NEBRASKA DEPARTMENT OF JUSTICE

Opinion No. 24-001 — April 2, 2024

OPINION FOR SENATOR KATHLEEN KAUTH

Lawfulness of the Sports and Spaces Act

Summary: The Sports and Spaces Act does not violate the Equal Protection Clause or Title IX. The Act's segregation of bathrooms and athletic teams based on biological sex is substantially related to the State's important interests in protecting student privacy and female athletic opportunity. Title IX's provisions permitting the segregation of teams and facilities based on "sex" permits segregation of teams and facilities based on biological sex.

You have asked whether L.B. 575, 108th Leg. (introduced 2023), known as the "Sports and Spaces Act" ("L.B. 575"), would violate the United States Constitution or federal law. If enacted, L.B. 575 would require all schools in Nebraska to designate group bathrooms and locker rooms for use according to biological sex.[1] Schools would also be required to designate school-sponsored athletic teams and sports based on biological sex.

We conclude that L.B. 575 is constitutional and violates no federal law. The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution ensures that states apply the law similarly to all people similarly situated. Cases interpreting the Equal Protection Clause do not consider men and women similarly situated in all respects. Laws that treat men and women differently

[1] Currently, Nebraska allows, but does not require, educational institutions to maintain separate toilet facilities, locker rooms, or living facilities for the different sexes. *See* Neb. Rev. Stat. § 79-2,124 (Reissue 2014).

in pursuit of an important government goal related to the real differences between men and women do not violate the Equal Protection Clause. L.B. 575 does exactly that. It recognizes the real biological differences between males and females and designates facilities and sports by biological sex in pursuit of the important goals of protecting student privacy and preserving female athletic opportunity. In pursuit of these goals, and in recognition of the biological differences between males and females, it is reasonable for L.B. 575 to classify students by biological sex regardless of their gender identity. We thus conclude L.B. 575 does not violate the Equal Protection Clause.

We further conclude that L.B. 575 does not violate federal law. Title IX of the Education Amendments Act of 1972 ensures that no person is deprived of equal opportunity in educational activities on the basis of sex. "Sex" under Title IX means biological sex, not gender identity. Title IX recognizes that to protect opportunity in interscholastic athletics, athletic teams may need to be segregated by sex. Title IX also appreciates the need for different restroom facilities based on sex. As a consequence, L.B. 575 does not violate Title IX by designating facilities and athletics based on biological sex.

Section I of our analysis outlines the provisions of L.B. 575. Section II summarizes the case law where similar laws have been challenged under the Equal Protection Clause and then lays out our reasons for finding that L.B. 575 does not violate the Equal Protection Clause. Section III summarizes case law where similar laws have been challenged under Title IX and then provides our reasons for finding L.B. 575 does not violate Title IX. Section IV summarizes our conclusions.

Lawfulness of the Sports and Spaces Act

I.

We begin with the text of L.B. 575. If enacted, L.B. 575 would designate certain school facilities and functions by a student's biological sex. It defines a biological female as "a person who was born with female anatomy with two X chromosomes in her cells," and a biological male as "a person who was born with male anatomy with X and Y chromosomes in his cells." L.B. 575, § 2(1)(a), (b). The bill also defines a school as any public, private, denominational, and parochial school offering instruction in elementary (kindergarten through eighth grades) or high school grades. *Id.* § 2(c).

L.B. 575 requires schools to designate each group bathroom and locker room within school buildings either for use by biological females or for use by biological males. Biological males are prohibited from using the restrooms or locker rooms designated for biological females and *vice versa*. L.B. 575, § 3(1), (2)(d).

School-sponsored athletic teams or sports must also be designated by biological sex as either male, female, or coed. *Id.* § 4(1). Athletic teams and sports designated for females are not open to biological males. *Id.* § 4(2). Teams and sports designated for males are not open to biological females unless there is no female team available for such sport. *Id.* Government entities, licensing or accrediting organizations, and athletic associations cannot investigate or take adverse action against a school for maintaining athletic teams in accordance with students' biological sex. *Id.* § 5.

A student who is deprived of an athletic opportunity or who suffers any direct or indirect harm as a result of a public school knowingly violating L.B. 575 can bring a private cause of action against the school. *Id.* § 6(1). Schools and school officials are forbidden from retaliating

against any person who reports a violation of L.B. 575's bathroom or locker room provisions. *Id.* § 3(4). Students aggrieved by a violation of the retaliation provision may also bring a civil cause of action against the school. *Id.* § 3(5). Students who prevail in these kinds of lawsuits may be entitled to injunctive relief, damages, and any other relief available by law. *Id.* §§ 3(5), 6.

II.

The Equal Protection Clause provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. The Supreme Court has said the Clause is "essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985).

Courts apply one of three standards to determine whether a law's classification unlawfully treats similarly situated people unequally. The first is known as rational-basis review. This standard applies when statutes make classifications that are not considered "suspect" (or "quasi-suspect") and do not otherwise implicate a fundamental right. *State v. Harris*, 284 Neb. 214, 233, 817 N.W.2d 258, 275 (2012). Classifications are not considered suspect or quasi-suspect unless the class created is based on "immutable characteristic[s] determined solely by the accident of birth" or is "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *Gallagher v. City of Clayton*, 699 F.3d 1013, 1018 (8th Cir. 2012) (first quoting *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973), second quoting *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973)). Examples of classes created by laws that are subject to rational-basis review include smokers,

id., compulsive sex offenders, *Artway v. Att'y Gen. of State of N.J.*, 81 F.3d 1235, 1266 (3d Cir. 1996), and victims of sexual harassment, *see Means v. Shyam Corp.*, 44 F. Supp. 2d 129, 131 (D.N.H. 1999).

Under the rational-basis standard, courts generally presume that a law is constitutional. Based on that presumption, courts may only overturn a law if the challenger can show that the law's classification is not rationally related to *any* government interest. *See F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993).

On the other end of the spectrum is strict scrutiny, which applies when a law or policy burdens a "suspect" group (e.g., a racial or ethnic minority), or when it burdens a fundamental right (e.g., voting). *Harris*, 284 Neb. at 233, 817 N.W.2d at 275. Under such a classification, a law will be upheld only "upon an extraordinary justification," *Shaw v. Reno*, 509 U.S. 630, 643 (1993) (quoting *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 272 (1979)), and it must be narrowly tailored to serve a compelling governmental interest, *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995).

Intermediate scrutiny lies in between. It applies to laws that discriminate based on a quasi-suspect classification. Sex-based classifications fall under this standard. *See United States v. Virginia*, 518 U.S. 515, 533 (1996). For a sex-based classification "to withstand equal protection scrutiny, it must be established . . . that the challenged classification serves important governmental objectives" and that the "means employed are substantially related to the achievement of those objectives." *Nguyen v. I.N.S.*, 533 U.S. 53, 60 (2001) (internal quotation marks omitted) (quoting *Virginia*, 518 U.S. at 533).

Intermediate-scrutiny analysis for sex classifications recognizes that "[p]hysical differences

between men and women . . . are enduring." *Virginia*, 518 U.S. at 533. And the Supreme Court accounts for these "actual differences between the sexes, including physical ones." *Clark v. Arizona Interscholastic Ass'n*, 695 F.2d 1126, 1129 (9th Cir. 1982). Indeed, the Supreme Court "has consistently upheld statutes where the gender classification is not invidious, but rather realistically reflects the fact that the sexes are not similarly situated in certain circumstances." *Michael M. v. Superior Ct. of Sonoma Cty.*, 450 U.S. 464, 469 (1981) (plurality opinion); *see, e.g.*, *Nguyen*, 533 U.S. at 63.

A.

Some courts have held statutes classifying facilities and athletic teams by biological sex do not violate the Equal Protection Clause. These courts, as summarized in subsections III.A.1–3 below, have decided that segregating by biological sex was a classification based on sex, not gender identity, and have held these policies survive intermediate scrutiny. *See Adams v. School Board of St. Johns County, Florida,* 57 F.4th 791 (11th Cir. 2022) (en banc); *Bridge ex rel. Bridge v. Okla. State Dep't of Educ.*, No. CIV-22-787, 2024 WL 150598 (W.D. Okla. Jan. 12, 2024); *D.N. ex rel. Jessica N. v. DeSantis*, No. 21-CV-61344, 2023 WL 7323078 (S.D. Fla. Nov. 6, 2023).

1.

In *Adams*, a biological female identifying as a man challenged her school's policy requiring students to use the bathroom that aligned with their biological sex.[2] 57 F.4th at 796, 798. A federal district court enjoined the policy, concluding that the policy discriminated against Adams

[2] Students also had the option to use a gender-neutral bathroom. *Adams*, 57 F.4th at 798.

because "'he d[id] not act in conformity with the sex-based stereotypes associated with' biological sex." *Id.* at 808.

The Eleventh Circuit reversed the district court. *Id.* at 801. The court observed that on its face, "the bathroom policy facially classifies based on biological sex—*not transgender status or gender identity*." *Id.* at 808 (emphasis added). It reasoned that "both sides of the classification—biological males and biological females—include transgender students." *Id.* The court also reasoned that the policy was not dependent on how students acted or identified, and therefore it did not rely on impermissible sex stereotypes associated with a student's transgender status. *Id.*

The fact that the bathroom policy had a disparate impact on the transgender students was not consequential. The court stated that a "disparate impact alone does not violate the Constitution." *Adams*, 57 F.4th at 810. "Instead, a disparate impact on a group offends the Constitution when an otherwise neutral policy is motivated by 'purposeful discrimination.'" *Id.* (quoting *Feeney*, 442 U.S. at 274); *see also Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264–66 (1977). And the record did not support a finding that the bathroom policy was motivated by discrimination against transgender students.

The court then applied intermediate scrutiny to the sex-based classification, examining whether the policy substantially advanced an important governmental objective. It found the school had an important interest in "ensur[ing] the privacy and overall welfare of its entire student body." *Adams*, 57 F.4th at 803. The court then determined that the "policy is clearly related to—indeed, is almost a mirror of—its objective of protecting the privacy interests of students to use the bathroom away from the opposite sex." *Id.* at 805. The court was ultimately persuaded by the "long tradition in this country of

separating sexes," with public bathrooms "likely the most frequently encountered example." *Id.* "Indeed, the universality of that practice" is why "a sign that says 'men only' looks very different on a bathroom door than a courthouse door." *Id.* at 801 (quoting *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 468–69 (1985) (Marshall, J., concurring in part and dissenting in part)). The policy thus survived intermediate scrutiny.

2.

In *Bridge*, transgender students challenged an Oklahoma law requiring every multiple occupancy restroom in a public school to be "[f]or the exclusive use of the male sex," or "[f]or the exclusive use of the female sex." Okla. Stat. tit. 70, § 1-125. The students argued that the law violated the Equal Protection Clause because they were not treated like non-transgender students who were allowed to use the bathroom that aligned with their gender identity. *Bridge*, 2024 WL 150598, at *4.

The court applied intermediate scrutiny to the law, finding it "enact[ed] a sex-based classification." *Id.* The court found that separating bathrooms by biological sex to address the privacy concerns of students using multiple occupancy restrooms was "an important governmental objective." *Id.* at *5. In response to the students' argument that the law was premised on generalizations about men and women, the Court reasoned that "[b]iological sex is distinct from gender generalizations, and [u]se of a restroom designated for the opposite sex does not constitute a mere failure to conform to sex stereotypes." *Id.* (internal quotation marks and citation omitted).

The court also found that the law was substantially related to achieving the important government objective of student privacy. The court reasoned that the means used to protect the government's privacy interest were "almost

identical" to the privacy interest itself. *Id.* at *6. In other words, the law did not extend beyond the State's important privacy concerns. The court also noted if biological-sex-based classifications were Equal Protection Clause violations, then "no law recognizing the inherent differences between male and female would pass constitutional muster. This is an untenable position." *Id.*

3.

D.N. involved a Florida law providing that school sports and teams designated for females are not open to biological males, and sports and teams designated for males are not open to biological females. *See* Fla. Stat. § 1006.205. Plaintiff, a biological male identifying as female who had played girls sports, sued claiming the law violated the Equal Protection Clause and Title IX. *D.N.*, 2023 WL 7323078, at *1.

On the equal-protection claim, the Southern District of Florida found that intermediate scrutiny applied because the law classifies students based on biological sex. *Id.* at *5. In applying the first step of intermediate scrutiny, the court found the government had an important government interest in "promoting women's equality in athletics." *Id.* at *6. The court looked to Justice Stevens's in-chambers opinion affirming the constitutionality of a middle school's gender-based classification in competitive contact sports. *Id.* (quoting *O'Connor v. Bd. of Educ. of Sch. Dist. 23*, 449 U.S. 1301, 1302 (1980) (Stevens, J., in chambers)). Justice Stevens reasoned, "Without a gender-based classification in competitive contact sports, there would be a substantial risk that boys would dominate the girls' programs and deny them an equal opportunity to compete in interscholastic events." *O'Connor*, 449 U.S. at 1307.

The court then found that the means the Florida law employed were substantially related to that important government objective. The court found that Florida's sex-based classification was "rooted in real differences between the sexes—not stereotypes." *Id.* at *9. "[T]he statute adopts the uncontroversial proposition that most men and women *do* have different (and innate) physical attributes." *Id.* The court also found that the plaintiff failed to plead any fact showing the law was based on "purposeful discrimination" against transgender students instead of a legitimate attempt to advance the important interest of "fostering and promoting athletic opportunities for girls." *Id.* at *8, *9.

B.

Other courts have held that policies similar to those in L.B. 575 unlawfully discriminate based on sex and transgender status. *See, e.g.*, *Hecox v. Little*, 79 F.4th 1009 (9th Cir. 2023); *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586 (4th Cir. 2020).

1.

In *Hecox*, Lindsay Hecox, a biological male identifying as a transgender woman, challenged Idaho's Fairness in Women's Sports Act, which mandated that all sports teams sponsored by schools in Idaho be expressly designated based on biological sex—male, female, or coed. *Hecox*, 79 F.4th at 1019; Idaho Code § 33-6203(1), (2). Hecox moved for, and the district court granted, a preliminary injunction to enjoin enforcement of the Act, finding it violated both the Equal Protection Clause and Title IX. *Id.* at 1019–20; *see also Doe v. Horne*, No. CV-23-00185, 2023 WL 4661831 (D. Ariz. July 20, 2023).

The Ninth Circuit affirmed, holding the Act failed intermediate scrutiny under the Equal Protection Clause. *Hecox*, 79 F.4th at 1022–35. The Ninth Circuit proffered

several reasons for its holding. The court found that the Act intentionally discriminated against transgender athletes based on comments in the Act's legislative history discussing the advantages biological males who identify as girls have over biological females. *Id.* at 1022. The court also asserted that "the Act's definition of 'biological sex' is likely an oversimplification of the complicated biological reality of sex and gender." *Id.* at 1023–24. Ultimately, the court found that the use of "biological sex" as a means of identifying a class was a form of "proxy discrimination" against transgender athletes. *Id.* at 1024 (quoting *Pac. Shores Props., LLC v. City of Newport Beach*, 730 F.3d 1142, 1160 n.23 (9th Cir. 2013)).

The court then determined that transgender status was a quasi-suspect class, reasoning that "discrimination on the basis of transgender status is a form of sex-based discrimination." *Id.* at 1026. The court thus reviewed the Act under intermediate scrutiny. *Id.*

In applying intermediate scrutiny, the court did not dispute that promoting fairness in female athletic teams is an important state interest. *Id.* at 1028. But it found the Act was not substantially related to, and "in fact undermine[d]," that interest. *Id.* The court found the district court reasonable in relying on a medical expert who testified that there is a "medical consensus" that the primary driver of difference in athletic performance between males and females is the difference in "circulating" testosterone—which can be reduced through hormone therapy—as opposed to "endogenously-produced" testosterone. *Id.* at 1030–31. The expert testified that a person's genetic make-up and reproductive anatomy "are not useful indicators of athletic performance." *Id.* The court thus found the Act was based on overbroad stereotypes and did not serve the interest of protecting female sports. *Id.* at 1033.

2.

Grimm involved a transgender student's claim that a school policy designating bathroom and locker room use by "biological gender" violated the Equal Protection Clause and Title IX. 972 F.3d at 593. The Fourth Circuit affirmed the district court's grant of summary judgment on both counts for the student. *Id.* at 616, 619. As to the equal-protection challenge, the court determined that intermediate scrutiny should apply because the policy "necessarily rests on a sex classification" and "cannot be stated without referencing sex." *Id.* at 608. The court also reasoned that Grimm was "subjected to sex discrimination because he was viewed as failing to conform to the sex stereotype propagated by the Policy." *Id.* The court, on an alternative basis, held that intermediate scrutiny was also appropriate since "it is apparent that transgender persons constitute a quasi-suspect class." *Id.* at 611.

Applying intermediate scrutiny, the court found that the State had an important interest in protecting student privacy, but it concluded that excluding Grimm from the boys' bathroom was not substantially related to that interest. *Id.* at 613–14. The court found that the record evidence showed privacy actually increased when Grimm was allowed to use the boys' bathroom because "privacy strips and screens between the urinals" were installed. *Id.* at 614. For this reason, the court held that "policy was not substantially related to its purported goal." *Id.*; *see also Whitaker ex rel. Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1050–54 (7th Cir. 2017).

C.

Each of the above cases applied intermediate scrutiny to determine whether a biological-sex-based classification of sports teams or facilities violates the equal-protection rights of transgender students. These

cases applied intermediate scrutiny because the subject polices made a sex-based classification.

Before turning to our analysis applying these authorities to L.B. 575, we address a threshold question–whether rational-basis review, instead of intermediate scrutiny, should apply to these challenges. Some courts and states, including Nebraska, have argued that rational basis is often the appropriate review standard.

In the paradigmatic sex-based equal-protection claim, a plaintiff argues that the subject law or policy is unconstitutional because it treats men and women differently. *See, e.g.*, *Clark*, 695 F.2d 1126. Men have access to something that women do not, or *vice versa*. *See, e.g.*, *Virginia*, 518 U.S. at 533. These claims are indisputably subject to intermediate scrutiny. *See id.*

But the challenges advanced by transgender students in the above cases are of a different variety, as observed in *B.P.J. v. West Virginia Board of Education*, 649 F.Supp.3d 220 (S.D. W. Va. 2023). In that case, a transgender 11-year-old biological male (B.P.J.) sought to participate on his school's female cross-country team. *Id.* at 223. But West Virginia designated athletic participation based on biological sex. *Id.* at 224. The district court held the policy survived intermediate scrutiny under the Equal Protection Clause. *Id.* at 229–32. But in so ruling, the district court observed the unique nature of B.P.J.'s claim: "B.P.J.'s issue here is not with the state's offering of girls' sports and boys' sports" but with "the state's definitions of 'girl' and 'boy.'" *Id.* at 228. B.P.J. believed the policy improperly defined the terms (according to biological sex). The district court's order was stayed by the Fourth Circuit without substantive explanation, *B.P.J. ex rel. Jackson v. W. Va. State Bd. of Educ.*, No. 23-1078, 2023 WL 2803113 (4th Cir. Feb. 22, 2023), but the court's observation remains relevant.

The dissent in the now-vacated Eleventh Circuit panel opinion in *Adams* made a similar observation. Chief Judge Pryor explained that while "[s]eparating bathrooms by sex treats people differently on the basis of sex," "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, 1325, 1326 (11th Cir. 2021) (Pryor, C.J., dissenting). Chief Judge Pryor suggested that by applying intermediate scrutiny, the majority "appl[ied] the wrong kind of constitutional scrutiny." *Id.*

Other states have taken positions in court that agree with and expand on this point. *See, e.g.*, Brief of Amici Curiae Alabama et al., *West Virginia v. B.P.J. ex rel. Jackson*, 2023 WL 2648004, at *10 (U.S. Mar. 13, 2023); Brief of Amici Curiae Alabama et al., *Doe v. Horne*, Nos. 23-16026 & 23-1603 (9th Cir. Sept. 15, 2023) (*Doe* Amicus). We agree with this reasoning and have joined these briefs. Our briefs have observed that transgender plaintiffs are not arguing that "to segregate sports teams on the basis of sex violates the Equal Protection Clause." *Doe* Amicus at 5. "Just the opposite. Plaintiffs *want* [their state] to continue segregating sports teams by sex." *Id.* But they argue their states have unlawfully excluded them from the segregated category in which they wish to be. *Id.* In other words, "Plaintiffs seek to compel the State to continue segregating—just to adjust the contours of its segregation." *Id.* So, plaintiffs are really arguing that the classes created by these laws are "unlawfully narrow"—a "textbook underinclusiveness challenge." *Id.* at 7.

In another context, courts have applied rational-basis review when plaintiffs have challenged the contours of racial classifications, rather than the fact of discrimination itself. For example, *Hoohuli v. Ariyoshi*, 631 F. Supp. 1153 (D. Haw. 1986), involved a law that provided

benefits to native Hawaiians based on ancestral lineage. *Id.* at 1154. Plaintiffs in the case did not contest the Legislature's ability to grant such preferences. They instead argued that the Legislature defined the beneficiary class too expansively. *Id.* at 1159. Plaintiffs asked the court to apply strict scrutiny because the legislation used a race-based classification. *Id.* at 1158–59. The district court refused and applied rational-basis review. *Id.* at 1159. The court reasoned that it was not asked to examine "the racial preference itself," but it was asked "to examine the parameters of the beneficiary class." *Id.* The court explained that the government's decision not to calibrate the class to plaintiffs' preferences does not warrant heightened scrutiny. *See id.* at 1160–61. The court thus rejected plaintiff's equal-protection claim because the State's "definition of 'Hawaiian' . . . ha[d] a rational basis." *Id.* at 1163.

The Second Circuit elucidated this principle in *Jana-Rock Construction, Inc. v. New York Department of Economic Development*. 438 F.3d 195 (2d Cir. 2006). The case involved a New York affirmative-action statute that benefitted "Hispanics." *Id.* at 200. Plaintiff Rocco Luiere was "the son of a Spanish mother whose parents were born in Spain," but he was not considered Hispanic for purposes of the statute. *Id.* at 199. Similar to the plaintiff in *Hoohuli*, Luiere did not challenge the fact that the program benefited only Hispanics; he challenged 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 court confirmed that "[t]he purpose of [heightened scrutiny] is to ensure that the government's choice to use racial classifications is justified." *Id.* at 210. It is "not to ensure that the contours of the specific racial classification" are always "correct." *Id.* The Second Circuit therefore

"evaluate[d] the plaintiff's underinclusiveness claim using rational basis review" and duly rejected it. *Id.* at 212.

We have argued that these racial-classification cases map onto sex-based classifications. The above cases were not about whether the government could draw lines between races for certain benefits; they were about whether the government drew the lines in the right spots. Transgender students have not argued the government cannot draw a line between boys and girls for purposes of bathrooms and sports; they have argued that the government has drawn the line in the wrong spot. Chief Judge Pryor and several states would argue that the definitions creating a sexual classification—like the definitions creating a racial classification—are subject to only rational-basis review.

D.

After considering all the above authority, we find L.B. 575 would not violate the Equal Protection Clause. Specifically, we find (1) L.B. 575 does not discriminate based on gender identity, but on only biological sex, (2) L.B. 575's discrimination of facilities and athletics based on biological sex survives intermediate scrutiny, and (3) L.B. 575's defining its classes based on biological sex rather than gender identity survives rational-basis review.

1.

We conclude that L.B. 575 does not discriminate based on gender identity. First, a plain reading of the bill reveals no mention of transgender status or gender identity. On its face, L.B. 575 defines females and males according to biology at birth. It designates bathrooms and locker rooms based on biological sex. It designates involvement in athletics based on biological sex. These are distinctions based on sex, not gender identity. Biological

males, transgender or not, cannot use female bathrooms or locker rooms or be on female-designated sports teams. And biological females, transgender or not, cannot use male bathrooms or locker rooms or be on male-designated sports teams. As such, the plain text of L.B. 575 cannot be said to single out transgender students.

It may be asserted that while the policy does not facially discriminate against transgender students, it may have a disparate impact on transgender students. Indeed, it seems transgender students would be more likely than non-transgender students to request to use a bathroom that differs from their biological sex. But as noted in *Adams*, disparate impact alone is not enough to render an otherwise neutral law unconstitutional. Instead, the policy must also be motivated by "purposeful discrimination." *Adams*, 57 F.4th at 810. Purposeful discrimination involves more than awareness of the disparate effect a bill may have on a group of people. *See Feeney*, 442 U.S. at 279. Purposeful discrimination requires that lawmakers acted "'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Id.* In *Adams*, the Eleventh Circuit found the defendant school board did not act to "single out" transgender students, evidenced by the fact that the school board sought to accommodate those students by offering alternative sex-neutral bathrooms. *Adams*, 57 F.4th at 810–11. We find no evidence that L.B. 575 has been introduced to single out and harm transgender students as opposed to protect the privacy of students and protect female athletic opportunity.

2.

Next, we conclude L.B. 575's sex-based classifications survive sex-based intermediate scrutiny. L.B. 575 classifies students (for both school facilities and athletic programs) based on biological sex. The State's decision to segregate facilities and sports teams by sex

would warrant intermediate scrutiny. *See Virginia*, 518 U.S. at 532–33. We find L.B. 575's sex-based classifications clear intermediate scrutiny.

Under intermediate scrutiny, "absolute necessity is not required before a gender based classification can be sustained." *Clark*, 695 F.2d at 1131. The question is whether the classification is substantially related to an important government interest. *Nguyen*, 533 U.S. at 60. We first review whether Nebraska has a substantial interest or interests in L.B. 575's sex classifications. Then, we review whether L.B. 575's means are substantially related to those interests.

a.

There is little-to-no dispute in the case law that segregating boys' and girls' bathrooms serves the important government interest of protecting student privacy. "The protection of students' privacy interests in using the bathroom away from the opposite sex . . . is obviously an important governmental objective." *Adams*, 57 F.4th at 804. Even in cases that found segregating bathrooms by biological sex is a violation of the Equal Protection Clause, courts have recognized "that students have a privacy interest in their body when they go to the bathroom." *Grimm*, 972 F.3d at 613. And the government has "a legitimate interest in ensuring [those] bathroom privacy rights are protected." *Whitaker*, 858 F.3d at 1052.

The cases also affirm that protecting female athletic opportunity is an important government interest. "[T]he government has an important interest in protecting and promoting athletic opportunities for girls." *D.N.*, 2023 WL 7323078, at *6. Even the Ninth Circuit, which struck down Idaho's Fairness in Women's Sports Act, has recognized this interest. In *Clark*, male students (who were not transgender) challenged the Arizona Interscholastic

Association's policy that prohibited them from competing on the girls' volleyball team even though their school did not offer boys' volleyball. 695 F.2d at 1127. The Ninth Circuit recognized that the challenged policy furthered two "legitimate and important" interests—(1) "promoting equality of athletic opportunity between the sexes" and (2) "redressing past discrimination against women in athletics." *Id.* at 1131. While the Ninth Circuit in *Hecox* distinguished *Clark* in striking down Idaho's Fairness in Women's Sports Act, the court still recognized "an important state interest" in "furthering women's equality and promoting fairness in female athletic teams." *Hecox*, 79 F.4th at 1028. States have an important interest in preserving and advancing female athletic opportunity.

b.

The conflict in the case law arrives at the second step of intermediate scrutiny—whether laws like L.B. 575 are *substantially related* to the government's important interests. *Adams* and *Bridge* and *D.N.* answered that question, "yes"; *Hecox* and *Grimm* answered, "no."

We find the latter line of cases have misapplied the standard and their reasoning unpersuasive. These courts have not focused on the question of whether separating bathrooms and athletics *by sex* is substantially related to protecting the privacy of students and protecting women's sports. These courts have instead focused on the question of whether prohibiting *transgender students* from accessing facilities and teams designated for the biological sex opposite them is substantially related to the government's interests. We find the logic of these decisions misplaced.

Hecox illustrates the methodological error. In that decision, the court affirmed the district court's conclusion that, based on the record, "a categorical bar against a

transgender female athlete's participation" was not necessary to "promote 'sex equality' or to 'protect athletic opportunities for females.'" *Hecox*, 79 F.4th at 1030. But the classification at issue was not based on transgender identity. The policy did not create a "non-transgender team" on one end and a "transgender team" on the other. The classification was between biological males and biological females. *See* Idaho Code §§ 33-6201–06 (2020). So, the question should have been whether a categorical bar against biological males' participation in female sports promoted "sex equality" and "protect[ed] athletic opportunity for females." The Ninth Circuit had already answered that question, "yes," in *Clark*. There, it held there was "clearly a substantial relationship between the exclusion of males from the [women's] team and the goal of redressing past discrimination and providing equal opportunities for women." *Clark*, 695 F.2d at 1131. Indeed, the court concluded that if Arizona was forced to allow biological males to compete on women's teams, "athletic opportunities for women would be diminished." *Id.*

In *Grimm*, the Fourth Circuit reasoned that "the record demonstrates that bodily privacy of cisgender boys using the boys restrooms did not increase when Grimm was banned from those restrooms." *Grimm*, 972 F.3d at 614. But the school board policy did not create a "non-transgender restroom" and a "transgender restroom." It provided for "male and female restroom and locker room facilities" as determined by biological sex. *Id.* at 599. So, the question should not have been whether bodily privacy of boys increases when transgender "boys" are banned from the restroom. The question should have been whether the bodily of privacy of biological males is supported when biological females are banned for the boys' restrooms.

In both cases, when the analysis is properly framed, the answer becomes clear. Disallowing biological males from competing with biological females in athletics is

substantially related to preserving athletic opportunity for biological females. As noted by the Ninth Circuit, because of "physiological differences" between average males and average females, "males would displace females to a substantial extent if they were allowed to compete for positions" on sports teams and "athletic opportunities for women would be diminished." *Clark*, 695 F.2d at 1131; *see also* pp. 24–25, *infra*.

It is also clear that segregation between the sexes in bathrooms is substantially related to the government's interest in privacy. The Seventh Circuit has explained that "the law tolerates same-sex restrooms or same-sex dressing rooms . . . to accommodate privacy needs." *Chaney v. Plainfield Healthcare Ctr.*, 612 F.3d 908, 913 (7th Cir. 2010). The Fourth Circuit has found that "[t]he need for privacy justifies separation and the differences between the genders demand a facility for each gender that is different." *Faulkner v. Jones*, 10 F.3d 226, 232 (4th Cir. 1993). The Supreme Court has also acknowledged the necessity of sex-segregated facilities, recognizing that admitting women for the first time into the Virginia Military Academy "would undoubtedly require alterations necessary to afford members of each sex privacy from the other sex in living arrangements." *Virginia*, 518 U.S. at 550 n.19. To hold otherwise would undermine a common practice throughout humanity itself. Indeed, "it has been commonplace and universally accepted—across societies and throughout history—to separate on the basis of sex those public restrooms, locker rooms, and shower facilities that are designed to be used by multiple people at a time." *Grimm*, 972 F.3d at 634 (Niemeyer, J., dissenting).

In the end, L.B. 575's separation of facilities and athletics is substantially related to the important government interests of student privacy and female athletic opportunity. Its sex-based classifications thus survive intermediate scrutiny.

3.

Finally, we note that while the above intermediate-scrutiny analysis is appropriate and necessary to evaluating the constitutionality of L.B. 575, we think that rational-basis is the correct review standard for the type of claim that would likely be brought against L.B. 575. For completeness, we address this issue as well.

In the case where a student challenges whether Nebraska can segregate bathrooms and sports between boys/men/males and girls/women/females at all, intermediate scrutiny would necessarily apply. *See* p. 13, *supra*. But plaintiffs who have recently challenged similar laws have not made this argument. They do not object to the fact that these laws segregate sports or bathrooms. *See* pp. 13–14, *supra*. Rather, plaintiffs have argued only that these policies' definitions should place transgender students on the side that matches their gender identity. *Id.* L.B. 575's definitions are subject to rational-basis review. And its definitions survive rational-basis review.

L.B. 575 defines a "biological female" as a person "born with female anatomy with two X chromosomes," and it defines a "biological male" as a person "born with male autonomy with X and Y chromosomes." L.B. 575 § 2(a), (b). Some may complain that those definitions improperly exclude transgender students. That objection is fundamentally a line-drawing one, which survives constitutional scrutiny under a rational-basis test.

The State's definitions of "biological male" and "biological female" do not warrant heightened scrutiny. *Jana-Rock* and *Hoohuli* subjected the government's definitions of a racial classification to rational-basis review. *See Jana-Rock*, 438 F.3d at 212; *Hoohuli*, 631 F. Supp. 1159. These cases demonstrate the difference between a challenge to a classification and a challenge that

disagrees with the parameters of the classification. The first is subject to heightened scrutiny while the latter receives only rational-basis review. *See* pp. 14–16, *supra*. L.B. 575's excluding transgender "boys" from the definition of male and transgender "girls" from the definition of female falls into the latter.

We agree with *Jana-Rock* that the reason for heightened scrutiny is suspicion over the fact that the government is dividing people into groups at all. *See Jana-Rock*, 438 F.3d at 210. That suspicion is not present where the parties agree the government can segregate and disagree only on where to draw the boundaries between groups. The issue of whether transgender students should get to play on the team and use the bathroom of their choice is about the parameters of segregation, not the segregation itself.

L.B. 575's definitions clearly pass rational-basis scrutiny. But they also would pass even intermediate scrutiny. Excluding transgender students from the definition of the sex with which they identify is substantially related to the important government interests already laid out—student privacy and protecting female athletic opportunity.

The privacy interests fueling L.B. 575's sex-based bathrooms rule are "sex-specific privacy interests." *Adams*, 57 F.4th at 806. "[M]ost people have 'a special sense of privacy in their genitals, and involuntary exposure of them in the presence of people of the other sex may be especially demeaning and humiliating.'" *Fortner v. Thomas*, 983 F.2d 1024, 1030 (11th Cir. 1993) (quoting *Lee v. Downs*, 641 F.2d 1117, 1119 (4th Cir. 1981)). This privacy interest is implicated when a male is in the female bathroom regardless of how that male identifies, and *vice versa*. It would undermine this interest for the State to give students of the opposite sex—who in many cases have

genitals of the opposite sex—access to bathrooms meant to provide students a place where they can "shield[] their bodies from the opposite sex." *Adams*, 57 F.4th at 805. In short, keeping biologically male students out of female bathrooms, even if the males identify as female, is substantially related to the State's interest in shielding students' bodies in intimate facilities from members of the opposite sex.

Disallowing transgender students to play on the team designated for the opposite biological sex is substantially related to protecting female athletic opportunity. Simply put, there are "physiological differences" between males and females. *Clark*, 695 F.2d at 1131. The "genetic" differences "between males and females" include "height, body mass, skeletal structure, strength, muscle quality, center of gravity, limb length ratios, [and] cardiovascular performance." Amicus Brief of 67 Female Athletes, Coaches, Sports Officials, and Parents of Female Athletes, *West Virginia v. B.P.J.*, 2023 WL 2648011, at *6 (Mar. 13, 2023).[3] "[A]dult males are faster, stronger, more powerful than females because of fundamental sex differences in anatomy and physiology dictated by sex chromosomes." *ACSM Releases Expert Consensus Statement*, American College of Sports Medicine (Sept. 29, 2023), https://perma.cc/Q5UZ-2F8G. These

[3] *See also* K. M. Halzip et al., *Sex-Based Differences in Skeletal Muscle Kinetics and Fiber-Type Composition*, 30 Physiology 30 (2015); Sandro Bartolomei et al., *A Comparison between Male and Female Athletes in Relative Strength and Power Performances*, 6 J. Functional Morphology and Kinesiology 17 (2021); Sarah R. St. Pierre et al., *Sex Matters: A Comprehensive Comparison of Female and Male Hearts*, Frontiers in Physiology (2022), https://perma.cc/2VHJ-FPCS; Melanie Schorr et al., *Sex Differences in Body Composition and Association with Cardiometabolic Risk*, Biology of Sex Differences (2018), https://perma.cc/VP2B-LTU9.

biological advantages are not erased the moment a male announces, "I am a woman." If Nebraska allowed biological males to play on a female team if they so identified, "there would be a substantial risk that boys would dominate the girls' programs and deny them an equal opportunity to compete in interscholastic events." *O'Connor*, 449 U.S. at 1307.

Some courts have suggested that estrogen therapy and other transition procedures may quell any physiological advantages biological males have over biological females. *See Hecox*, 79 F.4th at 1029. Even if that is true, not every biological male that identifies as a woman undergoes these procedures.[4] And neither rational-basis nor intermediate scrutiny requires states to narrowly tailor laws to every individual's unique circumstances. *See Heller v. Doe*, 509 U.S. 312, 321 (1993); *Clark*, 695 F.2d at 1131–32. The Legislature does not have to tailor L.B. 575 to allow biological males who have undertaken treatments that curtail their physiological advantages to compete on female-designated teams.

L.B. 575's definitions of "biological female" and "biological male" do not fail either rational-basis or intermediate review. L.B. 575 does not violate the Equal Protection Clause.

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[4] *See, e.g.*, *Transgender & Non-Binary Care Frequently Asked Questions*, The MetroHealth System, https://perma.cc/K3J3-3BU3 (last visited Mar. 12, 2024), ("Living according to your gender identity does not always mean you need to use hormones or surgery."); *Learn About Sex and Gender*, Planned Parenthood Great Northwest, Hawai'i, Alaska, Indiana, Kentucky, https://perma.cc/W66P-AK7Z (last visited Mar. 12, 2024) ("Transitioning can involve medical treatment and hormones, changing name and pronouns, altering appearance and dress, or coming out to your friends and family. Not all transgender people transition.").

III.

L.B. 575 is also consistent with Title IX of the Educational Amendments of 1972. Title IX provides that "[n]o 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." 20 U.S.C. § 1681(a); *accord* 34 C.F.R. § 106.31(a). "Congress enacted Title IX in response to its finding—after extensive hearings held in 1970 by the House Special Subcommittee on Education—of pervasive discrimination against women with respect to educational opportunities." *Cohen v. Brown Univ.*, 101 F.3d 155, 165 (1st Cir. 1996); *see also Neal v. Bd. of Trs. of Cal. State Univs.*, 198 F.3d 763, 766 (9th Cir. 1999).

While Title IX prohibits discrimination "on the basis of sex" in the provision of educational benefits, 20 U.S.C. § 1681(a), it *expressly allows* educational institutions to "maintain[] separate living facilities for the different sexes," *id.* § 1686, and implementing regulations allow "separate toilet, locker room, and shower facilities on the basis of sex," 34 C.F.R. § 106.33. The Title IX regulations also allow institutions to "operate or sponsor separate teams for members of *each sex* where selection for such teams is based upon competitive skill or the activity involved is a contact sport." 34 C.F.R. § 106.41(b) (emphasis added). As Senator Bayh, the chief sponsor of Title IX in the Senate, explained, this safe harbor was intended to "permit differential treatment by sex . . . in sports facilities or other instances where personal privacy must be preserved." 118 Cong. Rec. S5,807 (daily ed. Feb. 28, 1972) (statement of Sen. Bayh).

L.B. 575's separation of school facilities and athletics based on biological sex implicates Title IX. Courts are split on whether the refusal to allow transgender

athletes to use facilities or compete in sports based on their gender identity violates Title IX.

A.

In *Grimm*, the Fourth Circuit relied on the Supreme Court's holding in *Bostock v. Clayton County*, 590 U.S. 644 (2020)—a Title VII case about employment discrimination—to strike down a school board's policy prohibiting the transgender plaintiff from using the boys' restrooms. In *Bostock*, the Court found that discrimination based on sexual orientation or gender identity violates Title VII because "it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex." *Bostock*, 590 U.S. at 660.

The Fourth Circuit stated that "[a]lthough *Bostock* interprets Title VII of the Civil Rights Act of 1964, it guides our evaluation of claims under Title IX." *Grimm*, 972 F.3d at 616 (citation omitted). It explained that "the Board could not exclude Grimm from the boys bathrooms without referencing his 'biological gender' under the policy," so "[e]ven if the Board's primary motivation in implementing or applying the policy was to exclude Grimm because he is transgender, his sex remains a but-for cause for the Board's actions." *Id.* at 616. The court thus concluded that "the Board's policy excluded Grimm from the boys' restrooms 'on the basis of sex.'" *Id.* at 617. The court reasoned, "Grimm was treated worse than students with whom he was similarly situated because he alone could not use the restroom corresponding with his gender." *Id.* at 618. The court accordingly affirmed summary judgment on Grimm's Title IX claim. *Id.* at 619.

Similarly, in *Doe v. Snyder*, 28 F.4th 103 (9th Cir. 2022), the Ninth Circuit held that *Bostock's* reasoning should apply to Title IX challenges. There, two minors

diagnosed with gender dysphoria argued that the Arizona Health Care Cost Containment System's policy was unconstitutional. *Id.* at 106. Specifically, they argued that the policy of excluding "gender reassignment surgeries" from coverage under Arizona Medicaid violated the Affordable Care Act's anti-discrimination provision, which incorporates by reference Title IX's prohibition of discrimination "on the basis of sex," *see* 42 U.S.C. §18116(a). Although the court did not reach the merits of the constitutional and statutory challenges, it instructed that "Title IX's protections [should be construed] consistently with those of Title VII." *Doe*, 28 F.4th at 114. It did this despite acknowledging that the statutes employ different language, reasoning that *Bostock* interchangeably used "because of sex" and "on the basis of sex" throughout the opinion. *See id.*

B.

Other courts have declined to extend the reasoning of *Bostock* to Title IX. For example, in *Adams*, the en banc court held that a school's "separating school bathrooms based on biological sex . . . comports with Title IX." *Adams*, 57 F.4th at 796. To determine the meaning of "sex" in Title IX, the court looked to the ordinary meaning of the word when the law was enacted in 1972. *See id.* at 812. Guided by dictionary definitions from the time of Title IX's enactment, the court found the meaning of "sex" to be unambiguous. It held that "when Congress prohibited discrimination on the basis of 'sex' in education, it meant biological sex, i.e., discrimination between males and females." *Id.* If "sex" included "gender identity," then Title IX's "carve-out" for sex-separated living facilities, "as well as the various carveouts under the implementing [Title IX] regulations, would be rendered meaningless," and transgender persons "would be able to live in both living facilities associated with their biological sex *and* [those] associated with their gender identity or transgender

status." *Id.* at 813 (emphasis added). Such a conclusion was "difficult [for the court] to fathom." *Id.*

The court likewise declined to extend *Bostock* because it "expressly declined to address the issue of sex-separated bathrooms and locker rooms" and instead cabined itself to the Title VII issue of "various employers' decisions to fire employees based solely on their sexual orientations or gender identities." *Id.* at 808. The "appeal [in *Adams*] centers on the converse of that statement—whether discrimination based on biological sex necessarily entails discrimination based on transgender status." *Id.* at 809. The court concluded that "it does not—a policy can lawfully classify on the basis of biological sex without unlawfully discriminating on the basis of transgender status."[5] *Id.*

The court in *Bridge* also rejected the plaintiff's Title IX challenge to the school's policy that excluded him from his preferred bathroom. It found that because Title IX expressly allows schools to separate facilities based on sex, *see* 34 C.F.R. § 106.33, the determinative question was whether "sex" under Title VII means biological sex or gender identity. *Bridge*, 2024 WL 150598, at *7. The court concluded that "[a]t the time Title IX was enacted, the ordinary public meaning of 'sex' was understood to mean the biological, anatomical, and reproductive differences between male and female." *Id.* at *8. The school therefore did not violate Title IX by separating bathrooms by biological sex as allowed by Title IX's exception.

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[5] Even if the term "sex," as used in Title IX, was ambiguous, the court would have still found in favor of the School Board because under the clear-statement rule for laws passed under the Spending Clause, Congress must have "unambiguously" defined sex to mean something other than biological sex—which it did not. *Id.* at 815–17.

In *Neese v. Becerra*, two Texas-based physicians challenged the United States Department of Health and Human Services' (HHS) interpretation of Section 1557 of the Affordable Care Act. 640 F.Supp.3d 668, 672–73 (N.D. Tex. 2022). Section 1557 incorporated by reference Title IX's prohibition of discrimination "on the basis of sex," *see* 42 U.S.C. §18116(a), and HHS announced that it would interpret and enforce this provision to include gender-identity and sexual-orientation discrimination, per *Bostock*. *Neese*, 640 F.Supp.3d at 672.

The court held that neither *Bostock* nor its reasoning apply to Title IX. The court reasoned that Title VII and Title IX use different phraseology. Title VII prohibits discrimination "because of sex," while Title IX uses "on the basis of sex." *Id.* at 679–80. The court reasoned that "[a]s written and commonly construed, Title IX operates in binary terms—male and female—when it references 'on the basis of sex.'" *Id.* at 680. Thus, the word "sex" in Title IX refers to biological sex and not sexual orientation or gender identity. The court concluded that reading the phrase otherwise would render "Title IX and its regulations . . . nonsensical." *Id.* In fact, to ensure the legislative purposes of Title IX are accomplished, the court stated that Title IX "expressly allows [for] sex distinctions and sometimes even *requires* them to promote equal opportunity." *Id.* Accordingly, the court held, "Title IX's ordinary public meaning remains intact until changed by Congress, or perhaps the Supreme Court." *Id.* at 684.

C.

Adopting the analyses of the latter cases, we conclude L.B. 575 does not violate Title IX. Those courts reasoned that separating bathrooms and athletics based on biological sex comports with the text and legislative purpose of Title IX. As pointed out by the extensive en banc opinion in *Adams*, the reasoning of *Bostock* does not apply

to Title IX. *Bostock* concerned only Title VII; it expressly noted that "other federal or state laws that prohibit sex discrimination"—like Title IX—were not "before" the Court; and it refused to "prejudge any such question" about what those statutes require. 590 U.S. at 681. Substantively, "Title VII differs from Title IX in important respects." *Meriwether v. Hartop*, 992 F.3d 492, 510 n.4 (6th Cir. 2021). Title VII involves employment claims. Title IX is "about schools and children—and the school is not the workplace." *Adams*, 57 F.4th at 808. It therefore "does not follow that principles announced in the Title VII context automatically apply in the Title IX context." *Meriwether*, 992 F.3d at 510 n.4.

We also reiterate the material differences in the texts of Title VII and Title IX. Title IX prohibits discrimination "on *the basis* of sex," 20 U.S.C. § 1681(a) (emphasis added), rather than "because of . . . sex." 42 U.S.C. § 2000e-2(a)(1). That distinction is significant. *Bostock* concluded that Title VII's prohibition on discrimination "because of" sex imposed a but-for causation requirement, which the Court acknowledged "can be a sweeping standard." *Bostock*, 590 U.S. at 656. Title IX, by contrast, prohibits only discrimination "on *the basis* of sex." 20 U.S.C. § 1681(a) (emphasis added). That language conveys that biological sex must be the *sole* reason for the discrimination. "A statutory provision's use of the definite article 'the,' . . . indicates that Congress intended the term modified to have a singular referent." *S.E.C. v. KPMG LLP.*, 412 F. Supp. 2d 349, 387–88 (S.D.N.Y. 2006); *see also Rumsfeld v. Padilla*, 542 U.S. 426, 434 (2004).

We also agree with *Adams* and *Bridge* that separating bathrooms and sports by biological sex falls squarely into Title IX's carve-outs for separating facilities and athletic teams on the basis of "sex." *See* 20 U.S.C. § 1686; 34 C.F.R. §§ 106.33, .41(b). The ordinary meaning of the word "sex" at the time the law was enacted was

biological sex. Definitions show that in 1972 the word "sex" meant biological sex, not gender identity. *See Adams*, 57 F.4th at 812 (collecting dictionary definitions); *Bridge*, 2024 WL 150598, at *7 (same); *Grimm*, 972 F.3d at 632–33 (Niemeyer, J., dissenting); s*ee also* 85 Fed. Reg. 30026, 30178 ("Title IX and its implementing regulations include provisions that presuppose sex as a binary classification . . . ."). Defining sex to mean biological sex, as is the case in L.B. 575, does not offend Title IX. Rather, it appears to be in accord with the legislative purpose of Title IX. For these reasons, L.B. 575 does not violate Title IX.

IV.

We conclude that L.B. 575, as introduced, is constitutional. Courts have long found that separating sports and facilities by sex is permissible under the Equal Protection Clause. And any challenges to L.B. 575's exclusion of transgender students from its definitions of "biological male" and "biological female" should be examined under rational-basis review. But even if the bill is reviewed under intermediate scrutiny, it is still constitutional. Courts have routinely found that objectives like those of L.B. 575—student privacy and equal athletic opportunities—are important. It is reasonable for the State to make designations based on biology to ensure those objectives are accomplished.

As to Title IX challenges, we believe separating facilities and teams based on biological sex comports with the text and legislative purpose of Title IX. The word "sex" in Title IX and its carve-outs for facilities and athletic teams refers to biological sex, not sexual orientation or gender identity. To read the phrase otherwise would be to render Title IX illogical.

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