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Hon. Lawrence Lockman
President, Maine First Project
P.O. Box 623
Brewer, Maine 04412

RE: Constitutionality of Executive Order 14201 and Guidance for Maine School Districts

Dear Lawrence:

You asked me to provide a legal opinion regarding the conflict between President Trump's Executive Order 14201, signed on February 5, 2025, titled "Keeping Men Out of Women's Sports," and the Maine Human Rights Act (MHRA), as it pertains to Maine school districts' compliance obligations. This letter analyzes the constitutionality of the Executive Order, its preemptive effect on the MHRA, potential legal challenges, and practical considerations. In accordance with M.R. Prof. Conduct. 8.4(g), I affirm that this opinion is provided without discrimination or harassment based on gender identity or any other protected characteristic, and it is intended to offer an objective legal assessment of Executive Order 14201.

Background

Title IX, enacted on June 23, 1972, 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."

20 U.S.C. § 1681(a).

Executive Order 14201 defines "sex" as "an individual's immutable biological classification as either male or female," explicitly excluding gender identity. It mandates that educational institutions receiving federal funds bar biological males from women's sports, vacates prior Title IX rules that included gender identity within "sex," and directs federal agencies to withhold funding from non-compliant programs.

This directly conflicts with the Maine Human Rights Act, 5 M.R.S. §§ 4591–4594, amended in 2021 to include gender identity as a protected class, which prohibits school districts from discriminating against any student based upon their gender identity or sexual orientation. The Maine Supreme Court, sitting as the Law Court, narrowly affirmed this principle in *Doe v. Regional School Unit 26,* 2014 ME 11, 86 A.3d 600.

The Supremacy Clause, U.S. Const., Art. VI, cl. 2, states that:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution of Law of any State to the Contrary notwithstanding.

The Take Care Clause, U.S. Const., Art. II, § 3, is part of the President's broad authority under Article 2 of the Constitution, which provides:

> He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; ***he shall take Care that the Laws be faithfully executed***, and shall Commission all the Officers of the United States.

(emphasis added).

Analysis

The Executive Order's authority hinges on whether it is a permissible interpretation of Title IX and whether it exceeds presidential power.

The Supreme Court addressed the limitations on the President's Article II authority in *Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579 (1952). In that case, during the Korean War, President Truman issued an executive order seizing steel mills to prevent a strike that threatened war production. *Id.* at 583. The Supreme Court ruled the order unconstitutional, finding no statutory or constitutional authority for the action. The Court explained that "[t]he President's power, if any, to issue the order must stem either from an act of Congress or from

the Constitution itself." *Id.* at 585. Justice Jackson's concurrence established a framework for presidential power: authority is strongest when acting with congressional approval, weakest when acting against Congress's will, and in a "zone of twilight" when Congress is silent. *Id.* at 635-638.

Unlike *Youngstown*, where Truman acted without statutory support, Executive Order 14201 is anchored in Title IX, which delegates enforcement authority to the executive. Title IX's legislative history, emphasizing biological-sex distinctions, supports the order's interpretation, placing it in Jackson's strongest category—action with congressional authorization—unlike Truman's overreach. The order enforces existing law, but does not create new law, distinguishing it from *Youngstown*'s unauthorized seizure.

In *Crosby*, Massachusetts enacted a law barring state contracts with companies doing business in Myanmar, conflicting with federal sanctions and an executive order under the International Emergency Economic Powers Act. *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 366-370 (2000). The Supreme Court invalidated the state law, holding that it was preempted because it undermined federal foreign policy objectives. The Court explained "a fundamental principle of the Constitution is that Congress has the power to preempt state law." *Id.* at 372.

The Court continued:

> Even without an express provision for preemption, we have found that state law must yield to a congressional Act in at least two circumstances. When Congress intends federal law to "occupy the field," state law in that area is preempted. . . And even if Congress has not occupied the field, state law is naturally preempted to the extent of any conflict with a federal statute. . . ***We will find preemption where it is impossible for a private party to comply with both state and federal law***, see, *e.g., Florida Lime & Avocado Growers, Inc. v. Paul,* 373 U.S. 132, 142–143, 83 S.Ct. 1210, 10 L.Ed.2d 248 (1963), and where "under the circumstances of [a] particular case, [the challenged state law] stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines, supra,* at 67, 61 S.Ct. 399. What is a sufficient obstacle is a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects:
>
> 'For when the question is whether a Federal act overrides a state law, the entire scheme of the statute must of course be considered and that which needs must be implied is of no less force than that which is expressed. If the purpose of the act cannot otherwise be accomplished—if its operation within its chosen field else must be frustrated and its provisions be refused their natural effect—the

> state law must yield to the regulation of Congress within the sphere of its delegated power.'

Id. at 372-373 (emphasis added and citations omitted). *Crosby* informs this analysis by affirming that federal law, including executive actions authorized by statute, preempts state laws that create conflicts or obstruct federal goals. Like *Crosby*, where a statutorily authorized executive order preempted state law, Executive Order 14201 is tied to Title IX and preempts the MHRA, which undermines the federal goal of competitive fairness in women's sports. Title IX's legislative history, prioritizing women's opportunities based on biological sex, mirrors *Crosby*'s federal objective of uniform policy. The MHRA's gender identity protections create a direct conflict, as in *Crosby*, triggering preemption under the Supremacy Clause, as the order enforces Congress's intent.

In *Arizona*, the state passed S.B. 1070, tightening immigration enforcement, which clashed with federal immigration policy. 567 U.S. 387, 392-394 (2012). The Supreme Court struck down key provisions, finding them preempted because they conflicted with federal law and undermined uniform national policy. The Court explained that:

> Federalism, central to the constitutional design, adopts the principle that both the National and State Governments have elements of sovereignty the other is bound to respect. . . From the existence of two sovereigns follows the possibility that laws can be in conflict or at cross-purposes. The Supremacy Clause provides a clear rule that federal law "shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding." Art. VI, cl. 2. Under this principle, Congress has the power to preempt state law. There is no doubt that Congress may withdraw specified powers from the States by enacting a statute containing an express preemption provision.
>
> State law must also give way to federal law in at least two other circumstances. First, the States are precluded from regulating conduct in a field that Congress, acting within its proper authority, has determined must be regulated by its exclusive governance. The intent to displace state law altogether can be inferred from a framework of regulation "so pervasive ... that Congress left no room for the States to supplement it" or where there is a "federal interest ... so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject."
>
> Second, state laws are preempted when they conflict with federal law. *Crosby, supra,* at 372, 120 S.Ct. 2288. This includes cases where "compliance with both

> federal and state regulations is a physical impossibility," and those instances where the challenged state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Hines,* 312 U.S., at 67, 61 S.Ct. 399; see also *Crosby, supra,* at 373, 120 S.Ct. 2288 ("What is a sufficient obstacle is a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects"). In preemption analysis, courts should assume that "the historic police powers of the States" are not superseded "unless that was the clear and manifest purpose of Congress."

Id. at 398-400 (citations omitted). *Arizona* informs this analysis by reinforcing that federal law prevails when state laws create inconsistencies or obstacles to federal objectives, even in areas of shared state-federal authority. Similar to *Arizona*, where state law obstructed federal objectives, the MHRA's requirement to include transgender girls in women's sports conflicts with the Executive Order's biological-sex mandate, which reflects Title IX's legislative intent to ensure equitable opportunities for biological females. *Arizona* supports preemption here, as the order promotes a uniform federal policy under Title IX, overriding divergent state laws like the MHRA. The legislative history's focus on male-female distinctions strengthens this analogy, as Congress intended Title IX to govern education uniformly.

Despite its alignment with Title IX's legislative history and favorable comparisons to *Crosby* and *Arizona*, the Executive Order faces serious and significant legal challenges. The Supreme Court decided *Bostock v. Clayton County* in 2020 in the context of Title VII relating to employment discrimination. 590 U.S. 644 (2020). In that case, three employees were fired after revealing their sexual orientation or gender identity. *Id.* at 653-654. They sued, claiming sex discrimination under Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination "because of sex." *Id.* at 654. Although the Court noted that "sex" in 1964 meant biological distinctions, it held that Title VII's ban on sex discrimination includes gender identity, as discrimination based on transgender status involves sex. The Court expressly narrowed its holding only to the employment context of Title VII.

However, other courts have applied *Bostock*'s definition of "sex" to Title IX. *See*, *e.g.*, *A.C. by M.C. v. Metropolitan School District of Martinsville,* 75 F.4th 760, 769 (7th Cir. 2023)*; Grabowski v. Arizona Board of Regents,* 69 F.4th 1110, 1116 (9th Cir. 2023). Challenges to the Executive Order will likely argue that Bostock's definition of "sex" in Title VII should be applied to Title IX and that the Executive Order is similar to the order in Youngstown, arguing that redefining "sex" without congressional approval exceeds authority.

Other Courts have declined to apply Bostock to the Title IX context. See *Adams v. School Board of St. Johns County*, 57 F.4th 791 (11th Cir. 2022). The 11th Circuit held:

> In summary, Title IX prohibits discrimination on the basis of sex, but it expressly permits separating the sexes when it comes to bathrooms and other living facilities. When we read "sex" in Title IX to mean "biological sex," as we must, the statutory claim resolves itself. Title IX's implementing regulations explicitly allow schools to "provide separate toilet ... facilities on the basis of [biological] sex

Id. at 815. The split amongst the Circuit Courts creates uncertainty, and a Supreme Court ruling extending *Bostock* to Title IX would override the Executive Order.

Another challenge to the Executive Order is based on the Equal Protection Clause of the Fourteenth Amendment, which provides in relevant part " no state shall. . . deny to any person within its jurisdiction the equal protection of the law." U.S. Const. amend. XIV, Section 2. Government classifications based on biological sex trigger intermediate scrutiny requiring an important purpose and substantial relation. *See, e.g.*, Adams, 57 F.4th 791 at 803.

Challengers will argue that the Executive Order disproportionately harms biological males who identify as female by denying them access to women's sports based on their gender identity, while allowing biological females to participate. This disparate treatment, challengers will claim, reflects discrimination based on transgender status. Challengers will likely emphasize the order's harm, including psychological distress, social stigma, and exclusion from educational opportunities, which Title IX aims to protect. Denying biological males who identify as female access to women's sports, challengers will argue, violates equal protection by perpetuating discrimination and undermining their dignity.

The Government will likely argue that argue fairness and safety in sports (backed by studies, e.g., research on male physical advantages) meet this test. Empirical data supports this: studies show that biological males, even after hormone therapy, may retain advantages in muscle mass, bone density, and strength, *see* e.g., Hilton & Lundberg, *Transgender Women in the Female Category of Sport*, 51 Sports Med. 199 (2021). Safety concerns, particularly in contact sports, are also significant, as physical differences increase injury risks.

Conclusion

Executive Order 14201 is likely constitutional, as it aligns with Title IX's legislative history, which defines "sex" as biological male-female distinctions to protect women's educational opportunities. Unlike Youngstown, where executive actions lacked statutory support, the order is grounded in Title IX, placing it in the strongest category of presidential authority. Like

Crosby and Arizona, it preempts the MHRA under the Supremacy Clause, as the MHRA's gender identity protections conflict with Title IX's original intent. However, significant challenges from Bostock, equal protection scrutiny, overreach concerns, and pending litigation create uncertainty. The government is aggressively enforcing the order, placing school boards in a precarious position, caught between compliance with federal law and adherence to state laws like the MHRA.

The core issue is not Title IX's preemption of the MHRA, which is clear, but whether the President's Executive Order is a permissible enforcement of Title IX. In my opinion, it is, as it faithfully executes Title IX's purpose of ensuring competitive fairness for biological females.

Compliance with the order likely ensures school districts avoid federal investigations, which cost significant administrator time and resources, and keeps the focus on education. However, compliance also risks liability under the MHRA if the order is deemed unconstitutional.

Litigation is likely regardless of which position any particular school board takes-whether compliance or defiance- and this conflict will ultimately need to be addressed by the Supreme Court.

Sincerely,

/s/ John E. Baldacci, Jr.

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JEB/cls