

## Written Testimony in Support of S.B. 180

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House Health & Human Services Committee

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Chair Landwehr and members of the committee, my name is Brittany Jones. I am an attorney and the Director of Policy and Engagement for Kansas Family Voice. We represent thousands of members in Kansas who are concerned about the threat to Title IX and women's spaces across our state. We support S.B. 180 because it simply reaffirms the intent and application of Title IX.

### 1. Title IX Background and Impacts

Title IX was signed into law 1972 to ensure opportunities for women who had few educational opportunities up to that point.<sup>1</sup> The language states, "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."<sup>2</sup> It impacts any educational arena that receives federal funding. This includes sexual assault on educational campuses, equal access to educational opportunities, athletic opportunities, and protects women from retaliation when utilizing the reporting structure just to name a few of the areas that are impacted by Title IX.<sup>3</sup>

In the 50 years since Title IX was signed, it has had a marked effect on women's opportunities across the board. One of those arenas is athletics. It has increased the number of women competing by 140,000 yearly at the college level as opposed to just 30,000 in 1972. In high school athletics, just 295,000 women played in high school.<sup>4</sup> Today, 3.4 million girls play sports.<sup>5</sup> In Kansas, over 42,000 girls compete in high school athletics today.<sup>6</sup>

These numbers do not account for the number of women who now have the opportunity to compete on private teams – a ripple of effect of the success of Title IX. Other effects of Title IX are decreased dropout rates from high school for girls and increased number of women who pursue higher education and complete college degrees.<sup>7</sup> There are a whole list non-athletic successes that women have achieved over the last fifty years in large part due to the space created for them by Title IX.

### 2. Legal Background of Title IX and sex discrimination

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<sup>1</sup> Dep't of Justice, Equal Access to Education: Forty Years of Title IX (June 23, 2012)

<sup>2</sup> Dep't of Justice, Title IX, <https://www.justice.gov/crt/title-ix#C.%C2%A0%20Covered%20Education%20Program%20or%20Activity>.

<sup>3</sup> *Id.*

<sup>4</sup> The Nat'l Federation of State High School Assoc., 2018-19 High School Athletics Participation Survey.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> White House Council on Women and Girls, Women in America: Indicators of Social and Economic Well-Being 17 (March 2011).

S.B. 180 is consistent with both the Equal Protection Clause and Title IX. Today, I would like to address the basic legal underpinnings of S.B. 180 and Title IX as a whole. Title IX and the Equal Protection clause as it pertains to sex discrimination are very unique areas of constitutional law, and it is important to understand why they are different from other areas of law.

The Equal Protection Clause provides that no state shall “deny to any person within its jurisdiction the equal protection of the laws.”<sup>8</sup> And it is well settled that sex-based classifications must satisfy intermediate scrutiny.<sup>9</sup> Intermediate scrutiny requires the government to show that the classification serves important governmental objectives and that the government action is substantially related to the achievement of those objectives.<sup>10</sup>

At its core the Equal Protection clause in sex discrimination cases asks whether the distinctions in sex created by the governmental action substantially matter. The separation can’t just be for stereotypical or compensatory purposes, but it has to be for an important government interest.<sup>11</sup>

Gender-based classifications that favor one sex can be justified if they intentionally and directly assists members of the sex that is disproportionately burdened.<sup>12</sup> Even Ruth Bader Ginsburg said as a professor, “[s]eparate places to disrobe, sleep, perform personal bodily functions are permitted, in some situations required, by regard for individual privacy.”<sup>13</sup> There are spaces where this matters.

The Court has consistently pointed out that the “two sexes are not fungible.”<sup>14</sup> It is important to remember, “Inherent differences between men and women, we have come to appreciate, remain cause for celebration, but not for denigration of the members of either sex or for artificial constraints on an individual's opportunity.”<sup>15</sup> It should be noted that this is a different legal lens and therefore requires different analysis than in racial discrimination lawsuits that require a strict scrutiny analysis, the highest level of scrutiny.<sup>16</sup>

When it comes to Title IX, the regulations for years have allowed for separate living facilities,<sup>17</sup> separate toilets, locker rooms, and showers.<sup>18</sup> And as has already been mentioned, it allows for separate athletic teams for men and women.<sup>19</sup> Title IX has always been understood to protect the disadvantaged class. Courts have long found a

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<sup>8</sup> U.S. Const. amend. XIV, § 1.

<sup>9</sup> See *United States v. Virginia*, 518 U.S. 515 (1996).

<sup>10</sup> *Id.*, *Miss. Univ. for Women v. Hogan*, 458 U.S. 718 (1982).

<sup>11</sup> *Miss. Univ. for Women v. Hogan*, 458 U.S. 718 (1982).

<sup>12</sup> See *Schlesinger v. Ballard*, 419 U.S. 498 (1975).

<sup>13</sup> *The Fear of the Equal Rights Amendment*, Wash. Post, Apr. 7, 1975, at A21.

<sup>14</sup> *Ballard v. United States*, 329 U.S. 187 (1946).

<sup>15</sup> *United States v. Virginia*, 518 U.S. 515 (1996)

<sup>16</sup> See *Johnson v. California*, 543 U.S. 499 (2005); *Fisher v. Univ. of Tex.*, 579 U.S. 365 (2015).

<sup>17</sup> 20 U.S.C. § 1686

<sup>18</sup> 34 C.F.R. § 106.33

<sup>19</sup> 34 C.F.R. § 106.41

privacy interest in shielding one's body from the opposite sex in a variety of legal contexts.<sup>20</sup>

A federal court judge enjoined President Biden's proposed rules that would have reversed this historic understanding of Title IX.<sup>21</sup> Recently, the Eleventh Circuit issued a ruling upholding a school bathroom policy that required students to use the bathrooms that complied with their biological sex. The Court held that this did not violate the Equal Protection Clause or Title IX.<sup>22</sup> In that instance, after considering many different options and the complexity of the questions around this issue, the School Board decided to maintain its bathroom policy that separates bathrooms on the basis of biological sex while providing an accommodation by offering sex-neutral bathrooms.<sup>23</sup> The Court looked at the original definition of "sex" in Title IX and concluded that separating bathrooms in this manner did not violate Title IX.

This bill isn't merely speculating about encroachments into women's spaces. We have already seen instances in Kansas where women's spaces have been violated. In Eudora, a biological female was forced to share a room with a biological male on a school trip.<sup>24</sup> We are already seeing prisoners in Kansas who have sought to be moved to the prison opposite to their biological sex.<sup>25</sup> The most recent prisoner asking for this transfer was convicted of rape and kidnapping. Long story short, this is an area in which biology – bodies – matter.

Title IX was written to respond to real problems that real women faced and still face today. It provides the legal framework necessary to ensure space for women in our society. There are ongoing legal debates that are attempting to change these original words into something that would be unrecognizable to the drafters. We need to reaffirm the importance of Title IX and the long term benefits it has provided to women all across our country. I ask that you pass S.B. 180 out of committee favorably.

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<sup>20</sup> *Fortner v. Thomas*, 983 F.2d 1024, 1030 (11th Cir. 1993)

<sup>21</sup> *Tennessee v. United States Dep't of Educ.*, 2022 U.S. Dist. LEXIS 125684 (E.D. Tenn. 2022).

<sup>22</sup> *Adams v. Sch. Bd. of St. Johns Cnty.*, 2022 U.S. App. LEXIS 35962 (11th Cir., 2022).

<sup>23</sup> *Id.*

<sup>24</sup> Patrick Richardson, Eudora girl forced to share a bed with biological male on school-sponsored overseas trip, *The Heartlander*, May 17, 2022, <https://heartlandernews.com/2022/05/17/eudora-girl-forced-to-share-a-bed-with-biological-male-on-school-sponsored-overseas-trip/>.

<sup>25</sup> Inmate seeking gender-affirming surgery moved to women's prison in Topeka, *Topeka Capital Journal*, Feb. 1, 2023; <https://www.cjonline.com/story/news/state/2023/02/01/transgender-inmate-michelle-lamb-moved-to-topeka-correctional-facility/69854099007/>; Jon Janes and Melissa Brunner, Kansas transgender inmate transferred to all-female prison, Jan. 30, 2023 <https://www.wibw.com/2023/01/31/kansas-transgender-inmate-transferred-all-female-prison/>.