

II. THE THREAT AND THE PUSHBACK

Challenges to single-sex athletic competition fall into three primary categories:

(a) policies that allow transgender athletes who were born male to participate in women's sports; (b) policies that allow male athletes to participate on women's teams (usually field hockey or volleyball) where the institution offers no male counterpart; and (c) efforts to eliminate sex-specific sports altogether.

A. Transgender Participation in Women's Sports

Athletic Associations

A growing number of state, national, and international athletic associations allow transgender participation in women's sports. The rules for participation vary by association.

- At least 19 **state athletic associations** allow athletes to compete according to their gender identity *without restriction*, meaning without surgery or hormone therapy.²⁰ In these states, the only requirement for participation on women's teams is self-identification as a female.²¹
- The **National Collegiate Athletic Association (NCAA)** allows natal males to compete on women's teams once they have completed *one calendar year of testosterone suppression treatment*.²² In April 2021, the NCAA's Board of Governors issued a statement "firmly and unequivocally" supporting the participation of transgender (natal male) athletes on women's collegiate athletic teams.²³
- The **International Olympic Committee (IOC)** allows natal males to compete as women, provided that they have declared a female gender identity (and do not change it, for sporting purposes, for at least four years) *and* can demonstrate testosterone levels below 10 nanomoles per liter for at least a year.²⁴ [By comparison, most females, including elite female athletes, have testosterone levels of 0.12 to 1.79 nanomoles per liter; the normal testosterone range for post-pubescent males is 7.7 to 29.4 nanomoles per liter.]²⁵

Federal law

Recently, the federal government has taken steps to require (not just allow) schools to let transgender/natal male athletes play on female teams and compete against female athletes. On his first day in office in 2021, President Joe Biden issued **Executive Order 13988**, requiring the Department of Education to develop a plan to address “discrimination on the basis of gender identity,” including “deni[al of] access to . . . school sports.”²⁶ The Biden administration based its order on the Supreme Court’s 2020 ruling in *Bostock v. Clayton County*,²⁷ which held that Title VII of the Civil Rights Act of 1964 prohibits *workplace* discrimination against gay and transgender employees.**

By extending *Bostock* to education, the administration is telling schools that they may never take biological sex into consideration, including with respect to sports

In June, 2021, the **Department of Education** complied with Executive Order 13988 by issuing a **Notice of Interpretation** of Title IX. The Notice states that the Department will investigate, under threat of termination of an educational institution’s federal financial assistance, any allegations

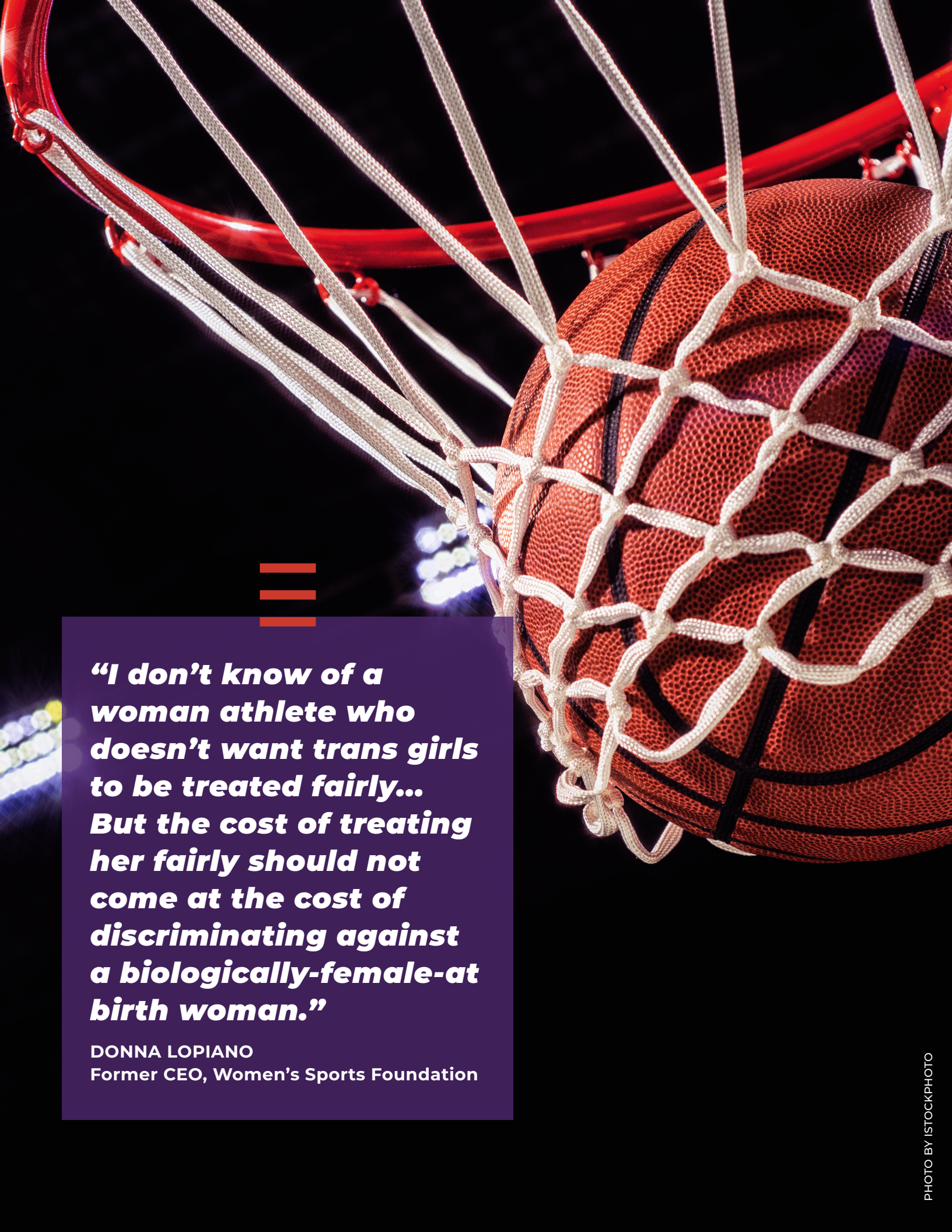
of individuals being “excluded from, denied equal access to, or subjected to sex stereotyping in academic or extracurricular opportunities” because of “gender identity.”²⁸ By unilaterally extending *Bostock* beyond the employment context to education, the administration is telling schools that they may never take biological sex into consideration, including with respect to sports.²⁹

To be clear, the Department of Education’s Notice of Interpretation is unlawful.

It is not the role of an administrative agency to make or change federal law. And the Supreme Court was crystal clear that *Bostock* concerned only Title VII (employment law), not Title IX (education). But by threatening revocation of federal financial assistance, the Department of Education’s Notice of Interpretation attempts to coerce schools into requiring women’s teams to include transgender athletes.

Congress has also entered the fray, attempting to codify transgender inclusion requirements across federal law. H.R. 5, known as the “Equality Act,”³⁰ would redefine “sex” under numerous federal statutes to include “gender identity.” If passed, **the Equality Act** would (among other things)³¹ accomplish legislatively what the Biden administration has attempted to do administratively: require schools and athletic associations to open up girls’ and women’s sports to natal males who identify as female.³²

** The *Bostock* decision did not purport to interpret Title IX, which applies to educational institutions that receive federal funds.



“I don’t know of a woman athlete who doesn’t want trans girls to be treated fairly... But the cost of treating her fairly should not come at the cost of discriminating against a biologically-female-at birth woman.”

DONNA LOPIANO
Former CEO, Women’s Sports Foundation

B. Male Participation on Women's Teams without a Male Counterpart

Across the U.S., many schools offer field hockey, volleyball, or other sports for females only. Significantly, schools initially created many of these programs to increase opportunities for female athletes so as to comply with Title IX.

Although female-only teams do not violate federal law,³³ they may run afoul of some state laws. For example, **Supreme Judicial Court of Massachusetts** has held that the state equal rights amendment prohibits schools from banning boys from girls' teams where the school offers no male counterpart.³⁴ As a result, and despite protest from parent groups,³⁵ Massachusetts today requires that public schools allow boys to play on girls' teams (such as field hockey and volleyball) where the school does not offer a boy's team. This policy applies even though such teams traditionally have limited rosters and need to cut students after tryouts.³⁶ In other words, males are allowed to play even where their participation means that female athletes get cut from the team or lose playing time.

For gender activists, trans-inclusion is merely a vehicle for abolishing single-sex sport altogether.

In applying *Bostock* to Title IX, the **Biden administration** has (perhaps inadvertently) adopted the position of the Massachusetts Supreme Judicial Court, requiring that schools across the country allow males to try out for and

compete on women's teams where the school does not offer the same sport for men. A quick review of the reasoning of *Bostock* illustrates why.

Prior to *Bostock*, courts interpreted Title VII (and, indeed, most federal sex-discrimination laws) as prohibiting: (1) discrimination against individuals because they are female or male and (2) policies that favor one sex over the other. Courts did *not* interpret federal law as prohibiting all policies that take biological sex into consideration. For example, prior to *Bostock*, courts would not have held an employer liable for sex discrimination under Title VII simply for offering separate male and female bathrooms, even though an employer clearly takes biological sex into consideration in providing separate sex-specific facilities.

In *Bostock*, however, the Court reasoned that discrimination against a transgender employee necessarily requires awareness of the employee's sex at birth in comparison to that employee's gender identity or mode of gender expression at work. Accordingly, the Court concluded that discrimination on the

basis of transgender status *is* discrimination “because of sex,” as prohibited by Title VII. *Bostock*, thus, established a “**but for**” test for determining liability.³⁷ This means that any employer who relies, even in part, on biological sex when making a particular decision or adopting a particular policy may be held liable for sex discrimination under Title VII.



The Biden administration’s decision to extend this reasoning to the education context has serious implications for women’s sports.

A coach who decides that an otherwise qualified male athlete cannot play on a women’s team is clearly making a decision that would have been different *but for* the particular student’s sex,³⁸ which *Bostock* seems to prohibit.³⁹

Suppose, for example, that a male student who is cut from the men’s lacrosse team then tries out for the women’s team and demonstrates that

he is a better player than any of the female students. Or suppose that a male student wants to play college field hockey, but his college only offers women’s field hockey (as is the case at most American colleges that offer the sport). The Department of Education’s Notice of Interpretation forbids coaches from denying roster spots to athletically superior male players simply because they are male.⁴⁰

C. Efforts to Eliminate Single-Sex Sport Altogether

Some gender ideologues argue for the elimination of sex-specific sports altogether.⁴¹ These activists claim that allowing males and females to compete in separate divisions reinforces pernicious stereotypes about male and female abilities and perpetuates the presumption that sex is binary.⁴²

Writing in the *Washington Post* in April 2021, for example, Professor Elizabeth Sharrow of the University of Massachusetts argues that single-sex athletic teams are a form of segregation that damages women and girls.⁴³ For gender activists, like Sharrow, trans-inclusion is not a goal in and of itself: it is a vehicle for abolishing single-sex sports.

Sharrow's goal of mandatory sex-integration in sport could very well become the law of the land if the United States adopts the proposed **Equal Rights Amendment (ERA)** to the Constitution. Although the ERA makes no mention of sports, its language is sufficiently broad that courts would likely interpret it as prohibiting the separation of the sexes in most contexts,⁴⁴ including athletics.⁴⁵

The language of the ERA is so broad that courts would likely interpret it as prohibiting the separation of the sexes in most contexts, including sports.

But activists may not have to wait for a constitutional amendment to achieve their objective of open, sex-neutral sport. As noted above, the Biden administration has already taken steps unilaterally to apply *Bostock* to Title IX (despite Justice Gorsuch's insistence that the Court's decision was limited to

the employment context). Applying *Bostock*'s "but for" test to sports will call into question not just individual coaching decisions about particular players, but the existence of single-sex teams altogether.⁴⁶ Indeed, if federal courts (incorrectly) hold that *Bostock* applies to Title IX, as some already have,⁴⁷ it may become unlawful ever to separate athletes into men's and women's teams because to do so would require consideration of the participants' sex, the very thing that Justice Gorsuch's opinion in *Bostock* prohibits.

D. The Pushback

Across the country, a number of federal and state legislators have begun to push back against efforts to force women's sports to include natal males.

Before leaving Congress in 2020, Rep. Tulsi Gabbard (D-HI) joined forces with Rep. Markwayne Mullin (R-OK) to introduce the **"Protect Women's Sports Act."**⁴⁸ This bill seeks to statutorily define "sex" for purposes of athletics under Title IX as biological sex at birth, not gender identity.⁴⁹

In March 2020, Idaho became the first state to pass a law limiting eligibility for women's teams to natal females.⁵⁰ Mississippi, Montana, Florida, West Virginia, Tennessee, Arkansas and Alabama have all followed suit, and a number of other states currently are considering similar measures.⁵¹

Unfortunately, some of the proposed legislative "fixes" miss the mark by, for example: (1) broadly covering youth and non-competitive sports without exception

and/or (2) excluding college level competitive sports (where the male physiological differences are most prominent and most disadvantage female athletes).

Although the laws that aim to protect women's sports differ from state to state, they all expressly contradict the federal Department of Education's Notice of Interpretation. This conflict between state legislative authority and federal administrative authority will, ultimately, have to be resolved in court.

Indeed, advocates for inclusion of natal males in women's sports have filed at least three lawsuits seeking to block enforcement of several of the above mentioned state laws. Ironically, these suits argue that state attempts to prohibit male-bodied athletes from participating in women's sports constitute unlawful sex discrimination under the Equal Protection Clause of the 14th Amendment and under Title IX, the law passed to expand opportunities for women and girls.⁵²

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On August 30, 2021, attorneys general from 20 states countered with a lawsuit of their own. The lawsuit, filed in the U.S. District Court for the Eastern District of Tennessee, seeks (among other things) a declaration that Title IX does not prohibit schools from offering single-sex sports teams or from determining eligibility for those teams on the basis of sex at birth. The lawsuit also seeks an injunction prohibiting the Department of Education from enforcing its Notice of Interpretation or any other non-binding guidance that administratively rewrites Title IX.⁵³

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Former Rep. Tulsi Gabbard (D-HI)

In resolving these cases, courts will need to consider the specific language of the legislation at issue (including the legal definition of “sex” under Title IX), the authority (if any) given to the Department of Education's Notice of Interpretation, and potentially the scientific evidence regarding the male-female athletic differential.



“I didn’t feel it was fair for [this athlete] to be playing [and taking] away a position from girls who could have started, which to me was so wrong on so many levels.”

DESTINY LABUANAN
Maui, HI

Played on the same high school volleyball team as a student who had previously competed on the school’s men’s team.