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.

ON WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE FOURTEENTH CIRCUIT

BRIEF FOR THE PETITIONER

TEAM 18

Attorneys

QUESTIONS PRESENTED

1. Whether Title IX prevents a state from consistently designating girls' and boys' sports teams based on biological sex determined at birth, when the statute discriminates on the basis of sex and results in unlawful harm.
2. Whether the Equal Protections Clause prevents a state from offering separate boys' and girls' sports teams based on biological sex determined at birth, when the state lacks an important governmental interest and the means used to achieve the alleged governmental interest are not substantially related.

PARTIES TO THE PROCEEDING

A.J.T. (plaintiff-appellant below) is the petitioner. The State of North Greene Board of Education, State Superintendent Floyd Lawson, the State of North Greene, and Attorney General Barney Fife (intervenor-defendants-appellees below) are the respondents.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

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OPINIONS BELOW

The opinion of the court of appeals (R. 2–16) is unreported, but is available at *A.J.T. v. North Greene Bd. Of Educ.*, 2024 WL 98765 (14th Cir. Jan. 15, 2024). The memorandum opinion of the district court is unpublished, but is available at *A.J.T. v. North Greene Bd. of Educ.*, 2023 WL 56789 (E.D. N. Greene 2023) (mem. op.).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pertinent constitutional and statutory provisions are reproduced at App., *infra*, 1a–3a.

STATEMENT

A. Factual Background

1. A.J.T. was born a biological male but began to live as a female. R. 3. As part of A.J.T.'s social transition, she adopted a name associated with females and began to dress as a

girl both privately and publicly. *Id*. After A.J.T. began her social transition, she joined her elementary school's all-girl cheerleading team. *Id.* It was not until 2022, however, that A.J.T. was diagnosed with gender dysphoria. *Id.* After the diagnosis, A.J.T. began counseling and discussing other potential gender affirming treatments, including puberty-delaying treatments—which would prevent any physiological changes from increased testosterone. *Id.*

2. In April 2023, the North Greene Senate introduced Senate Bill 2750—called the "Save Women's Sports Act." *Id.* The Bill was ultimately approved by both Houses of the state legislature and later signed into law on May 1, 2023, by North Greene Governor Howard Sprague. *Id.* The Bill was then codified as North Greene Code § 22-3-4 *et seq*, entitled "Limited participation in sports events to the biological sex of the athlete at birth." *See* N.G. CODE § 22-3-4 *et seq*; R. 3.

   Respondents assert that the Save Women's Sports Act's objective is to "provide equal athletic opportunities for female athletes and to protect the physical safety of female athletes when competing." R. 3–4. To accomplish this objective, the Save Women's Sports Act requires athletic teams or sports to be designated as either male, female, or coed. *Id.* at 4; N.G. CODE § 22-3-16(a). Any sport designated for females "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; N.G. CODE § 22-3-16(b). The Act defines female as "an individual whose biological sex determined at birth is female." R. 4; N.G. CODE § 22-3-15(a)(2). It further defines male as "an individual whose biological sex determined at birth is male." R. 4; N.G. CODE § 22-3-15(a)(3). An individual's biological sex, under this Act, is determined "*solely* on the

individual's reproductive biology and genetics at birth." R. 4; N.G. CODE § 22-3-15-(a)(1)(emphasis added).

3. As a result of the Save Women's Sports Act, A.J.T.'s school informed her that she was not permitted to join the girls' volleyball or cross-country teams, because A.J.T. is a transgender female.[1]R. 3.

B. Procedural History

1. In 2023, A.J.T., by and through her mother, sued the State of North Greene Board of Education and State Superintendent Floyd Lawson in the United States District Court in the Eastern District of North Greene. *Id.* at 4–5. A.J.T. sought declaratory judgment that the Save Women's Sports Act, N.G. CODE § 22-3-4 *et seq.*, violated Title IX, 20 U.S.C. § 1681(a)(1), and the Equal Protections Clause of the Fourteenth Amendment, U.S. CONST. amend. XIV, § 1, cl. 4, and an injunction against preventing Defendants from enforcing the Act against A.J.T. R. 4–5. The State of North Greene moved to intervene in the district court, and the motion was granted. *Id.* 4. A.J.T. then amended her complaint to name the State of North Greene and Attorney General Barney Fife as defendants. *Id.* at 4–5. Defendants filed a motion for summary judgment on Plaintiff's claims, and the district court granted their motion. *Id.* at 5.
2. In affirming the district court's grant of summary judgment for Defendants, the Fourteenth Circuit held that the Save Women's Sports Act did not violate the Equal Protections Clause of the U.S. Constitution or Title IX. *Id.* at 6. The Fourteenth Circuit found that the legislature's definition of "females," "women," or "girls" as being based

[1] Transgender has been "used as an umbrella term to describe groups of people who transcend conventional expectations of gender identity or expression. . . ." PFLAG, *PFLAG National Glossary of Terms*, https://pflag.org/glossary/ (last visited Sept. 13, 2024).

on "biological sex" was substantially related to the important government interests of providing equal athletic opportunities for females and protecting the physical safety of female athletes, and thus did not violate the Equal Protections Clause of the Fourteenth Amendment. *Id.* at 8–10. The court of appeals further held that the Act did not violate Title IX, because Title IX explicitly authorizes sex-separate sports, where the teams are based upon competitive skill or the activity involved is a contact sport. *Id.* at 11. To support their conclusion the court of appeals contended that even though Title IX did not define sex, it was used in the biological sense because Title IX's purpose was to promote sex equality. *Id.* Accordingly, the Save Women's Sports Act was found to not discriminate on the basis of sex and thus did not violate Title IX. *Id.* at 11–12.

Justice Knotts dissented from the Fourteenth Circuit's opinion. *Id.* at 13. Justice Knotts argued that the Save Women's Sports Act violated the Equal Protections Clause of the Fourteenth Amendment and ran afoul of Title IX. *Id.* at 13. The dissent would have held that the Act had a discriminatory purpose and effect, was facially discriminatory, failed to use means of achieving the Act's objective that were substantially related to the objectives. *Id.* at 14–15. T dissent also contended that the Act violated Title IX by treating A.J.T. worse on the basis of her sex which resulted in emotional and dignitary harm to A.J.T. *Id.* at 15–16.

SUMMARY OF ARGUMENT

I. Title IX prevents states from consistently designating girls' and boys' sports teams based on biological sex assigned at birth.

A. The Court determined that when interpreting statutes, you must begin by looking to the ordinary meaning at the time of the enactment. The ordinary meaning of "on the basis of"

in Title IX requires a but-for analysis. Accordingly, sex must be a but-for cause. Sex, however, need not be the only but-for cause as this Court has held events can have multiple but-for causes.

B. To prove a Title IX violation, the plaintiff must show that they were excluded on the basis of their sex. The Save Women's Sports Act excludes transgender women from participating in sports designated for females. This exclusion effectively only prohibits transwomen from participating in female sports. As such, the Act prohibits the transgender person who was identified as male at birth but now identifies a female, while permitting another identical cisgender student but who was identified as female at birth.

C. Unlawful discrimination is "treating that individual worse than other who are similarly situated" and employing "distinctions or differences in treatment that injure protected individuals." The Save Women's Sports Act requires treating transgender women worse than cisgender women by only excluding transgender women from participation in female sports. As such, transgender women are treated differently and worse than all of their peers.

D. Title IX regulations that allow the operation of sex-separated teams is neither at issue nor relevant. A.J.T is not challenging the legality of sex-separated teams. Further, the Department of Education has already attempted to revise these regulations counter to Respondents' arguments. Accordingly, the Court should not rely on such regulations in making its decision.

II. The Equal Protections Clause of the Fourteenth Amendment prevents states from consistently designating girls' and boys' sports teams based on biological sex assigned at birth.

A. The Save Women's Sports Act triggers heightened scrutiny because it improperly discriminates on the basis of sex and transgender status. Any gender-based classification is subject to heightened scrutiny, because of its quasi-suspect class. Further, the Act only prohibits transgender girls from participating in girls' sports, especially since the school athletic rules already prohibited cisgender males and boys from participating in female sports. Accordingly, the Act triggers heightened scrutiny both through its quasi-suspect gender-classification and its discrimination on the basis of transgender status.

B. The Save Women's Sports Act has a discriminatory purpose because it has a disproportionate impact on transgender girls. There is no significant relationship between the Respondents' objectives of furthering equality of athletic opportunity and safety in girls' sports and categorically banning transgender girls from girls' sports. The Act does not pass muster under heightened scrutiny because it makes overly broad generalizations about differential talents or capacities of males and females.

C. While furthering equality of opportunity and protecting female athletes is an important state interest, the means used do not substantially relate to or fulfil the objective. The State cannot prove that categorically banning transgender girls from all girls' sports relates to protecting the safety or equality of opportunity for girls in athletics. There is no evidence of (1) a single cisgender woman being displaced by a transgender girl in North Greene or (2) pre-pubescent transgender girls having a competitive advantage against cisgender girls. Rather than looking at circulating testosterone levels or other factors that actually drive competitive advantage, respondents rely solely on biological sex and an individual's reproductive biology. Further, there is no evidence that excluding pre-

pubescent transgender girls from girls' sports will in any way increase safety of cisgender girls in contact sports.

D. The Act fails any level of scrutiny because it covers every sport from middle school through college and every transgender woman without exception. The Act excludes all transgender women from girls' sports even if she has not gone through endogenous puberty or has similar testosterone levels as cisgender girls. It does not even make exceptions when the transgender woman has undergone gender transformation surgery or other gender-affirming care. Such a categorical ban of transgender girls from girls' sports cannot in any way prove to promote athletic opportunity or safety for girls, especially since transgender women make up only 0.6 percent of the general population.

ARGUMENT

I. TITLE IX PREVENTS STATES FROM CONSISTENTLY DESIGNATING GIRLS' AND BOYS' SPORTS TEAMS BASED ON BIOLOGICAL SEX ASSIGNED AT BIRTH

The North Greene Save Women's Sports Act violates Title IX because it excludes transgender women from sports teams on the basis of sex, that exclusion is improper, and the exclusion harms transgender women.[2]

A. The Save Women's Sports Act excludes transgender women on the basis of sex because the ordinary meaning of on the basis of in Title IX requires but-for causation

The Court should begin its interpretation of a statute with the plain meaning of its terms at the time of its enactment. *Bostock v. Clayton Cnty., Ga.*, 590 U.S. 644, 654 (2020). Accordingly, the

[2] Given that the Act only applies to "[i]nterscholastic, intercollegiate, intramural, or club athletic teams or sports that are sponsored by any public secondary school or a state institution of higher education," there is no dispute over whether such program receives Federal financing. *See* N.G. Code § 22-3-16(a).

Court must determine the ordinary public meaning of Title IX's command that "[n]o person . . . shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . ." 20 U.S.C. § 1681(a). In this case, the only language at issue is "on the basis of sex."

The ordinary meaning of "on the basis of" in Title IX requires but-for causation. *See Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 616–17 (4th Cir. 2020) (quoting *Bostock*, 590 U.S. at 660); *see also Sheppard v. Visitors of Va. State U.*, 993 F.3d 230, 236–37 (4th Cir. 2021) (stating that while the Supreme Court has not yet "addressed in the context of a Title IX school disciplinary proceeding, the Supreme Court [has] held that the same or similar language requires 'but-for' causation); *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 184 (2005) (holding that in Title IX retaliation claims, plaintiff must prove was retaliated against "because he complained of sex discrimination."); *Gentry v. E.W. Partners Club Mgmt. Co. Inc.*, 816 F.3d 229, 235–36 (4th Cir. 2016) (holding that under Title I of the American with Disabilities Act's language, "discrimination . . . on the basis of disability," requires "but-for" causation). This Court has already explained that the similar language of "because of" means "'by reason of' or 'on account of'" incorporates but-for causation into the statute. *U. of Tex. S.W. Med. Cntr. V. Nassar*, 570 U.S. 338, 346, 350 (2013) (citing *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 176 (2009) (quotation altered)). Additionally, the Fourth Circuit has held that "on the basis of" requires a but-for causation analysis. *See Grimm*, 972 F.3d at 616–17; *Sheppard*, 993 F.3d at 236–37; *B.PJ., ex rel. Jackson v. W. Va. State Bd. of Educ.*, 98 F.4th 542, 563 (4th Cir. 2024), as amended (Aug. 28, 2024). In applying but-for causation to the Save Women's Sports Act, the Court must only change one thing—the biological sex of

A.J.T.—to determine if the outcome differs. *See Bostock*, 590 U.S. at 656 (2020). If the outcome differs, then the Court has found a but-for cause. *See id.*

Further, biological sex does not need to be the only but-for cause because events can have multiple but-for causes. *See Bostock*, 590 U.S. at 656. Congress did not restrict Title IX to actions taken "solely on the basis of sex," even though Congress has included language "solely because of" in other statutes. *See* 20 U.S.C. 1681(a). *Cf.* 11 U.S.C. § 525 (prohibiting private employers from terminating individuals "solely because" the individual was a debtor). Further Congress could have even written language "primarily on the basis of sex" to indicate that sex "had to be the main cause of the defendant's challenged action. *See Bostock*, 590 U.S. at 656–57. *Cf.* 22 U.S.C. § 2688 (stating that no person can become a United States ambassador "primarily because of financial contributions to political campaigns."). Instead, Congress has opted to retain the broader language allowing the protected trait to only be one factor that contributed to the action and effectively ratified such language throughout numerous rulings from this Court. *See Bostock*, 590 U.S. at 656; *Nassar*, 570 U.S. at 350; *Burrage v. United States*, 571 U.S. 204, 211–12 (2014). Accordingly, the plain meaning of "on the basis of" in Title IX requires sex to at least be one factor in the state's action to violate Title IX.

B. North Greene's Act excludes transgender women from participation in female sports on the basis of their sex because the only difference between cisgender women and transgender women is their sex.

Simply because Title IX requires but-for causation analysis, however, does not mean Title IX prohibits everything that happens in education programs or activities "on the basis of sex." *See* 20 U.S.C. § 1681(a). Instead, it only imposes liability when an individual is excluded from participation in, . . . denied the benefits of, or . . . subjected to discrimination under any education

program or activity receiving Federal financial assistance . . . ." *Id.* Here, the North Greene Save Women's Sports Act violates Title IX by excluding transgender women from participating in all non-co-ed sports entirely on the basis of their sex. *See id.*; N.G. CODE § 22-3-16(a)–(b). *See also Mercer v. Duke Univ.*, 401 F.3d 199, 207 (4th Cir. 2005) (holding that school athletic programs are educational programs for purposes of Title IX); 34 C.F.R. § 106.41.

The Act requires that all "[i]nterscholastic, intercollegiate, intramural, or club athletic teams or sports that are sponsored by any public or secondary school or state institution of higher education" to be designated for males, females, or coed based on biological sex on birth. *See* N.G. CODE § 22-3-16(a). Once the sports or athletic teams are designated "for females, women, or girls," the Act requires that such teams "shall not be open to students of the male sex where selection is based upon competitive skill or the activity involved is a contact sport." *See id.* at § 22-3-16(b). This requirement effectively only prohibits transwomen from participating in sports that align with their gender identity. Such categorical exclusion targets transgender women—like A.J.T.—specifically because they are transgender women. Thus, North Greene's Save Women's Sports Act prohibits the transgender person who was identified as male at birth but now identifies a female, while permitting another identical cisgender student but who was identified as female at birth.[3] *See Bostock*, 590 U.S. at 659. This is textbook sex discrimination as the Act penalizes a person identified as male at birth for traits that it tolerates in a student identified as female at birth. *See id.* at 659; *Grimm*, 972 F.3d at 616–17; *B.P.J.*, 98 F.4th at 563.

[3] Cisgender has been "used to refer to an individual whose gender identity aligns with the sex assigned to them at birth." PFLAG, *PFLAG National Glossary of Terms*, https://pflag.org/glossary/ (last visited Sept. 13, 2024).

C. The Act harms transgender women through unlawful discrimination because the Save Women's Sports Act treats transgender women worse than cisgender women.

Title VII and Title IX both require more than mere differential treatment to be unlawful discrimination. Unlawful discrimination is "treating that individual worse than other who are similarly situated" and employing "distinctions or differences in treatment that injure protected individuals." *See Bostock*, 590 U.S. at 657 (incorporating *Burlington N. & Santa Fe Ry. V. White*'s standard, 548 U.S. 53, 59 (2006)); *Grimm*, 972 F.3d at 618 (adopting *Bostock* and *Burlington* standard for Title IX); *B.P.J.*, 98 F.4th at 563 (relying upon *Bostock* for the same).

1. Save Women's Sports Act requires treating transgender women differently than similarly situated cisgender women.

A.J.T. is similarly situated to other cisgender girls. *See B.P.J.*, 98 F.4th at 563 (stating that transgender women are similarly situated to other cisgender girls); *see also Grimm*, 972 F.3d at 609–10, 618 (holding that transgender boys were similarly situated to cisgender boys in Title IX claim). A.J.T. has identified as a girl from an early age and even began living as a girl at home by the third grade. *See A.J.T.*, 2024 WL 98765, at *3. A.J.T. later adopted a name commonly associated with girls and began to live as a girl at school. *See id.* A.J.T. was even a member of the elementary school's all-girl cheerleading team. *See id.* As such, A.J.T.'s daily life is lived as a girl and is not similarly situated with cisgender boys, but is similarly situated with other girls.

As such, when an Act forbids one—and only one—category of students from participating in sports congruent with their gender identity, "the Act requires treating students differently even when similarly situated." *See B.P.J.*, 98 F.4th at 542; *Grimm*, 972 F.3d at 609–10, 18. The Act here only prohibits transgender women from participating through its language

that "sports designated for females, women, or girls shall not be open to students of the male sex . . . ." *See* N.G. CODE § 22-3-16(b). Cisgender females are still able to freely play sports congruent to their gender identity while transgender girls—liked A.J.T.—must sit on the sidelines and only watch their peers regardless of whether she even has a competitive advantage.

2. Save Women's Sports Act further requires treating transgender women worse than similarly situated cisgender women.

The North Greene Act does not stop at merely treating transgender women differently, but it treats them worse. Unlike other cisgender girls, transgender women alone are prohibited from participating on girls' sports team. *See id.* at § 22-3-16(b). As a result of this exclusion, transgender women are treated worse than all of their peers. *See Grimm*, 972 F.3d at 618 (stating that Grimm was the only one who could not use the restroom corresponding with his gender). A.J.T. alone—like other transgender females—is only left with the option of participating in limited co-ed teams regardless of whether any inherent athletic advantage is present.

A.J.T. and other transgender women are harmed by the Act—both in what it prohibits and in what it would require if A.J.T. wished to join a sports team. To start, A.J.T. faces "emotional and dignitary harm" from the stigma of being unable to participate on a team with one's friends and peers. *See B.P.J.*, 98 F.4th at 563–64; *Grimm*, 972 F.3d at 617–18. Further, it requires that A.J.T. forfeit any ability to play school sports. *See B.P.J.*, 98 F.4th at 565. A.J.T. has been living as a girl since the third grade, changed her name, and been attending counseling to discuss future gender affirming treatments. *See A.J.T.*, 2024 WL 98765, at *3. This "choice" Respondents point to that A.J.T. can still play on the teams designated for males is no choice at all. Such "choice" would require A.J.T. to present herself as a male to other teams and team members, effectively destroying any progress she has made in her social transition, medical treat, and any work done

with schools, teachers, and coaches. *See B.P.J.*, 98 F.4th at 564; *Grimm*, 972 F.3d at 595–96 (stating that gender dysphoria becomes worse when gender identity diverges from gender expression). Finally, the requirement for A.J.T. and other transgender women to participate in sports designated for men would expose them to the risk of unfair competition—and physical danger—from which Respondents are claiming to protect cisgender girls. *See B.P.J.*, 98 F.4th at 564*;* N.G. CODE § 22-3-16(c); *A.J.T.*, 2024 WL 98765 at *3–4. The Act as a result requires A.J.T. to suffer the very harms Title IX was designed to prevent. *See* 20 U.S.C. § 1681(a).

D. Regulations permitting recipients of federal funds to operate separate teams for members of each sex are not relevant to this case because those regulations do not address the current controversy.

It is true that regulations were introduced after Title IX's enactment that permitted recipients of federal funds to "operate . . . separate teams for members of each sex." *See* 34 C.F.R. § 106.41(b). These regulations, however, are not relevant to the issue at hand because the Court is not asked to consider the legality of having separate teams entirely, but rather whether states are permitted under Title IX to designate such teams solely dependent on biological sex. R. 17. Furthermore, these regulations do not even address the current issue regarding transgender athletes, and the Department of Education has already begun amended such regulations to address transgender athletes ability to participate on the basis of their gender identity. *See* Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance: Sex-Related Eligibility Criteria for Male and Female Athletic Teams, 88 Fed. Reg. 22860 (proposed Apr. 13, 2022) (to be codified at 34 C.F.R. 160.41). Furthermore, the proposed new Title IX regulations poses a policy question that such regulatory bodies are best

equipped with to address. Accordingly, these regulations should not impact the ultimate decision in this case that the North Greene Act violates Title IX.

II. THE EQUAL PROTECTIONS CLAUSE PREVENTS A STATE FROM OFFERING SEPARATE BOYS' AND GIRLS' SPORTS TEAMS BASED ON BIOLOGICAL SEX ASSIGNED AT BIRTH.

The equal protections clause prevents any state from denying any person within its jurisdiction "equal protection of the laws." U.S. CONST. amend. XIV, § 1, cl. 4. By discriminating on the basis of sex and transgender status, the North Greene Act triggers heightened scrutiny. *See United States v. Virginia*, 518 U.S. 515, 555 (1996) (henceforth *VMI*) (holding that all gender classifications warrant heightened scrutiny); *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 136 (1994) (same); *Hecox v. Little*, 104 F.4th 1061, 1074 (9th Cir. 2024) (holding that classifications on basis of transgender status implicates heightened scrutiny); *Grimm*, 972 F.3d at 607–10 (same). The North Greene Act cannot survive heightened scrutiny for two reasons: (1) the Act has a discriminatory purpose rather than an important governmental interest; and (2) the Act's aligned interests are not substantially related to the means employed. *See* N.G. CODE § 22-3-4 *et seq.*

A. The North Greene Act triggers heightened scrutiny

To determine whether the Act violates the Equal Protections Clause, this Court must apply heightened scrutiny because the Act creates a classification on the basis of "biological sex" and transgender status. *See VMI*, 518 U.S. at 515; *J.E.B.*, 511 U.S. at 136–37 (1994); *Hecox*, 104 F.4th at 1080–081; N.G. CODE §§ 22-3-15(a)(1)–(3), 22-3-16(a)–(b).

The North Greene Act explicitly creates gender-based classifications by requiring all sports be "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." *See* N.G. CODE § 22-3-16(a). These classifications, however, only discriminate against participants in female sports, because the Act

does not ban "biological females" from sports designated for men. *See id.* at § 22-3-16(b). By only applying the prohibition to female sports, the Act only subjects participants in female sports to any sex verification process, and thus creates classification on the basis of sex when only applying the prohibition to female sports. Where female sports are the only teams subject to "separate requirements for educational opportunities that are 'unequal in tangible and intangible' ways from those for men, those requirements are tested under heightened scrutiny." *See Hecox*, 104 F.4th at 1080 (quoting *VMI*, 518 U.S. at 547).

Further the Act triggers heightened scrutiny, because the Act's text, structure, and effect clearly demonstrate its purpose to categorically ban transgender women and girls form participating in school sports or athletic teams. *See* N.G. CODE § 22-3-4 *et seq.*; *Hecox*, 104 F.4th at 1075. The Act may create classifications on the basis of sex, but only prohibits students of the male sex from participating in "[a]thletic teams or sports designated for females, women, or girls." *See* N.G. CODE § 22-3-16(b). This is an oversimplification of biological sex and gender that only effects one group of athletes—transgender women. *See Hecox*, 104 F.4th at 1077; *B.P.J.*, 98 F.4th at 556 (stating that where a statute's "purpose . . . and only effect . . . is to exclude transgender girls . . . from participation on girls sports teams," that statute discriminates on the basis of transgender status.); *Crawford v. Bd. of Educ.*, 458 U.S. 527, 544 (1982) (explaining that disproportionate effect provides a starting point to determine whether "[discriminatory] purpose was [its] motivating factor" (internal quotation marks omitted)).

If this weren't enough, the Act is facially discriminatory against transgender female athletes. *See Hecox*, 104 F.4th at 1077 (9th Cir. 2024). Simply because the Act does not explicitly mention the term "transgender" is not enough to show it is not facially discriminatory, as the State of North Greene is using "biological sex" as a form of "[p]roxy discrimination." *See Latta v. Otter*,

771 F.3d 456 (9th Cir. 2014) (rejecting a similar argument that the use of the term "procreative capacity" did not discriminate against sexual orientation) (quoting *Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am., UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 199 (1991)); *Pac. Shores Props., LLC v. City of Newport Beach*, 730 F.3d 1142, 1160 n.23 (9th Cir. 2013). The definition of "biological sex" in the Act is written in such a way that "discrimination on the basis of such criteria is, constructively, facial discrimination against" transgender women because it is written with "seemingly neutral criteria that is so closely associated with [transgender women]." *See Pac. Shores Props., LLC*, 730 F.3d at 1160 n.23; *see also Lawrence v. Texas*, 539 U.S. 558, 575 (2003) (stating that when typical "homosexual conduct is made criminal by law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination . . . ."). Accordingly, the Act triggers heightened scrutiny because of its discrimination on the basis of transgender status. *See Hecox*, 104 F.4th at 1079; *Karnoski v. Trump*, 926 F.3d 1180, 1200–01 (9th Cir. 2019); *Bostock*, 590 U.S. at 660 (stating that "it is impossible to discriminate against a person for being . . . transgender without discriminating against that individual based on sex.").

Heightened scrutiny is a "demanding" standard, where the state has the burden to demonstrate an "exceedingly persuasive" justification for its differential treatment. *See VMI*, 518 U.S. at 533. To survive, North Greene must show "at least that the [challenged] classification serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.'" *Mississippi U. for Women v. Hogan*, 458 U.S. 718, 724 (1982) (quoting *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 150 (1980)); *VMI*, 518 U.S. at 516 (1996).

B. The North Greene Act's true purpose is to discriminate rather than promote women's equality and protect physical safety of female athletes

Respondents argue that the Act is advancing the important government interest of "promoting equal athletic opportunities for the female sex," N.G. CODE § 22-3-16(c), and "protect[ing] the physical safety of female athletes when competing." R. 4. Though courts have held that furthering equality and protecting female athletes is an important state interest, this is not the true purpose of the North Greene Act. *See Hecox*, 104 F.4th at 1081; *Clark, ex rel. Clark v. Arizona Interscholastic Ass'n*, 695 F.2d 1126, 1131 (9th Cir. 1982); *Doe v. Horne*, 2024 WL 4113838, at *15 (9th Cir. Sept. 9, 2024). This Court must ignore the "'benign' justifications proffered in defense of categorical exclusions," because "a tenable justification must describe actual state purposes, not rationalizations for actions in fact differently grounded." *See VMI*, 518 U.S. at 535–36 (1996); *Weinberger* v. *Wiesenfeld*, 420 U.S. 636, 648, and n. 16 (1975) ("mere recitation of a benign [or] compensatory purpose" does not block "inquiry into the actual purposes" of government-maintained gender-based classifications); *Califano v. Goldfarb*, 430 U.S. 199, 212–13 (1977) (rejecting government-proffered purposes after "inquiry into the actual purposes"(internal quotation marks omitted)). Upon inquiry it is clear that there is "no close resemblance between 'the alleged objective' and 'the actual purpose underlying the discriminatory classification.'" *See VMI*, 518 U.S. at 536 (1996) (quoting *Hogan*, 458 U.S. at 720, n.1 (1982)). Instead, the Act's true purpose is to categorically ban transgender women and girls from participating in sports teams that correspond with their gender identity.

A discriminatory purpose is shown when "the decisionmaker, in this case a 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." *See Pers. Adm'r of Mass. v. Feeney*, 442 U.S.

256, 279 (1979). Beginning with the plain text of the Act, it creates three categories based on biological sex: "(A) Males, men, or boys; (B) Females, women, or girls; or (C) Coed or mixed." N.G. CODE § 22-3-16(a). Any such sports that are designated for women are not open to the male sex. *Id.* at § 22-3-16(b). The Act, however, does not go on to prohibit sports that are designated for males from being open to the female sex. *See id.* Such prohibition, though based on a definition of "biological sex" that appears to be neutral, is the result of an oversimplification of "biological sex" that only affects transgender female athletes by categorically excluding transgender females from participation in female sports. *See Hecox*, 104 F.4th at 1077; *B.P.J.*, 98 F.4th at 556 (stating that where a statute's "purpose . . . and only effect . . . is to exclude transgender girls . . . from participation on girls sports teams," that statute discriminates on the basis of transgender status.); *Crawford*, 458 U.S. at 544 (1982) (explaining that disproportionate effect provides a starting point to determine whether "[discriminatory] purpose was [its] motivating factor" (internal quotation marks omitted)).

The pre-existing North Greene school athletic rules further exemplify North Greene's true discriminatory purpose, because the school athletic rules already prohibited cisgender men and boys from participating on female-designated sports teams. R. 13. The only effect to student athletics because of this Act was to entirely exclude transgender women from sports. The state legislature purposefully used gender neutral language in the attempt to mask the true discriminatory reason behind the Act.

No such policy of promoting equal athletic opportunity for biological females or protecting the safety of female athletes can be discerned from the text, structure, and effect of the Act or from pre-existing policy considerations of the state. *See* N.G. CODE § 22-3-16(c); R. 4. *See generally, VMI*, 518 U.S. at 539–40 (reasoning that VMI's male-only admission policy could not be in

furtherance of a state policy of diversity, because Virginia had already moved away from single-sex education and the institute lacked the ability to give effect to a state policy among institutions); *Hogan*, 458 U.S. at 727, 730 (holding that the state asserted justification of excluding men from nursing school as "educational affirmative action" had no close resemblance to "the actual purpose underlying the discriminatory classification."). Accordingly, North Greene lacks a true important government interest and violates the equal protections clause.

C. The Act's means of achieving its alleged interests are not substantially related

The Act's sole justification offered in the text is "promoting equal athletic opportunities for the female sex," N.G. CODE § 22-3-16(c), but Respondents have also contended that they also seek to "protect the physical safety of female athletes when competing." R. 4. The state only offered this second justification "in response to litigation" and this Court should not credit such *post hoc* justification. *VMI*, 518 U.S. at 533 (1996); R. 3–4. Regardless of these justifications, Respondents cannot show that categorically excluding A.J.T. from all girls' sports is substantially related to either interest.

1. Categorically excluding transgender women from all girls' sports is not substantially related to promoting equal athletic opportunities for biological women

Respondents cannot demonstrate an "exceedingly persuasive" connection between barring transgender women from girls' sports and promoting equal athletic opportunities for biological women. *See VMI*, 518 U.S. at 534 (1996). Defendants' arguments—and the Fourteenth Circuit's reasoning—rely solely on the notion that, as a general matter, cisgender males outperform females athletically because of their inherent physical differences, and therefore, as a general matter, transgender girls will outperform cisgender girls. *See A.J.T.*, 2024 WL 98765, at *9 (14th Cir.

2024). These arguments rely upon "overbroad generalizations about the different talents [or] capacities" of males and females that do not demonstrate that transgender females would displace cisgender females to a substantial extent if permitted to play on female teams. *See VMI*, 518 U.S. at 533; *Weinberger*, 420 U.S. at 643 (1975); *Goldfarb*, 430 U.S. at 223–24 (1998) (Stevens, J., concurring in judgment).

There is no evidence in the record of a single cisgender woman being displaced by a transgender woman in North Greene. Regardless of this lack of evidence, respondents attempt to compare cisgender males to transgender females, but "[i]t is inapposite to compare the potential displacement of allowing approximately half of the population (cisgender men) to compete with cisgender women, with any potential displacement one half of one percent of the population (transgender women) could cause cisgender women." *See Horne*, 2024 WL 4113838, at * 16 (citing *Doe v. Horne*, 683 F. Supp. 3d 950, 961(D. Ariz. 2023); *Hecox*, 104 F.4th at 1081–82; *A.J.T.*, 2024 WL 98765, at *14 (Knotts, J., dissenting). The sheer small number of transgender women in the world prevents Respondents from credibly arguing that any displacement would occur. *See A.J.T.*, 2024 WL 98765, at *14 (Knotts, J., dissenting).

The *Clark v. Arizona Interscholastic Association* case from the Ninth Circuit, though recognizing that "[biological] males would displace biological females to a substantial extent if permitted to compete on [girls'] teams," does not apply to this case. *See* 695 F.2d at 113. *Clark* did not concern transgender student athletes and its reasoning does not support a categorical ban against transgender women. *See id.* Instead, *Clark* concerned a policy that prevented cisgender boys from playing volleyball on the girls' team when the school district lacked a boys' volleyball team but still provided "overall [athletic] opportunit[ies]" to boys. *See id.* at 1131–32. Further, both parties stipulated that the boys would, on average, be better than girls that created the athletic

advantage. The policy in *Clark* survived heightened scrutiny because boys and girls had equal number of overall athletic opportunities and "males would displace females to a substantial extent if they were allowed to compete for positions on the volleyball team." *See id.* at 1131. These facts are at odds with the case before the Court.

Transgender women do not have an equal number of overall athletic opportunities that were present in *Clark*. *See id.* at 1127. Transgender women are excluding from playing on girls' teams, are unable to play on boys' teams without resulting extreme dignitary harm, and are left with limited co-ed opportunities. *See* N.G. CODE §§ 22-3-16(a)–(b); *Hecox*, 104 F.4th at 1082–83. Additionally, the conditions placed upon participating on girls' teams do not relate to the actual physiological differences relied on in *Clark*. *See* 695 F.3d at 1131. Rather than looking to circulating testosterone levels—the actual largest known biological driver of average differences between males and females—Respondents insist on looking to "biological sex" "based *solely* on the individual's reproductive biology and genetics at birth." *See* N.G. CODE § 22-3-15(a)(1) (emphasis added); *See A.J.T.*, 2024 WL 98765, at *3. Accordingly, this controversy is nothing like *Clark* and this Court should not rely on its logic.

Further, even accepting the physiological differences between biological males and females, these differences do not dictate that biological males always have a competitive advantage. *See A.J.T.*, 2024 WL 98765, at *14 (Knotts, J., dissenting). Jackie Tonawanda knocked out male boxer Larry Rodania at Madison Square Garden, earning her the name "The Female Muhammad Ali." *See id.* Billie Jean King defeated Bobby Riggs in "The Battle of the Sexes." *See id.* And females are even joining men's football teams, where universities have kickers who are female, and Haley Van Voorhis became the first woman non-kicker to appear in an NCAA football game in 2023. *See id.*

The categorical ban includes all transgender women and girls, regardless of their true competitive advantage against biological women. *See* N.G. CODE § 22-3-4 *et seq.* Due to the Act's failure to consider factors that truly impact any competitive advantage, its means of categorically banning transgender women from participating in sports is not substantially related to its purpose of promoting equal athletic opportunities for females.

2. Categorically excluding A.J.T. from all girls' sports is not substantially related to protected women's safety

Respondents also cannot demonstrate an "exceedingly persuasive" connection between barring A.J.T. from girls' sports under the Act and protecting the safety of cisgender girls. *See VMI*, 518 U.S. at 534. There is special equipment widely available for contact sports that is "used to protect the safety of all participants; football players wear helmets and pads, soccer players wear shin guards, and boxers wear gloves and face masks." *See A.J.T.*, 2024 WL 98765, at *14–15 (Knotts, J., dissenting). Further, North Greene has failed to show how any injuries susceptible in contact sports are the result of transgender girl's participation, or that such injuries would not occur without transgender girls competing. *See id.* at *15 (Knotts, J., dissenting). Additionally, any physiological differences in non-contact sports are at most minimally related to safety. *See id.* at *14 (Knotts, J., dissenting).

Because Respondents cannot establish any "exceedingly persuasive justification" for categorically excluding transgender women from all girls' sports on the basis of their sex, the Act cannot survive heightened scrutiny.

D. North Greene Act fails any level of scrutiny as applied to AJT

Although heightened scrutiny applies and is dispositive, *see supra* II.A–C, the Act fails any level of scrutiny. The Act covers every sport from middle school through college, and every

transgender woman. *See* N.G. CODE § 22-3-16(a). There are no exceptions for any transgender woman if she has not gone through endogenous puberty or has similar circulating testosterone levels seen in cisgender girls. *See* N.G. CODE §§ 22-3-15(a), 22-3-16(a)–(b). Such prohibition against transgender women is so unrelated to North Greene's justifications of promoting equal athletic opportunity for females and protecting female athletes that they cannot serve as any justification for the law. *See VMI*, 518 U.S. at 539–40 (1996); *Romer v. Evans*, 517 U.S. 620, 635 (1996).

Justice Knotts's dissent in the Fourteenth Circuit correctly emphasized that "transgender women have not and could not displace cisgender women in athletics to a substantial extent." *See A.J.T.*, 2024 WL 98765, at *14 (Knotts, J., dissenting). Transgender women represent approximately 0.6 percent of the general population. *Id.* Such low percentage of individuals does not permit any credible argument that transgender women would displace cisgender female athletes. *Id.*

Further, it is not true that the physiological difference between biological males and females always result in competitive advantages for the biological male. As Justice Knotts noted, Jackie Tonawanda, an American female heavyweight boxer, knocked out male boxer Larry Rodania, which earned her the title "The Female Muhammad Ali." *Id.* at *14 n.2. Billie Jean King defeated Bobby Riggs in "The Battle of the Sexes." *Id.* Biological women are even joining men's football teams as seen with Haley Van Voorhis, "a safety at Shenandoah University, who became the first woman non-kicker to appear in an NCAA football game in 2023." *Id.* Physiological differences do exist between biological males and females, but such differences do not require that biological men and women cannot compete against each other.

Finally, there are no legitimate safety concerns from North Greene. Special equipment is used in contact sports to protect participants (e.g., helmets and pads for football; shin guards for soccer; gloves and face masks for boxers). Any such injuries that could result from permitting transgender women from participating in sports designated for biological women can still occur even without transgender women playing or even under North Greene's current rules that permit biological females to participate in sports designated for biological males. N.G. CODE § 22-3-16(b). Accordingly, without any valid interest the Act fails under any level of equal protection scrutiny.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

TEAM 18
Attorneys

SEPTEMBER 2024

APPENDIX

TABLE OF CONTENTS

APPENDIX

1. U.S. Constitution Amend. XIV, § 1, cl. 4 provides:

No State shall . . . deny to any person within its jurisdiction the equal protections of the laws.

2. 20 U.S.C. § 1681(a) provides:

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 . . . .

3. 34 C.F.R § 106.41 provides:

Athletics

(a) General.

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

(b) Separate Teams.

Notwithstanding the requirements of paragraph (a) of this section, a recipient may operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport. However, where a recipient operates or sponsors a team in a particular sport for members of one sex but operates or sponsors no such team for members of the other sex, and athletic opportunities for members of that sex have previously been limited, members of the excluded sex must be allowed to try-out for the team offered unless the sport involved is a contact sport. For the

purposes of this part, contact sports include boxing, wrestling, rugby, ice hockey, football, basketball and other sports the purpose or major activity of which involves bodily contact.

(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 facts:

(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 equipment and supplies

(3) Scheduling of games and practice time;

(4) Travel and per diem allowance;

(5) Opportunity to receive coaching and academic tutoring

(6) Assignment and compensation of coaches and tutors;

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

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

(9) Provision of housing and dining facilities and services;

(10) 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.

4. N.G. Code § 22-3-4 provides:

Limiting participation in sports events to the biological sex of the athlete at birth.

There are inherent differences between biological males and biological females, and that these differences are a cause for celebration.

5. N.G. Code § 22-3-15(a)(1)–(3) provides:

(1) "Biological sex" means an individual's physical form as a male or female based solely on the individual's reproductive biology and genetics at birth.

(2) "Female" means an individual whose biological sex determined at birth is female. As used in this section, "women" or "girls" refers to biological females.

(3) "Male" means an individual whose biological sex determined at birth is male. As used in this section, "men" or "boys" refers to biological males.

6. N.G. Code § 22-3-16 provides:

(a) Interscholastic, intercollegiate, intramural, or club athletic teams or sports that are sponsored by any secondary school or state institution of higher education, shall be expressly designated as one of the following based on biological sex at birth: (A) Males, mens, or boys; (B) Females, women, 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.