

No. 24 AP 483

**THE TENTH DISTRICT COURT OF  
APPEALS FOR THE STATE OF OHIO**

---

MADELINE MOE, ET AL.,

*Plaintiffs-Appellants,*

v.

DAVID YOST, ET AL.,

*Defendants-Appellees.*

---

Appeal from the Franklin County Court of  
Common Pleas, No. 24-cv-002481

---

**BRIEF FOR *AMICUS CURIAE* INDEPENDENT  
WOMEN'S FORUM IN SUPPORT OF DEFENDANTS-  
APPELLEES**

---

Freda J. Levenson (45916)

*Counsel of Record*

Amy Gilbert (100887)

ACLU of Ohio Foundation, Inc.

4506 Chester Ave.

Cleveland, Ohio 44103

(614) 586-1972

flevenson@acluohio.org

David J. Cary (88787)

Carlen Zhang-D'Souza (93079)

ACLU of Ohio Foundation, Inc.

1108 City Park Ave., Ste. 203

Columbus, Ohio 43206

Dave Yost (0056290)

OHIO ATTORNEY GENERAL

T. Elliot Gaiser (0096145)

SOLICITOR GENERAL

*Counsel of Record*

Erik Clark (0078732)

DEPUTY ATTORNEY GENERAL

Stephen P. Carney (0063460)

DEPUTY SOLICITOR GENERAL

Amanda Narog (0093954)

ASSISTANT ATTORNEY GENERAL

(614) 586-1972  
dcarey@acluohio.org  
czhangdsouza@acluohio.org

Chase Strangio  
Harper Seldin  
Leslie Cooper  
ACLU Foundation  
125 Broad Street, Floor 18  
New York, NY 10004

Miranda Hooker  
Jordan Bock  
Goodwin Procter LLP  
100 Northern Avenue  
Boston, MA 02210

*Counsel for Appellants*

30 East Broad Street, 17th Fl.  
Columbus, Ohio 43215  
(614) 466-8980  
thomas.gaiser@ohioago.gov

*Counsel for Appellees*

Andrew D. McCartney (0099853)  
*Counsel of Record*

James S. Kresge (0086370)  
Benjamin M. Flowers (0095284)  
Ashbrook Byrne Kresge LLC  
PO Box 8248  
Cincinnati, OH 45249  
Tel: (513) 201-5775  
Fax: (513) 216-9882  
admccartney@ashbrookbk.com

Sylvia May Mailman (0100520)  
Independent Women's  
Law Center  
1802 Vernon Street NW, Ste. 1027  
Washington, DC 20009  
(202) 807-9986  
may.mailman@iwf.org

*Attorneys for Amicus Curiae  
Independent Women's Forum*

## TABLE OF CONTENTS

Table of Authorities .....	ii
Statement of <i>Amicus</i> Interest.....	1
Argument.....	2
I.    H.B. 68 Preserves Fair Competition and Opportunities for Women. ....	3
II.   H.B. 68 Preserves the Societal Benefits of Women’s Sports. .	11
III.  H.B. 68 Prevents Increased Risk of Physical Injury. ....	13
IV.   H.B. 68 Safeguards Women’s Privacy.....	14
V.    H.B. 68 Preserves Title IX’s Revolution in Women’s Sports.....	16
Conclusion .....	19
Certificate of Service.....	20

## TABLE OF AUTHORITIES

Page(s)

### Cases

*Adams by & through Kasper v. Sch. Bd. of St. Johns Cty.*,  
57 F.4th 791 (11th Cir. 2022) ..... *passim*

*Chaney v. Plainfield Healthcare Ctr.*,  
612 F.3d 908 (7th Cir. 2010) ..... 15

*Cohen v. Brown Univ.*,  
101 F.3d 155 (1st Cir. 1996) ..... 17

*Tennessee v. Cardona*,  
No. 24-5588, 2024 WL 3453880 (6th Cir. July 17, 2024)  
(order) ..... 16

*United States v. Virginia*,  
518 U.S. 515 (1996) ..... 15

*State ex rel. Yost v. Holbrook*,  
No. 2024-0551 (Ohio, Apr. 24, 2024) ..... 14

### Statutes

R.C. 3313.5320(A) ..... 3

R.C. 3313.5320(B) ..... 3

R.C. 3345.562(B) ..... 3

R.C. 3345.562(C) ..... 3

### Other Authorities

Deborah Brake, *The Struggle for Sex Equality in Sport and the  
Theory Behind Title IX*, 34 U. Mich. J.L. Reform 13 (2001) ..... 16

Don Sabo & Phil Veliz, <i>Go Out and Play: Youth Sports in America</i> , Women’s Sports Foundation (2008) .....	18
Doriane Lambelet Coleman, <i>Why elite women’s sports need to be based on sex, not gender</i> , Wash. Post (Aug. 16, 2024).....	7
Ellen J. Staurowsky, et al., <i>Her Life Depends On It III: Sport, Physical Activity, and the Health and Well-Being of American Girls and Women</i> , Women’s Sports Foundation (2015) .....	18
Ernst & Young, PRNewswire, <i>Female executives say sport helps accelerate leadership and career potential</i> (Oct. 9, 2014).....	18
Independent Women’s Forum, <i>Competition: Title IX, Male-Bodied Athletes, and the Threat to Women’s Sports</i> , 2d ed. (June 2023).....	<i>passim</i>
Opinion of the Ohio Attorney General, No. 2023-006 (May 26, 2023) .....	15
Paul C. Sweeney, <i>Abuse, Misuse &amp; Abrogation of the Use of Legislative History: Title IX &amp; Peer Sexual Harassment</i> , 66 UMKC L. Rev. 41 (1997).....	17
Rick Sobey, <i>After Massachusetts field hockey player is injured by boy’s shot, team captain tells the MIAA that ‘boys do not belong in girls’ sports’</i> , Boston Herald (Nov. 6, 2023) .....	14
Testimony before Ohio Senate Government Oversight Committee, 2d Hearing (Nov. 28, 2023) (testimony of May Mailman) .....	10
Testimony before Ohio Senate Government Oversight Committee, 2d Hearing (Nov. 28, 2023) (testimony of Riley Gaines) .....	<i>passim</i>

Valerie Richardson, *Girls left in dust as male-born transgender athletes take state track titles in five states*, Wash. Times (June 16, 2024) ..... 9

W. Burlette Carter, *Sexism in the “Bathroom Debates”: How Bathrooms Really Became Separated by Sex*, 37 Yale L. & Pol’y Rev. 227 (2018) ..... 15

## STATEMENT OF *AMICUS* INTEREST

Independent Women’s Forum (IWF) is a non-profit, non-partisan 501(c)(3) organization founded by women to foster education and debate about legal, social, and economic policy issues. IWF promotes access to free markets and the marketplace of ideas and supports policies that expand liberty, encourage personal responsibility, and limit the reach of government.

Of particular relevance here, IWF supports, and has substantial expertise regarding the benefits of women’s sports not only for women, but for society more broadly. When males participate in women’s sports, women are left behind. Women have already lost roster spots, been forced to drop out of competitions, and sustained serious injuries inflicted by males who “identify” as women on the field. Moreover, women have been forced to endure invasive losses of privacy when men gain access to *female* locker rooms. The efforts are regressive; far from empowering women, they threaten the gains women have achieved in the last half century. IWF’s expertise on these issues may assist the Court in understanding some of the important interests that laws like H.B. 68 promote.

All parties have consented in writing to the filing of this brief. *See* Ex. A.

## ARGUMENT

The Court of Common Pleas rejected the plaintiffs' claims. Rightly so, as the Attorney General's brief explains. In what follows, Independent Women's Forum focuses on the important policy concerns that H.B. 68 promotes in preserving women's sports for women.

H.B. 68 preserves half a century of progress in women's rights in a key arena: sports. Because males have an undeniable biological advantage, their participation costs some women success and others a spot on the field. Leaving women behind has consequences: the skills learned on the field competing, communicating, and dealing with loss are directly connected to women's increased empowerment, leadership, wellbeing, and career advancement. *See below* at 11–13. For women able to compete, they face an increased risk of physical injury from stronger, bigger male athletes. And they face a loss of privacy when undressing and showering in front of men in locker rooms. In essence, they are told to say goodbye to more than 50 years of progress in women's rights in athletics. Any consideration of H.B. 68 must grapple with our duty, as a society and under law, to women.



## **I. H.B. 68 Preserves Fair Competition and Opportunities for Women.**

1. Section 4 of H.B. 68 is entitled the “Save Women’s Sports Act.” 2023 Sub. H.B. No. 68, Section 4. The Act requires that “[e]ach school that participates in athletic competitions or events” administered by athletic organizations “shall designate” sports teams as either male, female, or co-ed based on biological sex. R.C. 3313.5320(A). It prohibits schools and others who organize interscholastic sporting events from “knowingly permit[ting] individuals of the male sex to participate on athletic teams or in athletic competitions designated only for participants of the female sex.” R.C. 3313.5320(B). Moreover, each public or private college or university that is a member of the NCAA, the NAIA, or the NJCAA must “designate intercollegiate athletic teams and sports based on the sex of the participants.” R.C. 3345.562(B). None of these educational institutions shall “knowingly allow individuals of the male sex to participate on athletic teams or in athletic competitions designated for only participants of the female sex.” R.C. 3345.562(C).

A supermajority of the General Assembly enacted H.B. 68. And it did so after proponents of H.B. 68 provided compelling testimony about the harms of identity-based athletic policies and the urgent need to

preserve over 50 years of revolutionary gains in women’s rights. *See below* at 8–14.

At the non-collegiate level, interscholastic athletics are regulated largely by schools, school districts, and the Ohio High School Athletic Association (OHSAA). *See* Ohio Legislative Serv. Comm’n, Interscholastic Athletics Members Brief (July 2020), at 2, <https://perma.cc/3VFX-3TUH>. Prior to the lower court’s decision in this case, OHSAA’s student policy stated that a male may “participate in girl’s sport or on a girls’ team” if that person has completed at least “one year of hormone treatment.” OHSAA Student Policy at 3, <https://perma.cc/9YJG-8F7S> (emphasis omitted). Separately, OHSAA’s student policy provided that a male may “participate in girl’s sport or on a girls’ team” if that person “demonstrate[s] to the Executive Director’s Office” that he “does not possess physical ... or physiological advantages over genetic females of the same age group.” *Id.* (emphasis omitted). In sum, OHSAA’s policy allowed males to compete against females in girls’ sports and on girls’ sports teams.

At the college level, the NCAA’s updated student-athlete participation policy calls for identity-based student-athlete participation for each sport to be “determined by the policy for the national governing body of

that sport,” or if there is no national governing body, “by the policy for that sport’s international federation.” NCAA Student-Athlete Participation Policy (updated May 2024), <https://perma.cc/LL57-BDSV>.

In other words (and as discussed more below), H.B. 68 addresses a current phenomenon: males competing in women’s sports in Ohio.

2. On average, males have a 10% athletic advantage over females. Independent Women’s Forum, *Competition: Title IX, Male-Bodied Athletes, and the Threat to Women’s Sports*, 2d ed. (June 2023), <https://perma.cc/985G-K5CD> (2023 Competition Report), at 25. This male-female athletic gap is not simply the result of unequal opportunity, socialization, or lack of funding for women’s sports. *Id.* Rather, the difference is almost entirely the result of biology. *Id.*

“[M]easurable physical differences between males and females develop during puberty that significantly impact athletic performance.” *Adams by & through Kasper v. Sch. Bd. of St. Johns Cty.*, 57 F.4th 791, 819 (11th Cir. 2022) (Lagoa, J., specially concurring) (citing Emma N. Hilton & Tommy R. Lundberg, *Transgender Women in The Female Category of Sport: Perspectives on Testosterone Suppression and Performance Advantage*, 51 *Sports Medicine* 199, 200–01 (2021)). “Indeed, during puberty, ‘testosterone levels increase 20-fold in males, but remain low in females,

resulting in circulating testosterone concentrations at least 15 times higher in males than in females of any age.’” *Id.* (quoting Hilton & Lundberg, 51 Sports Medicine at 201). “[T]he biological effects of elevated pubertal testosterone are primarily responsible for driving the divergence of athletic performances between males and females.” *Id.* (quoting Hilton & Lundberg, 51 Sports Medicine at 201).

“[I]n comparison to biological females, biological males have: ‘greater lean body mass,’ i.e., ‘more skeletal muscle and less fat’; ‘larger hearts,’ ‘both in absolute terms and scaled to lean body mass’; ‘higher cardiac outputs’; ‘larger hemoglobin mass’; larger maximal oxygen consumption (VO<sub>2</sub> max), ‘both in absolute terms and scaled to lean body mass’; ‘greater glycogen utilization’; ‘higher anaerobic capacity’; and ‘different economy of motion.’” *Adams*, 57 F.4th at 819 (Lagoa, J., specially concurring) (quoting Benjamin D. Levine, et al., *The Role of Testosterone in Athletic Performance*, Duke Ctr. for Sports L. & Pol’y 1 (Jan. 2019)). “These physical differences cut directly to the ‘main physical attributes that contribute to elite athletic performance,’ as recognized by sports science and sports medicine experts. *Id.* at 819–20 (quoting Levine, et al., Duke Ctr. for Sports L. & Pol’y at 1).

“In tangible performance terms, studies have shown that these physical differences allow post-pubescent males to ‘jump (25%) higher than females, throw (25%) further than females, run (11%) faster than females, and accelerate (20%) faster than females’ on average.” *Adams*, 57 F.4th at 820 (Lagoa, J., specially concurring) (quoting Jennifer C. Braceras, et al., *Competition: Title IX, Male-Bodied Athletes, and the Threat to Women’s Sports*, Indep. Women’s F. & Indep. Women’s L. Ctr. 20 (2021) (2021 Competition Report) (footnotes omitted)). “The largest performance gap may be seen ‘in the area of strength.’” *Id.* (quoting 2021 Competition Report at 20). “Studies also have shown that males ‘are able to lift 30% more than females of equivalent stature and mass,’ as well as punch with significantly greater force than females.” *Id.* (quoting 2021 Competition Report at 20).

To drive home the point, consider this example. Katie Ledecky is the fastest female swimmer in world history. She is the greatest female swimmer in Olympic history by any metric. Yet her recent world record in her best event—the 800-meter freestyle—would qualify her as only “No. 26 among the best American *15- to 16-year-old boys*.” Doriane Lambelet Coleman, *Why elite women’s sports need to be based on sex, not gender*, Wash. Post (Aug. 16, 2024), <https://perma.cc/Y7K3-ZA4K> (emphasis added). If

Katie Ledecky cannot be expected to prevail over teenage boys, no teenage girls can be expected to either.

And hormone treatment does not solve this disparity. Scientific studies indicate that biological males, “even those who have undergone testosterone suppression to lower their testosterone levels to within that of an average biological female, retain most of the puberty-related advantages of muscle mass and strength seen in biological males.” *Adams*, 57 F.4th at 820 (Lagoa, J., specially concurring) (citing generally Hilton & Lundberg, 51 Sports Medicine 199).

3. Forcing women to compete against biological males harms women, along with women’s sports generally. Testimony supporting H.B. 68 makes this point powerfully. Riley Gaines, who testified in support of H.B. 68, was a student at the University of Kentucky and a member of the university’s Women’s Swim and Dive Team. Testimony before Ohio Senate Government Oversight Committee, 2d Hearing (Nov. 28, 2023) (testimony of Riley Gaines). Gaines was a 12-time NCAA All-American and Southeastern Conference record holder in the 200-yard butterfly, making her the 10th fastest American of all time in the event. *Id.* She was a two-time Olympic trial qualifier. *Id.*

But in March 2022, Gaines was forced to compete against a male named Lia Thomas. Testimony of R. Gaines in Support of H.B. 68 (Nov. 28, 2023). Thomas had competed as a member of the University of Pennsylvania Men’s Swim Team for three years before being allowed to compete in the women’s division. *Id.* Thomas had been ranked in the 400ths (at best) in the men’s division. *Id.* That quickly changed when he competed in the women’s division. Thomas “swam to a national title in the 500-yard freestyle, beating out the most impressive and accomplished female swimmers in the country, including Olympians and American record holders.” *Id.* Then, Thomas and Gaines raced in the 200-yard freestyle. *Id.* They tied—but NCAA officials told Gaines that the trophy belonged to Thomas, claiming this was necessary for public relations. *Id.* Gaines’s lifetime of sacrifice and effort was dismissed in favor of a male’s need to hold the trophy.

Gaines’s experience is not “a one off.” Testimony of R. Gaines in Support of H.B. 68 (Nov. 28, 2023). “Across the country, and across various sports, female athletes are losing not only titles and awards to males, but also roster spots and opportunities to compete.” *Id.*; *see, e.g.*, Valerie Richardson, *Girls left in dust as male-born transgender athletes take state track titles in five states*, Wash. Times (June 16, 2024),

<https://perma.cc/N25N-UBZS>. Most Americans are probably not aware of the extent to which this is happening. According to Gaines, “[a]t the high school level, the participation of male athletes on women’s teams is one of the most underreported stories in the country.” Testimony of R. Gaines in Support of H.B. 68 (Nov. 28, 2023).

4. Not only does forcing women to compete against biological males subject women to competitive disadvantage. It also “limits opportunities for women to compete at all.” Testimony before Ohio Senate Government Oversight Committee, 2d Hearing (Nov. 28, 2023) (testimony of May Mailman). “[C]ompetitive sport is a zero sum game in which some athletes make the team and others do not.” *Id.* And that reduces women’s participation in numerous ways. “[I]f a biological male is offered a spot on a women’s team with limited roster spots, a female athlete loses a roster spot[.]” *Id.* “[I]f a biological male is allowed to take the field with a women’s team, a female athlete loses playing time[.]” *Id.* “[A]nd if a biological male is granted a women’s athletic scholarship, a female athlete may lose a chance to attend the college of her dreams.” *Id.*

All this is exacerbated in high school, making H.B. 68 all the more important. The physiological differences discussed above “exist in high school sports” as well as at the collegiate level. *Adams*, 57 F.4th at 820



(Lagoa, J., specially concurring) (citing Doriane Lambelet Coleman, et al., *Re-affirming the Value of the Sports Exception to Title IX's General Non-Discrimination Rule*, 27 Duke J. Gender L. & Pol'y 69, 89–90 (2020)). “[G]irls who are only average high school athletes ... would fare even worse” than “elite class” female athletes. *Id.* (quoting Coleman, et al., 27 Duke J. Gender L. & Pol'y at 90). If girls did not have girl-only sports teams, “most school-aged females would be eliminated from competition in the earliest rounds.” *Id.* (quoting Coleman, et al., 27 Duke J. Gender L. & Pol'y at 90). “For that matter, many biological girls may not even make the team, missing out on the key skills learned from participation in sports and missing out on key opportunities to further their education through higher education scholarships.” *Id.* (citing Coleman, et al., 27 Duke J. Gender L. & Pol'y at 72).

## **II. H.B. 68 Preserves the Societal Benefits of Women's Sports.**

As Judge Barbara Lagoa explained in a recent decision from the Eleventh Circuit Court of Appeals, “commingling of the biological sexes in the female athletics arena would significantly undermine the benefits” that separate sports teams “afford[] to female student athletes.” *Adams*, 57 F.4th at 819 (Lagoa, J., specially concurring). “Girls who play sports stay in school longer, suffer fewer health problems, enter the labor force at

higher rates, and are more likely to land better jobs. They are also more likely to lead.” *Id.* at 820 (quoting Beth A. Brooke-Marciniak & Donna de Varona, *Amazing Things Happen When You Give Female Athletes the Same Funding as Men*, World Econ. Forum (Aug. 25, 2016), <https://perma.cc/6A8J-AWJH>).

“Research shows stunningly that 94 percent of women C-Suite executives today played sport, and over half played at a university level.” *Adams*, 57 F.4th at 820 (Lagoa, J., specially concurring) (brackets omitted) (quoting Brooke-Marciniak & de Varona, *supra*) (citing Coleman, et al., 27 Duke J. Gender L. & Pol’y at 106). “Being engaged in sports ‘inculcates the values of fitness and athleticism for lifelong health and wellness’ and ‘imparts additional socially valuable traits including teamwork, sportsmanship, and leadership, as well as individually valuable traits including goal setting, time management, perseverance, discipline, and grit.’” *Id.* at 820–21 (brackets omitted) (quoting Coleman, et al., 27 Duke J. Gender L. & Pol’y at 104). “To open up competition” to biological males “hinders biological women and girls—over half of the United States population—from experiencing these invaluable benefits and learning these traits.” *Id.* at 821.

Thus, “removing distinctions based on biological sex from sports, particularly for girls in middle school and high school, harms not only women’s prospects in sports, but also hinders their development and opportunities beyond the realm of sports—a significant harm to society as a whole.” *Adams*, 57 F.4th at 821 (Lagoa, J., specially concurring).

### **III. H.B. 68 Prevents Increased Risk of Physical Injury.**

Competitive disadvantage and the inevitable loss of opportunities—both in the sports arena and beyond—are leading reasons why H.B. 68 is essential. “But the inclusion of male athletes in women’s sports not only takes opportunities from female players. It puts women and girls at greater risk of injury.” Testimony of R. Gaines in Support of H.B. 68 (Nov. 28, 2023). For example, in 2022, North Carolina high school volleyball player Payton McNabb “suffered serious injury after a trans-identified male player spiked a ball at her head.” *Id.* The speed of the ball was estimated to be approximately 76 miles per hour. *Id.* McNabb reportedly experienced trauma to her head and neck and long-term concussion symptoms. *Id.*; *see also* 2023 Competition Report at 47–48. Forcing girls to compete with males—people who are, as a class, significantly stronger—risks more such injuries.

And indeed, other examples abound. In 2023, a male player on the Swanscott High School Field Hockey team in Massachusetts “injured an opposing player with a shot to the face, sending the female athlete to the hospital with significant facial and dental injuries.” Testimony of R. Gaines in Support of H.B. 68 (Nov. 28, 2023); *see* Rick Sobey, *After Massachusetts field hockey player is injured by boy’s shot, team captain tells the MIAA that ‘boys do not belong in girls’ sports’*, Boston Herald (Nov. 6, 2023), <https://perma.cc/9K32-EEKL>.

In the Supreme Court mandamus action related to the present case, a female, ninth-grade softball player moved to intervene, in part because, with H.B. 68 enjoined, she was “at increased risk of physical injury from having to compete against biological males who are physically stronger, heavier, or physiologically different from biological females of the same age group.” Jane Doe’s Motion to Intervene as a Relator, *State ex rel. Yost v. Holbrook*, No. 2024-0551 (Ohio, Apr. 24, 2024), at 2–3; *see also id.* at 3 (“no court will be able to undo any injuries biological male athletes inflict upon her”).

#### **IV. H.B. 68 Safeguards Women’s Privacy.**

American sports are inextricably tied to locker rooms. And allowing biological males access to female locker rooms harms women. Women do

not desire privacy because they are bigots. To the contrary, their desire for privacy is a natural instinct justified by inescapable biological realities. The first of those realities is that males alone have the biological capability to impregnate women. Combine that with other objective facts—men are, on average, larger, stronger, and more violent than women—and it is not hard to see why women are *naturally* nervous when made to expose their bodies around males. *Cf.* Opinion of the Ohio Attorney General, No. 2023-006 at 14–15 (May 26, 2023), <https://perma.cc/UT8L-Z56F>.

From these biological realities stems the “unremarkable—and nearly universal—practice of separating school bathrooms based on biological sex.” *Adams*, 57 F.4th at 796. “This common understanding is not the vestigial tail of Victorian-era prudishness.” Opinion of the Ohio Attorney General at 13. Rather, “sex separation in bathrooms dates back to ancient times.” W. Burlette Carter, *Sexism in the “Bathroom Debates”*: *How Bathrooms Really Became Separated by Sex*, 37 *Yale L. & Pol’y Rev.* 227, 229 (2018). “[C]ourts have long found a privacy interest in shielding one’s body from the opposite sex in a variety of legal contexts.” *Adams*, 57 F.4th at 805 (collecting cases); *accord Chaney v. Plainfield Healthcare Ctr.*, 612 F.3d 908, 913 (7th Cir. 2010); *see also United States v. Virginia*, 518 U.S. 515, 550 n.19 (1996) (recognizing that admitting women to VMI would

“undoubtedly require alterations necessary to afford members of each sex privacy from the other sex”).

If basic dignity means anything, it means not being forced without consent to expose one’s breasts and genitalia in the presence of the opposite sex. H.B. 68 serves that basic and important interest by safeguarding the privacy of female athletes.

#### **V. H.B. 68 Preserves Title IX’s Revolution in Women’s Sports.**

H.B. 68 preserves the promise of Title IX. Courts have made clear that Title IX is a sex-protective statute. *See, e.g., Adams*, 57 F.4th at 814–15; *Tennessee v. Cardona*, No. 24-5588, 2024 WL 3453880, at \*3–4 (6th Cir. July 17, 2024) (order). Through H.B. 68, Ohio enables schools to fulfill their mandate under Title IX.

Title IX, enacted in 1972, sparked immense progress in women’s rights in athletics (as well as in other contexts). Indeed, Title IX “precipitated a virtual revolution for girls and women in sports.” Deborah Brake, *The Struggle for Sex Equality in Sport and the Theory Behind Title IX*, 34 U. Mich. J.L. Reform 13, 15 (2001); *see* 2023 Competition Report at 12. “What stimulated this remarkable change in the quality of women’s athletic competition was not a sudden, anomalous upsurge in women’s interest in sports, but the enforcement of Title IX’s mandate” of sex-based

equality in sports. *Cohen v. Brown Univ.*, 101 F.3d 155, 188 (1st Cir. 1996) (citing Robert Kuttner, *Vicious Circle of Exclusion*, Wash. Post, Sept. 4, 1996, at A15).

Originally introduced by Senator Birch E. Bayh as the Women's Equality Act of 1971, Title IX has today helped millions of women to pick new courses of study, gain equal access to educational resources, and engage in athletics in ways unthinkable by prior generations. *See* Paul C. Sweeney, *Abuse, Misuse & Abrogation of the Use of Legislative History: Title IX & Peer Sexual Harassment*, 66 UMKC L. Rev. 41, 54 (1997).

“Prior to the passage of Title IX, fewer than 5% of female students participated in high school sports; by 2019, that number had grown to approximately 43%.” 2023 Competition Report at 12 (footnote omitted). “The female share of athletic scholarships has also increased dramatically during this time. In 1972, almost no such scholarships existed.” *Id.* “By 2017, women received from 41% to 45% of athletic scholarship dollars, depending on the division in which they competed.” *Id.* (footnote omitted).

All this is worth celebrating. Girls who play sports achieve outside of sports. They build traits like team leadership, collaboration, and self-confidence, all helpful in building successful careers and personal lives. *See* Ellen J. Staurowsky, et al., *Her Life Depends On It III: Sport, Physical*

*Activity, and the Health and Well-Being of American Girls and Women*, Women's Sports Foundation (2015), <https://perma.cc/MZ2W-T2H8>. In a survey of 400 women executives, 94% reported having competed as athletes. Ernst & Young, PRNewswire, *Female executives say sport helps accelerate leadership and career potential* (Oct. 9, 2014), <https://perma.cc/3ZBD-L6NJ>. And it builds happier families, measured by feelings of closeness, reliance, and fulfillment. Research shows both single-parent and dual-parent families reported higher satisfaction when girls participate in sports. Don Sabo & Phil Veliz, *Go Out and Play: Youth Sports in America*, Women's Sports Foundation, at 49–50 (2008), <https://perma.cc/TU5G-RXU4>.

H.B. 68 and the lower court's decision preserve women's sports, ensuring sex-based equality—in athletics and beyond. By upholding the will of the People, the lower court's decision ensures that women (and society as a whole) will continue to experience the benefits of women's athletic participation. It prevents women's increased risk of physical injury. And it safeguards important privacy interests. The lower court's decision is not only legally correct. It carries with it tremendous benefits to girls and women in Ohio.



## CONCLUSION

This Court should affirm the lower court's judgment.

August 29, 2024

Respectfully submitted,

*/s/ Andrew D. McCartney*

Andrew D. McCartney (0099853)

*Counsel of Record*

James S. Kresge (0086370)

Benjamin M. Flowers (0095284)

Ashbrook Byrne Kresge LLC

PO Box 8248

Cincinnati, OH 45249

Tel: (513) 201-5775

Fax: (513) 216-9882

admccartney@ashbrookbk.com

Sylvia May Mailman (0100520)

Independent Women's

Law Center

1802 Vernon Street NW, Ste. 1027

Washington, DC 20009

(202) 807-9986

may.mailman@iwf.org

*Attorneys for Amicus Curiae*

*Independent Women's Forum*

## CERTIFICATE OF SERVICE

I certify that, on August 29, 2024, this brief was electronically filed through the Court's e-filing system. A copy was served by email upon the following:

Elliott Gaiser  
Ohio Attorney General's Office  
30 E. Broad St., 17th Floor  
Columbus, OH 43215  
thomas.gaiser@ohioago.gov

*Counsel for Appellees*

Freda J. Levenson  
ACLU of Ohio Foundation, Inc.  
4506 Chester Ave.  
Cleveland, Ohio 44103  
flevenson@acluohio.org

*Counsel for Appellants*

/s/ Andrew D. McCartney  
Andrew D. McCartney (0099853)

# **Exhibit A**

**From:** [Freda Levenson](#)  
**To:** [James S. Kresge](#); [Stephen Carney](#); [Carlen Zhang-D'Souza](#); [Elliot Gaiser](#)  
**Cc:** [Andrew D. McCartney](#); [Benjamin M. Flowers](#)  
**Subject:** Re: Consent to File Amicus Brief in 24-AP-483 Madeline Moe et al, v. David Yost  
**Date:** Tuesday, August 27, 2024 1:12:21 PM  
**Attachments:** [image089445.png](#)  
[image055427.png](#)  
[image001.png](#)

---

Thank you for your patience, James. The Plaintiffs-Appellants consent.

Freda J. Levenson  
Legal Director  
ACLU of Ohio  
4506 Chester Ave.  
Cleveland, Ohio 44103  
(216) 541-1376  
[flevenson@acluohio.org](mailto:flevenson@acluohio.org)  
*Pronouns: she, her*



---

**From:** James S. Kresge <[jskresge@ashbrookbk.com](mailto:jskresge@ashbrookbk.com)>  
**Date:** Tuesday, August 27, 2024 at 1:03 PM  
**To:** Stephen Carney <[Stephen.Carney@OhioAGO.gov](mailto:Stephen.Carney@OhioAGO.gov)>, Freda Levenson <[flevenson@acluohio.org](mailto:flevenson@acluohio.org)>, Carlen Zhang-D'Souza <[CZhangDSouza@acluohio.org](mailto:CZhangDSouza@acluohio.org)>, Elliot Gaiser <[Thomas.Gaiser@OhioAGO.gov](mailto:Thomas.Gaiser@OhioAGO.gov)>  
**Cc:** Andrew D. McCartney <[admccartney@ashbrookbk.com](mailto:admccartney@ashbrookbk.com)>, Benjamin M. Flowers <[bflowers@ashbrookbk.com](mailto:bflowers@ashbrookbk.com)>  
**Subject:** Re: Consent to File Amicus Brief in 24-AP-483 Madeline Moe et al, v. David Yost

Thank you Stephen!

Freda and Carlen, I'm sure you need to confer with your clients, so I understand. Just let us know. Thank you!

**James S. Kresge**  
**Attorney-at-Law**  
[jskresge@ashbrookbk.com](mailto:jskresge@ashbrookbk.com)



614.905.2690



*This transmission is intended for the sole use of the individual or entity to whom it is addressed, and may contain information that is privileged, confidential and/or exempt from disclosure under applicable law. You are hereby notified that any dissemination, distribution or duplication of this transmission by someone other than the intended addressee or its designated agent is strictly prohibited. If your receipt of this transmission is in error, please notify the law firm of Ashbrook Byrne Kresge LLC immediately at (513) 201-5775 or by reply to this transmission.*

---

**From:** Stephen Carney <Stephen.Carney@OhioAGO.gov>  
**Sent:** Monday, August 26, 2024 8:53 PM  
**To:** James S. Kresge <jskresge@ashbrookbk.com>; flevenson@acluohio.org <flevenson@acluohio.org>; czhangdsouza@acluohio.org <czhangdsouza@acluohio.org>; Elliot Gaiser <Thomas.Gaiser@OhioAGO.gov>  
**Cc:** Andrew D. McCartney <admccartney@ashbrookbk.com>; Benjamin M. Flowers <bflowers@ashbrookbk.com>  
**Subject:** Re: Consent to File Amicus Brief in 24-AP-483 Madeline Moe et al, v. David Yost

The State Defendants-Appellees consent.

Stephen P. Carney  
Deputy Solicitor General  
Appeals Unit, SG Section  
Office of Ohio Attorney General Dave Yost  
614-466-8980 office  
614-507-0966 mobile

---

**From:** James S. Kresge <jskresge@ashbrookbk.com>  
**Sent:** Monday, August 26, 2024 8:42:11 PM  
**To:** flevenson@acluohio.org <flevenson@acluohio.org>; czhangdsouza@acluohio.org <czhangdsouza@acluohio.org>; Elliot Gaiser <Thomas.Gaiser@OhioAGO.gov>; Stephen Carney <Stephen.Carney@OhioAGO.gov>  
**Cc:** Andrew D. McCartney <admccartney@ashbrookbk.com>; Benjamin M. Flowers <bflowers@ashbrookbk.com>  
**Subject:** Consent to File Amicus Brief in 24-AP-483 Madeline Moe et al, v. David Yost

Some people who received this message don't often get email from jskresge@ashbrookbk.com. [Learn why this is important](#)

---

Good Evening Counsel,

My firm was asked to file an *amicus* brief in this case on behalf of the Independent Women's Forum.

I understand the deadline to file a brief is this Thursday August 29th.

Would the parties consent to the Independent Women's Forum filing a brief?

Thank you for considering this request.



**James S. Kresge**

**Attorney-at-Law**

jskresge@ashbrookbk.com

614.905.2690

————— ★ ★ ★ —————

*This transmission is intended for the sole use of the individual or entity to whom it is addressed, and may contain information that is privileged, confidential and/or exempt from disclosure under applicable law. You are hereby notified that any dissemination, distribution or duplication of this transmission by someone other than the intended addressee or its designated agent is strictly prohibited. If your receipt of this transmission is in error, please notify the law firm of Ashbrook Byrne Kresge LLC immediately at (513) 201-5775 or by reply to this transmission.*