

No. 24-2020

THE SUPREME COURT OF THE UNITED STATES

A.J.T.,

Petitioner,

v.

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

Respondents.

BRIEF FOR RESPONDENTS

QUESTIONS PRESENTED

1. Whether North Greene's use of sex-classifications based on one's biological sex in the SWSA, violates the Equal Protection Clause of the 14th Amendment of the United States Constitution.
2. Whether North Greene's use of sex-classifications based on one's biological sex in the SWSA, violates Title IX.

TABLE OF CONTENTS

QUESTIONS PRESENTED ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES..... v

OPINIONS BELOW..... 1

STATEMENT OF THE CASE..... 1

 A. Statement of Facts 1

 B. Procedural History 2

STANDARD OF REVIEW..... 3

SUMMARY OF ARGUMENT..... 3

ARGUMENT 5

**I. THE SWSA, WHICH SEPARATES BOYS’ AND GIRLS’ SPORTS TEAMS
 BASED ON BIOLOGICAL SEX DOES NOT VIOLATE THE EQUAL PROTECTION
 CLAUSE.**..... 5

 A. The SWSA Uses A Sex-Based Classification And Is Subject To Intermediate Scrutiny. 6

 1. *The SWSA Does Not Discriminate on the Basis of Transgender Status, but Rather
 Makes a Distinction Based on Biological Sex.* 6

 2. *Transgender Girls Are Similarly Situated to Biological Boys, Not Biological Girls.*..... 8

 3. *The SWSA Treats Similarly Situated Individuals, Biological Boys, Alike.* 10

 B. Even if the Court Finds That Similarly Situated Individuals Are Treated Differently
 Under the Statute, the SWSA Survives Intermediate Scrutiny..... 10

 1. *Providing Equal Athletic Opportunities to and Protecting the Safety of Female Athletes
 is an Indisputably Important Governmental Interest.*..... 11

2. The Disputed Definitions Set Forth in The SWSA are Substantially Related to The Important Governmental Interest of Protecting The Safety of And Providing Equal Opportunities To Female Athletes 12

II. A STATUE, LIKE THE SWSA, DESIGATING SINGLE SEX SPORTS TEAMS IS NOT A VIOLATION OF TITLE IX DUE TO THE STATUTORY DEFINITION OF SEX AND THE IMPORTANCE OF SEX SEPARATION FOR MAINTAINING COMPETITIVE FAIRNESS...... 16

A. Volleyball and Cross Country are Unlikely to be Considered Contact Sports therefore the Contact Sports Justification for Teams Separated by Sex is Inapplicable Here. 18

B. The Biological Differences Between Biological Males and Females Demonstrates that the Disparity in Competitive Skill Between the Two and Justifies Teams Separated by Sex Under Title IX. 18

C. The Integrity of Women’s Sports Must be Upheld due to Previously Excluded Opportunities and the Purpose of Title IX..... 24

CONCLUSION 25

TABLE OF AUTHORITIES

Cases:

Adams by and through Kasper v. Sch. Bd. of St. Johns Cnty., 57 F.4th 791 (11th Cir. 2022),*passim*

Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995).....14

B.P.J. by Jackson v. West Virginia State Board of Education, 98 F.4th 542 (2024).....19

Bostock v. Clayton County, Georgia, 590 U.S. 620(2020).....7, 8, 19

Craig v. Boren, 439 U.S. 190 (1976).....6, 11, 12

Davis Next Friend LaShonda D. v. Monroe Cnty. Bd. of Educ., 526 U.S. 629 (1999).....8

Grimm v. Gloucester County School Board, 972 F.3d 586 (2021).....2, 10, 17

Maulding Dev., LLC v City of Springfield 453 F.3d 967 (7th App, 2006).....8

Peltier v. Charter Day School, Inc., 37 F.4th 104 (2022).....23

Reed v. Reed, 404 U.S. 71 (1971).....*passim*

Rostker v. Goldberg, 453 U.S. 57 (1981).....6

Williams v. School Dist. of Bethlehem, Pa., 998 F.2d 168 (1993).....18

Statutes:

20 U.S.C. §1681(a).....17

34 C.F.R. §106.41(b).....*passim*

Other Authorities:

Hannah Shoenbaum, *North Carolina House Approves Ban On Transgender Athletes*.....15

Hunter et al., *The Biological Basis of Sex Differences in Athletic Performance: Consensus Statement for the American College of Sports Medicine, Medicine & Science in Sports & Exercise* (2023).....21

The Biological Basis of Sex Differences in Athletic Performance: Consensus Statement for the American College of Sports Medicine, Medicine & Science in Sports & Exercise (2023).....21

Regulations:

44 Fed. Reg. at 71, 417-18.....20

Constitutional Provisions:

U.S. Const. Amend. XIV §1, cl. 4.....5

U.S. Const. Art. 1, §8.....23

OPINIONS BELOW

The opinion of the District Court's is reported as *A.J.T. v. State of North Greene Board of Ed.*, 2023 WL 56789 (E.D. N. Greene 2023). The opinion of the United States Court of Appeals is reported as *A.J.T. v. State of North Greene Board of Ed.*, 2024 WL 98765 (14th Cir. 2024).

STATEMENT OF THE CASE

A. Statement of Facts

On May 1st, 2023, North Greene Governor Howard Sprague ("Sprague") signed Senate Bill 2750, otherwise known as the "Save Women's Sports Act," ("the SWSA") into law.¹ *A.J.T. v. State of North Greene Board of Ed.*, 2024 WL 98765 (14th Cir. 2024). The SWSA was enacted to celebrate the "inherent differences between biological males and females" by distinguishing sports events and teams between males and females² to promote "equal athletic opportunities for the female sex" and to protect the "physical safety of female athletes when competing." *Id.* at 4.

It is uncontested that "biological sex" is entirely different from "gender identity," the SWSA requires that any team or athletic sport that is "sponsored by any public secondary school or state institution" must be classified as either (a) male, (b) female or (c) coed/mixed. *Id.* The SWSA further explains that once those teams are created and classified, they must not accept individuals who do not fit in those categories. *Id.* With respect to female teams, the SWSA aims to protect female athletic teams by explaining that those teams are not "open to students of the male sex" because they are based upon "competitive skill" or whether the team is a contact sport. *Id.*

¹ The statute has been codified as North Greene Code §22-3-4 ("NGC §22-3-4). *See A.J.T. v. State of North Greene Board of Ed.*, 2024 WL 98765 (14th Cir. 2024).

² The State of North Greene ("The State") has defined "Female" in NGC §22-3-4(2) as "referring to one's biological sex at birth as female and used within the statute as such" and "Male" in NGC §22-3-4(3) as "meaning one's biological sex at birth as male as used within the statute as such." The State has also supplied a definition of "Biological Sex" in NGC §22-3-4(1) as "(Biological sex) which is solely based on the 'individual's physical form' and 'reproductive biology' as male or female at birth"

Petitioner A.J.T. (“Petitioner”), is eleven years old and identifies as a transgender³ girl. She was recently denied from joining her school’s seventh grade girls’ volleyball and cross-country team because of the SWSA.⁴ *Id.* at 3. Petitioner was born male but has identified as a girl from a young age, and until the third grade, Petitioner identified publicly as a boy but privately identified as a girl at home. After publicly identifying as a girl in the third grade but before the enactment of the SWSA, Petitioner was allowed to participate in her elementary school girl’s cheerleading team. *Id.*

Going through these multiple transitions, in 2022, Petitioner was diagnosed with gender dysphoria, began counseling and has considered other solutions for Petitioner’s diagnosis. *Id.* Some of these solutions included puberty delaying treatment to prevent “endogenous puberty” and any “physiological changes caused by increased testosterone.”⁵ *Id.* As the average age of puberty for males begins at age twelve, eleven-year-old Petitioner has not begun any of these puberty delaying treatments. *Id.* Furthermore, nothing has been provided by the Petitioner to show that there have been any changes in treatment, and therefore, Petitioner’s biological sex remains male. *Id.*

B. Procedural History

Petitioner commenced this action by filing a summons and complaint through her mother against the State of North Greene Board of Education and State Superintendent, Floyd Lawson.

³ The term “transgender” is used to “describe groups of people who transcend conventional expectations of gender identity or expression,” meaning that they do not identify as their biological sex. *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 596 (4th Cir. 2020) (quoting PFLAG, *PFLAG National Glossary of Terms* (July 2019), <http://pflag.org/glossary>).

⁴ For the purposes of this brief, The State will refer to the Petitioner with her preferred pronouns of “she/her/hers.”

⁵ An expert witness provided the testimony regarding treatments for gender dysmorphia. *A.J.T. v. State of North Greene Board of Ed.*, 2024 WL 98765 (14th Cir. 2024).

Id. at 4. Petitioner contends that NGC §22-3-4 violates Title IX and the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. As The State was not a party, they moved to intervene. *Id.* Petitioner amended the complaint to identify the respondents as The State and the Attorney General, Barney Fife (Collectively referred to as “The State”). *Id.* at 5. Following Petitioner’s amendment, Petitioner sought a declaratory judgment for the North Greene Act’s alleged violation and an injunction preventing The State from enforcing the law on Petitioner. *Id.* In opposition of Petitioner’s claim for injunction, The State subsequently filed a motion for summary judgment which was granted by the District Court. *Id.* (citing the District Court’s opinion at *A.J.T. v. State of North Greene Board of Ed*, 2023 WL 56789 (E.D. N. Greene 2023)).

Following the District Court’s Decision, Petitioner appealed this case alleging that the SWSA prohibits “transgender girls from participating in sports consistent with their gender identity” and thus suffices for a violation of Title IX and the Equal Protection Clause of the Fourteenth Amendment. *Id.*

STANDARD OF REVIEW

Considering all facts and exercising no deference on the lower court’s decision, this case is reviewed *de novo*. *Bostic v. Schaefer*, 760 F.3d 352, 370 (4th Cir. 2014).

SUMMARY OF ARGUMENT

The SWSA is constitutional under the Equal Protection Clause because it contains a sex-based classification that withstands intermediate scrutiny. While the SWSA makes a facially sex-based distinction based on biological sex assigned at birth, the SWSA meets the demands that intermediate scrutiny requires. First, to determine if a sex-based classification is discriminatory, it must treat those similarly situated in all relevant aspects alike. Transgender girls and cisgender boys are similarly situated for the purposes of the statute, based on their physiological composition and sex assigned at birth. Because the SWSA designates based on biological sex, the only

characteristic in dispute is a student's biological sex. Further, the SWSA enables *all* students to play on a school sports team, therefore similarly situated individuals are treated alike under the law.

Next, the State will demonstrate that the SWSA serves a sufficiently important governmental interest in protecting the safety of female athletes and promoting equal opportunities in sports for female athletes; and that the definitions of the law are substantially related to achieving these interests. It is without dispute that the State's rationale is an important governmental interest, and the SWSA's parameters serve as a legitimate proxy for meeting the goals set out by the State. As such, the SWSA withstands intermediate scrutiny, and is constitutional under the Equal Protection Clause.

Additionally, in identifying whether the SWSA passes constitutional muster and survives intermediate scrutiny, the question is whether the State's use of a sex classification within the SWSA furthers an important governmental interest. It is concluded that not only are both protecting the safety of female athletes and providing equal opportunities for female athletes important governmental interests, but the sex-based classification in the SWSA directly advances that interest. Therefore, even if the court finds that similarly situated individuals are treated differently under the statute, the SWSA survives intermediate scrutiny because North Greene's use of a sex classification advances an indisputable governmental interest.

Second, the separation of sexes for the purposes of athletic teams is not a violation of Title IX because of the express language of the statute permitting separate sex teams for certain instances. While volleyball and cross country may not classify as contact sports, the significance of competitive skill for these sports and the biological differences among biological men and women justify the separation of the sexes to prevent unjust competitive advantage and uphold

fairness. Therefore, North Greene’s interpretation of “sex” as biological sex for the purposes of designating players on each team is in compliance with the language and fundamental purpose of Title IX.

ARGUMENT

I. THE SWSA, WHICH SEPARATES BOYS’ AND GIRLS’ SPORTS TEAMS BASED ON BIOLOGICAL SEX DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE.

The Equal Protection Clause (“EPC”) is incorporated to the states by the Fourteenth Amendment. The EPC provides that no state may deny any person within its jurisdiction equal protection of the laws. U.S. Const. Amend. XIV, §1, cl. 4. At its inception, this provision was intended to ensure equality among the races; yet in practice, states have historically been permitted to pass laws that may discriminate based on a protected characteristic, so long as the State can withstand a Court’s review under the appropriate scrutiny. In essence, the EPC allows for a state’s classification of people if the classification is not “wholly unrelated to the objective of that statute.” *City of Cleburne, Tex., v. Cleburne Living Ctr.*, 453 U.S. 432 (1985).

The EPC has historically stood for the proposition that all similarly situated people must be treated alike under the law, recognizing that there are some inherent differences among varying classes of people. *Cleburne*, 473 U.S. at 433; *see also Rostker v. Goldberg*, 453 U.S. 57 (1981). The core requisite that all laws apply equally to all races has been applied in practice to those sharing similar, relevant characteristics in the context of the law. Of course, the State does not advocate for the institutionalization of discriminatory practices, but to protect its citizens and promote their welfare effectively, the EPC permits government actions that distinguish among classes for the sake of advancing productive governance. As such, this Court has held that where a state seeks to treat people similarly situated differently, the legislation must be substantially related to the object of the legislation so that all similarly situated people are treated alike. *A.J.T.*

v. North Greene Bd. Of Educ., 2024 WL 98765 (14th Cir. 2024). As emphasized by the 14th Circuit’s majority, the matter at issue is not to judge the “wisdom” behind North Greene’s Save Women’s Sports Act (“SWSA”). *Id.* at 6. Rather, this Court must determine whether the EPC permits the State to pass this law.

A. The SWSA Uses A Sex-Based Classification And Is Subject To Intermediate Scrutiny.

The applicable standard of review here is intermediate scrutiny, because the SWSA separates student athletes based on their biological sex, which is a quasi-suspect classification. *Craig v. Boren*, 429 U.S. 190, 192 (1976). Under intermediate scrutiny, a sex-based classification must serve an important state interest and be substantially related to that interest. *United States v. Virginia*, 518 U.S. 515 (1996).

1. *The SWSA Does Not Discriminate on the Basis of Transgender Status, but Rather Makes a Distinction Based on Biological Sex.*

At the top of this inquiry, it is crucial the Court recognize that there are material differences between sex and gender. *Virginia*, at 532. The State recognizes that there is substantial overlap between the two characteristics; inextricably, sex oftentimes frames gender identity. However, in reviewing the SWSA’s constitutionality under the EPC, it cannot be disputed that sex is an immutable and explicitly protected characteristic, while gender identity is fluid, and can change over time. *Adams by and through Kasper v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 798 (11th Cir. 2022). Similarly, transgender status is also fluid, but not immutable. Thus, sex and transgender status are distinct for the purposes of this case.

In the context of the SWSA, biological sex is treated as what it is, an immutable characteristic. Allowing for a distinction based on a fluid characteristic like gender identity or transgender status weakens the force of the EPC and provides for a host of issues when identifying

a basis for discrimination. To avoid this, the state opted to categorize sports team membership based on biological sex assigned at birth.

Further, the Petitioner in this case has not undergone any hormone treatments to prevent puberty. Biologically, Plaintiff is a boy based on their sex assigned at birth. To counter this fact, Plaintiff will surely rely on *Bostock v. Clayton County*, where this court held that a person discharged from a job based on their transgender status is unconstitutional discrimination on the basis of sex, thus broadening the protected class of “sex” to include “transgender status.” 590 U.S. 644 (2020). While this expansion has been recognized in the context of Title VII claims, this Court has expressly noted that the employment decision in this case does not extend to issues of school policy. “Under Title VII, ... we do not purport to address bathrooms, locker rooms, or anything else of the kind. The only question before us is whether an employer who fires someone simply for being homosexual or transgender has discharged or otherwise discriminated against that individual ‘because of such individual's sex.’” 590 U.S. 644, 681 (2020). This decision is too far distinguishable from the present case—this is a school, not a workplace, at issue. *Davis Next Friend LaShonda D. v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 651 (1999) (holding that the Court “must bear in mind that schools are unlike the adult workplace”).

It is wholly erroneous to view the SWSA as effectively “banning” transgender girls from competing in school sports, while allowing cisgender girls to play. Rather, the SWSA applies to all students, regardless of their gender identity. A student who identifies as a transgender girl may still participate in school sports with other students who are similarly situated. N.G. Code §22-3-16(c). Here, Petitioner seeks to play sports with cisgender girls, to which she is not similarly situated to, and poses a risk to the safety of female athletes and ultimately prevent equal opportunities in sports for female athletes. The Petitioner ignores that the sex-based classification

at issue applies to all individuals seeking to play school sports and aims to make a broad overgeneralization that the law “bans” their participation on a sports team. Transgender students are not prohibited from playing school sports under the SWSA.

2. *Transgender Girls Are Similarly Situated to Biological Boys, Not Biological Girls.*

When a state action that implements a sex-based classification on its face is challenged, courts must look to whether the distinction treats similarly situated people differently in the context of the law’s objective. A claimant bears this burden to identify people materially “identical” to them in all relevant aspects. *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992). If they can make this showing, the claimant must next show that the law “explicitly distinguishes between individuals on protected grounds.” *Shaw v. Reno*, 509 U.S. 630, 642 (1993); *Reed v. Reed*, 404 U.S. 71, 73 (1971); see *Maulding Dev., LLC v City of Springfield* 453 F.3d 967 (7th App, 2006) (“The courts have imposed on plaintiffs a ‘high burden’ in establishing someone who is similarly situated in equal protection cases. To be considered ‘similarly situated,’ comparators must be prima facie identical in all relevant respects”). The requisite showing is purposefully expansive, because a policy can make a facially sex-based classification “without unlawfully discriminating on the basis of transgender status.” *Adams*, 57 F.4th 791, 809; see *Nguyen v. INS*, 208 F.3d 528 (5th Cir. 2000).

Plaintiff contends that the SWSA is facially discriminatory because transgender girls are similarly situated to biological girls, and not biological boys. While the State does not dispute that there are some very similar characteristics between transgender girls and cisgender girls, the only relevant and defining characteristic in the SWSA is biological sex. The SWSA alternatively focuses on the scientific and biological makeup of individuals. The law does not include the terms “gender,” gender identity,” or “transgender status,” but rather bases its classifications on biological sex at birth. N.G. Code §22-3-15(a)(1)-(3). To sustain their claim, Petitioner would have to have

first shown that transgender girls are *treated differently* from someone who is prima facie identical in all relevant aspects. *Purze v. Winthrop Harbor*, 286 F.3d 452, 455. The inquiry must then continue to determine what the statute’s “relevant aspects” are. *See Adams* 57 F.4th 791,804 n.6 (citing *Cleburne*, at 439). In *Adams*, the 11th Circuit identified biological sex as “relevant respect...with respect to which persons must be ‘similarly situated.’” *Adams*, 57 F.4th 791 (upholding a school policy requiring students to use bathrooms aligning with their biological sex as permissible under the EPC, finding that the only material characteristic at issue was ‘biological sex’).

The SWSA treats people who are alike in all relevant aspects equally. *Nordlinger*; 505 U.S. 1, 10. The SWSA provides that all participants in any team sports “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.” NG Code 22-3-16(a). It is overwhelmingly clear that this SWSA provides a designation for every student, and simply separates them based on biological makeup.

There are inherent differences in the physiological makeup of school-aged girls and boys that impact both the safety of and opportunities for young female athletes. *Virginia*, 518 U.S. at 541. Namely, differences in testosterone levels provide a reasonable rationale for separating teams based on physiology, and not the identity, of students. Transgender girls who are not taking any sort of puberty-enhancing medication or any other alternative solutions, do not develop the same as cisgender girls. *Clark ex rel. Clark v. Arizona Interscholastic Ass’n (Clark I)*, 695 F.2d 1126 (9th Cir. 1982). To the contrary, their bodies develop at the rate and speed of cisgender boys. Based on this critical distinction, biological sex is the only relevant classification at issue, rendering transgender girls similarly situated to biological boys.

3. *The SWSA Treats Similarly Situated Individuals, Biological Boys, Alike.*

Having established this distinction, the Court must next decide if the law applies to similarly situated biological boys differently. *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 606 (4th Cir. 2020). All biologically male students are prohibited from playing on a biologically-female-designated team. While it is true that the law prohibits transgender girls from playing on a female team, the law also prohibits all cisgender boys and nonbinary individuals (who are biologically male but do not identify with one gender) from playing on a female team. There are clear, equal limitations on a cisgender male students and transgender female students. For example, say Student A is a 12-year-old, biological male hoping to join the girls' cross-country team at his school, so he can compete in meets with his best friends, who happen to all be biological girls. Student A naturally feels more comfortable around girls and is fearful that he won't "click" with a boys' team. Although Student A may be part of the same social circles, have the same interests and in general identify more with cis-gender girls, Student A, like the Petitioner, is not similarly situated because they are still developing at the rate of a cisgender boy. Correspondingly, here, Petitioner is similarly situated to a cisgender boy based on their biological makeup because they are not taking any gender enhancing drugs to prevent the natural course of male puberty or testosterone development.

In essence, permitting Petitioner to play on the girls' volleyball team and cross-country team would be the same as allowing a cisgender boy to play on these teams, which would threaten the very nature of what the SWSA intends to protect. When boiling the SWSA down to its core, it applies equally to all students based on their biological sex. Because the SWSA applies equally to students of all sex's it cannot be deemed as a violation of the EPC.

B. Even if the Court Finds That Similarly Situated Individuals Are Treated Differently Under the Statute, the SWSA Survives Intermediate Scrutiny.

The SWSA makes a sex-based classification and is thus subject to intermediate scrutiny. To meet constitutional muster under this level of scrutiny, the State must show that the law: (1) serves an important governmental objective which is (2) substantially related to the achievement of that objective. *U.S. v. Virginia*, 518 U.S. 515, 516 (1996). The State makes a convincing showing that the SWSA provisions are substantially related to protecting the safety and ensuring equal opportunities of female athletes, which is indisputably an important government interest. *Id.*

1. Providing Equal Athletic Opportunities to and Protecting the Safety of Female Athletes is an Indisputably Important Governmental Interest.

For a state to demonstrate an “important” governmental interest, the interest must be “genuine, actual, and not hypothesized” or invented to rationalize in response to litigation. *Id.* In its formulation, the law “must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females.” *Id.*

In *Craig v Boren*, the Court warned that “loose-fitting generalities” are unconvincing means of justification for enacting a sex-based classification. 429 U.S. 190 (1976) (Holding that the government’s purpose of protecting the safety of the general public and young persons by specifically limiting males and females of a certain age to purchase a specific type of beer is an important governmental interest). Here, the Court identified both promoting general welfare and the “safety of young persons” as a sufficiently important interest, satisfying the first prong of intermediate scrutiny. The classification failed on the second prong, because sex did not represent a “legitimate, accurate proxy for the regulation.” *Craig*, 429 U.S. 190 (1976).

Comparing the interests in *Craig* to the stated interests by the government in *Reed v. Reed*, the court found that the purposes of administrative ease and avoiding intrafamily controversy were

“of insufficient importance to sustain use of an overt gender criterion” in appointing an estate’s administrator. *Id.* at 77; *Reed*, 404 U.S. 71 (1971).

In the present case, both parties recognize that protecting female athletes and providing equal opportunities in sports is an important governmental interest. Although this point is uncontested, the State highlights precedent bolstering this conclusion. In *Craig*, the safety of youth and promotion of general welfare were deemed to be achievable interests within the State’s police powers; and this finding legitimizes North Greene’s parallel interests in protecting the safety of and ensuring equal opportunities for female student athletes. 429 U.S. 190 (1976).

Additionally, the State’s interest here can be distinguished from the one set forth in *Reed* because a classification must be “reasonable, not arbitrary.” 404 U.S. 71, 76 (1971). The interests in easing the burden of administrative duties is undoubtedly arbitrary, and serves no meaningful purpose to those benefitted by the classification. However, the same cannot be said for protecting the safety of young, female athletes and promoting equal opportunities for females in sports. The State in this case can easily articulate two important benefits to a specific group (female athletes) by enacting a sex-based classification, whereas the State in *Reed* was unable to demonstrate the importance of lessening an administration’s workload. *Id.*

Further, the court in *United States v. Virginia* recognized compensation of women for previously suffering “economic disabilities” and advancing “full development of the talent and capacities of our nation’s people” as important interests furthered by a sex-based classification. *Virginia*, 518 U.S. 515. Although the statute at issue was ultimately struck down on the failure of the second prong, this Court recognized that protection of a female’s financial well-being was sufficiently important. As such, it should follow that the protection of a female’s physical well-being is just as, if not more important. The SWSA sets out to regulate only contact sports and those

requiring competitive skill, thus focusing its interests to sports that could reasonably impact the safety of female athletes. In doing so, the SWSA provides for the protection of these interests.

2. *The Disputed Definitions Set Forth in The SWSA are Substantially Related to The Important Governmental Interest of Protecting the Safety of And Providing Equal Opportunities To Female Athletes.*

The government's objective to providing equal opportunity and protecting the safety of female athletes substantially related to the legislation enforced by the State. Further, the by using sex-based classifications and providing definitions of "biological sex," "male," and "female," the government advances their interest in protecting female athletes and providing them with equal opportunities in athletics.

To satisfy the second prong of intermediate scrutiny, the statute in question must have a "close and substantial bearing on the government's objective" and should not be "substantially broader than necessary to achieve the government's interest." *Nguyen*, 533 U.S. at 70. Rather, this relation between the means used and objective must be "reasonable" instead of a "perfect" fit. *Id.* Therefore, the sex classification can survive intermediate scrutiny if "in the aggregate" it advances the government's interest. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995). Confirming that providing equal opportunities for female athletes and protecting their safety in athletic environments is an important governmental objective, we must turn to assess whether the latter objective is substantially related to the sex classifications used within the act.

In *Adams*, the Court found the important governmental interest of protecting the privacy of students in a place where students are "most vulnerable" to be "almost a mirror of" and substantially related to the School Board's policy enforcing same sex bathrooms because of the policy's language of separating bathrooms based on biological sex. 57 F.4th 791, 805 (11th Cir. 2022). Further, the court noted that because the policy did not specifically discriminate against

transgender students but used a sex-classification in connection to protecting the privacy of students, the School Board exercised the least restrictive means as it was their only option to advance their interest. *Id.*

Additionally, the Court in *United States v. Virginia* reasons that although there are “inherent differences” between men and women which are a cause to celebrate, the classification cannot be used for the “denigration of the members of either sex or for artificial constraints” on their opportunities. *Virginia*, 518 U.S. 515.

Transgender girls’ participation in girls’ sports highlights serious risks to safety and has diminished athletic opportunities for females. The SWSA purposefully designated sports team participation based on biological sex in light of protecting these interests. Separating students based on their biological sex is the only meaningful way to achieve the State’s interests and ensure that no one student has an unfair physiological advantage over their peers.

First, the use of sex-based classifications is substantially related to the governmental interest of protecting female athletes because of the different physiological composition of males compared to females. Especially in contact sports, allowing a transgender girl whose biological sex is male and has different strength capacities, places women in extremely vulnerable positions, making them susceptible to numerous injuries. For example, here in North Carolina, Payton McNabb, a high-school senior and member of her girls’ high school volleyball team, recently suffered from long term concussion symptoms and severe head and neck injuries after a transgender girl spiked a volleyball in her face during one of her matches.⁶ Due to the transgender girl’s male composition such as their height, weight, and strength, McNabb states that this injury

⁶ Hannah Schoenbaum, *North Carolina House Approves Ban On Transgender Athletes*, ASSOC.PRESS, Apr. 19, <https://apnews.com/article/transgender-sports-ban-north-carolina-e09882f3f3e2ace72de2004d2f438a7e>

has left her impaired, leaving her unable to play for the rest of her senior season and forcing her to receive learning accommodations at school because of her chronic headaches, learning disabilities and visual impairments post injury.⁷ Clearly, in relation to this frightening account and similar to the court's reasoning in *Adams*, a volleyball court or other like-minded contact sport most definitely leaves females in a vulnerable position if biological males are permitted to play on a female oriented athletic team. By using a sex-based classification and eliminating the possibility of a transgender girl to play on an only female team, it significantly increases the risk of injuries to female athletes and is related to the goal of protecting their safety. Additionally, in this case, we have no update as to whether eleven-year-old petitioner is taking puberty blocking treatments, so if the petitioner were to join the girls' volleyball team at Petitioner's school, there is a huge risk that Petitioner will undergo male puberty and develop strength to injure other females on the team or competing teams.

Further, by using this sex-based classification, it directly enhances the opportunity for females. Using the court's emphasis in *United States v. Virginia*, here the sex classification is directly affecting female athletes' opportunities to compete in sports. By using the sex classification and permitting teams based on biological sex, it is allowing women to compete in athletics where there is similar athletic compatibility. Whereas, if a biological male were to join a female oriented team, there would be differences in athletic compatibility and thus decreasing the opportunity for a biological female athlete to excel in athletics. Here, Petitioner, although identifying as a female, will proceed to grow as a male as the petitioner has not taken any puberty enhancing treatments. Therefore, if Petitioner were to join an all-female team, there would be an undeniable competitive advantage which would decrease the likelihood of biological females

⁷ *Id.*

excelling in sports. It even could deter female students from joining those teams. In the aggregate, the sex-based classification is not being used to denigrate women; rather, it is being used to advance the opportunities for women and allowing them to excel in athletics with an unreasonable competition, such as a biological male, like Petitioner, who about to endure puberty and develop testosterone levels exposing them to a competitive advantage over female athletes. Although it is a fact that women may be better athletes compared to men, it is undisputed that men do grow and develop differently compared to women which can subject women to possible injuries in athletic competitions as well as an unequal competitive opportunity.

Even so, the state is using the least restrictive means, which is analogous to the court's ruling in *Adams*, as the state is exercising one of their only options to provide equal opportunities for female athletes and protect their safety at the same time. For example, the statute does not discriminate transgender persons all together, rather the statute still allows those persons to compete on teams. For example, if a team is co-ed, petitioner can still play on those teams with girls and is not prohibited to play on all sports teams - petitioner can still compete with the boy's teams as well. By using the least restrictive means and still allowing the petitioner to participate in athletics, the sex-based classification is reasonable to enforce and showcases a substantial relation to the governmental interest.

II. A STATUTE, LIKE THE SWSA, DESIGNATING SINGLE SEX SPORTS TEAMS IS NOT A VIOLATION OF TITLE IX DUE TO THE STATUTORY DEFINITION OF SEX AND THE IMPORTANCE OF SEX SEPARATION FOR MAINTAINING COMPETITIVE FAIRNESS.

The express language of Title IX and the carveout of subsection 106.41(b) demonstrates that separating athletics teams based on biological sex is permitted to promote safety in contact sports and uphold competitive fairness. The SWSA and the North Greene School Board's

application of it does not violate Title IX because of the application of 34 C.F.R. § 106.41(b) in accordance with the State’s definition of biological sex does not discriminate based on sex. Title IX provides that “no person ... shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.” 20 U.S.C. § 1681(a). In order to have a Title IX violation, one must prove: that they have been excluded from an educational program on the basis of sex; that the educational institution was receiving federal financial assistance at the time; that “improper discrimination caused them harm. *Grimm v. Gloucester County School Board*, 972 F.3d 586, 616(4th Cir. 2020) (citing *Preston v. Va. ex rel. New River Cmty. Coll.*, 31 F.3d 203, 206 (4th Cir. 1994)).

It is undisputed that educational institutions at issue receive federal financial assistance and would therefore be subject to 34 C.F.R. § 106.41(b). To prove a violation of Title IX under this statute one must prove that there was an instance of improper discrimination by the federally funded educational institution and that this discrimination caused them harm.

34 C.F.R § 106.41(b) states that separate teams for members of each sex is appropriate for teams where it is based on competitive skill or the activity involved is a contact sport. The statute identifies contact sports as sports including boxing, wrestling, rugby, ice hockey, football, basketball, and other sports the purpose or major activity of which involves bodily contact. The statute also states that the opportunities for both “sexes” must be equal. The word “sex” here is instrumental and while the statute does not define “sex” the lack of inclusion of the words gender and gender identity point towards the likelihood that the correct interpretation of “sex” is to mean biological sex assigned at birth. However, the factors of whether the sport is a contact sport and

preserving fairness when considering the competitive skill aspect have been used to define what “sex” is referring to in the context of the statute.

A. Volleyball and Cross Country are Unlikely to be Considered Contact Sports therefore the Contact Sports Justification for Teams Separated by Sex is Inapplicable Here.

First, we must assess whether the sports at issue here, volleyball and cross country, would be considered contact sports. In the context of sports and Title IX, *Williams* defines a contact sport as a sport where the purpose or major activity involves bodily contact. *Williams v. School Dist. of Bethlehem, Pa.*, 998 F.2d 168, 174 (1993). The inclusion of the purpose or major activity language is significant because it means sports where physical contact is considered incidental would not be classified as a contact sport. *Id.* at 173. Here, cross country being a sport where individual competitors do not have significant physical interaction with the other competitors or teammates, this would not be considered a contact sport. *B.P.J. by Jackson v. West Virginia State Board of Education*, 98 F.4th 542, 559 (2024).

While volleyball can involve some physical contact with teammates, the contact would be incidental as a result of falls, accidents, or reaching for the ball simultaneously. Physical contact is not a major part or central to the sport and performance in the sport. As a result, volleyball would not be considered a contact sport. Therefore, the justification of contact sports would not be valid to in this instance uphold the separation of the sexes under Title IX.

B. The Biological Differences Between Biological Males and Females Demonstrates that the Disparity in Competitive Skill Between the Two and Justifies Teams Separated by Sex Under Title IX.

It would be inappropriate to apply the standard from *Bostock* in this case because Title IX contains a specific carveout for separating the sexes unlike Title VII. *Bostock v. Clayton County, Georgia*, 590 U.S. 644 (2020). In *Bostock*, the court declared that discrimination based on transgender status equates to discrimination based on sex in the context of a Title VII violation

because the transgender status as a gender identity is related to one's biological sex. *Id.* at 1760. This is not analogous to the Title IX application of discrimination based on sex because of the carveout which allows the sexes to be separated for the purposes of athletics based on the sport being a contact sport or the competitive nature of the sport creating a disparity among the biological sexes regarding performance. *Adams*, 57 F.4th at 811. This carveout demonstrates that the statute's definition of sex is not ambiguous and refers only to the biological sex of an individual. If the statute was ambiguous then it would be difficult to fathom why the drafters of Title IX went through the trouble of providing the express carveout of sex separated teams and the factors of contact sports and competitive skill which heavily rely on biological sex. *Id.* at 813. These carve outs would be rendered meaningless if the definition of "sex" under Title IX were to include gender identity. *Id.*

The distinction of the biological sexes in the context of *Bostock* involved unlawful action by employers' reliance on impermissible stereotypes. *Id.* The application of biological sex as the definition of "sex" in the context of Title IX is not based on stereotypes, it instead relies on biological differences that have a direct impact on the activity at issue. *Id.* at 810. Extending the definition of "sex" to gender identity would provide more protection against discrimination on the basis of transgender status. *Id.* At 813. Transgender persons already fit into the preexisting classifications under the statutory scheme and purpose of Title IX, and they are thus already protected under Title IX on the basis of sex. *Id.* at 814. Adding gender identity into the definition of "sex" would also prohibit future permissible biological sex-based carve outs that could be necessary to preserve the state's interest. *Id.*

For example, if a female student who does not identify as transgender were to sue the school under Title IX to be permitted to play in the boys league the Title IX carve out would plainly

provide the school with a safe harbor even though this would constitute separation on the basis of sex. *Id.* As a result, the State’s implementation of athletic teams separated by biological sex does not violate Title IX. “The touchstone of the regulation is to effectively accommodate the interests and abilities of male and female athletes so that individuals of each sex have the opportunity ‘to have competitive team schedules which equally reflect their abilities.’” 44 Fed. Reg. at 71, 417–18.

Here, the separation of individuals based on biological sex assigned at birth was not improper because as established by the equal protection issue, the separation of sexes in some instances is in the government’s best interests. The separation of the sexes aligns with the government’s interests and express statutory language of preserving fairness and safety in sports leagues of academic institutions that receive federal aid. To align with the government’s interests and the “competitive skill” factor from the statute, the interpretation of sex as biological sex assigned at birth is the most appropriate. This is because statistically those born as biological males on average have advanced athletic ability in areas such as strength and speed than those born as biological females. Research, including a study conducted by the National Institution of Health (NIH) has established that biological men and women have many physiological differences especially when it comes to sports abilities. Hunter et al., *The Biological Basis of Sex Differences in Athletic Performance: Consensus Statement for the American College of Sports Medicine, Medicine & Science in Sports & Exercise* (2023) (confirming that biological men statistically have physical advantages in areas such as these enhanced abilities not only provide a competitive advantage to biological men in sports but also pose a safety risk to those without these physical advantages, namely biological women). The differences in athletic performance between the sexes emerge when an individual undergoes puberty. This is because the increase sex hormones,

particularly testosterone in males, leads them on average to be faster and stronger than the average female in the same age range. Looking at the sport of cross country, the NIH conducted a study of various running events and the differences in performance between the sexes and found that there is a 9-12% difference between the times for males versus females, females being the slower among the two. Similarly, in the jumping events the study showed a 14-18% difference in the jump distances. *Id.* The court in *Adams* further supports this contention by highlighting that “it is neither a myth nor an outdated stereotype that there are inherent differences between those born male and those born female and that those born male including transgender women and girls, have physiological advantages in many sports.” *Adams*, 57 F.4th at 819.

There are also significant differences among the biological sexes in strength and anaerobic power. *Hunter et al.*, (2023) Biological males have increased strength capabilities because of the greater maximal limb torque which results from anatomical differences like longer limbs and a larger cross-sectional area which leads to more force. *Id.* Muscles in biological males also contract faster than they do in biological females which lead to biological females having slower rates of relaxation and more fatigue-resistant muscle. *Id.* These differences particularly affect the upper body which impact actions like throwing, an action involved in the sport of volleyball. The combination of male muscles being more contractible and ability to expel more force creates a competitive advantage for a sport like volleyball and would therefore justify separated teams based on biological sex rather than gender identity. Further the irregularities caused by the menstrual cycle and its impact on sex hormones in biological females further justifies the separation of athletic teams based on biological differences in order to uphold safety concerns and competitive integrity. These differences in physiology are exaggerated and become more evident when an individual undergoes puberty due to the increase in sex hormones, particularly testosterone in

biological males. The onset of puberty can vary but on average occurs at age 10 for biological girls and age 11.5 for biological boys. The enhanced athletic ability including grip-strength can be attributed to the increase in testosterone in biological boys which frequently emerges at ages 12-13. On the other hand, biological females see an increase in estrogen during adolescence and while estrogen is important in maintaining bone mass, neural functions, bone health, and immune function, it does not have the same anabolic effects of testosterone that dictates the large sex difference in athletic performance. *Id.* Post-pubescent males have demonstrated abilities to jump higher than females, throw further than females, run faster than females, and accelerate faster on average. *Adams*, 57 F.4th at 820.

To determine whether a student's participation "would adversely affect competitive equity or safety of teammates or opposing players" the student's "age, athletic experience, strength, size, speed, the nature of the sport, and the degree to which fair competition among high school teams would be impacted" should be considered. *B.P.J.*, 98 F.4th at 551. A.J.T., being a student reaching the age of puberty as a biological male, is more appropriately placed on the boys' team due to the physical advantages she would have throughout her time participating in these activities while undergoing the hormonal and physical changes of puberty. The potential complications of hormonal treatments are not at issue here so the determination on competitive fairness must be made on the objective standard of biological sex and the athletic abilities statistically shown to be associated with that sex. Both scientific research and the regulatory history and context of the Title IX statute demonstrate the drafters intended for "sex" for the purposes of athletic opportunities to refer to biological sex rather than gender identity.

In order to assess whether A.J.T. suffered harm including "emotional and dignitary harm" as a result of the challenged action and exclusion, the plaintiff is treated "worse" than similarly

situated individuals rather than assessing whether a whole group is treated generally less favorably. *Peltier v. Charter Day School, Inc.*, 37 F.4th 104, 157 (2022). In order to make this assessment it must be determined whether A.J.T would be considered similarly situated to players on the women's team since placement on the women's team is the alleged exclusion here. A.J.T. 's status as a biological male, she would not be considered similarly situated to the biological female players. She would instead be considered similarly situated to the biological male players and since she is permitted to play in the men's league there can be no exclusion since she is given the same opportunities as those similarly situated to her.

Even if the statute were unclear, the implication of the Spending Clause⁸ would show that the School Board's implementation of the SWSA would not be a violation of Title IX. Congress passed Title IX pursuant to its authority under the Spending Clause based on the idea that if Congress intends to impose a condition on the grant of federal monies, it must do so unambiguously. *Adams*, 57 F.4th at 815. Due to the Spending Clause requiring a clear-statement rule, the Board's interpretation of the separate teams based on sex would only violate Title IX if the meaning of "sex" unambiguously referred to something other than biological sex because the interpretation would go against the text of the statute and by extension Congress's wishes. *Id.* Since the School Board's application of the word "sex" is in line with the language drafted in the statute this would not be a violation of Title IX. Whether Title IX would be amended to include gender identity and transgender status with the classification of sex and sex discrimination is a question of Congress and not the courts. *Id.* At 816.

⁸ For the Courts reference, the Spending Clause states as follows: "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States." *U.S. Const. Art. I, § 8.*

C. The Integrity of Women's Sports Must be Upheld due to Previously Excluded Opportunities and the Purpose of Title IX.

Upon first impression it may seem that North Green's application of Title IX allowing transgender men to compete in the men's team versus the prohibition of transgender women competing in the women's league is unjust. However, this distinction is justified by the founding principles of Title IX and 34 C.F.R. § 106.41(b). Individuals that are members of a sex that was either previously excluded or face limitations from a particular athletic activity must be permitted to try out for the sports team of the opposite sex. *Williams*, 998 F.2d at 174. The court here defines "previously limited" to mean real opportunities not illusory ones. *Id.* at 175. For example, the court declared that the exclusion of a boy from a girls' volleyball team being impermissible because boy's opportunities have been limited in that sport to be considered moot. *Id.* at 174. This is because then boys would be able to claim that they were previously limited from competing in sports that are traditionally considered "women's" sports, and this exclusion principle was not meant to be applied to each "particular sport." *Id.* Instead, the "*Policy Interpretation*" notes that participation in intercollegiate sports has historically been emphasized for men but not women." *Id.* at 176. The *Interpretation* reflects concern over the effect of prior discrimination and how Title IX was developed with the purpose of taking affirmative steps to develop athletic programs that substantially expand the opportunity for women to compete at all levels. *Id.* This interest of expanding athletic opportunities for women further emphasizes the importance of maintaining competitive fairness and integrity by preventing biological men who have predisposed athletic advantages from competing in women's sports. Allowing transgender women who are biologically male to compete in women and girls' sports would not only go against the express language of the statute but it would undermine the integrity and equitable foundations that Title IX was created to uphold.

North Greene School Board's application of Title IX is not excluding individuals from participation in an educational program. Transgender women are still permitted to play and participate in the given activity, they are simply assigned a team based on their sex assigned at birth in accordance with 34 C.F.R. § 106.41(b). When considering the definition of sex for the purposes of sports leagues in public educational institutions, the law considers the definition of "sex" to mean biological sex assigned at birth and does not refer to gender identity as evidenced by the express language of the statute and the context in which it's applied.

CONCLUSION

Considering the above facts and using the proper analyses, the SWSA's sex-based classification and implementation is warranted to pursue the goal of protecting female athletes and providing competitive fairness and equal opportunity for female athletes. Therefore, it is encouraged that this court affirms the Court of Appeals holding, ruling that the SWSA's sex classification does not violate Title IX and the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.

Respectfully Submitted,
Attorneys for the Respondent