No. 24-2020

IN THE SUPREME COURT OF THE UNITED STATES

A.J.T.,

Petitioner,

v.

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

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES SUPREME COURT

BRIEF FOR PETITIONER

Team Number 17

QUESTIONS PRESENTED

1. Whether Title IX prevents a state from consistently designating girls' and boys' sports teams based on biological sex determined at birth.
2. Whether the Equal Protection Clause prevents a state from offering separate boys' and girls' sports teams based on biological sec determined at birth.

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OPINIONS BELOW

The District Court of Greene's order is unreported but can be found at *A.J.T. v. North Greene Bd. of Educ.*, 2023 WL 56789 (E.D. N. Greene 2023). The Fourteenth Circuit's opinion also remains unreported but is included on the record. (R. 2).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Title IX of the Education Amendments of 1972 (20 U.S.C. § 1681(a)) states:

> "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."

Section 1 of the Fourteenth Amendment to the U.S. Constitution states:

> 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.

STANDARD OF REVIEW

The Supreme Court may review a grant of summary judgment under the de novo standard. *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 244 (1986). Summary judgment is appropriate when there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. *Shaliehsabou v. Hebrew Home of Greater Washington, Inc*., 363 F.3d 299, 304 (4th Cir. 2004).

STATEMENT OF THE CASE

Petitioner, A.J.T., an eleven-year-old transgender girl, filed suit against the State of North Greene Board of Education, *et al*., challenging the constitutionality of the State's newly enacted "Save the Women's Sports Act" (the "Act"), codified as North Greene Code § 22-3-4 et seq. The Act prohibits transgender girls from participating in school sports consistent with their gender identity, instead mandating that participation is limited to the biological sex of the athlete at

birth. (R.3). A.J.T., who was assigned male at birth but identifies as a female, has been living as a girl at home since third grade, and now lives as a girl in both public and private, hoped to participate in the girls' volleyball and cross-country teams. (R. 3). A.J.T. participated in the elementary school's all-girls cheerleading team and practiced and competed with this team without incident. (R. 3).

In 2022, A.J.T. was diagnosed with gender dysphoria and has been undergoing counseling and discussing potential medical treatments, including puberty-delaying treatments. (R. 3). As of the filing of this lawsuit, A.J.T. had not begun puberty or puberty-delaying treatments. (R. 3). The average boy generally starts puberty at age 12. (R. 3, n.2). Despite her interest in joining the girls' volleyball and cross-country teams, her school informed her because of the newly enacted statute, she was barred from participating due to her transgender status. (R. 3).

In April 2023, the North Greene General Assembly enacted the Save the Women's Sports Act, which was signed into law on May 1, 2023. (R. 4). The law explicitly states, "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." (R. 4). The state argues that the law promotes equal athletic opportunities and ensure the safety of female athletes. (R. 6). A.J.T. contends that the law's true objective is the exclude transgender students from participating in sports. (R. 7).

The District Court granted summary judgment in favor of the State of North Greene, holding that the Act did not violate Title IX or the Equal Protection Clause of the Fourteenth Amendment. (R. 5). The Circuit Court affirmed the District Court's judgment. (R. 12).

SUMMARY OF THE ARGUMENT

Title IX ensures that no person shall be excluded from participation in, or denied the benefits of, any education program. 20 U.S.C. § 1681(a). Under Title VII, discrimination "because of sex" inherently includes discrimination based on gender identity. *Bostock v. Clayton County, Georgia*, 590 U.S. 644, 662 (2020). Following recent precedent, courts look to Title VII when interpreting Title IX, so it follows that discrimination "on the basis of sex" includes discrimination based on transgender status. *Grimm v. Gloucester Cnty. Sch. Bd*., 972 F.3d 586, 616 (4th Cir. 2020), *as amended* (Aug. 28, 2020); *B.P.J. by Jackson v. W. Virginia State Bd. of Educ*., 98 F.4th 542, 564 (4th Cir. 2024). Excluding A.J.T. from participating in girls' sports based on her transgender status, is discrimination "on the basis of sex"

The choice between choosing to play on the team whose gender one does not identify with or being exclude from sports altogether, is not a genuine choice and subjects the transgender individual to further stigmatization and harm. *B.P.J. by Jackson,* 98 F.4th at 563; *Grimm,* 972 F.3d at 617-18. The stigma of being forced to use a separate restroom is likewise sufficient to constitute harm under Title IX, as it "invites more scrutiny and attention" from other students, "very publicly branding all transgender students with a scarlet 'T'." *Grimm,* 972 F.3d at, 617–18. Ultimately, the Act's focus on biological sex to determine athletic participation denies transgender students their right under Title IX, by effectively excluding them from meaningful participation in sports. *B.P.J. by Jackson*, 98 F.4th at 565.

The Equal Protection Clause of the Fourteenth Amendment provides that "[n]o State shall ... deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. Amend. XIV, § 1. Sex-based discrimination is subject to intermediate scrutiny under the Equal Protection Clause. *United States v. Virginia*, 518 U.S. 515, 555 (1996). The Supreme Court began to apply heightened scrutiny to sex-based classifications, its consistent purpose has been to

eliminate discrimination on the basis of gender stereotypes. *Glenn v. Brumby*, 663 F.3d 1312, 1319 (11th Cir. 2011). A policy resting on the sex classification at birth is inherently based upon the student's sex-classification. *Adams by and through Kasper v. School Board of St. Johns County,* 57 F.4th 791 (11th Cir. 2022). Therefore, a policy is using the sex classification is targeting transgender students' sex non-conformity. *Grimm*, 972 F.3d at 608; *Adams by and through Kasper*, 57 F.4th at 801. To demonstrate that a statute violates equal protection on its face, the plaintiff must show that the statute explicitly distinguishes between individuals. *Shaw v. Reno,* 509 U.S. 630, 642 (1993). The consistent purpose of applying intermediate scrutiny to sex-based classifications has been to eliminate discrimination on the basis of gender stereotypes. *Craig v. Boren*, 429 U.S. 190, 199 (1976); *Virginia*, 518 U.S. at 533; *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 726 (1982). The use of biological sex and genetics at birth to separate athletic teams is a facial classification based in gender identity discrimination. *B.P.J. by Jackson v. W. Virginia State Bd. of Educ.*, 98 F.4th 542, 556 (4th Cir. 2024).

To satisfy intermediate scrutiny, the policy must (1) advance an important governmental objective and (2) be substantially related to that objective. *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 726 (1982). The burden of justification is demanding, and it rests entirely on the state. *Miss. Univ. for Women*, 458 U.S., at 724. Gender identity does change the physiological advantages that biological males have over cisgender women. *Hecox v. Little*, 104 F.4th 1061, 1082 (9th Cir. 202*4), as amended* (June 14, 2024). The ban on transgender female athletes applies broadly to many students who do not have athletic advantages over cisgender female athletes. *Id*.

ARGUMENT

I. THE SAVE THE WOMEN'S SPORTS ACT VIOLATES TITLE IX BY DISCRMINATING ON THE BASIS OF SEX AND SUBJECTING TRANSGNEDER STUDENTS TO HARM THROUGH DENIAL OF EQUAL ATHLETIC OPPORTUNITIES.

Embodying this county's long-held principle of equity, 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). The Save Women's Sport's Act (the "Act"), codified as North Greene Code § 22-3-4 et seq, violates Title IX by discriminating against A.J.T. on the basis of sex.

To prevail on her Title IX claim, A.J.T. must demonstrate (1) that she was excluded 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 improper discrimination caused her harm. *Grimm,* 972 F.3d at 616. It is uncontested that the school received federal financial assistance at all relevant times and is subject to Title IX. (R. 3).

Under Title IX, discrimination "on the basis of sex" inherently includes discrimination based on gender identity. The Circuit Court's finding that Title IX was only intended to protect biological sex is unsound, given both the evolving understanding of sex discrimination and clear guidance from recent legal precents. The Supreme Court's decision in *Bostock*, 590 U.S. at 662, clearly established that discrimination against transgender individual is discrimination "because of sex". This principle has been applied to Title IX by both the Fourth and Seventh Circuits, making it clear that excluding A.J.T. from participating in girls' sports is a violation of her rights under Title IX.

By excluding A.J.T. from girls' sports teams, the Act inflicts direct harm based on her transgender status, effectively denying her the opportunity to participate in athletics. The harm caused by the Act goes beyond exclusion; it inflicts emotional and psychological damage by denying A.J.T. the right to participate on the girls' team. This harm is well documented in cases such as *Grimm*, 972 F.3d at 616 and *B.P.J. by Jackson*, 98 F.4th at 564[1], where the courts recognized the deep emotional and dignitary harm transgender students face when denied the opportunity to fully participate in school life. The Act does not just deny participation; it isolates and stigmatizes. *Grimm*, 972 F.3d at 617–18.

A. Excluding A.J.T. from participating on women's sports teams is exclusion "on the basis of sex" because it relies of a narrow interpretation of sex, which fails to account for gender identity.

The Act excludes A.J.T. from sports teams "on the basis of sex." *See Bostock,* 590 U.S. at 662 (the Supreme Court held that discrimination against a person for being transgender is discrimination "because of sex" under Title VII). Although *Bostock* interprets Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e–2(a)(1), it guides our evaluation of claims under Title IX. *Grimm,* 972 F.3d at 616; *See also Jennings v. Univ. of N.C.*, 482 F.3d 686, 695 (4th Cir. 2007); *cf. Fitzgerald v. Barnstable Sch. Comm*., 555 U.S. 246, 258 (2009) ("Congress modeled Title IX after Title VI ... and passed Title IX with the explicit understanding that it would be interpreted as Title VI was.").

i. The term "sex" as used in Title IX is ambiguous because it is not defined by the statute, or the Department of Education's regulations and the dictionary definitions are as equally inconclusive.

[1] *B.P.J. by Jackson* is pending writ of certiorari to the Supreme Court., but as it stands is still valid law.

Title IX nor its implementing regulations define the term "sex," and in looking to case law for guidance, there is nothing to suggest that "sex" referred only to biological sex. *A.C. by M.C. v. Metro. Sch. Dist. of Martinsville*, 75 F.4th 760, 770 (7th Cir. 2023).

To interpret "sex" within the meaning of Title IX, one looks to the ordinary meaning of the word when it was enacted in 1972. *Adams by & through Kasper v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 812 (11th Cir. 2022) (citing *Wis. Cent. Ltd. v. United States*, 585 U.S. 274, 277 (2018) (Our job is to interpret the words consistent with their 'ordinary meaning ... at the time Congress enacted the statute'.)). One of the methods of determining the ordinary meaning of a word "is by looking at dictionaries in existence around the time of enactment." *Adams by & through Kasper,* 57 F.4th at 812 (11th Cir. 2022).

Title IX, nor the regulation, defines sex, and further the dictionary definitions from around 1972 (when Title IX was passed) are equally inconclusive. *See, e.g., Black's Law Dictionary, Sex* (4th ed. 1968) (defining sex narrowly as "the sum of the peculiarities of structure and function that distinguish a male from a female organism" and broadly as "the character of being male or female"); *Webster's New World Dictionary*, *Sex* (2d ed. 1972) (defining sex both "with reference to ... reproductive functions" and broadly as "all the attributes by which males and females are distinguished"). It follows that the 11th circuit incorrectly ruled that the dictionary definitions prove that "sex" is unambiguous as used in Title IX. *Adams by & through Kasper*, 57 F.4th at 813. Consequently, there is insufficient evidence to support the assumption that sex can mean only biological sex. *A.C. by M.C.*, 75 F.4th at 770; *see also B.P.J. by Jackson*, 98 F.4th at 564; *see also Grimm,* 972 F.3d at 618.

It is not obvious that sports would be separated solely based on "biological sex" when Title IX was passed in 1972. The Supreme Court rejected a similar argument in *Bostock*.

Bostock, 590 U.S. at 676. The defendants in *Bostock* argued, and the Supreme Court rejected, that no one in 1964 would anticipate that Title VII would be interpreted to prohibit discrimination based on transgender status. *Id.* Often lurking just behind such objections resides a "cynicism that Congress could not possibly have meant to protect a disfavored group." *Id.* To refuse enforcement just because the parties before us happened to be unpopular at the time of the law's passage would "tilt the scales of justice in favor of the strong or popular and neglect the promise that all persons are entitled to the benefit of the law's terms." *Id. at* 677-78.

The Circuit Court errored in finding that there was no serious debate that Title IX's endorsement of sex refers to only biological sex. (R. 11). Just as there is doubt as to whether no one would anticipate prohibition based on transgender status is "really true" regarding Title VII, there is reason to doubt the Circuit Court's finding here. (R. 11). For example, Renee Richards was allowed to compete as a transgender woman in the woman's division of the US Open Tennis Championship in 1977. *See Richards v. U.S. Tennis Ass'n,* 93 Misc. 2d 713, 400 (Sup. Ct. 1977). Following the Supreme Court's reasoning this shows that "at least some people" in the 1970s did not share the Circuit Court's finding that there is no serious debate that Title IX's endorsement refers to protecting *only* biological sex. (R. 11).

ii. The Supreme Court's finding in *Bostock*, discrimination against transgender individuals is discrimination "because of sex", applies to Title IX because of the parallel language and legal precedent.

Finding that Title IX does not define the ambiguous terms "sex" and "on the basis of sex" for purposes of their application to transgender individuals, many courts have looked to other decisions interpretating other anti-discrimination statutes, particularly Title VII. *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ*., 858 F.3d 1034, 1047-49 (7th Cir. 2017)[2]; s*ee also*

[2] Abrogated on other grounds by *Illinois Republican Party v. Pritzker*, 973 F.3d 760 (7th Cir. 2020).

Grimm, 972 F.3d at 616; *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 616, (1999); *see also Johnson v. Bd. of Regents of Univ. of Georgia*, 263 F.3d 1234 (11th Cir. 2001).

In *Bostock*, the Supreme Court held that discrimination against a person for being transgender is discrimination because of sex. *Bostock,* 590 U.S. at 662. As the Supreme Court noted, "it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex." *Grimm*, 972 F.3d at 616 (quoting *Bostock*, 590 U.S. at, 660). That is because the discriminator is necessarily referring to the individual's sex to determine inconsistencies between sex and gender, making sex a but-for cause for the discriminator's actions. *Grimm,* 972 F.3d at 616 (citing quoting *Bostock,* 590 U.S. at 660).

Courts have long applied Title VII case law to analyze a broad range of claims under Title IX. *See, e.g., Franklin v. Gwinnett Cty. Pub. Schs*., 503 U.S. 60, 75 (1992) (holding that because sexual harassment is intentional discrimination because of sex under Title VII, "the same rule should apply when a teacher sexually harasses a student" under Title IX); *Bowers v. Bd. of Regents of Univ. Sys. of Ga*., 509 F. App'x 906, 910 (11th Cir. 2013) (per curiam) (noting that this Court "applies Title VII case law to assess a Title IX claim."); *GP by & through JP v. Lee Cty. Sch. Bd*., 737 F. App'x 910, 916 (11th Cir. 2018) (analyzing Title IX disparate treatment claim under Title VII); *Kocsis v. Fla. State Univ. Bd. of Trustees*, 788 F. App'x 680, 686 (11th Cir. 2019) (analyzing Title IX retaliation claim under Title VII). It follows, courts rely upon a common body of law to analyze sex discrimination claims under the Equal Protection Clause, Title VII, and Title IX. *See, e.g., Glenn v. Brumby*, 663 F.3d 1312, 1316 (11th Cir. 2011) (relying on both Equal Protection and Title VII authorities to find that "the very acts that define transgender people as transgender are those that contradict stereotypes of gender-appropriate appearance and behavior").

Congress's key drafting choices of Title VII—"to focus on discrimination against individuals and not merely between groups and to hold employers liable whenever sex is a but-for cause of the plaintiff 's injuries"—virtually guaranteed that unexpected applications would emerge over time. *Bostock*, 590 U.S. at 680. This precedent supports both statutes' plain terms prohibits discrimination against an individual because her gender identity differs from her biological sex. *See Doe v. Snyder*, 28 F.4th 103, 114 (9th Cir. 2022) (noting "the similarity in language prohibiting sex discrimination in Titles VII and IX" and holding that *Bostock* applies to Title IX); *see also Grimm*, 972 F.3d at 616.

Further, multiple circuits have found that discrimination against transgenders is a form of sex discrimination. *A.C. by M.C.*, 75 F.4th at 769; *Whitaker By Whitaker,* 858 F.3d at 1047; *Smith v. City of Salem*, 378 F.3d 566, 577 (6th Cir. 2004); *Glenn,* 663 F.3d at 1317. In *Smith,* 378 F.3d at 577, the plaintiff was diagnosed with gender identity disorder, a condition later renamed Gender Dysphoria. Born a male, the plaintiff began to present at work with a more feminine appearance and mannerisms. *Id*. He alleged in his complaint that as a result, his employer schemed to act against him and ultimately subjected him to a pretextual suspension in violation of Title VII. *Id*. The Sixth Circuit noted that in *Price Waterhouse*, the Supreme Court established that the prohibition on sex discrimination encompasses both the biological differences between men and women, and gender discrimination, that is, discrimination based on a failure to conform to stereotypical gender norms. *Smith*, 378 F.3d at, 573 (citing *Price Waterhouse v. Hopkins,* 490 U.S. 228, 251, (1989)).

By definition, a transgender individual does not conform to the sex-based stereotypes of the sex that he or she was assigned at birth. *Whitaker By Whitaker,* 858 F.3d 1034, 1048 (7th Cir. 2017); *See also Glenn*, 663 F.3d at 1317. The Court in *Grimm* explained that the School Board in

that case could not exclude the Student, Grimm, from the boy's bathroom without referencing his biological gender under the policy. *Grimm*, 972 F.3d at 616. Regardless of the Board's primary motivation, his sex remains a but-for cause for the Board's actions, therefore the court found excluding Grimm from the boy's restrooms exclusion "on the basis of sex." *Id.* at 616-617.

The Act in *B.P.J. by Jackson* discriminates based on gender identity, as well as based on sex assigned at birth by forbidding transgender girls—but not transgender boys—from participating in teams consistent with their gender identity. *B.P.J. by Jackson*, 98 F.4th at 563. The Act goes beyond even what the Court concluded was impermissible in *Grimm*. Under this Act, a transgender boy like Gavin Grimm may play on boys' teams but a transgender girl like B.P.J. may not play on girls' teams. *Id.*

Arguments asserting *Bostock's* reasoning should not apply to Title IX are unfounded. The precedents applying *Bostock* to Title IX comes from the parallel plain text of Title VII and Title IX. Title IX protects "any person," 20 U.S.C. § 1681(a), and Title VII protects "any individual," 42 U.S.C. § 2000e-2(a)(1). Therefore, the focus of both statutes is on individuals, not groups. Title IX prohibits discrimination "on the basis of" sex, 20 U.S.C. § 1681(a) and Title VII prohibits discrimination "because of" sex, 42 U.S.C. § 2000e-2(a)(1) – both statutes requiring "but for" causation. *See Gentry v. E. W. Partners Club Mgmt. Co.,* 816 F.3d 228, 235-36 (4th Cir. 2016) ("We see no 'meaningful textual difference' between the term 'on the basis of' and the terms 'because of,' 'by reason of,' or 'based on'-- terms that the Supreme Court has explained suggests 'but-for' causation."). Applying *Bostock's* reasoning to Title IX, discrimination against a transgender individual for being transgender is discrimination on the basis of sex for Title IX. Therefore, the Act excludes A.J.T. from sports teams "on the basis of sex".

A.J.T. does not conform to the sex-based stereotypes that aligns with her biological sex, male, and the Act is excluding A.J.T. from sports teams due to her transgender status, as it is impossible to discriminate against her without discriminating against her based-on sex. (R. 4). The Act discriminates due to transgender status by separating the teams based on biological sex, and discriminating based on gender identity. (R. 4). Just as the Board in *Grimm* could not exclude Grimm from the boy's bathroom without referencing his biological gender, here, the statute cannot exclude A.J.T. from participating in girls' sports without referencing her biological gender. (R. 4). Even if the statute's motivation was to exclude A.J.T. because she is transgender, her sex remains a but-for cause, therefore excluding A.J.T. on the basis of sex.

The Circuit Court incorrectly found that the Act did not discriminate based on biological sex. (R. 11). Just as the Act in *B.P.J. by Jackson*, the Act also discriminates based on sex assigned at birth by forbidding transgender girls, but not transgender boys, from participating in teams consistent with their gender identity. (R. 4). Following the court's reasoning, by discriminating not only based on gender identity, but also based on sex assigned at birth, the Act goes beyond what the Fourth Circuit already held was impermissible in *Grimm*. Following this reasoning, the Act discriminates on the basis of sex because it discriminates based on gender identity and biological sex. Therefore, the act discriminates against A.J.T. based on her transgender status.

B. The Save Women's Sports Act subjects A.J.T. to improper discrimination that harms her by inviting more scrutiny and denying her equal athletic opportunities.

Under Title IX, "discrimination 'means treating an individual worse than others who are similarly situated.'" *Grimm*, 972 F.3d at 618 (quoting *Bostock*, 590 U.S. at 657).

Title IX does not permit the exclusion of transgender students from sports teams that align with their gender identity by imposing a rigid requirement based solely on biological sex.

The Circuit Court misconstrued the Title IX's athletic regulations to support their assertion that transgender girls can be excluded from girls' sports teams. (R. 11).

i. A.J.T. is subjected to harm by the Act because it invites scrutiny and stigma and punishes her for her transgender status.

Harm under Title IX is not restricted to physical harm but also includes emotional and dignitary harm. *Grimm,* 972 F.3d at 618. In a country with a history of racial segregation, we know that "segregation not only makes for physical inconveniences, but it does something spiritually to an individual." *Grimm*, 972 F.3d at 617 (citing Martin Luther King, Jr., "Some Things We Must Do," Address Delivered at the Second Annual Institute on Nonviolence and Social Change at Holt Street Baptist Church (Dec. 5, 1957)).

The stigma of being forced to use a separate restroom is likewise sufficient to constitute harm under Title IX, as it "invites more scrutiny and attention" from other students, "very publicly branding all transgender students with a scarlet 'T'." *Grimm,* 972 F.3d at, 617–18. The student in *Grimm* described feeling stigmatized and isolated by having to use separate restroom facilities. His walk to the restroom felt like a "walk of shame." *Grimm*, 972 F.3d at 617. Emotional and dignitary harm is considered harm under Title IX, and it requires no imagination to understand the stigma of being unable to participate on a team with one's friends and peers. *B.P.J. by Jackson,* 98 F.4th at 563; *Grimm,* 972 F.3d at 617-18.

The student in *Grimm* was treated worse than students with whom he was similarly situated because he alone could not use the restroom corresponding with his gender. Unlike the other boys, he had to use either the girls' restroom or a single-stall option, and in that sense, he was treated worse than similarly situated students. *Id.* at 618.

An access policy that punishes a student for their transgender status violates Title IX. *A.C. by M.C.*, 75 F.4th at 772; *Whitaker By Whitaker*, 858 F.3d at 1049. The students in both

Whitaker By Whitaker and *A.C. by M.C.*, were threatened with discipline if they used the boys' bathrooms, and all three reported feeling depressed, humiliated and excluded by the requirement to use the girls' bathrooms or the unisex bathroom. *A.C. by M.C.*, 75 F.4th at 772. The gender-neutral alternatives were not true alternatives because of their distance and the increased stigmatization they caused the students. *A.C. by M.C.*, 75 F.4th at 772; *Whitaker By Whitaker,* 858 F.3d at 1050. Both courts found the school districts persisted in treating the students worse than other boys because of their transgender statues. *A.C. by M.C.*, 75 F.4th at, 772; *Whitaker By Whitaker*., 858 F.3d at 1050.

The stigma of being forced to participate on only boys' sports teams constitutes harm to A.J.T. Just as the student in *Grimm* described feeling stigmatized and isolated by being forced to use a separate restroom, the stigma that would come from A.J.T. being forced to play on the boys' team would publicly brand her with a scarlet T and invite more scrutiny and attention from other students. A.J.T. was previously allowed and participated with no incidents on the all-girls' cheerleading team, and due to the Act, will not be allowed to continue or to join the girls' cross country and volleyball team. It requires no imagination to understand the stigma of being unable to participate on a team with her friends and peers.

The Act punishes A.J.T. for her transgender status. The students in *Whitaker* and *A.C. by M.C.* were threatened with discipline if they used the boys' bathroom, causing them to feel depressed, humiliated and excluded by being forced to use the girls' bathroom or the unisex bathroom. Similarly, here, A.J.T. was forbidden from joining the girls' volleyball and cross-country team. (R. 3). Additionally, A.J.T. had previously joined, and been practicing and competing with the girls all-girl cheerleading without incident, and now will not be allowed to continue. (R. 3). A.J.T. began dressing as a girl at home in the third grade and transitioned to

living as a girl in both public and private settings. (R. 3). Due to this, and following the seventh circuit's reasoning, the option to play on the boys' sports teams is not a true alternative because of the increased stigmatization and harm it causes. This alternative persistently allows school districts to treat A.J.T. worse than other girls due to her transgender status.

ii. The Department of Education's regulation allowing separate teams based on sex does not justify excluding transgender students because it cannot override Title IX's anti-discrimination protections.

In the Title IX context, discrimination "means treating that individual worse than others who are similarly situated." *Grimm*, 972 F.3d at 618. Nevertheless, the Circuit Court emphasizes the Department of Education regulation, 34 C.F.R. § 106.33, as why the statute does not harm A.J.T. and therefore doesn't violate Title IX. R. 11.

Title IX prohibits schools from providing athletics separately "on the basis of sex" but the regulation allows for sex separate sports. 34 C.F.R. § 106.41(a)-(b). The Circuit Court believed that the Act does not exclude but simply designates which team Plaintiff will play on. (R. 11). The fourth circuit addressed this same argument in *Grimm* and reasoned that Grimm did not challenge sex-separated restrooms; he challenged the Board's discriminatory exclusion of himself from the sex-separated restroom matching his gender identity. *Grimm*, 972 F.3d at 618. Implementing the regulation cannot override the *statutory* prohibition against discrimination on the basis of sex and the Board's application of its restroom policy in *Grimm* violated Title IX. *Grimm,* 972 F.3d at 618, 619.

While the regulation may refer to males and females, it is silent as to how to determine whether a transgender individual is a male or female for the purpose of sex-segregated restrooms. The restroom regulation at issue in *Grimm* also referred to providing restrooms for students on the basis of sex, as long as they are comparable to each other. *Grimm,* 972 F.3d at

618. The court in *Grimm* explained that all the regulation suggests is that the act of creating the separate restrooms itself is not discriminatory. *Id.*

The choice between not participating in sports and participating only on boys' teams is no real choice at all. *B.P.J. by Jackson*, 98 F.4th at 564. The Act required B.P.J. to take on additional harms to avoid having to forfeit playing school sports all together. *Id.* It cannot be expected that B.P.J. will counter all the work she has done with her schools, teachers and coaches for nearly half her life by introducing herself to teammates, coaches and even opponents as a boy. *Id*. Doing so would directly contradict the treatment protocols for gender dysphoria, and thus the court found the act exposes B.P.J. to the very harms Title IX is meant to prevent by effectively excluding her from participation in all non-coed sports entirely. *Id.* B.P.J. has been publicly living as a girl for five years, and during that time, her school created plans to ensure she was recognized as a girl at school, and she has participated only on girls' sports teams. *Id.*

The Circuit Court ignores that "Title IX protects the rights of individuals, not groups, and does not ask whether the challenged policy treats [one sex] generally less favorably than [the other]. *Peltier v. Charter Day Sch., Inc*. 37 F.4th 104, 130 (4th Cir. 2022). B.P.J. has shown that applying the Act to her would cause her harm and treat her worse than those she is similarly situated to. *B.P.J. by Jackson*, 98 F.4th at 565. It would deprive her of any meaningful athletic opportunities by effectively excluding her from sports and does all of this on the basis of sex. *Id*. That is all that is required by Title IX. *Id*. Due to this, whether other transgender girls undergo different medical interventions that prevent them from being similarly situated to cisgender girls, is irrelevant to B.P.J.'s individual case. *Id*.

While the Department of Education regulation allows for "separate teams for members of each sex", (34 C.F.R. § 106.41(b)), A.J.T. does not challenge the legality of separate teams, but

instead the requirement that she may only compete on boys or co-ed teams. Instead, the Circuit Court simply states that transgender girls are not excluded from school sports entirely because they can play for the boys' teams, (R. 11) but this is effectively excluding them from sports.

The stigma of forcing A.J.T. to participate on only boys' teams effectively excludes her from sports. The Circuit Court errored in finding that allowing A.J.T. to participate on the boys' teams keeps her from being excluded from sports completely. (R. 11). A.J.T. must take on additional harm to avoid forfeiting sports all together. Just as the student in *B.P.J. by Jackson*, A.J.T. is fully living as a girl in both public and private. (R. 3). She was diagnosed with gender dysphoria in 2022[3]. (R. 3). At school, A.J.T. began using a name commonly associated with girls, and she joined the school's all-girl cheerleading team, all without incident. (R. 3). Following the fourth circuits reasoning in *B.P.J. by Jackson*, forcing A.J.T. to choose between participating only on the boys' sports teams and not participating at all is not a choice. The court explained, and it follows here, that it cannot be expected for A.J.T. to counter all the work she has done by introducing herself as a boy to teammates, coaches and opponents, as that would directly contradict the treatment protocols for gender dysphoria. Therefore, the Act effectively excludes her from participation in sports due to exposure to serious harms, the very harms Title IX is meant to prevent.

Title IX treats A.J.T., as an individual, less favorably than others she is similarly situated with. As the student in B.P.J., Applying the act to A.J.T. would treat her worse than those who

[3] Gender dysphoria is the feeling of discomfort or distress that might occur in people whose gender identity differs from their sex assigned at birth or sex-related physical characteristics. Gender Dysphoria, Mayo Clinic, https://www.mayoclinic.org/diseases-conditions/gender-dysphoria/symptoms-causes/syc-20475255 (last visited Sept. 12, 2024).

she is similarly situated with, deprives her of any meaningful athletic opportunities by effectively excluding her, and does so on the basis of sex. That is all that is required for Title IX.

II. THE SAVE WOMEN'S SPORTS ACT VIOLATES THE EQUAL PROTECTION CLAUSE BECAUSE IT IS DISCRMINATORY WITHOUT A SUBSTANTIAL RELATION TO AN IMPORTANT STATE INTEREST.

The Equal Protection Clause of the Fourteenth Amendment provides that "[n]o State shall ... deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. It is a direction that all persons similarly situated should be treated alike. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). The Equal Protection Clause does not tolerate gender stereotypes. *Mississippi Univ. for Women v. Hogan,* 458 U.S. 718, 726 (1982). Legislative classifications based on gender call for a heightened standard of review. *City of Cleburne,* 473 U.S. at 440. This standard requires the government to show that its "**gender** classification ... is substantially related to a sufficiently important government interest." *Id.* at 441.

The Save Women's Sport's Act, ("the Act"), codified as North Green Code § 22-3-4 et seq, violates the Equal Protection Clause because it fails to meet the heightened standard of review and is not substantially related to the State's interest. The Act is facially discriminatory through its language, definitions, and application. Further, the State's interest in protecting women's sports is not substantially related to preventing transgender women from participating on a sports team. A.J.C asks this Court to reverse the Fourteenth Circuit.

A. The Act fails the heightened standard of intermediate scrutiny as it is facially discriminatory against transgender individuals on the basis of sex non-compliance.

When considering an equal protection claim, we first determine what level of scrutiny applies; then, we ask whether the law or policy at issue survives such scrutiny. *Grimm v.*

Gloucester Cnty. Sch. Bd., 972 F.3d 586, 607 (4th Cir. 2020), *as amended* (Aug. 28, 2020). Statutes distributing benefits and burdens between the sexes in different ways very likely reflect outmoded notions of relative capabilities of men and women. *City of Cleburne,* 473 U.S. at 440. Sex-based discrimination is subject to intermediate scrutiny under the Equal Protection Clause. *United States v. Virginia*, 518 U.S. 515, 555 (1996).

i. Intermediate scrutiny is applied because the Act excludes transgender people from participating in athletic activities for their gender non-conformity.

Sex-based discrimination is subject to intermediate scrutiny under the Equal Protection Clause. *Virginia*, 518 U.S. at 555. The Supreme Court began to apply heightened scrutiny to sex-based classifications, its consistent purpose has been to eliminate discrimination on the basis of gender stereotypes. *Glenn v. Brumby*, 663 F.3d 1312, 1319 (11th Cir. 2011). Governmental acts based upon gender stereotypes—which presume that men and women's appearance and behavior will be determined by their sex—must be subjected to heightened scrutiny because they embody "the very stereotype the law condemns." *J.E.B. v. Alabama*, 511 U.S. 127, 138 (1994).

Policy seeking to separate students based on the biological marker on the student's birth certificate rests on a sex classification. *Grimm,* 972 F.3d at 608. A policy resting on the sex classification at birth is inherently based upon the student's sex-classification. *Adams by and through Kasper v. School Board of St. Johns County*, 57 F.4th 791 (11th Cir. 2022). Therefore, a policy is using the sex classification is targeting transgender students' sex non-conformity. *Grimm,* 972 F.3d at 608; *Adams by and through Kasper,* 57 F.4th at 801. On this ground, the policy constitutes sex-based discrimination because it relies on sex stereotypes and is subject to intermediate scrutiny. *Grimm,* 972 F.3d at 608.

Whether the Act is being described on the basis of sex or gender it is their gender nonconformity. The ninth circuit has held that a male-to-female transgender plaintiff who was singled out for harassment because he presented and defined himself as a woman had stated an actionable claim for sex discrimination under the Gender Motivated Violence Act because "the perpetrator's actions stem from the fact that he believed that the victim was a man who 'failed to act like one.'" *Schwenk v. Hartford*, 204 F.3d 1187, 1198–1203 (9th Cir.2000). The First Circuit echoed this reasoning in *Rosa v. Park West Bank & Trust Co*., where it held that a transgender plaintiff stated a claim by alleging that he "did not receive [a] loan application because he was a man, whereas a similarly situated woman would have received [a] loan application. That is, the Bank ... treat[s] ... a woman who dresses like a man differently than a man who dresses like a woman." *Rosa v. Park West Bank & Trust Co*., 214 F.3d 213, 215–16 (1st Cir.2000).

North Greene's Act is subject to intermediate scrutiny because it separates students based on their sex classification at birth. The Act limits participation in sports events to the biological sex of the athlete at birth. N.G. Code § 22-3-16(b). The Act defines biological sex as an individual's physical form as male or female based solely on the individual's reproductive biology and genetics at birth. N.G. Code § 22-3-15(a)(1). Following the reasoning in *Grimm* and *Adams,* using the biological marker on a student's birth certificate is a sex-based classification targeting transgender sex non-conformity. Therefore, the Act is a sex-based discrimination subject to intermediate scrutiny.

The application of intermediate scrutiny to transgender individuals for gender nonconformity in sex classification has been unanimously subject to intermediate scrutiny at the Circuit level. The Fourth, Sixth, Seventh, Ninth, and Eleventh Circuits have applied intermediate scrutiny to transgender individuals when a policy uses sex classification at birth. *Grimm v.*

Gloucester Cnty. Sch. Bd., 972 F.3d 586, 609 (4th Cir. 2020), *as amended* (Aug. 28, 2020); *Smith v. City of Salem,* 378 F.3d 566, 573–75; 578 (6th Cir. 2004); *Doe v. Snyder*, 28 F.4th 103, 114 (9th Cir. 2022); *Adams by and through Kasper*, 57 F.4th at 803. The Circuit Court is correct in applying intermediate scrutiny on the basis of a quasi-classification, like sex to transgender individuals. (R. 6). Here, intermediate scrutiny should be applied following the Circuit Court's decision and the Fourth, Sixth, Seventh, Ninth, and Eleventh Circuits decisions.

ii. The Act's plain language, purpose, and effect are facially invalid as the Act discriminates against transgender individuals for gender non-conformity.

To demonstrate that a statute violates equal protection on its face, the plaintiff must show that the statute explicitly distinguishes between individuals. *Shaw v. Reno,* 509 U.S. 630, 642 (1993). When a court holds a statute is facially unconstitutional, the result is that the statute cannot be applied to anyone—even if it could hypothetically be "implemented in a manner consistent with the Constitution." *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 451 (2008); *B.P.J. by Jackson,* 98 F.4th at 558. The Equal Protection Clause denies to States the power to legislate different treatment to persons classified in a statute. *Reed v. Reed,* 404 U.S. 71, 75 (1971). The Supreme Court began to apply heightened scrutiny to sex-based classifications, its consistent purpose has been to eliminate discrimination on the basis of gender stereotypes. *Glenn v. Brumby*, 663 F.3d 1312, 1319 (11th Cir. 2011). A discriminatory purpose is shown when the state legislature selected or reaffirmed a particular course of action at least in part "because of," not merely "in spite of," its adverse effects upon an identifiable group. *Pers. Adm'r of Massachusetts v. Feeney,* 443 U.S. 256, 279 (1979).

Using sex-based classifications to classify transgender individuals differently on the basis of gender stereotypes is sex discrimination. The consistent purpose of applying intermediate

scrutiny to sex-based classifications has been to eliminate discrimination on the basis of gender stereotypes. *Craig v. Boren*, 429 U.S. 190, 199 (1976); *Virginia*, 518 U.S. at 533; *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 726 (1982). A person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes. *Glenn v. Brumby*, 663 F.3d 1312, 1316 (11th Cir. 2011). The very acts that define transgender people as transgender are those that contradict stereotypes of gender-appropriate appearance and behavior. *Id.* These protections cannot be denied to transgender individuals. *Id.* at 1319. The court found using sex-based classifications which rely on sex stereotypes to classify transgender students differently on the basis of transgender status is subjecting them to gender stereotyping. *Id.* A transgender status is not able to be determined without looking at the biological gender of the individual. *Grimm,* 972 F.3d at 609. The policy using the sex-assigned-at-birth reflects the stereotypic notions that gender identity is a choice. *Id.* at 610.

The use of biological sex and genetics at birth to separate athletic teams is a facial classification based in gender identity discrimination. *B.P.J. by Jackson*, 98 F.4th at 556.[4] In *B.P.J*, the act separated athletic teams' students would be allowed to join based on their biological sex. *Id.* at 555. The act defined a person's biological sex only by their reproductive biology and genetics at birth. *Id.* at 556. The act stating it does not discriminate based on gender identity because it treats all "biological males", meaning cisgender boys and transgender girls, the same is the definition of gender identity discrimination. *Id.* at 556. Similarly, in *Whitaker by Whitaker,* the policy excluded based on the sex listed on the student's birth certificate. *Whitaker By Whitaker,* 858 F.3d at 1051.[5] The policy treated students who failed to conform to their sex-

[4] *B.P.J. by Jackson* is pending writ of certiorari to the Supreme Court but as it stands is valid law.
[5] *Whitaker by Whitaker* was abrogated on the standard used to analyze religious accommodation claim, but the analysis under the Equal Protection Clause stands valid.

classification differently and punished them for conforming with their gender identity. court held the policy was inherently based upon sex-classifications and students who failed to conform to the sex-based stereotypes associated with their sex at birth were treated differently. *Whitaker By Whitaker*, 858 F.3d at 1051.

In *B.P.J.,* differing treatment of cisgender girls and transgender girls has the purpose and effect to exclude transgender girls from participating on girls' sports teams. *B.P.J. by Jackson*, 98 F.4th at 555-56. The Act requiring transgender females to participate in athletics based upon their biological gender bars participation of transgender women and girls in athletes because they cannot, by explicit terms, participate in teams that conform to their gender status. *Hecox v. Little*, 104 F.4th 1061, 1083 (9th Cir. 202*4), as amended* (June 14, 2024).[6] Being forced to play onto a team of men would be like forcing them to wear a sign that says, 'this person is not a "real" woman'. *Id.* Further, this categorical bar forcing transgender athletes to play on a sports team that does not match their gender identity would damage their mental health. *Id.*

The Act is discriminating on the basis of sex because it uses sex-based classifications to classify transgender individuals differently based on gender stereotypes. The Act requires students to participate on an athletic team based on their biological sex at birth. N.G. Code § 22-3-16(b). The Act states gender identity is separate and distinctive from biological sex and serves no legitimate relationship in promoting equal athletic opportunities for female sex. N.G. Code § 22-3-16(c). By classifying individuals by their sex-assigned-at-birth, the Act is discriminatory towards transgender individuals who, by definition, contradict gender stereotypes. The Act is relying on biological sex to classify students onto athletic teams. (R. 8). The Circuit Court

[6] *Hecox* is pending writ of certiorari to the Supreme Court but as it stands is valid law.

incorrectly states the Act classifies based only on biological sex and not transgender status, (R. 8), as transgender status can only be determined by looking at the biological sex of an individual. Relying on biological sex with no consideration for gender identity pushes the stereotypic notion that gender is a choice, and the transgender students must abide by their biological sex.

The Act's plain text that separates athletic teams based on biological sex and genetics at birth is a facial discrimination. The Act classifies only on biological sex, not transgender status, and permissibly excludes "biological males" from female sports. (R. 8). The Act defines biological males to mean an individual whose biological sex determined at birth is male. N.G. Code § 22-3-15(a)(3). The Circuit Court incorrectly states that the Act does not treat transgender individuals differently but treats only biological males and biological females differently, (R. 8), for the definition of biological male under the statute classifies cisgender males and transgender females as the same. Treating cisgender males and transgender females the same punishes transgender students who conform with their gender identity.

The Act's definition of biological sex categorically excludes transgender people from participating in sports based on their gender nonconformity. The Act forces transgender students to participate in sports according to their biological gender rather than their gender identity. (R. 4). Here, like in *Hecox,* the Act bars participation of transgender women and girls in athletics because it forces them to participate on teams that do not match their gender identity, and in doing so, effectively labels them as not a real woman. According to a report issued by the National Center for Transgender Equality, 78% of students who identify as transgender or as gender non-conformant, report being harassed while in grades K-12. *See* Jaime M. Grant et al., *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey*, Nat'l Center for Transgender Equality, at 33 (2011), *available*

at http://www.transequality.org/sites/default/files/docs/resources/NTDS_Report.pdf. These same individuals in K-12 also reported an alarming rate of assault, with 35% reporting physical assault and 12% reporting sexual assault. *Id.* As a result, 15% of transgender and gender non-conformant students surveyed made the decision to drop out. *Id.* Forcing transgender athletes to out themselves by participating on their biological gender teams could cause a substantial increase in mental and physical harm.

B. Assuming arguendo the statute is facially discriminatory, the Act is serving an important governmental interest but the discriminatory means employed are not substantially related to the achievement of those objectives.

To satisfy intermediate scrutiny, the policy must (1) advance an important governmental objective and (2) be substantially related to that objective. *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 726 (1982). The purpose of heightened scrutiny is to ensure that sex-based classifications rest upon reasoned analysis rather than the traditional assumption of the proper roles of men and women. *Id.* at 726. A gender classification fails unless it is substantially related to a sufficiently important governmental interest. *Id.*; *Craig v. Boren,* 429 U.S. 190, (1976). To survive intermediate scrutiny, the state must provide an exceedingly persuasive justification for its classification. *United States v. Virginia*, 518 U.S. 515, 533, (1996). The burden of justification is demanding, and it rests entirely on the state. *Miss. Univ. for Women*, 458 U.S., at 724. The State must show the challenged classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives. *Virginia*, 518 U.S. at 533. The justification must be genuine, not hypothesized, and must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females. *Id.*

Providing equal athletic opportunities is an important governmental interest. (R. 8, 14). However, the Act's means of achieving the interest by categorically banning transgender women and girls from all female athletic teams is not substantially related to, and in fact undermines, those asserted objectives.

Gender identity does change the physiological advantages that biological males have over cisgender women. *Hecox v. Little*, 104 F.4th 1061, 1082 (9th Cir. 202*4), as amended* (June 14, 2024). In *Hecox*, the transgender girl had been taking hormone therapy to suppress her testosterone and raise estrogen levels. *Id*. The treatment lowered her circulating testosterone levels well below the levels required to meet the NCAA eligibility for cross country and track. *Id*. The court contrasts these facts from Clark as the Clark brothers as they were cisgender boys, and that Clark supports the reasoning transgender female athletes do not have an athletic advantage over cisgender female athletes. *Id*. Before puberty, circulating testosterone levels do not vary significantly depending on whether a person has two X chromosomes, one X and Y chromosomes, or some other genetic makeup. *B.P.J. by Jackson,* 98 F.4th at 560. Receiving gender affirming hormone therapy causes physical changes to bones, muscles, and fat distribution. *Id.* at 561.

The ban on transgender female athletes applies broadly to many students who do not have athletic advantages over cisgender female athletes. *Hecox*, 104 F.4th at 1082. The primary known driver of differences in athletic performance between elite male athletes and elite female athletes is the difference testosterone levels, and a person's genetic make-up and reproductive anatomy are not useful indicators of athletic performance. *Id*. There is no scientific evidence to suggest a categorical bar against a transgender female athlete's participation in sports is required to promote sex equality or to protect athletic opportunities for females. *Id.* Further, basing the team

off of external genitalia and internal chromosomes excludes around two percent of the population who are born intersex with variations of characteristics. *Id*. at 183. Transgender women have not and could not displace cisgender women in athletics to a substantial extent. *Id*.

The States interest in protecting women from men's biological genetic advantage is not substantially related to denying transgender women the right to play as they are similarly situated to cisgender women which have biological genetic advantages within their own sex class. The Circuit Court asserts that biological sex is a substantial factor in the difference in athletic ability between males and females. (R. 9). Biology does play a role in differences in athletic abilities, but the difference is seen more prominently within the same gender. Non-transgender women athletes may have distinct advantages, such as longer legs, perfect form, or rich parents who are able to spend money on trainers and coaches. Suprenant, Chris W, *Accommodating transgender athletes,* 18 GEO. JL & PUB. POL'Y 905, 911 (2020). For any given natural physical characteristic, while the geometric means for "male" and "female" are significantly different, difference *within* a given sex is much larger. Ivy Veronic and Aryn Conrad, *Including Trans Women Athletes in Competitive Sport: Analyzing the Science, Law, and Principles and Policies of Fairness in Competition,* 46 GENDEREO. JL & PUB. POL'Y 103, 120 (2020). There is almost a complete overlap between men and women when looking at secondary sex characteristics like height, bone density, lean body mass, mean muscle cross-sectional area, and so on. *Id.* We permit women to compete with natural physical characteristics, such as height, that can confer large competitive advantages, much larger than the 8-12 percent being attributed to testosterone. *Id.* at 123. Significant proportion of cisgender men who were competing at the highest levels of international competition were within the high-end female range for endogenous testosterone. *Id.* at 125 (citing Healy et al. (2014) and Sonksen et al. (2018)). Here, A.J.T had participated,

without incident, on the elementary school's all-girl cheerleading team. The States interest in protecting women against biological advantages is unsubstantiated.

Even if there were marginal differences in athletic performance between transgender girls and cisgender girls, the Act is not justified because of the sweeping categorical exclusion. The Circuit Court incorrectly asserts that gender identity is irrelevant when it comes to sports. (R. 8). In *Hecox* the court reasons gender identity is relevant to the exclusion because testosterone can be altered to situate a transgender female similar to a cisgender female, and it excludes someone who was born intersex completely. *Hecox*, 104 F.4th at 1082. Here, the Act only allows the sex-at-birth teams, (R. 5), which provides a sweeping exclusion against transgender women, an individual who is situated similar by testosterone level to a cisgender female, and any intersex individual. A.J.T was informed by her school that she would not be able to join either team as a transgender girl. (R. 3). A similar issue arose in the Olympics when an athlete who was born with female features and male testosterone was prevented from competing, and this was addressed by the International Olympic Committee who changed their gender framework to take into account a variety of factors including testosterone after an athlete who was born with female features to allow her to compete. Laine Higgins*, Blocked From her Signature Race, Caster Semenya Won't Run in Tokyo,* Wall St. J. (July 1, 2021), https://www.wsj.com/articles/caster-semenya-tokyo-olympics-11625159284 [https://perma.cc/C5YK-4MJL]; Olympic Talk*, IOC Gives Sports New Guidance on* ***Transgender Athletes*** *Rules,* NBC Sports (Nov. 16, 2021, 3:50 PM), https://olympics.nbcsports.com/2021/11/16/ olympic-**transgender**-rules-ioc-**athletes**/ [https://perma.cc/QUJ4-2CN5].

The State's interest in saving female athletics is not substantially related to preventing transgender women from participating in female athletic teams because of the small ration of

transgender youth. Roughly 0.6 percent of the general population are transgender women. *Hecox v. Little*, 104 F.4th 1061, 1069 (9th Cir. 202*4), as amended* (June 14, 2024). Additionally, only two percent of the population are born intersex. *Id*. Therefore, the States argument the Act is necessary to protect cisgender women's ability to participate in female sports is not supported.

The State's interest in safety of female athletes is not substantially related to the objective of the Act to separate athletes based on biological sex at the time of birth. The Act limits participation in sports events to the biological sex of the athlete at birth. N.G. Code § 22-3-4. A student can be designated to a Coed or Mixed team. N.G. Code § 22-3-16(a). If the State was worried about a male whose sex is determined at birth as male and a female whose sex is determined at birth as female playing together for safety of females, then they would not have allowed a coed or mixed team. Further, as the Circuit Court dissent points out, the physiological differences between sex are minimally, if at all, related to safety, and even in contact sports, special equiptment is used to protect safety of all participants. (R. 14). Women have successfully participated in male sports such as Jackie in heavyweight, Billie Jean King in tennis, and Galey Van Voorhis as a football kicker. (R. 14 n.12). The State's interest is not substantially connected to safety when historically we have not been concerned and the Act does not separate genders.

Thus, we need not and do not decide what policy would justify the exclusion of transgender women and girls from athletics under the Equal Protection Clause, because the means-end fit here demonstrates that the Act does not survive heightened scrutiny

CONCLUSION

For the foregoing reasons, the Petitioner requests that this Court reverse the Fourteenth Circuit as the Save the Women's Sport Act in violation of Title IX and is unconstitutional under the Equal Protection Clause of the Fourteenth Amendment.