke College

Halle Schart*

NCAA Swimming Athlete – Roanoke College

Jennifer Sees

NCAA Pole Vaulter, Current High School Track Coach, Mother to a Signed NCAA Soccer Player

Jeri Shanteau

National Champion, U.S. National Team member – Swimming

Sharon Shapiro

NCAA Champion and U.S. National Team – Women’s Artistic Gymnastics

Sandy Shasby*

Family Member of a Female Athlete

DeNee Shepherd*

Professional Disc Golf

Bre Showers

NCAA Champion – Artistic Gymnastics

Anne Simpson

NCAA Rowing Athlete

Bronwyn Sims

Athlete, Girls and Women’s Gymnastics Coach

Brooke Slusser*

NCAA Volleyball Player

Lori Stenstrom

National Champion, Former American Record holder, Mother of Female Athletes

Steve Stenstrom

NFL Quarterback, Father of Female Athlete

Jill Sterkel

*Olympian – Swimming, Former University of Texas
Head Swim Coach*

Tracy Sundlan

*5x Olympic Coach, Manager, and Administrator –
Track and Field*

Barry Switzer

*Super Bowl Champion, NFL and NCAA Head Football
Coach*

Becky Switzer

*Olympic and NCAA Coach – Women’s Artistic
Gymnastics*

Maya Tait*

NCAA Rowing Athlete

Inga Thompson

Olympian – Cycling

Alison Townley

*Past Associate Executive Director, Women’s Sports
Foundation*

Hollister (Holly) W. Turner

*Past Associate Executive Director, Women’s Sports
Foundation*

Leanne Venema*

Mother of Female NCAA Swimmer

Eric Venema*

Father of Female NCAA Swimmer

Vincent J. Ventura

Coach 1984 Women's Olympic Single Sculler: Charlotte Geer, Silver Medal, Co-Founder and Head Coach New York Athletic Club Women's Rowing Team 1996-2012, Former Member US Rowing High Performance Committee, US National Team Coach: 1979, 1980, 83,84, 85, 88

Diane Vreugdenhil

Olympian – Rowing

Sue Walsh

Olympian – Swimming, Coach, Sports Official

Claudia Westholder

NCAA Swimmer, Mother of Female Athlete

Max Wettstein

Father of U.S. Olympic Skateboard Team Member

Kaitlynn Wheeler*

All American, NCAA Qualifier and Silver Medalist, SEC Team and Relay Champion

Val Whiting

National Champion, WNBA

Laura Wilkinson

*Olympian and World Champion – Diving, Mother of
Female Athlete*

Sippy Woodhead

Olympian, World Record Holder – Swimming

Sara Younger-Merrill

Masters Athlete, Rowing

Jacqueline Zoch

1976 Olympic Rowing Medalist