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.

ON WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS FOR THE FOURTEENTH CIRCUIT

BRIEF FOR THE PETITIONER

TEAM 10

QUESTION PRESENTED

I. Whether a state law prohibiting transgender girls from participating on a girls sports team constitutes sex discrimination “because of … sex” within the meaning of Title IX of the Civil Rights Act of 1964, when the law disregards the youth’s gender identity, forcing the youth to either misgender themselves or lose the right to play on their gender’s team.

II. Whether a state law that provides for separate boys’ and girls’ sports teams, based only on biological sex determined at birth, violates the Equal Protection Clause when the law affects solely transgender girls, applies even to non-contact sports, and disregards factors like puberty, gender identity, age, medical intervention, and physiological characteristics.

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the U.S. Constitution states:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Section 1681(a) of Chapter 38 of Title 20 of the United States Code states:

"[N]o 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."

Section 106.10 of Chapter 1 of Title 34 of the Code of Federal Regulations states:

"Discrimination on the basis of sex includes discrimination on the basis of sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity."

Section 106.41(a-b) of Chapter 1 of Title 34 of the Code of Federal Regulations states:

a. No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic . . . or intramural athletics offered by a recipient.

b. Notwithstanding the requirements of paragraph (a) of this section, a recipient may operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport.

Section 22-3-15(a)(1)-(3) of North Greene Code states:

(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.

Section 22-3-16(a) of North Greene Code states:

It is required that "interscholastic, intercollegiate, intramural, or club athletic teams or sports that are sponsored by a 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."

Section 22-3-16(b) of North Greene Code states:

"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."

Section 22-3-16(c) of North Greene Code states:

"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."

STATEMENT OF THE FACTS

At the start of this case, A.J.T. was an eleven-year-old girl entering seventh grade. Record 3. Despite being born male, A.J.T. knew from a young age that she identified as a girl. Record 3. By third grade, A.J.T. began to adjust her presentation, living as a girl while at home with her family but not yet feeling comfortable enough to dress as a girl for school. Record 3. Eventually, A.J.T. began fully expressing her authentic self, living life as a girl both privately and publicly. Record 3. She adopted a female name to align with her gender and began participating in public as a girl. Record 3.

In 2022, A.J.T. was diagnosed with gender dysphoria and started attending counseling. Record 3. She has been attending counseling and discussing with experts the availability of

prevalent treatment options, such as puberty-delaying treatments. Record 3. Experts have explained that the use of puberty-delaying treatments on transgender girls, especially at a young age, will prevent endogenous puberty, in turn protecting the child from the physiological changes that typically occur due to the increase of testosterone circulation. Record 3. The timeframe in which a child starts experiencing puberty varies, with the average age for transgender girls starting puberty being the age of 12, though some can start at 14. Record 3 n.2. Currently A.J.T. has not begun puberty and has not yet decided on whether she wants to take puberty-delaying treatments. Record 3.

A.J.T. began seventh grade with the desire to join the girls' volleyball and cross-country teams, as these teams align with her gender. Record 3. She had participated on her elementary school's all-girl cheerleading team without any issues or incidents arising from her identifying as a girl. Record 3. A.J.T. 's participation in her school's sports became unachievable with the passage of North Greene's erroneously titled "Save Women's Sports Act" ("Act") on May 1st, 2023. Record 3. The Bill was introduced with the intention of "limiting participation in sports events to the biological sex of the athlete at birth[,]" in turn denying transgender youth the ability to participate in sports that align with their gender. Record 3, N. Greene Code § 22-3-4. The Bill specifically denies transgender girls the right to play on their identified gender's teams, regardless of the youth's gender identity. Record 4.

The law will ban transgender girls from participating in their gender's sports, regardless of whether they have started puberty or treatment to delay puberty. Record 3-4. This law has given A.J.T. an unimaginable choice: she must either purposefully misgender herself in order to participate in sports or willingly give up her ability to participate to avoid misgendering and betraying her deeply held sense of self. Record 4.

In response to her exclusion, A.J.T., through her mother, filed this lawsuit against the State of North Greene Board of Education and State Superintendent Floyd Lawson, and later amended her complaint to include the State of North Greene and the Attorney General Barney Fife after the State's motion to intervene was granted. Record 4-5. A.J.T. is seeking both a declaratory judgment that the Act violates Title IX and the Equal Protection Clause of the Fourteenth Amendment and an injunction that would allow her to play on her chosen team without incident. Record 4-5. The District Court granted Defendants' motion for summary judgment, which A.J.T appealed. The Fourteenth Circuit Court of Appeals affirmed the District Court's decision, and a Writ of Certiorari was filed with the Supreme Court of the United States. Record 5, 17.

SUMMARY OF THE ARGUMENT

This court should reverse the Fourteenth Circuit's decision and grant A.J.T.'s declaratory judgment as well as injunctive relief. North Greene's Act violates Title IX's prohibition of unlawful sex-based discrimination by limiting A.J.T.'s participation because of her sex and violates the Equal Protection Clause of the Fourteenth Amendment by discriminating against A.J.T. based on her biological sex.

Title IX requires that all educational institutions receiving some form of federal funding must provide equal opportunities to both sexes, and not discriminate on the basis of sex. Discrimination on the basis of sex only requires that sex be a but-for cause of the discrimination. Because of the closely held concept of sex and gender, it is impossible t discriminate on the basis of gender identity without also using sex as a but-for cause. This is further demonstrated by the Department of Education's guidance that Title IX discrimination includes gender identity discrimination.

The Equal Protection Clause of the Fourteenth Amendment requires that all persons similarly situated be treated equally. When a law classifies individuals based on a quasi-suspect classification like sex or gender, courts apply intermediate scrutiny. This means the government must show that the classification serves important governmental objectives, and the discriminatory means employed are substantially related to achieving those objectives.

The North Greene Act facially discriminates against individuals based on their biological sex and gender identity. It categorically excludes transgender girls from participating on girls' sports teams based solely on their sex assigned at birth, disregarding their gender identity. Even if facially neutral, the Act's discriminatory intent and disparate impact on transgender girls would trigger intermediate scrutiny. The Act fails to satisfy intermediate scrutiny as it is not substantially related to state objectives because it relies on overbroad generalizations equating biological sex with athletic capability, disregarding impacting factors like puberty.

The government cannot justify the Act's sweeping categorical exclusion based on unsubstantiated concerns about transgender girls dominating women's athletics. Data suggests transgender women and girls constitute a small percentage of the population, and research on athletic performance gaps between transgender and cisgender women is inconsistent and incomplete.

The Act's justifications are further undermined by inconsistencies and contradictions. It disproportionately targets girls' sports while allowing transgender boys to participate on boys' teams. Therefore, the Act fails the second prong of intermediate scrutiny, and the Court should strike it as unconstitutional under the Equal Protection Clause.

ARGUMENT

THIS COURT SHOULD REVERSE THE FOURTEENTH CIRCUIT'S DECISION BECAUSE THE NORTH GREENE STATUTE VIOLATES TITLE IX AND THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

In recent years, many states have enacted laws limiting the ability of transgender individuals to participate on sports teams and leagues that align with their gender identity. But despite widespread public debate over the participation of transgender athletes in sports, such legislation cannot discriminate against transgender girls under Title IX or the Equal Protection Clause of the Fourteenth Amendment.

The Act violates Title IX's prohibition of unlawful sex-based discrimination by limiting A.J.T.'s participation because of her sex by denying her the right to participate in her gender's sports and violates the Equal Protection Clause of the Fourteenth Amendment by discriminating against A.J.T. based on her biological sex. Accordingly, Petitioner A.J.T. respectfully requests that this Court reverse the Fourteenth Circuit's decision and grant A.J.T.'s declaratory judgment as well as injunctive relief.

I. Statutory Interpretation of North Greene's Act Prohibiting Students from Playing on Their Genders' Teams Demonstrates That Sex is a But-For Cause of the Gender Discrimination and Harms the Youth in Violation of Title IX, and Even If Statutory Interpretation is Not Fully Conclusive, the Department's Guidance and Amendments to Include Gender Identity Should Be Followed.

The 60's and 70's were a time of monumental change in the United States, culminating in the passage of anti-discrimination laws through both the Civil Rights Act of 1964 and the Education Amendments of 1972. The two predominate statutes prohibiting sex-based discrimination are Title VII of the Civil Rights Act of 1964 ("Title VII") and Title IX of the Education Amendments of 1972 ("Title IX"). *See* McKenzie Miller, Comment, *Is VII > IX?: Does Title VII Preempt Title IX Sex Discrimination Claims in Higher Ed Employment?* 68 Cath. U.L. Rev. 401 (2019). While Title VII outlawed sex-discrimination within employment, Title IX outlawed sex-based discrimination in educational institutions, providing the promise that "[n]o

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) (emphasis added).

Questions arose shortly after the introduction of anti-discrimination laws about their application. The lower courts incorrectly focused their analysis on the permissibility of separate-sex sports teams to justify the discrimination based on biological sex. The legality of having sex-separated sports teams was never in question. Rather, the Title IX claim arises on the basis of discriminating acceptance into the teams without consideration of gender identity. As such, the focus of the analysis should be on whether enforcing separate sex teams based on biological sex in disregard for transgender girls gender identity is discriminatory.

A. The North Greene Statute's Prohibition of Transgender Youths Playing on Teams Aligned with Their Gender Violates Title IX because a Statutory Interpretation of Title IX Affirms that Discrimination Based on Gender Identity Relied on Sex as A But-For Cause and Harms Youths.

To succeed on a Title IX claim, the claimant must establish three elements: (1) the individual was excluded from participating in an educational program on the basis of the individual's sex, (2) the educational institution denying participation was receiving federal financial assistance at the time the individual was denied, and (3) the "improper discrimination caused [the individual] harm." *Grimm v. Gloucester Cty. Sch. Bd.*, 972 F.3d 586, 616 (4th Cir. 2020). Neither party contests that A.J.T.'s school is an educational institution that received federal financial aid at the time this dispute arose, thus this court need only focus on whether the Act unlawfully discriminated against A.J.T. on the basis of sex, and whether this discrimination harmed her. See Record 1-3, 11.

1. <u>Traditional rules of statutory construction demonstrate that discrimination based on gender identity is inherently because of sex, in violation of Title IX.</u>

Courts deciding how to apply Title IX have often used both Title VI and VII of the Civil Rights Act of 1964 to help guide their decisions. See Grimm, 972 F.3d at 616 ("Although Bostock interprets Title VII . . . it guides our evaluation of claims under Title IX"); see also Preston v. Virginia ex rel. New River Community College, 31 F.3d 203, 206 (4th Cir. 1994) ("Title VII principles should be applied to Title IX actions"); cf. Fitzgerald v. Barnstable Sch. Comm., 555 U.S. 246, 258 (2009) ("Congress modeled Title IX after Title VI . . . and passed Title IX with the explicit understanding that it would be interpreted as Title VI was.") Using this Court's statutory interpretation of the terms "sex," "because of sex," and "discriminate" from Title VII, it is clear that sex and gender identity are inseparable when used in Title IX, such that discrimination based on gender identity is discrimination based on sex. See Bostock v. Clayton Cnty., 590 U.S. 644, 660-661 (2020).

In determining the application of a statute, typical rules of statutory construction lead courts to first look to the ordinary meaning of the terms, specifically focusing on the meaning at the time of Congressional enactment of the law. See id. at 655. In Bostock, the court used the ordinary meaning of three key terms from Title VII, "sex," "because of," and "discrimination," to determine whether an employer firing employees based on their sexual orientation or gender identity was a form of sexual discrimination in the workplace, in direct violation of Title VII. See id.

To avoid unnecessary analysis, the court accepted the employee's concession that "sex" refers to "biological distinctions between male and female" for purposes of this analysis. Id. at 655. Turning toward the ordinary meaning of the phrase "because of", the court found this to mean "by reason of" or "on account of." Id. (citations omitted). It is through this definition this Court found that "because of sex" incorporates the but-for causation test, which merely requires

a finding that a particular outcome would not have happened but-for the sex of the individual. See id. at 656. In applying a but-for causation test to a sexual discrimination in employment claim, an employer cannot avoid liability by demonstrating that other factors existed that influenced the employment decision; in fact, sex does not have to be the main factor, it merely needs to be one of the factors. See id. at 656-657. The court then defined discrimination to mean "mak[ing] a difference in treatment or favor (of one as compared with others)." Id. (quoting Webster's New International Dictionary 745 (2d ed. 1954)). In applying this definition, discriminating against another means "treating that individual worse than others who are similarly situated." Bostock at 656-657.

In combining the statutory interpretation used in Title VII, the court looks at whether "changing an employee's sex would have yielded a different choice by the employer," and in doing so the court held that firing an individual based on their sexual orientation or gender identity does discriminate based on their sex. Id. At 658-659. This is because in order to fire an individual based on their sexual orientation or gender identity, an employer is looking at the individual's sex to determine what characteristics the employer tolerates. Put differently, a man liking a woman is acceptable behavior to the employer, but a woman liking a woman would be unacceptable. The distinction between the two relies on the employee's sex: one is permissible because the employee is following what the employer deems to be proper based on their sex, while the other is impermissible because it defies the norms of the employee's sex. Similarly, an employer who fires an employee for being transgender is looking toward the characteristics the individual portrays in comparison to their sex. A biological man who presents as a woman is undesirable, while a woman who presents as a woman is desirable; the key difference is the sex of the individual. Ultimately, the Supreme Court found that "it is impossible to discriminate

against a person for being homosexual or transgender without discriminating against that individual based on sex." Id. At 660.

In Grimm, the court takes Bostock's Tile VII application and uses it to guide their Title IX analysis. The court must apply the definitions used in Bostock to decide whether a school board policy requiring students to only use the bathrooms assigned to their biological sex, or gender-neutral bathrooms, was discriminating against a transgender young man on the basis of his sex. See Grimm at 616. The court recognized that the analysis in Bostock involves a different statute, but guided the Title IX analysis on Bostock's analysis due to the precedent of analyzing Title IX claims in a similar manner as Title VII claims. See id. At 616. Based on the Supreme Court finding in Bostock that discrimination based on gender identity cannot occur without discrimination based on sex, the court in Grimm found that the policy banning transgender boys from using male bathrooms must be discriminatory and based on sex. See Grimm at 616. An analysis of the facts demonstrates this: Grimm, a transgender boy, is denied the right to use his gendered bathroom because the school's bathroom policy relies on his biological sex to determine whether entering a girl's bathroom or boys' bathroom is appropriate. See id. This falls within the definition of discrimination, as he was unable to use the bathroom corresponding with his gender, while other cis-gender boys were able to use their gendered bathrooms. Id.

However, application of Bostock's analysis to Title IX requires a further analysis once establishing that discrimination based on sex occurred, because Title IX provides very limited carve-outs to allow for sex discrimination, while Title VII does not. See id. at 618. Title IX allows for "separate toilet, locker room, and shower facilities on the basis of sex[,]" so long as the bathrooms are "comparable" to each other. Id. (quoting 34 C.F.R. § 106.33). While this carve-out exists, the issue in Grimm is not the legality of having sex-based bathrooms, in fact,

Grimm relies on sex-based bathrooms in order to use a bathroom specifically aligned with his gender identity. See id. Instead, the challenge is the "discriminatory exclusion of [transgender boys] from the sex-separated restroom matching [the boys] gender identity." Id. Grimm holds that Title IX's carveout allows for the creation of sex-separated bathrooms but does not override the prohibition of discrimination on the basis of sex to determine who is acceptably male or female. See id; see also Adams v. Sch. Bd. Of St. Johns Cnty, 57 F.4th 791, 843 (11th Cir. 2022) (Pryor, J. dissenting) (explaining that Title IX carveouts do not allow a school to rely on its own discriminatory guidelines for what constitutes sex.)

Here, North Greene's Act relies on the carveout to Title IX provided in 34 C.F.R. 106.41(b) allowing for separate sex sports teams. Record 4, 11. In doing so, the Act creates separate-sex teams, then furthers the separation by creating its own definition of sex required for eligibility on a team. Record 4. The Act states that "[a]thletic 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), and continues to define biological sex to mean "an individual's physical form as a male or female based solely on the individual's reproductive biology and genetics at birth," N.G. Code § 22-3-15(a)(1), such that "male means an individual whose biological sex determined at birth is male," N.G. Code § 22-3-15(a)(3). With the use of these definition, A.J.T. is unable to join the sports team aligned with her gender. Record 4.

Both courts in Bostock and Grimm looked at policies that discriminate against transgender individuals by using the individual's sex as a but-for cause of discrimination. See Bostock at 658-659, Grimm at 616. Bostock involved a transgender woman being fired because her gender identity, see Bostock at 658, while Grimm involved a transgender boy who was

denied access to male bathrooms pursuant to school policy separating bathrooms by sex, see Grimm at 616. A.J.T.'s discrimination can be analogized to both cases, as she is a transgender youth who is being prohibited from playing on her preferred sports team on the basis that her gender identity does not align with the school's definition of sex. The Act's discrimination of A.J.T. is based on her sex, as her sex is a but-for cause of the discrimination in the same way Bostock's sex was a but-for cause of her firing. If A.J.T identified as female, and was born a female, she would be allowed to play on her identified team, but because she was born a male, she is denied access to her gender's team. The Supreme Court used a similar analogy in Bostock, and found that sex was a but-for cause when changing the biological sex changes the result of the discrimination.

In addition, while the Act uses the carveout to Title IX provided in 34 C.F.R. 106.41(b) allowing for separate sex sports teams to justify the existence of the separate teams, the school's decision as to who is male enough or female enough to qualify for a team is discriminatory. In Grimm, the court looked at a similar carveout in Title IX related to separate bathrooms, and held that excluding a transgender boy from using the bathroom that aligns with his gender identity is a discriminatory policy based on sex, as while the existence of the bathrooms is okay, the exclusion of certain groups, namely transgender youths, is using sex discrimination. See Grimm at 616. The situation A.J.T. faces is similar, though instead of sex-separated bathrooms, she faces sex-separated sports teams. Record 4. Similar to the issue in Grimm, A.J.T.'s contention is not with the existence of a boys team and a girls team, but rather the school boards self-made definitions that categorize A.J.T. into one group based solely on her biological sex, without consideration of her gender. This categorization treats A.J.T. "worse than others who are similarly situated," by forcing her to join a team opposite of her gender identity, while other

biological males are allowed to join teams that align with their gender identity. Bostock at 656-657. In confirming that the policy discriminates against A.J.T. based on her sex, the last step to determine whether the Act violates Title IX is to determine whether the unlawful discrimination caused her harm.

2. The North Greene Statute's discrimination based on A.J.T.'s biological sex caused her harm.

Once discrimination based on sex is demonstrated, courts must then look at whether the unlawful discrimination caused the individual harm in order to find a violation of Title IX occurred. See Grimm at 616. Understanding how transgender students suffer harm from discriminatory policies requires a deeper understanding of what it means to be transgender. Id. at 594.

Transgender individuals have a different gender identity than the binary gender assigned to them at birth, and this gender identity is a "'deeply felt, inherent sense' of their gender." Edmo v. Corizon, Inc., 935 F.3d 757, 768 (9th Cir. 2019) (quoting Am. Psychol. Ass'n, Guidelines for Psychological Practice with Transgender and Gender Nonconforming People, 70 Am. Psychologist 832, 834 (2015)). People who have gender identities that do not align with their biological sex are often diagnosed with gender dysphoria, a clinical condition characterized by debilitating distress and anxiety. See Grimm, at 594-95.

It is through the incongruence between an individual's gender and sex that harm typically occurs, deepening around the years of puberty when the child experiences declining mental health, including instances of increased depression, substance abuse, self-harm, and suicide. See id. Societal pressure on the youth to conform to their societally accepted sex often causes harm, as being misgendered and scrutinized causes shame and psychological pain. Id.

It is through this lens that harm inflicted by discriminatory policies can best be understood. In Grimm, the court looked at how discriminatory policies banning a transgender boy from using the boys bathroom caused him harm. Id. The central focus was on the emotional and mental harm the youth incurred as a result of the stigma surrounding being forced into misgendering himself, or traveling to the gender neutral bathrooms that no one else had to use. Id. at 617-618. By forcing transgender youths to use separate restrooms, the school is "'invit[ing] more scrutiny and attention' from other students, 'very publicly brand[ing] all transgender students with a scarlet "T".'" Id. (quoting Doe v. Boyertown Area Sch. Dist., 897 F.3d 518, 530 (3d Cir. 2018)). The court held that the unlawful, discriminatory bathroom policy caused Grimm emotional and dignitary harm that satisfies the harm requirement of Title IX. See Grimm at 618.

Similarly, the dissent in Adams explains that the mere denial of a transgender students right to use a resource that aligns with their gender, is harmful. See Adams, 57 F.4th at 843 (Pryor, J. dissenting). In Adams, a transgender male was denied access to the boys bathroom at school, and the dissenting judge found that denying him access to his genders bathroom, while cisgender boys are granted that access, is an injury forced upon the student. See id. This is further demonstrated when the boy testified he felt ashamed, anxious, and less like a person due to the school policy. Id.

The emotional and dignitary harm A.J.T. suffers as a result of the unlawful, discriminatory sports policy is similar to the harm Grimm and Adams suffered. The court found in Grimm, and the dissenting judge found in Adams, that denying a transgender student the right to participate in alignment with their gender is harmful, leading to conflicting emotions of shame and anxiety in the youth. See Grimm at 594-95, Adams at 843 (Pryor, J. dissenting). A.J.T. is diagnosed with gender dysphoria, which leads to debilitating distress and anxiety when forced to

confront the discrepancies between one's gender and sex. See Grimm, at 594-95. The sports policy at North Greene forces A.J.T. to do exactly that: the policy forces her to acknowledge that others do not consider her a girl, and that to play in sports she must either play as a boy, contrary to her deeply held sense of self, or choose a co-ed team if available. Edmo at 768, Record 3-4. This shows that the school's unlawful discriminatory policy does cause A.J.T. harm, this making her eligible for relief under Title IX.

B. Even if this Court Does Not Find that The Statutory Interpretation is Fully Dispositive, the Department of Education's Guidance and Recent Amendment Should Be Accepted Such that North Greene's Statute Violates the Amended Scope of Title IX.

For 40 years, Chevron deference was a doctrine that governed judicial deference to administrative agencies when ambiguity surrounding a statute's interpretation is present. See Chevron, U.S.A., Inc. v. Natural Resources Defense Counsel, Inc., 468 U.S. 837 (1984). This deference occurred after satisfying a two-step test, in which the court determined, first, if Congress has directly spoken about the statutory issue present, and second, if Congress has remained silent, the court would defer to the agency's interpretation if it was a permissible reading of the statue. See id. at 842. However, such deference contradicted with the judiciaries power to hear Cases and Controversies. See Loper at 2257. In an effort to take back the Judiciary's power, The Supreme Court of the United States overruled Chevron in Loper, finding that Chevron deference to agency interpretations is no longer required. See id.

1. This Court's recent overruling of Chevron does not take away agency deference, it merely does not require it.

In overruling Chevron deference, Loper has allowed the Court to revert to the traditional judicial role of interpreting questions of law through its own independent judgment rather that forcing the court to disregard its own reading for the administrative reading. See id. at 2258.

However, such traditional principles do not negate an administrative agency's influence in a court's statutory interpretation. When exercising independent judgment, the courts often look to the Executive Branch and offer the agency's interpretation of a federal statute due respect. See id. at 2258. The overruling of Chevron deference just creates the ability for these interpretations to guide the court, rather than to supersede the courts powers and interpretation. See id. at 2258.

The court's decision to overrule Chevron is heavily based in Congressional enactment of the APA in 1946, which provided that the court "to the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action." Loper at 2261 (quoting 5 U.S.C. § 706). This guidance differs from what Chevron required, as it has the courts, *not* the agencies, determine questions of law surrounding all statutes, including ambiguous statutes. See id. The issue with Chevron hinged on the requirement that the court abandon its own reason and interpretation of law in deference of an administrative agency, when it is well established that it is the courts job to judge the law and an agency's job to make the law. Requiring the court to ignore its own interpretation of the law does not avoid the court from making policy, it hinders the court from interpreting the law—in direct contrast from the role a court is intended to play. See id. at 2267-2268. As such, the court in Loper overruled Chevron, finding that there is not deference required with ambiguous statutes, and the court is free to apply its own interpretation. See id. While following an agency interpretations is no longer required, the reasons courts looked at agency interpretations has not changed: agency interpretations "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Id* at 2262 (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

Through this understanding of Loper, the use of agency interpretation to determine the applicability of Title IX to gender identity is clear. The court is free to make its own interpretation of the application of the statute to the issues presented, though the court may review and consider an agencies interpretation. The Department of Education, the agency charged with enforcing Title IX, has released two guiding viewpoints to help guide the court: an interpretation clarifying Title IX application to gender identity after the opinion in Bostock, 86 FR 32637, and an amendment to 34 CFR Chapter 1 to include gender identity within the scope of discrimination based on sex, 34 CFR 106.10. Based on the changes in *Loper*, these guidelines and amendments can be used by the court to guide their decision.

2. The Department of Education's regulations and amendments are in line with prior court precedents ruling in favor of the inclusion of gender identity within the scope of Title IX, such that while deference is not required, it should be used.

In response to the constant litigation surrounding whether Title IX extends to discrimination on the basis of gender identity, the Department of Education released an interpretation to guide courts in applying Title IX following the Supreme Court decision in Bostock. More recently, the Department of Education made an amendment to Title IX to include within the definition of discrimination the term "gender dysphoria." It is by comparing the two changes made by the Department with the court cases that it can best be understood that the Department's view is in line with court precedent, such that the Court should adopt the Department's amendments and apply Title IX as suggested by the Department.

In 2021, following the decision of Bostock, the Department of Education released an interpretation that clarified that the reasoning used in Bostock to find that discrimination because of gender identity is inherently discrimination based on sex for Title VII purposes also applies to Title IX. *See* 86 FR 32637. The interpretation explained that it has been a longstanding view of

the Department that Title IX was enacted to protect all students from sex discrimination, including those who are lesbian, gay, bisexual, and transgender. *Id.* The interpretation analyzed the court's analysis in *Bostock* and found that the reasoning used by the court should apply to Title IX because the text in Title VII is similar to that of Title IX, prior case law demonstrates that the two Statutes are similarly interpreted by federal courts, and harm can be established in Title IX the same way it can be established in Title VII. The interpretation goes on to say that when complaints are lodged under Title IX, the Department intends to follow the guidance provided in Bostock to determine whether a gender identity discriminatory practice constitutes a sexual discriminatory practice. *See id.* at 326389.

In addition to creating an interpretation of Title IX's applicability to gender identity discrimination, the Department amended Title IX to include a new section, 34 CFR § 106.10, which defines the scope of discrimination on the basis of sex to include gender identity. 89 Fed. Reg. 33886 (2024). Several States sought a preliminary injunction against the rule, arguing that the amendment exceeded the bounds of the Department's authority given by Congress. *See Dep't of Educ. v. Louisiana,* 2024 U.S. LEXIS 2983* (2024). However, regardless of whether the Department had the authority to make such an amendment by themselves, the actual addition of the term "gender identity" into the umbrella of sexual discrimination is pursuant to this Court's analysis in *Bostock*, as well as federal precedent in *Grimm*. As demonstrated in Loper, this Court has the ability to look at an agency's interpretations and changes in deciding how a statute should be interpreted. While there is no requirement to defer to the Department with regards to Title IV, this court in Loper did recognize that administrative agency interpretations could be persuasive.

In this case, the Department's interpretation, both through its published interpretation guideline and it's contested amendment to the statute, demonstrates a consistent application of

Title IX to include gender identity as a form of sex-discrimination. This stance is further supported when compared to judicial precedent, such as the Supreme Court's ruling in *Bostock* stating that it is impossible to discriminate based on gender without discriminating based on sex in Title VII cases, the Fourth Circuit's application of *Bostock* to a Title IX discrimination case in *Grimm*, and the court precedent that Title VII cases should be interpreted similarly to Title IX cases. *See Grimm* at 594-95; *Bostock* at 658; *see e.g. Preston*, 31 F.3d 203, 206 ("Title VII principles should be applied to Title IX actions"). In determining whether the sports policy at North Greene are violative of Title IX, the court should analyze the prior court precedents in conjunction with the Department's interpretation of the statute, to determine that gender identity is included within the realm of sex-based discrimination.

With these interpretations, the North Greene's Act violates Title IX by discriminating against A.J.T. based on her biological sex, limiting her ability to participate in her gender's teams the way similarly situated biological boys can, and harming her through stigmatizing her based on her sex and causing intense anxiety and mental anguish based on the denial of her gender.

II. States Cannot Offer Separate Girls' and Boys' Sports Teams, Based Only on Biological Sex Determined at Birth, Without Violating the Equal Protection Clause of the Fourteenth Amendment.

The Equal Protection Clause of the Fourteenth Amendment provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1, cl. 4. This "is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985) (citing *Plyer v. Doe*, 457 U.S. 202, 216 (1982).

But laws naturally impact people in different ways, and the Fourteenth Amendment does not change that reality. *Reed v. Reed*, 404 U.S. 71, 75 (1971). What the Fourteenth Amendment

does through the Equal Protection Clause, though, is ban states from legislating that unequal treatment be given to people placed into classes by statute based on criteria "wholly unrelated to the objective of that statute." *Id.* at 75–76. To withstand an equal protection challenge, a classification "must be reasonable, not arbitrary, and must rest 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." *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920).

Sweeping state laws like the "Save Women's Sports Act," North Greene Code § 22-3-4 et seq. ("the Act"), violate the Equal Protection Clause by categorically excluding transgender girls from participating in girls' sports teams. On their face, these laws are facially discriminatory because they classify individuals based on their birth-assigned sex—disregarding gender identity and all other factors related to athletic performance—and offer them unequal treatment with respect to participation in athletics. Although the Fourteenth Circuit properly applied intermediate scrutiny to analyze the Act's constitutionality, the Fourteenth Circuit improperly found that the Act could withstand intermediate scrutiny. *See* Record 6–8.

The present issue is whether a state law violates the Equal Protection Clause when the law bans transgender girls from participating in girls' sports teams based solely on their biological sex at birth. Because these state laws address only unsubstantiated concerns and rely on broad generalizations about sex and athletic capability, the laws impose sex-based classifications that are not substantially related to any important state interest. They are thus constitutionally invalid under the Equal Protection Clause.

Petitioner A.J.T. respectfully requests that this Court reverse the Fourteenth Circuit's grant of summary judgment because defining "women" or "girls" based only on biological sex—and thereby imposing a categorical ban on transgender girls' participation in girls' sports—is not

substantially related to the state interests of providing equal athletic opportunities for females and protecting the physical safety of female athletes. *See* N.G. Code § 22-3-15(a)(1), (2).

A. *The North Greene Act facially discriminates against individuals based on sex and gender identity and exists solely for the purpose of categorically banning transgender girls from girls' sports teams, triggering intermediate scrutiny.*

A state law may violate the Equal Protection Clause where the law is (1) facially discriminatory, expressly separating individuals into classes based on a protected status; or (2) facially neutral but enacted with a discriminatory purpose and a discriminatory effect that is traceable to the purpose. *See Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 264–65 (1977). The North Greene "Save Women's Sports Act" discriminates, on its face, against individuals based on sex and gender identity. Even if the Act were facially neutral, its discriminatory intent and disparate effects would provide an additional trigger for the application of intermediate scrutiny. Therefore, the Fourteenth Circuit properly applied heightened scrutiny to determine the Act's constitutionality. *See* Record 6.

Courts have developed standards for assessing the constitutionality of a state law challenged on equal protection grounds absent controlling legislative guidance. *Cleburne*, 473 U.S. at 439–40. Under the judicial framework, state action involving classifications of persons is subject to one of three standards of scrutiny. *Id.* at 439–41. When a quasi-suspect classification like sex or gender is challenged, the Supreme Court calls for the application of intermediate scrutiny—a heightened standard of review. *Id.* at 440; *see also J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 136 (1994) ("[A]ll gender-based classifications today warrant heightened scrutiny.").

Courts routinely recognize gender identity as closely tied to sex, and laws that discriminate against transgender individuals are a form of sex-based discrimination, triggering intermediate scrutiny. *See Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1741 (2020); *Grimm v.*

Gloucester Cty. Sch. Bd., 972 F.3d 586, 607 (4th Cir. 2020). Sex-based legislative classifications warrant such heightened scrutiny because "the sex characteristic frequently bears no relation to ability to perform or contribute to society." *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (plurality opinion). These classifications, rather than reflecting "meaningful considerations," most likely "reflect outmoded notions of the relative capabilities of men and women." *Cleburne*, 473 U.S. at 441. Accordingly, the classifications are presumptively invalid, meaning the government must justify them. *United States v. Virginia*, 518 U.S. 515, 533 (1996). To sufficiently do so, "the [government] must show 'at least that the classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives.'" *Virginia*, 518 U.S. at 524 (quoting *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982)).

1. <u>The North Greene Act is facially discriminatory because its use of the term "biological sex" functions as a form of proxy discrimination, targeting only transgender girls.</u>

A law need not explicitly use the term "transgender" to facially discriminate against transgender individuals. *Hecox v. Little*, 104 F.4th 1061, 1078 (9th Cir. 2023). In *Hecox*, the Ninth Circuit held that the use of "biological sex" in a statute functioned as a form of proxy discrimination because the definition was specifically crafted to target transgender athletes without explicitly using the term. *Id.* On that basis, the court found that the statute was discriminatory on its face despite the omission of the word "transgender." *Id.* Applying similar logic, the Court in *Craig* stated, "[t]he hallmark of a stereotypical sex-based classification . . . [is] whether it 'relie[s] upon the simplistic, outdated assumption that [sex or transgender status] could be used as a 'proxy for other, more germane bases of classification.'" *Craig v. Boren*, 429 U.S. 190, 198 (1976).

Where a law expressly classifies individuals based on sex and references—but opts to disregard—gender identity, it is facially discriminatory. *See Doe v. Horne*, 683 F. Supp. 3d 950, 973 (Ariz. D. 2023). The North Greene Act targets transgender girls, disregarding their gender identity by defining "girls" and "women" only by biological sex. *See* N.G. Code § 22-3-15(a)(2). The Act then categorically excludes transgender girls from participating on girls' sports teams based on its stringent definition of "biological sex." N.G. Code § 22-3-15(a)(1). Such a categorical exclusion constitutes facial discrimination based on transgender status by means of proxy discrimination, as it targets transgender girls and women without addressing any real threat to competitive balance. *See Hecox*, 104 F.4th at 1078; *Craig*, 439 U.S. at 198.

Moreover, the Act affords unequal treatment between transgender boys and transgender girls. Although it bans transgender girls from participating in girls' sports, transgender boys face no similar categorical exclusion and are free to participate on boys' teams in accordance with their gender identity. *See* Record 4, 8. This distinction is based entirely on the "biological sex" provision and affords boys and girls unequal treatment, further demonstrating the law's targeted impact on transgender girls. *See* N.G. Code § 22-3-15(a)(1).

2. Even if the North Greene Act were facially neutral, the traceable connection between the Act's underlying discriminatory intent and its discriminatory effects would warrant intermediate scrutiny, as the Act exists to serve only one purpose: keeping transgender girls off girls' sports teams.

Even if the Save Women's Sports Act were facially neutral, its discriminatory intent, coupled with its disparate impact, would subject it to intermediate scrutiny. *See Arlington Heights*, 429 U.S. at 267. In *Arlington Heights*, the Supreme Court outlined factors indicating discriminatory intent, including historical context, legislative history, and statements made by lawmakers. 429 U.S. at 267. Although there exists a presumption that a legislature acted in good faith, a plaintiff need demonstrate only that discrimination against a protected class "was a

substantial or motivating factor in enacting the challenged provision," not the sole or predominant factor. *United States v. Carrillo-Lopez*, 68 F.4th 1133, 1139–40 (9th Cir. 2023). Further, the Supreme Court has long recognized that a policy's disparate impact may support a finding of discriminatory intent. *See Crawford v. Bd. of Educ.*, 458 U.S. 527, 544 (1982).

Applying those principles here, the legislative record makes clear that the North Greene General Assembly enacted the Act with discriminatory intent—specifically, in response to concerns about transgender girls participating in girls' sports. *See* Record 9. The legislature perceived transgender girls as a threat to competitive fairness in women's sports, and this concern formed the basis for the Act. Record 9. That context clarifies that the Act exists to serve one purpose: categorical exclusion of transgender women and girls from participating on women's and girls' sports teams. In effect, the Act achieves that discriminatory purpose; due to its sweeping coverage, Petitioner was denied the opportunity to join her middle school's girls' volleyball and cross-country teams, and other transgender girls subject to the Act's prohibition similarly cannot participate on sports teams that align with their gender identity. *See* Record 3. Accordingly, the Act's discriminatory effect is traceable to its discriminatory intent.

Because the Act is facially discriminatory and classifies individuals based on sex and gender identity, the Fourteenth Circuit properly applied intermediate scrutiny to determine the Act's constitutionality. *See* Record 6. Even if the Act were facially neutral, its discriminatory intent and effects provide an additional trigger for intermediate scrutiny.

B. *Laws that function like the North Greene Act, separating boys' and girls' sports teams based only on biological sex determined at birth, fail intermediate scrutiny because they are not substantially related to the achievement of any important government interest.*

Although Petitioner recognizes ensuring equal opportunity and safety in girls' athletics as important government objectives, the North Greene Act and similar state laws cannot withstand

intermediate scrutiny because the government cannot demonstrate that its means are substantially related to achieving those objectives. The Act's exclusion is based on overbroad, speculative assumptions about biological sex, gender identity, and athletic capability, failing to account for the complexities of individual athletic development, hormone therapy, and the nature of the sports covered under the Act. *See* Record 9–10.

Specifically, the Act's sweeping prohibitions are not substantially related to the Assembly's asserted interests because the Act (1) is premised on overbroad generalizations that equate transgender status with athletic capability, disregarding factors like puberty, gender identity, age, and medical intervention; and (2) bans transgender women from participating in women's sports, including minimum-contact sports and sports in which biological differences are irrelevant to performance capability. For those reasons, the Court should find that the Act and other laws imposing similar classifications fail the second prong of intermediate scrutiny and thus violate the Equal Protection Clause.

1. The North Greene Act relies on overbroad generalizations that equate transgender status with athletic capability, ignoring factors like puberty, gender, and treatment.

The Supreme Court consistently rejects classifications justified by reliance on broad generalizations linking biological sex to certain traits and characteristics. *See Craig*, 429 U.S. at 198; *Hecox*, 104 F.4th at 1085–86; *Sessions v. Morales-Santana*, 582 U.S. 47, 63 n.13 (2017) ("[The Court must] reject measures that classify unnecessarily and overbroadly by gender when more accurate and impartial lines can be drawn."); *Parham v. Hughes*, 441 U.S. 347, 354 (1979) ("[A] State is not free to make overbroad generalizations based on sex which are entirely unrelated to any differences between men and women or which demean the ability or social status of the affected class."); *see also Horne*, 683 F. Supp. 3d at 973 ("The Supreme Court has

long viewed with suspicion laws that rely on overbroad generalizations about the different talents, capacities, or preferences of males and females.”).

In *Craig*, for example, the Court struck down an Oklahoma statute that afforded men and women different treatment in purchasing alcohol based on various statistical generalizations about behavior. 429 U.S. at 198. The Court noted: archaic, overbroad, and loose-fitting generalizations cannot justify “state statutory schemes that [are] premised upon their accuracy.” *Id.* at 198–99). According to the Court, such “congruence between gender and the . . . trait that gender purported to represent,” could not justify sex-based classifications; any differences between men and women with respect to alcohol purchasing behaviors did not warrant unequal treatment, and the Oklahoma statute failed intermediate scrutiny. *Id.* at 199–200.

Applying similar reasoning, the Ninth Circuit in *Hecox* considered the constitutionality of an Idaho statute categorically banning transgender women and girls from competing on sports teams that match their gender identity. 104 F.4th at 1081. Despite the court’s recognition of fairness in women’s athletics as an important state interest, the court rejected to find that the statute’s sex-based classification was substantially related to that interest. *Id.* In the court’s view, the statute rather undermined those objectives by broadly relying on “physiological differences” between men and women and failing to account for transgender women who, in reality, do not possess those differences. *Id.* at 1081–82. Notably, the court emphasized the possibility of transgender women suppressing their testosterone and, thus, suppressing any athletic advantages over cisgender women. *Id.* Due to that possibility, coupled with additional concerns and noted inconsistencies, the Ninth Circuit deemed the Idaho statute impermissible. *Id.* at 1083–85.

Further, courts should not accept unsubstantiated legislative concerns as justifications for sex-based classifications. *See Hecox*, 104 F.4th at 1083, 1085–86. The *Hecox* court further took

issue with the Idaho law's core justification: the concern that the participation of transgender women in women's sports could displace cisgender women. *Id.* at 1083. The court reasoned that "[a] vague, unsubstantiated concern that transgender women might one day dominate women's athletics is insufficient to satisfy heightened scrutiny," as transgender women represent less than one percent of the population. *Id.* at 1083, 1085–86. Because "unsupported legislative conclusions as to whether particular policies will have societal effects . . . have not been afforded deference by the Court," the Ninth Circuit concluded that the law violated equal protection. *Id.* Contrary to legislative concerns, at least one court is confident that transgender women will not—and likely cannot—take over women's athletics. *See id.*

Moreover, although legislative justifications often rest on the idea that transgender women and girls inherently possess a physiological advantage over cisgender women and girls in athletics, research into the athletic performance gaps between transgender and cisgender women is inconsistent and incomplete. Despite conflicting research on puberty's effects on athletic capability, "the well-established scientific consensus is that, before puberty, there are no significant physiological differences in athletic performance between boys and girls." *Horne*, 683 F. Supp. 3d at 972; *see also Hecox v. Little*, 479 F. Supp. 3d 930, 981 (D. Idaho 2020) (finding transgender girls who do not go through male puberty "do not have an ascertainable advantage over cisgender female athletes"). In fact, there exists much overlap between boys' and girls' performances, with some girls outperforming boys and some boys performing girls. *Horne*, 683 F. Supp. 3d at 972.

No credible evidence suggests transgender girls who take puberty suppressing medication before undergoing male puberty possess any performance advantage over cisgender girls. *Id.* ("There are no studies that have documented any such advantage, and there is no medical reason

to posit that any such advantage would exist.”). Although it is accepted that biological men are larger and stronger than biological women after completing puberty, with elevated testosterone levels offering men a performance advantage in some sports, biological sex at birth is not the sole cause of that divergence. *See* Emma N. Hilton & Tommy R. Lundberg, *Effects of Testosterone Suppression in Transgender Women*, 51 Sports Medicine 199, 201 (2020). Thus, researchers consider factors other than sex at birth in calculating the athletic performance of men relative to women. Notably,

> [Biological men often possess] larger and denser muscle mass, and stiffer connective tissue . . . ; reduced fat mass, and different distribution of body fat and lean muscle mass . . . ; longer and larger skeletal structure . . . ; superior cardiovascular and respiratory function, with larger blood and heart volumes, higher hemoglobin concentration, greater cross-sectional area of the trachea and lower oxygen cost of respiration.

Id. (citations omitted). These physical attributes confer a performance advantage to only some biological men in only some sports. *Id.* at 199–201. Specifically, the advantage is most significant only after a biological man has gone through puberty and is more pronounced in sports that require muscle mass and strength. *Id.* at 199.

Those attributes are not exclusive to individuals assigned males at birth. “To date, the only established driver for the athletic differences between men and women is testosterone, first during puberty and then ongoing.” Joshua D. Safer, *Fairness for Transgender People in Sport*, 6 J. Endocrine Soc’y 1, 1 (2022). But often, transgender girls take puberty blockers or undergo other hormone therapies, treatment options that can lower testosterone levels and thus mitigate any athletic advantage over biological girls. *See id*. In other instances, transgender women who have gone through puberty can decrease their testosterone levels, thereby decreasing their muscle mass, which can put them on par with women when it comes to athletic performance. *See id.*

Here, because North Greene's ban on transgender girls' sports participation sweeps too far and ignores countless factors relevant to athletic performance, the Act's justifications are not substantially related to the state's interest in providing equal athletic opportunity for women and protecting women's safety in sports. Respondent misrelies on unsubstantiated concerns and generalized assumptions about gender and biological sex. *See Craig*, 429 U.S. at 198; *Hecox*, 104 F.4th at 1085–86; *Sessions*, 582 U.S. at 63 n.13.

The government most cannot justify a sweeping categorical exclusion of transgender athletes that fails to consider material factors like age, puberty, and treatment measures that could address any competitive imbalances among athletes. *See Hecox*, 104 F.4th at 1081–82. There exists insufficient data to substantiate the claim that transgender girls who undergo hormone therapy retain an unfair advantage over cisgender girls or that transgender athletes pose a heightened safety risk. Safer, *supra*, at 1. In some instances, transgender girls who undergo hormone therapy experience significant reductions in muscle mass and physical strength, aligning their abilities with those of cisgender women. Hilton & Lundberg, *supra*, at 199. Relatedly, studies show athletic performance correlates more with current testosterone levels rather than prior exposure during male puberty. *See* Safer, *supra*, at 1–2. Thus, concerns about transgender women inherently retaining unfair competitive advantages even after transitioning largely are unsubstantiated. *See id.*

2. <u>The North Greene Act categorically bans transgender women from participating in women's sports, including minimum-contact sports and sports in which biological differences are irrelevant to performance capability.</u>

Further, the argument that transgender girls pose a safety risk in sports ignores the fact that most women's sports are non-contact sports, where physical interaction between players is

minimal or nonexistent. *See Hecox*, 79 F.4th at 1047. At the same time, contact sports like volleyball and cross country rarely injure participants. Record 10.

For example, volleyball—one of the sports A.J.T. seeks to play—is a contact sport in which the risks of physical injury are minimal. Record 10. The Fourteenth Circuit raised concerns about safety risks transgender athletes might pose, citing an incident where a cisgender volleyball player in North Carolina was injured by a spike from a transgender athlete. Record 10 n.8 (citing Valerie Richardson, *North Carolina on Verge of Transgender Sports Ban After Player Is Injured by Spiked Ball*, Wash. Times, Apr. 21, 2023). However, the court's conclusion rests on unsubstantiated assumptions. The court's reasoning reflects speculative fears, as public reports of the incident never directly linked the player's injury to the athlete or the athlete's transgender status. *See* Richardson, *supra*.

And even in contact sports, existing safety measures, such as training protocols, fitness requirements, and required protective gear often are sufficient to mitigate safety concerns. These safety standards apply universally to all athletes, regardless of gender identity. The National Collegiate Athletic Association, for example, allows transgender women to compete in women's sports if they meet specific hormone therapy requirements, and no data suggests that transgender athletes pose an undue safety risk when these standards are met. *See Transgender Student-Athlete Participation Policy*, NCAA, https://www.ncaa.org/sports/2022/1/27/transgender-participation-policy.aspx (last updated May 2024). This makes clear that addressing safety concerns need not involve categorical exclusions based on sex or gender identity.

Finally, the North Greene Act provides for co-ed sports teams and disproportionately targets girls' sports while leaving boys' sports largely unchanged, undermining the government's objectives of fairness and safety. N.G. Code § 22-3-15(a)(1)–(3). The Act selectively targets

transgender girls by barring them from participating in girls' sports teams yet leaves transgender boys entirely free to participate on boys' teams. *Id.* If the government were concerned primarily with safety, it could limit the participation of biological girls on boys' teams. Instead, the Act goes as far as providing for co-ed sports teams, which involve boys and girls competing together. N.G. Code § 22-3-16(a). If, according to the North Greene General Assembly, boys and girls can safely compete on co-ed teams, there is no reason why transgender girls who undergo hormone therapy or puberty suppression cannot safely compete with cisgender girls in sports. *See* N.G. Code § 22-3-16(a). Thus, the Act is not aimed at ensuring competitive balance or safety; rather, it is meant to serve as a targeted exclusion of transgender girls.

The Act imposes classifications that are not substantially related to the important governmental interests of promoting equal opportunity and safety in female athletics. Its blanket exclusion of transgender girls is based on unsubstantiated generalizations about biological sex and disregards medical intervention, competitive dynamics of sports, and other relevant factors. Accordingly, the Act fails the second prong of intermediate scrutiny.

For the foregoing reasons, Petitioner respectfully requests that this Court declare the North Greene Act unconstitutional. The Act and other laws similarly imposing a categorical ban on transgender girls' participation in girls' sports classify individuals solely based on their sex, as determined at birth, and thereby facially discriminate against transgender athletes without addressing legitimate concerns about fairness and safety.

CONCLUSION

This court should reverse the Fourteenth Circuit's decision and grant A.J.T.'s declaratory judgment as well as injunctive relief. North Greene's Act violates Title IX's prohibition of unlawful sex-based discrimination because statutory interpretation demonstrates that

discrimination based on gender identity is inherently discrimination based on sex, and this gender discrimination harmed A.J.T. by impacting her opportunities and impacting her mental health. In addition to this statutory interpretation, the Department of Education's guidance and amendments should be followed, as it aligns with prior jurisprudence.

The Act also violates the Equal Protection Clause of the Fourteenth Amendment because the Act's sole purpose is to discriminate against transgender girls by discriminating against transgender student athletes. Further, the Act cannot withstand intermediate scrutiny because it is not substantially related to the achievement of any important governmental interest. The Act imposes an unjustifiable burden on transgender girls, denying them equal opportunities in school athletics, while offering no similar restriction on cisgender girls and transgender boys. This unequal treatment highlights the discriminatory effect of the law and its intent merely to exclude transgender athletes. Accordingly, the Act is unconstitutional on its face.