NO. 24-2020

IN THE SUPREME COURT OF THE UNITED STATES

A.J.T.,

Plaintiff-Petitioner,

v.

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

Defendants-Respondents.

ON WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE FOURTEENTH CIRCUIT

BRIEF OF RESPONDENTS

TEAM IDENTIFIER #13

STATEMENT OF THE ISSUES

This action presents two (2) issues of the validity of the "Save Women's Sports Act" (hereinafter "the Act"). Petitioner, identifying as a female, intended to participate on athletic teams at school that are designated for biological females, despite Petitioner being born biologically male. Given the recent passage of the Act, Petitioner is not permitted to participate in sports designated for biological females. The Petitioner submits the following questions to the United States Supreme Court for review:

First Question Presented:

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

Second Question Presented:

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

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STATEMENT OF THE CASE

a. Background

Under the Act, "athletic teams or sports designated for females, women, or girls are not open to students of the male sex where selection for such teams is based upon competitive skill or is a contact sport." N.G. Code § 22-3-16(b). The objective of the Act is to "provide equal athletic opportunities for female athletes and to protect the physical safety of female athletes when competing." *A.J.T. v. North Greene Bd. of Educ.*, 2024 WL 98765 at *4 (14th Cir. 2024). The Act, codified as North Greene Code § 22-3-4, requires that:

> "[i]nterscholastic, intercollegiate, intramural, or club athletic teams or sports that are sponsored by any public secondary school or a state institution of higher education," "shall be expressly designated as one of the following based on biological sex at birth: (A) Males, men, or boys; (B) Females, women, or girls; or (C) Coed or mixed."

N.G. Code § 22-3-16(a).

Under the pertinent language of the statute:

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

N.G. Code § 22-3-15(a)(1)–(3).

The Act is solely concerned with biological sex, not with gender identity. Gender identity is separate and distinct insofar that gender identity classifications do not change an individual's biological sex which is determinative of athletic designations.

b. Facts and Procedural History

At all times relevant, Petitioner is an eleven-year-old biological male preparing to begin the seventh grade and participate in school athletics. *A.J.T.*, 2024 WL at *3. Petitioner contends that they have identified as a girl from an early age. *Id*. Petitioner was informed by their school that they would be unable to join the girls' volleyball and cross-country teams because Petitioner is a biological male which would violate the Act. *Id*. The Act, introduced as Senate Bill 2750 by the North Greene Senate, was enacted on May 1, 2023. *Id*. "The objective of the Act is to provide equal athletic opportunities for female athletes and to protect the physical safety of female athletes when competing." *Id.* at *4. The statute, entitled "Limiting participation in sports events to the biological sex of the athlete at birth," states that "[t]here are inherent differences between biological males and biological females, and that these differences are cause for celebration." *Id.* at *3.

Despite Petitioner's expert witness's testimony of the commencement of puberty-delaying treatments, Petitioner has not begun puberty or puberty-delaying treatment. *Id*. The Petitioner is a biological male wishing to participate in female athletics because they identify as a girl. *Id*.

Petitioner brought this lawsuit against the State of North Greene Board of Education and State Superintendent Floyd Lawson. *Id.* at *4. The State of North Greene moved to intervene, and a motion was granted. *Id*. Thereafter, Petitioner amended the Complaint to name both the State of North Greene and Attorney General Barney Fife as the Defendants (collectively "Respondents"). *Id.* at *5.

The relief sought in the Complaint was a judgment that the Act violates Title IX and the Equal Protection Clause of the Fourteenth Amendment. *Id*. Further, the Complaint also sought an injunction preventing Respondents from enforcing the law against Petitioner. *Id*. Thereafter,

Respondents filed a motion for Summary Judgment on Petitioner's claims. *Id*. The United States District Court for the Eastern District of North Greene granted Respondents' motion, and Petitioner appealed. *Id*.

The United States Court of Appeals for the Fourteenth Circuit affirmed the District Court's entry of judgment in favor of Respondents. *Id.* at 3. The court held that the Act does not violate Title IX or the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 12. The court found that the District Court appropriately granted the Respondents' motion for Summary Judgment. *Id*. Petitioner thereafter was granted a Petition for Writ of Certiorari by order. *Id.* at 17.

SUMMARY OF THE ARGUMENT

Title IX does not prevent a state from consistently designating girls' and boys' sports teams based on biological sex determined at birth because laws that are predicated on providing equal opportunities for female athletes and to protect the physical safety of female athletes through sex-based sport distinctions do not violate Title IX. North Greene's Act provides an equal playing field for both sexes, affording each the opportunity to participate in sports and the Act provides no deferential treatment as to the type of sports that both sexes will have access to. Further, the Act should not be held to the same standard as Title VII as the statute differs significantly from Title IX.

The Equal Protection Clause of the Fourteenth Amendment does not prevent a state from offering separate boys' and girls' sports teams based on biological sex determined at birth because the Act is nondiscriminatory and passes intermediate scrutiny. The Act affects all members of the male biological sex equally, and the Act's purpose is to protect women's health and opportunities which is a legitimate state interest worthy of sex-based classification. Further,

the Equal Protection Clause forbids an unconstitutional subclass out of similarly situated individuals who have opportunities available for them.

ARGUMENT

I. Title IX allows a state to consistently designate girls' and boys' sports teams based on biological sex determined at birth.

The Petitioner's claim that the Act violates Title IX asks this Court to stray from Congress's understanding of the words used within Title IX at the time of its enactment. If this Court were to adopt the Petitioner's prospective interpretation, this Court would set a dangerous precedent as it pertains to the interpretation of statutory law, as it has been long understood that courts should ascribe the ordinary meaning of a term within a statute at the time of its enactment. *See Wisconsin Central Ltd v. United States,* 585 U.S. 274, 277 (2018); *citing Perrin v. United States,* 444 U.S. 37, 42 (1979). When analyzing the text of Title IX, in conjunction with dictionary definitions of the word "sex" at the time of Title's enactment, the term unquestionably refers to biological sex.

The Act also furthers the purpose of Title IX in that it complies with carveouts within the Title that allow for states to create designations for sports teams based on one's biological sex. The Act, in recognition of the potential harm that biological males could cause to females if allowed to compete alongside them, permissibly designates sports on a male, female, and coed basis. *See* 34 C.F.R. § 106.41(b).

The unworkability of the Petitioner's argument is evidenced by the repercussions that it would impose upon female athletics. Further, if this Court were to hold that the Act was in violation of Title IX, the complexities associated with ensuring that gender nonconforming individuals were

not unfairly advantaged by excess levels of coursing testosterone, would place an unfair burden on school districts or on the parents of transgender athletes.

For these reasons, this Court should find that the Act does not violate Title IX by creating sex-based distinctions in sports.

A. The term "sex", as used in Title IX, refers to a person's biological sex, not gender identity.

In order for the Petitioner's Title IX claim to be successful, this Court must first make a determination that the term "sex", as used in Title IX, applies not only to biological sex, but also to gender identity. If this Court were to hold that the term "sex" as it is used in Title IX pertains to gender identity, this Court would be defining the term in a manner incongruous with the definition of "sex" at the time Congress enacted Title IX.

Title IX, was patterned after the Civil Rights Act of 1964; its purpose was to carry on the spirit of Title VI, prohibiting institutional discrimination. *Cannon v. University of Chicago*, 441 U.S. 677, 695 (1979). Title IX provides in part, that: "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.

To interpret "sex" within the meaning of Title IX, this Court must look to the ordinary meaning of the word when the statute was enacted in 1972. *Wis. Cent. Ltd.* 585 U.S. 274, 277; *see also Perrin*, 44 U.S. 37, 42 (stating that words should be interpreted with their "ordinary meaning" . . . at the time Congress enacted the statute). Because a law's ordinary meaning at the time it was enacted may differ from its more contemporary meaning, courts must take care to

ensure that they do not ascribe a particular term's definition inconsistent with that of Congress's intent at the time of drafting. *Bostock v. Clayton Cnty., Georgia*, 590 U.S. 644, 674 (2020).

The term "sex" as understood in 1972 can be elicited from the dictionary definitions of the word in the years immediately preceding Title IX's enactment and the year it was enacted itself. It is conclusive that at the time of the law's enactment, "sex" referred to a person's biological sex determined at birth. *See Sex, Webster's New World Dictionary* (1972) ("[E]ither of the two divisions, male or female, into which persons, animals, or plants are divided, with reference to their reproductive functions"); *see also Sex, Female, Male, Webster's Seventh New Collegiate Dictionary* (1969) (defining "sex" as "either of two divisions of organisms distinguished respectively as male or female", "female" as "an individual that bears young or produces eggs as distinguished from one that begets young", and "male" as "of, relating to, or being sex that begets young by performing fertilizing function"); *see also SEX, Black's Law Dictionary* (4th rev. ed. 1968) (defining "sex" as "[T]he sum of the peculiarities of structure and function that distinguish a male from a female organism; the character of being male or female").

It is apparent, with the exception of the dictionary definition from *Black's Law Dictionary,* that the word "sex" was ordinarily understood to mean biological sex. While *Black's Law Dictionary* defines the term by using the phrase "the character of being male or female", a cursory examination of the terms "male" and "female" within the text exemplify a predominant understanding that "sex" refers to biology and reproductive function.[1] With there being no ambiguity within the language of Title IX, this Court should reasonably find that the term "sex" refers to biological males and females. *See Adams by and through Kasper v. School Board of St.*

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[1] *See MALE, Black's Law Dictionary (*4th rev. ed. 1968) (defining "male" as "[O]f the masculine sex; of the sex that begets young"); *see also FEMALE, Black's Law Dictionary* (4th rev. ed. 1968) (defining "female" as "the sex which conceives and gives birth to young").

Johns Cnty., 57 F.4th 791, 813 (11th Cir., 2022) (stating that "reading in ambiguity to the term "sex" ignores the statutory context of Title IX").

Further, the analysis of several sections within Title IX providing carve outs for gender specific facilities lends to a finding that the term "sex" contemplates biological sex as opposed to gender identity. For example, Title IX's carve-out for separate living facilities for the different sexes would be rendered meaningless if "sex" meant gender identity.[2] This is because transgender persons, if determined to be a member of one biological sex, as well as a member of the other gender, would be able to live in the living facilities associated with their biological sex and those associated with their gender identity. If this were acceptable under Title IX, there would be no reason for a gender specific living facility carve-out. The same can be said for the carve-out for gender specific bathrooms, where transgender persons could seemingly utilize both male and female bathrooms.[3] Determining that "sex" in the context of Title IX means anything other than biological sex frustrates its statutory scheme and purpose. *See Adams by and through Kasper*, 57 F.4th 791 at 813.

Because "sex" means biological sex within the context of Title IX, laws that are predicated on providing equal opportunities for female athletes and to protect the physical safety of female athletes through sex-based sport distinctions do not violate Title IX.

B. North Greene's designation of girls' and boys' sports based on sex determined at birth does not violate Title IX.

Title IX is violated when a party is discriminated against on the basis of their sex. As previously noted, Title IX's language contemplates the term "sex" to mean biological sex assigned

[2] *See* § 1686. Interpretation with respect to living facilities, 20 USCA § 1686.
[3] *See* § 106.33 Comparable facilities., 34 C.F.R. § 106.33.

at birth as opposed to gender identity. For this reason, the Petitioner's claim that the Act violates Title IX with respect to the gender nonconforming fails to pass muster.

"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. Title IX authorizes sex-separate sports based upon competitive skill or if the activity involved is a contact sport. 34 C.F.R. § 106.41(b). Title IX forbids schools from treating individuals "worse than others who are similarly situated" based on sex. *Bostock*, 140 S. Ct. 1731 at 1740.

In order to be in violation of Title IX, the Act would have needed to make a distinction based on biological sex, where one biological sex was given favored treatment over the other. Yet, even so, states may be required to create distinctions based on biological sex to ensure that students are able to fully enjoy educational programs and activities. *See U.S. v. Virginia*, 518 U.S. 515, 533 (1996); *citing Ballard v. United States,* 329 U.S. 187, 193 (1946) (stating that "[T]he two sexes are not fungible; a community made up exclusively of one [sex] is different from a community composed of both"). The inherent differences between biological males and females is not something to ignore, and sex based classifications are sometimes necessary to create equality for the sexes, especially women, who have been historically marginalized and discriminated against.

Here, North Greene's interest in passing the Act was to "provide equal athletic opportunities for female athletes and to protect the physical safety of female athletes when competing". *A.J.T. v. North Greene Bd. of Educ.*, 2024 WL 98765 at *4 (14th Cir. 2024). The state's reasoning falls squarely within the purpose of Title IX, in providing equal opportunities for the sexes. 20 U.S.C. § 1681(a). Additionally, this Court should not disregard the most important factor for finding a Title IX violation, that one party is treated worse than another similarly situated

party. *See A.J.T.*, 2024 WL at *10 (Knotts, J., dissenting). As such, an illustration of violations of Title IX are illustrative as to why the Act is not in violation of Title IX.

A violation of Title IX can be seen in *A. B. v. Hawaii State Department of Education*, wherein female students alleged that male sports were provided deferential treatment over female sports. 30 F.4th 828, 832 (9th Cir. 2022). The deferential treatment to male sports could be seen in the disparity in locker rooms between the sexes, the manner in which the parties' had to haul and store their gear, and their access to training facilities. *Id.* While these disparities were isolated to a single school, the school treated both genders, who are similarly situated, differently, particularly where the male team for a sport was given clear deference over a female team. *See Id.* (noting that the male water polo team had primary use of the school's pool, resulting in the female team having to practice on land or in the ocean).

Further violative treatment of athletes on the basis of sex can be seen in *McCormick ex rel. McCormick v. School Dist. of Mamaroneck*, where girls' soccer was scheduled in the spring to accommodate the boy's fall season, effectively barring the girls' team from competing in state championships held in the fall. 370 F.3d 275, 281 (2nd Cir. 2004). The court found that this preference for the boys' soccer teams violated Title IX, as it allowed male players to compete in championships while preventing female players from doing so, to the detriment of the female athletes. *Id.* at 303.

Here, the North Greene law treats biological males no differently than other biological males, in that all biological males are permitted to participate in boys sports. *See* N.G. Code (a). The law also treats biological females in the same manner as other biological females in that they are permitted to participate in female sports. *Id.* The Act also provides for alternative coed options for both sexes, providing for an inclusive environment where biological males and females can

compete amongst each other if they choose. *Id.* The Act provides an equal playing field for both sexes, affording each the opportunity to participate in sports. Further, the law provides no deferential treatment as to the type of sports that both sexes will have access to.

1. Sex-specific sports ensure that biological females have the opportunity to succeed in sports.

When biological males are permitted to participate on female sports teams, they prevent females from realizing their goals and championship aspirations.

Due to average physiological differences, males would displace females to a substantial extent if they were allowed to compete together. *Clark, By and Through Clark v. Arizona Interscholastic Ass'n*, 695 F.2d 1126, 1131 (9th Cir. 1982) (holding that excluding boys from a girls' high school volleyball team was permissible to redress past discrimination against women athletes and to promote equal opportunity for women). Because of innate physiological differences, boys and girls are not similarly situated as they enter athletic competition. *Kleczek v. R.I. Interscholastic League, Inc.*, 612 A.2d 734, 738 (R.I. 1992).

Following the passage of Title IX, the sports exception was issued, authorizing sex-segregated teams "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). The history of Title IX, during its early stages, evidence that there was a fear among many that the law could result in mixed sports teams leading to inequality for females. See Paul M. Anderson, *Title IX at Forty: An Introduction and Historical Review of Forty Legal Developments That Shaped Gender Equity Law*, 22 MARQ. SPORTS L. REV. 325, 333 (2012).

Further, in the years following the enactment of Title IX, courts recognized that there **must** be equality between the sexes. Yet, courts have been reluctant to hold that as a result, biological

males and females should compete on the same sports teams. *See Mansourian v. Regents of Univ. of* Cal., 602 F.3d 957, 970 n.18 (9th Cir. 2010) (noting that if female athletes are squeezed off teams or relegated to the back of the pack by "requiring them to prevail against men," then that barrier "foreseeably preclude[s] their future participation" in sports).

While the Petitioner would have this Court allow biological males to compete on biological female teams and displace them, this Court should consider the purpose of Title IX, which was to provide inclusive opportunities for biological females. If biological males were to compete on biological female sports teams in North Greene, many female athletes could be prevented from playing sports, closing the door that Title IX definitively opened for millions of females in the United States.

C. Reliance on cases considering Title VII violations should not be utilized to find the Act violative of Title IX as the statutes differ significantly.

Judge Knotts' dissenting opinion at the Court of Appeals fails to distinguish the differences between Title VII and Title IX. In doing so, the dissent seeks to find justification for invalidating the Act despite its compliance with Title IX.

Title IX and Title VII are vastly different statues and vary in many important respects. *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 168 (2005). Title VII prohibits employment discrimination "because of sex", while Title IX prohibits discrimination in educational programming on the "basis of sex". *See* 42 U.S.C. § 2000e-2(a); *see also* 20 U.S.C. § 1681(a). Title VII's "because of sex" terminology should be read to prohibit "sexual orientation" and "gender identity" discrimination in employment, creating a "but-for" causation test for violations under Title VII. *Bostock*, 590 U.S. 644 at 657; *Neese v. Becerra*, 640 F.Supp.3d 668, 677 (N.D. Tex., 2022). Because Title IX does not utilize the word "because", instead using "basis", biological

sex must be the sole reason for finding discrimination under Title IX. *Kouambo v. Barr*, 943 F.3d 205, 211 (4th Cir. 2019).

The dissent's reliance on *Bostock*, a Title VII case, fails to address issues regarding classifications of sex specific sports. In *Bostock*, this Court was tasked with resolving a dispute where employees suffered adverse employment decisions based on their gender and sexual orientation. *Bostock*, 590 U.S. 644 at 653. This Court held that the gender identity and sexual orientation of a prospective employee is not a relevant consideration for hiring and firing determinations. *Id.* at 660. This Court further held that if changing a person's sex or gender identity led to a different employment decision, then discrimination would occur under Title VII. *Id*.

If the Act pertained to making distinctions for employment based on one's sex, then it would certainly violate Title VII, especially under *Bostock*. But, the North Greene law pertains to sports, not employment. Where an employee's sex is not relevant in determining their compensation, sex certainly is relevant in competitive sports. *Clark By and Through Clark*, 886 F.2d 1191 at 1193. Because the law here applies to sports sponsored by the educational institutions in North Greene, Title IX, and its standard applies here. It follows then that to find the Act in violation of Title IX, the Act must make discriminatory distinctions based solely on sex. It does not.

As noted previously, the meaning of "sex" within the context of Title IX means biological sex. Also previously noted, the Act does not prevent any of the similarly situated biological sexes, differently in that both sexes may participate in sports corresponding to their sex or coed sports. The prohibition of transgender females in biological female sports, in contrast with the allowance of transgender males participating in male sports also follows Title IX regulations, as this is based on the competitive skill carve-out in Title IX. *See* 34 C.F.R. § 106.41(b); *see also A.J.T.*, 2024 WL

at *3. The inherent biological differences between males and females cannot be understated when it comes to their competitive ability. Where a biological male would dominate female sports, a biological female is less likely to dominate male sports, especially after puberty due to their coursing testosterone levels. Edward Bezuglov et. al: *The Relationship of Testosterone Levels With Sprint Performance in Young Professional Track and Field Athletes*, 271 Physiology & Behavior 114344 (2023).

Because the age in which young biological males reach puberty differs from person to person, a blanket prohibition on transgender females from participating in female sports is the best way to ensure fair competition between the sexes as contemplated by Title IX. The alternatives would require schools to continuously test the testosterone levels of transgender females to determine when they reach puberty or place the onus on the children's parents to pay for the testing. When puberty occurs, the athletes would then be abruptly pulled from their sport due to competitive advantages. This solution puts a great cost burden on schools or the parents of transgender females both of whom are unlikely to have the resources to afford such continual testing. This would also leave transgender females in limbo when pulled from their sport, as it is unlikely that they would be able to insert themselves on to a biological male sports team in the middle of a season. The same cost-prohibitive issues arise when considering puberty-blocking hormonal treatments. It is unlikely that all transgender athletes will have the resources necessary to afford them, creating a class-based distinction within sports, running contrary to the purpose of publicly provided sports programs at schools. The Act prevents the class-based distinctions that the Petitioner's position implicates, providing even-ground for both biological sexes which can hardly equate to discrimination.

This Court should refrain from accepting the dissent's invitation to implement sweeping changes to Title IX jurisprudence. Instead, this Court should apply the principles that comport with the language of law at issue, setting aside the incongruent standard applied in Title VII. Applying Title VII standards to Title IX issues would create a cacophonous din within the symphony of this Court's legal philosophy, given the fundamental differences between these two laws.

II. The Equal Protection Clause does not prevent North Greene from offering separate boys' and girls' teams based on biological sex because the Act is nondiscriminatory and passes intermediate scrutiny.

This is a case about protecting women's health and opportunities. The state of North Greene passed a constitutionally viable law prohibiting any biological man, meaning people assigned the sex of male at birth, from playing in girls' middle school and high school sports, and they did so to protect the young girls of the state. *A.J.T. v. North Greene Bd. of Educ.*, 2024 WL at *4 (14th Cir. 2024).

The Act is constitutionally valid for three distinct reasons. First, although the Equal Protection Clause seeks to maintain an even playing field for all, it only prohibits discrimination based on inter-class distinctions. That said, the Act only concerns one group, biological males, and it treats every male the same. Due to its nondiscriminatory nature towards the similarly situated individuals of the affected class, the Act is constitutional.

Second, the Act passes constitutional muster under the Equal Protection Clause because it fulfills the requirements of its assigned means-end scrutiny test, intermediate scrutiny. The Act satisfies both requirements of intermediate scrutiny. First, the law concerns an "important" government objective—protecting its women's opportunities and health—and, second, the

statute's provisions are "substantially related to" that goal—preventing biological men from taking playing time or injuring girls. Because the Act does both, it passes intermediate scrutiny.

Third, the Court should give no weight to arguments asserting that transgender girls should be classified with biological females instead of biological males. Petitioner will likely argue this on the basis of puberty and testosterone levels, but such an argument invites unlawful discrimination against biological males and is unconstitutional. Such a division would sub-divide similarly situated members of the same class unconstitutionally, and attempting to establish this standard is impossible to implement and would require the Court to create the most fluid equal protection class ever.

North Greene Passed the Act to protect both the health and competitive atmosphere for young women who participate in sports. It is of utmost importance that a state can enact legislation that protects its citizens. For the reasons set forth, this Court should affirm the Fourteenth Circuit's decision and protect women's safety and opportunities in North Greene and nationwide.

A. The Act does not violate the Equal Protection Clause because it affects all members of the male biological sex equally.

North Greene's Act does not violate the Equal Protection Clause because its language is nondiscriminatory towards the only group it is seeking to enforce its legislation against: biological males at birth. The Act, unlike what Petitioner argues, is completely unconcerned with gender identity, and because of that, it satisfies the Equal Protection Clause. *Califano v. Boles*, 443 U.S. 282, 293-94 (1979) (looking to the statutory classification itself rather than the proposed interpretation of the party challenging the statute).

The language of North Greene's statute here is instructive, "[a]thletic teams or sports designated for females, women, or girls shall not be open to students of the male sex where

selection for such teams is based upon competitive skill or the activity involved is a contact sport." N.G. Code § 22-3-16(b). The statute also clarifies that "male" as used in the statute is solely concerned with individuals whose biological sex at birth is determined to be male.[4] N.G. Code § 22-3-15(a)(2). At no place in the Act is there any mention of gender or gender identity being a limiting constraint of the statute and attempting to read either of those terms into the statute is inaccurate. *See* N.G. Code § 22-3-15.

Accordingly, the Act's nondiscriminatory language passes the Constitution's equal protection requirements, and North Greene was warranted in creating such a class. The Court has long recognized that "the sexes are not similarly situated in certain circumstances," and that these differences can require a "different set of rules" when enacting legislation. *Michael M. v. Super. Ct. of Sonoma Cnty.*, 450 U.S. 464, 471-73 (1981) (holding that legislation which punishes men for having sex with underage women satisfies equal protection because women disproportionately face the risks of pregnancy); *Tuan Anh Nguyen v. I.N.S.*, 533 U.S. 53, 63 (2001)("Fathers and mothers are not similarly situated with regard to the proof of biological parenthood. The imposition of a different set of rules for making that legal determination . . . is neither surprising nor troublesome from a constitutional perspective.")

While many laws "affect certain groups unevenly," these laws are constitutional if they "treat[] them no differently from all other members" of the "class described." *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 271-72 (1979). And while "[t]he Equal Protection Clause … prohibits only intentional discrimination; it does not have a disparate-impact component." *Ricci v. DeStefano*, 557 U.S. 557, 627 (2009) (Ginsburg, J., dissenting).

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[4] "Biological sex" in the statute also refers to "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).

This Act's sex classification is no different from the many equal protection classifications and cases which have come before this Court in the past. A statute defined a class, and that class had laws enacted against it. It did not discriminate against any member within that specific class, and in no way did it violate the Equal Protection Clause. The Act imposes no harsher of an impact on transgender girls than on cis-males because it treats both of them exactly the same: no human born with the "biological genetics of a male at birth" are permitted to participate in the listed sports of the Act.

For the reasons discussed, this Act is no different from any of the equal protection claims that this Court has deemed are constitutional, and while some members of this class may feel they are being "disparate[ly]-impacted," it is well established that alone is not enough to prevail on an equal-protection claim. For equal protection just requires nondiscriminatory treatment to the designated class, it does not require equal outcomes to that class. *Pimentel v. Dreyfus*, 670 F.3d 1096, 1109 (9th Cir. 2012) ("[T]he right to equal protection does not require the State to . . . guarantee equal outcomes")(cleaned up).

Because the Act treats all biological males exactly the same, and it is completely unconcerned with gender identity and makes no attempt to classify anyone on that basis, the Act is constitutional under the Equal Protection Clause.

B. The Act does not violate the Equal Protection Clause and passes intermediate scrutiny because its purpose, protecting women's health and opportunities, is a legitimate state interest worthy of sex-based classification.

The Act serves an important interest of North Greene—preserving the opportunities of its young female athletes and protecting them from unnecessary injury. As will be established, this

interest and North Greene's method for accomplishing its goal more than satisfies equal protection requirements.

This Court's equal protection analysis requires laws in question to undergo a means-end scrutiny test to remain constitutionally viable. *Virginia*, 518 U.S. at 533. There are various levels of scrutiny, but sex-based classifications undergo intermediate scrutiny. *Tuan Anh Nguyen v. I.N.S.*, 533 U.S. 53, 63 (2001). This is especially true when "creating separate teams for boys and girls is a sex-based distinction, which triggers intermediate scrutiny under the Equal Protection Clause." *B.P.J. by Jackson v. W. Virginia State Bd. of Educ.*, 98 F.4th 542, 555 (4th Cir. 2024) (citing *United States v. Virginia*, 518 U.S. 515, 533 (1996)). All intermediate scrutiny requires is that law in question identify an "important" government objective, and the sex-based classification must be "substantially related to" that goal. *Virginia*, 518 U.S. at 533. Since the Act is a sex-based classification, this Court should apply intermediate scrutiny to this statute.

To be clear the Act only needs to do two things. First, satisfy an important government objective. Second, the statute's provisions must be substantially related to accomplishing that objective. The Act does not have to be "narrowly tailored" towards a "compelling government[] interest" as required under heightened scrutiny. *Johnson v. California*, 543 U.S. 499, 505 (2005) (citation omitted).

Turning to the requirements of intermediate scrutiny, consider the situations in which classifications based on sex were warranted. *Califano v. Webster*, 430 U.S. 313, 320 (1977) ("for particular economic disabilities suffered by women."); (*California Fed. Sav. & Loan Assn. v. Guerra*, 479 U.S. 272, 289 (1987) (for the "promot[ion] of equal employment opportunity"). Both these cases decided by this Court were mainly concerned with protecting opportunity and potential injury to women.

Now consider the prime example of when it is not—when such a classification will hinder the "development of the talent and capacities of our Nation's people." *United States v. Virginia*, 518 U.S. 515, 533 (1996). When applying intermediate scrutiny in *Virginia*, the Court identified Virginia's goal, to "create citizen soldiers," and found that "[s]urely that goal is great enough to accommodate women, who today count as citizens in our American democracy equal in stature to men." *Id.* at 545. In doing so, the Court recognized that the completion of Virginia's proposed goal had no basis in excluding women, and it struck down its law. *Id.*

Here, the Act is not meant to hinder any development, instead, it offers only the chance for everyone to be on an equal playing field. And without the Act, there is no longer a guarantee that an equal playing field will exist. To spell out North Greene's concern, they have recognized that there are distinct physical differences between biological men and women, and they concerned that these differences will interfere with women's physical health and safety. As the Fourteenth and Eleventh Circuits have correctly pointed out, this is a warranted concern. *A.J.T. v. North Greene Bd. of Educ.*, 2024 WL at *7 (14th Cir. 2024)("'studies have shown that these [biological] differences allow post-pubescent males to 'jump (25%) higher than females, throw (25%) further than females, run (11%) faster than females, and accelerate (20%) faster than females' on average"')(cleaned up).

In recognizing uncontroversial science, North Greene enacted the Act to preserve its important state interest of preserving female athletic opportunities and protection from injury. This is a legitimate interest of the state, and its solution is related to that interest's completion. *See B.P.J. by Jackson*, 98 F.4th at 562 (4th Cir. 2024)(reversing district court's grant of summary judgment to plaintiff because material fact remained over whether a law banning transgender girls from female sports passed intermediary scrutiny).

Unlike in *Virginia*, this is the only way to reach its goals. It is fine if other girls take the opportunities of girls. It is not fair if biological men who have an athletic advantage do. It is fine—as fine as it can be—if a girl injures another girl in a game. It is not fine if a larger, stronger male injures a girl during a game. North Greene has no other obligation here in enacting this statute. It recognized the issue and came up with a reasonable way to prevent it. We are not sure how else Petitioner would recommend that the North Greene go about achieving this goal. As mentioned, we acknowledge that injuries happen and spots get taken, but if North Greene is worried about injuries and taken opportunities from bigger, stronger males, there is not much else they can do except place a blanket ban on any male participation in female athletics.

In deciding this case, we ask that this Court recognize that this Act is no different from this Court's own decisions in protecting "equal employment opportunities" or from protecting women from "economic disabilities." The Act is well within its means and the requirements of the Equal Protection Clause because it has identified an "important" government objective—preservation of safety and opportunity—and it has chosen a "substantially related" way to protect it—prohibitions on biological men from participating on these teams.

The stakes here are high, and that is not just in reference to the level of this Court. Instead, this Court should recognize that if it reverses the Fourteenth Circuit, it will not just be depriving women of opportunities and safety in North Greene, but country-wide. A reversal here would deny every state seeking to protect its young female athletes an avenue to accomplish that goal, and the results could be devastating. Every single spot that is taken by a biological male on a team might mean that a spot is lost by a biological woman. Every minute of playing time that is taken by a biological male is lost by a biological woman. Every injury given by a biological male will be sustained by a biological woman.

If the Act is deemed unconstitutional by this Court, then it will be allowing women's opportunities to be taken by biological men all over the country. It would undo years of hard work to preserve these opportunities, and we ask this Court to greatly consider the countrywide ramifications that such a decision would have on the health and safety of young women in this country.

C. Arguments by Petitioner seeking division of biological males by puberty or testosterone are unconstitutional, completely unworkable, and far too fluid to be established by this Court.

This Court should not give any weight to an argument forwarded by Petitioner which discusses division of biological males by puberty or testosterone levels for ways of including biological men into women's sports. This argument is faulty for three reasons. First, and most importantly, this is an attempt to make an unconstitutional subclass out of similarly situated individuals—biological men. Second, such an argument includes far too many variables to be constitutionally workable because of its breadth and fluidity. Third, this is not a case where Petitioner is denied an opportunity—there are already male teams for the sports Petitioner is seeking to play. For these reasons, this Court should not consider any argument seeking to allow biological men to be divided by testosterone levels or puberty status.

1. The Equal Protection Clause forbids such an arbitrary sub-classification of similarly situated individuals.

"The Equal Protection Clause 'is essentially a direction that all persons similarly situated should be treated alike.'" *Tuan Anh Nguyen v. I.N.S.*, 533 U.S. 53, 63 (2001) (citing *Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439 (1985)). Simply put, attempts to sub-divide men by testosterone levels or puberty status is discriminatory and fails under the Equal Protection Clause.

Similarly situated members of the same class cannot be discriminated against among each other, and any sort of argument presenting this rationale should be dismissed.

The rationale for this is based in logic, biology, and opportunity. Men should not be discriminated against for reaching puberty later, or for having lower levels of testosterone. But this argument advocates for creating a sub-class within biological males who have not fully undergone puberty or have lower testosterone levels to play with biological females. This is epitome of what the Equal Protection Clause is supposed to prevent—dividing similarly situated members of a class and treating them differently based on that classification. As established before, biological males are a singular and similarly situated class. To divide them and discriminate against their similarly situated counterparts would be the very opposite of what equal protection allows. Any argument by Petitioner to subdivide that group would be far more discriminatory than anything Petitioner has alleged on behalf of the state.

2. While unconstitutional to create, such a standard would also be impossible to implement and maintain due to its breadth.

Any puberty or testosterone-based justification for division should fail because this is a completely unworkable practice. This argument would require such exact testing and monitoring that there is no possible way this Court could create a standard to apply to all situations. Without such a proposal we are only left to speculate, but imagine a situation in which this Court allows such a practice to occur. The Court would need to set an arbitrary testosterone level, one which would require extensive scientific research, briefing, and consultation, and then would also require these students to regularly test to maintain membership in this class. For so many reasons this is wrong and unworkable. This Court should not even consider this argument because of the sheer

impossibility of implementing such a standard that will no doubt invite several constitutional challenges.

Additionally, allowing such a sub-division would include other biological men who do not wish to participate in women's sports, but on the basis of testosterone or puberty, would be permitted to. Petitioner surely would not recommend that we treat some biological men with the same testosterone differently, as this would be nearly impossible to argue that biological men with the same testosterone levels of other men are not similarly situated.

But giving Petitioner the benefit of the doubt—because this would be an even worse Equal Protection violation than the one outlined above—we are then left with the scenario in which all biological men under a certain threshold can participate in women's sports. Is this the standard the Court wants to uphold? The Court would likely need to allow any pre-pubescent or lower testosterone male to join any team they want since Petitioner's argument is premised on the idea that testosterone is the only contributing factor to athletic advantage. Then the Court would fall right into the same violation that has been discussed in previous sections. Men and women are different, it is imperative that equal opportunities are available for women, and it is fine to deny men access to them. However, establishing this blanket testosterone threshold for all men would completely destroy young women's opportunities.

3. This is not a situation in which a sub-division is necessary to give equal opportunity as there are already male teams in the sports Petitioner seeks to join.

As hinted at in the previous section, this is not a case or situation which requires equal protection or sub-division because the opportunity Petitioner is seeking is already available through biological male teams.

The Fourth Circuit in a case nearly identical to this one raised the concern that we agree may be valid in a different case: that equal protection is especially important in instances where an opportunity is had by a different class but not the other. *B.P.J.*, 98 F.4th at 560 (4th Cir. 2024). They also cited an example from this Court, *Mississippi Univ. for Women v. Hogan*, in which Mississippi's ban on allowing men to attend an all-girl nursing school was stricken down under the Equal Protection Clause. 458 U.S. 718, 731 (1982). When Mississippi attempted to justify its discriminatory act, its sole argument was to protect women's opportunities. *Id*. The Court rejected that argument on the grounds that such discrimination was no longer necessary because Mississippi could not show that "women [were] deprived of such opportunities [anymore]." *Id.* at 729.

Applying that logic here, to justify such a classification, Petitioner would need to argue that they are being deprived of their only opportunity to play their sport. But they have not done this. The sports Petitioner wishes to play are typically offered by both men's and women's teams. Further, they have the opportunity to play on the male team. Equal protection here is not an issue.

We now ask this Court to consider again *U.S. v. Virginia*, in which this Court struck down a ban on female enrollment at the sole military academy. In that case, the only opportunity to join a military academy was at VMI, but the state's restrictions prevented it. The Court acknowledged the unfair opportunity and found such a law unconstitutional.

That is not what is happening here. There is not one opportunity for Petitioner to play this sport; they already have the opportunity to play their sport, they are just seeking to join a new team. The Equal Protection Clause is unconcerned with such a problem and this Court should not give any weight to an argument seeking to strike down a statute to give a member of a class an opportunity they already have.

CONCLUSION

For the foregoing reasons, this Court should affirm the ruling of the Court of Appeals for the Fourteenth Circuit, granting the Respondent's Motion for Summary Judgment.

Respectfully submitted,

Counsel for Respondents

APPENDIX

U.S. Const. amend. XIV, § 1.

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

20 U.S.C. § 1681 – Sex

(a)Prohibition against discrimination; exceptions

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, except that:

20 U.S.C. § 1686 - Interpretation with respect to living facilities

Notwithstanding anything to the contrary contained in this chapter, nothing contained herein shall be construed to prohibit any educational institution receiving funds under this Act, from maintaining separate living facilities for the different sexes.

34 C.F.R. § 106.33 - Comparable facilities.

A recipient may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex.

34 C.F.R. § 106.41 - Athletics.

(a) ***General***. No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient, and no recipient shall provide any such athletics separately on such basis.

(b) ***Separate teams***. Notwithstanding the requirements of paragraph (a) of this section, a recipient may operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport. 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. For the purposes of this part, contact sports include boxing, wrestling, rugby, ice hockey, football, basketball and other sports the purpose or major activity of which involves bodily contact.

42 U.S.C. § 2000e-2 - Unlawful employment practices

(a) Employer practices

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.