ELON UNIVERSITY SCHOOL OF LAW
BILLINGS, EXUM & FRYE NATIONAL MOOT COURT COMPETITION
FALL 2024 PROBLEM

No. 24-2020

IN THE SUPREME COURT OF THE UNITED STATES

A.J.T.,

Petitioner,

v.

STATE OF NORTH GREENE BOARD OF EDUCATION, *et al.*,

Respondents.

RECORD ON APPEAL

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTEENTH CIRCUIT

_____

No. 23-1023

_____

A.J.T.,

Plaintiff-Petitioner,

v.

STATE OF NORTH GREENE BOARD OF EDUCATION, *et al*.,

Defendant-Respondents.

Argued October 15, 2023
Decided January 15, 2024

_____

Appeal from the United States District Court
for the Eastern District of North Greene

_____

Before GRIFFITH, KNOTTS, and HOWARD, Circuit Judges.

HOWARD, Circuit Judge, delivered the opinion of the Court.

Plaintiff A.J.T. appeals from the District Court's entry of judgment for the Defendant State of North Greene Board of Education, State Superintendent Floyd Lawson, the State of North Greene, and Attorney General Barney Fife, following grant of Defendants' motion for summary judgment. Plaintiff brought suit, alleging that the North Greene law, which prohibits transgender girls from participating in sports consistent with their gender identity, violates Title IX and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

We affirm the District Court's judgment and hold that the State of North Greene's "Save Women's Sports Act" and the Board's enforcement of that Act did not violate Title IX or the Equal Protection Clause of the United States Constitution.

BACKGROUND

At the initiation of this lawsuit, A.J.T. was an eleven-year-old preparing to begin the seventh grade. A.J.T. intends to participate in school athletics and hopes to join both the girls' volleyball and cross-country teams. A.J.T. has been informed by her school that, because of a statute recently enacted by the State of North Greene General Assembly, A.J.T. cannot join either team, because A.J.T. is a transgender girl.[1]

A.J.T. was assigned the sex of male at birth but identified as a girl from an early age. By the third grade, A.J.T. was living as a girl at home but dressing as a boy at school. A.J.T. began using a name commonly associated with girls and began living as a girl in both public and private. A.J.T. also joined the elementary school's all-girl cheerleading team. A.J.T. practiced and competed with this team without incident.

A.J.T. was diagnosed with gender dysphoria in 2022 and has been going to counseling and discussing the possibility of other courses of action, including the commencement of puberty-delaying treatments. Plaintiff's expert witness avers that this treatment would prevent endogenous puberty and therefore any physiological changes caused by increased testosterone circulation. As of the commencement of this lawsuit, A.J.T. had not begun puberty or puberty-delaying treatment, and the court has not learned of any subsequent change in A.J.T.'s treatment.[2]

In April 2023, the North Greene Senate introduced—and both Houses of the North Greene legislature approved—Senate Bill 2750, referred to as the "Save Women's Sports Act." North Greene Governor Howard Sprague signed the Bill into law on May 1, 2023, and it was codified as North Greene Code § 22-3-4, entitled "Limiting participation in sports events to the biological sex of the athlete at birth." The statute states that "[t]here are inherent differences between biological males and biological females, and that these differences are cause for celebration." The State

[1] " 'Transgender' is … 'used as an umbrella term to describe groups of people who transcend conventional expectations of gender identity or expression.' " *See Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 596 (4th Cir. 2020) (quoting *PFLAG, PFLAG National Glossary of Terms* (July 2019), http://pflag.org/glossary).

[2] While boys generally start puberty between the ages of 9 and 14, the average age is 12.

asserts that the objective of the Act is to provide equal athletic opportunities for female athletes and to protect the physical safety of female athletes when competing.

Plaintiff argues that the State's assertion is a pretext concealing the true objective: to exclude transgender girls and women from participating in sports consistent with their gender identity.

The North Greene statute also provides a series of definitions, all at issue here:

> (1) "Biological sex" means an individual's physical form as a male or female based solely on the individual's reproductive biology and genetics at birth.
>
> (2) "Female" means an individual whose biological sex determined at birth is female. As used in this section, "women" or "girls" refers to biological females.
>
> (3) "Male" means an individual whose biological sex determined at birth is male. As used in this section, "men" or "boys" refers to biological males.

N.G. Code § 22-3-15(a)(1)–(3).

Using these definitions, the gravamen of the statute requires that "[i]nterscholastic, intercollegiate, intramural, or club athletic teams or sports that are sponsored by any public secondary school or a state institution of higher education," "shall be expressly designated as one of the following based on biological sex at birth: (A) Males, men, or boys; (B) Females, women, or girls; or (C) Coed or mixed." N.G. Code § 22-3-16(a). Once those teams are properly designated, the statute goes on to address who may participate on which teams. "Athletic teams or sports designated for females, women, or girls shall not be open to students of the male sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport." N.G. Code § 22-3-16(b).

The statute's definition of "biological sex" has nothing to do with gender identity. The statute explains: "Gender identity is separate and distinct from biological sex to the extent that an individual's biological sex is not determinative or indicative of the individual's gender identity. Classifications based on gender identity serve no legitimate relationship to the State of North Greene's interest in promoting equal athletic opportunities for the female sex." N.G. Code § 22-3-16(c).

Procedural History

A.J.T., by and through the child's mother, filed this lawsuit against the State of North Greene Board of Education and State Superintendent Floyd Lawson.[3] The State of North Greene moved to intervene, and that motion was granted. Plaintiff then amended the complaint to name

[3] The parties have stipulated, and we agree with the District Court, that Plaintiff has standing to pursue this constitutional challenge. [NOTE: These issues should not be the subject of briefing or oral argument by the parties.]

both the State and Attorney General Barney Fife as defendants.[4]

Plaintiff sought a declaratory judgment that the North Greene Act violates Title IX and the Equal Protection Clause of the Fourteenth Amendment and an injunction preventing Defendants from enforcing the law against Plaintiff. Defendants opposed Plaintiff's motion for a permanent injunction and filed a motion for summary judgment on Plaintiff's claims. The District Court granted Defendants' motion for summary judgment.[5]

Plaintiff appealed, and this Court has jurisdiction under 28 U.S.C. § 1291.

STANDARD OF REVIEW

"Summary judgment is appropriate when 'there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.'" *Bostic v. Schaefer*, 760 F.3d 352, 370 (4th Cir. 2014) (citation and internal quotation marks omitted). "A dispute is genuine if a reasonable jury could return a verdict for the nonmoving party." *Libertarian Party of Va. v. Judd*, 718 F.3d 308, 313 (4th Cir. 2013) (citation and internal quotation marks omitted). "A fact is material if it might affect the outcome of the suit under the governing law." *Id.* (citation and internal quotation marks omitted). The court is "required to view the facts and all justifiable inferences arising therefrom in the light most favorable to the nonmoving party." *Id.* at 312. The grant or denial of summary judgment is reviewed de novo. *B&G Enters., Ltd. v. United States*, 220 F.3d 1318, 1322 (11th Cir. 2000); *Thornton v. E.I. Du Pont de Numours & Co.*, 22 F.3d 284, 288 (11th Cir. 1994). In reviewing a lower court's grant or denial of summary judgment, the appellate court gives no deference to the lower court's decision and applies the same standard as the district court. *Whatley v. CNA Ins. Co.*, 189 F.3d 1310, 1313 (11th Cir. 1999).

DISCUSSION

At the outset, we make clear that the resolution of the constitutional and federal statutory questions raised by Plaintiff does not call on this Court to assess the wisdom of the North Greene statutes at issue here or their policy of separating sports by biological sex at birth. Instead, the Court today is charged with answering only whether the North Greene Save Women's Sports Act violates Title IX and the Equal Protection Clause of the Fourteenth Amendment. For the reasons

[4] In general, all defendants will be referred to collectively as "Defendants" but references to "the State Board of Education," "the Board," "the State," or "the government" should be understood to also refer to all Defendants unless otherwise specifically noted. The parties have stipulated that all of the necessary Defendants have been included in this action. The parties have further stipulated, and we agree, that Defendants are properly before this Court. This Court has jurisdiction over Defendants, and service on the Defendants was properly achieved. [NOTE: These issues should not be the subject of briefing or oral argument by the parties.]

[5] The District Court's Memorandum opinion is unpublished. Its citation is *A.J.T. v. North Greene Bd. of Educ.*, 2023 WL 56789 (E.D. N. Greene 2023). [NOTE: Citations to the District Court's opinion may be just to the Record on Appeal pages, or to this WL citation. If the WL citation is used, then the Record page number can be used as the WL star number.]

explained below, we conclude that the Act is not violative of the U.S. Constitution or federal law and affirm the District Court's grant of summary judgment for Defendants.

Equal Protection Claim

We begin by analyzing Plaintiff's challenge to North Greene's law under the Equal Protection Clause.[6] The District Court determined that the legislature's definition of "women" or "girls" as being based on "biological sex" is substantially related to the important government interests of providing equal athletic opportunities for females and protecting the physical safety of female athletes and, thus, the law did not violate the Equal Protection Clause. We agree.

The Equal Protection Clause of the Fourteenth Amendment provides that no state may deny any person within its jurisdiction "equal protection of the laws." U.S. Const. amend. XIV, § 1, cl. 4. In other words, "all persons similarly situated should be treated alike." *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). Realistically, though, every law impacts people differently, and the Fourteenth Amendment does not prohibit that outcome. *Reed v. Reed*, 404 U.S. 71, 75 (1971). But the Equal Protection Clause does forbid a statute from placing people into different classes and treating them unequally for reasons "wholly unrelated to the objective of that statute." *Id.* at 75–76. Ultimately, if a law seeks to treat different groups of people differently, it must do so "upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *Id.* at 76.

We assess the constitutionality of the North Greene Act using intermediate scrutiny. Under United States Supreme Court precedents, intermediate scrutiny applies to laws that discriminate on the basis of a quasi-suspect classification, like sex. *United States v. Virginia*, 518 U.S. 515 (1996). Intermediate scrutiny is appropriate because, while states have historically used sex as a basis for invidious discrimination, the United States Supreme Court has recognized that there are

[6] While the complaint is less than clear on this point, Plaintiff appears to assert only a facial challenge to the Act. However, even if Plaintiff's complaint were interpreted also to raise an as-applied challenge, the result would be the same. As the United States Supreme Court has made clear, "classifying a lawsuit as facial or as-applied . . . *does not speak at all to the substantive rule of law necessary* to establish a constitutional violation." *Bucklew v. Precythe*, 587 U.S. 119, 138 (2019) (emphasis added). "Indeed, an as-applied challenge merely 'affects the extent to which' a plaintiff must demonstrate 'the invalidity of the challenged law' or constitutional violation and the corresponding 'breadth of the remedy.' " *See Adams ex rel. Kasper v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 803 n.4 (11th Cir. 2022) (en banc) (quoting *Bucklew*). In a "facial constitutional challenge," we consider "only the text of the law, not its specific application to a particular set of circumstances." *828 Mgmt., LLC v. Broward Cnty.*, 508 F. Supp. 3d 1188, 1195 (S.D. Fla. 2020) (Singhal, J.); *see also Field Day, LLC v. Cnty. of Suffolk*, 463 F.3d 167, 174 (2d Cir. 2006) ("A 'facial challenge' to a statute considers only the text of the statute itself, not its application to the particular circumstances of an individual."); *Wa. State Grange v. Wa. State Republican Party*, 552 U.S. 442, 449–50 (2008) ("In determining whether a law is facially invalid, we must be careful not to go beyond the statute's facial requirements and speculate about 'hypothetical' or 'imaginary' cases."). [NOTE: The parties should treat the Plaintiff's challenge as a facial challenge.]

some "real differences" between males and females that could legitimately form the basis for different treatment. *Virginia*, 518 U.S. at 533.

Plaintiff contends that the Act excludes students from sports teams based on "biological sex" and defines "biological sex" solely in terms of "reproductive biology and genetics at birth" and that this ends-driven definition of biological sex is used to guarantee a particular outcome: barring transgender girls from qualifying as girls for purposes of school sports, categorically excluding them from teams and, therefore, from school sports altogether. It is Plaintiff's contention that transgender girls are similarly situated to biological girls and not biological males, and that by barring transgender girls from competing while allowing cisgender[7] girls to compete is a violation of Equal Protection. Plaintiff further argues that the Act's definition of "biological sex," and the related definitions of "girl" and "woman," are not substantially related to the government interest in providing equal athletic opportunities for females or its interest in protecting the safety of competing biological girls. Consequently, Plaintiff contends that the Act discriminates against transgender athletes on its face.

Initially, Plaintiff's contentions mistakenly imply that biology is irrelevant to sports. The Equal Protection Clause is "essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne*, 473 U.S. at 439. To prove an equal protection violation, the plaintiff must identify persons materially identical to him or her who has received different treatment. See *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992) (stating that the Equal Protection Clause prevents "governmental decisionmakers from treating differently persons who are *in all relevant respects alike*." (emphasis added)).

Plaintiff cannot make the requisite showing, because it is beyond dispute that biological sex is relevant to sports and therefore that the person who is "in all relevant respects alike" to a transgender girl is a biological boy. It is undisputed that after puberty biological males have physiological advantages over biological females that significantly impact athletic performance. See *Adams*, 57 F.4th 791 at 819 (Lagoa, J., specially concurring) ("[I]t is neither myth nor outdated stereotype that there are inherent differences between those born male and those born female and that those born male, including transgender women and girls, have physiological advantages in many sports."). Indeed, "[i]n tangible performance terms, studies have shown that these [biological] 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." *Id*. at 820 (citation omitted). Further, while Plaintiff has not gone through puberty, Defendants' expert opined that often biological boys have a competitive advantage over biological girls even before puberty.

It seems axiomatic that because biology provides a competitive advantage in sports, biology is a significantly relevant characteristic for the similarly situated analysis. Yet, Plaintiff asserts that Plaintiff—a biological boy—is nonetheless similarly situated to biological girls. In

[7] While Plaintiff and the dissenting judge use the terms "cisgender" girl(s), women, or females to refer to individuals whose gender identity correspond with the sex assigned to them at birth, this opinion uses the terms "biological" girl(s), women, or females (or boys, men, or males, as appropriate) to more closely track the language of the challenged North Greene Act.

doing so, Plaintiff essentially makes gender identity the only relevant factor when determining the individuals with whom Plaintiff is similarly situated. That is plainly incorrect.

While Plaintiff relies heavily on Plaintiff's gender identity, it is not enough—and is actually irrelevant when it comes to competitive sports—that Plaintiff identifies as a girl. Gender identity, simply put, has nothing to do with sports. It does not change a person's biology or physical characteristics. It does not affect how fast someone can run or how far they can throw a ball. Biology does. Thus, we reject Plaintiff's invitation to conclusively determine that A.J.T. is similarly situated to biological girls based on A.J.T.'s gender identity. See *Nguyen v. INS*, 533 U.S. 53, 73 (2001) ("To fail to acknowledge even our most basic biological difference … risks making the guarantee of equal protection superficial, and so disserving it.").

We do not believe that the Act impermissibly treats transgender athletes differently than their peers on its face. To demonstrate that a statute violates equal protection on its face, the plaintiff must show that the statute "explicitly distinguish[es] between individuals on [protected] grounds." *Shaw v. Reno*, 509 U.S. 630, 642 (1993); *Reed v. Reed*, 404 U.S. 71, 73 (1971) (involving a facial classification where the statute stated that "males must be preferred to females").

The Act does not facially discriminate based on transgender status. It simply places athletes on sports teams based on their biological sex. *See* N.G. Code § 22-3-16(a) (stating that "[i]nterscholastic, intercollegiate, intramural, or club athletic teams or sports ... shall be expressly designated as" male, female, or coed, "based on biological sex"). Although the Act explicitly treats biological boys and biological girls differently, it does not expressly treat transgender individuals differently.

Defendants correctly note that the Act classifies based only on biological sex, not "transgender status," and permissibly excludes "biological males" from female sports under established precedent. See *Clark ex rel. Clark v. Arizona Interscholastic Ass'n* (*Clark I*), 695 F.2d 1126, 1131-32 (9th Cir. 1982) (holding that excluding boys from a girls' high school volleyball team was permissible to redress past discrimination against women athletes and to promote equal opportunity for women). Indeed, the Act's only reference to transgender status is a statement that the North Greene General Assembly found that "gender identity is separate and distinct from biological sex." *Id.* § 22-3-16(d). But that factually accurate statement does not serve to treat transgender individuals differently. Applying the Act, schools place all athletes on the team corresponding with their biological sex. Transgender athletes fair no differently than any other athlete. On its face, therefore, the Act does not discriminate against transgender athletes. See *Adams*, 57 F.4th at 809 ("[W]hile the … policy at issue classifies students on the basis of biological sex, it does not facially discriminate on the basis of transgender status.").

Further, even assuming that the Act facially treats similarly situated individuals differently than Plaintiff, it is clear that the Act still survives heightened scrutiny. It cannot be disputed that ensuring equal opportunities for females is a sufficiently important government interest. Plaintiff contends that the Act's definition of "biological sex," and the related definitions of "girl" and "woman," are not substantially related to the government interest in providing equal athletic opportunities for females. Specifically, she asserts that excluding Plaintiff and other transgender

girls who have not gone through puberty is not substantially related to that interest. We disagree.

Given how biological differences affect typical outcomes in sports, ensuring equal opportunities for biological girls in sports requires that they not have to compete against biological boys. Defendants argue that the State's classification based on "biological sex" is substantially related to its important interest in providing equal athletic opportunities for females. The State points to a longstanding recognition in the courts that physical differences between men and women are enduring and render the two sexes not fungible with each other. See *Virginia*, 518 U.S. at 533. Defendants explain that, in order to preserve athletic opportunities for females, it is necessary to exclude biological males from female teams because males as a group have significant athletic advantage over females.

The record makes clear that, in passing this law, the North Greene General Assembly intended to prevent transgender girls from playing on biological girls' sports teams. But acting to prevent transgender girls, along with all other biological males, from playing on girls' teams is not unconstitutional if the classification is substantially related to an important government interest. Plaintiff does not contest that the state's interest in providing equal athletic opportunity to females is an important one or that sex-separate sports in general are not substantially related to that interest. Instead, Plaintiff suggests that transgender girls should be able to play on girls' teams despite their male sex, because their gender identity is "girl."

While sex and gender are related, they are not the same. Barring rare genetic mutations not at issue here, a person either has male sex chromosomes or female sex chromosomes. Gender, on the other hand, refers to a set of socially constructed roles, behaviors, activities, and attributes that a given society considers appropriate. See *PFLAG, PFLAG National Glossary of Terms* (June 2022), http://pflag.org/glossary. Gender identity, then, is "[a] person's deeply held core sense of self in relation to gender." *Id.* For most people, gender identity is in line with biological sex. *See Grimm*, 972 F.3d at 594. That is, most females identify as girls or women, and most males identify as boys or men. But gender is fluid. There are females who may prefer to dress in a style that is more typical of males and vice versa, and there are males who may not enjoy what are considered typical male activities. These individuals may, however, still identify as the gender that aligns with their sex. Others may not. When one's gender identity is incongruent with their sex, that person is transgender. However, it is the sex of an individual and not their gender that dictates physical characteristics that are relevant to athletics.

Whether a person has male or female sex chromosomes determines many of the physical characteristics relevant to athletic performance. Those with male chromosomes, regardless of their gender identity, naturally undergo male puberty, resulting in an increase in testosterone in the body. While some females may be able to outperform some males, it is generally accepted that, on average, males outperform females athletically because of inherent physical differences between the sexes. This is not an overbroad generalization, but rather a general principle that realistically reflects the average physical differences between the sexes. Plaintiff acknowledges that circulating testosterone in males creates a biological difference in athletic performance, which we think also amounts to a tacit acknowledgement that the state's classification based on biological sex is substantially related to its interest in providing equal athletic opportunities for females.

In an attempt to avoid that conclusion, Plaintiff contends that excluding transgender girls from the definition of "girl" in this context is unconstitutional, because transgender girls can take puberty blockers or other hormone therapies to mitigate any athletic advantage over biological females. If Plaintiff does ultimately undergo hormone therapy to block puberty, Plaintiff asserts that this will prevent gaining the physical characteristics typical of males during and after puberty. However, it is uncertain that Plaintiff will undergo the treatment suggested by her doctors, and regardless of Plaintiff's decision, other transgender girls may not take those medications. Even if a transgender girl wanted to receive hormone therapy, she may have difficulty accessing those treatment options depending on her age and the state where she lives. Further, there is much debate over whether and to what extent hormone therapies after puberty can reduce a transgender girl's athletic advantage over biological girls. In addition, there is no requirement that a transgender person take any specific medications or undergo hormone therapy before or after puberty. A transgender person may choose to only transition socially, rather than medically. Some may not even come to realize or accept that they are transgender until after they have completed male puberty. At the end of the day, a transgender girl is biologically male and, barring medical intervention, would undergo male puberty like other biological males. And as discussed above, biological males generally outperform females athletically. The State of North Greene is permitted to legislate sports rules on this basis because sex, and the physical characteristics that flow from it, are substantially related to athletic performance and fairness in sports.

Plaintiff also contends that the District Court erred in relying on protecting the safety of girls as an important interest advanced by the Act, since cross country and volleyball are not the type of contact sports that can often result in injuries to participants. This contention ignores the fact that the size and strength of volleyball competitors influences the speed and force with which the ball travels after being struck by a player and, thus, the danger to other competitors.[8] Very real physical differences between men and women create safety risks. Thus, the Act's classification based on biological sex also is substantially related to Defendants' interest in protecting the safety of female athletes.

The North Greene General Assembly's definition of "girl" as being based on "biological sex" is substantially related to the important government interests of providing equal athletic opportunities for females and protecting the physical safety of female athletes when competing. Accordingly, we conclude that the State of North Greene's Save Women's Sports Act does not violate the Equal Protection Clause of the Fourteenth Amendment and affirm the District Court's order granting Defendants' motion for summary judgment.

Title IX Claim

We next turn to Plaintiff's contention that the North Greene Act violates Title IX. In our

[8] For instance, in late 2022, a female high school volleyball player in North Carolina suffered severe head and neck injuries, resulting in long-term concussion symptoms, when a biological male spiked a ball in her face during a return play.

https://www.washingtontimes.com/news/2023/apr/21/north-carolina-verge-transgender-sports-ban-after-/ (last visited August 15, 2024).

view, Title IX does not prohibit a state from having sex-separate sports that limit participation based on the biological sex of the athlete at birth.

Title IX provides that "no person … 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). To succeed on a Title IX claim, a plaintiff must prove that she was (1) excluded from an educational program on the basis of sex; (2) that the educational institution was receiving federal financial assistance at the time; and (3) that "improper discrimination caused [her] harm." *Grimm*, 972 F.3d at 616 (citing *Preston v. Va. ex rel. New River Cmty. Coll.*, 31 F.3d 203, 206 (4th Cir. 1994)). "In the Title IX context, discrimination 'mean[s] treating [an] individual worse than others who are similarly situated.' " *Id.* at 618 (quoting *Bostock v. Clayton Cnty., Ga.*, 590 U.S. 644, 657-58 (2020)).

Plaintiff contends that the Act violates Title IX, because it excludes transgender girls from participation on girls' sports teams and effectively completely excludes them from school sports altogether. As with the Equal Protection Claim, Plaintiff asserts that the Act discriminates because transgender girls are similarly situated to biological girls. As already explained, transgender girls are biologically male. Short of any medical intervention that will differ for each individual person, biological males are not similarly situated to biological females for purposes of athletics. In addition, contrary to Plaintiff's suggestion, transgender girls are not excluded from school sports entirely, because they may try out for boys' teams, regardless of how they express their gender.

We agree with Defendants that the Act does not exclude Plaintiff from school athletics but just designates on which team Plaintiff will play. In fact, Title IX authorizes sex-separate sports in the same scenarios outlined in the Act, 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). Further, while Title IX did not define the term, we conclude that Title IX used "sex" in the biological sense, because its purpose was to promote sex equality. Accordingly, rather than contravening the purposes of Title IX, the Save Women's Sports Act actually furthers them.

Title IX authorizes sex separate sports in the same manner as the Save Women's Sports Act, so long as overall athletic opportunities for each sex are equal. 34 C.F.R. § 106.41(b)–(c). While the regulation technically "applies equally to boys as well as girls, it cannot be ignored that the motivation for the promulgation of the regulation" was to increase opportunities for women and girls in athletics.[9] *Williams v. Sch. Dist. of Bethlehem, Pa.*, 998 F.2d 168, 175 (3d Cir. 1993). There is no serious debate that Title IX's endorsement of sex separation in sports refers to

[9] We disagree with Plaintiff's argument that the North Greene Act is discriminatory, because it only forbids transgender girls, but not transgender boys, from participating in teams consistent with their gender identity. Title IX allows differences based on competitive advantage and contact sports/safety; that same rationale underpins the North Greene Act. Allowing transgender boys to participate in athletic events with biological boys does not present the same concerns about athletic opportunity and safety as presented in the case of allowing transgender girls to compete with biological girls.

biological sex.[10]

Because the North Greene Save Women's Sports Act does not discriminate on the basis of sex, we conclude that it does not violate Title IX. Accordingly, we affirm the District Court's entry of summary judgment for Defendants.

CONCLUSION

For the foregoing reasons, we hold that the State of North Greene's Save Women's Sports Act does not violate the Equal Protection Clause of the Fourteenth Amendment or Title IX. The District Court appropriately granted the Defendants' motion for summary judgment.

Accordingly, the judgment of the District Court is **AFFIRMED**.

[10] Plaintiff urges this Court to equate gender identity with sex, relying on the United States Supreme Court's decision in *Bostock*, where the Supreme Court held that, in the context of Title VII, "it is impossible to discriminate against a person for being . . . transgender without discriminating against that individual based on sex." *Bostock*, 590 U.S. at 660. We believe that *Bostock's* reasoning does not apply to Title IX because, unlike Title VII, Title IX includes express statutory and regulatory carve-outs for differentiating between the sexes. See *Adams*, 57 F.4th at 811. Title IX prohibits discrimination on the basis of biological sex and not gender identity.

KNOTTS, J., dissenting.

I feel compelled to write separately to explain why I believe the North Greene Save Women's Sports Act violates the Equal Protection Clause and also runs afoul of Title IX. I would reverse the District Court and remand this case with instructions that Plaintiff's claims proceed.[11]

Equal Protection Claim

In affirming summary judgment for Defendants, the majority has sanctioned the State of North Greene's discrimination against transgender athletes. The Act's definition of "biological sex" describes only the physiological differences between the sexes relevant to athletics. However, it explicitly references gender identity, and its text, structure, and effect all demonstrate that the purpose of the Act was to categorically ban transgender women and girls from public school sports teams that correspond with their gender identity.

A discriminatory purpose is shown when "the decisionmaker, in this case a state legislature, selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Pers. Adm'r of Massachusetts v. Feeney*, 442 U.S. 256, 279 (1979). It is evident that the North Greene Act is directed at excluding women and girls who are transgender, rather than on promoting sex equality and opportunities for women.

The plain language of the Act bans transgender girls and women from "biological[ly] female" teams. The Act divides sports teams into three categories based on biological sex: (A) Males, men, or boys; (B) Females, women, or girls; or (C) Coed or mixed." N.G. Code § 22-3-16(a). Sports designated for "females, women, or girls" are not open to students of the male sex. N.G. Code § 22-3-16(b).

Defendants suggest that "biological sex" is a neutral and well-established medical and legal concept, rather than one designed precisely by the North Greene General Assembly to exclude transgender people. But the Act's definition of "biological sex" is an oversimplification of the complicated biological reality of sex and gender.

Further, contrary to the majority's conclusion, the Act's discriminatory purpose is further evidenced by the Act's prohibition of "biological males" from female-designated teams because that prohibition affects one group of athletes only—transgender women. See *Crawford v. Bd. of Educ.*, 458 U.S. 527, 544 (1982) (explaining that the "disproportionate effect of official action provides an important starting point" for determining whether a "[discriminatory] purpose was [its] motivating factor" (internal quotation marks omitted)). Before the Act's passage, the North Greene school athletic rules prohibited cisgender men and boys from participating on female-designated sports teams, but there were no prohibitions against transgender athletes competing. Giving effect to the Save Women's Sports Act still prohibits men and boys from participating on

[11] Plaintiff did not file a cross motion for summary judgment in the District Court, or I would suggest that the District Court immediately enter summary judgment for Plaintiff. However, on remand, Plaintiff could file such a motion, which could be properly considered and granted by the District Court for the reasons noted here.

female athletic teams, thus, the Act's only contribution to the North Greene student-athletic landscape is to entirely exclude transgender women and girls from participating on female sports teams. Where a statute's clear purpose and only effect is to exclude transgender girls from participation on girls' sports teams, the statute must be said to discriminate on the basis of transgender status.

In addition to having a discriminatory purpose and effect, the Act is also facially discriminatory against transgender female athletes. The definition of "biological sex" was designed precisely as a pretext to exclude transgender women from women's athletics, a classification which the Equal Protection Clause prohibits. The clear purpose and effect of the Act's definitions were to exclude transgender "girls" (biological boys who identify as girls) from girls' sports teams by excluding them from the definition of "female." This is "a facial classification based on gender identity," which is not cleansed by the fact that the Act does not transparently refer to the term "transgender" when separating sports teams. The Act's use of "biological sex" functions as a form of proxy discrimination. Thus, this use of a "seemingly neutral criteria" in the statute still was constructively, facial discrimination against the disfavored group. The Act treats transgender girls differently from cisgender girls, which is literally the definition of gender identity discrimination.

Undoubtedly, furthering women's equality and promoting fairness in female athletic teams is an important state interest. However, the Act's means of achieving this interest—categorically banning transgender women and girls from all female athletic teams— are not substantially related to, and in fact undermine, those asserted objectives.

Transgender women have not and could not displace cisgender women in athletics to a substantial extent. Because transgender women represent about 0.6 percent of the general population, it cannot credibly be argued that they would displace cisgender women from women's sports. In addition, I am not convinced that the physiological differences between biological males and females dictate that there is always a competitive advantage for the biological male, even in sports where traditionally males would be considered to hold such an advantage.[12]

In addition, I am unconvinced that allowing transgender women to compete will cause safety concerns for cisgender females. For non-contact sports, physiological differences between the sexes are minimally, if at all, related to safety. Cross country, one of the sports of interest to Plaintiff, is a good example. In addition, even in contact sports, special equipment is used to protect the safety of all participants; football players wear helmets and pads, soccer players wear

[12] For example, take Jackie Tonawanda, the American female heavyweight who knocked out male boxer Larry Rodania at Madison Square Garden on June 8, 1975, earning the nickname "The Female Muhammad Ali." Famously, Billie Jean King defeated male tennis player Bobby Riggs. And it is almost becoming commonplace for females to play men's football, with Haley Van Voorhis, a safety at Shenandoah University, becoming the first woman non-kicker to appear in an NCAA football game in 2023. This is not to say that there are no physiological differences between males and females, but just that they should not necessarily dictate which athletes are allowed to compete against each other.

shin guards; and boxers wear gloves and face masks. The unfortunate volleyball accident that the majority notes happened to involve a ball striker who was a transgender girl competing with cisgender girls, but this does not mean that the injury to the player struck was caused by the transgender girl's participation or that the same type of injury could not have occurred with a cisgender ball striker. Thus, I do not believe that banning transgender girls or women from competing is substantially related to the government's interest in protecting competitor safety.

For these reasons, I would hold that the challenged North Greene law violates the Equal Protection Clause. I would reverse the District Court's grant of summary judgment for Defendants.

Title IX Claim

Much of what I have said bears on the Title IX analysis here. In enacting the Save Women's Sports Act, the North Greene General Assembly has discriminated against Plaintiff and other transgender females on the basis of sex in violation of Title IX.

Although Title IX and equal protection claims are similar, they are "not ... wholly congruent." *Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 257 (2009). For one thing, not every act of sex-based classification is enough to show legally relevant "discrimination" for purposes of Title IX. Instead, under Title IX, "discrimination 'mean[s] treating [an] individual *worse than* others who are similarly situated.' " *Grimm*, 972 F.3d at 618 (first alteration in original) (emphasis added) (quoting *Bostock*, 590 U.S. at 657). In addition, even having experienced worse treatment than a similarly situated comparator is not enough to prevail on a Title IX claim. Rather, a plaintiff must establish that the "improper discrimination caused [her] harm." *Id.* at 616. On the other hand, once a Title IX plaintiff shows she has been discriminated against in the relevant sense and suffered harm, no showing of a substantial relationship to an important government interest can save an institution's discriminatory policy. See *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 309 (2023) (Gorsuch, J., concurring) (noting that Title VI, whose language Title IX mirrors, "does not direct courts to subject these classifications to one degree of scrutiny or another").

Because Plaintiff can show both worse treatment based on sex and resulting harm, Plaintiff has established each of the disputed requirements for a Title IX claim. First, the Act operates "on the basis of sex" for two reasons that should be familiar by now. For one, discrimination based on gender identity is discrimination "on the basis of sex" under Title IX, see *Grimm*, 972 F.3d at 616, and the Save Women's Sports Act discriminates based on gender identity.

In addition, the North Greene Act requires treating students differently even when they are similarly situated. The Act forbids one—and only one—category of students from participating in sports teams "corresponding with [their] gender": transgender girls. *Id.* at 618. And it does so on a categorical basis, regardless of whether any given girl possesses any inherent athletic advantages based on being transgender.

Plaintiff also has established that harm from the Act's application—both in terms of what the Act forbids Plaintiff from doing and what it would require if Plaintiff wanted to gain the opportunity to participate in school sports. This "emotional and dignitary harm … is legally

cognizable under Title IX," and it requires no feat of imagination to appreciate "[t]he stigma of being" unable to participate on a team with one's friends and peers. *Grimm*, 972 F.3d at 617–18. Offering Plaintiff a "choice" between not participating in sports and participating only on boys' teams is no real choice at all. It would require Plaintiff to countermand the social transition that has occurred and to be reintroduced to teammates, coaches, and even opponents as a boy.

While regulations introduced soon after Title IX's enactment say recipients of federal funds "may operate … separate teams for members of each sex," 34 C.F.R. § 106.41(b), Plaintiff does not challenge the legality of having separate teams for boys and girls but rather the Act's requirement that Plaintiff may compete only on boys or coed teams—even though doing so treats Plaintiff differently than similarly-situated people, contradicts Plaintiff's gender identity, and would cause Plaintiff significant harm. The regulations Defendants cite do not purport to address this situation. Thus, Defendants' emphasis on the regulations as expressly authorizing the Act's chosen discrimination is misguided.

In addition, the Save Women's Sports Act is not saved by Defendants' contention that overall athletic opportunities for each sex are equal. This argument ignores that "Title IX protects the rights of individuals, not groups, and does not ask whether the challenged policy treats [one sex] generally less favorably than [the other]." *Peltier v. Charter Day Sch., Inc.*, 37 F.4th 104, 130 (4th Cir. 2022) (en banc). I believe that applying the Act to Plaintiff would treat her worse than people to whom she is similarly situated, deprive Plaintiff of any meaningful athletic opportunities, and do so on the basis of sex. That is all that is required to show a violation of Title IX.

For the foregoing reasons, I would reverse the District Court and hold that the North Greene Save Women's Sports Act violates Title IX.

No. 24-2020

IN THE SUPREME COURT OF THE UNITED STATES

A.J.T.,

Petitioner,

v.

STATE OF NORTH GREENE BOARD OF EDUCATION, *et al*.,

Respondents.

ORDER

Petition for Writ of Certiorari to the United States Court of Appeals for the Fourteenth Circuit is GRANTED. The issues before the Court are:

1. Whether Title IX prevents a state from consistently designating girls' and boys' sports teams based on biological sex determined at birth.[13]

2. Whether the Equal Protection Clause prevents a state from offering separate boys' and girls' sports teams based on biological sex determined at birth.

[13] On August 16, 2024, this Court issued an order in *Dept. of Educ. v. Louisiana* and *Cardona v. Tennessee*, 603 U. S. ____ (2024), denying the Government's emergency applications seeking partial stays of preliminary injunctions against a rule recently issued by the Department of Education implementing Title IX of the Education Amendments of 1972 (89 Fed. Reg. 33886 (2024)). That order does not resolve and should not impact the issues in this matter.