Docket No. 24-2020

In The

Supreme Court of the United States

October Term, 2024

A.J.T.,

Petitioner,

v.

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

Respondents.

On Writ of Certiorari to the United States

Court of Appeals for the Fourteenth Circuit

BRIEF FOR PETITIONER

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Team 19

QUESTIONS PRESENTED

I. Under Title IX, does a state act discriminate against a transgender eleven-year old girl on the basis of sex and cause her harm when it denies her the meaningful opportunity to participate alongside her classmates in girls' athletics because of her gender identity?

II. Is a state act facially discriminatory and substantially related to promoting the notions of fairness and safety in athletics when it forbids all transgender female athletes from participating in women's athletics because of their gender identity, regardless of other external factors such as testosterone-blocking treatments or individual athletic prowess?

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TO THE SUPREME COURT OF THE UNITED STATES:

Petitioner, A.J.T., appellant in Docket No. 24–2020 before the United States Court of Appeals for the Fourteenth Circuit, respectfully submits this brief on the merits, and asks this Court to reverse the United States Court of Appeals for the Fourteenth Circuit.

OPINIONS BELOW

The memorandum opinion of the United States District Court for the Eastern District of North Greene is unreported but is available at *A.J.T. v. North Greene Bd. of Educ.*, 2023 WL 56789 (E.D. N. Greene 2023). The decision of the United States Court of Appeals for the Fourteenth Circuit is unreported and set out in the record. (R. at 2–16.)

CONSTITUTIONAL PROVISIONS

The Fourteenth Amendment to the United States Constitution is relevant to this case and is reprinted in Appendix A.

STATEMENT OF THE CASE

Factual Background

The Child. Like many other eleven-year-old girls, participating in athletics was just a normal part of A.J.T.'s life. (R. at 3.) She practiced and competed on her elementary school's all-girl cheerleading team, and upon entering the seventh grade, intended to join the girls' volleyball and cross country teams. (R. at 3.) A.J.T. had one trait that made her unique from many of her classmates: she was transgender. (R. at 3.) While assigned the sex of male at birth, from an early age, A.J.T. identified as female. (R. at 3.) She began living at home as a girl by the time she reached the third grade, and soon after, began openly expressing her gender identity as female in public, adopting a name commonly associated with girls. (R. at 3.)

The Condition. In 2022, A.J.T. was diagnosed with gender dysphoria, a condition that causes significant mental distress because of the "incongruence between one's sex assigned at birth and one's gender identity."[1] (R. at 3) She soon began attending counseling, and while not taking formal action, discussed the idea of commencing hormone treatments that would prevent her from experiencing puberty as a boy. (R. at 3.) Despite all of this, A.J.T.'s school informed her that she could not participate on these teams because of Senate Bill 2750, a recent law passed by the State of North Greene (the "State") that effectively forbade transgender girls from participating in women's athletics. (R. at 3.)

The Act. On May 1, 2023, North Greene Governor Howard Sprague signed Senate Bill 2750, or the Save Women's Sports Act (the "Act"), into law. (R. at 3.) The Act's objectives were twofold: "provide equal athletic opportunities for female athletes" and protect their physical safety in competition. (R. at 3.) It further emphasized that inherent differences exist between

[1] Am. Psychiatric Ass'n, *Diagnostic and Statistical Manual of Mental Disorders* 451–53 (5th ed. 2013).

biological sexes which should be a "cause for celebration." (R. at 3.) The Act's central provision provides that any individual born biologically male may not compete in any female athletics based on competitive skill or where the activity involved constitutes as a contact sport. (R. at 4.) The Act encompasses all public secondary school or higher education institution-sponsored "[i]nterscholastic, intercollegiate, intramural, or club athletic teams or sports." (R. at 4.) Further, the Act provides that athletic teams are to be designated in three ways: coed or mixed, male, or female. (R. at 4.) The Act contains specific definitions of "female" and "male," which strictly refer to individuals only by their "biological sex." (R. at 4.) "Biological sex" is likewise defined and refers to an individual's designation as male or female based on their individual "reproductive biology and genetics at birth." (R. at 4.) Lastly, the Act notes that sex is separate from and nondeterminative of gender identity, which bears "no legitimate relationship" to the State's interest to promote equal opportunities in women's athletics. (R. at 4.)

Procedural History

Eastern District of North Greene. A.J.T., by her mother, filed suit against the State of North Greene Board of Education and the State Superintendent, with the State of North Greene and its Attorney General Barney Fife later joining as defendants. (R. at 4–5.) She sought a declaratory judgment that the Act violated both Title IX and the Equal Protection Clause, and a permanent injunction to accordingly block the State from enforcing the Act. (R. at 5.) In response, the State moved for summary judgment to dismiss both claims, which the district court granted. (R. at 5.)

Fourteenth Circuit. A.J.T. appealed the district court's grant of summary judgment to the United States Court of Appeals for the Fourteenth Circuit. (R. at 5.) The Fourteenth Circuit affirmed the district court's decision, holding that the Act did not violate Title IX or the Equal

Protection Clause of the Fourteenth Amendment. (R. at 12.) The court determined that the Act did not violate Title IX because it was not discriminatory on the basis of sex. (R. at 11–12.) The Court also found that the Act did not violate the Equal Protection Clause because the eligibility requirements based on biological sex were not facially discriminatory against transgender females. (R. at 8.) Furthermore, the court found that the Act's means were substantially related to the important governmental interests of promoting fairness and safety in women's athletics. (R. at 10.)

SUMMARY OF THE ARGUMENT

Title IX: Discrimination "on the Basis of Sex" against Transgender Athletes. Since its inception, the purpose of Title IX has been to promote equality in school environments and prevent discrimination "on the basis of sex." When a state passes a law categorically banning a particular class of individuals from participating in school-sponsored athletics, it doesn't promote equality—it hinders it. Furthermore, when it does so in a way that causes harm to an individual, this amounts to a Title IX violation. As it relates to transgender individuals, discrimination "on the basis of sex" does not strictly encompass biological sex, but also extends to gender identity. This is because transgender individuals experience discrimination when they are treated differently than cisgender individuals because their gender identity does not align with their biological sex. This Court has already accepted this rationale as the basis of transgender discrimination in a Title VII context, and because of its similar statutory construction in all relevant aspects, can be understood to likewise apply to Title IX.

This type of discrimination against transgender individuals can be notably observed within the area of athletics. A.J.T., despite being similarly situated to her cisgender female classmates in having the same gender identity, is not allowed to participate in girls' athletics. The

Act further discriminates against A.J.T. as a transgender female when it forbids her from participating in athletics consistent with her gender identity, but not transgender boys. Because the types of sports she wants to participate in are separated by gender, the only athletic opportunity she has is to participate on boys' teams, if at all. In being allowed only this option, transgender individuals such as A.J.T. suffer from significant negative impacts on their mental health because they are essentially compelled to disacknowledge their gender identity. Furthermore, these impacts arise when transgender individuals are faced with harassment due to greater scrutiny from their peers. Thus, because A.J.T. can demonstrate that the Act discriminates against her based on sex and causes her harm, it violates Title IX.

Equal Protection: Transgender Athlete Bans and Fairness and Safety in Athletics. Like in a Title IX context, the Save Women's Sports Act discriminates against transgender individuals in an equal protection context because it treats them less favorably than cisgender females despite their shared gender identity. Under equal protection however, the Act is not just discriminatory as applied to A.J.T.'s specific circumstances—it is discriminatory in all circumstances. Despite not naming transgender individuals explicitly, the Act's language closely relates to transgender females by expressly disregarding gender identity and having the Act only apply to women's athletics.

The Act is discriminatory by functioning as a blanket ban on all transgender females from participating in women's athletics, regardless of any other relevant factors in a particular set of circumstances. For example, it disregards transgender female athletes who take puberty-delaying treatments to completely prevent them from undergoing male puberty and continue treatments to prevent their testosterone levels to rise above those of cisgender female competitors. Likewise, the Act does not consider that a transgender female may have an innate talent or superior athletic

prowess when it comes to a particular sport completely separate from their biological sex. In the case of A.J.T. and many other transgender girls, it also does not consider the fact that boys and girls between the ages of 8 and 12 have similar athletic abilities, so the Act's effect on many middle school athletic competitions would be negligible.

In addition, the Act is not substantially related to fairness and safety in women's athletics. The Act relies on the misguided presumption that transgender women have an inherent biologically-based athletic advantage over cisgender women because they were born male, leaving the playing field unbalanced. Likewise, it uses this presumption to argue that the inclusion of transgender female athletes in women's athletics will put cisgender female athletes at risk of physical harm. In following this rationale, the Act paints with an overly broad brush and disregards the numerous factors at play that keep women's athletics fair and safe. Thus, the Act fails intermediate scrutiny and violates the Equal Protection Clause.

STANDARD OF REVIEW

Whether a school's actions violate Title IX is a mixed question of law and fact. *Doe v. Mercy Catholic Med. Ctr.,* 850 F.3d 545, 556 (3d Cir. 2017). Questions of law are reviewed *de novo*, and questions of fact are reviewed for clear error. *United States v. Bursey*, 801 F. App'x 1, 4 (2d Cir. 2020). Whether a state statute is constitutional is a question of law reviewed *de novo*. *Miller v. Raytheon Co.,* 716 F.3d 138, 148 (5th Cir. 2013).

Summary judgment is appropriate when a court determines "there is no genuine dispute as to any material fact and . . . the moving party is entitled to judgment as a matter of law." *Celotex Corp. v. Catrett,* 477 U.S. 317, 330 (1986) (quoting Fed. R. Civ. P. 56(a)). In examining a grant of summary judgment, this Court should review all facts and draw all reasonable inferences in favor of the non-movant. *Simpson v. Borg-Warner Auto., Inc.,* 196 F.3d 873, 876 (7th Cir. 1999). The legal standard for determining if a grant of summary judgment is proper is a question of law that this Court should review *de novo*. *Doe v. Dardanelle Sch. Dist.,* 928 F.3d 722, 725 (8th Cir. 2019).

ARGUMENT

I. A statute that forbids a transgender female from participating in women's athletics because of her gender identity is discriminatory on the basis of sex and violates Title IX when its causes her to suffer harm.

At the time it was adopted, Title IX's motivation was to provide women an equal opportunity to participate in athletics, which had been historically deemphasized in comparison to men's athletics. *Williams v. Sch. Dist.*, 998 F.2d 168, 175 (3d Cir. 1993). This motivation towards promoting an equal opportunity for women in athletics still carries on today, and to keep in line with this notion of equality, should be interpreted to apply to *all* women, regardless of biological sex at birth. Title IX plainly states 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).

To succeed on a sex discrimination claim based on a Title IX violation, a plaintiff must prove an educational institution that receives federal funds caused them harm by excluding them from an educational program "on the basis of sex." *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 616 (4th Cir. 2020). An individual suffers discrimination under Title IX when they are treated less favorably than others who are similarly situated. *Id.* at 618 (quoting *Bostock v. Clayton Cnty.*, 590 U.S. 644, 657–58 (2020)). While the Act is discriminatory towards all transgender female athletes, Title IX claims provide redress for actions against individuals, so only A.J.T.'s circumstances are relevant in this inquiry. *Peltier v. Charter Day Sch., Inc.*, 37 F.4th 104, 130 (4th Cir. 2022).

Because the Act effectively uses biological sex to discriminate against transgender individuals, the Fourteenth Circuit erred in holding that it is not discriminatory. *Grimm*, 972 F.3d at 616. In A.J.T.'s case, she is unable to participate in girls' volleyball and cross-country because

she is a transgender girl, and is thus excluded on the basis of sex. (R. at 3.) Further, the Act has caused her to suffer emotional and dignitary harm, and will cause her to suffer additional harm in being unable to participate on women's sports teams throughout high school and college. *Hecox v. Little*, 104 F.4th 1061, 1088 (9th Cir. 2024), as amended (June 14, 2024); *B.P.J. v. W. Va. State Bd. of Educ.*, 98 F.4th 542, 564 (4th Cir. 2024). Thus, because A.J.T. suffered harm when her school, a recipient of federal funds, enforced a State law that was discriminatory on the basis of sex, Title IX was violated.

A. The Act improperly discriminates against transgender females on the basis of sex by categorically forbidding them from participating in women's athletics.

Because cisgender and transgender individuals of the same gender identity differ in biological sex, in a Title IX context, discrimination against transgender individuals based on their gender identity functions as discrimination on the basis of sex. *Grimm,* 972 F.3d at 616. Accordingly, transgender females are discriminated against when they are categorically banned from participating in women's athletics despite being similarly situated to cisgender females. *B.P.J.*, 98 F.4th at 563. Further, because transgender girls and boys are similarly situated in sharing a different gender identity to their biological sex, an Act that forbids only transgender girls from participating in athletics consistent with their gender identity is discriminatory. *Id.*

1. Based on this Court's holding in *Bostock v. Clayton County*, discrimination based on gender identity is discrimination on the basis of sex under Title IX.

In coming to its decision, the Fourteenth Circuit found that "no serious debate" exists that Title IX refers to biological sex when referring to sex separation in athletics. (R. at 11.) While this is simply untrue regarding athletics specifically, it also lends support to the faulty statement that no debate exists in whether Title IX defines sex explicitly as biological sex. *See B.P.J. v. W. Va. State Bd. of Educ.*, 98 F.4th 542, 563 (4th Cir. 2024). In *Grimm v. Gloucester Cnty. Sch. Bd.*,

the Fourth Circuit held that discrimination against transgender individuals based on their gender identity is sex discrimination in a Title IX context. 972 F.3d at 616–17. There, a transgender male student challenged a school board policy requiring students to use only restrooms that aligned with their biological sex determined at birth, or use other private restrooms if they had gender identity "issues." *Id.* at 593. The court found that the policy's use of biological sex as criteria to use a particular restroom constructively discriminated against the student as a transgender male due to his difference in gender identity. *Id.* at 616–17.

In arriving to its decision in *Grimm*, the Fourth Circuit relied on this Court's holding in *Bostock v. Clayton Cty. Id.* In *Bostock*, this Court found that in a Title VII context, "it is impossible to discriminate against a person for being . . . transgender without discriminating against that individual based on sex." 590 U.S. 644, 660 (2020). *Bostock* examined Title VII, which has a substantial interplay with Title IX regarding sex discrimination due to their similar purpose and language. *Grimm*, 972 F.3d at 616; *see Jennings v. Univ. of N.C.*, 482 F.3d 686, 695 (4th Cir. 2007) (noting instances when this Court has interpreted Title VII to examine Title IX sex discrimination claims, *see e.g. Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 647 (1999); *Franklin v. Gwinnett Cnty. Pub. Sch.*, 503 U.S. 60, 75 (1992)). Both statues prohibit sex discrimination, and while Title IX explicitly uses the phrase "on the basis of sex" in its language and Title VII uses the phrase "because of . . . sex", this court has referred to Title VII as prohibiting discrimination "on the basis of . . . sex." 20 U.S.C. § 1681(a); 42 U.S.C. § 2000e-2(a)(1); *Bostock*, 590 U.S. at 650.

In *Bostock*, this Court held that discrimination against a transgender individual based on their gender identity is sex discrimination under Title VII because of two causal factors: the individual's sex and the sex that they identify with. 590 U.S. at 661. In the Title IX context, this

analysis is virtually identical, and accordingly the Fourth Circuit correctly applied it in *Grimm.* 972 F.3d at 616–17. Notably, the Department of Education itself released a Notice of Interpretation following this Court's holding in *Bostock* that essentially stated that it interpreted *Bostock* to apply to Title IX, and would thus enforce Title IX against claims of discrimination based on gender identity. 86 Fed. Reg. 32637 (June 22, 2021). While the enforcement of this interpretation was eventually stayed by later decisions largely based on procedural grounds, it is significant in demonstrating that the agency that promulgates the rules of Title IX agreed with *Grimm*'s interpretation. *Tennessee v. United States Dep't. of Educ.,* 615 F. Supp. 3d 807 (E.D. Tenn. 2022); *Texas v. Cardona*, No. 4:23-CV-00604-O, 2024 U.S. Dist. LEXIS 103452 (N.D. Tex. June 11, 2024).

Several other circuits have also recognized *Bostock's* applicability to Title IX in sex discrimination claims. In *A.C. v. Metro. Sch. Dist. of Martinsville*, the Seventh Circuit applied *Bostock's* reasoning in the same way to hold in favor of three transgender boys who brought a Title IX claim of sex discrimination against their schools. 75 F.4th 760, 769 (7th Cir. 2023). There, two schools implemented policies requiring students to use restrooms that aligned with their biological sex, which the court held violated Title IX because it caused the transgender boys to experience negative consequences that their cisgender classmates did not. *Id.* Further, the Ninth Circuit also applied *Bostock's* rationale in *Grabowski v. Ariz. Bd. of Regents* to find that discrimination based on perceived sexual orientation is sex discrimination and violates Title IX. 69 F.4th 1110, 1116 (9th Cir. 2023). Lastly, the Second Circuit inversely applied *Bostock's* reasoning in *Soule v. Conn. Ass'n. of Sch.* to find that an interscholastic conference could not be held liable under Title IX for a policy that prohibited discrimination against transgender athletes. 57 F.4th 43, 55 (2d Cir. 2022).

Not all circuits have accepted *Bostock's* application to Title IX. In *Adams v. Sch. Bd. of St. Johns Cnty.*, the Eleventh Circuit held that Title VII claims are distinguishable from Title IX claims because Title IX contains carveouts for separate living and restroom facilities based on sex that Title VII does not. 57 F.4th 791, 811 (11th Cir. 2022). Thus, the court held these carveouts demonstrate that Title IX clearly and unambiguously intended "sex" to refer to biological sex. *Id.* at 811–13. The majority in *Adams* misses the mark, and as Judge Wilson's dissent notes, these carveouts are completely immaterial because they merely reinforce the uncontested notion that it is not discriminatory to create separate facilities based on sex. *Id.* at 858–59 (Wilson, J., dissenting); *Grimm*, 972 F.3d at 618. Contrarily, the carveouts do not provide insight into determining what constitutes as sex discrimination, and accordingly should not be interpreted to permit educational institutions to make this decision in their policies. *Adams*, 57 F.4th at 859 (Wilson, J., dissenting) (quoting *Grimm*, 972 F.3d at 618).

Following *Bostock,* the Fourth Circuit took *Grimm* one step further in *B.P.J. v. W. Va. State Bd. of Educ.*, and directly held that discrimination against a transgender female athlete based on her gender identity was sex discrimination as it relates to athletics under Title IX. 98 F.4th at 563. In finding that "no serious debate" exists in how "sex" is defined under Title IX in relation to athletics, the Fourteenth Circuit ignored not only this holding—it ignored all of the jurisprudence building up to this decision by other circuits and this Court in *Bostock*. (R. at 11–12.) In light of these holdings, discrimination against transgender athletes constitutes discrimination on the basis of sex under Title IX.

2. Transgender female athletes are discriminated against when they are treated less favorably than cisgender female athletes despite being similarly situated.

Biologically, transgender and cisgender girls of A.J.T.'s age are very similar in terms of their athletic abilities. Before puberty, boys and girls have relatively equal physical athletic abilities because they have relatively similar levels of testosterone. *B.P.J.*, 98 F.4th at 559. Testosterone is the hormone that is generally described as being most relevant in athletics because it is attributed to increased muscle mass. *Id*. This can be seen in *Fortin v. Darlington Little League, Inc.*, where the First Circuit held that a cisgender female should be permitted to play on a boys' little league baseball team because girls and boys between the ages of eight and twelve are closely matched in "size and physical potential." 514 F.2d 344, 351 (1st Cir. 1975). Furthermore, transgender girls that receive puberty-delaying treatments before its onset will not experience male puberty. *B.P.J.*, 98 F.4th at 560–61. Aside from athletic ability, transgender females are also similarly situated to cisgender females because they share the same gender identity. *Id.* at 563.

In A.J.T.'s case, she is discriminated against on the basis of both her athletic ability and gender identity. At the time A.J.T. filed suit, she was eleven years old and had yet to begin puberty, thus she should have had relatively similar athletic abilities as any cisgender girl of her age. (R. at 3.) This is reflected in her athletics record, which states that she has competed on the all-girls cheerleading team without incident. (R. at 3.) The fact that she has competed without incident shows that she has competed normally as an athlete in a girls' sport without any indication of advantage due to her biological sex. (R. at 3.) Additionally, because A.J.T. was eleven at the time the suit was filed and cisgender boys enter puberty on average at the age of twelve, her interest in taking puberty-delaying treatments shows a substantial likelihood that she

will not enter puberty as a male at all. (R. at 3.) Therefore, she would not undergo the "physiological changes caused by increased testosterone circulation" that cisgender boys typically do, and she would be similarly situated to cisgender girls in her later teenage years and entire life. (R. at 3.)

Moreover, A.J.T. is similarly situated to girls in her age range because of her gender identity. Above all else, A.J.T. identifies as a girl. (R. at 3.) This identity is not something A.J.T. is private about because she openly lives as a girl in public and in private and uses a name commonly associated with girls. (R. at 3.) This is something A.J.T. has accepted for much of her life, starting at an early age and continuing presently. (R. at 3.) Furthermore, A.J.T.'s interest in taking puberty-delaying treatments further shows that she is certain about her gender identity. (R. at 3.) In not being allowed to participate in girls' athletics, both currently and for the rest of middle school, high school, and college, A.J.T. would be treated less favorably than cisgender girls of her age despite being similarly situated to them in athletic ability and gender identity.

3. Transgender female athletes are discriminated against when they are treated less favorably than transgender male athletes despite being similarly situated.

In *B.P.J.*, the Fourth Circuit also noted that the act in question differently treated transgender girls from transgender boys, who were allowed to participate in boys' athletics. 98 F.4th at 563; W. Va. Code § 18-2-25d (c)(3). Because both transgender boys and girls are similarly situated in sharing a different gender identity than the one assigned at birth, the Fourth Circuit held that this was discriminatory under Title IX because transgender girls were treated less favorably. 98 F.4th at 563. While the act in *B.P.J.* expressly stated that any individual could participate in men's athletics, the Save Women's Sports Act does not contain such a statement. 98 F.4th at 563; W. Va. Code § 18-2-25d (c)(3); (R. at 4.) However, in light of the Act's name and

purpose claiming to provide equal athletic opportunities for and protect the safety of female athletes, the intent of the Act does not convey a message that it intends to impose any restrictions on athletes participating in men's athletics. (R. at 3–4.) Thus, the Act is discriminatory towards A.J.T. by treating her less favorably than transgender boys.

B. The Act has caused A.J.T. to suffer harm by denying her a genuine opportunity to participate in athletics.

1. A.J.T. suffers harm in only being allowed to participate in boys' athletics because it effectively compels her to disacknowledge her own gender identity.

Gender dysphoria affects many transgender children experiencing puberty, causing them to experience negative mental health impacts because of the differences between the physical changes in their body and their gender identity. *Grimm*, 972 F.3d at 595. These effects of gender dysphoria are greatly worsened when transgender individuals are forced to conform to their biological sex, and include psychological distress, suicidal ideation, and overall "life-long diminished well-being and life-functioning." *Whitaker, by Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1045 (7th Cir. 2017). While gender dysphoria can have devastating impacts on transgender individuals, effective treatments include allowing transgender individuals to live in a way consistent with their preferred gender identity. *Grimm*, 972 F.3d at 596; *Doe v. Horne*, Nos. 23-16026, 23-16030, *56 n. 13, 2024 U.S. App. LEXIS 22847 (9th Cir. Sep. 9, 2024).

Transgender students also often experience such impacts on their mental health due to the large stigma that follows them, which incurs greater scrutiny and unwanted attention from their peers in school settings. *Grimm*, 972 F.3d at 617–18. Significantly, the 2015 U.S. Transgender Survey found that 77% of transgender individuals reported experiencing harassment in K-12 schools by students, teachers, and staff. *Id.* at 597. In the world of athletics, this impact is

amplified tenfold. In *Hecox v. Little*, the Ninth Circuit recognized that policies forbidding transgender athletes from participating in athletics consistent with their gender identity cause harm because transgender athletes are compelled to openly express themselves as cisgender. 104 F.4th at 1083. This can be incredibly painful and embarrassing for transgender athletes, and as the transgender female athlete in *Hecox* stated, playing on a men's team was akin to "constantly wearing a big sign that says 'this person is not a 'real' woman.'" *Id.* Fortunately, under Title IX, harm can be established as emotional and dignitary. *Grimm*, 972 F.3d at 618; *See also Whitaker*, 858 F.3d at 1049 (stating that policies that force transgender individuals to conform to their biological sex effectively "punish [them] for [their] gender non-conformance, which in turn violate[] Title IX.").

Here, the Act provides three options for A.J.T.: play coed or mixed sports, play men's sports, or don't play sports. (R. at 4.) However, because the two sports she wants to participate in, volleyball and cross-country, are separated by sex, her only options are to participate on the boys' teams or not at all. (R. at 3) Because this does not give A.J.T. a legitimate choice, this actively causes her harm. (R. at 15.) If she decides to participate in men's athletics, she may face mental health impacts in being forced to express herself as cisgender. *Hecox*, 104 F.4th 1083. Furthermore, there is a substantial likelihood that this will subject her to a greater risk of scrutiny from other students and cause her to forebear the stigma associated with being transgender because of her gender identity, thus further negatively impacting her mental health. *See Grimm*, 972 F.3d at 617–18. Because the Act has caused A.J.T. to experience emotional and dignitary harm in effectively punishing her for her gender non-conformance, it violates Title IX.

2. A.J.T. does not receive an equal opportunity to participate in athletics by only being allowed to participate in boys' and coed athletics.

Transgender individuals also endure harm in being excluded from the equal opportunity to participate in athletics, which is forbidden under Title IX. *Yellow Springs Exempted Vill. Sch. Dist. Bd. of Educ. v. Ohio High Sch. Athletic Ass'n*., 647 F.2d 651, 655 (6th Cir. 1981). By depriving transgender individuals of this experience, they lose out on crucial opportunities to build valuable bonds, learn important skills, and exercise. *Doe v. Hanover Cnty. Sch. Bd.*, No. 3:24-CV-493, 2024 U.S. Dist. LEXIS 146940, *45 (E.D. Va. Aug. 16, 2024). In addition to social and physical benefits, sports can serve as a vital outlet for transgender students in supporting their mental wellbeing and combatting negative mental health impacts arising from gender dysphoria. Scott Skinner-Thompson & Ilona M. Turner, *Title IX's Protections for Transgender Student Athletes*, 272 Wisc. Journal of Law, Gender & Society, Vol. 28:3, 271, 297 (2014).

The Act not only causes A.J.T. harm by subjecting her to negative impacts on her mental health and scrutiny from her peers, but also in taking away her ability to equally participate in athletics. (R. at 15.) She may also suffer physical harm if she decides to delay or block puberty altogether, putting her at a significant athletic disadvantage to boys who have already experienced puberty. (R. at 15.) In addition, the Act will cause her further future harm because she will be denied the ability to participate in female athletics as long as she is in public school and college. (R. at 15.) These are pivotal years in A.J.T.'s life, and because she is forbidden from participating in these activities throughout the rest of her childhood, she will miss out on essential moments in life that can never be replaced. Furthermore, she will miss out on a part of life that might help ease her gender dysphoria and make her life as a transgender person that much easier overall.

Because the State has caused A.J.T. harm by excluding her from school sponsored women's athletics on the basis of sex, this Court should reverse the judgment of the Court of Appeals for the Fourteenth Circuit granting summary judgment to the State.

II. The Save Women's Sports Act violates the Equal Protection Clause because it discriminates against transgender females without a substantial relation to an important governmental interest, thus failing intermediate scrutiny.

Similar to Title IX, this Court has interpreted the Equal Protection Clause to mean that a state should treat "all persons similarly situated . . . alike." *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). Furthermore, a state must meet the required level of scrutiny when taking action that treats people differently based on certain classifications. *Reed v. Reed*, 404 U.S. 71, 75–76 (1971). Intermediate scrutiny is the applicable standard in cases where a statute's impact involves quasi-suspect classifications, such as gender. *United States v. Virginia*, 518 U.S. 515, 555 (1996); *City of Cleburne, Tex.*, 473 U.S. at 437–38. Under intermediate scrutiny, the State has the burden to prove an "exceedingly persuasive justification" for statues that are based on such classifications. *Virginia*, 518 U.S. at 524. (quoting *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982)). A discriminatory statute only survives intermediate scrutiny if its discriminatory means employed are substantially related to serving important governmental objectives. *Id.*

While the Fourteenth Circuit correctly applied intermediate scrutiny, it erred in finding that the Act was not discriminatory. (R. at 6–7.) The Act facially discriminates against transgender females by explicitly disregarding gender identity and only allowing participation in women's athletics based on biological sex. The court further erred in finding that the Act was substantially related to the important governmental interests of providing equal athletic opportunities for female athletes and protecting their physical safety. (R. at 3–4, 10.) While

fairness and safety in women's athletics are important governmental interests, excluding transgender females from women's athletics bears no substantial relation to achieving these interests.

A. By explicitly excluding transgender females from participating in athletics consistent with their gender identity, the Act is facially discriminatory.

The first step in an intermediate scrutiny analysis under the Equal Protection Clause is determining if a state impermissibly provides differential treatment to similarly situated persons. *B.P.J.*, 98 F.4th at 555. As previously mentioned, transgender and cisgender female athletes are similarly situated in two ways: athletic ability and gender identity. *See* section (I)(A)(1). In its decision, the Fourteenth Circuit was insistent that transgender and cisgender female athletes are not similarly situated, and rather only biological sex was relevant in athletics due to the inherent biological differences between the sexes. (R. at 7–8.) Thus, the court erred in finding that the Act was not discriminatory because it used a gender-based classification to provide differential treatment to two similarly situated groups of people, resulting in one being negatively impacted. *City of Cleburne, Tex.*, 473 U.S. at 442; *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992).

The Fourteenth Circuit also found the Act was not facially discriminatory because its requirement that athletes compete on teams consistent with their biological sex did not expressly treat transgender female athletes differently than cisgender female athletes. (R. at 7.) Statutes are facially discriminatory when they are completely unconstitutional in any instance and not as applied to a particular set of circumstances. *United States v. Salerno*, 481 U.S. 739, 745 (1987). While the Act discriminates against A.J.T. as applied to her specific circumstances, it goes much further than that—its language is clearly directed at transgender female athletes seeking to compete in school-sponsored women's athletics and inherently affects them all. Further, because transgender and cisgender female athletes are always similarly situated based on their shared

gender identity and the Act treats them dissimilarly in spite of this, it is discriminatory on its face.

1. The Act discriminates against transgender females on the basis of sex by treating them less favorably than cisgender females.

A state act is discriminatory under the Equal Protection Clause when it "treats differently persons who are in all relevant respects alike." *Nordlinger*, 505 U.S. at 10. In finding that biology is the only relevant designation in women's athletics, the Fourteenth Circuit concluded that transgender and cisgender women are not similarly situated. (R. at 7.) The basis of this conclusion is that men—and by extension transgender women—have an inherent athletic advantage over cisgender women because of their biology. (R. at 7.) While this stereotypic presumption has been echoed time and time again, it is drastically misguided and only perpetuates an oversimplification of the dynamics between sex and gender. *See B.P.J.*, 98 F.4th at 561; *Hecox*, 104 F.4th 1084–85. Further, relying on stereotypes due to gender nonconformance is impermissible discrimination. *Smith v. City of Salem, Ohio,* 378 F.3d 566, 575 (6th Cir. 2004).

To unpack this presumption, a suitable starting place is in discussing testosterone, which is generally regarded as the most relevant hormone in athletics because it corresponds to increases in muscle mass. *B.P.J.*, 98 F.4th at 559. As previously stated, boys and girls between ages eight and twelve have relatively similar levels of testosterone and thus relatively similar athletic abilities. *Id.*; *see Fortin*, 514 F.2d at 350. Additionally, scientific evidence suggests that transgender women who do not undergo puberty are similarly situated to women with androgen insensitivity syndrome regarding athletic performance. *B.P.J.*, 98 F.4th at 561. This syndrome causes women to be born with XY chromosomes instead of XX chromosomes and has long been recognized to not give individuals an inherent athletic advantage. *Id.*

Following puberty, traditional differences in biological sex, such as increased levels of muscle mass, begin manifesting. *Id.* at 559. Despite the fact that males generally have increased levels of testosterone as compared to females, several other factors demonstrate that males will not athletically outperform females in all instances. *Id.* First, many transgender females engage in hormone therapy and treatments. *Hecox*, 104 F.4th at 1084–85. These hormone treatments lower transgender females' testosterone levels to a point that their physiological characteristics would not give them any advantage over cisgender women. *Id.* at 1084; *see* Deborah L. Brake, *The New Gender Panic in Sport: Why State Laws Banning Transgender Athletes are Unconstitutional*, 15 ConLawNow 35, 47 (2024) (stating that no clear evidence shows that transgender females who undergo hormone therapy or do not enter puberty as a male have any significant advantage over cisgender females). Transgender female athletes regularly engage in such treatments to compete in NCAA athletics and the Olympics, where meeting certain testosterone levels is a requirement for these competitions. *Hecox*, 104 F.4th at 1068, 1077.

Testosterone is not the only indicator of athletic ability, however. Regardless of their sex, an individual may have an inherent athletic advantage, either based on their individual athletic talent or in their developed practice in a particular sport. *B.J.P.*, 98 F.4th at 563. In many instances, an athlete may have superior athletic skill not because of their testosterone levels, but rather because they have spent more time refining fine-motor skills and form that are relevant to an action in a particular sport, such as catching or throwing. Erin E. Buzuvis, *Transgender Student-Athletes and Sex-Segregated Sport: Developing Policies of Inclusion for Intercollegiate and Interscholastic Athletics*, 21 Seton Hall J. Sports & Ent. L. 1, 37 (2010).

As previously mentioned, cisgender and transgender individuals are also similarly situated by their shared common gender identity. *Grimm*, 972 F.3d at 609–10. In an equal

protection context, several circuits have held that policies aimed at transgender individuals that provide for the differential treatment based on biological sex "necessarily rest[] on a sex classification." *Grimm*, 972 at 608; *Whitaker*, 858 F.3d at 1051. This is also the rationale of discrimination against transgender individuals in a Title IX context, and while "not . . . wholly congruent," Title IX and equal protection claims are similar. *Grimm*, 972 at 618; *Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 257 (2009); *see* section (I)(A)(1).

Statutes that dissimilarly treat transgender individuals are often rooted in bias against gender-nonconformity. *Grimm*, 972 at 608; *Glenn v. Brumby*, 663 F.3d 1312, 1317 (11th Cir. 2011). In *Grimm,* the school board argued that transgender boys were not similarly situated to cisgender boys under the Equal Protection Clause and should accordingly be treated as "'biological' girls" when their "choice of gender identity did not cause biological changes." *Id.* at 609–10. However, the Fourth Circuit dismissed this argument and found that the transgender male student was similarly situated to cisgender boys because of his gender identity, emphasizing that his gender identity was *not* a choice, and certainly not one that biological sex should not have priority over. *Id.*

Here, the Act takes no external factors regarding athletic ability into account, and rather bans transgender females from women's athletics altogether. (R. at 4.) The Act also wrongly affirms the notion that gender identity is a "choice." *Grimm*, 972 F.3d at 609–10. While the Act allows transgender and cisgender female athletes to compete together on coed teams, most interscholastic or intercollegiate sports today are separated by sex, so this is a largely unrealistic option. *See* Erin E. Buzuvis, *Attorney General v. MIAA at Forty Years: A Critical Examination of Gender Segregation in High School Athletics in Massachusetts*, 25 Tex. J. C.L. & C.R. 1, 8 (2019). Thus, the Act effectively only permits transgender females the options to participate in

men's athletics or not participate at all, which provides them "no real choice." *B.P.J.*, 98 F.4th at 564. In essence, the Act requires transgender female athletes to choose between not participating in athletics or participating in athletics that misalign with their gender identity, a choice—with large consequences—that cisgender female athletes are not required to make.

2. The Act is facially discriminatory against transgender females in its use of "proxy discrimination" without naming them in its language.

When considering if a statute is facially unconstitutional, only the text of the law itself is relevant, not its application to specific circumstances. *Field Day, LLC v. Cnty. of Suffolk*, 463 F.3d 167, 174 (2d Cir. 2006). At first glance, the unconstitutionality of a law may not be glaringly obvious, but gender classifications traditionally have carried undertones of subtle discrimination. *Pers. Adm'r. of Mass. v. Feeney*, 442 U.S. 256, 273 (1979). A statute that does not explicitly reference a particular class may be facially discriminatory under "proxy discrimination" when it uses "seemingly neutral criteria . . . so closely associated with" a class to treat it unfavorably. *Pac. Shores Props., LLC v. City of Newport Beach*, 730 F.3d 1142, 1160 n.23 (9th Cir. 2013). Under proxy discrimination, the criteria consist "almost exclusively [of] indicators of membership in the disfavored group." *Id.* This Court provided an example of proxy discrimination in *Bray v. Alexandria Women's Health Clinic*, when it noted that a hypothetical tax on wearing yarmulkes would effectively be a tax on Jewish people because it would present a clear intent to discriminate against them as a class. 506 U.S. 263, 270 (1993).

In *Hecox,* the court found that a policy explicitly designating athletes by biological sex functioned as proxy discrimination because "biological sex" has a clear association with discrimination against transgender individuals, despite its apparent neutrality. 104 F.4th at 1078. Moreover, the court in *B.P.J.* held that a similar act defining sex based on "reproductive biology

and genetics at birth" for athletic purposes was facially discriminatory because its "undisputed purpose" was to exclude transgender females from women's athletics. 98 F.4th at 556.

The Fourteenth Circuit held that the Act is not facially discriminatory because it "does not expressly treat transgender individuals differently," but rather "explicitly treats biological boys and biological girls differently." (R. at 8.) Because transgender and cisgender females share the same gender identity, these express biological sex classifications constructively discriminate against all transgender females. *B.P.J.*, 98 F.4th at 542. Additionally, the Act makes direct reference to gender identity, stating that it is distinct and has "nothing to do" with the definition of "biological sex." (R. at 4.) This clearly references transgender female athletes because their basis for competing in women's athletics is entirely contingent on their gender identity and is an "indicator of membership" as discussed in *Pacific Shores*. 730 F.3d at 1160 n.23. Thus, because the Act explicitly treats individuals differently based on their biological sex and disregards gender identity, it facially discriminates against transgender female athletes. (R. at 8.)

B. The Act's discriminatory means are not substantially related to promoting fairness and athlete safety in women's athletics because they rely on the faulty presumption that transgender women have an inherent athletic advantage.

In addition to improperly treating transgender females differently than cisgender females, the Act's means lack a substantial relation to any important governmental interest, thus failing intermediate scrutiny. *Virginia*, 518 U.S. at 524. While the Fourteenth Circuit properly held that "providing equal athletic opportunities for females" and protecting athlete safety are important governmental interests, blanket bans on transgender females from competing in women's athletics do not substantially advance these interests. (R. at 10.); *Clark ex. rel. Clark v. Ariz. Interscholastic Ass'n*, 695 F.2d 1126, 1131 (9th Cir. 1982); *Saint v. Neb. Sch. Activities Ass'n.*, 684 F. Supp. 626, 628 (D. Neb. 1988).

1. Prohibiting transgender females from participating in women's athletics is not substantially related to promoting fairness.

As discussed, transgender women do not hold an inherent athletic advantage over cisgender women to the extent necessary to justify their exclusion as a class. *See* section (II)(A)(1). Because cisgender and transgender athletes do not largely differ in terms of athletic ability in many circumstances, the Act's discriminatory means do not substantially relate to leveling the playing field and advancing fairness in women's athletics. Furthermore, the effect on allowing transgender females to participate in women's athletics is negligible overall. In *Clark ex. rel. Clark v. Ariz. Interscholastic Ass'n.*, the Ninth Circuit held that excluding a boy from participating in girls' volleyball was substantially related to furthering equal opportunities in women's athletics. 886 F.2d 1191, 1193 (9th Cir. 1989). The court reasoned that this was to further the notion of redressing past discrimination against female athletes, and that allowing boys to participate in athletics alongside girls would "displace" them and go against this notion. *Id.* Even if there was a significant difference in athletic ability between transgender men and women, transgender women make up only 0.6% of the general population, and even less participate in athletics. *Hecox*, 104 F.4th at 1069. Thus, the effect of forbidding transgender females from competing in women's athletics would not likely make any overall material impact.

2. Prohibiting transgender females from participating in women's athletics is not substantially related to promoting overall athlete safety.

Because transgender women do not possess any inherent athletic advantage over cisgender women, there is not a substantial likelihood that cisgender females are more likely to be injured when participating in athletics alongside transgender females. *Doe v. Horne*, 683 F. Supp. 3d 950, 973 (D. Ariz. 2023), *aff'd*, Nos. 23-16026, 23-16030, 2024 U.S. App. LEXIS 22847 (9th Cir. Sep. 9, 2024). While athlete safety is certainly a high priority, student athletes

may not be excluded from particular sports based on "unsupported generalizations" about differences in males' and females' athletic abilities simply in the interest of protecting athletes' safety. *Haffer v. Temple Univ. of the Commonwealth Sys. Of Higher Educ.*, 678 F. Supp. 517, 524 (E.D. Pa. 1987). Athletes participate in sports at their own risk, and accordingly there is not a constitutional basis in forbidding them from competition because of how this risk relates to stereotypes about their gender. *Force v. Pierce City R-VI Sch. Dist.*, 570 F. Supp. 1020, 1030 (W.D. Mo. 1983).

Furthermore, the Fourteenth Circuit's reference to the instance where a female volleyball player was injured during a game as a result of the actions of a transgender female is inapposite. (R. at 10.) In referring to this isolated instance, the Fourteenth Circuit does nothing more than perpetuate the false notion that an inherent danger exists when transgender females compete in women's athletics. (R. at 10.) Injuries occur constantly in all sports regardless of sex, and in many circumstances, it is just as likely for a cisgender male to be injured by a cisgender female or transgender male. *Beattie v. Line Mt. Sch. Dist.*, 992 F. Supp. 2d 384, 393 (M.D. Pa. 2014). Based on the State's faulty logic, the Act also suggests that transgender females should be forbidden from competing with cisgender females because they put them at risk of harm, yet transgender males should be allowed to compete with cisgender males at their own risk of harm. *Horne*, 683 F. Supp. 3d at 963.

The Act additionally does not permit transgender females to participate in any women's sports "based upon competitive skill." (R. at 4.) Many non-contact sports, such as cross country, do not reasonably put cisgender females at any danger in competing with transgender females. *B.P.J.*, 98 F.4th at 559. In *B.P.J.*, the State of West Virginia acknowledged that a law that would have prohibited a transgender female from participating in women's cross-country did not

substantially relate to safety. *Id.* Thus, regarding non-contact sports, the Act does not substantially relate to promoting athlete safety.

Because the State has not proven an exceedingly persuasive justification for the Act and it violates the Equal Protection Clause, this Court should reverse the judgment of the Court of Appeals for the Fourteenth Circuit granting summary judgment to the State.

CONCLUSION

A state violates Title IX when it discriminates on the basis of sex in such a manner that causes harm to an individual. Here, there are genuine issues of material fact as to whether the Act is discriminatory towards A.J.T. as a transgender female and whether it causes her harm as a result.

Under the Equal Protection Clause of the Fourteenth Amendment, intermediate scrutiny is applicable when an act discriminates against a quasi-suspect classification. To survive intermediate scrutiny, a state act's discriminatory means must be substantially related to important governmental objectives. Here, there are genuine issues of material fact as to whether the Act's means are discriminatory and if they substantially relate to advancing the notions of fairness and safety in athletics.

It is for these reasons that this Court should reverse the holding of the United States Court of Appeals for the Fourteenth Circuit and remand for further proceedings not inconsistent with this opinion.

Respectfully submitted,

/s/_____

Attorneys for Petitioner

CERTIFICATE OF SERVICE

We certify that a copy of Petitioner's brief was served upon Respondents, State of North Greene Board of Education, through the counsel of record by certified U.S. mail return receipt requested, on this, the 13th day of September, 2024.

/s/_____

Attorneys for Petitioner

APPENDIX A

Constitutional Provisions

U.S. Const. amend. XIV, § 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and 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.