No. 24-2020

In The

Supreme Court of the United States

October Term 2024

A.J.T.,

Petitioner,

v.

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

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourteenth Circuit

BRIEF FOR PETITIONER

Team 12
Counsel for Petitioner
September 13, 2024

QUESTIONS PRESENTED

1. Does Senate Bill 2750 violate Title IX when it uses "biological" sex classifications solely to prevent transgender girls from playing on girls' teams even though the Act provides greater athletic opportunities to transgender males and cisgender females who can participate on the sports team that aligns with their respective gender identities?

2. Does Senate Bill 2750 violate the Equal Protection Clause when it discriminates against transgender females by categorically barring them from participating on the sports team that aligns with their gender identity, even though transgender males and cisgender females do not receive a similar prohibition under the Act?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Constitutional Provisions

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourteenth Circuit has not been reported in the Federal Reporter. However, the opinion is reported at *A.J.T. v. North Greene Bd. of Educ.*, 2024 WL 98765 (14th Cir. 2024) and is reprinted in the Record on Appeal ("Record") at 2–16. The district court's memorandum opinion is currently unpublished but is reported at *A.J.T. v. North Greene Bd. of Educ.*, 2023 WL 56789 (E.D. N. Greene 2023).

STATUTORY AND CONSTITUTIONAL PROVISIONS

Title IX of the Education Amendments of 1972 provides, in relevant part, that "[no] person . . . shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a).

The Fourteenth Amendment to the United States Constitution provides, in relevant part, that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

STATEMENT OF THE CASE

I. STATEMENT OF FACTS.

A.J.T. is like any other child: she goes to school, has friends, and wants to play sports with people like her. A.J.T. is also part of the very small percentage (1.8 percent) of youth in this country who identify as transgender.[1] Record 3; *see also infra* Section II.B.2. For five years, A.J.T has lived

[1] "Transgender" means an individual whose gender identity does not align with their sex assigned at birth. *See* Record 3, n.1. Gender identity is defined as "a person's deeply felt, inherent sense of being a girl, woman, or female; [or] a boy, a man, or male[.]" Am. Psych. Ass'n, *Guidelines for Psychological Practice with Transgender and Gender Nonconforming People*, 70 Am. Psych. 832, 834 (2015), https://www.apa.org/practice/guidelines/transgender.pdf. A person's gender identity will typically align with their biological sex assigned at birth. C.E. Roselli, *Neurology of gender*

in private and public as a girl, even though she is a biological male.[2] Record 3. When she was in elementary school, A.J.T. practiced and competed on the school's all-girl cheerleading team without any issues. *Id.* A.J.T. hoped to continue to play with her female peers on her middle school volleyball and cross-country teams, but those hopes were lost in May of 2023 when the State of North Greene passed Senate Bill 2750, codified into law as North Greene Code § 22-3-4. *Id.*

Even though A.J.T. was diagnosed with gender dysphoria in 2022, has been receiving counseling to treat her gender dysphoria, and has socially transitioned as a girl for five years,[3] the State of North Greene decided she and her transgender female peers were not permitted to play on female sports teams. *Id.* at 3–4. What the State refers to as the "Save Women's Sports Act" (the "Act"), North Greene Code § 22-3-4 ensures that no transgender female can ever play with their cisgender female peers. *Id*. While the State previously prohibited cisgender males from participating in female sports, *Id.* at 13 (Knotts, J., dissenting), the Act goes a step further by claiming "[g]ender identity is separate and distinct from biological sex" and "[c]lassifications

---

identity and sexual orientation, 30(7) J Neuroendocrinol 1, 2 (2018). However, for people who identify as transgender, their gender identities align with members of the opposite sex. *See* Genny Beemyn & Susan Rankin, *The Lives of Transgender People* 1–2 (Colum. Univ. Press, 2011).

[2] Throughout this brief, A.J.T. will use the following terms: "biological female, girl, or woman" or "biological male, boy, or man" when referring to a person's sex assigned at birth; "transgender female, girl, or woman" when referring to a person assigned the male sex at birth but who identifies as a female; "transgender male, boy, or man" when referring to a person assigned the female sex at birth but who identifies as a male; and "cisgender female, girl, or woman" or "cisgender male, boy, or man" when referring to a person whose sex assigned at birth aligns with their gender identity.

[3] Social transitioning is the process by which a transgender individual publicly and privately presents to other people as a member of the opposite gender without undergoing medical procedures. *See* Lily Durwood et al., *Mental Health and Self-Worth in Socially Transitioned Transgender Youth*, 56 J. Am. Acad. Child. Adolescent Psychiatry 116, 116 (2017).

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).

The Act requires that all public-school sports in the State of North Greene "be expressly designated as one of the following based on biological sex at birth: (A) Males, men, or boys; (B) Females, women, or girls; or (C) Coed or mixed." N.G. Code § 22-3-16(a). The State bases its definition of biological sex "solely on the individual's reproductive biology and genetics at birth." N.G. Code § 22-3-15(a)(1). Under the Act, female "means an individual whose biological sex is determined at birth to be female," and male "means an individual whose biological sex is determined at birth to be male." N.G. Code § 22-3-15(a)(2)–(3).

North Greene asserts the Act's objectives are to "provide equal athletic opportunities for female athletes and to protect the physical safety of female athletes when competing." Record 4. Further, the Act intends to "[l]imit[] participation in sports events to the biological sex of the athlete at birth." N.G. Code § 22-3-4. Yet only transgender females, not transgender males (who are biological females under the Act), are excluded from participating on the sports teams that align with their gender identity. N.G. Code § 22-3-16(b) ("Athletic teams or sports designated for females, women, or girls shall not be open to [transgender females] where selection for such teams is based upon competitive skill or the activity involved is a contact sport."). Realizing that her rights were being infringed upon, eleven-year-old A.J.T., by and through her mother, initiated this action to get relief from the Federal and Constitutional laws enacted to protect her. Record 3, 5.

II. PROCEDURAL HISTORY.

In 2023, A.J.T. filed suit in the United States District Court for the Eastern District of North Greene against the State of North Greene Board of Education, State Superintendent Floyd Lawson, State of North Greene, and Attorney General Barney Fife ("Respondents"). Record 3–4. A.J.T.

sought a declaratory judgment that the Act violates Title IX and the Equal Protection Clause of the Fourteenth Amendment, as well as an injunction against enforcement of the Act. *Id.* Respondents moved for summary judgment, and the District Court granted Respondents' motion. *Id.* at 4.

A.J.T. then appealed the decision to the United States Court of Appeals for the Fourteenth Circuit. *Id.* at 2. On January 15, 2024, the Fourteenth Circuit affirmed the judgment of the District Court by holding that the Act does not violate either Title IX or the Equal Protection Clause. *Id.* at 12. A.J.T. appealed the Fourteenth Circuit's decision, and this Court granted certiorari. *Id.* at 17.

SUMMARY OF THE ARGUMENT

The Act violates Title IX because it unlawfully discriminates on the basis of sex and causes harm to A.J.T. and all transgender females. Discrimination based on transgender status necessarily entails discrimination based on sex; the first cannot happen without the second. Title IX "on the basis of sex" requires a "but-for" causation analysis. If sex is even one of the "but-for" causes of any challenged action, then the Act runs afoul of Title IX. The Act's unequal treatment of biological boys and transgender girls illustrates that one's sex, either viewed as strictly biological or accounting for their gender identity, is a "but-for" consideration of the Act. Reliance upon purportedly valid generalizations is insufficient when sex is a "but-for" cause. The Act discriminates against A.J.T. and transgender females because it treats them differently than their similarly situated transgender boy and cisgender female comparators. This unlawful discrimination causes A.J.T. and transgender females harm and cannot be reconciled with the commands of Title IX: equal treatment for all sexes.

The Act also violates the Equal Protection Clause because it uniquely discriminates against transgender females and fails intermediate scrutiny. Under the Equal Protection Clause, a law is unconstitutional if it treats similarly situated people differently based on gender

and fails intermediate scrutiny. While transgender females are categorically prohibited from participating in female sports, transgender males and cisgender females have no such prohibition to compete on the sports team that aligns with their gender identities. Transgender females are similarly situated to both transgender males and cisgender females under the Act. Intermediate scrutiny requires a law to be substantially related to an important government objective. While the State of North Greene has important government objectives, preventing transgender female participation in female sports is not substantially related to those objectives.

ARGUMENT

I. THE ACT VIOLATES TITLE IX BECAUSE IT UNLAWFULLY DISCRIMINATES ON THE BASIS OF SEX.

Congress enacted Title IX "to avoid the use of federal resources to support *discriminatory practices*." *Cannon v. Univ. of Chi.*, 441 U.S. 677, 704 (1979) (emphasis added). The Act here is just that: a discriminatory practice that tells A.J.T. and other transgender females that they are not welcome to play sports in the State of North Greene. On its face the Act unlawfully discriminates against A.J.T. and other transgender females on the basis of sex in violation of Title IX. Title IX states 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). To prevail on her Title IX claim, A.J.T. must prove (1) that the Respondents are the recipients of federal funds; (2) that she was "excluded from participation in, [] denied the benefits of, or [] subjected to discrimination under any education program or activity [on the basis of sex];" and (3) the Act's improper exclusion or discrimination caused A.J.T. harm. 20 U.S.C. § 1681(a); *see also* Record 11 (citing *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 616 (4th Cir. 2020)).

A. Respondents Are Subject To Title IX Because They Are Recipients Of Federal Funds.

Respondents receive Federal financial assistance and at no time have they argued otherwise during this litigation. *See A.J.T.*, 2023 WL 56789 (mentioning no dispute regarding this element). A party who fails to adequately present an issue to the district court has waived the issue for purposes of appeal. *See Kunz v. Defelice*, 538 F.3d 667, 681 (7th Cir. 2009). Thus, Respondents are subject to Title IX.

B. North Greene Public School Sports Are Education Programs Or Activities Within The Meaning Of Title IX.

The parties have not disputed that North Greene's public-school sports are "education program[s] or activit[ies]" within the meaning of Title IX. *See B.P.J. v. W. Va. State Bd. of Educ.*, 98 F.4th 542, 562 (4th Cir. 2024); *see also* 20 U.S.C. § 1687(2)(B) (defining the term "program or activity" to include "all of the operations of . . . a local educational agency . . . ."). Thus, the sports that Respondents provide at its schools are within the scope of Title IX's protections.

C. The Act Discriminates Against A.J.T. And Transgender Females "On the Basis of Sex."

Congress has not defined sex within the meaning of Title IX. Both parties will offer their view of the word "sex" and how it should operate in the Title IX context. Respondents define sex as "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). A.J.T.'s understanding of sex recognizes that one's sex includes the person's gender identity, which is undoubtedly impacted by their biological sex. Record 12, n.10. Similar to A.J.T.'s understanding, this Court has affirmed that "transgender status [is] inextricably bound up with sex." *Bostock v. Clayton Cnty.*, 590 U.S. 644, 660–61 (2020). Accordingly, the Court made clear that "it is impossible to discriminate against a person for being . . . transgender without discriminating against that individual based on sex." *Id.*

at 660 ("[D]iscrimination based on . . . transgender status necessarily entails discrimination based on sex; the first cannot happen without the second." *Id.* at 669).

Under either approach to sex in the Title IX context, the Act discriminates against A.J.T. and all transgender females on the basis of sex. Here is why: two students, both of whom were born with a gender identity that is not in alignment with their biological sex, intend to play sports. Under the Act, one of these two students can play on any team that he or she chooses, and the other can only play on the team the Act determines he or she must play on. The only difference between these two students is the sex they were assigned at birth. One student, born a biological girl, is a transgender boy and can participate on either the girls' or boys' team. The other student was born a biological boy but is a transgender girl (like A.J.T) and can participate on *only* the boys' team. Under the Respondents' approach to sex, the biological boy is treated differently than the biological girl based on their sex. Using A.J.T.'s approach to sex, the transgender boy is treated differently than the transgender girl based on their sex. The inquiry should end here.

1. This Court's reasoning in *Bostock* logically answers the proper approach to "sex" in Title IX.

The Second, Fourth, Seventh, and Ninth Circuits have all incorporated this Court's understanding of sex in *Bostock* within the context of Title IX. *See Soule v. Conn. Ass'n of Sch.*, 57 F.4th 43, 56 (2d Cir. 2022) ("[D]iscrimination based on transgender status is generally prohibited under federal law . . . ."); *Grimm*, 972 F.3d at 616 (stating that, after *Bostock*, "we have little difficulty holding that a bathroom policy precluding [a transgender boy] from using the boys restrooms discriminated against him 'on the basis of sex.'"); *B.P.J.*, 98 F.4th at 563; *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1049 (7th Cir. 2017) (finding that discrimination on transgender status was sex discrimination before *Bostock* was decided); *A.C. v. Metro. Sch. Dist. of Martinsville*, 75 F.4th 760 (7th Cir. 2023) (applying *Bostock*'s reasoning to

Title IX); *Grabowski v. Ariz. Bd. of Regents*, 69 F.4th 1110, 1116 (9th Cir. 2023); *see also Tirrell v. Edelblut*, 2024 U.S. Dist. LEXIS 162185, at *47–55 (D.N.H. 2024) (applying *Bostock*'s reasoning to find that a statute similar to Respondents' Act likely violates Title IX). These courts have adopted *Bostock*'s rationale because this Court has "looked to its Title VII interpretations of discrimination in illuminating Title IX." *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 616 n.1 (1999) (Thomas, J., dissenting). And because of the "similarity in language prohibiting sex discrimination in Titles VII and IX . . . ." *Doe v. Snyder*, 28 F.4th 103, 115 (9th Cir. 2022).

As discussed below, both Title VII and IX require but-for causation and the protection of individuals instead of groups. *See infra* Section I.C.1. Thus, "because Title VII prohibits the identical conduct prohibited by Title IX, i.e., sex discrimination," it is regarded "as the most appropriate analog when defining Title IX's substantive standards." *Mabry v. St. Bd. of Cmty. Colls. & Occupational Educ.*, 813 F.2d 311, 316 n.6 (10th Cir. 1987) *cert. denied*, 484 U.S. 849 (1987).

In *Bostock*, this Court was called upon to determine whether Title VII's protections, outlawing discrimination in the workplace based on sex, included an employer firing someone for "simply" being transgender. 590 U.S. at 649–51. This Court correctly held that "[a]n employer who fires an individual for being . . . *transgender* fires that person for traits or actions it would not have questioned in members of a different sex. Sex plays a necessary and undisguisable role in the decision, exactly what Title VII forbids." *Id.* at 651–52 (emphasis added). This Court reasoned that even though Congress may have had a different purpose and outcome in mind when enacting Title VII, "limits of the drafter's imagination" supplied "no reason to ignore the law's demands." *Id.* at 653.[4] For argument's sake, this Court adhered to the strict biological approach to sex. *Id.* at 655.

[4] The argument that the transgender community and their legal status was a foreign concept in the 1970s is unfounded. *See, e.g., Richards v. U.S. Tennis Ass'n*, 93 Misc. 2d 713, 721–22 (Sup. Ct.

Next, the Court noted that the words "because of" in Title VII were similar to the words "by reason of" or "on account of," all of which triggered a but-for causation test. *Id.* at 656 (citations omitted). This Court stated that "the traditional but-for causation standard means a defendant cannot avoid liability just by citing some other factor that contributed to its challenged employment decision. So long as the plaintiff's sex was one but-for cause of that decision, that is enough to trigger the law." *Id.* Many circuits have concluded that Title VII's language "because of sex" and Title IX's language "on the basis of sex" are interchangeable and both require a but-for causation analysis. *See supra* Section I.C.1.; *see also Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 63 (2007) ("In common talk, the phrase 'based on' indicates a but-for causal relationship . . . ."). This Court's example in *Bostock* is further illustrative of how but-for causation works:

> Consider an employer with a policy for firing any woman he discovers to be a Yankees fan. Carrying out that rule because an employee is a woman *and* a fan of the Yankees is firing "because of sex" if the employer would have tolerated the same allegiance in a male employee.

590 U.S. at 661. Changing the situation from an employer firing a female Yankees fan to North Greene's treatment of transgender girls renders identical results. North Greene has a policy that any biological boy who is a transgender girl can only participate in boys' sports. Carrying out this rule because the student is a biological boy *and* a transgender person, North Greene's discrimination is "because of sex" because Respondents tolerate biological girls (transgender boys) playing in boys' sports. Thus, North Greene discriminates "on the basis of sex."

1977) (holding that a transgender woman had a legal right to compete in the women's division of the U.S. Open Tennis Championship); Comment, *Transsexuals in Limbo: the Search for a Legal Definition of Sex*, 31 Md. L. Rev. 236, 254 (1971) ("Judicial fairness requires that society determine sex on the basis of psychological identity and anatomical appearance.").

2. Respondents' arguments cannot circumvent the plain meaning of Title IX.

Respondents and the Fourteenth Circuit attempt to avoid *Bostock*'s rationale by arguing that their approach aligns best with the definition of sex in 1972 when Title IX was enacted and with the law's overall purpose. *See* Record 11 ("[W]hile Title IX did not define the term, we conclude that Title IX used 'sex' in the biological sense, because its purpose was to promote sex equality."). However, as *Bostock* and the above examples illustrate, their reasoning is flawed. *See supra* Section I.C.I. A school district that singles out transgender females for special treatment does so because of "traits or actions it would not have questioned in [biological females]." *Bostock*, 590 U.S. at 651–52. Thus, "[s]ex plays a necessary and undisguisable role in the decision," precisely what Title IX forbids. *Id.* at 652.

The Fourteenth Circuit supports its position by stating, "Title IX authorizes sex-separate sports in the same manner as [the Act], so long as overall athletic opportunities for each sex are equal." Record 11 (allowing for sex separated teams "where selection for such teams is based upon competitive skill or the activity involved is a contact sport." (citing 34 C.F.R. § 106.41(b)–(c)). Reliance upon this regulation is misplaced because Title IX is based upon equal athletic opportunities for all, not just biological women. *See Bostock*, 590 U.S. at 659 (stating that Congress could have written Title VII "[m]ore narrowly still, it could have forbidden only 'sexist policies' against women as a class. But, once again, that is not the law we have."); *see also* 34 C.F.R. § 106.41(c) ("A recipient . . . shall provide equal athletic opportunity for members of both sexes."). Title IX does not say "on the basis of being a biological woman"; it says "on the basis of sex." 20 U.S.C. § 1681(a); *see also Kentuckians for Commonwealth, Inc. v. Rivenburgh*, 317 F.3d 425, 440 (4th Cir. 2003) ("[A] regulation must be consistent with the statute it implements, any interpretation of a regulation must accord with the statute as well.").

In *Grimm*, the Fourth Circuit dealt with a similar argument when addressing 34 C.F.R. § 106.33, which allows for sex differentiated bathrooms. 972 F.3d at 618. The Fourth Circuit reasoned that the "regulation cannot override the statutory prohibition against *discrimination* on the basis of sex. All it suggests is that the act of creating sex-separated restrooms in and of itself is not discriminatory—not that . . . the Board may rely on its own discriminatory notions of what 'sex' means." *Id.* North Greene relied upon its own discriminatory notions of what sex means, and in doing so, the Act makes athletic opportunities unequal. *See* Record 11 ("[W]e conclude Title IX used 'sex' in the biological sense . . . ."). Respondents ignore that the Act allows biological females and transgender boys to have greater athletic opportunities than biological males and transgender girls. *But cf. Adams v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 797 (11th Cir. 2022) (supporting Respondents' view of *Bostock*'s application to Title IX but dealing with a policy that required *both girls and boys* equally to use the bathroom that aligned with their biological sex).

The Fourteenth Circuit tried to reconcile this outcome with the argument that Title IX and its regulations were passed "to increase opportunities for women and girls in athletics." Record 11 (quoting *Williams v. Sch. Dist. of Bethlehem, Pa.*, 998 F.2d 168, 175 (3d Cir. 1993)). However, "[a]s in all cases of statutory interpretation, 'the purpose must be derived from the text.'" *United States v. Bryant*, 996 F.3d 1243, 1246 (11th Cir. 2021) (quoting Antonin Scalia & Bryan A. Garner, *Reading Law* 56 (2012)). Further, this Court has stated that "[w]hen the express terms of a statute give us one answer and extratextual considerations suggest another, it's no contest. Only the written word is the law, and all persons are entitled to its benefit." *Bostock*, 590 U.S. at 653. Title IX does not say that only biological women will benefit from its protections. Both biological and transgender men and women must benefit; the Fourteenth Circuit's reliance on this "extratextual" purpose does not change the written words of the law or correct the above discrepancy.

Next, the Fourteenth Circuit relied upon "biological differences" as the reason for the structure of the Act. The court doubled down and stated that "[a]llowing transgender boys to participate in athletic events with biological boys does not present the same concerns about athletic opportunity and safety as presented in the case of allowing transgender girls to compete with biological girls." Record 11, n.9.[5] Under Title IX's but-for causation standard "citing some other factor that contributed" to the challenged decision does not avoid triggering Title IX when sex is one of the but-for causes. *Bostock*, 590 U.S. at 656.

In *City of L.A. Dept. of Water & Power v. Manhart*, the employer relied on "reliable statistics" that "women live longer than men" when enacting a policy that women had to pay more towards their pension plan. 435 U.S. 702, 704 (1978). This Court held that an employment practice that treats individuals differently "simply because each of them is a woman, rather than a man" does not pass Title VII's simple "but-for" test. *Id.* at 711. This Court noted that "[t]his case does not . . . involve a fictional difference between men and women. It involves a generalization that the parties accept as unquestionably true . . . ." *Id.* at 707. Still, this Court reasoned that the statute protects individuals, not groups. *Id.* at 708. Further, reasoning that "a true generalization about the class is an insufficient reason for disqualifying an individual to whom the generalization does not apply." *Id.* at 707.

Like the employer in *Manhart*, which relied upon reliable statistical evidence in creating their policy, Respondents and the Fourteenth Circuit rely upon supposedly "undisputed" evidence

[5] This argument is self-defeating. Respondents believe that these "biological differences" lead to the need to "protect[] the safety of competing biological girls." Record 7. By allowing transgender boys (biological girls) to compete with biological boys, Respondents—under their view—put these athletes in harm's way. For this argument to hold any weight, Respondents must, like A.J.T., acknowledge that one's secondary sex characteristics can be altered, thus making transgender boys and girls similarly situated to their cisgender comparators. *See infra* Sections I.D., II.A.3.

that "after puberty biological males have physiological advantages over biological females that significantly impact athletic performance." Record 7. Assuming arguendo that this evidence is reliable and undisputed, it does not change the fact that, like Title VII, Title IX protects individuals and not groups. *Compare* 42 U.S.C. § 2000e-2(a)(1) (extending Title VII's protections to "any individual"), *with* 20 U.S.C. § 1681(a) (extending Title IX's protections to "[any] person"); *see also infra* Section II.A.3 (disputing whether there are competitive advantages between the biological sexes). Similar to the policy in *Manhart*, which relied upon a true generalization about a class, Respondents claim they rely upon a "true" generalization about a class. However, this generalization is insufficient for disqualifying A.J.T. and other transgender females. *See* Record 15 (Knotts, J., dissenting) (noting that the Act treats transgender females differently "on a categorical basis, regardless of whether any given girl possesses any inherent athletic advantages based on being transgender.").

Just like the policy in *Manhart*, the Act violates Title IX because, when the Act works precisely as planned, it cannot pass the simple but-for test and requires taking into account a student's sex. Its purported valid generalization does not make its additional consideration sufficient to bypass the commands of Title IX. No additional criterion will be adequate when sex is a but-for cause.

D. The Act Improperly Discriminates Against A.J.T. And Transgender Females Causing Them Harm.

The Act discriminates against A.J.T. and transgender females, causing them irreparable harm. This case is similar to that of *B.P.J.* The legislature of West Virginia passed a nearly identical law to the Act preventing the plaintiff, a transgender girl, from participating on sports teams that aligned with her gender identity. *B.P.J.*, 98 F.4th at 550–51. The Fourth Circuit held that the district court erred in denying B.P.J. summary judgment on her Title IX claim. *Id.* at 562. The court

reasoned that "under Title IX, 'discrimination mean[s] treating [an] individual *worse than* others who are similarly situated.'" *Id.* at 563 (alterations in original) (quoting *Grimm*, 927 F.3d at 618). Further, the court reasoned that the plaintiff "must establish that the 'improper discrimination caused [her] harm.'" *Id.* (alteration in original) (quoting *Grimm*, 927 F.3d at 616). The court found that the law treated students differently because it "forbids one—and only one—category of students from participating in sports teams," consistent with their gender identity, that category being transgender girls. *Id.* at 563. This discrimination caused the plaintiff harm because of the stigma it created and the "emotional and dignitary harm" it led to. *Id.* (quoting *Grimm*, 972 F.3d at 617–18). And by going further and requiring that the plaintiff forfeit playing school sports altogether or derail her treatment for gender dysphoria. *See id* at 563–64.

Similarly, here, the Act discriminates against A.J.T. and others like her because it treats A.J.T. differently than those with whom she is similarly situated. A.J.T. is similarly situated to two groups of students. First, A.J.T. is similarly situated to transgender boys. Like transgender boys, A.J.T. and other transgender girls were assigned a sex at birth that is not in alignment with their gender identity. Second, A.J.T. and other transgender girls are similarly situated to cisgender females because they have the same gender identity and have similar secondary sex characteristics and mannerisms such as voice tone, breasts, low amounts of body and facial hair, and stylistic choices such as long hair, clothing, make-up, and other appearance choices.[6] These secondary sex characteristics can be achieved through social transitioning, as well as hormonal treatment and surgical intervention. Social transitioning has been found to largely equate the behaviors, appearance, and capabilities of transgender and cisgender females. *See infra* Section II.A.3.

[6] Secondary sex characteristics are defined as "features not directly concerned with reproduction." Am. Psych. Ass'n, *Sex Characteristic*, APA Dictionary of Psych. (Apr. 19, 2018), dictionary.apa.org/sex-characteristic.

The acts in *B.P.J.* and this case treat the plaintiffs (both transgender females) differently than the similarly situated transgender males because they forbid transgender females from playing on the sports team that aligns with their gender identity while permitting transgender males to play on boys' teams. *See B.P.J.*, 98 F.4th. at 563; N.G. Code § 22-3-16(b). This differential treatment between these two comparators will lead to lasting harm for A.J.T. and her transgender female peers. Both groups are likely to be diagnosed with gender dysphoria, which is defined as "the distress that may accompany the incongruence between one's experienced or expressed gender and one's assigned gender." Am. Psychiatric Ass'n, *Diagnostic & Stat. Manual of Mental Disorders* 451–52 (5th ed. 2013) [hereinafter DSM-5] (requiring at least 6 of 8 additional criteria).

A.J.T. was diagnosed with gender dysphoria when she was ten years old. Record 3. The prevailing treatment for someone diagnosed with gender dysphoria is "affirming their gender identity" through "their social, mental, and medical health needs . . . ." The World Pro. Ass'n for Transgender Health, *Standards of Care for the Health of Transgender & Gender Diverse People, Version 8*, 23 Int'l J. of Transgender Health S1, S7 (2022) [hereinafter WPATH Standards of Care], https://www.tandfonline.com/doi/pdf/10.1080/26895269.2022.2100644. Social transitioning for children typically includes a "Name change; Pronoun change; Change in sex/gender markers . . . ; *Participation in gender-segregated programs* (*e.g., sports teams; recreational clubs and camps; schools; etc.*); Bathroom and locker room use; Personal expression . . . ; Communication of affirmed gender to others . . . ." *Id.* at S76 (emphasis added). The Act "directly contradict[s] the treatment protocols for gender dysphoria." *B.P.J.*, 98 F.4th at 564. It does so *only* to A.J.T.'s and other transgender females' detriment, allowing their transgender male counterparts to continue their effective social transition and play on their desired team.

The acts in *B.P.J.*, and here, also treat the plaintiffs, transgender females, differently from similarly situated cisgender females. A.J.T., like the plaintiff in *B.P.J.*, began to identify as a girl from a young age, has previously participated on female teams, and has been living publicly as a girl since the third grade. Record 3; *B.P.J.*, 98 F.4th at 551–52. Cisgender females can play on the team with individuals who share their secondary sex characteristics and gender identity, while A.J.T. cannot. For A.J.T. "participating only on boys teams is no real choice at all." *B.P.J.*, 98 F.4th at 564. Not only will A.J.T. be mentally distressed by having to do so, but she will not be accepted by the other boys because she is not one of them. A.J.T. is a transgender girl who externally appears to be a biological female and who is known by her school community to be a girl. A.J.T.'s ability to play on the boys' team is analogous to a gay or lesbian person being able to marry someone of the opposite sex, which this Court realized was no choice at all. *Obergefell v. Hodges*, 576 U.S. 644, 658 (2015) ("[S]ame-sex marriage is their only real path . . . ."); *see also Hecox v. Little*, 479 F. Supp. 3d 930, 984 (D. Idaho 2020) (making the same analogy in the context of transgender female participation in female sports). A.J.T.'s only real path forward is to be treated like her similarly situated cisgender female counterparts and to be allowed to play on their team.

In short, A.J.T. and other transgender females are discriminated against "on the basis of sex" and are treated unequally to their similarly situated transgender boy and cisgender female comparators. Furthermore, this improper discrimination will lead to irreparable harm and amounts to a wholesale exclusion of transgender girls from school-sponsored sports. The Act runs afoul of Title IX and is antithetical to its purpose of providing equal opportunity to all.

II. THE ACT VIOLATES THE EQUAL PROTECTION CLAUSE BY PROHIBITING TRANSGENDER FEMALES FROM PARTICIPATING IN FEMALE SPORTS AND FAILS INTERMEDIATE SCRUTINY.

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution protects persons in the United States by providing that no State shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. This Court has stated that the purpose of the Equal Protection Clause is to "keep[] governmental decisionmakers from treating differently persons who are in all relevant respects alike." *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992); *see also City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985) ("[A]ll persons similarly situated should be treated alike.").

Further, when the government treats individuals differently based on sex, heightened scrutiny is applied. *United States v. Virginia*, 518 U.S. 515, 532–33 (1996) (concluding that when a State treats individuals differently based on gender or denies an opportunity altogether, the Court applies intermediate scrutiny). To overcome the heightened scrutiny, the State must prove that the discriminatory means employed are substantially related to an important government interest. *See id.* at 533. To surpass this standard, "[t]he justification must be genuine, not hypothesized or invented *post hoc* in response to litigation. And it must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females." *Id.*

Most courts, including the Fourteenth Circuit, have ruled that discrimination based on transgender status is discrimination based on sex under the Equal Protection Clause and applied intermediate scrutiny. *See, e.g.*, Record 6–7 ("Under United States Supreme Court precedents, intermediate scrutiny applies to laws that discriminate on the basis of . . . sex."); *B.P.J.*, 98 F.4th at 556; *Hecox v. Little*, 104 F.4th 1061, 1074 (9th Cir. 2023); *Adams*, 57 F.4th at 801. This Court's jurisprudence surrounding transgender individuals is sparse. However, in *Bostock*, the Court

clearly stated that "it is impossible to discriminate against a person for being . . . transgender without discriminating against that individual based on sex." 590 U.S. at 660.

Here, the Act uniquely discriminates against transgender females because it excludes only transgender females from participating on sports teams that correspond to their gender identities, even though it permits transgender males and cisgender females—both of whom are similarly situated to transgender females—to participate on sports teams that correspond to their gender identities. Additionally, the Act fails intermediate scrutiny because the discriminatory means employed are not substantially related to the important government interests of protecting the safety of female athletes while competing and providing equal opportunities to female athletes.

A. Transgender Females Are Uniquely Discriminated Against Under The Act Because They Are The Only Category Of People Who Cannot Participate On The Sports Teams That Match Their Gender Identity.

For any claim under the Equal Protection Clause to be actionable, the State must take some discriminatory action. *Pers. Adm'r of Mass. V. Feeney*, 442 U.S. 256, 272, 279 (1979). Statutes that discriminate against a group of people based on gender on their face or in their effect trigger intermediate scrutiny. *See id.* at 273. The challenger of the statute must prove that the Act treats her differently than other people who are similarly situated. *City of Cleburne*, 473 U.S. at 439. Here, the Act discriminates against A.J.T. and her transgender female peers both facially and in effect. *See infra* Section II.A.1–2. The Act also treats transgender females differently than transgender males and biological females, even though transgender females are similarly situated to both groups. *See infra* Section II.A.3.

1. The Act is facially discriminatory because it states that gender identity is not considered, and transgender girls cannot play in female sports.

A government statute or policy that explicitly targets a particular group of people on its face triggers intermediate scrutiny. *See* Katie Eyer, *Transgender Equality &* Geduldig *2.0*, 55 Ariz.

St. L.J. 475, 483–84 (2023) (citing *Virginia*, 518 U.S. at 531–34). Here, the Act discriminates against transgender girls on its face by claiming that "[g]ender identity is separate and distinct from biological sex," and that "[c]lassifications based on gender identity serve no legitimate relationship to the State['s] interest in promoting equal athletic opportunities for the female sex." N.G. Code § 22-3-16(c). Respondents do not even attempt to mask their desire to keep transgender girls out of sports. The Act bases classifications for sport participation "*solely* on the individual's reproductive biology and genetics at birth." N.G. Code § 22-3-15(a)(1) (emphasis added).

Further, the Act singles out transgender females and *not* transgender males. If the Act stated that no individual may participate in sports (be it male or female sports) based on gender identity, then perhaps this would be a neutral Act. However, that is not what Respondent has put forth. The Act is silent as to whether transgender males are permitted to participate in boys' sports, while explicitly barring transgender females from participating in girls' sports, thus implying that transgender males *can* do so. *See* Scalia & Garner, *supra* Section I.C.2, at 107 (defining the "Negative-Implication Canon" as "[t]he expression of one thing implies the exclusion of others . . . ."). This is textbook facial discrimination on the basis of sex—regardless of how one views gender identity—that can only be justified by satisfying intermediate scrutiny.

In *B.P.J.*, the West Virginia statute had nearly identical language to North Greene's Act. *See* 98 F.4th at 551. There too, West Virginia attempted to ban all transgender females from participation in sports by claiming that "gender identity [was] separate and distinct from biological sex" and was not to play any part in determining who could participate in female sports. W. Va. Code § 18-2-25d(a)–(b). The Fourth Circuit stated that because the definition of the statute explicitly barred transgender females from participating in female sports, it was a "facial

classification based on gender identity." *B.P.J.*, 98 F.4th at 556. The court concluded that facial discrimination based on gender identity triggered intermediate scrutiny. *Id.*

In *Tirrell v. Edelblut*, New Hampshire's law similarly prohibited transgender females from participating in girls' sports, but "place[d] no restrictions on who may play on teams designated for males, men, or boys." 2024 U.S. Dist. LEXIS 162185 at *13 (D.N.H. 2024). The court concluded that the "issue 'is not even a close call.' . . . [The law], on its face, discriminates against transgender girls." *Id.* at *21. The North Greene Act is also not a close call. It is materially identical to the statutes in *B.P.J.* and *Tirrell* and is equally facially discriminatory.

2. The Act is discriminatory in effect against transgender females because they are the only individuals prevented from playing on their desired sports teams.

Not only is the Act facially discriminatory, but it is also discriminatory in effect. A law that has a "disproportionately adverse effect" upon a particular group "is unconstitutional under the Equal Protection Clause" when it has a "discriminatory purpose." *Feeney*, 442 U.S. at 272. An Act has a "discriminatory purpose" when it is enacted "at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Id.* at 279 (citations omitted).

The Act's only effect was to prohibit transgender females from participating in female sports. Prior to passing the Act, North Greene already had male, female, and coed sports; certainly, the Act did not establish gender-segregated sports for the very first time. Record 13–14 (Knotts, J., dissenting). Also, the State's school athletic rules "prohibited cisgender men and boys from participating [i]n female" sports. *Id.* at 13 (Knotts, J., dissenting). Therefore, "the Act's only contribution to the North Greene student-athletic landscape is to entirely exclude transgender women and girls from participating on female sports teams." *Id.* at 14 (Knotts, J., dissenting).

Under West Virginia's nearly identical statute, the Fourth Circuit in *B.P.J.* stated that the statute's "undisputed purpose—and the only effect—[was] to exclude [transgender girls] from

participation on girls sports teams." 98 F.4th at 556. The court concluded such discrimination was sufficient to trigger intermediate scrutiny. *Id.* Likewise, the clear purpose and effect of the Act in this case is to exclude A.J.T. and all other transgender girls from female sports.

3. The Act discriminates against transgender females, unlike other groups with whom transgender females are similarly situated.

The Equal Protection Clause protects individuals from being treated differently than other people who "are in all relevant respects alike." *Nordlinger*, 505 U.S. at 10. Put another way, individuals who are "similarly situated" should be treated the same way. *See City of Cleburne*, 473 U.S. at 439. Transgender females are treated differently from both transgender males and cisgender females even though transgender females are similarly situated to both groups of people.

Transgender females are similarly situated to transgender males because both groups seek to play sports with other people who share their gender identity. Much like A.J.T., transgender males simply want to play sports with people they connect with. And, in North Greene, they can. Respondents' desire to keep gender identity "separate and distinct from biological sex," incredibly, only applies to females. N.G. Code § 22-3-16(c). Under the Act, a person who identifies as a male but is a biological female would not qualify as a "male." *See* N.G. Code § 22-3-15(a)(3). However, there is no prohibition anywhere in the Act for transgender males to participate in boys' sports. Respondents have singled out transgender females like A.J.T. and treat them differently than transgender males even though they are in all relevant respects alike.

Additionally, transgender girls and cisgender girls are similarly situated, yet Respondents' Act permits cisgender females to participate on sports teams with other females. The relevant similarities between transgender females and cisgender females are that they share gender identity, secondary sex characteristics, and want to play on female teams. *See supra* Section I.D. While undoubtedly gender identity and biological sex are different concepts, studies have shown that

children who transition—even just socially—to match their gender identity align very closely with their cisgender peers. For example, "[s]tudies have indicated socially transitioned gender diverse children largely mirror the mental health characteristics of age matched cisgender siblings and peers." WPATH Standards of Care at S77. Also, transgender youth who have socially transitioned experience lower rates of anxiety and depression and higher rates of self-worth compared to transgender youth who have not socially transitioned to fit their gender identity. Durwood et al., *supra* note 3, at 116. Along with changing one's name, pronouns, hair style, clothing choice, and communication of affirmed gender to others, another recommended way to transition socially is participating in gender-segregated sports teams. WPATH Standards of Care at S76.

Furthermore, there are many sports, particularly sports based on competitive skill, where there are no differences in performance based on biological sex at all. Sandra K. Hunter, et al., *The Biological Basis of Sex Differences in Athletic Performance: Consensus Statement for the American College of Sports Medicine*, 8(4) Translational J. of the Am. Coll. of Sports Med. 1, 6 (Sept. 29, 2023) ("Sports relying primarily on technical skill . . . have minimal sex differences in performance." (citations omitted)). Even though there are no biological sex differences in sports relying on skill, Respondents intentionally exclude transgender females from participating in even these sports. *See* N.G. Code § 22-3-16(b) ("Athletic teams or sports designated for females, women, or girls shall not be open to [transgender females] where selection for such teams is based upon competitive skill . . . .").

Even still, Respondents, like the Fourteenth Circuit, will claim that A.J.T. and her transgender female peers are not similarly situated to cisgender females because of physiological differences. Record 7–8. However, "the weight of [] authority across the country favor[s]" A.J.T.'s position. *L.E. v. Lee*, 2024 U.S. Dist. LEXIS 57803, at *52 (M.D. Tenn. 2024). Courts have found

that transgender individuals and their cisgender comparators *are* similarly situated. *Id.* at *52–54; *see also Grimm*, 972 F.3d at 610 ("The overwhelming thrust of everything in the record . . . is that Grimm was similarly situated [as a transgender boy] to other boys . . . ."); *Kadel v. Folwell*, 100 F.4th 122, 154–56 (4th Cir. 2024) (dismissing concerns that transgender individuals were not similarly situated with cisgender individuals); *B.P.J.*, 98 F.4th at 556 (dismissing claims that transgender females were not similarly situated to cisgender females in the context of sports). This Court should affirm what these courts have held: transgender girls and cisgender girls are similarly situated under the Act.

Respondents uniquely discriminated against transgender females through the Act. Transgender females and transgender males are similarly situated because they both do not identify as the gender that aligns with their biological sex, and they want to participate in sports with people who share their gender identities. Transgender females and cisgender females are similarly situated because as transgender individuals transition (socially or otherwise), they look, act, feel, and oftentimes perform like their cisgender counterparts. Because Respondents permit transgender males and biological females to participate on the sports team of their choice, the Act treats similarly situated individuals differently and triggers intermediate scrutiny.

B. The Act Fails Intermediate Scrutiny Because The Justifications Respondents Put Forth Are Not Substantially Related To Important Government Objectives.

Once a statute is shown to discriminate against a group of people on the basis of gender, and the statute treats similarly situated individuals differently, intermediate scrutiny is triggered, and the government must prove that the discrimination employed is substantially related to an important government interest. *Virginia*, 518 U.S. at 533 (1996). A.J.T. does not dispute that providing equal athletic opportunities for female athletes and protecting the physical safety of female athletes when competing are important government objectives. *See* Record 9. However,

how Respondents attempt to effectuate these interests is not substantially related to the objectives because biological females can still compete against biological males, and there is no evidence that transgender females cause harm to or take opportunities from biological females.

1. The purpose of protecting the physical safety of female athletes is pure pretext because biological females can still participate in male sports.

Respondents claim one of the purposes of the Act is to "protect the physical safety of female athletes when competing" in sports. Record 4. The Act defines a "female" as "an individual whose biological sex determined at birth is female." N.G. Code § 22-3-15(a)(2). Under this definition, a transgender male would be considered a female. And as discussed above, the Act does *not* prevent transgender males from participating in male sports. *See supra* Sections I.D, II.A.1.

The same arrangement was noted in *B.P.J.*, where the court recognized the law "create[d] a rule that people whose sex assigned at birth as female may play on any team but people whose sex was assigned at birth as male may only play on male or co-ed teams." 98 F.4th at 556. Similarly, in *Hecox*, the Idaho statute "[did] not include any limitation for transgender individuals who wish to participate on athletic teams designated for men." 104 F.4th at 1071. In both cases, the courts found the means did not justify the ends; the purposes of the statutes were not substantially related to the important government interest. *B.P.J.*, 98 F.4th at 562; *Hecox*, 104 F.4th at 1088.

As in both *B.P.J.* and *Hecox*, if the purpose of the North Greene Act is to protect the physical safety of female athletes when competing, why do Respondents continue to allow these females (by definition) to compete against males? Would not a transgender male be among the individuals the Act purports to protect? In fact, if biological males playing against biological females was so dangerous to females, wouldn't one transgender male—a biological female—playing against many biological males be extremely dangerous to the physical safety of the supposed female athlete? Respondents avoid these questions because they only point towards one

answer: the purpose of protecting female safety is pure pretext. The real reason is to prevent transgender females from involvement in sports. Respondents do not wish to protect all biological females—only those who align with its desired political outcome.

2. Providing equal opportunities for female athletes and protecting the physical safety of female athletes when competing is not harmed by the inclusion of transgender females.

Along with supposedly protecting the physical safety of female athletes, Respondents also claim that the Act is designed to provide equal opportunities for female athletes. There is no question these are honorable goals; however, Respondents have no evidence to show that transgender females participating in female sports would harm either of these interests. Under the Equal Protection Clause, this Court has said that if a statute discriminates based on gender, "[t]he justification must be genuine, not hypothesized . . . . And it must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females." *Virginia*, 518 U.S. at 533. Here, the justification for the Act is hypothesized and relies on similar overbroad generalizations that the Court referred to in *Virginia*. Therefore, the Act is not substantially related to these important interests.

The Fourteenth Circuit's opinion detailed the Act, introduced A.J.T., and explained why it did not believe A.J.T. and all her transgender female peers should be allowed to play sports with people like them. *See* Record 3–4, 6–10. However, what the Fourteenth Circuit did *not* state is very telling: it made no mention of the fact that transgender females were dominating female sports, taking opportunities from biological females, and physically harming them in the process. In fact, the only mention of any harm caused by a transgender female was in a footnote, and that incident occurred in an entirely different state—not North Greene. *See* Record 10, n.8. If there were issues in North Greene with transgender females harming biological females in a sport, or if it was

commonplace for transgender females to take positions from biological females on teams, it would have been in the opinion. But that is not happening in North Greene, or anywhere in the country.

In two recent federal appellate court cases, the stories that played out do not depict transgender females dominating female sports, rather the cases show that there are occasions where transgender females are considerably inferior to their cisgender peers. For example, in *B.P.J.*, the thirteen-year-old transgender female participated in her school's girls' cross country and track teams. 98 F.4th at 551. In three seasons, B.P.J.—a biological male under the statute—"regularly finishe[d] near the back of the pack, and she was not fast enough to make the girls' running events . . . ." *B.P.J.*, Opening Br. at 11. Similarly, in *Hecox*, the college-aged transgender female tried out for the women's track team at Boise State University and failed to make the team. 104 F.4th at 1072. These cases show that Respondents' concerns are hypothesized and overbroad generalizations on the capabilities of males and females.

Additionally, Respondents cannot explain the outliers to their theory that all biological males are superior athletically to biological females. Take Brittney Griner, for instance. Brittney Griner was six feet, eight inches, when she played basketball at the University of Baylor. Baylor Bears, *2012-13 Women's Basketball Roster*, https://baylorbears.com/sports/womensbasketball/roster/brittney-griner/3266 (last visited Sept. 9, 2024). The average male in the United States, at five feet, nine inches, would stand no chance against Brittney Griner on a basketball floor. CDC.gov, *Body Measurements*, https://www.cdc.gov/nchs/fastats/body-measurements.htm (Sept. 10, 2021). Yet Respondents' Act would have this Court believe that Brittney Griner is at risk of physical harm and losing her position as a professional basketball player if such a biological male shared the basketball court with her. Further, what about the men who do not conform to the generalization that men are athletically superior to females? Are all men supposed to be "macho"

and lift weights? Respondents' Act puts males and females in boxes and requires everyone to conform to "overbroad generalizations" about their biological sex. *Virginia*, 518 U.S. at 533.

While individual comparisons detail why Respondents' concerns are flawed, data also indicates that transgender females taking opportunities from biological females is a "vague [and] unsubstantiated concern . . . ." *Hecox*, 104 F.4th at 1086. Only 0.6 percent of Americans identify as transgender, and "roughly 1.8 percent of high school students identify as transgender." *Id.* at 1069. Using this data, that would mean that at most a grand total of 0.4 percent of Americans, and 1.2 percent of high school students, identify as a transgender female. *Compare* Matthew C. Leinung & Jalaja Joseph, *Changing Demographics in Transgender Individuals Seeking Hormonal Therapy: Are Trans Women More Common Than Trans Men?*, 5(4) Transgender Health 241, 243 (2020) (detailing studies that have recorded a two-to-one ratio between transgender females to transgender males), *with Hecox*, 479 F. Supp. 3d at 977 (stating that approximately one-half of individuals who identify as transgender are transgender females).

Just based on those numbers, it is inconceivable to think that 1.2 percent of high school students would create an impermeable bar to biological female participation in sports. However, that is not even considering the fact that "[l]ess than 15% of transgender youths participate in sports compared with nearly 70% of all youths nationwide." Alexander Waselewski, et al., *Perspectives of US Youths on Participation of Transgender Individuals in Sports*, 6(2) JAMA Network Open 1, 8 (2023). Taking into account the extraordinarily low level of transgender individuals who actually participate in sports, the actual percentage of transgender females in sports is roughly 0.18 percent. It is impossible to stretch reality thin enough to believe that transgender females playing sports (0.18 percent of high school students) will overtake female sports when 70% of high school females are already involved.

To tell such a small percentage of people who are already overwhelmingly discriminated against, harassed, and abused that they are not welcome in sports is shameful. *See Grimm*, 972 F.3d at 597 ("77% of [survey] respondents who were known or perceived as transgender in their K-12 schools reported harassment by students, teachers, or staff."). Ultimately, it is entirely "untenable that allowing transgender women to compete on women's teams would substantially displace female athletes." *Hecox*, 479 F. Supp. 3d at 977–78. The standard under the Equal Protection Clause requires the justification for the Act not be hypothesized. *See Virginia*, 518 U.S. at 533. Banning 0.18 percent of the population from sports to prevent those individuals from taking opportunities from female athletes without any evidence to show such a thing is actually occurring in North Greene is the definition of a hypothesized concern.

3. The Court should not require puberty blockers for transgender female participation in female sports.

Respondents will undoubtedly point to the fact that A.J.T. is not on puberty blockers and suggest that the lack of hormone therapy is a reason for enforcement of the Act.[7] Some courts have ruled in favor of the transgender female in the context of female sports because they used puberty blockers. *See e.g.*, *B.P.J.*, 98 F.4th at 560–62; *Hecox*, 104 F.4th at 1084–85; *Tirrell*, at *44–46. However, the Court should not make puberty blockers a prerequisite for playing female sports.

First, puberty blockers are not available to all individuals in A.J.T.'s shoes and thus do not provide an adequate test. As the Fourteenth Circuit stated, "[e]ven if a transgender girl wanted to receive hormone therapy, she may have difficulty accessing those treatment options depending on

[7] A.J.T. understands this Court will be deciding whether bans on gender-affirming healthcare for transgender children violates the Equal Protection Clause this term. *United States v. Skrmetti*, 144 S. Ct. 2679 (2024). A.J.T. does not ask the Court to make a decision on this issue here. A.J.T. merely requests the Court to hold that puberty blockers are not required for participation in female sports.

her age and the state where she lives." Record 10; *see, e.g.*, Tenn. Code § 68-33-101(b), (n) (prohibiting "medical procedures that alter a minor's hormonal balance . . . ."); 63 Okl. St. § 2607.1A–B (prohibiting "puberty-blocking drugs, cross-sex hormones, or other drugs to suppress or delay normal puberty or to promote the development of feminizing or masculinizing features consistent with the opposite biological sex.").

If this Court made it a requirement for transgender females to be on puberty blockers to play female sports, it would carve out roughly half the population of transgender females from being able to participate in sports. Selena Simmons-Duffin & Hilary Fung, *In just a few years, half of all states passed bans on trans health care for kids*, NPR (July 3, 2024), https://www.npr.org/sections/shots-health-news/2024/07/03/nx-s1-4986385/trans-kids-health-bans-gender-affirming-care (showing that twenty-five states passed laws barring children from gender-affirming health care). Such a decision is unnecessary to reach any conclusion in this case and would have a disparate impact on children in the states that currently ban gender-affirming healthcare.

Secondly, puberty blockers should not affect a transgender girl's participation in female sports because even if a state permits gender-affirming care, not all doctors recommend such treatment. Jack L. Turban et al., *Pubertal Suppression for Transgender Youth & Risk of Suicidal Ideation*, 145(2) Pediatrics 1, 6–7 (2020) (suggesting doctors do not always recommend puberty blockers because it may not be the proper treatment method for the patient); Am. Psych. Ass'n, *Report of the APA Task Force on Gender Identity & Gender Variance* 32 (2009) https://www.apa.org/pi/lgbt/resources/policy/gender-identity-report.pdf (recommending each individual receive an individualized treatment plan to account for the person's specific needs).

For many people, social transition is the best course of action and is just as effective as hormone therapy. *See* WPATH Standards of Care S76–77; Durwood et al., *supra* note 3, at 116.

Social transition is also the only treatment method available for individuals who underwent puberty before they knew they were transgender. If the Court wishes to create a bright-line rule for female sport participation, the appropriate line is whether the transgender female has socially transitioned for six months or more and is seeking the recommended treatment by a medical professional.[8]

CONCLUSION

Title IX is designed to prevent discriminatory practices and ensure that all sexes are treated equally. The Act ignores those commands and discriminates "on the basis of sex." The Act's discrimination is unlawful because it treats A.J.T. and transgender females unequally to transgender males and cisgender females. This unlawful discrimination causes A.J.T. and transgender females irreparable harm. The Act also violates A.J.T.'s rights under the Equal Protection Clause because it uniquely discriminates against transgender females and treats them differently than individuals who are similarly situated. The Act also fails intermediate scrutiny because it is not substantially related to the important government interests.

For the foregoing reasons, A.J.T. respectfully requests that this Court reverse the Fourteenth Circuit's decision to affirm the District Court of North Greene and hold that the Act facially violates Title IX and the Equal Protection Clause of the United States Constitution.

Team 12

Counsel for Petitioner

[8] The six-month standard is taken from the American Psychiatric Association's DSM-5 that states a person is medically diagnosed with gender dysphoria when the individual has had "marked incongruence" with their gender identity and biological sex for six months. DSM-5 at 451–53.