No. 24-2020

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 2024

A.J.T.,

Petitioner,

v.

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

Respondents.

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

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BRIEF FOR RESPONDENTS

Team 16
Counsel for Respondents
September 13, 2024

ISSUES PRESENTED

1. Does the Save Women's Sports Act comply with Title IX by separating sports teams on the basis of biological sex when the Act reflects Congress's intent and a student fails to show improper discrimination and harm?
2. Does the Save Women's Sports Act satisfy the Equal Protection Clause by circumscribing biological males' participation in female sports to protect women's equal opportunities and physical safety in athletics?

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The opinion of the United States District Court for the Eastern District of North Greene's opinion is reported in *A.J.T. v. North Greene Bd. of Educ.*, 2023 WL 56789, at *1 (E.D. N. Greene 2023). The Fourteenth Circuit's opinion is found in the record on appeal in *A.J.T. v. North Greene Bd. of Educ.*, No. 24-2020 (14th Cir. Oct. 15, 2023). Record 2–16.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions are provided in the appendix. App., *infra*, 1a–5a.

STATEMENT OF THE CASE

Statement of Facts

North Greene enacted the Save Women's Sports Act ("the Act") to ensure biological males' inherent physiological advantages do not impact women's safety or equal opportunities in sports. The Act limits the participation of A.J.T., a student identified as a male at birth. Historically, women, as compared to men, have experienced disadvantages in the competitive sports arena. *See McCormick ex rel. McCormick v. Sch. Dist. of Mamaroneck*, 370 F.3d 275, 295 (2d Cir. 2004). Congress enacted Title IX to help prevent discrimination against students "on the basis of sex." 20 U.S.C.

§ 1681 (2024). After the enactment of Title IX, women's participation in competitive sports sharply increased. *See* Charles L. Kennedy, *A New Frontier for Women's Sports (Beyond Title IX*), 27 GENDER ISSUES 78 (2010). However, inequalities in sports between males and females still exist.[1]

[1] Champion Women, *Discrimination Against Women in Collegiate Sports is Getting Worse*, Cal. Women's L. Ctr. (2020), https://www.cwlc.org/download/cwlc-initiative-ncaa-data-collection/?wpdmdl=8445&refresh=66da7a9bced8c1725594267&ind=1600626935712&filename=For-TY-email.pdf (explaining how data from all national schools shows that women still suffer inequalities in sports).

North Greene enacted the Save Women's Sports Act to "protect the physical safety of female athletes when competing" and "provide equal athletic opportunities for female athletes." Record 4. To further these objectives, the Act circumscribes the participation of biological males in female sports. *Id.* The Act defines biological sex as "an individual's physical form as a male or female based solely on the individual's reproductive biology and genetics at birth" and distinguishes gender identity from biological sex. *Id.* The Act also designates sports teams by female, male, and co-ed teams. *Id.* Biological males can join women's sports teams not "based upon competitive skill" or involving a "contact sport." *Id.*

A.J.T., an eleven-year-old student identified as male at birth, now identifies as a transgender girl and wants to join the females' volleyball and cross-country teams. Record 3. The Act limits A.J.T.'s participation because, under the statute, biological males cannot play on the same competitive teams as females. *Id.* at 4. Before reaching puberty, A.J.T., participated in all-female cheerleading activities as an elementary student. *Id.* at 3. According to A.J.T. 's expert, hormonal blockers or other puberty-delaying treatment would prevent the normal "physiological changes caused by increased testosterone circulation." *Id.* Now, effectively at the average age of puberty,[2] A.J.T. has yet to take any hormonal blockers or other puberty-delaying treatment. *Id.*

Procedural History

A.J.T. filed suit against the North Greene Board of Education and Floyd Lawson, the State Superintendent, alleging a Title IX and Equal Protection Clause violation. *Id.* at 4. The district court granted the State of North Greene's motion to intervene. *Id.* A.J.T. then amended the complaint, adding the State of North Greene and North Greene's Attorney General, Barney Fife,

[2] A.J.T. was eleven at the initiation of this lawsuit in 2023, and "[w]hile boys generally start puberty between the ages of 9 and 14, the average age is 12." Record 3, n.2.

as defendants. *Id.* at 4–5. All defendants filed a motion for summary judgment, which the district court granted. A.J.T. then appealed. *Id.* at 5.

The Fourteenth Circuit Court of Appeals took the appeal and heard oral arguments on October 15, 2023. *Id.* at 2. The Fourteenth Circuit affirmed the district court's grant of summary judgment for the defendants. *Id.* at 12. A.J.T. timely appealed to this Court, and the Court granted certiorari on both the Title IX and Equal Protection Clause questions. *Id.* at 17.

SUMMARY OF ARGUMENT

As the lower court correctly determined, both Title IX and the Equal Protection Clause permit reasonable classifications between non-similarly situated individuals, a long-standing precedent that A.J.T. attempts to redefine. This Court should affirm the Fourteenth Circuit's decision.

Title IX allows states to separate school sports teams based on biological sex. The history and construction of Title IX demonstrate its purpose: to prevent discrimination and ensure opportunities for women, including opportunities in sports. While Title IX generally prohibits sex discrimination, the text contains multiple exceptions that permit separating the sexes, and Congress's federal regulations allow sex-separated sports. Reflecting Congress's intent for Title IX, the Act separates sports teams by biological sex to ensure female-only teams for contact and competitive sports. Further, under the Fourth Circuit's *Grimm* test, the Act complies with Title IX for two reasons: The Act does not improperly exclude A.J.T. because gender identity is not sex, and (2) the Act does not improperly discriminate against or harm A.J.T. Title IX discrimination must be found "on the basis of sex," whereas Title VII utilizes a "but-for" causation under *Bostock v. Clayton County*. The Act does not exclude A.J.T. "on the basis of sex." Finally, A.J.T. has not

shown the requisite harm because A.J.T. has not alleged life-threatening mental health concerns or faced exclusion from *all* female sports teams.

The Equal Protection Clause permits sex-based classifications when the sexes are not similarly situated. The Act permissibly separates sports by biological sex because men possess inherent physiological advantages as compared to women from puberty and beyond. A.J.T., a biological male who has not taken puberty blockers, is similarly situated to biological males, not biological females. Also, the Act passes intermediate scrutiny. The Act's sex-based classifications satisfy the Equal Protection Clause because the State (1) has an important interest in protecting females' safety and equal opportunities in athletics, and (2) uses means substantially related to its interests by limiting the participation of biological males in female sports. The means used do not always need to produce perfect results. North Greene's statute only *limits* biological males from participating in female athletics. Biological males, like A.J.T., can freely join female sports teams in noncontact and non-competitive sports. Thus, the Act properly designates sports teams by biological sex and avoids intentional discrimination against transgender students.

Because the Act satisfies both Title IX and the Equal Protection Clause, this Court should affirm the Fourteenth Circuit's opinion.

ARGUMENT

Justice Ruth Bader Ginsberg's words still ring true today: "Inherent differences between men and women, [that] we have come to appreciate, remain cause for celebration." *United States v. Virginia*, 518 U.S. 515, 533 (1996) (quoting *Califano* v. *Webster*, 430 U.S. 313 (1977) (*per curiam*) (internal quotations omitted). Under the law, "[s]ex classifications may be used to compensate women" for their historical suffering and to advance equal opportunities. *Id.* The North Greene Save Women's Sports Act reflects these same principles: recognizing sex

distinctions and providing equal opportunities to safeguard "equal athletic opportunities for the female sex." N.G. Code § 22- 3-16(c).

The Fourteenth Circuit rightly found the Save Women's Sports Act lawful under Title IX and the Equal Protection Clause. This Court should affirm the Fourteenth Circuit's holding for two reasons. First, Title IX permits a state to separate sports teams by biological sex. The Act provides ways for all students to compete while properly distinguishing between the sexes. Second, the Act satisfies the Equal Protection Clause by protecting women's equal opportunities in sports and physical safety. The Act recognizes biological males are not similarly situated to biological females and passes an intermediate scrutiny standard of review.

I. TITLE IX PERMITS A STATE TO SEPARATE SPORTS TEAMS BY BIOLOGICAL SEX.

Senator Bayh, an author of Title IX, emphasized during the debate on Title IX that "one of the great failings of the American educational system is the continuation of corrosive and unjustified discrimination against women." *Kansas v. Dep't of Educ.*, No. 24-4041-JWB, 2024 WL 3273285, at *1 (D. Kan. July 2, 2024) (quoting 118 Cong. Rec. at 5,803). The purpose of Title IX is to "root out" the "pervasive discrimination against women with respect to educational opportunities." *Id.* (first quoting 118 Cong. Rec. at 5,804; then quoting *McCormick*, at 286).

When Congress enacted Title IX in 1972, only 294,015 high school girls competed in sports, whereas 3,333,917 boys competed. AMY WILSON, NCAA OFF. OF INC. & NCAA RSCH, NCAA TITLE IX 50TH ANNIVERSARY: THE STATE OF WOMEN IN COLLEGE SPORTS 15 (2022). Today, the rate of girls participating in high school sports has increased by "more than 1,000 percent." *Id.* Yet, female participation in sports still has not surpassed that of males in 1972. *Id*. States need the ability to protect Title IX's purpose–increasing and protecting female participation in athletics.

North Greene adheres to Title IX's purpose through the Save Women's Sports Act.[3] Congress enacted Title IX on the basis of one characteristic: "sex." 20 U.S.C. § 1681(a) (2024). Title IX permits sex-based teams for two reasons. First, the Act adheres to Title IX and its corresponding regulations by separating teams "on the basis of sex." Second, the Act satisfies the *Grimm* test.

A statute's construction helps determine its meaning. Under Title IX, "[n]o person . . . shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). "A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their *ordinary, contemporary, common* meaning." *Perrin v. United States*, 444 U.S. 37, 42 (1979) (emphasis added). When determining meaning, "[t]he statute cannot be divorced from the circumstances existing at the time it was passed, and from the evil which Congress sought to correct and prevent." *United States v. Champlin Refining Co.*, 341 U.S. 290, 297 (1951). The statutory construction of Title IX supports the Act's sex-based team designations.

Congress enacted Title IX in response to "evidence of pervasive discrimination against women with respect to educational opportunities[.]" *McCormick*, 370 F.3d at 286. As the First Circuit recognized, "Title IX's remedial focus is . . . on the underrepresented gender; in this case,

[3] Twenty-three states have passed similar legislation to the Save Women's Sport's Act. *See* Ala. Code 16-1-52 (2021); Ariz. Rev. Stat. Ann. 1006.205 (2022); Ark. Code Ann. 6-1-107 (2021); Fla. Stat. Ann. 1006.205 (2021); Idaho Code 33-6201 (2020); Ind. Code Ann. 20-33-13-4 (2022); Iowa Code Ann. 261I.2 (2022); Kan. Stat. Ann. 60-5601 (2023); Ky. Rev. Stat. Ann. 164.2813 (2022); La. Stat. Ann. 4:442 (2022); Miss. Code Ann. 37-97-1 (2021); Mo. Rev. Stat. 163:048 (2023); Mon. Code Ann. 20-7-1306 (2021); N.D. Cent. Code 15-10.6.-01 (2023); Ohio Rev. Code 3313.5302; Okla. Stat. Ann. tit. 70, 27-106 (2022); S.C. Code Ann. 59-1-500 (2022); S.D. Codified Laws 13-67-1 (2022); Tenn. Code Ann. 49-7-180 (2022); Tex. Educ. Code Ann. 33.0834 (2022); Utah Code Ann. 53G-6-902 (2022); W.Va. Code Ann. 18-2-25d (2021); Wyo. Stat. Ann. 21-25-201 (2023).

women." *Cohen v. Brown Univ.*, 101 F.3d 155, 175 (1st Cir. 1996). Through Title IX, Congress sought to "protect the class for whose special benefit the statute was enacted." *Id.* The Act clearly advances Title IX's purpose: "promoting equal athletic opportunities to the female sex." N.G. Code § 22-3-16(c).

A. The Act Reflects the Construction of Title IX.

Title IX does not prohibit the separation of sexes in all circumstances; the statute's language clearly permits "exceptions." 20 U.S.C. § 1681(a). These exceptions are a "deliberate choice." *Peltier v. Charter Day Sch., Inc.*, 37 F.4th 104, 128 (2022). The text lists nine exceptions where Congress deemed it appropriate to create certain sex-separated activities. 20 U.S.C. § 1681(a). These exceptions include "military services," "social fraternities or sororities," and "voluntary youth service organizations" which are "limited to persons of *one* sex." 20 U.S.C. § 1681(a) (emphasis added). Title IX does not shy from sex-based categories which separate men and women for certain activities. To further shine light on Title IX's construction, this Court should consider "additional evidence" demonstrating Congress's intent in the statute's enforcement. *N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 530–531 (1982). Congress purposefully amended Title IX in 1974, directing the Department of Health, Education, and Welfare to create regulations regarding "intercollegiate athletic activities" and "the nature of particular sports." Education Amendments of 1974, Pub. L. No. 93-380, § 844, 88 Stat. 484, 612 (1974). Two specific regulations, 34 C.F.R § 106.41(a) and (b), involve Congress's intent for Title IX.

Because Congress did not alter the first of these regulations, it intended to permit the separation of teams under Title IX. "The legislative intent has been correctly discerned" when an "agency's statutory construction has been 'fully brought to the attention of the public and the Congress,'" and Congress has not "alter[ed] that interpretation." *N. Haven Bd. of Educ.*, 456 U.S.

at 535 (quoting *United States* v. *Rutherford*, 442 U.S. 544, 554, n. 10 (1979) (referring to 34 C.F.R. 106.41(a)).[4] After the regulations were created, Congress had the "opportunity to examine" and "disapprove" of the regulations through a concurrent resolution, "consistent with the law and with the intent of the [sic] Congress in enacting the law." *Id.* at 531–32 (quoting 1975 Hearings 1, Remarks of Rep. O'Hara)). But Congress chose not to act. *Id.* at 533. Neither Congress nor the federal government have changed the regulations permitting the separation of teams. *See id.*; 34 C.F.R. § 106.41(a)-(c).

Title IX applies to all students equally, but "it would require blinders to ignore that the motivation for promulgation of the regulation on athletics was the historic emphasis on boys' athletic programs to the exclusion of girls' athletic programs in high schools as well as colleges." *Williams v. Sch. Dist. Of Bethlehem*, 998 F.2d. 168, 175 (3d Cir. 1993). The second portion of these regulations permits the separation of school sports teams o*n the basis of sex*, thereby creating another exception to Title IX's general rule against sex discrimination. 34 C.F.R. § 106.41(b). Title IX generally prohibits sex discrimination in athletics to ensure all students "have a chance to compete," and to further this goal of equal opportunity, 34 C.F.R. § 106.41(b) allows schools to designate sports teams by sex. *McCormick*, 370 F.3d at 296. The regulation addresses "[s]eparate teams" accordingly: "*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*

[4] This Court recently denied emergency applications for partial stays regarding federal regulations adding "gender identity" to portions of Title IX regulations. *Dep't of Educ. v. Louisiana*, 144 S. Ct. 2507, 2509 (2024). These regulations are not in effect in several states due to preliminary injunctions and the dissent noted the regulations leave Title IX's athletic provisions "untouched." *Id.* at 25511. (Sotomayor, J. dissenting).

based upon competitive skill or the activity involved is a contact sport."[5] 34 C.F.R. § 106.41(b) (emphasis added). The Act similarly regulates athletic team designations. Like Title IX, the Act provides equal opportunities for all students while protecting women in sports.

Title IX and the Act focus on only one specific program: sports. The Act ensures that *all students* can participate in "athletic teams or sports." N.G. Code § 22-3-16(b). Instead of limiting sports teams to one sex, the Act merely designates teams based on sex, just as the Title IX regulations prescribe. N.G. Code § 22-3-16(b); 34 C.F.R. § 106.41(b). The Act even surpasses Title IX's minimum requirements by giving North Greene students additional opportunities to play on "[c]oed or mixed teams." N.G. Code § 22-3-16(a); 20 U.S.C. § 1681. The Act's emphasis on limiting female sports to biological females also aligns with Title IX regulations. N.G. Code § 22-3-16(B).

Under Title IX regulations, schools "may operate or sponsor separate teams for members of each sex where selection for such teams is based upon *competitive skill* or the activity involved is a *contact sport*." 34 C.F.R. § 106.41(b). Similarly, the Act separates female "competitive skill" and "contact sport" teams from male teams. N.G. Code § 22-3-16(b); 34 C.F.R. 106.41(b).

A.J.T. asserts the Act prohibits transgender girls from playing on girls' sports teams and "effectively completely excludes them from school sports altogether." Record 11. But this is not the case. The Act does not create a categorical ban against transgender girls; it only prevents biological males from playing on a girls' team in a competitive or contact sports context. *Id.* A.J.T.

[5] The second portion of 34 § C.F.R. 106.41(b) provides that a student may try out for a non-contact team of the opposite sex if (1) the sport is available for "the *other* sex" and (2) "members of that sex have been previously limited." 34 C.F.R. § 106.41(b). But A.J.T. failed to allege the denial of a tryout for a sport solely available to the opposite sex. A.J.T. also failed to allege a sex was previously limited. Therefore, this section of the statute is inapplicable.

can still play on *any* male sports team or *any* co-ed team. A.J.T. can also try out for female non-competitive and non-contact sports teams. *See* Record 4.

B. The Act Satisfies Title IX under the *Grimm* Analysis.

Recognizing the applicability of the *Grimm* framework, both the dissent and the majority used this Fourth Circuit framework to analyze the Act under Title IX. Record 11, 15. Under *Grimm*, a Title IX claim fails when a plaintiff cannot prove the state (1) "excluded [him] from participation in an education program 'on the basis of sex'; (2) that the educational institution was receiving federal financial assistance at the time; and (3) that [the] improper discrimination caused him harm." *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 616 (4th Cir. 2020). The second prong of the analysis—whether the Act affects educational institutions—does not apply here as A.J.T. did not bring this contention. But the first and third prongs apply. Under the first prong, the Act does not exclude A.J.T. "on the basis of sex."

1. The Act does not improperly exclude A.J.T. on the basis of sex.

Here lies the heart of the matter: the definition of "sex" under Title IX. The question of proper exclusion depends on "whether discrimination based on biological sex" includes discrimination "based on transgender status." *See Adams ex rel. Kasper v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 809 (11th Cir. 2022). This Court should hold it does not because gender identity is not sex under Title IX.

Title IX limits the definition of "sex" to "biological sex." As reflected in the plain language of the Title IX regulations, Congress intended "sex" to mean "biological sex." *See* 34 C.F.R. § 106.41(b). The year following Title IX's enactment, this Court made clear that "sex, like race and national origin, is an immutable characteristic determined *solely* by the accident of birth." *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (emphasis added). Indeed, "[t]he truth is that

the two sexes are not fungible; a community made up exclusively of one [sex] is different from a community composed of both." *Ballard v. United States*, 329 U.S. 187, 193 (1946). The language of Title IX supports this Court's findings.

Title IX consistently defines sex as solely male or female. For example, the terms "one" or "*both*" sexes, and "the *other sex*" exist within the statute. 20 U.S.C. § 1681 (emphasis added). The "consistent use of the definite article," in this case "the," demonstrates "the statute refers to only one such object." *Kaouambo v. Barr*, 943 F.3d 205, 211 (4th Cir. 2019) (quoting *Rumsfeld v. Padilla*, 542 U.S. 426, 434 (2004). And the statute's exceptions repeatedly separate the two sexes. *See, e.g.*, 20 U.S.C. § 1681 ("Young *Men*'s Christian Association, Young *Women*'s Christian Association,"); (emphasis added); *id.* (listing "*Boy* Scouts" and "Camp Fire *Girls*," "*Boys* State" and "*Girls* State" programs, "*Boy or Girl* Conferences," and "*Father-son* or *mother-daughter* activities.") (emphasis added). The dictionary's definition of sex at the time of Title IX's construction provides further context for the meaning of "sex."

This Court previously utilized dictionaries to determine the meanings of words in a statute, specifically "dictionaries in existence around the time of enactment." *United States v. Chinchilla*, 987 F.3d 1303, 1308 (11th Cir. 2021) (quoting *Equal Emp't Opportunity Comm'n v. Catastrophe Mgmt. Sols.*, 852 F.3d 1018, 1026 (11th Cir. 2016)); *see also Campos-Chaves v. Garland*, 602 U.S. ___, 144 S. Ct. 1637, 1647 (2024); *Sandifer v. U.S. Steel Corp.*, 571 U.S. 220, 227–28 (2014). In 1963, before Title IX's enactment, dictionaries defined "sex" as "either of two divisions of organisms distinguished respectively as male or female; the sum of the structural, functional, and behavioral peculiarities of living beings that subserve reproduction by two interactive parents and distinguish males and females." *See, e.g.*, Webster's Seventh New Collegiate Dictionary (7th ed. 1963). In 1979, after the enactment of Title IX, the definition of "sex" remained as "either of

the two divisions of organisms distinguished as male or female." *Sex*, WEBSTER'S DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED (Encyclopedic ed. 1979). Thus, at the time of Title IX's enactment, "sex" meant either male or female.

"There simply is no alternative definition of 'sex' for transgender persons as compared to nontransgender persons under Title IX." *Adams*, 57 F.4th at 814; *Grimm*, 972 F.3d at 596. Transgender may "refer[] to a person whose gender identity does not align with the sex that person was determined to have at birth." *Doe v. Boyertown Area Sch. Dist.* 897 F.3d 518, 522 (3d Cir. 2018); *see also id.* at 522 ("A person's gender identity is their subjective, deep-core sense of self as being a particular gender"). Gender functions as a subjective definition that, if applied to the definition of sex, removes the objective standard of biological sex. But there is only one meaning of sex.

If the Act conflated gender identity with sex, the result would "establish dual protection under Title IX based on *both* sex and gender identity" in instances when gender identity does not align with sex—a deviation from Congress' intent. *Adams*, 57 F.4th 791 (11th Cir. 2022). Because gender identity is not sex, the Act does not wrongfully exclude A.J.T. or other transgender students from competing in sports. Instead, the Act rightfully reserves a place for females to play on female teams. All students may engage in athletic programs under the Act. But allowing students to play based on gender identity would prevent the Act from separating teams by sex—the only separation Title IX allows. Thus, A.J.T. fails to prove the first prong of the *Grimm* analysis. A.J.T. also fails to show harm under the *Grimm* test's third prong.

2. The Act does not improperly discriminate against or harm A.J.T.

A.J.T. does not face harm from discrimination on the basis of sex. This Court defines "discrimination" as "'treating [an] individual *worse* than others who are similarly situated.'"

Grimm, 972 F.3d at 618 (quoting *Bostock v. Clayton Cnty.*, 590 U.S. 644, 657 (2020)) (emphasis added). A.J.T. unsuccessfully urged the Fourteenth Circuit to adopt Title VII's sex discrimination standard found in *Bostock v. Clayton Cnty.* 590 U.S. at 657 (2020); Record 11. But "[i]t is imperative to recognize that athletics presents a distinctly different situation from admissions and employment and requires a different analysis in order to determine" discrimination. *Cohen*, 101 F.3d at 177. Title IX allows schools "to maintain single-sex teams and gender-segregated athletics programs" so that "men and women do not compete against each other for places on team rosters." *Id.* And unlike Title VII, Title IX's anti-discrimination measures are distinct, recognizing that sex distinction is relevant to the purpose. *Id.* at 177–78.

Title VII affects the workplace, whereas Title IX affects schools, and "schools are not workplaces and children are not adults." *Davis ex rel. LaShonda D. v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 675 (1999) (Kennedy, J. dissenting). *Bostock* analyzed a Title VII issue, and Title VII, as this Court explained, "is a vastly different statute" from Title IX. *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 175 (2005). *Bostock* also affirmed Title VII "does not concern itself with everything that happens 'because of sex.'" *Bostock*, 590 U.S. at 657. Instead, Title VII only applies to *employers* who "fail or refuse to hire," or to "discharge" employees because of sex. *Id.* at 658 (quoting 42 U.S.C. § 2000e-2 (a)(1) (2024)).

In *Bostock*, this Court held that under Title VII, an employer could not use the sexual identities of employees as a reason for firing them. *Bostock*, 590 U.S. at 665. Relying heavily on Title VII's "because of" language, this Court created a but-for causation test that prohibited employers from discriminating against employees because of their sexual identities. *Id.* at 656–57. This "but for" test distinguishes Title VII from Title IX; Congress intentionally chose not to use the "because of" language from Title VII, instead using the "on the basis of" language for Title IX.

When "Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Bates v. United States*, 522 U.S. 23, 29–30 (1997) (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)). Congress intentionally omitted this "because of" language in its construction of Title IX. Congress's failure to amend Title IX further supports its intentional omission of Title VII's language.

The "but-for" causation test found in Title VII is distinguishable from the "basis of sex" language in Title IX. *Compare* 42 U.S.C. § 2000e–2(a)-(b), *with* 20 U.S.C. § 1681(a). If this Court "fail[ed] to acknowledge the different phrases Title VII and Title IX employ, the Court 'would risk amending [the] statutes outside [of] the legislative process reserved for the people's representatives.'" *Neese v. Becerra*, 640 F. Supp. 3d 668 (N.D. Tex. 2022) (quoting *Bostock,* 590 U.S. at 655).

Additionally, this Court ruled on *Bostock* in 2020, meaning Congress has had over three years to amend Title IX to reflect Title VII's language, but it has not. As this Court previously noted, it "must presume that a legislature says in a statute what it means." *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253–54 (1992). Because Congress made no attempts to amend Title IX after the *Bostock* decision, this Court can reasonably presume that Congress meant Title IX to reflect a different standard from Title VII. Still, the differences between Title VII and Title IX do not end with the but-for causation analysis.

Title VII and *Bostock* explicitly address employment matters, whereas Title IX explicitly addresses schools and student activities. *Bostock*, 590 U.S. 644 at 681 ("[W]e do not purport to address bathrooms, locker rooms, or anything else of the kind."). Title IX provides exceptions to its general rule, allowing for discrimination in a select number of categories. 34 C.F.R. § 106.41(b).

In contrast, Title VII provides no such exceptions and prohibits discrimination "because of" sex within the context of employment. *See* 42 U.S.C. § 2000e-1 (2024). Because of the expressly different issues and statutory constructions surrounding Title VII and Title IX, *Bostock* does not apply to a Title IX matter. But *Bostock* does support the difference between transgenderism and sex.

While distinguishable, this Court's holding in *Bostock* maintains the understanding that "transgender status [is a] distinct concept[] from sex." *Bostock*, 590 U.S. at 669. Transgenderism depends on sex, but sex does not depend on transgenderism; "the first cannot happen without the second." *Id.*

Even if this Court agrees that discrimination occurred, the *Grimm* test requires harm to the plaintiff, and in this case, A.J.T. experienced no harm. *Grimm*, 972 F.3d at 618. When the plaintiff experiences no harm, he or she cannot pass the third prong and subsequently fails the *Grimm* test. *Id.* When courts look at harm in the Title IX school setting, they consider factors such as emotional injury, inconvenience, and lack of equal opportunity. *See id.*; *McCormick*, 370 F.3d at 288-90 (collecting cases). While A.J.T. alleges emotional injury and lack of equal opportunity, A.J.T. cannot show the requisite level of harm needed to adequately allege harm in the Title IX sports context.

In this case, A.J.T.'s alleged emotional harm does not arise to the level necessary to meet the third prong of the *Grimm* test. In *Grimm*, the school instituted a policy that separated restrooms by biological sex. *Grimm*, 972 F.3d at 593. The plaintiff, a biological female, had to use the bathroom assigned to her biological sex or use a single-stall restroom. *Id.* The plaintiff claimed that the school's restroom policy caused feelings of stigmatization that resulted in restroom avoidance and then urinary tract infections. *Id.* Because of the pain from the infections and the

feelings of shame in having to use a different bathroom, the plaintiff needed hospitalization for mental health reasons. *Id*. at 617. But A.J.T. claims nothing close to the level of harm the plaintiff experienced in *Grimm*. A.J.T. also has not taken "puberty blocking medication" that would significantly change hormones and physical development. *B.P.J. by Jackson v. W. Va. State Bd. of Educ.*, 98 F.4th 542, 564 (4th Cir. 2024).

A.J.T. made a bare allegation of emotional harm, A.J.T. has not experienced physical illness or life-threatening mental health concerns. At a minimum, A.J.T. claims exclusion from a sports team aligned with his gender identity, and nothing more. Thus, A.J.T. cannot prove the Act directly caused any emotional or physical harm to the level necessary to claim an injury from discrimination. Also, A.J.T. cannot claim harm from exclusion because A.J.T. can still join the boys' team, a co-ed team, and the female noncompetitive and non-contact teams. If A.J.T. could claim harm from exclusion, then by default, every other biological boy could also claim harm, rendering Title IX's regulations meaningless. Because A.J.T. can still play on various sports teams and alleges insufficient emotional injury, no harm has occurred, and A.J.T. fails to prove the third prong of the *Grimm* test.

Because the Act reflects the construction of Title IX by separating sports teams on the basis of biological sex and does not inflict discriminatory harm, the Act complies with Title IX. And Title IX is not the "exclusive mechanism" that may be used to uphold the Act under Title IX because the Act also satisfies the Equal Protection Clause. *Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 258 (2009).

II. THE EQUAL PROTECTION CLAUSE PERMITS REASONABLE SEX-BASED CLASSIFICATIONS.

The Save Women's Sports Act satisfies the Equal Protection Clause because biological males are not similarly situated to biological females, and the Act passes an intermediate scrutiny standard of review.

Under the Equal Protection Clause, states must ensure "to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. The bounds of equal protection necessitate that "all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). But the bounds of equal protection also permit states to create policies that classify based on sex. *Nguyen v. INS*, 533 U.S. 53, 70 (2001). The Equal Protection Clause vests states with the authority to "treat different classes of persons in different ways." *Reed v. Reed*, 404 U.S. 71, 75 (1971). And state legislatures hold "[t]he initial discretion to determine what is 'different' and what is 'the same'" *Plyler v. Doe*, 457 U.S. 202, 216 (1982). With this "latitude," states may draw lines that avoid "arbitrary or irrational" classifications. *Cleburne*, 473 U.S. at 446. A statute facing an Equal Protection challenge does not need to be "drawn as precisely as it might have been" but only needs to fall "within constitutional limitations." *Michael M. v. Super. Ct. of Sonoma Cnty.*, 450 U.S. 464, 473 (1981).

When the North Greene Legislature enacted the Save Women's Sports Act, it acted within its discretion to classify individuals. The Act's biological sex-based classifications satisfy the Equal Protection Clause for two reasons. First, the Act recognizes that in the context of sports, physiological differences prevent biological males from being similarly situated to biological females. Second, the Act advances the State's interest in safety and equal opportunity for females and uses means substantially related to advancing that interest.

A. Biological Males are Not Similarly Situated to Biological Females in Athletics.

Choosing only to classify by biological sex, the Act avoids "overbroad generalizations about the different talents, capacities, or preferences of males and females." *Virginia*, 518 U.S. at 533. The Act's classification "reflect[s]" the "pre-existing differences" between males and females and ensures equal treatment between the sexes in athletics. *Williams v. Vermont*, 472 U.S. 14, 27 (1985). All biological males can play male sports; all biological females can play female sports. This biological classification guarantees "that all persons similarly situated" are "treated alike." *Cleburne*, 473 U.S. at 439. As science, previous court observations, and even Title IX regulations show, separating the sexes in athletics to ensure fair treatment is not a novel concept.

The Fourteenth Circuit's finding that biology affects sports does "not result from some stereotype" or "from irrational or uncritical analysis." *Nguyen*, 533 U.S. at 68. Rather, the Fourteenth Circuit's finding "truth[fully]" reflects "that the two sexes are not fungible." *Ballard*, 329 U.S. at 193. The Fourteenth Circuit does not stand alone in its finding that one's biological sex affects one's athletic performance. Indeed, in athletics, the physical difference between men and women is apparent. As noted by the Sixth Circuit, "i[t] takes little imagination to realize that were play and competition not separated by sex, the great bulk of the females would quickly be eliminated from participation and denied any meaningful opportunity for athletic involvement." *Cape v. Tenn. Secondary Sch. Athletic Ass'n*, 563 F.2d 793, 795 (6th Cir. 1977). Likewise, the First Circuit observed, "[i]t seems likely that as girls and boys mature, greater physical differences affecting athletic ability exist." *Fortin v. Darlington Little League, Inc.*, 514 F.2d 344, 351 (1st Cir. 1975). The Ninth Circuit, too, noted "that due to average physiological differences, males would displace females to a substantial extent if they were allowed to compete for positions on the volleyball team." *Clark ex rel v. Arizona Interscholastic Ass'n*, 695 F.2d 1126, 1131 (9th Cir. 1982).

Even the Fourth and Eleventh Circuits recognize that increased testosterone levels give biological males an athletic advantage. *See, e.g.*, *Hecox v. Little*, 79 F.4th 1009, 1029 (9th Cir. 2023) (finding the transgender student's treatment to suppress hormones "lowered her circulating testosterone levels–which impact athletic prowess");[6] *B.P.J.*, 98 F.4th at 560 ("Once puberty begins, however, sex-based differences begin to emerge. Those differences—along with others that begin at the same time—lead to different physical processes during puberty."). Scientific studies additionally reflect the biological differences between men and women in athletics. In "sports relying on endurance, muscle strength, speed, and power, males typically outperform females by 10%-30% [.]" Sandra K. Hunter, et al., *The Biological Basis of Sex Differences in Athletic Performance: Consensus Statement for the American College of Sports Medicine*, 55 MED. & SCI. IN SPORTS & EXERCISE J. 2328, 2328 (2023). Biological differences undoubtedly "cut directly to the 'main physical attributes that contribute to elite athletic performance,' as recognized by sports science and sports medicine." *Adams*, 57 F.4th at 819 (Logoa, J., specially concurring) (quoting Benjamin D. Levine, et al., *The Role of Testosterone in Athletic Performance*, DUKE CTR. FOR SPORTS L. & POL'Y 1, 1 (2019)). A.J.T.'s alternative to sex-based classification fails to address this physical difference.

A.J.T. admits that "increased testosterone circulation" in males creates a biological difference in athletic performance. *See* Record 3. To remedy this problem, A.J.T. asserts that transgender girls can take puberty blockers or hormone therapy to mitigate any athletic advantages. But A.J.T.'s solution fails to reach the heart of the biological difference, as "[t]aking hormone suppressants is not a permanent condition" and transgender athletes "can, at any point, choose to

[6] The 9th Circuit withdrew its *Hecox* opinion because of this Court's opinion in *Labrador v. Poe,* 144 S. Ct. 921 (2024), allowing an Idaho law banning gender-affirming care for minors to stand. The Ninth Circuit will be issuing a revised opinion in light of the Court's recent holding.

stop taking them." *B.P.J.* 98 F.4th at 570, n. 7 (Agee, J., dissenting). A.J.T.'s situation proves this; despite discussing the possibility of puberty blockers in 2022, A.J.T. still has not begun any puberty-delaying treatment. And if the Legislature were to regulate biological males' participation in female sports by their level of testosterone, this could "subject[] all women to an invasive sex dispute verification process." *Hecox*, 79 F.4th at 1029. Recognizing the physical difference between biological males and females, and its pervasive effect on sports, the State chose to classify sports differently between biological males and females, thereby avoiding invasive medical testing. But this classification does not create a categorical ban against transgender girls in athletics.

The Act limits the participation of biological males in female sports; it does not, as Petitioner alleges, create a categorical ban against transgender girls. A.J.T., as a biological male, receives the same treatment as other biological males. Transgender girls are similarly situated to biological males, not biological females, because of their inherent biological differences. *See Nguyen*, 533 U.S. at 63, 73 (finding mothers and fathers are not similarly situated with respect to proof of biological parenthood because of their biological differences). A.J.T., an eleven-year-old about to enter puberty, has not undergone any physiological changes that would differentiate him from biological males. A.J.T. has not begun puberty-delaying treatment that, as A.J.T.'s expert testified, "would prevent endogenous puberty and therefore any physiological changes caused by increased testosterone circulation." Record 3. Thus, A.J.T., like other biological males, is not similarly situated to biological females.

No biological boy is similarly situated to any biological girl. The Act does not classify the sexes on the basis of "gross, stereotyped distinctions between the sexes"; it classifies based on scientific, physiological differences. *Frontiero*, 411 U.S. 685. Biological boys possess innate

physiological differences from biological girls that prevent a similar situation. The Act's "classification," therefore, "is not invidious, but rather realistically reflects the fact that the sexes are not similarly situated in certain circumstances." *Michael M.*, 450 U.S. at 469.

B. The Save Women's Sports Act Satisfies Intermediate Scrutiny.

Under this Court's Equal Protection Clause precedent, gender-based classifications need only satisfy an intermediate standard of scrutiny. *See Craig v. Boren*, 429 U.S. 190, 197 (1976); *see e.g., Michael M.*, 450 U.S. at 467-69; *Nguyen*, 533 U.S. at 60. Statutes satisfy an intermediate standard of scrutiny when they 1) involve "important government objectives" and 2) use means "substantially related" to the achievement of those objectives." *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982) (quoting *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 150 (1980)). Under an intermediate standard of scrutiny, a "perfect fit between means and ends" is not required for a statute to pass constitutional muster. *Adams*, 57 F.4th at 801. Thus, statutes do not have to "be capable of achieving [their] ultimate objective in every instance." *Nguyen*, 533 U.S. at 70.

North Greene's Act satisfies intermediate scrutiny because it advances an important government objective in providing equal opportunities for women in sports and uses reasonable means substantially related to that interest.

1. The Act advances an important government objective by ensuring equal opportunities for women in sports.

A state's justification for why it enacts a statute will be "entitled to great deference" when the lower court accepts the state's asserted interest. *See Michael M.*, 450 U.S. at 470. States justifying sex-based classifications as necessary for "administrative ease and convenience" will not pass an Equal Protection Clause challenge. *Craig*, 429 U.S. at 198. However, sex-based classifications falling outside of "administrative ease and convenience" pass constitutional muster.

See Miller v. Albright, 523 U.S. 420 (1998). This Court upholds laws that properly distinguish between genders without relying on overbroad generalizations. *Compare Nguyen*, 533 U.S. at 69–70 (explaining how the statute did not rely on overbroad generalizations but on real differences between mothers and fathers), *with Virginia*, 518 U.S. at 550 ("[G]eneralizations about 'the way women are' . . . no longer justify denying opportunity to women whose talent and capacity place them outside the average description.").

The physiological differences between biological males and females implicate valid safety concerns. Aware of the harm that could result from biological males playing on female sports teams, the state acted to protect women. Academic studies, examining the effects of testosterone on men, note how males, in the absence of pre-pubescent hormonal blockers, will have greater muscle mass than females.[7] Even Justice Ginsburg recognized that "[p]hysical differences between men and women . . . are enduring." *Virginia*, 518 U.S. at 533. Multiple news stories speak to instances where transgender athletes severely harmed biological females or even caused women's sports teams to forfeit competitions.[8] The lower court, in its opinion, even referenced a news report about a biological female who experienced "long-term concussion symptoms" after an injury

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[7] *See* Dennis L. Weisman, *Transgender Athletes, Fair Competition, and Public Policy*, CATO INST. (Fall 2022), https://www.cato.org/regulation/fall-2022/transgender-athletes-fair-competition-public-policy ("[N]atural male advantages, including bone structure, heart size, and lung capacity, are not eliminated by hormonal therapy, especially if the transition is post-pubescent."); Alison K. Heather, *Transwoman Elite Athletes: Their Extra Percentage Relative to Female Physiology*, 19 INT. J. ENVIRON. RES. PUBLIC HEALTH 9103 (2022) (explaining how reduced testosterone levels in adult mice did not reduce muscle mass, thus indicating that reduced testosterone may not be necessary to maintain muscle mass in an adult individual).

[8] *See* Justin Tasch, *Team Forfeits After Girls Basketball Player Allegedly Hurt in Play with Male Who Identifies as Female*, New York Post (Feb. 20, 2024), https://nypost.com/2024/02/20/sports/team-forfeits-against-kipp-academy-after-play-allegedly-involving-male-who-identifies-as-female/; Matthew Impelli, *Shocking Field Hockey Injury Sparks Fight Over Transgender Athletes*, Newsweek (Nov. 3, 2023), https://www.newsweek.com/shocking-field-hockey-injury-sparks-fight-over-transgender-athletes-1840845.

caused by a biological male. Record 10. Thus, North Greene reasonably holds a concern in protecting women's safety in sports.

Even if this Court disagrees that North Greene has a valid interest in protecting women's safety, the State still satisfies the first prong of intermediate scrutiny by ensuring women have "equal athletic opportunities." Record 4. And this Court will give states broad deference when analyzing their asserted important interests when the lower court agrees with the state's justification. *Michael M.*, 450 U.S. at 470. At the most basic level, if a biological male can compete on a female team, this prevents a biological female from taking that spot on the team. In *B.P.J.*, the plaintiff "consistently placed in the top fifteen participants at track-and-field events . . . In so doing, over one hundred biological girls participating in these events were displaced by and denied athletic opportunities because of [the plaintiff]." *B.P.J.*, 98 F.4th at 566 (Agee, J., concurring in part and dissenting in part).

Women, historically, have been disadvantaged in athletics, holding fewer opportunities than men to participate in competitive sports. Richard C. Bell, *A History of Women in Sport Prior to Title IX*, The Sport J. (Mar. 14, 2008) https://thesportjournal.org/article/a-history-of-women-in-sport-prior-to-title-ix/. Though Title IX helped provide more competitive opportunities for women, biological females still face more difficulties than biological males in participating on athletic teams. The California Law Center, in analyzing Title IX data, found that "[w]omen are denied nearly $1 billion in scholarships," and women fail to hold over 148,000 sporting opportunities due to NCAA noncompliance.[9] Even Justice Stevens expressed concerns that "[w]ithout a gender-

[9] Champion Women, Discrimination Against Women in Collegiate Sports is Getting Worse, Cal. Women's L. Ctr. (2020), https://www.cwlc.org/download/cwlc-initiative-ncaa-data-collection/?wpdmdl=8445&refresh=66da7a9bced8c1725594267&ind=1600626935712&filename=For-TY-email.pdf.

based classification in competitive contact sports, there would be a substantial risk that boys would dominate the girls' programs and deny them an equal opportunity to compete in interscholastic events." *O'Connor v. Bd. of Educ.*, 449 U.S. 1301, 1307 (1980) (Stevens, J., in chambers). When even just one biological male competes on a female team, this participation steals the opportunity from a biological female to compete on that same team. She loses her spot on a team designated just for her. Considering the past disadvantages women experienced in sports, North Greene holds a valid concern in ensuring women receive equal opportunities to play competitively.

On its face, nothing in the statute implies that North Greene seeks to increase administrative convenience, and North Greene has also not admitted to creating the statute to ease administrative burdens like the government in *Frontiero*. *Frontiero*, 411 U.S. at 688 (explaining how a statute that differentiated between men and women violated the Equal Protection Clause because the government admitted that "the differential treatment . . . serves no purpose other than mere 'administrative convenience.'"). The state's justifications for the statute also do not rely on stereotypical ideas of men and women but on realistic and proven biological differences. North Greene endeavors to support both men and women in sports by ensuring all students can play in a reasonably safe manner and have an equal opportunity to compete. Since this Court gives states "great deference" toward their stated important objectives, and because North Greene's reasons have nothing to do with administrative convenience but everything to do with advancing important interests, the state satisfies the first prong of the Equal Protection analysis.

2. The Act's means substantially relate to the state's interest in safety and equal opportunities.

The Equal Protection Clause does not prohibit states from "classif[ying] for the purposes of legislation." *F.S. Royster Guana Co. v. Virginia*, 253 U.S. 412, 415 (1920). Intermediate scrutiny applies to sex-based classifications. *Craig*, 429 U.S. at 197. So, when a sex-based classification

relates to the purpose of the statute, it passes constitutional muster. *See Stanton v. Stanton*, 421 U.S. 7, 15 (1975). As long as the statute "fair[ly] and substantial[ly]" relates to the important governmental interest, the Equal Protection Clause is satisfied. *See Caban v. Mohammed*, 441 U.S. 380, 391 (1979).

North Greene's statute uses reasonable means to advance its important governmental objective. The Act specifically defines biological sex as "an individual's physical form . . . based solely on the individual's reproductive biology and genetics at birth." N.G. Code § 22-3-15(a)(1). A.J.T. argues this definition does not substantially relate to the purpose of the Act. But, as recognized by this Court, biological differences among the sexes exist. *See Virginia*, 518 U.S. at 533; *Michael M.*, 450 U.S. at 471–72. A.J.T.'s own expert witness even implicitly recognized a physiological difference between biological males and females.

Even the Fourth Circuit, in *B.P.J.*, recognized that testosterone creates differences between the sexes. *B.P.J.*, 98 F.4th at 560. In *B.P.J.*, the court noted that the school's policy, in prohibiting transgender women from playing on female sports teams, did not substantially relate to the government's important interest. *Id.* at 559, 561. However, in that case, the court only addressed an as-applied challenge—rather than a facial challenge, as in this case—and the plaintiff had been taking puberty-blockers to eliminate any physical advantages gained from testosterone. *Id.* at 559–61. The instant case is substantially different. A.J.T. has not taken any puberty blockers and does not have current plans to do so. Record 3. In recognizing that testosterone increases physical advantages in biological men, North Greene purposefully structured its statute to keep biological men playing with others like them and ensure women could find a spot on a competitive sports team. North Greene's means are reasonable because it does not bar biological men from playing on *all* female sports teams but only those involving contact sports (relating to the safety interest)

or competitive sports (relating to the equal opportunity interest). The Act's limitations on male participation in female sports at the time of puberty also relate to the government's interest.

The Act only limits participation in sports during the age of or after puberty, where physiological differences between men and women begin occurring. N.G. Code § 22-3-16(a). The Act does not create a sweeping ban of biological men from women's sports. Rather, the limitations only occur at the "secondary school" or "higher education" level. *Id.* Experts agree that pre-puberty, boys and girls are similarly situated physiologically. *Doe v. Horne*, No. 23-16026, 23-16030, ---F.4th----, 2024 WL 4113838, at *32–34, 53 (9th Cir. Sept. 9, 2024). However, after puberty, differences begin to form, creating the need for "puberty suppression medication" to eliminate "athletic advantage[s]." *See id.* at *37–38. The Ninth Circuit, in *Horne*, found that a school would most likely violate the Equal Protection Clause because its policy, in disallowing biological boys from joining girls' sports teams, created a sweeping ban on transgender students across all educational levels. *Id.* at *54–56. This is not the case here.

Here, North Greene does not ban transgender students at all levels of education but only at the levels of education where physiological differences begin to emerge. N.G. Code § 22-3-16(a). If North Greene meant to discriminate against transgender students, it could have banned them from participating in sports consistent with their gender identity at all education levels. Instead, North Greene only limited their participation in certain female sports to advance its interest in protecting women and their opportunities to play on competitive teams. Thus, North Greene does not go beyond its stated objectives and keeps its solutions strongly tied to its important government interests. Additionally, A.J.T.'s facial challenge to the statute frustrates the State's ability to advance its interest in ensuring safety and equal opportunities for females.

A.J.T.'s facial challenge attempts "to short circuit the democratic process' by preventing duly enacted laws from being implemented in constitutional ways." *Moody v. NetChoice, LLC*, 144 S. Ct. 2383, 2397 (2024) (quoting *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 451 (2008)). "This Court has therefore made facial challenges hard to win." *Id.* Petitioner's facial challenge to the Act "force[s] the Judiciary to take a maximalist approach" by asking the Court to find "that the law is unconstitutional in all of its applications." *Id.* at 2417; *Washington State Grange*, 552 U.S. at 449 (2008). Meaning, biological males could dominate female sports without restriction; and their physiological differences could exist unrestrained by hormone suppressants. As a result, "the number of displaced biological girls [would] expand exponentially" and "deny [biological girls] any athletic opportunity." *B.P.J.*, 98 F.4th at 571 (Agee, J. dissenting). Further, under the applicable intermediate standard of scrutiny, A.J.T.'s facial challenge does not survive.

To satisfy intermediate scrutiny, a state need only show that a substantial relationship exists between the means used and the state's objective. The state does not need to narrowly tailor its statute or use the least restrictive means necessary to achieve its goals. A.J.T. claims that North Greene's means discriminate against transgender students and prevent them from playing on teams aligning with their chosen gender identity. Effectively, AJ.T. argues a strict standard of scrutiny: North Greene must ensure its statute is narrowly tailored to avoid preventing transgender students from playing on certain teams. *See Grutter v. Bollinger*, 539 U.S. 306, 226 (2003) (explaining that "strict scrutiny" requires "narrowly tailored" classifications). *Frontiero v. Richardson* stands as the only case that even comes close to applying a strict standard of scrutiny to sex-based classification, but the Court could not reach a plurality, so *Frontiero* does not control. 411 U.S. at 678 (plurality opinion). And even if *Frontiero* did control, it remains distinguishable because the Act classifies

the sex in the interest of safety and equal opportunities, not "administrative efficiency." *Frontiero*, 411 U.S. at 684. Thus, strict scrutiny does not apply here. Under intermediate scrutiny, North Greene only needs to use reasonable means substantially related to its objectives. The Equal Protection Clause requires "equal laws, not equal results." *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 273 (1979).

An intermediate standard of scrutiny does not require reasonable means to be perfect in application. In *Nguyen*, 8 U.S.C. § 1409 established different standards for fathers and mothers to prove paternity for children born out of wedlock in a different country. *Nguyen*, 533 U.S. at 59–60. This Court rejected the notion that because the statute placed more requirements on fathers, it violated the Equal Protection Clause. *Id.* at 69–70. Rather, this Court stated that "gender specific terms can mark a permissible distinction" and that sex-based classifications do not have to "be capable of achieving its ultimate objective in every instance." *Id.* at 64, 70.

3. A disparate impact is not always synonymous with intentional discrimination.

A disparate impact on one group of people does not automatically create intentional discrimination and will not prevent a court from finding that a statute passes intermediate scrutiny. *See Fowler v. Stitt*, 104 F.4th 770, 784–85 (10th Cir. 2024) (citing *Washington v. Davis*, 426 U.S. 229, 242 (1976)). This Court must look at the "totality of the relevant facts" rather than disparate impact alone. *Davis*, 426 U.S. at 242. Disparate impact is "not the sole touchstone" of a discrimination analysis. *See Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264–65 (1977 (quoting *Davis*, 426 U.S. at 242). Thus, a question the Court must ask is whether the sex-based classification makes a "permissible distinction" or purposefully discriminates against one group. *Nguyen*, 533 U.S. at 64.

Even if this Court finds that North Greene's act disparately impacts transgender students, the Act does not purposefully discriminate against them. Only referencing transgender status once, the Act explains why the legislature chose sex-based classifications. N.G. Code § 22-3-16(c) ("Gender identity is separate and distinct from biological sex to the extent that an individual's biological sex is not determinative or indicative of the individual's gender identity."). A.J.T. effectively argues that the Save Women's Sports Act, by prohibiting transgender girls from playing on women's sports teams, is a burden that only transgender girls must bear; thus, the state is using the Act to disguise its intentional discrimination against transgender students. But nothing in the statute supports A.J.T.'s contention.

On its face, the statute does not intentionally discriminate against transgender individuals, and even the plain language of the statute itself shows a lack of discriminatory intent. The statute *allows* biological males to play on women's sports teams in the context of non-competitive or noncontact sports. If North Greene intended to discriminate against transgender students, it could have explicitly mentioned barring transgender students from sports or categorically banned them from participating in female sports teams altogether, even at the elementary school levels. However, the state chose not to do so, and "without proof of discriminatory intent, a generally applicable law with disparate impact is not unconstitutional." *Crawford v. Marion Cnty., Election Bd.*, 533 U.S. 181, 207 (2008) (Scalia, J., concurring). And a disparate impact on a group of students does not mean a policy or statute violates the Equal Protection Clause on its face. *See Adams*, 57 F.4th at 810. The true test asks if the means used are substantially related to an important government interest and are reasonable. *See Reed*, 404 U.S. at 75–76. North Greene passes this test; the state used reasonable and substantial means to ensure women's safety and equal opportunities for them in sports.

The Equal Protection Clause requires an intermediate standard of scrutiny and nothing more. North Greene holds an important interest in protecting equal opportunities for women in sports and separates teams based on biological sex to advance that interest. Since the means used substantially relate to the state's important objective, the Save Women's Sports Act satisfies the Equal Protection Clause.

Thus, North Greene's statute satisfies the Equal Protection Clause. The Act properly classifies sports teams based on biological sex. The physiological differences between males and females prevent them from being similarly situated. In recognition of these physiological differences, North Greene reasonably limited boys' participation in female sports. This limitation satisfies intermediate scrutiny because limiting boys' participation in contact and competitive sports substantially relates to protecting women's safety and their opportunities to compete on athletic teams.

CONCLUSION

For the foregoing reasons, this Court should affirm the Fourteenth Circuit's decision by finding the Act complies with Title IX and satisfies the Equal Protection Clause.

Respectfully submitted,

/s/ Team 16

Counsel for Respondents

APPENDIX

APPENDIX

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CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS

U.S. Const. amend. XIV

* * *

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.

* * *

N.G. Code § 22-3-15(a)(1)-(3)

(1) "Biological sex" means any 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 § 22-3-16(a)-(c)

(a) Interscholastic, intercollegiate, intramural, or club athletic teams or sports that are sponsored by any public secondary school or a state institution of higher education shall be expressly designated as one of the following based on biological sex at birth:

(A) Males, men, or boys;

(B) Females, women, or girls; or

(C) Coed or mixed

(b) Athletic teams or sports designated for females, women, or girls shall not be open to students of the male sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport.

(c) Gender identity is separate and distinct from biological sex to the extent that an individual's biological sex is not determinative or indicative of the individual's gender identity. Classifications based on gender identity serve no legitimate relationship to the State of North Greene's interest in promoting equal athletic opportunities for the female sex.

* * *

20 U.S.C. § 1681(a). 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:

* * *

42 U.S.C. § 2000e-1(a)-(b). Exemption

(a) Inapplicability of Subchapter to Certain Aliens and Employees of Religious Entities

This subchapter shall not apply to an employer with respect to the employment of aliens outside any State, or to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular

religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.

(b) Compliance with Statute as Violative of Foreign Law

It shall not be unlawful under section 2000e-2 or 2000e-3 of this title for an employer (or a corporation controlled by an employer), labor organization, employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining (including on-the-job training programs) to take any action otherwise prohibited by such section, with respect to an employee in a workplace in a foreign country if compliance with such section would cause such employer (or such corporation), such organization, such agency, or such committee to violate the law of the foreign country in which such workplace is located.

* * *

34 C.F.R. 106.41(a)-(c). 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 ap articular 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.

(c) Equal opportunity. A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics shall provide equal athletic opportunity for members of both sexes. In determining whether equal opportunities are available the Director will consider, among other factors:

(1) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes;

(2) The provision of games and practice time;

(3) Travel and per diem allowance;

(4) Opportunity to receive coaching and academic tutoring;

(5) Assignment and compensation of coaches and tutors;

(6) Provision of locker rooms, practice and competitive facilities;

(7) Provision of medical and training facilities and services;

(8) Provision of housing and dining facilities and services

(9) Publicity.

Unequal aggregate expenditures for members of each sex or unequal expenditures for male and female teams if a recipient operates or sponsors separate teams will not constitute noncompliance with this section, but the Assistant Secretary may consider

the failure to provide necessary funds for teams for one sex in assessing equality of opportunity for members of each sex.