ORIGINAL

IN THE SUPREME COURT OF THE STATE OF MONTANA
NO. DA 22-0586

STEVE BARRETT, ET AL.,

Plaintiffs-Appellees/Cross-Appellants,

v.

STATE OF MONTANA, ET AL.,

Defendants-Appellants/Cross-Appellees.

On Appeal from the Eighteenth Judicial District Court
Gallatin County, Cause No. DV-21-581-B
The Hon. Rienne H. McElyea, Presiding

BRIEF OF FIVE FEMALE ATHLETES AS AMICI CURIAE IN SUPPORT OF DEFENDANT-APPELLANTS/CROSS-APPELLEES AND FOR REVERSAL

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IDENTITY OF AMICI CURIAE AND STATEMENT OF INTEREST

Amici Selina Soule, Chelsea Mitchell, Madison Kenyon, Macy Petty, and Cynthia Monteleone are female athletes from across the country who support Montana's efforts to protect women's sports. These women have competed against and lost to men in athletic competitions ranging from basketball games to track-and-field events. They have personally suffered the deflating experience of having opportunities stripped away from them in the name of "progress." Their experiences underscore the importance of Montana's statutory policy separating sports based on biology rather than self-professed identity.

SUMMARY OF ARGUMENT

The intersection between sex and sports has sparked a nationwide debate. "Biological sex, sex equality, and sport are matters that mean a lot to many people regardless of politics, and so many people are interested in the conversation." Doriane Lambert Coleman, Michael J. Joyner & Donna Lopiano, *Re-Affirming the Value of the Sports Exception to Title IX's General Non-Discrimination Rule*, 27 DUKE J. OF GENDER L. & POL'Y 69, 99–100 (2020). Some believe that anyone who identifies as female, including biological males, should compete in women's sports. Others remain committed to equality between the biological sexes.

With this debate surging, the Montana Legislature recognized that "[p]hysical differences between men and women ... are enduring" and "the two sexes are not fungible." *United States v. Virginia*, 518 U.S. 515, 533 (1996). It enacted the Save Women's Sports Act, Mont. Code Ann. § 20-7-1305–07 (the "Sports Act"), to demarcate athletics "based on biological sex." By doing so, the Legislature intended to protect equal athletic opportunities for women. *Id.*

The Legislature had both the authority and justification to do so. The Montana Constitution vests full legislative power in the Legislature's hands. Traditionally, this power encompasses the ability to

regulate "the health, order, convenience, and comfort of the inhabitants." *State v. Penny*, 111 P. 727, 730 (Mont. 1910). Protecting equal athletic opportunities for women fits within this tradition.

This historic understanding did not change when Montana adopted its most recent Constitution. Contemporaneous commentators agreed that, though the 1972 Constitution gave the Board of Regents expansive powers, "there are certain areas to which even constitutionally created boards must be subservient," including "social welfare, civil rights, and health codes." Hugh V. Schaefer, *The Legal Status of the Montana University System under the New Montana Constitution*, 35 MONT. L. REV. 189, 206 (1974). To hold otherwise in this case would imperil numerous other generally applicable laws, such as laws prohibiting sex and race discrimination in employment and public accommodations.

The Legislature not only had the authority to enact the Sports Act, but it also had good reason to do so. Amici's experiences show what happens when sports are not separated by biological sex. If biological males who identify as female can compete in women's events, those males would, "due to average physiological differences, ... displace females to a substantial extent." *Clark v. Ariz. Interscholastic Ass'n,* 695 F.2d 1126,

1131 (9th Cir. 1982) (*Clark I*). Montana has a compelling interest in preventing such displacement.

This Court should reverse the District Court.

ARGUMENT

I. The Sports Act is a valid exercise of legislative power and does not conflict with the Board of Regents' constitutional authority.

When interpreting the Montana Constitution, this Court looks to the "intent of the Framers" as expressed in "the plain meaning of the language [they] used" in conjunction with "the circumstances under which the Constitution was drafted, the nature of the subject matter the Framers faced, and the objective they sought to achieve." *Bd. of Regents of Higher Educ. v. State ex rel. Knudsen*, 512 P.3d 748, 750–51 (Mont. 2022).

The Montana Constitution clearly vests "legislative power" "in a legislature." Mont. Const. art. V, § 1. The legislative power "is very broad and comprehensive, and is exercised to promote the health, comfort, safety, and welfare of society." *City of Helena v. Kent*, 80 P. 258, 260 (Mont. 1905). From the beginning, the Legislature has routinely enacted laws that protect women and their interests, including those at public universities. Even after 1972, the Legislature has, for instance,

prohibited employment discrimination based on sex and has required the "university system" to provide women with break time to breastfeed. *E.g.*, Mont. Code Ann. § 49-2-303(1)(a); Mont. Code Ann. § 39-2-217.

Nothing contained in the 1972 Constitution or the discussion and debates leading to its creation detracted from the Legislature's authority to protect women. In the 1972 Constitution, the Framers gave the Board of Regents "full power, responsibility, and authority to supervise, coordinate, manage and control the Montana university system." Mont. Const. art. X, § 9. That language "do[es] not stand in isolation;" it must be interpreted "as part of a complex structure in which each power acquires specific content and meaning *in relation* to the others." *McLaughlin v. Mont. State Legislature*, 493 P.3d 980, 999 (Mont. 2021) (McKinnon, J., concurring). Accordingly, this Court has held that the Board's "full power" is *not* equivalent to establishing the Board as a "fourth branch of government." *Bd. of Regents*, 512 P.3d at 751–52.

The only way to honor this precedent is to interpret the Board's authority as subservient to the Legislature's longstanding ability to exercise its legislative authority. That is how courts have approached the unique relationship between the university system and state legislature

in Michigan, a relationship that highly influenced the Framers of the 1972 Constitution. Schaefer, *The Legal Status of the Montana University System*, 35 MONT. L. REV. at 198. Though Michigan's Constitution similarly gives its public universities and their boards unique constitutional status, which has been recognized by one member of this Court as "the *most* independently operated higher education system in the country," the universities remain "subject to the Legislature's police power." *Sheehy v. Comm'r of Pol. Pracs. for the State*, 458 P.3d 309, 317 (Mont. 2020) (McKinnon, J., concurring) (emphasis added); *Nat'l Pride At Work, Inc. v. Governor of Mich.*, 732 N.W.2d 139, 152 (Mich. Ct. App. 2007). That includes the Legislature's prerogatives on how public universities could extend benefits to same-sex couples. *Id.* University regents could not "use their independence to thwart the clearly established public policy of the people of Michigan." *Id.*

Similarly, the United States Supreme Court has upheld the power of Michiganders, through direct referendum, to affect policy on public colleges and universities even when the Michigan boards resist, reasoning as follows:

> In the federal system States respond, through the enactment of positive law, to the initiative of those who seek a voice in shaping the destiny of their own times. Michigan voters used the initiative system to bypass public officials who were deemed not responsive to the concerns of a majority of the voters with respect to a policy of granting race-based preferences that raises difficult and delicate issues. ... The respondents in this case insist that a difficult question of public policy must be taken from the reach of the voters, and thus removed from the realm of public discussion, dialogue, and debate. ... [T]hat position ... is inconsistent with the underlying premises of a responsible, functioning democracy. ... It is demeaning to the democratic process to presume that the voters are not capable of deciding an issue of this sensitivity on decent and rational grounds. ... Freedom embraces the right, indeed the duty, to engage in a rational, civic discourse in order to determine how best to form a consensus to shape the destiny of the Nation and its people.

Schuette v. Coal. to Def. Affirmative Action, 572 U.S. 291, 311–13 (2014).

Like Michigan's university system, Montana's Board remains "subject to state legislation enforcing state-wide standards for public welfare, health, and safety." *Sheehy*, 458 P.3d at 318 (McKinnon, J., concurring).

This is how Montanans understood the language when they approved the Constitution. Delegates to the 1972 Constitutional Convention debated whether the Board would have the power to order paper clips and control faculty hiring, not whether the Board could stop

the Legislature from enacting anti-discrimination laws or civil-rights guarantees to protect women on campus. *E.g.*, Montana Constitutional Convention, Verbatim Transcript, Mar. 9–15, 1972, Vol. VI, p. 2127. Contemporaneous commentators reflected that, with respect to the Board's power vis-à-vis the Legislature, "there are certain areas to which" the Board "*must* be subservient," including "the general area of social welfare, civil rights and health codes." Schaefer, *The Legal Status of the Montana University System*, 35 MONT. L. REV. at 206 (emphasis added). Most relevant here, "anti-discrimination" laws enacted by the Legislature were considered "binding on systems of higher education." *Id.*

The Sports Act is such a law. The Legislature introduced the Act to "promote sex equality." H.B. 112, 67th Legislature (Mont. 2021). Assigning sports team by sex achieves this objective by "providing opportunities for female athletes to demonstrate their skill, strength, and athletic abilities" and "providing them opportunities to obtain recognition and accolades, college scholarships, and the numerous other long-term benefits that flow from success in athletic endeavors." *Id.* Otherwise, even mediocre "boys and men" could "beat the best girls and women" and deprive them of the opportunity. *Id.* Just as the Legislature can enact

statutes that provide women with equal pay "for equivalent service" in the workforce, or break time on university campuses for breastfeeding, so too can it enact legislation that gives women equal athletic opportunities as part of its historic legislative power. *E.g.*, Mont. Code Ann. § 39-3-104(1); Mont. Code Ann. § 39-2-217.

Moreover, the Sports Act is a "neutral statewide law[ ]." *Bd. of Regents*, 512 P.3d at 754. The Act applies to *all* school sports, those sponsored by "a public elementary or high school" as well as those sponsored by "a public institution of higher education, or any school or institution whose students or teams compete against a public school or institution of higher education." Mont. Code Ann. § 20-7-1306. Unlike other laws that this Court has found violative of the Board's constitutional authority, the Sports Act does *not* "singl[e] out the Board or its constitutional powers and duties." *Bd. of Regents*, 512 P.3d at 754 & n.5. In *Board of Regents*, the law at issue "specifically aimed to counter" a Board of Regents policy. *Id.* In stark contrast here, the District Court held that there was a "*lack* of an existing Board policy specifically

addressing transgender athletes."[1] The Legislature had the constitutional authority to speak into that vacuum.

The Sports Act does not, as the District Court suggested, contradict Board Policy 1202.1, which requires compliance with NCAA guidelines. Although the Board expressed concern that the Sports Act could force member schools out of compliance with national organization requirements, its fears have not been explained. Many States have enacted similar Sports Acts without facing these issues. Though NCAA policy *permits* some males who identify as female to compete in women's events, it does not *require* participants to have such a policy.

And the Sports Act does not "target" the Board's constitutional powers just because it applies to "college athletics and public institutions of higher education." Many laws enacted under the Legislature's power apply specifically to public universities. *E.g.*, Mont. Code Ann. § 39-2-217.

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[1] The district court was wrong to suggest that the Sports Act "addresses transgender athletes" or "prohibit[s] transgender women from participating in athletics." The Sports Act says nothing about gender identity but, like numerous other laws, classifies based on biological sex. Under the statute's text, all males—those who identify as male and those who identify as female—are barred from participating in women's sports. A male who identifies as male and a male who identifies as female receive the same treatment. "Too many men are affected ... to permit the inference that the statute is but a pretext" for disfavoring transgender persons. *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 275 (1979); *see also Geduldig v. Aiello*, 417 U.S. 484, 496 n.20 (1974) ("nonpregnant" category "includes members of both sexes").

But that does not mean these laws "target" the Board's constitutional power. What matters is not *where* the law applies but *what* it seeks to do. Here, the law seeks not to usurp the Board's control over the public university system's general management but instead to protect females from discrimination in athletics, whether in high school or college. The Sports Act is no different than other generally applicable laws that protect women on college campuses. *E.g.*, Mont. Code Ann. § 39-3-104(1) (protecting women from employment discrimination); Mont. Code Ann. § 49-2-304 (protecting women from discrimination in public accommodations).

II. Amici's experiences show the need for the Sports Act.

Unsurprisingly, when it comes to sports, "sex actually matters." *Re-Affirming the Value of the Sports Exception*, 27 DUKE J. OF GENDER L. & POL'Y at 86 & n.73. The United States has spent the last half-century assigning sports teams by sex to ensure equal opportunity for women and girls. In fact, sports are "designed to develop and showcase the capacities of the physical body ... and the girls' and women's categories are designed to secure sex equality with respect to the benefits that flow from sports." *Re-Affirming the Value of the Sports Exception*, 27 DUKE J. OF GENDER L.

& POL'Y at 86 & n.73. If biological males who identify as female could compete in women's events, those biological males would, "due to average physiological differences, ... displace females to a substantial extent." *Clark I,* 695 F.2d at 1131.

Indeed, without sex-separated events, "the great bulk of the females would quickly be eliminated from participation and denied any meaningful opportunity for athletic involvement." *Cape v. Tenn. Secondary Sch. Athletic Ass'n*, 563 F.2d 793, 795 (6th Cir. 1977) (per curiam). "[I]t is well-established that athletic but not necessarily elite males dominate females in almost every sport and event, which is true without regard to how individuals identify." *Re-Affirming the Value of the Sports Exception*, 27 DUKE J. OF GENDER L. & POL'Y at 115–116. That is why women's teams are part of "a long-standing tradition in sports of setting up classifications whereby persons having objectively measured characteristics likely to make them more proficient are eliminated from certain classes of competition." *Petrie v. Ill. High Sch. Ass'n*, 394 N.E.2d 855, 861 (Ill. App. Ct. 1979).

The Sports Act remedies real harms faced by women, including amici.

In Connecticut, amici Selina Soule and Chelsea Mitchell suffered the predictable results of allowing males to compete in women's sports. *See generally Soule ex rel. Stanescu v. Conn. Ass'n of Schs., Inc.*, 57 F.4th 43 (2d Cir. 2022). Selina and Chelsea ran track in high school. At one point, Chelsea was considered the fastest female athlete in Connecticut. Then Connecticut allowed males who identify as female to compete in women's sports. On over twenty occasions, Chelsea competed against two males and never won a race in which both males competed. The male athletes ended up taking fifteen state championship titles and set seventeen new records that belonged to women. They took from Selena an opportunity to advance to the championship races, and relegated Chelsea to second or third place in many events.

Madison Kenyon had similar experiences. Since early childhood, she has pursued athletic training and competition, now describing running as her "passion." Decl. of Madison Kenyon in Supp. of Intervention at 1, *Hecox v. Little*, No. 1:20-cv-00184-DCN (D. Idaho May 26, 2020), ECF No. 30-2. Yet during her athletic career at Idaho State University, she repeatedly was forced to compete against a male who

identified as female, ran times faster than the college women's *national* record, and consistently displaced Madison in rankings.

The biological differences between men and women also matter in volleyball, as amicus Macy Petty well knows. When Macy played volleyball in high school, her team competed against a male athlete who identified as female and who ran the court and earned the attention of college recruiters. The male athlete was able to take advantage of the women's net being seven inches lower than the standard men's net due to men's natural biological ability to jump higher than women.

Cynthia Monteleone, a "Team USA World Masters track athlete," has experienced these harms at multiple levels. At the 2018 World Masters Athletics Championships, Cynthia competed against a male whom she beat "by only a few tenths of a second." Cynthia Monteleone, *I'm a Team USA World Masters Track Athlete, Mom and Coach Calling for the Protection of Women's Sports,* FOX NEWS (Feb. 18, 2022).[2] Then she watched as both her daughter and the female track athletes she now coaches were forced to compete and lose to males. *Id.*

[2] https://perma.cc/RZ6Q-L39W.

With sports, "[t]he difference between men and women ... is a real one." *See Tuan Anh Nguyen v. INS*, 533 U.S. 53, 73 (2001). "[D]ue to average physiological differences, males would displace females to a substantial extent if they were allowed to compete" for the same teams. *Clark I*, 695 F.2d at 1131. As amici's experiences demonstrate, without distinct teams, "the great bulk of the females would quickly be eliminated from participation and denied any meaningful opportunity for athletic involvement." *Cape*, 563 F.2d at 795.

Far from being an exception, the Sports Act is part of a "long-standing tradition in sports of setting up classifications whereby persons having objectively measured characteristics likely to make them more proficient are eliminated from certain classes of competition." *Petrie*, 394 N.E.2d at 861.

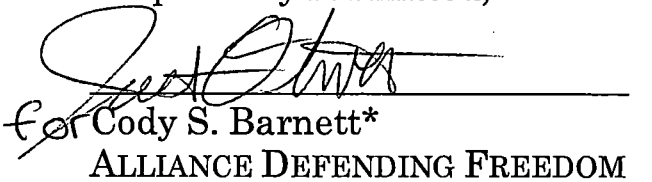
CONCLUSION

The Montana Constitution does not make the Board of Regents an "island." *See Nat'l Pride At Work, Inc.*, 732 N.W.2d at 152. It remains subject to the Legislature's general authority to provide for the safety, health, and welfare of Montanans. Yet the District Court's logic would improperly prevent the Legislature from enacting *any* laws that concern university property to any degree. To so hold would defy the balance the Montana Constitution sought to strike and leave women and minorities at the mercy of university officials. This Court should reverse.

The Sports Act is a crucial piece of anti-discrimination legislation. Amici can testify to the real harms women face in athletics without its protections. Like any other legislation that seeks to promote sex equality and women's civil rights, the Sports Act is a valid exercise of the Legislature's powers and should be upheld as such.

Dated: February 16, 2023

Respectfully submitted,



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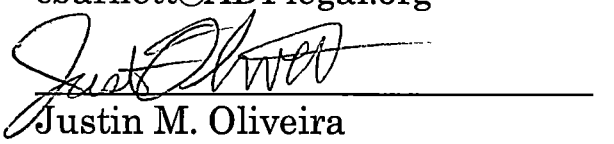

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CERTIFICATE OF COMPLIANCE

Pursuant to Rules 11(2) and 11(4)(a) of the Montana Rules of Appellate Procedure, I certify that this brief has been produced in a proportionally spaced typeface using Century Schoolbook 14-point font; is double spaced; and the word count as calculated by Microsoft Word is 3,079 words, excluding the Table of Contents, Table of Authorities, Certificate of Service and Certificate of Compliance.

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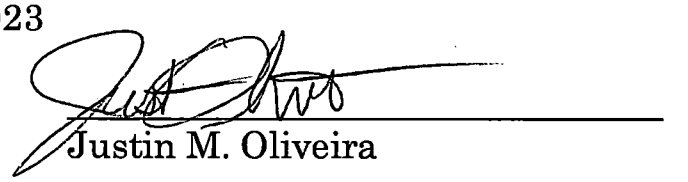

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I hereby certify that on February 16, 2023, I filed the foregoing amici brief with the Clerk of the Court for the Montana Supreme Court via UPS for overnight delivery on February 17, 2023 and have served true and accurate copies on the following parties:

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