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 RESPONDENTS

TEAM 11
Counsel of Record

QUESTIONS PRESENTED

1. Does the maintenance of public-school athletic teams separated on the basis of biological sex, as determined at birth, violate Title IX's prohibition on sex-based discrimination?
2. Does the maintenance of public-school athletic teams separated on the basis of biological sex, as determined at birth, deny the people of North Greene "the equal protection of the laws?"

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PARTIES TO THE PROCEEDING

Petitioner, plaintiff-appellant in the court below, is A.J.T. Respondents, defendant-appellees in the court below, are the State of North Greene Board of Education, State Superintendent Floyd Lawson, the State of North Greene, and North Greene Attorney General Barney Fife.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourteenth Circuit has not yet been reported in the Federal Reporter, but is published at *A.J.T. v. N. Greene Bd. of Educ.*, No. 23-1023, 2024 WL 98765 (14th Cir. Jan. 15, 2024). The order of the United States District Court for the Eastern District of North Greene has not yet been reported in the Federal Supplement, but is published at *A.J.T. v. N. Greene Bd. of Educ.*, No. 23:07CV00028, 2023 WL 56789 (E.D. N. Greene Oct. 14, 2023).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In relevant part, the Fourteenth Amendment to the United States Constitution provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

Section 15(a)(1)–(3) of Chapter 3 of Title 22 of the 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 16(a)–(c) of Chapter 3 of Title 22 of the North Greene Code States in relevant part:

(a) Interscholastic, 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;

(C) Coed or mixed.

(b) 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.

(c) 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 CASE

I. STATEMENT OF FACTS

On May 1, 2023, North Greene Governor Howard Sprague signed state Senate Bill 2750 into law. *A.J.T. v. N. Greene Bd. of Educ.* ("*A.J.T.*"), No. 23-1023, 2024 WL 98765, at *3 (14th Cir. Jan. 15, 2024). To provide equal athletic opportunities for and protect the physical safety of female athletes, the Save Women's Sports Act ("the Act") provides for the designation of sports teams exclusively for athletes "whose biological sex determined at birth is female." N.G. Code §§ 22-3-15(a)(2), -16(a)–(b). Teams so designated "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).

Beginning at the secondary school level, all teams are to be designated for males, females, or both. N.G. Code § 22-3-16(a). The Act defines "male" and "female" athletes by their respective "biological sex[es] determined at birth." N.G. Code § 22-3-16(a)(2)–(3). In turn, the Act defines "biological sex" by reference to an individual's "reproductive biology and genetics at birth." N.G.

Code § 22-3-16(a)(1). So defined, female athletes are eligible for any program, but male athletes are not. Male students may not try out for female-designated teams where selection is based on competitive skill, nor may they compete in female-designated contact sports. N.G. Code § 22-3-16(b).

Petitioner is an eleven-year-old slated to begin seventh grade in a North Greene public school. *A.J.T.*, 2024 WL 89765, at *3. Petitioner is also a transgender girl. *Id.* Her sex determined at birth was male, but she has identified as a girl from an early age. *Id.* Petitioner has been diagnosed with gender dysphoria, but has not begun puberty-delaying treatments. *Id.* In elementary school, she joined an "all-girl cheerleading team" and competed without incident. *Id.* Now in middle school, she seeks to join the volleyball and cross-country teams designated for girls. *Id.* Her school has informed her that, despite her gender identity, she may not join either team because of her biological sex determined at birth. *Id.*

II. PROCEDURAL HISTORY

By and through her mother, Petitioner filed a complaint in the United States District Court for the Eastern District of North Greene. *A.J.T.*, 2024 WL 89765, at *4–5. Petitioner's complaint asserted a facial challenge to the Act, alleging that the legislation itself—not just its application to Petitioner—violates Title IX and the Equal Protection Clause of the Fourteenth Amendment. *Id.* at *5, *6 n.6. Although Petitioner originally filed her suit against the North Greene Board of Education and State Superintendent Floyd Lawson, the State of North Greene successfully moved to intervene and Petitioner subsequently amended her complained to name the State and North Greene Attorney General Barney Fife as defendants. *Id.* at *4–5.

Petitioner sought a declaratory judgment that the Act violates federal law and the United States Constitution. *Id.* at *5. Petitioner also moved for a permanent injunction preventing

Respondents from enforcing the Act against her. *A.J.T.*, 2024 WL 89765, at *5. Respondents opposed Petitioner's motion and moved for summary judgment on her claims. *Id.* The District Court granted Respondents' motion and Petitioner appealed. *Id.* The United States Court of Appeals for the Fourteenth Circuit affirmed, holding that "the Act is not violative of the U.S. Constitution or federal law." *Id.* at *6.

SUMMARY OF THE ARGUMENT

This Court should affirm summary judgment for Respondents. The Save Women's Sports Act violates neither Title IX nor the Equal Protection Clause of the Fourteenth Amendment.

Title IX refers only to sex, and the North Greene act is similarly concerned *only* with sex. Relying on the same definition of sex, the Act operates within the confines of Title IX in allowing sex-separate sports teams. Because the sex-separate sports teams maintained under the Act are expressly contemplated by and permitted by Title IX, the legislation does not improperly discriminate against male athletes. Even if Petitioner could establish improper discrimination, she suffered no harm because Petitioner may still participate in North Greene athletics. The Act complies with Title IX.

Similarly, the Act does not deny the equal protection of the laws to either male athletes or transgender athletes. The Act classifies individuals and programs according to sex and operates to the detriment of male athletes but does so in a permissible manner. The Act does not discriminate on the basis of transgender status. The sex-based classifications and definitions contained in the Act are substantially related to the important government interest in preserving opportunities for female athletes. The Act is not unconstitutional under the Equal Protection Clause.

ARGUMENT

STANDARD OF REVIEW

Courts review the grant or denial of summary judgment 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). 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).

"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) (quoting *Libertarian Party of Va. v. Judd*, 718 F.3d 308, 313 (4th Cir. 2014)). "A dispute is genuine if 'a reasonable jury could return a verdict for the nonmoving party.'" *Judd*, 718 F.3d at 313 (quoting *Dulaney v. Packaging Corp. of Am.*, 673 F.3d 323, 330 (4th Cir. 2012)). "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 Federal Rules of Civil Procedure "mandate[s] the entry of summary judgment. . . against a party who fails to make a showing sufficient to establish the existence of an element *essential* to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) (emphasis added); Fed. R. Civ. P. 56(c).

I. THE SAVE WOMEN'S SPORTS ACT FURTHERS TITLE IX'S OBJECTIVE OF ENSURING EQUAL OPPORTUNITIES FOR FEMALE ATHLETES AND INFLICTS NO HARM PETITIONER BECAUSE IT COMPORTS WITH TITLE IX'S PERMISSION OF SEX-SEPARATE SPORTS.

Under Title IX, "no person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education

program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). In response to "pervasive discrimination against women with respect to educational opportunities," Congress enacted Title IX as part of the Education Amendments of 1972. *Cohen v. Brown Univ*., 101 F.3d 155, 165 (1st Cir. 1996). Congress intended Title IX to redress sex-based discrimination, particularly with respect to women and girls. *Id.*

Though relevant to all educational programs and activities, Title IX's application is especially important in athletics, where women have historically been underrepresented. Prior to Title IX, "women's athletics were not simply underfunded, but administratively disapproved of, resulting in women receiving the cast-offs of what . . . administrators reserved for the men." Timothy Davis & N. Jeremi Duru, *Understanding Sports Law* 136 (2022). After Title IX's implementation, female participation in athletics leapt from 15.5% in 1971 to 43.7% in 2019. *Id.* at 137. Similarly, "female high school [athletes'] participation has increased eleven-fold . . . from less than 10% in 1972 to 42.8% of all high school athletes in 2018." *Id*. The aims of Title IX are thus twofold: "'to avoid the use of federal resources to support discriminatory practices,' and 'to provide individual citizens protection against those practices.'" *Cohen*, 101 F.3d at 165 (quoting *Cannon v. Univ. of Chi.*, 441 U.S. 677, 704 (1979)).

Any federal agency empowered to provide federal funds is likewise empowered to effectuate Title IX by promulgating rules, regulations, and orders that are "consistent with achievement of the objectives of the statute." 20 U.S.C. § 1682. Such regulations further define the scope and applicability of Title IX. *Kelley v. Bd. of Trs.*, 35 F.3d 265, 270 (7th Cir. 1994). With respect to athletics, the Department of Education provides that schools "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." 34 C.F.R. § 106.41(b).

> However, where a recipient operates or sponsors a team in a particular sport for members of one sex but operates or sponsors no such team for members of the other sex, and athletic opportunities for members of that sex have previously been limited, members of the excluded sex must be allowed to try-out for the team offered unless the sport involved is a contact sport.

34 C.F.R. § 106.41(b). Contact sports "include boxing, wrestling, rugby, ice hockey, football, basketball, and any other sports the purpose or major activity of which involves bodily contact." *Id.* Yet, even where authorized regulations permit separation by sex, an institution must not implement such separation by "subjecting a person to more than de minimis harm." 34 C.F.R. § 106.31(a)(2).

Title IX provides individuals with an implied right of action against institutions that violate its provisions. *See Cannon*, 441 U.S. at 703. To advance a Title IX claim, an individual must show that: (1) an educational program excluded the individual from participation because of his or her sex; (2) the educational program from which the individual was excluded received federal financial assistance at the time; and (3) the improper discrimination caused the individual harm. *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 616 (4th Cir. 2020). The causal link between the alleged improper discrimination and the harm suffered by a plaintiff is a necessary, central component of a successful Title IX claim. *Id.* (citing *Cannon,* 441 U.S. at 680).

Respondents do not contest that North Greene public schools receive federal financial assistance. Nor do the parties dispute that Petitioner is ineligible to compete in programs designated for female athletes. Thus, the only dispute is whether her exclusion is *improper* and causes her harm.

Petitioner's exclusion from sports teams provided for athletes assigned female at birth is permissible under Title IX. Because Petitioner is not precluded from participating in school athletics under the Act, Petitioner is not harmed. Accordingly, this Court should find that Petitioner

has not created a genuine issue of material fact with respect to her Title IX claim and affirm the District Court's order granting summary judgment for Respondents.

A. The Act does not discriminate against Petitioner because it accords with Title IX's purpose and focus on biological sex and not gender identity.

The North Greene act employs the same meaning of sex as Title IX: "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)–(3). To prevent any confusion about the meaning of "sex," the Act clarifies that "gender identity is separate and distinct from biological sex." N.G. Code § 22-3-16(c). The Act is wholly unconcerned with gender; so too is Title IX.

Title IX requires that no one be discriminated against "on the basis of sex," but it does not explicitly define "sex." 20 U.S.C. § 1681(a). Historically, courts have interpreted the meaning of "sex" under Title IX by looking to traditional tools of statutory interpretation. Analyzing the ordinary meaning of the word as it was understood when Title IX was passed, "sex" clearly refers to innate biological differences. *Adams ex rel. Kasper v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 812 (11th Cir. 2022). Dictionaries from the time period define sex as "the property or quality by which organisms are classified according to their reproductive functions" and "either the male or female divisions of a species . . . as differentiated with reference to the reproductive functions." *Id.*; *see Sex*, *Am. Heritage Dictionary of the English Language* (1976); *Sex*, *Random House Coll. Dictionary* (rev. ed. 1980). The text of Title IX carries this definition of sex forward to the present day. Indeed, contemporary dictionaries demonstrate that this understanding of sex has persisted. Again, sex is "either of the two divisions, male or female, into which persons . . . are divided, with reference to their reproductive functions." *Grimm*, 972 F.3d at 633 (Niemeyer, J., dissenting) (quoting *Sex*, *Webster's New World Coll. Dictionary* 1331 (5th ed. 2014)). In determining sex, an individual's gender identity is irrelevant. Instead, sex is determined "on the basis of . . .

reproductive organs and functions." *Grimm*, 972 F.3d at 633 (Niemeyer, J., dissenting) (quoting *Sex*, *Am. Heritage Dictionary* 1605 (5th ed. 2011)). Taken together, these textual analyses establish that the definition of sex remains clear, unambiguous, and substantively unchanged since Title IX's passage. As employed in Title IX, "sex" implicates physical and biological differences and nothing more.

Petitioner erroneously conflates sex with gender. Analyzing Title VII, this Court held in *Bostock* that "transgender status [is] inextricably bound up with sex . . . because to discriminate on these grounds requires an employer to intentionally treat individual employees differently because of their sex." *Bostock v. Clayton Cnty.*, 590 U.S. 644, 661 (2020). Extending this reasoning to Title IX ignores that *Bostock* was a narrow opinion, concerned only with the Title VII employment context. *See id.* at 681. Title VII prohibits employment discrimination on the basis of sex. 42 U.S.C. § 2000e-2. Although both Title VII and Title IX proscribe improper considerations of sex, the employment context and the education context are completely distinct. "Congress itself recognized that addressing discrimination in athletics presented a unique set of problems not raised in areas such as employment and academics." *Kelley*, 35 F.3d at 270. The needs of women in employment are simply different than the needs of girls in school sports.

Further, Title IX explicitly provides for carveout exceptions in different contexts, including the athletics exception. Construing this carveout to encompass both gender and sex would render it meaningless. *Adams*, 57 F.4th at 813. Such a reading would "establish dual protection under Title IX based on *both* sex and gender identity when gender identity does not match sex." *Id.* at 814; *accord D.N. ex rel. Jessica N. v. DeSantis,* 701 F. Supp. 3d 1244, 1264 (S.D. Fla. 2023). This Court should not contravene Title IX's original purpose by allowing gender to supersede sex-based protections when the two conflict.

In *Adams*, the Eleventh Circuit considered a school policy that separated bathrooms according to students' biological sex at birth as reflected on their birth certificates. 57 F.4th at 797. The court found that such a policy was expressly contemplated by Title IX and permitted by a statutory carve-out for "separating the sexes when it comes to bathrooms and other living facilities." *Id.* at 813, 815. With such a clear exception, the school's bathroom policy could not violate Title IX. *Id.* at 815. The athletics exception under Title IX is equally straightforward.

The Act's requirement that only biological females play on girls' sports teams parallels the athletics exception codified in 34 C.F.R. § 106.41(b). Similar to the *Adams* bathroom policy, the North Greene statute looks to the determination made at birth to ascertain biological sex. The law considers no other factors. The Title IX athletics exception explicitly allows for teams to be separated by sex "where selection for such teams is based upon competitive skill or the activity involved is a contact sport"; the Save Women's Sports Act does the same. 34 C.F.R. § 106.41(b); N.G. Code § 22-3-16(b). Thus, it is permissible within the meaning of Title IX for North Greene to rely on an athlete's biological sex at birth to determine whether he or she may play on a team designated for biological girls. Not only are the sex-separate teams facilitated by the Act permissible under the plain text of Title IX, but they also fit perfectly within its purpose.

In a recent effort to expand the scope of Title IX's regulatory framework, the Department of Education proposed an updated rule stating that discrimination on the basis of sex includes discrimination on the basis of gender identity. 89 Fed. Reg. 33474 (Apr. 29, 2024) (codified 34 C.F.R. § 106.10). The addition of "gender identity" has sparked recent litigation resulting in preliminary injunctions preventing the provision from taking effect. *See Alabama v. U.S. Sec'y of Educ.*, No. 24-12444, 2024 WL 3981994, at *4 (11th Cir. Aug. 22, 2024) ("[I]t is certainly highly likely that the Department's new regulation defining discrimination 'on the basis of sex' to include

'gender identity' is contrary to law and 'in excess of statutory . . . authority.'" (citing *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2266, 2273 (2024))); *see also Texas v. United States*, No. 2:24-CV-86-Z, 2024 WL 3405342, at *1 (N.D. Tex. July 11, 2024); *Tennessee v. Cardona*, No. 24-5588, 2024 WL 3453880, at *5 (6th Cir. July 17, 2024); *Louisiana ex rel. Murrill v. U.S. Dept. of Educ.*, No. 24-30399, 2024 WL 3452887, at *3 (5th Cir. July 17, 2024); *Dept. of Educ. v. Louisiana*, 144 S. Ct. 2507, 2509–10 (2024). The failure of this attempt to redefine sex reinforces that sex has never encompassed gender identity, and consideration of gender identity improperly expands the definition of sex in a way that Congress did not intend. If Congress wishes for Title IX to encompass gender identity, it may take heed of such litigation and amend the language of Title IX accordingly.

B. Petitioner cannot prove harm because she has not been subjected to worse treatment than similarly situated students and she has not been excluded from school sports.

To establish the final element of a Title IX claim, Petitioner must show that she has been "treat[ed] . . . *worse* than others who are similarly situated." *Grimm* 972 F.3d at 618 (emphasis added). Because Title IX is concerned only with sex discrimination and inequality, "the question of whether males, as a group, are otherwise similarly situated to females, as a group, need not be considered in this narrow context." *Klinger v. Dep't of Corr.*, 107 F.3d 609, 614–15 (8th Cir. 1997). "[F]emale and male participants within a given federally-funded program or activity are presumed similarly situated for purposes of being entitled to equal educational opportunities within that program or activity." *Id.* at 614. Petitioner cannot establish discrimination on the basis of sex because, under the Act, male and female athletes have equal opportunity to participate in athletic programs.

The Act provides for the designation of teams for either sex and even coed teams. N.G. Code § 22-3-16(a). Only where selection for a given team is based upon competitive skill or the

activity involved is a contact sport does the Act require the exclusion of male athletes from female-designated programs. N.G. Code § 22-3-16(b). As discussed above, regulations implementing Title IX authorize sex separation in exactly these circumstances. 34 C.F.R. § 106.41(b).[1]

Petitioner has neither proven nor even alleged that her school has failed to offer a volleyball or cross-country team that she is eligible to join under the Act. Nonetheless, Petitioner contends that, because she is not eligible to join teams designated for female athletes, she has been "*effectively* completely exclude[d] from school sports altogether." *A.J.T.*, 2024 WL 98765, at *11 (emphasis added). This is not enough. Under the terms of the North Greene statute, Petitioner is eligible to join teams designated for her sex. N.G. Code § 22-3-16. If she desires to do so, Petitioner may even join coed teams and programs to compete alongside and against cisgender female athletes. *Id*. The Act merely prevents Petitioner from joining teams that correspond with her gender identity, but this does not deprive her of equal athletic opportunities on the basis of sex.

If Petitioner elects to abstain from school sports altogether, that "harm" would be self-inflicted. Stated simply, "[t]he equality of the teams diminishes [Petitioner's] claim to injury, and her voluntary refusal to try out for that team [is] not the result of the [Respondents'] actions." *O'Connor v. Bd. of Educ. of Sch. Dist. 23* ("*O'Connor II*"), 645 F.2d 578, 583 (7th Cir. 1981). Petitioner complains merely that she cannot compete on a team consistent with her gender identity. This is not a cognizable harm under Title IX.

[1] Some courts have indicated that, where a school offers a female team and no equivalent team for males, male athletes could be entitled to try-out if "athletic opportunities for members of that sex have previously been limited." *Williams v. Sch. Dist. of Bethlehem*, 998 F.2d 168, 174–75 (3d Cir. 1993); 34 C.F.R. § 106.41(b). In such a scenario, Title IX may require a school administrator to redesignate a female program as coed to permit male athletes to try-out under the Act. However, because Petitioner has not alleged that her school does not offer male or coed volleyball or cross-country teams, determining whether opportunities for male athletes have previously been limited is unnecessary.

Title IX does not require North Greene public schools to accommodate the interests of transgender girls. Under the North Greene act, Petitioner was excluded from the girls' team because of her biological sex. Because Title IX's regulatory framework expressly allows sex separation in the precise context of sports, Petitioner's exclusion was not an instance of *improper* discrimination. Even if Petitioner could establish improper discrimination, Petitioner nonetheless fails to establish the necessary causal link between her discrimination and harm suffered. Federal law does not entitle Petitioner to a position on the team of her choice.

II. THE SAVE WOMEN'S SPORTS ACT IS A PERMISSIBLE SEX-BASED CLASSIFICATION UNDER THE EQUAL PROTECTION CLAUSE.

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV. The purpose of this provision "is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination." *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (quoting *Sioux City Bridge Co. v. Dakota Cnty.*, 260 U.S. 441, 445 (1923)). In essence, it commands simply that "all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985). Of course, not all legislative distinctions violate equal protection. "The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." *Id.* at 440. The general rule gives way, however, when legislation concerns certain classifications. *Id.*[2]

[2] Courts also apply strict scrutiny to legislation affecting fundamental rights, but "[a]ccess to interscholastic sports is not a constitutionally recognized fundamental right." *Doe v. Horne*, 683 F. Supp. 3d 950, 970–71 (D. Ariz. 2023); *accord Walsh v. La. High Sch. Athletics Ass'n*, 616 F.2d 152, 159 (5th Cir. 1980).

If legislative implicates a suspect classification, courts apply "strict" scrutiny. *Cleburne*, 473 U.S. at 440. Under this standard, laws "will be sustained only if they are suitably tailored to serve a compelling state interest." *Id.* However, if a legislative distinction implicates merely a "quasi-suspect" classification, courts apply a "heightened" or "intermediate" level of scrutiny. *Grimm*, 972 F.3d 586, 607–08. To determine what level of scrutiny applies, courts must look "to the basis of the distinction between classes of persons." *Id.* at 607. Once the court has ascertained the basis of the distinction, the court then determines whether the challenged legislation passes constitutional muster under the applicable standard. *Id.*

Distinctions drawn on the basis of race, alienage, or national origin are inherently suspect precisely because "[t]hese factors are so seldom relevant to the achievement of legitimate state interests that laws grounded in such considerations are deemed to reflect prejudice and antipathy." *Cleburne*, 473 U.S. at 440. In contrast, classifications drawn on the basis of sex are merely "quasi-suspect," because—as this Court has consistently recognized—inherent biological differences between the sexes provide appropriate justification for distinctions between them. *Grimm*, 972 F.3d at 607–08; *Adams*, 57 F.4th at 809. Where real differences between the sexes justify a distinction, "[t]o fail to acknowledge even our most basic biological differences . . . risks making the guarantee of equal protection superficial, and so disserv[es] it." *Tuan Anh Nguyen v. Immigr. & Naturalization Serv.*, 533 U.S. 53, 73 (2001).

The State of North Greene contends that the Act permissibly distinguishes between athletes on the basis of sex, not gender identity or transgender status. *A.J.T.*, 2024 WL 98765, at *7. Apart from expressly disclaiming its relevance to the Act, the language of the Act makes absolutely no reference to gender identity. N.G. Code § 22-3-16(c) ; *A.J.T.*, 2024 WL 98765, at *8. Nonetheless, Petitioner "contends that the Act discriminates against transgender athletes on its face." *Id.* at *7.

Petitioner further argues that the Act's definition of biological sex—the method by which the Act distinguishes between male and female athletes—bears no substantial relationship to important government interests. *A.J.T.*, 2024 WL 98765, at *7. Therefore, issues relevant to Petitioner's equal protection claim are (1) whether sex-separate sports violates equal protection; (2) whether the Act's definition of biological sex facially discriminates against transgender athletes; and (3) whether excluding "biological males," as defined by the Act, from certain teams designated for "biological females" is arbitrary with respect to transgender girls.

A. The Act Contains Sex-Based Classifications Subject to Intermediate Scrutiny.

The Court of Appeals correctly determined that the Act's sex-based classifications withstand intermediate scrutiny. *Id.* at *10. The Act draws three interrelated sex-based distinctions. First, the Act requires public secondary schools and institutions of higher learning to designate their sports teams as either for males, for females, or for both. N.G. Code § 22-3-16(a). Second, by reference to an individual's genetics and external morphology at birth, the Act divides athletes into two groups on the basis of sex. N.G. Code § 22-3-15(a)(1)–(3). Finally, as defined by the Act, male athletes may not try out for teams designated for female athletes "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).

Because the Act draws explicit sex-based distinctions, this Court must subject it to intermediate scrutiny. *Adams*, 57 F.4th at 801. "[S]ex, like race and national origin, is an immutable characteristic determined solely by the accident of birth . . . ." *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973). Yet, under this Court's precedent, sex is not a proscribed classification. *United States v. Virginia*, 518 U.S. 515, 533 (1996). The physical differences between the two sexes are enduring, and "a community made up exclusively of one [sex] is different from a community

composed of both." *Virginia*, 518 U.S. at 533 (quoting *Ballard v. United States*, 329 U.S. 187, 193 (1946)) (alteration in original). Indeed, "the biological differences between males and females are the reasons intermediate scrutiny applies in sex-discrimination cases in the first place." *Adams*, 57 F.4th at 809.

To withstand intermediate scrutiny, legislative classification "must serve important governmental objectives and must be substantially related to the achievement of those objectives." *Craig v. Boren*, 429 U.S. 190, 197 (1976). "But the Equal Protection Clause does not demand a perfect fit between means and ends when it comes to sex." *Adams*, 57 F.4th at 801. The existence of less restrictive alternatives "does not mean that the required substantial relationship does not exist." *Clark ex rel. Clark v. Ariz. Interscholastic Ass'n* ("*Clark I*"), 695 F.2d 1126, 1131 (9th Cir. 1982). Because Petitioner acknowledges that the state's interest in protecting opportunities for female athletes is important, the only dispute is whether sex-based classification is sufficiently related to that interest.

B. Unfair Physiological Advantages Require Excluding Male Competitors from Female Athletic Programs to Preserve Opportunities for Female Athletes.

Under the Equal Protection Clause, sex is a legitimate criterion for eligibility to join a public-school sports team. *O'Connor v. Bd. of Educ. of Sch. Dist. 23* ("*O'Connor I*"), 449 U.S. 1301, 1306–07 (1980). In the context of public-school athletic programs, equality of opportunity is all that equal protection requires. *Clark I*, 695 F.2d at 1130–31. Separating sports teams on the basis of sex does not offend this requirement, provided that schools offer an equivalent team for female athletes. *O'Connor v. Bd. of Educ. of Sch. Dist. 23* ("*O'Connor II*"), 645 F.2d 578, 581 (7th Cir. 1981); *see also O'Connor v. Bd. of Educ. of Sch. Dist. 23* ("*O'Connor III*"), 545 F. Supp. 376, 381 n.7 (N.D. Ill. 1982) ("The weight of authority supports the constitutionality of 'separate but equal' sports teams for males and females."). Only where sex-separation deprives female athletes

of the ability to compete in a particular sport does the Constitution proscribe the practice. *Compare Brenden v. Indep. Sch. Dist. 742*, 477 F.2d 1292, 1299, 1302 (8th Cir. 1973) (holding that a rule against female athletes joining male teams violated equal protection, where schools did not provide female teams, because the rule completely barred female athletes from playing those sports), *with Clark I*, 695 F.2d at 1127, 1131–32 (holding that exclusion of male athletes from female volleyball team, even where schools only offered a female volleyball team, did not deny male athletes equal protection). Sex-separate sports in general—and the exclusion of male athletes from female programs in particular—further two important and interrelated government interests.

First, in classifying and separating student athletes according to sex, courts recognize that the physiological advantages of male athletes would threaten the athletic opportunities of female athletes if the sexes were forced to compete together. Without sex-based classifications in sports, "there would be a substantial risk that [males] would dominate the [females'] programs and deny them an equal opportunity to compete in interscholastic events." *O'Connor I*, 449 U.S. at 1307. "[D]ue to average physiological differences, males would displace females to a substantial extent if they were allowed to compete for positions on the [same] team." *Clark I*, 695 F.2d at 1131. By maintaining separate programs, schools enable female athletes to effectively participate in interscholastic sports. *O'Connor III*, 545 F. Supp. at 379. The danger that male athletes would elbow out female competitors lurks even in secondary schools.

To an extent, the physiological advantages of male athletes develop even before puberty. *Adams*, 57 F.4th at 819 (Lagoa, J., specially concurring). "[E]ven apart from increased circulating testosterone levels associated with puberty, there are 'significant physiological differences, and significant male athletic performance advantages in certain areas.'" *B.P.J. v. W. Va. Bd. of Educ.*, 98 F.4th 542, 561–62 (4th Cir. 2024). By the time students enter middle school, the physiological

disparities between the sexes give male athletes a pronounced advantage. *See O'Connor III*, 545 F. Supp. at 378, 381 (reasoning that, even in sixth grade, male athletes generally possess a substantial advantage over female athletes of the same age). By high school, male athletes are "substantially taller, heavier and stronger than their [female] counterparts and have longer extremities." *Petrie v. Ill. High Sch. Ass'n*, 394 N.E.2d 855, 861 (Ill. App. Ct. 1979).

Although individual male athletes may wield lesser or greater advantages over female athletes, the existence of a physiological disparity between the sexes is an actual, biological difference rather than a mere sexual stereotype. *Clark I*, 695 F.2d at 1129, 1131; *Adams*, 57 F.4th at 819 (Lagoa, J., specially concurring). This Court's precedent "allows for these average real differences between the sexes to be recognized" and for sex "to be used as a proxy in this sense if it is an accurate proxy." *Clark I*, 695 F.2d at 1131. "This is not an overbroad generalization, but rather a general principle that realistically reflects the average physical differences between the sexes." *A.J.T.*, 2024 WL 98765, at *8. Real physiological differences justify the exclusion of male athletes from female sports programs.

Second, excluding male students from teams reserved for female athletes furthers the vitally important purpose of remediating past discrimination against female students. *Clark ex rel. Clark v. Ariz. Interscholastic Ass'n* ("*Clark II*"), 886 F.2d 1191, 1194 (9th Cir. 1989); *cf. Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 728 (1982) ("[C]lassification favoring one sex can be justified if it intentionally and directly assists members of the sex that is disproportionately burdened."). "There is no question that removing the legacy of sexual discrimination—including discrimination in the provision of extra-curricular offerings such as athletics—from our nation's educational institutions is an important governmental objective." *Kelley*, 35 F.3d at 272; *accord Equity in Athletics v. Dept. of Educ.*, 675 F. Supp.2d 660, 671 (W.D.

Va. 2009). The remedial measures authorized when Congress promulgated Title IX permit policies and actions that adversely impact male athletes and athletic programs. *Kelley*, 35 F.3d at 272. Excluding male athletes from female teams is just one sex-conscious policy that furthers this important interest. *Clark I*, 695 F.2d at 1131.

Forcing athletic programs for female athletes to admit even one male player jeopardizes this remedial objective. "If males are permitted to displace females on [a] school [sports] team even to the extent of one player . . . the goal of equal participation by females in interscholastic athletics is set back, not advanced." *Clark II*, 886 F.2d at 1193. The revolution in opportunities for female athletes that Title IX achieved would come undone. *Adams*, 57 F.4th at 819 (Lagoa, J., specially concurring). Of course, the Constitution does not require the exclusion of male athletes from female athletic programs—but neither does it prohibit such policies. *Clark I*, 695 F.2d at 1131–32. States and schools *may* choose a policy that place fewer burdens on male athletes, but the policy chosen need not be *necessary* to advance the cause of equality for female athletics. *Id.* at 1131–32. "[A]bsolute necessity is not the standard, and . . . the existence of wiser alternatives than the one chosen does not serve to invalidate the policy . . . ." *Id.* at 1132. Equal access for male athletes does not require the piecemeal demolition of equal opportunity for female athletes to participate in sports. *Id.* "As common sense would advise against this, neither does the Constitution demand it." *Id.*

Hence, although schools may not exclude female athletes from male teams in the absence of an alternative, male athletes are never constitutionally entitled to join teams reserved for the opposite sex. *Id.* at 1131; *see also O'Connor I*, 449 U.S. at 1307 n.4 ("[T]here is no necessary reason why [males] may not be required to compete with talented [females] without reciprocal rights."). Of course, under the Act, male students may still participate on male teams or coed teams.

See N.G. Code § 22-3-16(b). But excluding male athletes from female athletic programs is substantially related to North Greene's interest in preserving athletic opportunities for female students. The Act discriminates against male athletes, but it does not offend the Constitution.

C. The Act Does Not Invidiously Discriminate Against Transgender Athletes.

Petitioner challenges the Act as discriminatory against transgender girls in particular, not "individual[s] whose biological sex determined at birth is male" in general.[3] To prove that the Act discriminates against transgender athletes, Petitioner must demonstrate that the law "is discriminatory on its face" or that "it was motivated by discriminatory animus and its application results in a discriminatory effect." *See Hayden v. Cnty. of Nassau*, 180 F.3d 42, 48 (2d Cir. 1999). Because Petitioner has introduced no evidence of either overt or covert discrimination on the basis

[3] Although, as discussed below, the Act does not discriminate on the basis of transgender status, Petitioner's challenge would fare no better if it did. This Court has never held that transgender status constitutes a suspect or quasi-suspect classification, so rational basis review would apply. *Gore v. Lee*, 107 F.4th 548, 558 (6th Cir. 2024). This Court has repeatedly declined invitations to craft new constitutionally protected classes, and it "has never defined a suspect or quasi-suspect class on anything other than a trait that is definitively ascertainable at the moment of birth." *Ondo v. City of Cleveland*, 795 F.3d 597, 609 (6th Cir. 2015); *see, e.g.*, *Cleburne*, 473 U.S. at 442 (declining to designate developmental disabilities as a quasi-suspect classification); *Bowen v. Gilliard*, 483 U.S. 587, 602–03 (1987) (declining to designate families as a suspect class); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973) (declining to designate poverty as a suspect classification).

Although the Ninth and Fourth Circuits have designated transgender status as a quasi-suspect class, the Sixth Circuit has expressly refused to do so. *Hecox v. Little*, 104 F.4th 1061, 1079 (9th Cir. 2024); *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 610 (4th Cir. 2020); *L.W. ex rel. Williams v. Skrmetti*, 83 F.4th 470, 486–87 (6th Cir. 2023). Several Circuits have expressed doubt that transgender status constitutes a protected class but have interpreted claims of anti-transgender discrimination as claims of sex discrimination to which intermediate scrutiny applies. *Adams ex rel. Kasper v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 803 n.5 (11th Cir. 2022); *Brandt ex rel. Brandt v. Rutledge*, 47 F.4th 661, 670 n.4 (8th Cir. 2022); *Whitaker ex rel. Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1051–52 (7th Cir. 2017). Because the Act distinguishes on the basis of sex, this Court need not resolve the issue today. Intermediate scrutiny is both the greatest and least level of scrutiny under which this Court must review the Act.

of transgender status, the Court of Appeals correctly concluded that the Act does not discriminate against transgender athletes. *A.J.T.*, 2024 WL 98765, at *8.

1. The Act does not facially discriminate against transgender athletes because it does not operate on the basis of gender identity or transgender status.

The Court of Appeals correctly determined that the Act facially distinguishes among student athletes by their biological sex, not their gender identity or transgender status. *A.J.T.*, 2024 WL 98765, at *8; N.G. Code § 22-3-15(a)(2)–(3). "To demonstrate that a statute makes a classification on its face, the plaintiff must show that it 'explicitly distinguish[es] between individuals on [protected] grounds.'" *B.P.J.*, 98 F.4th at 569 (4th Cir. 2024) (Agee, J., dissenting) (alterations in original) (quoting *Shaw v. Reno*, 509 U.S. 630, 642 (1993)); *accord Hayden*, 180 F.3d at 48. Of course, "gender identity is different from biological sex." *Adams*, 57 F.4th at 807.

Because the Act draws no distinction among student athletes on the basis of their gender identity, the Act does not and cannot draw a distinction based on transgender status.[4] By definition, a transgender individual identifies with and expresses "a gender that, on a binary, we would think of as opposite to their assigned sex." *Grimm*, 972 F.3d at 594; *accord Adams*, 57 F.4th at 807; *id.* at 834 (Jill Pryor, J., dissenting). Conversely, cisgender individuals are those whose gender identity and sex determined at birth align. *Adams*, 57 F.4th at 834 (Pryor, J., dissenting). Without referring to gender, the Act cannot distinguish between athletes whose gender identities are either congruent or incongruent with their biological sex determined at birth. *Compare Adams*, 57 F.4th at 808 ("[T]he bathroom policy facially classifies on the basis of sex—not transgender status or gender

[4] The substantive provisions of the Act speak in terms of sex, not gender. In fact, the Act's declaration of legislative findings—the *only* statutory reference to gender identity—expressly disclaims its relevance to the state's interest in promoting equal athletic opportunities for the female sex. N.G. Code § 22-3-16(c). Such statements recognizing the distinction between gender identity and biological sex "do[] not serve to treat transgender individuals differently." *See B.P.J.*, 98 F.4th at 569 (Agee, J., dissenting).

identity. . . . [a]nd both sides of the classification . . . include transgender students."), *with Grimm*, 972 F.3d at 608–09 (holding that a school bathroom policy that, according to the school board, "relie[d] solely on transgender status" discriminated on that basis).

Discrimination on the basis of transgender status may constitute sex-based discrimination, *Bostock*, 590 U.S. at 661–62, but the inverse is not true. "[A] policy can lawfully classify on the basis of biological sex without unlawfully discriminating on the basis of transgender status." *Adams*, 57 F.4th at 809. Discrimination against individuals for nonconformity in sex and gender expression necessarily implicates sex; discrimination on the basis of sex does not implicate gender or nonconformity. The Act concerns sex and sex alone.

The Act does not treat transgender athletes differently from similarly situated cisgender athletes. Judges have differed over the proper test for disparate treatment on the basis of transgender status under the Equal Protection Clause. *Compare Adams*, 57 F.4th at 803 n.6 (controlling for biological sex and not gender), *with id.* at 844 n.10 (Pryor, J., dissenting) (controlling for gender and not biological sex). But because the Act facially distinguishes on the basis of sex, to control for gender identity begs the question.

Transgender status is not unique to just one sex or gender. *Bostock*, 590 U.S. at 689 (Alito, J., dissenting). The defining characteristic of *trans*gender status is the disparity between sex and gender identity or expression, so the presence or absence of such disparity is the relevant inquiry. Athletes that express "a gender that, on a binary, we would think of as opposite to their assigned sex," *Grimm*, 972 F.3d at 594, fare no worse under the Act than athletes whose "birth-assigned sex and gender identity align." *Adams*, 57 F.4th at 834 (Pryor, J., dissenting). Thus, the Act imposes no disparate treatment on the basis of transgender status.

2. The North Greene legislature promulgated the Act despite its impact on transgender athletes, not because of its impact on transgender girls.

The Act explicitly prohibits "individual[s] whose biological sex determined at birth is male" from claiming a position on athletic teams reserved for "individual[s] whose biological sex determined at birth is female." N.G. Code §§ 22-3-15(a)(2)–(3), -16(a)–(b). This restriction applies indiscriminately to all persons whose sex determined at birth is male, regardless of whether the individual is cisgender or transgender. N.G. Code § 22-3-16(b). Petitioner does not contend that the Act treats transgender persons of this class differently than their cisgender counterparts, but rather *fails* to distinguish among this group according to transgender status. *A.J.T.*, 2024 WL 98765, at *9. Petitioner argues that this failure to exempt transgender girls from the Act constitutes intentional discrimination.

According to Petitioner, the North Greene legislature defined biological sex with the intent of "barring transgender girls from qualifying as girls for purposes of school sports, categorically excluding them from teams and, therefore, from school sports altogether." *Id.* at *7. However, the Act does not prevent transgender girls from joining school sports teams. The Act simply provides that *if* a sports team is "designated for females," *and* selection for that team "is based on competitive skill or the activity is a contact sport," then that team would not be open to students—of whatever gender identity—whose biological sex as defined by the Act is male. N.G. Code §§ 22-3-15(a)(3), -16(b); *A.J.T.*, 2024 WL 98765, at *8.

Petitioner argues that, in practice, this restriction will present an obstacle to more transgender girls than cisgender boys, but her hypothesis is not enough to render the Act unconstitutional. Proof of "discriminatory intent or purpose is required to show a violation of the Equal Protection Clause." *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977). "'Discriminatory purpose,' . . . . implies that 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. Admin. of Mass. v. Feeney*, 442 U.S. 256, 279 (1979). Petitioner has not introduced any evidence of this alleged intent, nor can she.

Any disproportionate impact on transgender girls would not demonstrate that the legislature *intended* to discriminate against them. *See Washington v. Davis*, 426 U.S. 229, 242 (1976) ("Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious . . . discrimination forbidden by the Constitution."). "When, as here, the impact is essentially an unavoidable consequence of a legislative policy that has in itself always been deemed to be legitimate. . . the inference simply fails to ripen into proof." *Feeney*, 442 U.S. at 279 n.25.

Before the North Greene legislature passed the Act, "North Greene school athletic rules prohibited cisgender men and boys from participating on female-designated sports teams, but there were no prohibitions on transgender athletes competing." *A.J.T.*, 2024 WL 98765, at *13 (Knotts, J., dissenting). The state legislature chose to codify that practice, but made no exception on the basis of transgender status. The history of public-school athletics demonstrates that this rule was not a solution in search of a problem. Like transgender girls, cisgender boys can and do compete in girls' sports. Doriane Lambelet Coleman, Michael J. Joyner & Donna Lopiano, *Re-Affirming the Value of the Sports Exception to Title IX's General Non-Discrimination Sex*, 27 Duke J.L. & Pol'y 69, 128 (2020). In some instances, cisgender boys have even asserted a constitutional right to compete in girls' sports—an assertion that courts have roundly refused because their exclusion furthers the same remedial purpose as Title IX. *See, e.g.*, *Clark I*, 695 F.2d at 1131–32; *Clark II*, 886 F.2d at 1192, 1194; *Petrie*, 394 N.E.2d at 861; *Kleczek ex rel. Kleczek v. R.I. Interscholastic*

League, Inc., 768 F. Supp. 951, 956 (D.R.I. 1991); *B.C. v. Bd. of Educ.*, 531 A.2d 1059, 1063–64 (N.J. Super. Ct. App. Div. 1987). The Constitution does not countermand those efforts.

3. The Act's definition of biological sex substantially furthers North Greene's interest in providing equal opportunities for female athletes.

The Fourteenth Circuit correctly concluded that the Act's definition of sex bears a substantial relationship to the important government interest of preserving athletic opportunities for female athletes. *A.J.T.*, 2024 WL 98765, at *10; N.G. Code § 22-3-15(a)(2). "It is the [biological] sex of an individual and not their gender that dictates physical characteristics that are relevant to athletics." *A.J.T.*, 2024 WL 98765, at *9. Thus, "[c]lassifications 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).

Physical differences justify the Act's sex-based distinction and permit disparate treatment of male and female athletes. Yet Petitioner contends that the Act's definition of "biological sex," premised exclusively on physical characteristics of sex, is not substantially related to the government's interest in providing equal athletic opportunities for female athletes. *A.J.T.*, 2024 WL 98765, at *8. Instead, Petitioner suggests that transgender girls should be permitted to join teams designated for female athletes, despite their male sex, because of their gender identity. *Id.* at *9.

The Act's definition of "biological sex" is by no means the only possible definition.[5] In formulating a policy for interscholastic sports, the North Greene legislature chose to define sex by

[5] To the extent that Petitioner argues that the Act's definitions offend equal protection merely by failing to include transgender individuals within the class corresponding to their gender identity, such a complaint is meritless. The North Greene legislature permissibly defined these terms to clarify the basis of the Act's distinction and operation. *See Gore*, 107 F.4th at 560 ("The States have considerable discretion in defining the terms used in their own laws . . . . [North Greene] did not exceed that discretion in distinguishing biological sex from gender identity . . . .").

reference to an individual's genetic composition and reproductive anatomy at birth. N.G. Code § 22-3-15(a)(1). In a different context, this definition may be "an oversimplification of the complicated biological reality of sex and gender." *Hecox*, 104 F.4th at 1076; *A.J.T.*, 2024 WL 98765, at *13 (Knotts, J., dissenting). In the context of medicine, some physicians define sex by reference to a set of characteristics, of which "chromosomal sex" and "external morphological sex" are only two. *Adams*, 57 F.4th at 836 (Jill Pryor, J., dissenting). Where other components, such as "gender identity" and "neurological sex," are relevant, chromosomal sex and external morphological sex might not serve as an accurate proxy for "biological sex." *Id.*

However, the Act does not employ those elements in its definition because the North Greene legislature found gender identity irrelevant to its interest in preserving athletic opportunities for female students. N.G. Code § 22-3-16(c). As discussed above, the characteristics that justify separating sports by sex are the physical characteristics of the sexes—determined by genetics and indicated at birth by reproductive anatomy. Petitioner does not challenge the practice of separating sports by sex generally; she only wishes to redefine sex within the meaning of the Act by reference to gender identity. *A.J.T.*, 2024 WL 98765, at *8. As this Court has cautioned,

> [W]here individuals in the group affected by a law have distinguishing characteristics relevant to interests the State has the authority to implement, the courts have been very reluctant, as they should be in our federal system and with our respect for the separation of powers, to closely scrutinize legislative choices as to whether, how, and to what extent those interests should be pursued.

Cleburne, 473 U.S. at 441–42. Petitioner's preferred proxy for biological sex bears no relation to the physical characteristics that justify sex-separate sports. The Constitution does not require this Court to prefer her judgment to that of the North Greene legislature.

Petitioner further contends that, by including her and other transgender girls who have not gone through puberty within the definition of "male," the Act's classification no longer bears a

substantial relationship to preserving athletic opportunities for female athletes. *A.J.T.*, 2024 WL 98765, at *8–9. However, "there are inherent differences between those born male and those born female and . . . those born male, including transgender women and girls, have physiological advantages in many sports." *Adams*, 57 F.4th at 819 (Lagoa, J., specially concurring). Although the advantages of male athletes are notably pronounced after puberty, *see Petrie*, 394 N.E.2d at 861, physical differences prior to puberty are "not unequivocally negligible." *Adams*, 57 F.4th at 819 (Lagoa, J., specially concurring) (quoting Emma N. Hilton & Tommy R. Lundberg, *Transgender Women in the Female Category of Sport: Perspectives on Testosterone Suppression and Performance Advantage*, 51 Sports Med. 199, 200 (2021)). Without contradiction, Respondents' expert opined that male athletes often have a competitive advantage over female athletes even before puberty. *A.J.T.*, 2024 WL 98765, at *7. Even if this were not so, the mere fact that Petitioner herself has not begun male puberty does not mean that the Act's scope lacks a substantial relationship to its goals.

The Act applies only to teams sponsored by "public secondary school[s]" and "state institution[s] of higher education." N.G. Code § 22-3-16(a). On average, males begin puberty at twelve years old—just one year older than Petitioner herself—and may even begin the process as young as nine. *A.J.T.*, 2024 WL 98765, at *2 n.2. With the onset of puberty, circulating testosterone levels in males increase dramatically, accelerating an athlete's capacity to build muscle mass and thus "greater speed and strength—two attributes relevant to most competitive sports." *B.P.J.*, 98 F.4th at 569. Petitioner "acknowledges that circulating testosterone in males creates a biological difference in athletic performance," *A.J.T.*, 2024 WL 98765, at *2, a fact that "a consensus of the medical community" accepts. *Hecox*, 104 F.4th at 1075–76. Because the Act permits schools to designate female-only teams beginning at the grade level at which male athletes generally begin

puberty, the fact that Petitioner herself has not yet developed the more pronounced advantages concomitant with male puberty has no bearing on the Act's constitutionality.

Similarly, the mere fact that "transgender girls *can* take puberty blockers or other hormone therapies" that *may* tend to mitigate their intrinsic biological advantages does not make the Act's definitions improper. *A.J.T.*, 2024 WL 98765, at *8–9 (emphasis added). Petitioner has not demonstrated what portion of transgender girls undergo medical treatment as part of their transition, what portion of those do so before male puberty, or what portion of those effectively negate their prepubescent physiological advantages over female athletes. Even *if* medical intervention could effectively ameliorate the biological differences between male and female athletes, nothing requires transgender girls to undergo such treatment. *Id.* at *10. There is no basis for the North Greene legislature—or this Court—to presume that transgender girls will do so.

Petitioner has not introduced evidence indicating that the Act is arbitrary as applied to her. *Cf. B.P.J.*, 98 F.4th at 560–61. In *B.P.J.*, the Fourth Circuit reversed a District Court's order granting summary judgment against a transgender girl' as-applied challenge to her exclusion from female athletic programs. *Id.* at 561. The plaintiff had undergone "puberty blocking treatment" from a young age and was "receiving gender affirming hormone therapy." *Id.* at 560–61. Because she had submitted expert testimony to the effect that her medical treatment had induced "physical changes to her bones, muscles, and fat distribution that are typically experienced by cisgender girls," the *B.P.J.* plaintiff had created a genuine issue as to whether she possessed a competitive advantage that would justify her exclusion. *Id.* at 561. Here, Petitioner has not begun puberty blocking treatment or hormone therapy, *A.J.T.*, 2024 WL 98765, at *3, and her expert testimony about what such treatment *might* do would not support an as-applied claim.

Even if Petitioner had introduced evidence that the rationale underpinning the Act's definitions does not apply to her, she has nonetheless failed to meet her burden of demonstrating that the Act is unconstitutional on its face. "A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exist under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987). "A 'facial challenge' to a statute considers only the text of the statute itself, not its application to the particular circumstances of an individual." *A.J.T.*, 2024 WL 98765, at *6 n.6 (quoting *Field Day, LLC v. City of Suffolk*, 463 F.3d 167, 174 (2d Cir. 2006)). Because "the classification is reasonable in substantially all of its applications," it cannot be pronounced unconstitutional "simply because it appears arbitrary in an individual case." *O'Connor I*, 449 U.S. at 1306. The Act restrains all secondary-school athletes whose sex determined at birth is male—a classification that is undeniably reasonable in substantially all applications—and the hypothetical situation of a subset of transgender girls cannot sustain a facial challenge. *See Hecox v. Little*, 479 F. Supp. 3d 930, 969–71 (D. Idaho 2020), *vacated on other grounds*, *Hecox*, 104 F.4th at 1091. Petitioner has failed to introduce evidence that could support a finding that the Act is unconstitutional on its face.

CONCLUSION

The Save Women's Sports Act operates within the parameters of Title IX and facilitates the important objective of ensuring and protecting equal athletic opportunities for female athletes. Further, the sex-based classification employed by the Act bears a substantial relationship to this important objective. Because Petitioner introduced no evidence that the Act contradicts the language and requirements of Title IX and the Equal Protection Clause, there remains no genuine

issue of material fact to be decided. Accordingly, for the foregoing reasons, Respondents respectfully request that this Court affirm the decision of Fourteenth Circuit Court of Appeals.